

**LEASE AND AGREEMENT TO DEVELOP AND OPERATE**  
**AN URBAN AGRICULTURAL-GARDEN FACILITY**  
**BETWEEN THE CITY OF TEMPE AND SINGH ORGANIC SOILS, L.L.C**

This Agreement to Develop and Operate an Urban Agricultural-Garden Facility (“Agreement”) between the City of Tempe, an Arizona municipal corporation (“City”), and Singh Organic Soils, LLC, an Arizona limited liability company (“Singh Organic”) (collectively, “Parties”), is entered into this \_\_\_ day of \_\_\_\_\_, 2014.

**Agreement**

**Objective:** The Parties agree that the objective of this Agreement (“Objective”) is to develop a showcase destination in Tempe consisting of a recreational-themed, all-natural and sustainable urban farm or garden that will host a farmers market and provide an educational, recreational, and community gathering place (“Facility”). The Facility will be 100% natural and operated without use of chemicals, herbicides, or pesticides. The Facility will offer recreational opportunities and be used to elevate awareness of, and provide opportunities in, sustainable farming, gardening and turf-raising practices, food nutrition, and environmental issues. These opportunities will be afforded to residents and visitors of Tempe and Maricopa County, as well as students, teachers, professors, schools, colleges, universities, researchers, corporations, community groups, garden groups, restaurants, nurseries and others.

Specific objectives shall include, but not be limited to, the following:

- a. Operating the Facility in a manner that is 100% natural, without use of chemicals, herbicides, and pesticides.
- b. The Facility providing at least three of the uses specified in Subsection 6(c).
- c. The Facility being open to the public at least 20 hours each week during at least eight months during each year.
- d. The Facility being visited or used by at least 5,000 members of the public each year during private or public events.

1. **Lease and Location.** City, in consideration of the rents and covenants provided in this Agreement, leases to Singh Organic, and Singh Organic leases from City, real property, and all fixtures and improvements located on the real property (collectively, the “Premises”), located in the Indian Bend Wash Outlet area, bounded on the north by McKellips Road and on the south by Curry/Princess Road, legally described on Exhibit A-1 and depicted on Exhibit A-2, both of which are incorporated and made a part of this Agreement by this reference.

2. Flood Control. Singh Organic acknowledges and agrees that:

a. The real property of the Premises is owned by the Flood Control District of Maricopa County ("FCDMC") and is a part of the Indian Bend Wash Outlet Project, a flood control project constructed by the U.S. Corps of Engineers and operated and maintained by the FCDMC.

b. FCDMC has the right to utilize the Premises for storm water conveyance and is not responsible for any damage to any improvement or emblements that may be damaged as a result of storm water flows.

c. City has authority to enter into this Agreement in accordance with Intergovernmental Agreement for the Commercial Recreational Development of Indian Bend Wash Outlet between the City of Tempe and the Flood Control District of Maricopa County, as that Intergovernmental Agreement has been amended by Amendment No. 1 (collectively, "IGA").

d. The IGA is attached to this Agreement as Exhibit B and is incorporated and made a part of this Agreement by this reference. Any conflicts between this Agreement and the IGA shall be controlled by the IGA.

e. In accordance with the IGA, any new construction, substantial improvements, alterations, additions, or major repairs to existing improvements on the Premises shall be subject to review and approval by FCDMC, as further specified in Subsection 6(c) of this Agreement.

f. The Premises are within an existing FEMA-delineated floodplain/floodway. Singh Organic acknowledges that any improvements such as crops, gardens, etc., could be destroyed and/or impacted by a flooding event. Neither FCDMC nor City is responsible for any such losses.

g. Nothing shall be done on or to the Premises that interferes with, reduces or diminishes in any way the flood control capacities of the Premises, as determined solely by the FCDMC.

h. If FCDMC shall determine, in its sole and exclusive discretion, that any development, operation, or use located on the Premises is causing interference with or otherwise compromising the flood control ability or capacity of the Indian Bend Wash Outlet, then and in such event, all operations and activities on the Premises shall immediately cease and shall not be resumed unless and until FCDMC shall advise Singh Organic, in writing, that operations, or some of them, may resume. In the event FCDMC shall determine, in its sole and exclusive discretion, that interference with or compromise of the flood control ability or capacity cannot be alleviated in a manner consistent or compatible with the continued operation by Singh Organic, then and in such event, this Agreement shall be deemed terminated.

3. No Warranties by the City.

a. The Parties have jointly investigated the condition of the Premises, and at the time of execution of this Agreement are each satisfied with the condition of the Premises. Except as provided by Subsection 3(b), City leases the Premises to Singh Organic in their current condition, "as is," with no representation or warranty by City, as to the quality, condition, or suitability of use, and without any liability or obligation on the part of City of making any alterations, improvements, or repairs of any kind on or about the Premises. If within six months of execution date of this Agreement, as specified in the first paragraph, above, Singh Organic discovers a material defect in the condition of the Premises, it may terminate the Agreement upon 90-days written notice to City.

b. If, prior to the execution of this Agreement, Singh Organic and City agree that reasonable repair and maintenance are necessary for any of the fixtures or improvements that are located on the Premises, a list of those repair and maintenance items and an estimated cost for those items shall be attached to this Agreement as Exhibit E. If repair and maintenance items are necessary and agreed to by City, the rent specified in Section 5 shall be reduced by 25% if Singh Organic submits invoices or other evidence of payment to City to document the expenditures. Upon Singh Organic having recouped all expenditures for the repair and maintenance items listed on Exhibit E, the rent shall be as specified in Section 5.

4. Lease Term. This Agreement shall begin on the date first written above. The term of the Agreement shall be ten years, with two ten-year renewal options. So long as the Parties agree that the Agreement's Objective is being achieved, Singh Organic may exercise the renewal option at its discretion subject to the final approval of FCDMC, which shall not withhold approval if the Objective is being achieved. Written notice of the exercise of the option to renew must be delivered to City at least six months before the expiration of the Agreement.

5. Rent.

a. During the first two years of the term of this Agreement, there shall be no rent required to allow for development and start-up of the Facility. For the remaining years in the term of the Agreement, including during any renewal term, the annual rent shall be the minimum annual rent amounts specified in Subsection 5(b) or 3% of the annual gross revenues of the Facility, whichever is greater. Within three months of the end of any year for which rent is due, Singh Organic shall provide Tempe with records showing its gross annual revenues for that year. If 3% of that amount is greater than the rent paid for the year, Singh Organic shall at that time pay the difference to Tempe.

b. Minimum annual rent for the Facility shall be as follows:

<u>Lease Year</u>	<u>Minimum Annual Rent</u>
Years 0-1	\$0.00

Years 2-5	\$15,544.00
Years 6-10	\$17,283.00
Years 11-15	\$19,440.00
Years 16-20	\$21,866.00
Years 21-25	\$24,595.00
Years 26-30	\$27,665.00

c. The minimum annual rent may be paid monthly, in 12 equal payments, on or before the first day of every month of the year, or, at Singh Organic’s option, may be paid in full annually on or before the first day of every year. For the purposes of this Section 5, a “year” shall begin on the first day of the first full month following the execution date of this Agreement, as specified in the first paragraph, above.

6. Use of the Premises.

a. Singh Organic shall develop the Premises into a showcase destination in Tempe consisting of a recreational-themed, all-natural and sustainable urban farm and/or garden (“Facility”) as described in the Objective and may charge fees for admission, participation in activities, and other uses of the Facility.

b. The Facility shall make at least one half acre of community gardens available to members of the public to ensure community benefit. At such point as the Premises may be legally irrigated and so long as it is legal to do so, as discussed in Section 7, the Facility shall provide at least 2 acres of community gardens available to members of the public. Singh Organic may charge a reasonable fee for such gardens.

c. In addition, the Facility shall provide all or some, but at a minimum, three, of the following uses:

- i. The production of edible organic produce and materials.
- ii. Farmers market.
- iii. Gardens and/or arboretums.
- iv. Demonstration gardens.
- v. Vineyards and orchards.
- vi. Nursery.
- vii. Recreational facilities compatible with an urban agricultural-garden facility, including but not limited to golf, camping, and obstacle courses.
- viii. Naturalized open-space or other community gathering and event spaces available for public and private events, including but not limited to lectures, corporate events, and weddings.

ix. Vendors compatible with a recreational-themed, urban agricultural-garden facility, including but not limited to food trucks, food trailers, merchandise vendors and restaurants.

x. Facilities and activities that provide education, teaching, and research activities in the field of organic agriculture and sustainable agriculture.

xi. Tours.

d. After the first year of this Agreement, the Facility shall be substantially operational and operating in compliance with the Objective. If at any point thereafter, City determines that the Facility is not in compliance with the Objective, the City shall provide written notice of the deficiencies to Singh Organic. If Singh Organic provides City with written notice that it disputes City's determination, the Parties shall enter into Dispute Resolution as specified in Section 12 of the Standard Terms and Conditions (Exhibit C of this Agreement). If Singh Organic does not dispute City's notice of deficiency, it shall, if feasible, cure the deficiencies within 90 days of receipt of City's written notice. If it is not feasible to cure the deficiencies within that time, Singh Organics shall begin to take action to address the deficiencies within 90 days and then proceed to cure the deficiencies as expeditiously as possible. Failure to cure shall constitute a material breach and default of this Agreement, and City may pursue all rights and remedies in accordance with Section 16 of the Standard Terms and Conditions.

e. The following shall apply to the development of the Facility:

i. Singh Organic acknowledges and agrees that all development and plans are subject to the normal planning and zoning processes at the City of Tempe, that Singh Organic must obtain any necessary approval and variance, together with any applicable use permit, plumbing permit, building permit, floodplain use permit, and any other applicable permit, and that Singh Organic is responsible for all normal fees and charges.

ii. In addition to the requirement specified in Item (i) of this Subsection 6(e), as to any development of any nature whatsoever to be located, in whole or in part, in an area identified as parcel type "B" on Exhibit F, Singh Organic shall submit two complete sets of plans and specifications to City, for City to review to determine if such plans are compatible with its local sponsor obligations with the U.S. Army Corps of Engineers regarding the Rio Salado Environmental Restoration Project. City may, as appropriate, submit the plans and specifications to the U.S. Army Corps of Engineers. If City determines the proposed plan does impact the Corps Restoration Project, no new construction or substantial improvements, alterations, additions, or major repairs to existing improvements shall be undertaken within an area identified as parcel type "B" without first obtaining the approval of City.

iii. In addition to the requirement specified in Item (i) of this Subsection 6(e), as to any development of any nature whatsoever to be located, in whole or in part, within an area identified as parcel type “B” and/or “C” on Exhibit F, Singh Organic shall submit two complete sets of plans and specifications to City, and City shall transmit the plans and specifications to FCDMC for review to determine if such plans are compatible with the requirements imposed upon FCDMC as the local sponsor of the U.S. Army Corps of Engineers project. The FCDMC may, as appropriate, submit the plans and specifications to the U.S. Army Corps of Engineers. No new construction or substantial improvements, alterations, additions, or major repairs to existing improvements shall be undertaken within an area identified as parcel type “B” and/or “C” without first obtaining the approval of FCDMC via its Right of Way Use Permitting process.

iv. The area defined as parcel type “D” on Exhibit F, consisting of an existing bike path isolated from the project by fence, is not part of the Premises or this Agreement.

v. Exhibit F is incorporated and made a part of this Agreement by this reference.

f. Singh Organic covenants and agrees that it shall not use the Premises or permit the Premises to be used contrary to any applicable law, statute, ordinance, or regulation, including but not limited to all water and environmental laws. Singh Organic covenants that it will not permit, create, or tolerate any public or private nuisance upon the Premises. Singh Organic shall to the extent permissible by law, indemnify, defend and hold harmless the City and FCDMC, including their agents, officers, directors, governors and employees thereof, from and against any and all loss or expense incurred as a result of any claim or suit of any nature whatsoever, which arises out of any act or omission of Singh Organic pursuant to this Agreement, including but not limited to, reasonable attorneys’ fees, court costs, and other expenses relating to the defense against claims or litigation, incurred by the City or FCDMC.

g. Singh Organic shall, at its sole cost and expense, procure any and all necessary permits, certificates, licenses, and other authorizations required for any and all operations permitted under this Agreement.

h. Singh Organic shall be solely responsible for arranging for any utility services needed for its purposes at the Premises and for paying for those utility services.

i. Singh Organic shall not use or permit others to use the Premises for any purposes other than as expressly stated in this Agreement. Any subordinate use agreements shall expressly provide that the parties to any subordinate use agreement acknowledge and agree to the terms of Section 2 of this Agreement. Any subordinate use agreement shall be consistent with the IGA and this Agreement, and in any dispute between the Parties, the terms of the IGA and this Agreement shall control. Singh Organic shall provide copies of any subordinate use agreements

to City and FCDMC within 30 days of the execution of the subordinate use agreement, but the provision of these copies shall not affect Singh Organic's responsibility to ensure the consistency of the subordinate use agreements with the terms of the IGA and this Agreement, which responsibility is solely Singh Organic's.

j. Singh Organic and all others who may use the Premises pursuant to this Agreement shall not, in the use of the Premises, discriminate because of race, color, gender, gender identity, sexual orientation, religion, national origin, familial status, age, disability, or United States military veteran status.

k. In the use of the Premises, Singh Organic shall not, nor cause to be, nor allow any other person to deposit, store, dispose of, place, or otherwise locate or allow to be located on or within the Premises, any hazardous substances, as that term is defined and/or regulated under any federal, state, or local statute, ordinance, code, or regulation. In the event any environmental hazard as defined by any regulatory agency should be found to be present on the Premises at levels equal to or in excess of the remedial standard, or in the event during the term of this Agreement any environmental pollution and/or contamination occurs on the Premises in the form of gradual or sudden pollution or contamination, the same shall be the sole responsibility of Singh Organic to clean up in a manner approved by the appropriate governmental agencies. Singh Organic shall remedy same and obtain all necessary approvals, except if such contamination were caused by City or FCDMC.

l. Singh Organic shall provide recognition of City's and FCDMC's cooperation in development of the Facility by including "in cooperation with the City of Tempe and the Flood Control District of Maricopa County" on signage and on promotional material, so long as such material provides adequate space for such recognition.

