

PROFESSIONAL SERVICE AGREEMENT

This Professional Service Agreement (“the Agreement”) is made and entered into by and between the City of Broken Arrow, a municipal corporation (City), and McDonald, McCann, Metcalf & Carwile, LLP, Attorneys and Counselors at Law (“Outside Counsel”), 15 East Fifth Street, Suite 1400, Tulsa, Oklahoma 74103-4358.

I. PURPOSE OF REPRESENTATION

City has retained Outside Counsel to provide counsel and legal advice to the City of Broken Arrow regarding the Tiger Hill Retaining Wall Design and Construction Defect Dispute with Contech, Inc., O.J.C., Co., and Heartstone.

II. OUTSIDE COUNSEL REPORTS TO CITY ATTORNEY

Outside Counsel agrees to keep City informed of the status of the matters covered by this Agreement by:

- A. communicating orally with the City Attorney or designated representative as needed and as requested by City;
- B. providing timely copies of all pleadings, discovery, and correspondence to City Attorney; and
- C. submitting to the City Attorney a detailed monthly statement identifying by separate entries:
 - 1. each date work was performed under the Agreement,
 - 2. the amount of time billed for the work,
 - 3. the attorney or paralegal billing for the entry,
 - 4. the hourly rate of the attorney or paralegal billing the entry,
 - 5. a description of the work performed, and
 - 6. the dollar amount billed for the entry.

All written communications required by this Agreement should be sent to Beth Anne Childs, Esq., City Attorney, City of Broken Arrow, City Hall, 220 South 1st Street, Broken Arrow, Oklahoma 74012.

III. CONFLICT OF INTEREST

Outside Counsel must conduct a conflicts check covering potential and actual conflicts of interest before representing the City or other City related parties. Outside Counsel must promptly notify the City Attorney in writing of all actual or potential conflicts. Outside Counsel must disclose past or present representation of a client associated directly, indirectly, actually, or potentially with the subject of the representation that is the subject of this Agreement. No waiver of an actual or potential conflict will be valid unless in writing and executed by the City. Outside Counsel must obtain any necessary third party waivers in writing prior to representing the City. Outside Council will monitor whether any actual or potential conflicts arise in connection with

Outside Counsel's proposed representation of other parties to the dispute that is the subject of this Agreement while Outside Counsel is representing the City and shall promptly notify the City Attorney in writing of any such conflicts.

IV. TIMELY ACTION BY OUTSIDE COUNSEL

By executing this Agreement, Outside Counsel agrees to act in a timely manner in conducting work under this Agreement.

V. FEES AND EXPENSES

City agrees to pay Outside Counsel an hourly fee based on the following hourly rates:

Steven K. Metcalf	\$275.00 per hour maximum
William H. Spitler	\$245.00 per hour maximum
Associates	\$195.00 per hour maximum
Paralegals	\$80.00 to \$100.00 hour maximum

The maximum fees and costs and expenses shall not exceed \$75,000.00 without amendment to this Agreement agreed upon between the City and Outside Counsel.

City will pay Outside Counsel's out-of-pocket costs and expenses reasonably incurred in these matters as follows:

- Out-of-pocket necessary copying costs
- Out-of-pocket long distance telephone charges
- Out-of-pocket automated research costs
- Out-of-pocket postage charges
- Courier and messenger services
- Other items as necessary if the City Attorney approves prior to expenditure.

The following types of expenditures will not be paid by City:

- Administrative overhead, including time spent copying, filing, docketing or calendaring deadlines, attending internal firm meetings for planning or status updates, reviewing or processing this Agreement or invoices for services or expenses rendered under this Agreement, or any clerical or secretarial work,
- Air conditioning and electricity for overtime work,
- Client entertainment,
- Local and suburban telephone calls,
- Refreshments during meetings,
- Meals during meetings or any other time unless associated with pre-approved overnight travel,
- Fees for telecopying other than out-of-pocket long distance telephone charges associated therewith, and
- Off-duty hours while traveling (not to include travel to or from the location of a meeting or hearing by counsel)

VI. SETTLEMENT

Settlement possibilities should be identified and considered early and at subsequent stages in the proceedings. Outside Counsel must promptly report settlement overtures to the City Attorney or her designated representative. Cases may be settled only with the prior approval of the City Attorney and appropriate City officials.

