



## REPORT/RECOMMENDATION

<b>To:</b> <b>MAYOR AND COUNCIL</b>	<b>Agenda Item #</b> <u>IV. Q.</u>
<b>From:</b> <b>Wayne D. Houle, PE</b> <i>WDH</i>  <b>City Engineer</b>	<input checked="" type="checkbox"/> <b>Action</b> <input type="checkbox"/> <b>Discussion</b> <input type="checkbox"/> <b>Information</b>
<b>Date:</b> <b>January 3, 2012</b>	
<b>Subject:</b> Engineering Services For 50 <sup>th</sup> & France Streetscapes	

**Recommendation:**

Authorize City Manager to approve attached proposal for the feasibility study and construction documents for improvements to the streetscapes at 50<sup>th</sup> and France.

**Info/Background:**

These proposals are for the feasibility study and construction documents for the improvements to the streetscapes at 50<sup>th</sup> & France. This project is part of the overall parking structure and street improvement project. The fee for this work is \$39,280 for the feasibility study and construction documents.

**ATTACHMENTS:**

- Agreement for Professional Engineering Services.
- Proposal for Final Design and Bidding of Streetscape Improvements, 50<sup>th</sup> and France District 2012 Improvements/Renovations – Dated December 16, 2011
- ENGINEER'S 2011 Hourly Fee Schedule

# AGREEMENT FOR ENGINEERING SERVICES

**THIS AGREEMENT** is made on the \_\_\_\_\_ day of \_\_\_\_\_, 2012, between the **CITY OF EDINA**, a Minnesota municipal corporation (“CITY”), and **KIMLEY-HORN AND ASSOCIATES, INC.**, a North Carolina corporation (“ENGINEER”).

The CITY and the ENGINEER agree as follows:

1. **Contract Documents.** The ENGINEER agrees to provide engineering services to the CITY in accordance with the following contract documents which are incorporated herein by reference:
  - A. This Agreement for Engineering Services.
  - B. Proposal for Final Design and Bidding of Streetscape Improvements 50<sup>th</sup> and France District 2012 Improvements/Renovations, pages 1 - 5, excluding the Kimley-Horn and Associates, Inc. Standard Provisions.
  - C. Engineer’s Hourly Fee Schedule dated \_\_\_\_\_.

In the event of conflict among the documents, the conflict shall be resolved in descending order of priority, with the document listed first having the highest priority and the document listed last having the lowest priority.

2. **Compensation.** ENGINEER shall be paid on an hourly basis in accordance with the Fee Schedule fee and shall be reimbursed for out-of-pocket expenses at cost without any mark-up.
3. **Method of Payment.** ENGINEER may request progress payments as the work is performed. The CITY will normally make payment within thirty-five (35) days of receipt of a properly itemized bill.
4. **Change Orders.** All change orders, regardless of amount, must be approved in advance and in writing by the Edina City Council. No payment will be due or made for work done in advance of such approval.
5. **Warranty.** ENGINEER shall be responsible for the accuracy of the work and shall promptly make necessary revisions or corrections resulting from errors and omissions on the part of ENGINEER without additional compensation. ENGINEER shall exercise the same degree of care, skill, and diligence in the performance of the services as is ordinarily possessed and exercised by a professional engineer under similar circumstances. No

other warranty, expressed or implied, is included in this Agreement or in any drawing, specification, report, or opinion produced pursuant to this Agreement.

6. **Subcontractor.** ENGINEER shall not enter into subcontracts for services provided under this Agreement without the express written consent of the CITY. The ENGINEER shall pay any subcontractor involved in the performance of this Agreement within ten (10) days of the ENGINEER'S receipt of payment by the CITY for undisputed services provided by the subcontractor. If the ENGINEER fails within that time to pay the subcontractor any undisputed amount for which the ENGINEER has received payment by the CITY, the ENGINEER shall pay interest to the subcontractor on the unpaid amount at the rate of 1-1/2 percent per month or any part of a month. The minimum monthly interest penalty payment for an unpaid balance of \$100 or more is \$10. For an unpaid balance of less than \$100, the ENGINEER shall pay the actual interest penalty due to the subcontractor. A subcontractor who prevails in a civil action to collect interest penalties from the ENGINEER shall be awarded its costs and disbursements, including attorney's fees, incurred in bringing the action.
  