7. Water and Water Use.

a. Singh Organic acknowledges and agrees that the Premises do not have an irrigation history, as "irrigate" is defined by A.R.S. § 45-402, between the years 1975-1980, do not qualify for an irrigation grandfathered right under the Arizona Groundwater Code, A.R.S. §§ 45-401 *et seq.*, and currently may not lawfully be irrigated. Singh Organic agrees to comply with all applicable laws, codes, management plans, and regulations governing irrigation and water use, including but not limited to the Arizona Groundwater Code. The Parties shall work cooperatively to achieve the Objective in compliance with the Arizona Groundwater Code.

b. City acknowledges that the Arizona Groundwater Code, A.R.S. § 45-452(H), allows a state university engaged in the teaching and study of and experimentation in the science of agriculture to irrigate and to withdraw groundwater for such purposes and agrees that Singh Organic may enter into such arrangements and agreements with a state university as may facilitate irrigation on the Premises under this provision of the Arizona Groundwater Code;

provided, however, that Tempe makes no representation or warranty that any such arrangement is lawful under the Arizona Groundwater Code.

c. A well, Arizona Department of Water Resources Well Registration No. 55-527102; Legal Description A(1-4)11dba, is located on and is a fixture of the Premises and is included as part of the Premises. Singh Organic may utilize this well for its purposes; provided, however, that Singh Organic has or obtains a lawful right to, or may otherwise lawfully, withdraw water from underground in the Phoenix Active Management Area. While the Parties shall work cooperatively to achieve the Objective in compliance with the Arizona Groundwater Code as specified in Subsection 7(a), above, Singh Organic expressly acknowledges and agrees that City is under no duty or obligation to provide such a right or means to lawfully withdraw water from underground using the well. Ensuring the lawfulness of any underground water withdrawal is solely Singh Organic's responsibility and shall be at its sole expense. City makes no warranty or representation as to the quality, availability, condition, or suitability of use, of the well or the water produced by the well, and there shall be no liability or obligation on the part of City of making any alterations, improvements, treatment, or repairs of any kind on or about or with regard to the well or the water produced by the well.

d. The City Water and Wastewater Utility provides potable water and wastewater services to the existing "clubhouse" and other parts of the Premises, will continue to do so, and will provide these services, as requested, to any similar domestic or commercial purposes on the Premises under the rates set forth on Appendix A of the Tempe City Code, as those rates may be amended from time to time. Payment for such services shall solely be the responsibility of Singh Organic.

8. Maintenance and Repair. During the Agreement Term, Singh Organic, at its sole cost and expense, shall do and perform the following:

a. Keep the Premises in a neat, clean, pest-free, and debris-free condition, including but not limited to keeping the Premises free of weeds, pests, dead vegetative materials, garbage, and offensive odors.

b. Keep the Premises clear of all obstructions or refuse of any kind.

c. Keep and maintain the Premises, including all buildings, fixtures, and improvements, in good and substantial repair so that the Premises fully comply with all applicable laws, statutes, ordinances, and regulations, and if deemed necessary by Singh Organic, provide security for the Premises, including quarters for security or caretakers on the Premises, provided that the construction of any quarters shall be subject to all other requirements of this Agreement.

d. In the event the Premises, including all buildings, fixtures, and improvements, shall be in a condition, need or state of disrepair that Singh Organic cannot continue to occupy

and use the Premises as permitted by this Agreement, City shall have no obligation to make, or liability for not undertaking to make, any alterations, improvements, or repairs of any kind to the Premises, buildings, fixtures, or improvements necessary to continue Singh Organic's use and occupancy of the Premises. Singh Organic shall make all alterations, improvements, or necessary repairs necessary to continue to achieve the Objective, all at Singh Organic's sole cost and expense in accordance with this Agreement.

e. An event of force majeure, as set forth in Section 18 of the Standard Terms & Conditions, shall not affect the maintenance requirements of this Agreement, and within a reasonable period of time following such an event, the Premises shall be brought into compliance with the maintenance and repair standards of this Agreement, at the sole expense of Singh Organic.

f. If City determines at any point that Singh Organic is not in compliance with this Section 8, City shall provide written notice of the noncompliance to Singh Organic, and Singh Organic shall cure the noncompliance within 30 days of receipt of City's written notice or, if it is not feasible to cure the deficiency within 30 days, shall begin to take action to address the deficiencies within 30 days and then proceed to cure the deficiencies as expeditiously as possible. Failure to cure shall constitute a material breach of this Agreement.

9. Alterations and Modifications.

a. All alterations and modifications of the Premises shall be (i) performed and completed in a good, workman like manner at the sole cost and expense of Singh Organic; (ii) completed in compliance with all applicable laws, ordinances, codes, rules, regulations, and orders; (iii) done in compliance with Subsection 6(e) of this Agreement, and (iv) shall become a part of the Premises, and any title shall vest in and be retained by City, except as otherwise provided by Subsection 12(b).

b. In addition to complying with all other applicable environmental laws, Singh Organic shall obtain any required Maricopa County Earth Moving Permit as may be required under Rule 200 of the Maricopa County Division of Air Pollution Control Requirements, as amended from time to time. If a Control Plan is required for approval of the Earth Moving Permit, Singh Organic agrees to submit the Control Plan to the City for review prior to County submittal, to ensure that all elements of the planned operation are covered.

10. Right of Inspection. Singh Organic agrees to permit City, FCDMC, and their agents, contractors, or employees to enter the Premises at all reasonable times upon reasonable notice for the purposes of viewing or inspecting the Premises.

11. Taxes. Singh Organic shall be responsible for the payment of all applicable taxes (personal, privilege, or real estate) or ad valorem and assessments which may be assessed, levied, or imposed upon Singh Organic or the Premises during the Agreement Term including any taxes

resulting from Singh Organic's occupancy and/or use of the Premises. Singh Organic shall have the right to lawfully contest the amount of any such taxes or assessments.

12. Termination.

a. Prior to or upon termination of this Agreement, City shall inspect the property and conduct a site inspection. Singh Organic, at the termination of this Agreement, will give up and surrender the Premises. The Premises shall be surrendered in a neat, clean, pest-free, and debris-free condition and all fixtures and improvements shall be in good and substantial repair, all in accordance with the maintenance and repair requirements of this Agreement. Singh Organic shall be solely responsible for any repair or maintenance found necessary to bring the Premises, fixtures, and improvements up to the standards specified by this Agreement.

b. Those fixtures and improvements that are located on the Premises on the execution date of this Agreement, as specified in the first paragraph, above, shall be the sole property of City. Those fixtures and improvements installed on the Premises by Singh Organic during the term of this Agreement may be removed by Singh Organic, at its sole expense, within 30 days of the termination of the Agreement, provided, however, that after removal, Singh Organic shall return the Premises to a clean, orderly, and functional condition, at its sole expense. No fixture or improvement shall be removed if, after such removal, the Premises are not capable of being restored by Singh Organic to a clean, orderly, and functional condition. Any fixture or improvement remaining after those 30 days shall be the sole property of City.

13. FCDMC Concurrence. No future alterations to this Agreement shall be valid without first getting the written concurrence of the Flood Control District of Maricopa County, as the landowner of the property.

14. Terms & Conditions.

a. Standard Terms & Conditions, except for Sections 8, 15, 45, 46, and 47, are attached as Exhibit C and incorporated into and made a part of this Agreement by this reference. Sections 8, 15, 45, 46, and 47 of the Standard Terms & Conditions are deleted in their entirety.

b. Special Terms & Conditions are attached as Exhibit D and incorporated into and made a part of this Agreement by this reference.

c. As provided by Section 25 of the Standard Terms & Conditions, the address of Singh Organic to receive all notices is:

Singh Organic Soils, L.L.C.  
ATTN: Ken Singh  
6929 N Hayden Rd Ste C-4 #263  
Scottsdale, Arizona 85250

IN WITNESS WHEREOF, the parties hereto have executed this Agreement, this the \_\_\_\_\_ day of \_\_\_\_\_, 2014.

**CITY OF TEMPE**

By \_\_\_\_\_

Mark W. Mitchell, Mayor

ATTEST:

\_\_\_\_\_  
Brigitta M. Kuiper, City Clerk

APPROVED AS TO FORM:

\_\_\_\_\_  
Judith R. Baumann, City Attorney

**SINGH ORGANIC SOILS, LLC**

By \_\_\_\_\_

Its \_\_\_\_\_

**PARCEL NO. 1:**

All that part of the East half of the Northwest quarter of the Northeast quarter of Section 11, Township 1 North, Range 4 East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona, described as follows:

BEGINNING at the Northeast corner of said Section 11; thence North 89 degrees 57 minutes 47 seconds West 1319.76 feet along the North line of said Section 11 to the East line of said East half of the Northwest quarter of the Northeast quarter and the True Point of Beginning; thence South 0 degrees 53 minutes 36 seconds West 1318.89 feet along the said East line to the Southeast corner of said East half of the Northwest quarter of the Northeast quarter; thence North 89 degrees 54 minutes 32 seconds West 653.64 feet along the South line of said East half of the Northwest quarter of the Northeast quarter to the Southwest corner thereof; thence North 24 degrees 37 minutes 00 seconds East 1101.27 feet to a point; thence North 9 degrees 00 minutes 00 seconds East 229.47 feet to a point; thence North 88 degrees 17 minutes 57 seconds West 241.24 feet to a point; thence South 0 degrees 37 minutes 33 seconds West 80.00 feet to a point; thence North 89 degrees 57 minutes 47 seconds West 65.00 feet to a point on the East line of the West 175 feet of the North 500 feet of said East half of the Northwest quarter of the Northeast quarter; thence North 0 degrees 37 minutes 33 seconds East 163.00 feet to a point on the North line of said Section 11; thence South 89 degrees 57 minutes 47 seconds East 484.80 feet along said North line to the True Point of Beginning.

EXCEPT the South 130 feet of the North 163 feet of the East 80 feet of the West 240 feet of the East half of the Northwest quarter of the Northeast quarter of Section 11, Township 1 North, Range 4 East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona.

**PARCEL NO. 2:**

All that part of the South 200 feet of the West 1045.4 feet of the East 1085.4 feet of the Northeast quarter of the Northeast quarter of Section 11, Township 1 North, Range 4 East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona, described as follows:

BEGINNING at the Northeast corner of said Section 11; thence North 89 degrees 57 minutes 47 seconds West 1319.76 feet along the North line of said Section 11 to the Northwest corner of said Northeast quarter of the Northeast quarter; thence South 0 degrees 53 minutes 36 seconds West 1318.89 feet to the Southwest corner of said Northeast quarter of the Northeast quarter; thence South 89 degrees 54 minutes 32 seconds East 221.16 feet along the South line of said Northeast quarter of the Northeast quarter to the Southwest corner of the subject property; thence North 1 degrees 27 minutes 53 seconds East 170.60 feet along the West line of said subject property to the True Point of Beginning; thence continuing North 1 degree 27 minutes 53 seconds East 29.40 feet to the Northwest corner of the subject property; thence South 89 degrees 54 minutes 32 seconds East 12.83 feet along the North line of said subject property to a point; thence South 24 degrees 48 minutes 17 seconds West 32.35 feet to the True Point of Beginning.

