

**ADDENDUM**

Document 00910

**ADDENDUM NO. 1**

Date of Addendum: 10/8/2024

PROJECT NAME: Hispanic History Research Center

PROJECT NO: E-000244

**BID DATE: October 31, 2024 (There is no change to the Bid Date.)**

FROM: City of Houston, General Services Department  
900 Bagby, 2nd Floor, City Hall Annex  
Houston, Texas 77002  
Attn: Will Rios, Senior Project Manager

TO: Prospective Bidders

This Addendum forms a part of the Bid Documents and will be incorporated into the Contract, as applicable. Insofar as the original Project Manual and Drawings are inconsistent, this Addendum governs.

*This Addendum uses the change page method: remove and replace or add pages, or Drawing sheets, as directed in the change instructions below. Change bars ( | ) are provided in the outside margins of pages from the Project Manual to indicate where changes have been made; no change bars are provided in added Sections. Reissued Drawing Sheets show the Addendum number below the title block and changes in the Drawing are noted by a revision mark and enclosed in a revision cloud.*

**Addendum No. 1**

**BIDDING REQUIREMENTS**

**Request for Proposals: 7 – Sample Contract.** Add the attached contract to this section.

END OF ADDENDUM NO. 1

DocuSigned by:  
  
**(TRC: \_\_\_\_\_ DATED: 10/8/2024**  
Richard Vella  
Assistant Director  
Real Estate, Design & Construction Division  
General Services Department

Outline Agreement No: \_\_\_\_\_

Ordinance No: \_\_\_\_\_

**CONSTRUCTION MANAGER-AT-RISK AGREEMENT  
FOR THE**

\_\_\_\_\_  
**WBS No.:** \_\_\_\_\_

Version 4-30-24

**1. PARTIES**

**THIS CONSTRUCTION MANAGER-AT-RISK AGREEMENT** ("Agreement") is made on the Countersignature Date between the **CITY OF HOUSTON, TEXAS** ("City"), a home-rule municipal corporation, and \_\_\_\_\_ ("Construction Manager"), a **CORPORATION** authorized to do business in the State of Texas, (also referred to as "Party" individually or "Parties" collectively).

**1.1. Address**

1.1.1. The initial addresses of the Parties, which one Party may change by giving written notice of its changed address to the other Party, are as follows:

**City**

**Construction Manager**

Director, General Services Department  
City of Houston  
P.O. Box 1562  
Houston, Texas 77251

The Parties agree as follows:

**1.2. Table Of Contents**

1.2.1 This Agreement consists of the following sections:

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**1.3. Parts Incorporated**

1.1.2. The above-described sections and exhibits are incorporated into this Agreement.

**1.4. Controlling Parts**

- 1.1.3. If a conflict between the sections and exhibits arises, the sections control over the exhibits.

**{THE REST OF THIS PAGE INTENTIONALLY LEFT BLANK}**

**1.5. Signatures**

1.1.4. The Parties have executed this Agreement in multiple copies, each of which is an original. Each person signing this Agreement represents and warrants that he or she is duly authorized and has legal capacity to execute and deliver this Agreement. Each Party represents and warrants to the other that the execution and delivery of this Agreement and the performance of such Party's obligations hereunder have been duly authorized, and that the Agreement is a valid and legal agreement binding on such Party and enforceable in accordance with its terms. The Parties hereby agree that each Party may sign and deliver this Agreement electronically or by electronic means and that an electronic transmittal of a signature, including but not limited to, a scanned signature page, will be as good, binding, and effective as an original signature.

Construction Manager

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

Name: \_\_\_\_\_

Title: \_\_\_\_\_

**ATTEST/SEAL**

**CITY OF HOUSTON, TEXAS**

Signed by

\_\_\_\_\_  
City Secretary

\_\_\_\_\_  
Mayor

APPROVED BY:

**COUNTERSIGNED BY:**

\_\_\_\_\_  
Director, General Services  
Department

\_\_\_\_\_  
City Controller

**DATE COUNTERSIGNED:**

**APPROVED AS TO FORM:**

\_\_\_\_\_

\_\_\_\_\_  
Sr. Assistant City Attorney  
LD# - \_\_\_\_\_

## 2. DEFINITIONS

As used in this Agreement, the following terms have the meanings set out below. Terms not defined in this Article shall have the meaning given to them in the attached Document 00700-General Conditions (Exhibit A).