VII. MALPRACTICE INSURANCE

Outside Counsel shall maintain professional liability insurance acceptable to the City Attorney with appropriate and adequate coverage. Upon request, Outside Counsel shall submit a certificate from its insurance carrier that provides that written notice will be provided to the City Attorney before cancellation of the insurance is effective. Outside Counsel shall promptly advise the City if its insurance is canceled or lapses.

VIII. RIGHT TO AUDIT

The City shall have the right by use of internal or external resources to audit Outside Counsel's time records and billings, upon reasonable notice provided in writing to Outside Counsel. Outside Counsel will cooperate with an audit request by providing reasonable access to appropriate records and personnel necessary to conduct an audit.

IX. RETENTION OF OUTSIDE COUNSEL

Outside Counsel is being retained because of Outside Counsel's experience and expertise in the area of construction law and litigation. The goal of the City Attorney's office is to meet all ethical and professional standards applicable to government lawyers and to meet mandates of the City of Broken Arrow Code of Ordinances with regard to the City Attorney. In appropriate instances, screening measures will be created and used with policies and procedures and restricting the flow of and access to information regarding the representation between the Staff Attorney and other attorneys within the office of the City Attorney representing the City. The City Attorney's office and Outside Counsel will in such instances discuss appropriate procedures to accomplish ethical representation and will comply with all professional rules of conduct. Outside Counsel will be required in such circumstances to identify all concerns with such process immediately and prior to commencing representation.

X. ACCEPTANCES

This Agreement constitutes the entire agreement between the City and Outside Counsel and supersedes all prior agreements, written or oral, relating to the subject matter. Any change must be made or confirmed in writing, duly executed by both parties.

XI. ASSIGNABILITY OF AGREEMENT

This Agreement is personal in nature and may not be assigned by Outside Counsel.

XII. INDEPENDENT CONTRACTOR.

Outside Counsel agrees and acknowledges that during the existence of this Agreement, it acts in the capacity of an independent contractor and that Outside Counsel is not an employee of the City of Broken Arrow.

XIII. APPLICABLE LAW AND VENUE.

This Agreement and its incorporated documents shall be governed by and construed in accordance with the laws of the State of Oklahoma. The venue of any suit brought concerning this Agreement or its incorporated documents is fixed in any court of competent jurisdiction in Tulsa County, Oklahoma.

XIV. TERMINATION

The City may terminate this Agreement upon providing 30 days' written notice to Outside Counsel.

XV. TERM

This Agreement shall commence on the date below and shall remain in full force and effect through June 30, 2018, unless the term of this Agreement is extended by agreement of the parties.

IN WITNESS WHEREOF, this Agreement has been executed in multiple copies and is effective as of THIS 3rd day of October, 2017.

SIGNATURES CONTINUED ON THE NEXT PAGE

MCDONALD, MCCANN, METCALF & CARWILE, LLP

By: _____
Managing Partner

CITY OF BROKEN ARROW, a municipal corporation

By: _____
Craig Thurmond, Mayor

ATTEST:

City Clerk

Date: _____

APPROVED AS TO FORM:

Assistant City Attorney

AFFIDAVIT OF OUTSIDE COUNSEL

STATE OF OKLAHOMA)
) ss.
COUNTY OF TULSA)

The undersigned person, of lawful age, being first duly sworn on oath, says that all invoices to be submitted pursuant to this agreement with the City of Broken Arrow will be true and correct. Affiant further states that (s)he has made no payment directly or indirectly to any elected official, officer or employee of the City of Broken Arrow or of any public trust where the City of Broken Arrow is a beneficiary, of money or any other thing of value to obtain payment of the invoice or procure the contract or purchase order pursuant to which an invoice is submitted. Affiant further certifies that (s)he has complied with all applicable laws relating to equal employment opportunity.

MCDONALD, MCCANN, METCALF & CARWILE, LLP

By: _____
 Managing Partner

Subscribed and sworn to before me this _____ day of _____, 2017.

Notary Public

My commission expires: _____

My commission number: _____