PARCEL NO. 3:

The West half of the East half of the West half of the North half of the Southeast quarter of Section 11, Township 1 North, Range 4 East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona;

EXCEPT the North 33 feet thereof, as conveyed to The United States of America, by Quit Claim Deed recorded at Book 334 of Deeds, Page 68; and

EXCEPT the undivided one-half interest in and to all oil, gas and mineral rights as reserved by ROBERT JAMES HIGHT, also known as R.J. HIGHT and HOLLIE HIGHT, his wife, in Deed recorded in Docket 324, Page 137.

PARCEL NO. 4:

The East half of the East half of the Northwest quarter of the Southeast quarter of Section 11, Township 1 North, Range 4 East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona, being a part of FARM UNIT "B";

EXCEPT that part thereof that lies within the North 33 feet of the West 1050 feet of the Northwest quarter of the Southeast quarter of said Section 11, as conveyed to The United States of America, by Quit Claim Deed recorded in Book 334 of Deeds, Page 68; and

EXCEPT the South 30 feet; and

EXCEPT the undivided one-half interest in and to all oil, gas and mineral rights as reserved by ROBERT JAMES HIGHT, also known as R.J. HIGHT and HOLLIE HIGHT, his wife, in Deed recorded in Docket 324, Page 137; and

EXCEPT commencing at the Southeast corner of the East half of the Northwest quarter of the Southeast quarter of the said Section 11; thence North (assumed bearing) along the Easterly line of the said East half of the Northwest quarter of the Southeast quarter of Section 11, 40.00 feet; thence South 89 degrees 07 minutes 08 seconds West, parallel to the Southerly line of the said East half of the Northwest quarter of the Southeast quarter of the said Section 11, 30.00 feet to the True Point of Beginning; thence North parallel to the said Easterly line, 147.50 feet; thence South 89 degrees 07 minutes 07 seconds West, 230.46 feet; thence South 147.50 feet to a point 40.00 feet North of the said Southerly line; thence North 89 degrees 07 minutes 07 seconds East, parallel to the said Southerly line, 230.46 feet to the True Point of Beginning; and

EXCEPT any portion of APACHE INDUSTRIAL PARK UNIT THREE, as recorded in Book 280 of Maps, Page 28, described as follows:

Beginning at the South quarter of said Section 11; thence North 0 degrees 19 minutes 04 seconds East 1326.20 feet along the West line of the Southeast quarter of said Section 11 to the Southwest corner of the Northwest quarter of the Southeast quarter; thence South 89 degrees 58 minutes 06 seconds East 1280.67 feet to the Southeast corner of said Northwest quarter of the Southeast quarter; thence North 0 degrees 51 minutes 38 seconds East 187.50 feet along the East line of said East half of the East half of the Northwest quarter of the Southeast quarter to the True Point of Beginning; thence continuing North 0 degrees 51 minutes 38 seconds East 450.00 feet to a point; thence North 89 degrees 58 minutes 06 seconds West 167.93 feet to a point; thence South 4 degrees 59 minutes 24 seconds West 451.65 feet to a point; thence South 89 degrees 58 minutes 06 seconds East 200.46 feet along the North line of the South 187.50 feet of said East half of the East half of the Northwest quarter of the Southeast quarter to the True Point of Beginning; and

EXCEPT any portion lying within APACHE INDUSTRIAL PARK TWO, as recorded in Book 262 of Maps, Page 12.

PARCEL NO. 5:

All that part of the Northeast quarter of the Northeast quarter of Section 11, Township 1 North, Range 4 East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona, described as follows:

BEGINNING at the Northeast corner of said Section 11; thence North 89 degrees 57 minutes 47 seconds West 370.25 feet along the North line of said Section 11 to the TRUE POINT OF BEGINNING; thence South 0 degrees 02 minutes 13 seconds West 93.0 feet to a point; thence North 89 degrees 57 minutes 47 seconds West, 320 feet to a point; thence South 15 degrees 40 minutes 18 seconds West,

361.27 feet to a point; thence South 24 degrees 48 minutes 17 seconds West, 746.33 feet to a point on the North line of the South 200 feet of the West 1045.5 feet of the East 1085.4 feet of said Northeast quarter of the Northeast quarter; thence North 89 degrees 54 minutes 32 seconds West, 12.83 feet to the Northwest corner of said parcel; thence South 1 degrees 27 minutes 53 seconds West, 200.00 feet along the West line of said Parcel to a point on the South line of said Northeast quarter of the Northeast quarter; thence North 89 degrees 54 minutes 32 seconds West, 221.16 feet to the Southwest corner thereof; thence North 0 degrees 53 minutes 36 seconds East, 1318.89 feet along the West line of said Northeast quarter of the Northeast quarter to the Northwest corner thereof; thence South 89 degrees 57 minutes 47 seconds East 950.00 feet along the North line of said Section 11 to the TRUE POINT OF BEGINNING;

EXCEPT the South 200 feet of the West 1045.5 feet of the East 1085.4 feet of the said Northeast quarter of the Northeast quarter.

PARCEL NO. 6:

All that part of the Southwest quarter of the Northeast quarter of Section 11, Township 1 North, Range 4 East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona, described as follows:

BEGINNING at the East quarter corner of said Section 11; thence North 89 degrees 48 minutes 15 seconds West 1293.37 feet to the Southeast corner of said Southwest quarter of the Northeast quarter of said Section 11 and the TRUE POINT OF BEGINNING; thence North 89 degrees 49 minutes 21 seconds West 865.93 feet along the South line of said Southwest quarter of the Northeast quarter to a point; thence North 4 degrees 59 minutes 24 seconds East 1001.82 feet to a point; thence North 24 degrees 37 minutes 00 seconds East 349.75 feet to a point on the North line of said Southwest quarter of the Northeast quarter; thence South 89 degrees 54 minutes 32 seconds East 653.64 feet along said North line of said Southwest quarter of the Northeast quarter to the Northeast corner thereof; thence South 0 degrees 53 minutes 36 seconds West 1317.79 feet along the East line of said Southwest quarter of the Northeast quarter to the TRUE POINT OF BEGINNING.

PARCEL NO. 7:

All that part of the North half of the North half of the Southeast quarter of the Northeast quarter of Section 11, Township 1 North, Range 4 East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona, described as follows:

BEGINNING at the East quarter corner of said Section 11; thence North 89 degrees 48 minutes 15 seconds West 1293.37 feet along the East-West midsection line to the Southwest corner of the Southeast

quarter of the Northeast quarter of said Section 11; thence North 0 degrees 53 minutes 36 seconds East 988.86 feet along the West line of said Southeast quarter of the Northeast quarter to the Southwest corner of said North half of the North half of the Southeast quarter of the Northeast quarter and the TRUE POINT OF BEGINNING; thence continuing North 0 degrees 53 minutes 36 seconds East 328.93 feet to the Northwest corner of said Southeast quarter of the Northeast quarter; thence South 89 degrees 54 minutes 32 seconds East 146.75 feet along the North line of said Southeast quarter of the Northeast quarter to a point; thence South 24 degrees 48 minutes 17 seconds West 362.06 feet to the TRUE POINT OF BEGINNING.

PARCEL NO. 8:

The South 130 feet of the North 163 feet of the East 80 feet of the West 240 feet of the East half of the Northwest quarter of the Northeast quarter of Section 11, Township 1 North, Range 4 East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona.

PARCEL NO. 9:

The East half of the West half of the West half of the North half of the Southeast quarter of Section 11, Township 1 North, Range 4 East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona.

EXCEPT the North 33 feet thereof; and

EXCEPT an area described as follows:

BEGINNING at the center of said Section 11; thence South 89 degrees 49 minutes 21 seconds East 427.26 feet along the North line of said Southeast quarter of said Section 11; thence South 4 degrees 59 minutes 24 second West 33.12 feet to the TRUE POINT OF BEGINNING and on the South line of the North 33 feet of said Southeast quarter; thence South 4 degrees 56 minutes 46 seconds West 715.82 feet to a point; thence North 89 degrees 58 minutes 06 seconds West 45.48 feet to a point on the West line of said West half of the East half of the West half of the West half of the North half of the Southeast quarter of said Section 11 and is the Northeast corner of the North 125 feet of the South 580 feet of the East half of the West half of the West half of the West half of the North half of the Southeast quarter of said Section 11; thence North 0 degrees 27 minutes 14 seconds East 713.44 feet along the West line of said West half of the East half of the West half of the West half of the North half of the Southeast quarter of said Section 11 to a point on the South line of the North 33 feet of said Southeast quarter; thence South 89 degrees 49 minutes 21 seconds East 101.55 feet along said South line to the TRUE POINT OF BEGINNING.

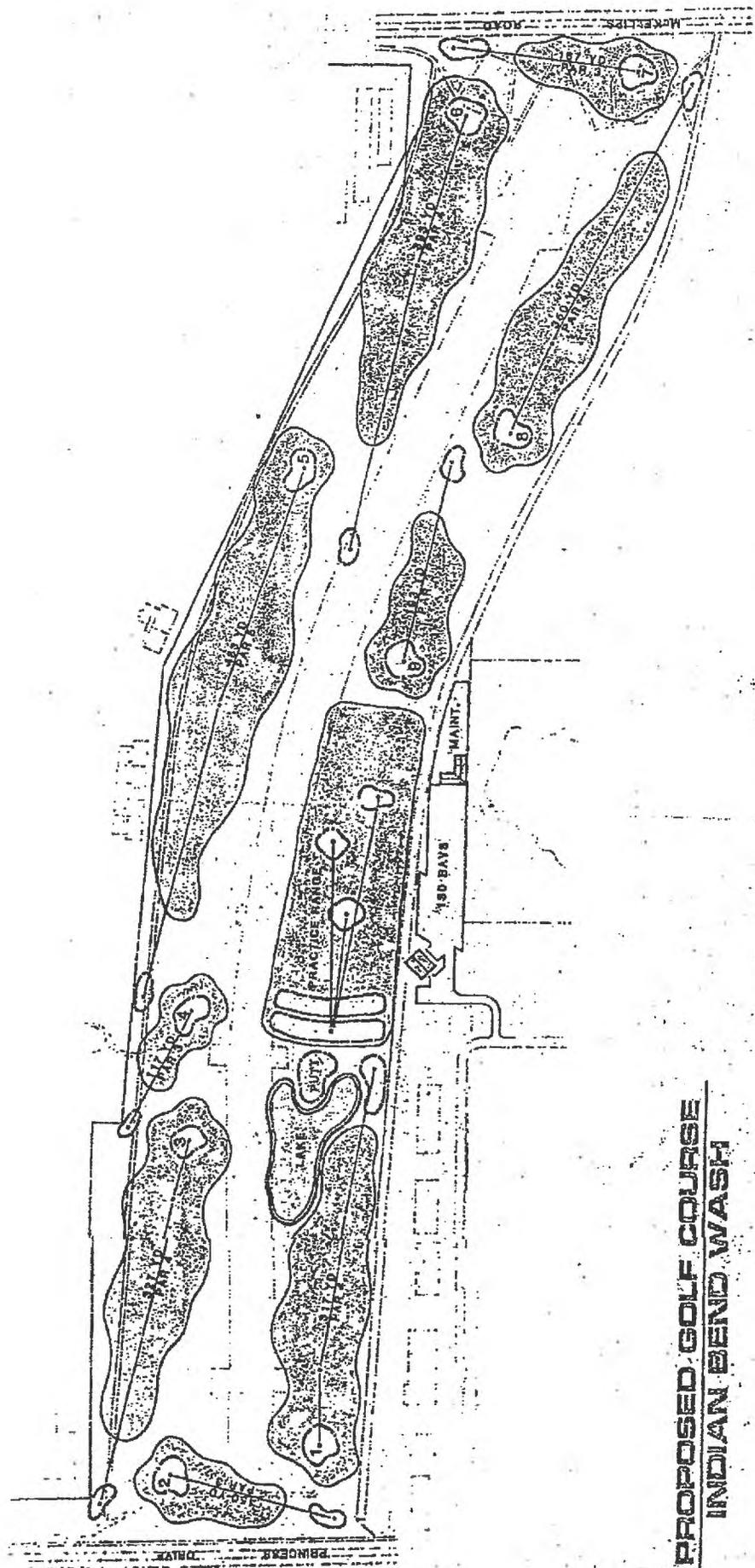
90 077856

PAGE 6

**PARCEL NO. 101**

An Easement Estate created by Contract and Grant of Easement dated December 15, 1975, recorded December 31, 1975 in Docket 11480, Page 780 for flood control works and channel improvements purposes lying within the East 620 feet of the West 1050 feet of the North 33 feet of the Northwest quarter of the Southeast quarter of Section 11, Township 1 North, Range 4 East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona.