- 2.1. "Additional Preconstruction Phase Services" means those services described in section 3.4.
- 2.2. "Agreement or Contract" means this contract between the Parties, including all exhibits, any written amendments authorized by City Council and Construction Manager, GMP(s), Modifications, Drawings, Specifications, and all documents listed in the Agreement or Modifications as being incorporated into the Agreement.
- 2.3. "Basic Preconstruction Phase Services" means those services described in Section 3.3.
- 2.4. "City" is defined in the preamble of this Agreement and includes its successors and assigns.
- 2.5. "City Engineer" with respect to Sections 4.1.8 and 4.3 thru 4.5 of the General Conditions, is Obioma Nwakanma, P.E. (or his successor). City Engineer, with respect to all other terms of the General Conditions, is \_\_\_\_\_ (or his successor).
- 2.6. "Construction Manager" is defined in the preamble of this Agreement and includes its successors and assigns.
- 2.7. "Construction Manager's" Contingency means the dollar amount set out in the Guaranteed Maximum Price Proposal that includes (but is not limited to) costs that Construction Manager incurs as a result of: (1) its Subcontractors' failure to perform or insolvency; (2) fines or penalties imposed by any governmental body for its negligent acts; (3) it or its Subcontractors' failure to coordinate their work with that of the City or its contractors after agreeing to a schedule; and (4) it or its Subcontractors' acts of negligence for costs related to defective, rejected, or nonconforming Work, materials, or equipment. The Construction Manager's Contingency shall not exceed 3% of the estimated Cost of the Work at the time of acceptance of the Guaranteed Maximum Price.
- 2.8. "Construction Phase" means the phase of the Project during which the Construction Manager implements and executes the construction work required by the Contract.
- 2.9. "Construction Phase Fee" means the fee for Construction Manager's profit and general overhead, calculated as \_\_\_\_\_% of estimated Cost of the Work determined by the City at the time of acceptance of the Guaranteed Maximum Price.
- 2.10. "Cost of the Work" means reasonable costs that the Construction Manager necessarily incurs to perform the Work in strict compliance with the Contract, as described in Section 4.3.2.
- 2.11. "Day" means a calendar day.
- 2.12. "Design Consultant" means any licensed professionals or firms engaged by City as an independent consultant(s) for the Project.
- 2.13. "Effective Date" means the date the City Controller countersigns the Signature Page (Section 1.5) of this Agreement.

- 2.14. "General Conditions" Work means Construction Manager's management and administrative personnel directly engaged in the performance of the work, insurance, bonds, equipment, utilities, temporary facilities, permit and inspections fees, testing fees pursuant to the terms and conditions of City's Document 00700-General Conditions (Exhibit A) and the Contract and incidental work, including field labor and materials.
- 2.15. "Parties" means Construction Manager and City. "Party," in singular form, refers to Construction Manager or City, as appropriate.
- 2.16. "Phase" means either the Project's Preconstruction Phase or the Project's Construction Phase, as those terms are defined in this Article.
- 2.17. "Preconstruction Phase" means the phase of the Project during which the Construction Manager performs the services described in Section 3.3.
- 2.18. "Project" is described in the title of this Agreement.
- 2.19. "Project Team" means the City, Construction Manager, Design Consultant(s), and separate contractors employed by the City, and other consultants employed for the purpose of programming, design, and construction of the Project. The composition of the Project Team may vary at different phases of the Project. The City will designate the Project Team and may modify it from time to time.