7. **Independent Contractor.** The CITY hereby retains the ENGINEER as an independent contractor upon the terms and conditions set forth in this Agreement. The ENGINEER is not an employee of the CITY and is free to contract with other entities as provided herein. ENGINEER shall be responsible for selecting the means and methods of performing the work. ENGINEER shall furnish any and all supplies, equipment, and incidentals necessary for ENGINEER'S performance under this Agreement. CITY and ENGINEER agree that ENGINEER shall not at any time or in any manner represent that ENGINEER or any of ENGINEER'S agents or employees are in any manner agents or employees of the CITY. ENGINEER shall be exclusively responsible under this Agreement for ENGINEER'S own FICA payments, workers compensation payments, unemployment compensation payments, withholding amounts, and/or self-employment taxes if any such payments, amounts, or taxes are required to be paid by law or regulation.
  
8. **Non-Discrimination.** During the performance of this Agreement, the ENGINEER shall not discriminate against any employee or applicants for employment because of race, color, creed, religion, national origin, sex, sexual orientation, marital status, status with regard to public assistance, disability, or age. The ENGINEER shall post, in places available to employees and applicants for employment, notices setting forth the provisions of this non-discrimination clause and stating that all qualified applicants will receive consideration for employment. The ENGINEER shall incorporate the foregoing requirements of this paragraph in all of its subcontracts for program work, and will require all of its subcontractors for such work to incorporate such requirements in all subcontracts for program work.
  
9. **Assignment.** Neither party shall assign this Agreement, nor any interest arising herein, without the written consent of the other party.

10. **Indemnification.** The ENGINEER shall indemnify and hold harmless the CITY, its officials, agents, and employees, of and from any and all claims, demands, actions, causes of action, including costs and attorney's fees, arising out of or by reason of the execution or performance of the work or services provided for herein and further agrees to defend at its sole cost and expense any action or proceeding commenced for the purpose of asserting any claim of whatsoever character arising hereunder, to the extent caused by the negligent acts, errors or omissions, willful misconduct, or breach of any substantive provision of this Agreement by the ENGINEER, its officials, agents or employees in the execution, performance, or failure to adequately perform the ENGINEER'S obligations pursuant to this Agreement.

11. **Insurance.**

A. **General Liability.** During the term of this Agreement, ENGINEER shall maintain a general liability insurance policy with limits of at least \$2,000,000 for each person, and each occurrence, for both personal injury and property damage. This policy shall name the CITY as an additional insured for the services provided under this Agreement and shall provide that the ENGINEER'S coverage shall be the primary coverage in the event of a loss. The policy shall also insure the indemnification obligation contained in Paragraph 10 above.

B. **Worker's Compensation.** The ENGINEER shall secure and maintain such insurance as will protect ENGINEER from claims under the Worker's Compensation Act and from claims for bodily injury, death, or property damage which may arise from the performance of ENGINEER'S services under this Agreement.

C. **Professional Liability Insurance.** The ENGINEER shall secure and maintain a professional liability insurance policy. Said policy shall insure payment of damages for legal liability arising out of the performance of professional services for the CITY, in the insured's capacity as ENGINEER, if such legal liability is caused by an error, omission, or negligent act of the insured or any person or organization for whom the insured is legally liable. Said policy shall provide minimum limits of \$2,000,000 with a deductible maximum of \$125,000.

D. **Certificate of Insurance.** A certificate of insurance on a form acceptable to the CITY which verifies the existence of this insurance coverage must be provided to the CITY before work under this Agreement is begun.

12. **Records Access.** The ENGINEER shall provide the CITY access to any books, documents, papers, and records which are directly pertinent to the specific contract, for the purpose of making audits, examinations, excerpts, and transcriptions, for three (3) years after final payments and all other pending matters related to this Agreement are closed.