90 077856



**PROPOSED GOLF COURSE  
INDIAN BEND WASH**





OFFICIAL RECORDS OF  
MARICOPA COUNTY RECORDER  
HELEN PURCELL  
20110038055 01/13/2011 01:28  
ELECTRONIC RECORDING

When recorded return to:  
Flood Control District of  
Maricopa County

COB415-3-1-1--  
chagolla

AMENDMENT NO. 1  
TO  
INTERGOVERNMENTAL AGREEMENT FOR THE COMMERCIAL  
RECREATIONAL DEVELOPMENT OF INDIAN BEND WASH OUTLET  
IGA FCD-87030A  
C87-85A

C-69-11-017-3-00

This Amendment to IGA FCD-87030, City of Tempe No. C87-85 ("Amendment") is entered this date November 3, 2010, between the City of Tempe, an Arizona municipal corporation ("Tempe") and the Flood Control District of Maricopa County, a municipal corporation and political subdivision of the State of Arizona ("District").

This Agreement is effective the date it is filed with the Maricopa County Recorder.

WHEREAS, Tempe and the District are parties to the Intergovernmental Agreement for the Commercial Recreational Development of Indian Bend Wash Outlet, dated August 26, 1987 ("Agreement"); and

WHEREAS, Tempe and the District desire to amend the Agreement to clarify the District's role in approving subagreements that Tempe enters into as authorized by the Agreement.

WHEREAS, Tempe and the District desire to amend the Agreement to reflect the new distribution of gross revenue derived from all subagreements that Tempe enters into as authorized by the Agreement.

THEREFORE, the parties agree as follows.

1. The foregoing recitals are incorporated herein by this reference.
2. As of the effective date of this Amendment, Section 9 states:

"Tempe shall be responsible for entering into and managing subagreements with private entrepreneurs for use of the subject property for commercial recreational development. However, prior to any subagreement becoming valid, or if an existing subagreement is to be modified in any way, it will first be submitted to the District for review and approval. Tempe and the District will work collaboratively to ensure the appropriate use of the subject property. The District will participate with Tempe in lease negotiations to the

extent the District determines necessary to protect its interests as the fee owner of the land. This Agreement is the controlling document that governs the use of the subject property, notwithstanding any representation to the contrary in a subagreement or lease executed under the authority of this Agreement.”

3. As of the effective date of this Amendment, Section 10 states:

“All gross revenues, including base rents, percentages and other income derived from any subagreements related to the development of the subject lands shall be shared with the District as the fee owner of the land. For the period from January 1, 2009, through December 31, 2013, the District will receive 100% of the gross revenues derived from the subagreement(s). Beginning on January 1, 2014, gross revenues derived from the subagreement(s) will be divided in the ratio of 20% to Tempe and 80% to the District. Tempe shall pay to the District all monies due the District within 60 days of the payment due date of the lessee(s).”

4. As of the effective date of this Amendment, Section 20 states:

“This Agreement and the obligations of the parties as herein stated shall terminate upon the written agreement of both parties. This Agreement may be amended upon the written agreement of both parties. By December 31, 2015, the parties will enter into discussions concerning the amendment or termination of this Agreement.”

5. This Amendment governs where terms conflict with the original Agreement. However, the original Agreement is applicable unless specifically changed by this Amendment. The paragraph numbering in this Amendment is coincidental and is not intended to indicate that these same numbered paragraphs in the Agreement are being replaced in their entirety.

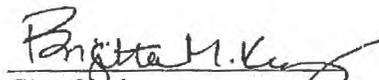
6. The Agreement as modified by this Amendment remains in full force and effect and is hereby ratified by Tempe and the District.

Authorized representatives of the parties have executed this Amendment as follows.

CITY OF TEMPE

  
Mayor

ATTEST:

  
City Clerk

Reviewed and approved as to form and within the powers and authority of the City of Tempe:

Andrew B. Cling  
City Attorney

FLOOD CONTROL DISTRICT OF MARICOPA COUNTY

RECOMMENDED BY:

Edward Kalcik 11/3/2010  
for Timothy S. Phillips, PE, Chief Engineer and General Manager Date

Michael D. Wilson 9/28/10  
Michael D. Wilson, Public Works Real Estate Division Manager Date

APPROVED BY:

Don Stogley NOV 03 2010  
Chairman of the Board of Directors

ATTEST:

Janet McQuinn  
Clerk of the Board

Reviewed and approved as to form and within the powers and authority of the Flood Control District of Maricopa County:

Julie M. Zimmerman 10/1/10  
General Counsel

When Recorded Return to:  
Flood Control District of Maricopa County  
3335 West Durango  
Phoenix, Arizona 85009

C 87-85

INTERGOVERNMENTAL AGREEMENT  
FOR THE COMMERCIAL RECREATIONAL DEVELOPMENT  
OF INDIAN BEND WASH OUTLET  
IGA FCD-87030

This Agreement is entered into by and between the City of Tempe, a municipal corporation of the State of Arizona, hereinafter called TEMPE, and the Flood Control District of Maricopa County, a municipal corporation and political subdivision of the State of Arizona, hereinafter called DISTRICT.

This Agreement shall become effective as of the date it is filed with the Maricopa County Recorder pursuant to Arizona Revised Statutes 11-952, as amended.

DATE FILED WITH THE MARICOPA COUNTY RECORDER August 26, 1987

STATUTORY AUTHORIZATION

1. The DISTRICT is empowered by Arizona Revised Statutes 48-3603 to enter into this Agreement.
2. TEMPE is empowered by Arizona Revised Statutes 11-952 to enter into this Agreement.

BACKGROUND

3. The DISTRICT is the local sponsor of the Indian Bend Wash Outlet Project which was constructed by the U. S. Army Corps of Engineers. As the local sponsor the DISTRICT was responsible for acquiring rights-of-way and operating and maintaining the project after construction.
4. TEMPE entered into an Agreement with the U. S. Army Corps of Engineers regarding the installation and maintenance of certain improvements including bicycling and hiking paths as well as landscaping.
5. On January 9, 1978, an Intergovernmental Recreation Development and Use Agreement between the DISTRICT and TEMPE was filed with the Maricopa County Recorder outlining the recreational facilities and landscape features to be constructed within the Indian Bend Wash Outlet and stating that TEMPE would operate and maintain these recreational facilities and landscape features.
6. It has been proposed that commercial recreational development be constructed within the Indian Bend Wash Outlet within Tempe. Exhibit A shows the property owned by the District which is available for such commercial recreational development.

## PURPOSE OF THE AGREEMENT

7. The purpose of this Agreement is to identify and define the responsibilities of the DISTRICT and TEMPE for the commercial recreational development of the Indian Bend Wash Outlet.

## TERMS OF AGREEMENT

8. TEMPE agrees to be responsible for the development, construction, installation, operation and maintenance of commercial recreational development of the Indian Bend Wash Outlet. All costs and expenses involved in the construction, operation, and maintenance of the commercial recreational development features shall be entirely the responsibility of TEMPE, its agents, contractors or lessees, and the DISTRICT will not contribute any funds for recreational development or maintenance. TEMPE shall be solely responsible for the control, regulation and supervision of the public use of the subject property.

9. TEMPE shall be responsible for entering into and managing subagreements with private entrepreneurs for use of the subject property for commercial recreational development. However, prior to any subagreement becoming valid, it will be submitted to the DISTRICT for review and approval.

10. All gross income derived from any subagreements related to the development of the subject lands shall be shared with the DISTRICT as the fee owner of the land. Gross revenues, including base rents, percentages and other income resulting from these subagreements, will be divided in the ratio of 25% to TEMPE and 75% to the DISTRICT. TEMPE shall pay to the DISTRICT all monies due the DISTRICT within 60 days of the payment due date of the lessee(s).

11. Prior to the start of any new construction, or substantial improvements, alterations, additions or major repairs to existing improvements, TEMPE shall first submit two complete sets of plans and specifications to the DISTRICT for review and approval. The parties acknowledge the necessity of the DISTRICT's review and approval of recreational development to ensure that the flood control capacities are not reduced or diminished in any way by the activities of TEMPE in performance of its recreational functions. The DISTRICT will be responsible for submitting the plans and specifications to the U. S. Army Corps of Engineers for its review and approval.

12. TEMPE agrees to indemnify and save harmless the District, or any of its departments, agencies, officers or employees, against all liability, losses and damages of any nature for or on account of any injuries to or death of persons or damages to or destruction of property arising out of or in any way connected with the performance or nonperformance of this agreement, except such injury or damages which have been occasioned by the negligence of the DISTRICT. The above cost of damages incurred by the DISTRICT or any of its departments, agencies, officers or employees shall include in the event of a court action, court costs, expenses for litigation and reasonable attorney's fees. TEMPE agrees to indemnify and save harmless the DISTRICT from and against all losses, expenses or damages which it may suffer by reason or entering into this

intergovernmental agreement with TEMPE except such injury, loss or damage which has been occasioned by the negligence of the DISTRICT.

13. Any construction, substantial improvements, alterations, additions or major repairs to existing improvements shall be commenced only after TEMPE shall have secured and supplied to the District evidence of a guarantee in the form of performance/payment bonds acceptable to the DISTRICT. This guaranty shall be for the full amount of the proposed construction, substantial improvements alterations, additions or major repairs to existing improvements. The guaranty shall also provide that no liens shall exist on the property after the time period set forth in the following paragraph.

14. If, because of any act or omission (or alleged act or omission) of TEMPE or its lessees, any mechanics', materialmen's or other lien, charge or order for the payment of money shall be filed or recorded against the subject property or any building or improvements thereon or against DISTRICT (whether or not such lien, charge or order is valid or enforceable as such), TEMPE shall, at its own expense, cause the same to be cancelled and discharged of record within a reasonable time after TEMPE receives notice of the filing thereof, or TEMPE may, within said period, furnish to DISTRICT a bond satisfactory to DISTRICT against said lien, charge or order, in which case TEMPE shall have the right in good faith to contest the validity or amount thereof.

15. Title to any approved improvements constructed by TEMPE or constructed by others shall vest and remain with TEMPE, and TEMPE shall be solely responsible for continuous maintenance. TEMPE may assign this responsibility in a subagreement; however, if the parties to the subagreement do not fulfill the maintenance requirements, then TEMPE is responsible for such maintenance.

16. The DISTRICT must ensure that the flood control capabilities are not reduced in any way by the commercial recreational development activities of TEMPE. If TEMPE fails to maintain the features in a manner consistent with the overriding purpose of flood control, as determined by the DISTRICT, then the DISTRICT has the option to alter or remove the recreational improvements. The DISTRICT will give notice to TEMPE of the need for alteration or removal of improvements, unless notice is impossible because of an emergency situation, and will give TEMPE the reasons for any actions taken. TEMPE shall promptly reimburse the DISTRICT for actual costs incurred in said alteration or removal.

17. It is expressly understood and agreed that neither this Agreement, nor any of its terms or conditions shall in any way interfere with the absolute, free and unrestricted right of the DISTRICT to enter the subject lands to inspect or to operate and maintain the flood control structures or appurtenant works thereto, or to repair or reconstruct any of its structures or works, or to raise or lower any floodwaters on the subject property, without liability to TEMPE or third parties.

18. Should temporary maintenance or operations of the DISTRICT's flood control facilities be necessary and require temporary closure of the commercial recreational facilities, as solely determined by the DISTRICT, then TEMPE

shall, upon receiving such notice from the DISTRICT, cause the recreational facilities to be temporarily closed.

19. In the event it is necessary for the commercial recreational development, or any part thereof, to be relocated and/or moved from the site for flood control purposes, as determined by the DISTRICT, such relocation and/or removal shall be performed at no cost to the DISTRICT.

20. This Agreement and the obligations of the parties as herein stated shall continue in perpetuity; however, upon the written agreement of both parties, this Agreement may be amended or terminated.

21. Upon termination of this Agreement, TEMPE agrees to remove the improvements built upon the subject land within a reasonable time after such termination.