### **3. DUTIES OF CONSTRUCTION MANAGER**

#### **3.1. Generally**

- 3.1.1. Construction Manager shall perform the Work, as defined in Document 00700-General Conditions (Exhibit A)
- 3.1.2. The City is entering into this Agreement in reliance on Construction Manager's special abilities in construction management and in performing its obligations under this Agreement. Construction Manager accepts the relationship of trust and confidence established between it and the City by this Agreement. Construction Manager shall use its best efforts, skill, judgment, and abilities to perform the services hereunder and to further the interests of City in accordance with City's requirements and procedures. Construction Manager represents that it has no obligations or impediments of any kind that will limit or prevent performance of the services required under this Agreement.
- 3.1.3. Construction Manager shall use best efforts to coordinate with other contractors on or around the Project site.
- 3.1.4. No governmental authorization, approval, order, license, permit, franchise or consent, and no registration, declaration or filing with any governmental authority is required on the part of Construction Manager in connection with the execution, delivery and performance of the Agreement, except those that have already been obtained or which Construction Manager anticipates will be timely obtained in the ordinary course of performance of the Agreement.

- 3.1.5. Construction Manager has no actual knowledge of any strikes, lockouts or other labor disputes pending, or threatened or scheduled to occur, with respect to any of the factories, offices or other facilities of any of Construction Manager's suppliers, sub-vendors, or proposed subcontractors.
- 3.1.6. Construction Manager shall perform Preconstruction Phase services and Construction Phase services for the Project if authorized by the City Engineer.

**3.2. Construction Manager's Personnel And Subcontractors**

- 3.2.1. Construction Manager, its employees, and its subcontractors are duly registered and/or licensed under the laws, rules and regulations of any authority having jurisdiction.
- 3.2.2. Construction Manager's personnel to be employed in the Project are identified in Exhibit B to the extent known at the time of signing this Agreement. Construction Manager shall not change the personnel identified in Exhibit B except with the City Engineer's prior written consent, which shall not be unreasonably withheld. If any of Construction Manager's key personnel is not identified in Exhibit B, Construction Manager shall identify in writing such persons to the City Engineer. If City Engineer does not approve of an individual, Construction Manager shall propose an alternate individual reasonably acceptable to City Engineer.
- 3.2.3. Construction Manager shall not award subcontracts or other agreements based on cost plus a fee without the prior consent of City Engineer.
- 3.2.4. Construction Manager shall require its subcontractors who have not competitively bid to disclose to City their markups (both overhead and profit), estimates, and costs calculated in their proposal or incurred or expected in sub-subcontracts and the Work performed, including all Change Order Work.

**3.3. Basic Preconstruction Phase Services**

Construction Manager shall perform and complete the following Basic Preconstruction Phase Services:

- 3.3.1. *Budget and Cost Consultation*
  - 3.3.1.1. Provide, throughout the duration of the Preconstruction Phase, updates of ongoing cost and budget impacts as well as cost consultation services.
  - 3.3.1.2. Prepare and be responsible for all construction cost estimates.
  - 3.3.1.3. Advise the other members of the Project Team immediately if at any time the Construction Manager has knowledge or belief that the previously established cost or schedule goals will not be met and make recommendations to the Project Team for corrective action.
  - 3.3.1.4.** Provide cost estimate at the completion of each of the following design submittal milestones: (1) schematic design, (2) design development,



(3) 50% construction documents, and (4) 95% construction documents. Review shall be completed in a period of two weeks of the date such submittals are provided to construction manager. The estimate shall include quantity take-offs assembly and installation costs to include all materials, labor, and physical plant. In addition, the estimate shall include the costs breakdowns for optional or recommended changes to the scope set out in the drawings or specifications for review and consideration by the design consultant and city engineer.

3.3.2. *Review of Design and Construction Drawings and Specifications*

3.3.2.1. Review all drawings and specifications for constructability and coordination of documents at the completion of each of the following design submittal milestones: (1) Schematic Design, (2) Design Development, (3) 50% Construction Documents, and (4) 95% Construction Documents. Review shall be completed in a period of two weeks of the date such submittals are provided to Construction Manager.