13. **Minnesota Government Data Practices Act.** ENGINEER must comply with the Minnesota Government Data Practices Act, Minnesota Statutes Chapter 13, as it applies to (1) all data provided by the CITY pursuant to this Agreement, and (2) all data, created, collected, received, stored, used, maintained, or disseminated by the ENGINEER pursuant to this Agreement. ENGINEER is subject to all the provisions of the Minnesota Government Data Practices Act, including but not limited to the civil remedies of Minnesota Statutes Section 13.08, as if it were a government entity. In the event ENGINEER receives a request to release data, ENGINEER must immediately notify CITY. CITY will give ENGINEER instructions concerning the release of the data to the requesting party before the data is released. ENGINEER agrees to defend, indemnify, and hold CITY, its officials, officers, agents, employees, and volunteers harmless from any claims resulting from ENGINEER'S officers', agents', city's, partners', employees', volunteers', assignees' or subcontractors' unlawful disclosure and/or use of protected data. The terms of this paragraph shall survive the cancellation or termination of this Agreement.
14. **Ownership of Documents.** All plans, diagrams, analyses, reports, and information generated in connection with the performance of this Agreement shall become the property of the CITY. The CITY may use the information for its purposes. Any modifications made by the CITY to any of the ENGINEER'S documents without written authorization or adaptation by the ENGINEER will be at the CITY'S sole risk and without liability to the ENGINEER.
15. **Copyright/Patten.** ENGINEER shall defend actions or claims charging infringement of any copyright or patent by reason of the use or adoption of any designs, drawings or specifications supplied by it, and it shall hold harmless the CITY from loss or damage resulting there from.
16. **Governing Law/Venue.** This Agreement shall be governed by and construed in accordance with the laws of the State of Minnesota, without giving effect to the principles of conflict of laws. All proceedings related to this contract shall be venued in the Hennepin County District Court.
17. **Permits.** ENGINEER shall obtain all necessary permits required for completion of ENGINEER'S services.
18. **Entire Agreement.** The entire agreement of the parties is contained herein. This Agreement supersedes all oral agreements and negotiations between the parties relating to the subject matter hereof as well as any previous agreements presently in effect between the parties relating to the subject matter hereof. Any alterations, amendments, deletions, or waivers of the provisions of this Agreement shall be valid only when expressed in writing and duly signed by the parties, unless otherwise provided herein.
19. **Termination.** CITY may terminate this Agreement without cause by written notice delivered to the ENGINEER. . Upon termination under this provision if there is no fault of the ENGINEER, the ENGINEER shall be paid for services rendered and reimbursable

expenses until the effective date of termination. If however, the CITY terminates the Agreement because the ENGINEER has failed to perform in accordance with this Agreement, no further payment shall be made to the ENGINEER, and the CITY may retain another contractor to undertake or complete the work identified in the Contract Documents. If as a result, the CITY incurs total costs for the work (including payments to both the present contractor and a future contractor) which exceed the not to exceed amount specified in the Contract Documents, if any, then the ENGINEER shall be responsible for the difference between the cost actually incurred and the Agreement amount.

**CITY OF EDINA**

**KIMLEY-HORN AND ASSOCIATES, INC.**

By: \_\_\_\_\_  
James B. Hovland, Mayor

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

By: \_\_\_\_\_  
Scott Neal, City Manager



Kimley-Horn  
and Associates. Inc.

December 16, 2011

Mr. Wayne Houle, P.E.  
Director of Public Works / City Engineer  
City of Edina  
7450 Metro Blvd.  
Edina, MN 55439

**Re: Proposal for Final Design and Bidding of Streetscape Improvements  
50<sup>th</sup> and France District 2012 Improvements/Renovations**

Dear Mr. Houle:

Thank you for this opportunity to continue our feasibility and landscape design efforts for the 50<sup>th</sup> and France District Improvements project. Our understanding of the project, scope of services, schedule, and fee are detailed below.

## Project Understanding

The City of Edina is moving forward with implementation of urban design and landscape improvements for portions of the 50<sup>th</sup> and France District generally based on a draft feasibility report prepared by Kimley-Horn and Associates dated August 25, 2009. We understand that the council has authorized both streetscape improvements and the construction of parking ramp facilities. Parking ramp work will be performed under a separate contract between the city and Walker Parking Consultants. Coordination between streetscape and parking ramp design work will need to be closely coordinated.

The work included within this proposal will consist of landscape restoration of both raised and at-grade planting areas throughout the district, replacement of some of the existing trees, adjustments to tree grates and adjacent pavers, directional boring for new irrigation to planting beds and tree grates, provisions for future district-wide audio systems, and replacement of high-priority deteriorated pavers with modifications to existing concrete underslab. The current construction budget for this work is \$590,000.