22. Any water rights acquired by the DISTRICT in connection with the acquisition of rights-of-way for this project, remain the sole property of the DISTRICT.

23. Pursuant to Arizona Revised Statutes 11-952, as amended, a copy of the documents authorizing each party to enter into this Agreement are attached.

CITY OF TEMPE

APPROVED AND ACCEPTED:

By: Harry E. Mitchell  
Mayor, City of Tempe

ATTEST:

By: Virginia D. Thompson  
City Clerk

The foregoing Intergovernmental Agreement has been reviewed pursuant to A.R.S. 11-952, as amended, by the undersigned attorney who has determined that it is in proper form and within the powers and authority granted to the City of Tempe under the laws of the State of Arizona.

David R. Maske 5-22-87  
City Attorney Date

87 536395

FLOOD CONTROL DISTRICT OF MARICOPA COUNTY

RECOMMENDED BY:

D. E. Sagramoso 7-2-87  
D. E. Sagramoso, P. E. Date  
Chief Engineer and General Manager

APPROVED AND ACCEPTED:

By: Fred Kooyij  
Chairman, Board of Directors

ATTEST:

By: Cherie Brunning JUL 20 1987  
Clerk of the Board Date

This Intergovernmental Agreement has been reviewed pursuant to A.R.S. 11-952, as amended, by the undersigned General Counsel, who has determined that it is in proper form and within the powers and authority granted to the Flood Control District of Maricopa County under the laws of the State of Arizona.

Julie M. Lemmon 7/2/87  
General Counsel Date  
for Gary J. Richmond

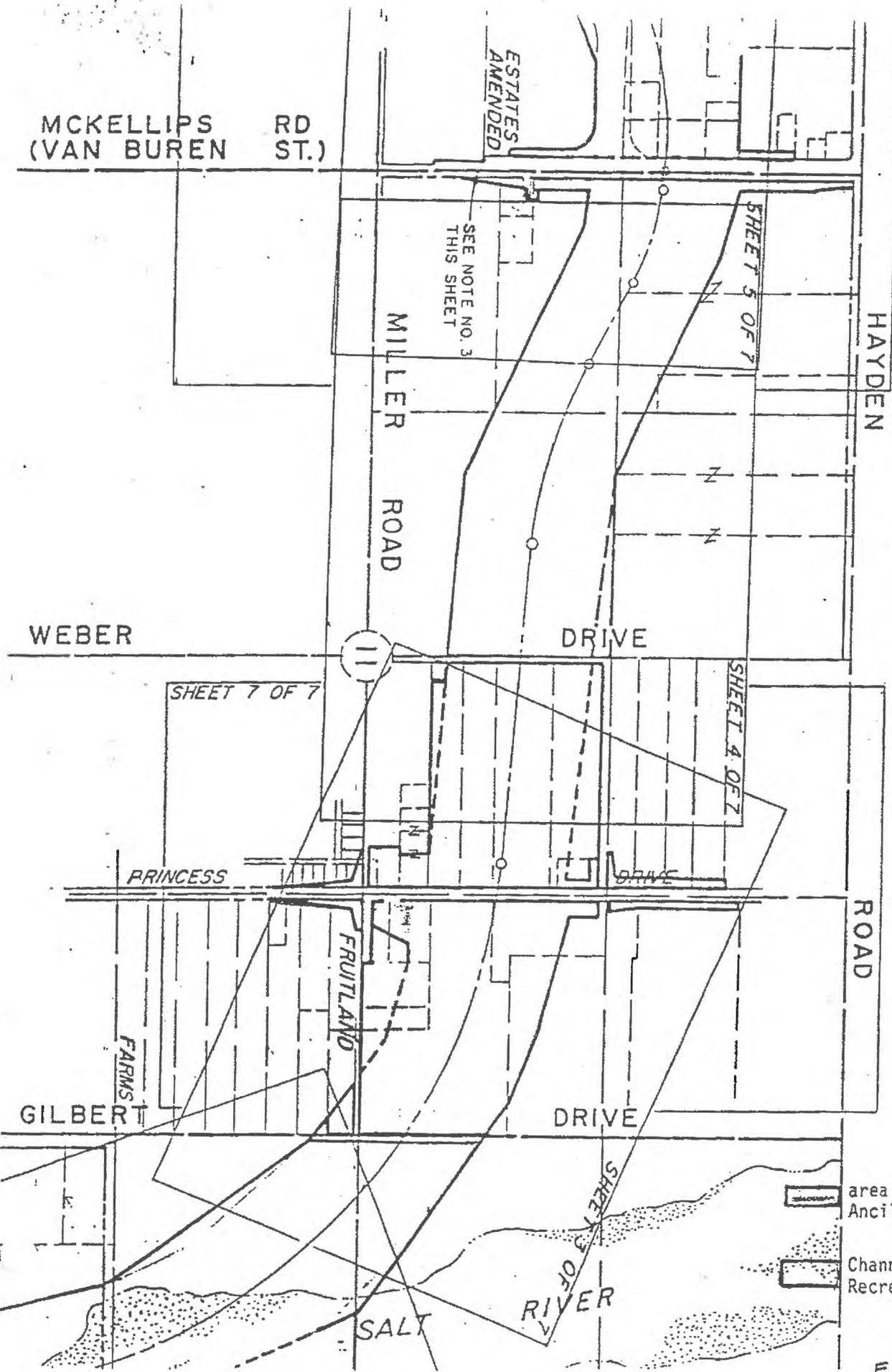
# INDIAN BEND WASH OUTLET CHANNEL



area out of basin  
Ancillary Dev.

Channel area  
Recreational Dev.

Exhibit A



# County of Maricopa

State of Arizona

Office of the Clerk

87 536395

State of Arizona }  
County of Maricopa } SS.

*I, Cherie Pennington, Clerk of the Board of Supervisors*  
*do hereby Certify That* the attached is a true and correct copy of  
of the minutes of the meeting of the Board of Directors of the Flood  
Control District of Maricopa County, Arizona, held July 20, 1987:

INTERGOVERNMENTAL AGREEMENT WITH CITY OF TEMPE APPROVED:

Motion was made by Mr. Pastor and unanimously carried that the Board  
approve and authorize the Chairman to sign IGA FCD087030 with the  
City of Tempe for the Commercial Recreational Development of  
Indian Bend Wash Outlet.

FLOOD CONTROL DISTRICT RECEIVED	
AUG 13 '87	
CH ENG	P & PM
DEP	HYDRO
ADMIN	LMST
FINANCE	FILE
G & O	
ENGR	
REMARKS	

In Witness Whereof, I have hereunto set  
my hand and affixed the Official Seal of the Board  
of Supervisors. Done at Phoenix, the County Seat  
this 12th day of August, 1987  
A.D.

*Cherie Pennington*

Clerk of the Board of Supervisors

Flood Control ✓  
File

## STANDARD TERMS & CONDITIONS

Please note that these Standard Terms & Conditions shall be fully complied with by Offeror. Failure to comply with these requirements may result in rejection of a proposal for non-responsiveness, or cancellation or termination of any awarded Contract.

1. **Applicable Law:** This Contract shall be governed by, and the City and Contractor shall have all remedies afforded each by the Uniform Commercial Code as adopted in the State of Arizona, except as otherwise provided in this Request for Proposal and resultant Contract, and all statutes or ordinances pertaining specifically to the City. This Contract shall be governed by State of Arizona law and suits pertaining to this Contract may only be brought in courts located in Maricopa County, Arizona.
2. **Arizona Climate Action Compliance:** Offeror shall comply with all applicable standards, laws, rules, orders and regulations issued pursuant to A.R.S. §49-101, *et seq.*, including but not limited to, Arizona Executive Orders Nos. 2006-13 and 2005-02, with regard to reducing GHG emissions, increasing energy efficiency, conserving natural resources and developing renewable energy sources.
3. **Availability of Funds for the Next Fiscal Year:** The City's obligation for performance of the Contract is contingent upon the availability of City, state and federal funds that are allocated or appropriated for payment obligations of the Contract. If funds are not allocated by the City or available for the continued use or purchase of services, work and/or materials set forth herein, the City may terminate the Contract. The City will use reasonable efforts to notify Contractor of such non-allocation affecting the obligations of the Contractor and/or City. The City shall not be penalized or adversely affected for exercise of its termination rights. Further, the City shall in no way be obligated or liable for additional payments or other damages as a result of such termination. No legal liability on the part of the City for any payment may arise for performance under this Contract.
4. **Certification:** By signing the "Vendor's Offer", form 201-B (RFP), the Offeror certifies:
  - A. The submission of the vendor's proposal Offer response did not involve collusion or other anti-competitive practices.
  - B. The City is an equal opportunity, affirmative action employer. Offeror hereby covenants that it shall not discriminate unlawfully against any employee or applicant for employment, nor shall it deny the benefits of this Contract, to any person on the basis of race, religion, color, national origin, ancestry, physical or mental disability, age, veteran status, marital status, sex, gender, sexual orientation or gender identification. Offeror agrees and covenants that it will comply in all respects with the applicable provisions of Executive Order 11246, Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Vietnam Era Veterans' Readjustment Assistance Act, the Rehabilitation Act, Arizona Executive Order No. 99-4, and all other applicable state and federal statutes governing equal opportunity.
  - C. Offeror has not given, offered to give, nor intends to give at any time hereafter any economic opportunity, future employment, gift, loan, gratuity, special discount, trip, favor, or service to a public servant in connection with the submitted Offer. Failure to sign the "Vendor's Offer" or signing it with a false statement shall void the submitted proposal and any resulting Contract. In addition, the Offeror may be barred from future proposal and bidding participation with the City and may be subject to such further actions as permitted by law.
  - D. The Offeror agrees to promote and offer to the City only those materials and/or services as stated and allowed by this Request for Proposal and resultant Contract award. Violation of this condition shall be grounds for Contract termination by the City.

- E. The Offeror expressly warrants that it has and will continue to comply in all respects with Arizona law concerning employment practices and working conditions, pursuant to A.R.S. § 23-211, *et seq.*, and all laws, regulations, requirements and duties relating thereto. Offeror further warrants that to the extent permitted by law, it will fully indemnify the City for any and all losses arising from or relating to any violation thereof.
- F. Contractor agrees and covenants that it will comply with any and all applicable governmental restrictions, regulations and rules of duly constituted authorities having jurisdiction insofar as the performance of the work and services pursuant to the Contract, and all applicable safety and employment laws, rules and regulations, including but not limited to, the Fair Labor Standards Act, the Walsh-Healey Act, and the Legal Arizona Workers Act (LAWA), and all amendments thereto, along with all attendant laws, rules and regulations. Contractor acknowledges that a breach of this warranty is a material breach of this Contract and Contractor is subject to penalties for violation(s) of this provision, including termination of this Contract. City retains the right to inspect the documents of any and all contractors, subcontractors and sub-subcontractors performing work and/or services relating to the Contract to ensure compliance with this warranty. Any and all costs associated with City inspection are the sole responsibility of Contractor. Contractor hereby agrees to indemnify, defend and hold City harmless for, from and against all losses and liabilities arising from any and all violations thereof.

5. **Commencement of Work:** Contractor is cautioned not to commence any work or provide any materials or services under the Contract until and unless Contractor receives a purchase order, Notice to Proceed, or is otherwise directed in writing to do so, by the City.
6. **Confidentiality of Records:** The Contractor shall establish and maintain procedures and controls that are acceptable to the City for the purpose of assuring that no information contained in its records or obtained from the City or from others in carrying out its functions under the Contract shall be used by or disclosed by it, its agents, officers, or employees, except as required to efficiently perform duties under the Contract. Persons requesting such information should be referred to the City. Contractor also agrees that any information pertaining to individual persons shall not be divulged other than to employees or officers of Contractor as needed for the performance of duties under the Contract, unless otherwise agreed to in writing by the City.
7. **Conflict of Interest:** This Contract is subject to the cancellation provisions of A.R.S. § 38-511.
8. **Contract Formation:** This Contract shall consist of this Request for Proposal and the vendor's proposal Offer submitted, as may be found responsive and approved by the City. In the event of a conflict in language between the documents, the provisions of the City's Request for Proposal shall govern. The City's Request for Proposal shall govern in all other matters not otherwise specified by the Contract between the parties. All previous contracts between the Offeror and the City are not applicable to this Contract or other resultant contracts. Any contracted vendor documents that conflict with the language and requirements of the City's solicitation are not acceptable and void the Contract.
9. **Contract Modifications:** This Request for Proposal and resultant Contract may only be modified by a written contract modification issued by the City Procurement Office and counter-signed by the Contractor. Contractors are not authorized to modify any portion of this solicitation or resulting Contract without the written approval of the City Procurement Office and issuance of an official modification notice.
10. **Contracts Administration:** Contractor must notify the designated Procurement Officer from the City's Procurement Office for guidance or direction of matters of Contract interpretation or problems regarding the terms, conditions or scope of this Contract. The Contract shall contain the entire agreement between the City and the Contractor and the Contract shall prevail over any and all previous agreements, contracts, proposals, negotiations, purchase orders or master agreements in any form.

11. **Cooperative Use of Contract:** Any Contract resulting from this solicitation shall be for the use of the City of Tempe. In addition, public and nonprofit agencies that have entered into a Cooperative Purchasing Agreement with the City of Tempe's Department of Procurement are eligible to participate in any subsequent Contract. Additionally, this Contract is eligible for use by the Strategic Alliance for Volume Expenditures (SAVE) cooperative. See <http://www.maricopa.gov/Materials/SAVE/save-members.pdf> for a listing of participating agencies. The parties agree that these lists are subject to change. Any such usage by other municipalities and government agencies must be in accord with the ordinance, charter and/or rules and regulations of the respective political entity.

Any orders placed to, or services required from, the successful Contractor(s) will be requested by each participating agency. Payment for purchases made under this agreement will be the sole responsibility of each participating agency. The City shall not be responsible for any disputes arising out of transactions made by others. Contractor shall be responsible for correctly administering this Contract in accordance with all terms, conditions, requirements, and approved pricing to any eligible procurement unit.

12. **Dispute Resolution:** This Contract is subject to arbitration to the extent required by law. If arbitration is not required by law, the City and the Contractor agree to negotiate with each other in good faith to resolve any disputes arising out of the Contract. In the event of any legal action or proceeding arising out of this Contract, the prevailing party shall be entitled to recover its reasonable attorneys' fees and costs incurred with said fees and costs to be included in any judgment rendered.
13. **Energy Efficient Products:** The City may consider energy conservation factors including costs in the evaluation of equipment and product purchases for the purpose of obtaining energy efficient products. In addition, vendor proposal Offers may specify items that have been given an energy efficient classification by the federal government for consideration by the City.
14. **Billing:** All invoices submitted by Contractor for the City's review and approval shall be in itemized form to identify the specific item(s) being billed. Items must be identified by the name, model number, and/or serial number most applicable. Any purchase/delivery order issued by the City shall refer to the Contract number resulting from this Request for Proposal. Separate invoices are required on individual contracts or purchase orders. Only invoices with items resulting from this Request for Proposal will be accepted for review and approval by the City.
15. **Estimated Quantities:** This Request for Proposal references quantities as a general indication of the City's needs. The City anticipates considerable activity resulting from Contracts that will be awarded as a result of this Request for Proposal; however, the quantities shown are estimates only and the City reserves the right to increase or decrease any quantities actually acquired, in its sole discretion. No commitment of any kind is made concerning quantities and Offeror hereby acknowledges and accepts same.
16. **Events of Default and Termination:**
- A. The occurrence of any or more of the following events shall constitute a material breach of and default under the Contract. The City reserves the right to terminate the whole or any part of the Contract due to Contractor's failure to fully comply with any term or condition herein.
- i) Any failure by Contractor to pay funds or furnish materials, services and/or goods that fail to conform to any requirement of this Contract or provide personnel that do not meet Contract requirements;
- ii) Any failure by Contractor to observe, perform or undertake any provision, covenant or condition of this Contract to be observed or performed by Contractor herein, including but not limited to failing to submit any report required herein;

- iii) Any failure to make progress in the performance required pursuant to the Contract and/or gives the City reason to believe that Contractor cannot or will not perform to the requirements of the Contract; or,
- iv) Any failure of Contractor to commence construction, work or services within the time specified herein, and to diligently undertake Contractor's work to completion.

B. Upon and during the continuance of an event of default, the City, at its option and in addition to any other remedies available by law or in equity, without further notice or demand of any kind to Contractor, may do the following:

- i) Terminate the Contract;
- ii) Pursue and/or reserve any and all rights for claims to damages for breach or default of the Contract; and/or,
- iii) Recover any and all monies due from Contractor, including but not limited to, the detriment proximately caused by Contractor's failure to perform its obligations under the Contract, or which in the ordinary course would likely result there from, including, any and all costs and expenses incurred by the City in: (a) maintaining, repairing, altering and/or preserving the premises (if any) of the Project; (b) costs incurred in selecting and retaining substitute Contractor for the purchase of services, materials and/or work from another source; and/or (c) attorneys' fees and costs in pursuing any remedies under the Contract and/or arising there from.

C. The exercise of any one of the City's remedies as set forth herein shall not preclude subsequent or concurrent exercise of further or additional remedies. In addition, the City shall be entitled to terminate this Contract at any time, in its discretion. The City may terminate this Contract for default, non-performance, breach or convenience, or pursuant to A.R.S. § 38-511, or abandon any portion of the project for which services have not been fully and/or properly performed by the Contractor.

D. Termination shall be commenced by delivery of written notice to Contractor by the City personally or by certified mail, return receipt requested. Upon notice of termination, Contractor shall immediately stop all work, services and/or shipment of goods hereunder and cause its suppliers and/or subcontractors to cease work pursuant to the Contract. Contractor shall not be paid for work or services performed or costs incurred after receipt of notice of termination, nor for any costs incurred that Contractor could reasonably have avoided.

E. The City, in its sole discretion, may terminate or reduce the scope of this Contract if available funding is reduced for any reason.

17. **Termination for Convenience:** The City at its sole discretion may terminate this Contract for convenience with thirty (30) days advance notice to Contractor. Contractor shall be reimbursed for all appropriate costs as provided for within the Contract up to the termination date specified.

18. **Force Majeure:**

- A. Except for payment of sums due, neither party shall be liable to the other nor deemed in default under the Contract only in the event that and to the extent that such party's performance of the Contract is prevented by reason of force majeure. Force majeure means an occurrence that is beyond the control of the party affected and occurs without its fault or negligence. Without limiting the foregoing, force majeure includes acts of God, acts of the public enemy, war, riots, mobilization, labor disputes, civil disorders, fire, floods, lockouts, injunctions, failures or refusal to act by government authority, and other similar occurrences beyond the control of the party declaring force majeure which such party is unable to prevent by exercising reasonable diligence.
- B. Force majeure shall not include the following occurrences:
- i) Late delivery of equipment or materials caused by congestion at a manufacturer's plant or elsewhere, an oversold condition of the market, inefficiencies, or similar occurrences.
  - ii) Late performance by a subcontractor.
- C. If either party is delayed at any time in the progress of the work by force majeure, then the delayed party shall notify the other party in writing of such delay within forty-eight (48) hours of the commencement thereof and shall specify the causes of such delay in the notice. Such notice shall be hand delivered or sent via certified mail and shall make a specific reference to this clause, thereby invoking its provisions. The delayed party shall cause such delay to cease as soon as practicable and shall notify the other party in writing by hand delivery or certified mail when it has done so. The time of completion shall be extended by Contract modification for a period of time equal to the time that the results or effects of such delay prevent the delayed party from performing in accordance with the Contract.

19. **Gratuities:** The City may elect to terminate any resultant Contract, if it is found that gratuities in any form were offered or given by the Contractor or agent thereof, to any employee of the City or member of a City evaluation committee with a view toward securing an order, securing favorable treatment with respect to awarding, amending or making of any determinations with respect to performing such order. In event the Contract is terminated by the City pursuant to this provision, the City shall be entitled, in addition to any other rights and remedies, to recover or withhold from Contractor the amount of gratuity.

20. **Indemnification:** To the fullest extent permitted by law, the Contractor shall defend, indemnify and hold harmless the City, Maricopa County, the Flood Control District of Maricopa County, and their agents, officer, officials, and employees from and against all claims, damages, losses and expenses (including but not limited to attorney's fees, court costs, and the costs of appellate proceedings), arising out of, or alleged to have resulted from the acts, errors, mistakes, omissions, work, services, or professional services of the Contractor, its agents, employees, or any other person (not the City) for whose acts, errors, mistakes, omissions, work, services, or professional services the Contractor may be legally liable in the performance of this Contract. Contractor's duty to hold harmless and indemnify the City, Maricopa County, the Flood Control District of Maricopa County, and their agents, officers, officials and employees shall arise in connection with any claim for damage, loss or expenses that is attributable to bodily injury, sickness disease, death, or injury to, impairment, or destruction of any person or property, including loss of use resulting from, caused by any acts, errors, mistakes, omissions, work, services, or professional services in the performance of this Contract by Contractor or any employee of the Contractor or any other person (not the City) for whose acts, errors, mistakes, omissions, work, or services the Contractor may be legally liable. The amount and type of insurance coverage requirement set forth herein will in no way be construed as limiting the scope of indemnity in this paragraph. This provision shall survive the term of this Contract.

21. **Interpretation of Parole Evidence:** This Contract is intended as a final expression of the agreement between the parties and as a complete and exclusive statement of the Contract, unless the signing of a subsequent Contract is specifically called for in this Request for Proposal. No course of prior dealings between the parties and no usage of the trade shall be relevant to supplement or explain any term used in the Contract. Acceptance or acquiescence in a course of performance rendered under this Contract shall not be relevant to determine the meaning of the Contract, even though the accepting or acquiescing party has knowledge of the nature of the performance and opportunity to object.

Contractor shall respond within five (5) calendar days after notice by the City of any defects and/or maintenance requests to immediately remedy the condition of the job site. Should the Contractor fail to respond promptly as set forth herein, the City shall correct the job site at the expense of the Contractor, and recover all attendant costs.

22. **Key Personnel:** Contractor shall provide adequate experienced personnel, capable of and devoted to the successful accomplishment of work to be performed under this Contract during the Contract term and any renewal periods. The Contractor must agree to assign specific individuals to the key positions.
- A. The Contractor agrees that, once assigned to work under this Contract, key personnel shall not be removed or replaced without prior written notice to the City.
- B. If key personnel are not available for work under this Contract for a continuous period exceeding thirty (30) calendar days, or are expected to devote substantially less effort to the work than initially anticipated, the Contractor shall immediately notify the City, and shall replace each person with personnel of substantially equal ability and qualifications upon prior City approval.
23. **Licenses and Permits:** Contractor shall maintain in current status all federal, state and local licenses and permits required for the operation of the business conducted by the Contractor, at its sole expense.
24. **No Assignment:** No right or interest in this Contract shall be assigned by Contractor and no delegation of any duty of Contractor shall be made without prior written permission of the City.
25. **Notices:** All notices, requests, demands, consents, approvals, and other communications which may or are required to be served or given hereunder (for the purposes of this provision collectively called "Notices"), shall be in writing and shall be hand delivered or sent by registered or certified United States mail, return receipt requested, postage prepaid, addressed to the party or parties to receive such notice as follows:

City of Tempe Procurement Office  
Attn: Procurement Officer  
20 E. 6<sup>th</sup> Street (Second Floor)  
PO Box 5002  
Tempe, Arizona 85280

[Contractor's Name]  
[Attn of Offeror Named in Contract]  
[Address]

Or to such other address as either party may from time to time furnish in writing to the other by notice hereunder.