The work will generally occur within the public street and pedestrian alleyways between buildings of the multi-block district that is bounded by 49½ Street to the North and West 50<sup>th</sup> Street to the south, Halifax Avenue to the west and France Avenue to the east. We understand that since the draft feasibility report was prepared, some improvements have been made and some areas have further deteriorated – specifically pavers. Initial tasks will include a re-evaluation of the priority paver replacement areas and the advancement/updating of the draft feasibility study.

We understand that all design and construction of the streetscape work is to be performed in 2012. A detailed schedule is included later within this proposal.

## Scope of Services

Kimley-Horn and Associates, Inc. proposes to finalize the draft feasibility report, provide final design services and limited bidding phase services to the City of Edina for urban design, landscape and irrigation improvements within 50<sup>th</sup> and France District. The following identifies our detailed work scope:

### 1. Finalize Feasibility Report

#### A. Inventory Existing Conditions

1. Travel to the project site and work with city staff to visually inspect/inventory the existing condition of the pavement and planting areas. Inventory will be documented through both site photography and notations indicated on plan mapping.
2. Summarize the identified conditions of the existing components and quantities of the various renovation areas.
3. Confirm limits of project improvements based on updated inventory
4. Quantify areas requiring renovation and new improvements.

#### B. Finalize Feasibility Report

1. Finalize the draft feasibility report based on the required improvements of this project as identified in this proposal.

#### C. Prepare Final Landscape Concept

1. Prepare one (1) final and updated rendered landscape concept for city staff and business owner group review, prior to commencing the final construction documents.

#### D. Update Preliminary Project Costs and Schedule

1. Prepare an updated opinion of probable cost
2. Prepare an updated project schedule – design through construction

#### E. Meetings:

1. Attend up to a total of two (2) meetings with city staff and/or district business owner group as requested.

*Areas to be inventoried may be covered with snow given the timing of this project. The accuracy of this inventory is therefore limited to the exposure of the components. It is assumed that the city will provide snow removal for the limits of the project to better accomplish this inventory, or provide a mark-up of the limits requiring renovation.*

***Deliverables:** An electronic copy (both pdf and Word document) of the final feasibility report.*

### 2. Final Design

#### A. Final Urban Design, Landscape, and Irrigation Plans

1. Coordinate with Walker Parking Consultants who will be preparing multiple parking ramp expansion and renovation plans.

2. Prepare final plans and details utilizing electronic base files previously provided by the city. It is assumed that the city will provide additional as-built electronic base files for existing utility information. Plans will include a cover sheet, urban design plans and details, landscape plans with irrigation limits denoted, planting and irrigation details, and a plant schedule.
3. Provide a 95% complete plan set to the city for review and approval prior to issuance of plans for construction. It is anticipated that very minor plan revisions will be required following this review and that discussion with the city is intended to be accomplished via telephone.
4. Prepare 100% plans following city review and comment.

B. Specifications

1. Prepare a project manual to include city-provided 'front end' sections, and technical specifications for urban design, landscape, and irrigation construction, to be incorporated into the master contract specification. A bid form will also be provided. Since an irrigation design will not be provided, a performance specification will be prepared.

C. Engineer's Estimate

1. Prepare an opinion of probable cost, represented as an engineer's estimate for comparison to bids received from contractors.

*Separate plans and specifications will be prepared for the streetscape work. The parking ramp construction will be bid separately.*

*Deliverables: Construction plans; project manual; bid form; engineer's estimate*

**3. Bidding Administration**

A. Bidding Administration

1. Provide multiple construction document sets (plans and project manuals) for distribution to interested bidders and city staff. Plans will be issued at 11"x17" format size. Initial plans and any required addenda will be provided to city staff for distribution.
2. Attend (1) pre-bid conference on site with bidders and city staff.
3. Respond to contractor inquiries. Prepare addenda as required and provide to the city for distribution.
4. Review city-tabulated bids and recommend award of project to city.

*It is assumed that the city will provide bidding administration, which will include advertisements, distribution of plans and specifications, maintaining a bidders list, tabulating the bids, and performing bid opening.*

*Deliverables: Up to fifteen (15) sets of plans and project manuals; addenda; award recommendation letter.*

**Additional Services**

Any services not specifically provided for in the above scope, as well as any changes in the scope the City requests, will be considered additional services and will be performed at our current hourly rates. Additional services we can provide include, but are not limited to, the following:

- Additional meetings
- Additional plan and specification
- Illustrative plans and graphics for meetings and other presentations
- Construction services. This proposal does not include construction services. However, we understand that the city is interested in part to full time inspection services. Kimley-Horn has construction services personnel who can perform these services. A proposal for these services will be provided.