26. **No Waiver:** No breach of default hereunder shall be deemed to have been waived by the City, except by written instrument to that effect signed by an authorized agent of the City. No waiver of any such breach or default shall operate as a waiver of any other succeeding or preceding breach or default or as a waiver of that breach or default after demand by the City for strict performance of this Contract. Acceptance of partial or delinquent payments or performance shall not constitute the waiver of any right of the City. Acceptance by the City for any materials shall not bind the City to accept remaining materials, future shipments or deprive the City of the right to return materials already accepted. Acceptance by the City of delinquent or late delivery shall not constitute a waiver of a later claim for damages and/or bind the City for future or subsequent deliveries.
27. **Overcharges by Antitrust Violations:** The City maintains that, in actual practice, overcharges resulting from antitrust violations are borne by the City. Therefore, to the extent permitted by law, the Contractor hereby assigns to the City any and all claims for such overcharges as the goods and/or services used fulfill the Contract.
28. **Performance Standards:** Equipment shall operate in accordance with the performance criteria specified in the Request for Proposal, including the manufacturer's published specifications applicable to the machine involved. Each machine is expected to be available for productive use, as provided in the procurement documents. Penalties and/or bonuses applicable to machine and system performance, if any, shall be calculated as specified in the Request for Proposal.
29. **Preparation of Specifications by Persons Other Than City Personnel:** No person preparing specifications for this Request for Proposal shall receive any direct or indirect benefit from the use of these specifications.
30. **Procurement of Recycled Materials:** If the price of recycled material that conforms to specifications is within five percent (5%) of the lower priced material that is not recycled and the recycled Offeror is otherwise the lowest responsive and responsible Offeror, the proposal containing recycled material shall be considered more advantageous; provided the item(s) to be obtained contains at least the minimum amount of recycled content material as defined in the City's solicitation and sufficient funds have been budgeted for the purchase.
31. **Provisions By Law:** Each and every provision of law and any clause required by law to be in this Contract will be read and enforced as though it were included herein, and if through mistake or otherwise any such provision is not inserted, or is not correctly inserted, then upon the application of either party the Contract will forthwith be physically amended to make such insertion or correction.
32. **Public Record:** After award of Contract, proposal responses shall be considered public record and open for public inspection except to the extent the withholding of information is permitted or required by law. If an Offeror believes a specific section of its proposal response is confidential, the Offeror shall mark the page(s) confidential and isolate the pages marked confidential in a specific and clearly labeled section of its proposal response. The Offeror shall include a written statement as to the basis for considering the marked pages confidential and the City Procurement Office will review the material and make a determination, pursuant to A.R.S. §§ 39-121, *et seq.*, and 41-1330, *et seq.* A general statement of confidentiality (boiler plate statement) that is not appropriately referenced to a specific section of the RFP will not be sufficient to warrant protection by the City. The confidential portion of the submission must be clearly noted with accompanying justification for treating the section confidential. Failure of the vendor to appropriately designate confidential information in this manner will relieve the City of any obligation to protect this information as confidential.
33. **Records:** Pursuant to provisions of Title 35, Chapter 1, Article 6 Arizona Revised Statutes §§ 35-214 and 36-215, Contractor shall retain, and shall contractually require each subcontractor to retain, all books, accounts, reports, files and other records relating to the acquisition and performance of the Contract for a period of five (5) years after the completion of the Contract. All such documents shall be subject to inspection and audit at reasonable times. Upon request, a legible copy of any or all such documents shall be produced at the offices of the City Attorney or City Procurement Office.

34. **Relationship of Parties:** It is clearly understood that each party to this Contract will act in its individual capacity and not as an agent, employee, partner, joint venture, or associate of the other party. The Contractor is an independent contractor and shall be solely responsible for any unemployment or disability insurance payments, or any social security, income tax or other withholdings, deductions or payments that may be required by federal, state or local law with respect to any compensation paid to the Offeror. An employee or agent of one party shall not be an employee or agent of the other party for any purpose whatsoever.
35. **Rights and Remedies:** No provisions of this Request for Proposal or in the proposal shall be construed, expressly or by implication, as a waiver by the City of any existing or future right and/or remedy available by law in the event of any claim of default or breach of Contract. The failure of the City to insist upon strict performance of any term or condition of the Contract or to exercise or delay the exercise of any right or remedy provided in the Contract, or by law, shall not release the Contractor from any responsibilities or obligations imposed by the Contract or by law, and shall not be deemed a waiver of any right of the City to insist upon the strict performance of the Contract.
36. **Safety Standards:** All items supplied on this Contract must comply with the current applicable Occupational Safety and Health Standards of the State of Arizona Industrial Commission, the National Electric Code and the National Fire Protection Association Standards.
37. **Serial Numbers:** Proposals shall include equipment on which the original manufacturer's serial number has not been altered in any way. The City reserves the right to reject any and all equipment.
38. **Severability:** The provisions of this Contract are severable to the extent that any provision or application held to be invalid shall not affect any other provision or application of the Contract which may remain in effect without the invalid provision or application.
39. **Specially Designated Nationals and Blocked Persons List:** Contractor represents and warrants to the City that neither Contractor nor any affiliate or representative of Contractor:
- A. Is listed on the Specially Designated Nationals and Blocked Persons List maintained by the Office of Foreign Asset Control, Department of the Treasury (OFAC) pursuant to Executive Order no. 13224, 66 Fed. Reg. 49079 (“Order”);
  - B. Is listed on any other list of terrorists or terrorist organizations maintained pursuant to the Order, the rules and regulations of OFAC or any other applicable requirements contained in any enabling legislation or other related Order(s);
  - C. Is engaged in activities prohibited in the Order; or,
  - D. Has been convicted, pleaded *nolo contendere*, indicted, arraigned or custodially detained on charges involving money laundering or predicate crimes to money laundering.
40. **Time of the Essence:** Time is and shall be of the essence in this Contract. If the delivery date(s) specified herein cannot be met, Contractor shall notify the City using an acknowledgment of receipt of order and intent to perform without delay, for instruction. The City reserves the right to terminate this Contract and to hold Contractor liable for any cost of cover, excess cost(s) or damage(s) incurred as a result of delay.

41. **Unauthorized Firearms & Explosives:** No person conducting business on City property is to carry a firearm or explosive of any type. All Offerors, Contractors and subcontractors shall honor this requirement at all times and failure to honor this requirement shall result in Contract termination and additional penalties. This requirement also applies to any and all persons, including those who maintain a concealed weapon's permit. In addition to Contract termination, anyone carrying a firearm or explosive device will be subject to further legal action.
42. **Warranties:** Contractor expressly warrants that all materials and/or goods delivered under the Contract shall conform to the specifications of this Contract, and be merchantable and free from defects in material and workmanship, and of the quality, size and dimensions specified herein. This express warranty shall not be waived by way of acceptance or payment by the City, or otherwise. Contractor expressly warrants the following:
- A. All workmanship shall be finest and first-class;
  - B. All materials and goods utilized shall be new and of the highest suitable grade for its purpose; and,
  - C. All services will be performed in a good and workmanlike manner. Contractor's warranties shall survive inspection, acceptance and/or payment by the City, and shall run to the City, its successors, agents and assigns.

The Contractor agrees to make good by replacement and/or repair, at its sole expense and at no cost to the City, any defects in materials or workmanship which may appear during the period ending on a date twelve (12) months after acceptance by the City, unless otherwise specified herein. Should Contractor fail to perform said replacement and/or repair to City's satisfaction within a reasonable period of time, City may correct or replace said defective or nonconforming materials and recover the costs thereof from Contractor. This warranty shall not operate to reduce the statute of limitations period for breach of contract actions or otherwise, or reduce or eliminate any legal or equitable remedies.

43. **Work for Hire and Ownership of Deliverables:** Contractor hereby agrees and covenants that all the results and proceeds of Contractor's work and/or services for the Project specified herein, for Contractor and all of its agents, employees, officers and subcontractors, shall be owned by the City, including the copyright thereto, as work for hire. In the event, for any reason such results and proceeds are not deemed work for hire, Contractor agrees and covenants that it shall be deemed to have assigned to the City all of its right, title and interests in such results, proceeds and content to the City, without limitation. Contractor agrees to indemnify and hold the City harmless from and against all claims, liability, losses, damages and expenses, including without limitation, legal fees and costs, arising from or due to any actual or claimed trademark, patent or copyright infringement and any litigation based thereon, with respect to any work, services and/or materials contemplated in this Contract. Contractor agrees to pay to defend any and all such actions brought against the City. Contractor's obligations hereunder shall survive acceptance by the City of all covenants herein as well as the term of the Contract itself.
44. **Non-exclusive Contract:** Any Contract resulting from this Request for Proposal shall be awarded with the understanding and agreement that it is non-exclusive and entered into for the sole convenience of the City. The City reserves the right to obtain like goods or services from another source to secure cost savings or if timely delivery may be met by the Contractor
45. **Ordering Process:** Upon award of a Contract by the City Procurement Office, the City may procure the specific material and/or service awarded by the issuance of a purchase order to the appropriate Contractor. Each purchase order must cite the correct Contract number. Such purchase order is required for the City to order and the Contractor to deliver the material and/or service.

46. **Shipping Terms:** Prices shall be F.O.B. Destination to the delivery location(s) designated herein. Contractor shall retain title and control of all goods until they are delivered and the Contract of coverage has been completed. All risk of transportation and all related charges shall be the responsibility of the Contractor. The City will notify the Contractor promptly of any damaged materials and shall assist the Contractor in arranging for inspection. Shipments under reservation are prohibited. No tender of a bill of lading shall operate as a tender of the materials.
47. **Delegated Awards:** In the event this Contract is administratively awarded via delegated authority as provided for in Section 26A-5 of the Procurement Ordinance, the Contractor acknowledges that a final Contract with the City of Tempe requires City Council approval and possibly the signature of the Mayor. Should this Contract be rejected by the City Council, Contractor agrees that it is immediately void and unenforceable against any party. The awarded firm(s) will be compensated only for any and all costs incurred up to the date of notification of such termination.

## Special Terms and Conditions

Proposals taking exception to Special Terms & Conditions stated within this Request for Proposal may cause the Proposal to be considered nonresponsive and rejected.

1. **City Procurement Document:** This Request for Proposal is issued by the City. No alteration of any portion of this Request for Proposal by an Offeror is permitted and any attempt to do so shall result in vendor's proposal Offer being considered nonresponsive, and rejected. No alteration of any portion of a resultant Contract is permitted without the written approval of the City Procurement Office and any attempt to do so shall be considered a breach of the Contract. Any such action is subject to the legal and contractual remedies available to the City inclusive of, but not limited to, Contract termination and/or suspension of the Contractor.
2. **Offer Acceptance Period:** To allow for an adequate evaluation, the City requires the vendor's proposal Offer in response to this Request for Proposal to be valid and irrevocable for ninety (90) days after the proposal due time and date.
3. **Contract Type:** Term with justifiable price adjustments allowed, indefinite quantity.
4. **Term of Contract:** The term of the Contract shall commence on the date of award and shall continue for a period of five (5) years thereafter, unless terminated, canceled or extended as otherwise provided herein.
5. **Contract Renewal:** The City reserves the right to unilaterally extend the period of any resultant Contract for ninety (90) days beyond the stated term. In addition, the City at its option may renew for supplemental terms of up to a maximum of fifteen (15) additional years. The period for any single renewal increment shall be determined by the City Procurement Office. Such increment shall not be for more than a period of five (5) years each, unless the City is eligible to obtain a significant cost and/or supply advantage by a longer Contract renewal period.
6. **Insurance:**
  - A. **Insurance Required:** Prior to commencing services under this Contract, Contractor shall procure and maintain for the duration of the Contract insurance against claims for injuries (including death) to persons and damages to property, which may arise from or in connection with the performance of the work hereunder by the Contractor, its agents, representatives, employees, subcontractors, or sub-subcontractors. For Offerors with self-insurance, proof of self-insurance with minimum limits expressed below must be submitted on proper forms for evaluation prior to award of Contract.

A Contract Award Notice or Purchase Order will not be issued to a Vendor until receipt of all required insurance documents by the City Procurement Office with such documents meeting all requirements herein. In addition, before any Contract renewal, all required insurance must be in force and on file with the City Procurement Office. Contractor must submit required insurance within ten (10) calendar days after request by the City Procurement Office or the award may be rescinded and another Vendor selected for award.

- B. **Minimum Limits of Coverage:** Without limiting any obligations or liabilities, the Contractor, at its sole expense, shall purchase and maintain the minimum insurance specified below with companies duly licensed or otherwise approved by the State of Arizona, Department of Insurance and with forms satisfactory to the City. Each insurer shall have a current A.M. Best Company, Inc., rating of not less than A-VII. Use of alternative insurers requires prior approval from the City.

Minimum Limits of Insurance: Contractor shall maintain limits no less than:

a. Commercial General Liability

Commercial general liability insurance limit of not less than \$2,000,000 for each occurrence, with a \$4,000,000 general aggregate limit. The general aggregate limit shall apply separately to the services under this Contract or the general aggregate shall be twice the required per claim limit. The policy shall be primary and include coverage for bodily injury, property damage, personal injury, products, completed operations, and blanket contractual coverage, including but not limited to the liability assumed under the indemnification provisions of this Contract which coverage will be at least as broad as insurance service officer policy form CG2010 11/85 edition or any replacement thereof.

In the event the general liability policy is written on a "claims made" basis, coverage shall extend for two (2) years past completion and acceptance of the services as evidenced by annual certificates of insurance.

Such policy shall contain a "severability of interests" provision.

b. Worker's Compensation

The Contractor shall carry worker's compensation insurance to cover obligations imposed by federal and state statutes having jurisdiction of Contractor employees engaged in the performance of services; and employer's liability insurance of not less than \$100,000 for each accident, \$100,000 disease for each employee and \$500,000 disease policy limit.