## Schedule

The following is a summary of the anticipated schedule for tasks within this proposal:

<b>Notice to Proceed</b>	December 23, 2011
<b>Confirm and Finalize Feasibility Report</b>	December 27, 2011–January 20, 2012
<b>Final Design – Prepare Plans and Specifications</b>	January 23, 2012 – March 15, 2012
<b>Bid Opening</b>	April 24, 2012
<b>Award Contract</b>	May 1, 2012
<b>Estimated Construction Start</b>	May 15, 2012
<b>Substantial Completion</b>	October 1, 2012
<b>Final Completion</b>	November 30 <sup>th</sup> , 2012
<b>Estimated 2 Year Warranty Period Completion</b>	November 30 <sup>th</sup> , 2014

## Fee and Billing

Kimley-Horn and Associates, Inc. will provide the services described in the scope of services on a labor fee plus expense basis. Labor fee will be billed according to our current hourly rate schedule. An amount will be added to each invoice to cover certain other expenses such as in-house duplicating, local mileage, postage, and delivery charges. The total estimated fees and expenses for the work tasks included in this Agreement is **\$39,280.00**

Fees will be invoiced monthly based on the actual amount of service performed and expenses incurred. Payment will be due within 25 days of the date of the invoice.

In addition to the matters set forth herein, our Agreement shall include and be subject to, and only to, the terms and conditions in the attached Standard Provisions, which are incorporated by reference. As used in the Standard Provisions, the term "the Consultant" shall refer to Kimley-Horn and Associates, Inc., and the term "the Client" shall refer to the City of Edina.

If you concur in all the foregoing and wish to direct us to proceed with the services, please have authorized persons execute both copies of this Agreement in the spaces provided below, retain

one copy, and return the other to us. Fees and times stated in this Agreement are valid for sixty (60) days after the date of this letter.

We appreciate this opportunity to continue our services to the City of Edina. Please contact me at 651-643-0446 if you have any questions.

Sincerely,

KIMLEY-HORN AND ASSOCIATES, INC.



Thomas R. Harrington, RLA  
Project Manager

Attachment - Standard Provisions

Copy: File

Agreed to this \_\_\_\_ day of \_\_\_\_\_, 2011.

CITY OF EDINA

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Name

\_\_\_\_\_  
Title

\_\_\_\_\_  
Date

**KIMLEY-HORN AND ASSOCIATES, INC.**  
**STANDARD PROVISIONS**

(1) **Consultant's Scope of Services and Additional Services.** The Consultant's undertaking to perform professional services extends only to the services specifically described in this Agreement. However, if requested by the Client and agreed to by the Consultant, the Consultant will perform additional services ("Additional Services"), and such Additional Services shall be governed by these provisions. Unless otherwise agreed to in writing, the Client shall pay the Consultant for the performance of any Additional Services an amount based upon the Consultant's then-current hourly rates plus an amount to cover certain direct expenses including in-house duplicating, local mileage, telephone calls, postage, and word processing. Other direct expenses will be billed at 1.15 times cost. Technical use of computers for design, analysis, GIS, and graphics, etc., will be billed at \$25.00 per hour.

(2) **Client's Responsibilities.** In addition to other responsibilities described herein or imposed by law, the Client shall:

- (a) Designate in writing a person to act as its representative with respect to this Agreement, such person having complete authority to transmit instructions, receive information, and make or interpret the Client's decisions.
- (b) Provide all information and criteria as to the Client's requirements, objectives, and expectations for the project including all numerical criteria that are to be met and all standards of development, design, or construction.
- (c) Provide to the Consultant all previous studies, plans, or other documents pertaining to the project and all new data reasonably necessary in the Consultant's opinion, such as site survey and engineering data, environmental impact assessments or statements, zoning or other land use regulations, etc., upon all of which the Consultant may rely.
- (d) Arrange for access to the site and other private or public property as required for the Consultant to provide its services.
- (e) Review all documents or oral reports presented by the Consultant and render in writing decisions pertaining thereto within a reasonable time so as not to delay the services of the Consultant.
- (f) Furnish approvals and permits from governmental authorities having jurisdiction over the project and approvals and consents from other parties as may be necessary for completion of the Consultant's services.
- (g) Cause to be provided such independent accounting, legal, insurance, cost estimating and overall feasibility services as the Client may require or the Consultant may reasonably request in furtherance of the project development.
- (h) Give prompt written notice to the Consultant whenever the Client becomes aware of any development that affects the scope and timing of the Consultant's services or any defect or noncompliance in any aspect of the project.
- (i) Bear all costs incident to the responsibilities of the Client.

(3) **Period of Services.** Unless otherwise stated herein, the Consultant will begin work timely after receipt of an executed copy of this Agreement and will complete the services in a reasonable time. This Agreement is made in anticipation of conditions permitting continuous and orderly progress through completion of the services. Times for performance shall be extended as necessary for delays or suspensions due to circumstances that the Consultant does not control. If such delay or suspension extends for more than six months (cumulatively), Consultant's compensation shall be renegotiated.

(4) **Method of Payment.** Compensation shall be paid to the Consultant in accordance with the following provisions:

- (a) Invoices will be submitted periodically, via regular mail or email, for services performed and expenses incurred. Payment of each invoice will be due within 25 days of receipt. The Client shall also pay any applicable sales tax. All retainers will be held by the Consultant for the duration of the project and applied against the final invoice. Interest will be added to accounts not paid within 25 days at the maximum rate allowed by law. If the Client fails to make any payment due the Consultant under this or any other agreement within 30 days after the Consultant's transmittal of its invoice, the Consultant may, after giving notice to the Client, suspend services until all amounts due are paid in full.
- (b) If the Client objects to an invoice, it must advise the Consultant in writing giving its reasons within 14 days of receipt of the invoice or the Client's objections will be waived, and the invoice shall conclusively be deemed due and owing.
- (c) If the Consultant initiates legal proceedings to collect payment, it may recover, in addition to all amounts due, its reasonable attorneys' fees, reasonable experts' fees, and other expenses related to the proceedings. Such expenses shall include the cost, at the Consultant's normal hourly billing rates, of the time devoted to such proceedings by its employees.
- (d) The Client agrees that the payment to the Consultant is not subject to any contingency or condition. The Consultant may negotiate payment of any check tendered by the Client, even if the words "in full satisfaction" or words intended to have similar effect appear on the check without such negotiation being an accord and satisfaction of any disputed debt and without prejudicing any right of the Consultant to collect additional amounts from the Client.

(5) **Use of Documents.** All documents, including but not limited to drawings, specifications, reports, and data or programs stored electronically, prepared by the Consultant are related exclusively to the services described in this Agreement, and may be used only if the Client has satisfied all of its obligations under this Agreement. They are not intended or represented to be suitable for use, partial use or reuse by the Client or others on extensions of this project or on any other project. Any modifications made by the Client to any of the Consultant's documents, or any use, partial use or reuse of the documents without written authorization or adaptation by the Consultant will be at the Client's sole risk and without liability to the

Consultant, and the Client shall indemnify, defend and hold the Consultant harmless from all claims, damages, losses and expenses, including but not limited to attorneys' fees, resulting therefrom. Any authorization or adaptation will entitle the Consultant to further compensation at rates to be agreed upon by the Client and the Consultant. Any electronic files not containing an electronic seal are provided only for the convenience of the Client, and use of them is at the Client's sole risk.

In the case of any defects in the electronic files or any discrepancies between them and the hardcopy of the documents prepared by the Consultant, the hardcopy shall govern. Only printed copies of documents conveyed by the Consultant may be relied upon. Because data stored in electronic media format can deteriorate or be modified without the Consultant's authorization, the Client has 60 days to perform acceptance tests, after which it shall be deemed to have accepted the data.

(6) **Opinions of Cost.** Because the Consultant does not control the cost of labor, materials, equipment or services furnished by others, methods of determining prices, or competitive bidding or market conditions, any opinions rendered as to costs, including but not limited to opinions as to the costs of construction and materials, shall be made on the basis of its experience and represent its judgment as an experienced and qualified professional, familiar with the industry. The Consultant cannot and does not guarantee that proposals, bids or actual costs will not vary from its opinions of cost. If the Client wishes greater assurance as to the amount of any cost, it shall employ an independent cost estimator. Consultant's services required to bring costs within any limitation established by the Client will be paid for as Additional Services.