In case services are subcontracted, the Contractor will require the subcontractor to provide worker's compensation and employer's liability to at least the same extent as provided by Contractor.

c. Automobile Liability

Commercial business automobile liability insurance with a combined single life or bodily injury and property damages of not less than \$1,000,000 per accident regarding any owned, hired, and non-owned vehicles assigned to or used in performance of the Contractor services. Coverage will be at least as broad as coverage Code 1 "any auto". Insurance Service Office policy form CA0001 Y87 or any replacements thereof. Such coverage shall include coverage for loading and unloading hazards.

d. Property Insurance

Property insurance against all risks of loss to any tenant improvements or betterments and personal property for full replacement cost with no coinsurance penalty provision.

e. Crime Insurance

Contractor shall provide additional crime insurance that includes third party fidelity coverage with minimums of \$25,000 combined single limit per occurrence. The policy must not contain a condition requiring a conviction or arrest in order to file a claim.

f. Liquor Liability

Contractor shall provide liquor liability insurance of \$2,000,000 per occurrence.

g. Fidelity Bond

A blanket fidelity bond covering all officers and employees, in an amount not less than \$7,500, with any deductible not to exceed \$1,000, including City as an additional obligee or loss payee as its interest may appear.

- C. Additional Insured. The insurance coverage, except for workers compensation and professional liability coverage, required by this Contract, shall name the City, Maricopa County and the Flood Control District of Maricopa County, and their agents, representatives, directors, officials, employees, and officers, as additional insureds, and shall specify that insurance afforded the Contractor shall be primary insurance. This provision and the naming of the City, Maricopa County and the Flood Control District of Maricopa County as additional insureds shall in no way be construed as giving rise to responsibility or liability of the City, Maricopa County or the Flood Control District of Maricopa County for applicable deductible amounts under such policy(s).
- D. Coverage Term. All insurance required herein shall be maintained in full force and effect until all work or service required to be performed under the terms of the Contract is satisfactorily completed and formally accepted by the City. Failure to do so shall constitute a material breach of this Contract.
- E. Primary Coverage. Contractor's insurance shall be primary insurance to the City, and any insurance or self-insurance maintained by the City shall not contribute to it.
- F. Claim Reporting. Any failure to comply with the claim reporting provisions of the policies or any breach of a policy warranty shall not affect coverage afforded under the policy to protect the City.
- G. Waiver. The policies, including workers' compensation, shall contain a waiver of transfer rights of recovery (subrogation) against the City, its agents, representatives, directors, officers, and employees for any claims arising out of the work or services of the Contractor.
- H. Deductible/Retention. The policies may provide coverage which contain deductibles or self-insured retentions. Such deductible and/or self-insured retentions shall be disclosed by the contractor and shall not be applicable with respect to the coverage provided to the City under such policies. Contractor shall be solely responsible for deductible and/or self-insurance retention and the City, at its option, may require Contractor to secure the payment of such deductible or self-insured retentions by a surety bond or an irrevocable and unconditional letter of credit.
- I. Certificates of Insurance. Prior to commencing work or services under this Contract, Contractor shall furnish the City with certificates of insurance, or formal endorsements as required by the Contract, issued by the Contractor's insurer(s), as evidence that policies providing the required coverages, conditions, and limits required by this Contract are in full force and effect. Such certificates shall identify this Contract number or name and shall provide for not less than thirty (30) days advance notice of cancellation, termination, or material alteration. Such certificates shall be sent directly to: Contract Administrator, City of Tempe, P. O. Box 5002, Tempe, AZ 85280.
- J. Copies of Policies. The City reserves the right to request and to receive, within ten (10) working days, certified copies of any or all of the above policies and/or endorsements. The City shall not be obligated, however, to review same or to advise Contractor of any deficiencies in such policies and endorsements, and such receipt shall not relieve Contractor from, or be deemed a waiver of, the City's right to insist on strict fulfillment of Contractor's obligations under this Contract.

7. **Performance Security:** The Contractor shall be required to furnish non-revocable security binding the Contractor to provide faithful performance of the Contract in the amount of ten thousand dollars (\$10,000) payable to the City of Tempe. Performance security shall be in the form of an irrevocable letter of credit, performance bond, certified check or cashier's check pursuant to A.R.S. Title 34, Chapter 2, Article 2. This security must be in the possession of the City of Tempe Procurement Office within the time specified or within ten (10) days after notice of award if no period is specified. If the Contractor fails to execute the security document as required, the Contractor shall be found in default and the Contract terminated by the City.
8. **Conduct and Dress Code:** The Contractor's employees shall maintain proper conduct at all times while on City property. Employees shall respect other personnel at the work site. Abusive language, ethnic and racial slurs, sexual comments and jokes, shouting, and gestures toward other personnel will not be tolerated. Any occurrence will result in immediate action with possible dismissal of that employee.

Employees will be neatly dressed with badges or uniforms that identify them as employees of the Contractor.

9. **Safety, Health and Sanitation:** The Contractor shall provide and maintain in a neat, sanitary condition such facility accommodations for the use by their employees as may be necessary to comply with the requirements and regulations of the Arizona State Department of Health or as specified by the Maricopa County Health Department, Sanitary Code.

The Contractor shall be fully responsible for the safety of their employees, the public and property in connection with the performance of the work covered by this Contract. The Contractor shall provide all safeguards, safety devices and protective equipment and be responsible for taking any needed actions to protect the life and health of their employees and the public during work activity. The Contractor shall also take any necessary actions as directed by the City of Tempe Project Manager to reasonably protect the life and health of employees on this job and others coming into contact with the job site.

Precaution shall be exercised by the Contractor at all times for the protection of persons (including employees) and property. The Contractor shall comply with the provisions of all applicable laws, pertaining to such protection including all Federal and State Occupational Safety and Health Acts, and Standards and Regulations promulgated there under.

10. **Protection and Restoration of Property and Landscape:** The Contractor shall be responsible for all damage or injury to public or private property of any character, during the prosecution of the work resulting from any act, omission, neglect, or misconduct in its manner or method of executing the work or at any time due to defective work or materials. The Contractor's responsibility will not be released until the project has been completed and accepted.

If damage is caused by the Contractor, the Contractor shall restore at no cost to the City of Tempe, such property to a condition similar or equal to that existing before such damage or injury was done, by repairing, rebuilding or otherwise restoring as may be directed, or they shall make good such damage or injury in an acceptable manner. Further payments will be withheld until the City of Tempe has inspected the corrected damage or injury and has signed-off the completion and acceptance.

Contractor shall not dump spoils or waste material on private or private public property without first obtaining from the owner written permission for such dumping.

11. **Responsibility for Work:** The Contractor shall properly guard, protect, and take every reasonable precaution necessary against damage or injury to all finished or partially finished work due to weathering action by the elements or from any other cause, until the entire portion of their respective Contract obligation is completed and accepted by the City of Tempe. The Contractor shall rebuild, repair, restore, and make good all injuries or damages to any portion of the work before final acceptance at no cost to the City of Tempe. Partial payment for any completed portion of work shall not release the Contractor from such responsibility.

12. **Employees of the Contractor:** No one except authorized employees of the Contractor is allowed on the premises of the City of Tempe. Contractor employees are NOT to be accompanied in their work area by acquaintances, family members, assistants, or any other person unless said person is an authorized employee of the Contractor. Failure of Contractor to meet this requirement will result in permanent removal of employee performing work at the City of Tempe sites. The Contractor must, however, furnish the City a current employee register on the issuance of this Contract and updated every six (6) months thereafter. This register must contain the Name, Social Security Number, Phone Number, and Address.
13. **Sub-Contractor(s):** The City reserves the right to approve all sub-contractors. Contractor is responsible for all actions of sub-contractors. Contractor shall name sub-contractors as additionally insured, in addition to the City of Tempe on all required insurance documents.
14. **Black Out Provision:** No Offeror, including anyone directly or indirectly on behalf of such Offeror, shall attempt to influence any part of the process. From the time the RFP is issued until the City Council makes the Contract Award (the "Black-Out Period"), Offerors directly or indirectly through others, are restricted from attempting to influence in any manner the decision making process through, including, but not limited to, the use of paid media; contacting or lobbying the City Council or City Manager or any other City employee; contacting reporters; contacting RFP evaluators; submitting letters, e-mail messages or other similar forms of communications to the editor of newspapers and other media for publication or ghostwriting or otherwise requesting others to submit such letters, e-mail messages or other similar forms of communication; answering questions regarding the RFP or their Proposals during the "Black-Out Period" or in any other way which could be construed to influence any part of the decision making process about this RFP.

Violation of this provision will cause the Proposal of the Offeror found in violation to be rejected.

**RESERVED**

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**EXHIBIT E**

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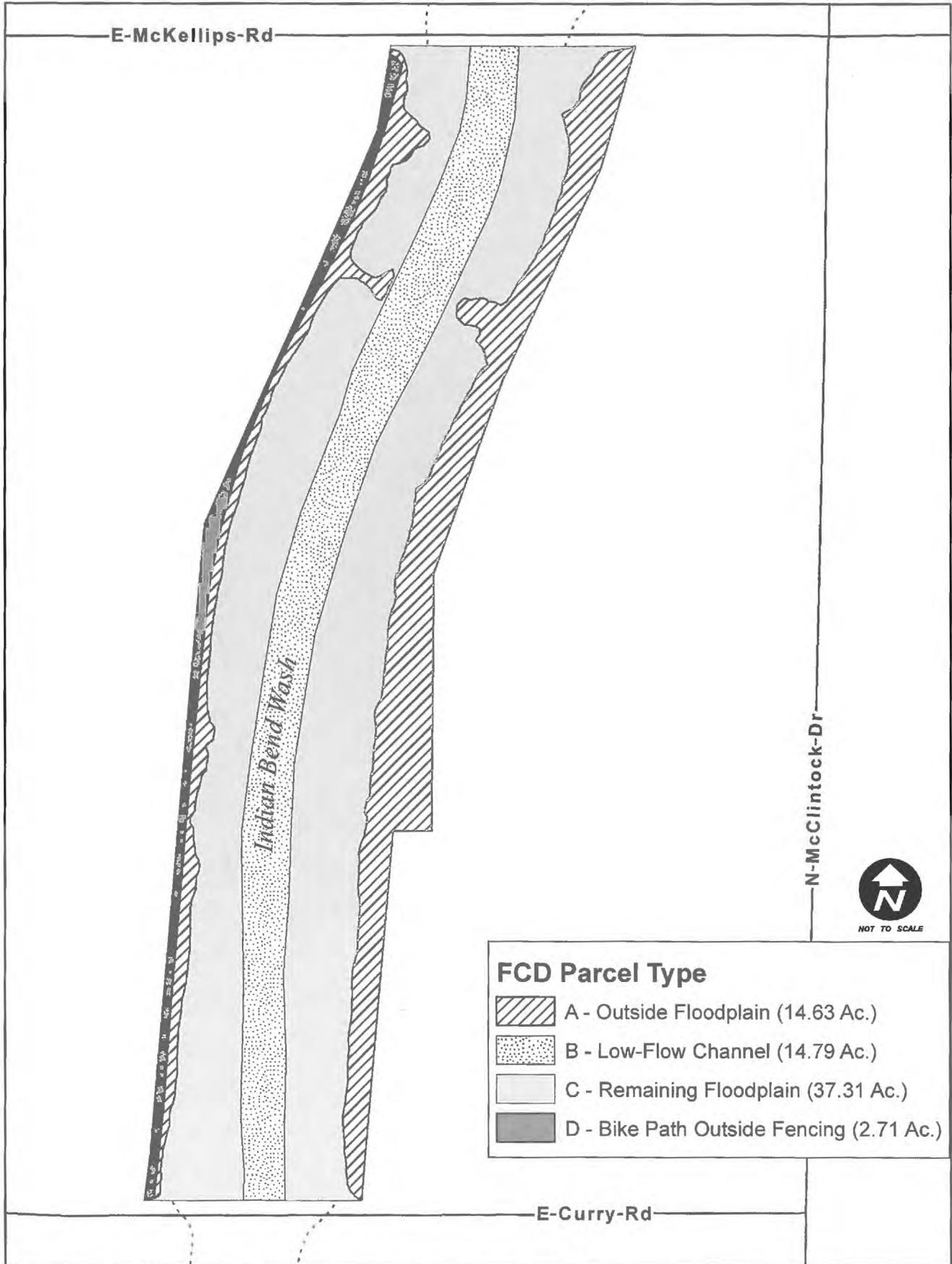


EXHIBIT F