(7) **Termination.** The obligation to provide further services under this Agreement may be terminated by either party upon seven days' written notice in the event of substantial failure by the other party to perform in accordance with the terms hereof through no fault of the terminating party, or upon thirty days' written notice for the convenience of the terminating party. If any change occurs in the ownership of the Client, the Consultant shall have the right to immediately terminate this Agreement. In the event of any termination, the Consultant shall be paid for all services rendered and expenses incurred to the effective date of termination, and other reasonable expenses incurred by the Consultant as a result of such termination. If the Consultant's compensation is a fixed fee, the amount payable for services will be a proportional amount of the total fee based on the ratio of the amount of the services performed, as reasonably determined by the Consultant, to the total amount of services which were to have been performed.

(8) **Insurance.** The Consultant carries Workers' Compensation insurance, professional liability insurance, and general liability insurance. If the Client directs the Consultant to obtain increased insurance coverage, the Consultant will take out such additional insurance, if obtainable, at the Client's expense.

(9) **Standard of Care.** In performing its professional services, the Consultant will use that degree of care and skill ordinarily exercised, under similar circumstances, by reputable members of its profession in the same locality at the time the services are provided. No warranty, express or implied, is made or intended by the Consultant's undertaking herein or its performance of services, and it is agreed that the Consultant is not a fiduciary with respect to the Client.

(10) **LIMITATION OF LIABILITY.** In recognition of the relative risks and benefits of the Project to both the Client and the Consultant, the risks have been allocated such that the Client agrees, to the fullest extent of the law, and notwithstanding any other provisions of this Agreement or the existence of applicable insurance coverage, that the total liability, in the aggregate, of the Consultant and the Consultant's officers, directors, employees, agents, and subconsultants to the Client or to anyone claiming by, through or under the Client, for any and all claims, losses, costs or damages whatsoever arising out of, resulting from or in any way related to the services under this Agreement from any cause or causes, including but not limited to, the negligence, professional errors or omissions, strict liability or breach of contract or any warranty, express or implied, of the Consultant or the Consultant's officers, directors, employees, agents, and subconsultants, shall not exceed twice the total compensation received by the Consultant under this Agreement or \$50,000, whichever is greater. Higher limits of liability may be negotiated for additional fee. Under no circumstances shall the Consultant be liable to the Client or those claiming by or through the Client for lost profits or consequential damages, for extra costs or other consequences due to changed conditions, or for costs related to the failure of contractors to perform work in accordance with the plans and specifications. This Section 10 is intended solely to limit the remedies available to the Client or those claiming by or through the Client, and nothing in this Section 10 shall require the Client to indemnify the Consultant.

(11) **Certifications.** The Consultant shall not be required to execute certifications or third-party reliance letters that are inaccurate, that relate to facts of which the Consultant does not have actual knowledge, or that would cause the Consultant to violate applicable rules of professional responsibility.

(12) **Dispute Resolution.** All claims by the Client arising out of this Agreement or its breach shall be submitted first to mediation in accordance with the Construction Industry Mediation Rules of the American Arbitration Association as a condition precedent to litigation. Any mediation or civil action by Client must be commenced within one year of the accrual of the cause of action asserted but in no event later than allowed by applicable statutes.

**(13) Hazardous Substances and Conditions.**

(a) Services related to determinations involving hazardous substances or conditions, as defined by federal or state law, are limited to those tasks expressly stated in the scope of services. In any event, Consultant shall not be a custodian, transporter, handler, arranger, contractor, or remediator with respect to hazardous substances and conditions. Consultant's services will be limited to professional analysis, recommendations, and reporting, including, when agreed to, plans and specifications for isolation, removal, or remediation.

(b) The Consultant shall notify the Client of hazardous substances or conditions not contemplated in the scope of services of which the Consultant actually becomes aware. Upon such notice by the Consultant, the Consultant may stop affected portions of its services until the hazardous substance or condition is eliminated. The parties shall decide if Consultant is to proceed with its services and if Consultant is to conduct testing and evaluations, and the parties may enter into further agreements as to the additional scope, fee, and terms for such services.

**(14) Construction Phase Services.**

(a) If the Consultant's services include the preparation of documents to be used for construction and the Consultant is not retained to make periodic site visits, the Client assumes all responsibility for interpretation of the documents and for construction observation, and the Client waives any claims against the Consultant in any way connected thereto.

(b) If the Consultant provides construction phase services, the Consultant shall have no responsibility for any contractor's means, methods, techniques, equipment choice and usage, sequence, schedule, safety programs, or safety practices, nor shall Consultant have any authority or responsibility to stop or direct the work of any contractor. The Consultant's visits will be for the purpose of endeavoring to provide the Client a greater degree of confidence that the completed work of its contractors will generally conform to the construction documents prepared by the Consultant. Consultant neither guarantees the performance of contractors, nor assumes responsibility for any contractor's failure to perform its work in accordance with the contract documents.

(c) The Consultant is not responsible for any duties assigned to the design professional in the construction contract that are not expressly provided for in this Agreement. The Client agrees that each contract with any contractor shall state that the contractor shall be solely responsible for job site safety and for its means and methods; that the contractor shall indemnify the Client and the Consultant for all claims and liability arising out of job site accidents; and that the Client and the Consultant shall be made additional insureds under the contractor's general liability insurance policy.

**(15) No Third-Party Beneficiaries; Assignment and Subcontracting.** This Agreement gives no rights or benefits to anyone other than the Client and the Consultant, and all duties and responsibilities undertaken pursuant to this Agreement will be for the sole benefit of the Client and the Consultant. The Client shall not assign or transfer any rights under or interest in this Agreement, or any claim arising out of the performance of services by Consultant, without the written consent of the Consultant. The Consultant reserves the right to augment its staff with subconsultants as it deems appropriate due to project logistics, schedules, or market conditions. If the Consultant exercises this right, the Consultant will maintain the agreed-upon billing rates for services identified in the contract, regardless of whether the services are provided by in-house employees, contract employees, or independent subconsultants.

**(16) Confidentiality.** The Client consents to the use and dissemination by the Consultant of photographs of the project and to the use by the Consultant of facts, data and information obtained by the Consultant in the performance of its services. If, however, any facts, data or information are specifically identified in writing by the Client as confidential, the Consultant shall use reasonable care to maintain the confidentiality of that material.

**(17) Miscellaneous Provisions.** This Agreement is to be governed by the law of the State of Minnesota. This Agreement contains the entire and fully integrated agreement between the parties and supersedes all prior and contemporaneous negotiations, representations, agreements or understandings, whether written or oral. Except as provided in Section 1, this Agreement can be supplemented or amended only by a written document executed by both parties. Provided, however, that any conflicting or additional terms on any purchase order issued by the Client shall be void and are hereby expressly rejected by the Consultant. Any provision in this Agreement that is unenforceable shall be ineffective to the extent of such unenforceability without invalidating the remaining provisions. The non-enforcement of any provision by either party shall not constitute a waiver of that provision nor shall it affect the enforceability of that provision or of the remainder of this Agreement.

**Public Sector**

**Kimley-Horn and Associates, Inc.  
Schedule of Rates**

Effective January 1, 2011 to December 31, 2011

<b><u>Classification</u></b>	<b><u>Hourly Rate</u></b>
Administrative Assistant	\$ 77.50
CADD Technician	\$ 85.00
Clerical	\$ 65.00
Client Manager	\$180.00
Drafter	\$ 60.00
Field Technician I	\$ 97.50
Field Technician II	\$105.00
Graduate Eng./Planner I	\$ 97.50
Graduate Eng./Planner II	\$107.50
Principal	\$190.00
Project Engineer/Planner	\$115.00
Project Manager	\$135.00
Senior Administrative Assistant	\$ 95.00
Senior CADD Technician	\$ 95.00
Senior Designer	\$115.00
Senior Field Technician	\$120.00
Senior Project Manager	\$150.00

Reimbursable expenses (copy/printing charges, plotting, mileage, delivery charges, faxes, etc.) will be charged as an office expense at 6.0% of the labor fee. Any subconsultant charges will be excluded from the office expense and will be passed directly to the Client with no Kimley-Horn markup.

Additional rates may be negotiated at a later date for classifications or services not included above.