3.3.2.2. Advise Project Team of inconsistencies, defects, or omissions in the drawings and specifications, and recommend alternative solutions. Submit a written constructability report for City Engineer's approval.

3.3.2.3. Submit a report recommending reasonable adjustments in the scope of the Project, including but not limited to: construction feasibility; quality; availability of materials and labor; cost factors, including costs of alternative materials or designs, costs of operation and maintenance, preliminary budgets, and possible cost savings; and any other matters necessary to accomplish the Project in accordance with the Master Project Schedule (Exhibit E) and Project construction budget established by City Engineer.

3.3.3. *Existing Site Conditions*

3.3.3.1. City has given the Construction Manager unrestricted access to the existing improvements and conditions on the Project site and has given the Construction Manager the opportunity to visually investigate the existing conditions. Construction Manager will perform a thorough visual, non-destructive, and concise review of the site to become familiar with the existing conditions of the facility building systems and components. Construction Manager may recommend destructive demolition or building utility interruptions to accurately determine the scope of the work as Additional Preconstruction Phase Services. Construction Manager shall perform the review prior to submitting any Guaranteed Maximum Price Proposal. Construction Manager's submission of a Guaranteed Maximum Price Proposal shall be a representation that it has completed a review of existing site conditions and considered them in establishing the Guaranteed Maximum Price ("GMP"). Construction Manager shall not be entitled to a claim for an adjustment in time or price under the Document 00700-General Conditions (Exhibit A) for conditions that it discovered or ought to have

reasonably discovered using best practices during its visual and non-destructive review, but any costs incurred shall be a legitimate use of the Construction Manager's Contingency.

3.3.4. *Construction Planning and Bidding*

- 3.3.4.1. Schedule, conduct, and record the minutes of pre-bid conferences with interested bidders, subcontractors, material suppliers, and equipment suppliers, as required.
- 3.3.4.2. Coordinate and develop with Design Consultant the bid package and work scope description that represents the entirety of the Project.
- 3.3.4.3. In accordance with Texas Government Code Section 2269.255(a), as amended from time to time, publicly advertise and solicit either competitive bids or competitive sealed proposals from potential Subcontractors for the performance of all major elements of the Work. Construction Manager may seek to perform portions of the Work itself if Construction Manager submits its bid or proposal for those portions of the Work in the same manner as all other subcontractors and if City Engineer determines, in his sole discretion, that Construction Manager's bid or proposal provides the best value for City. City Engineer's determination in such matters is final. If Construction Manager intends to submit a bid or proposal for such Work, it shall notify City Engineer in writing prior to soliciting such bids or proposals. Construction Manager shall receive and open all Subcontractor bids or proposals. Construction Manager and City Engineer shall review all Subcontractors' bids or proposals in a manner that does not disclose the contents of the bid or proposal during the selection process to individuals other than those employed by the Construction Manager, City, or Design Consultant. All bids and proposals shall be made available to the public after the award of the subcontract or not later than the seventh day after the date of final selection of bids or proposals, whichever is later. If Construction Manager reviews, evaluates, and recommends to City a bid or proposal from a Subcontractor, but City requires a bid or proposal from another Subcontractor to be accepted, then, pursuant to the terms of the Contract, City shall compensate Construction Manager by a change in price, time, or Guaranteed Maximum Price for any additional cost and risk that Construction Manager incurs because of City's requirement that another subcontractor's bid or proposal be accepted.
- 3.3.4.4. Before submitting Guaranteed Maximum Price proposal, submit a summary of subcontractor bids and any amounts added to subcontractor bids by Construction Manager in a format acceptable to the City Engineer. In addition, provide a detailed breakdown of anticipated General Condition costs.

3.3.5. *Guaranteed Maximum Price Proposal*

3.3.5.1. When the Cost of the Work has been bid and costs agreed upon, Construction Manager shall submit a Guaranteed Maximum Price Proposal (“Proposal”) to the City Engineer in the form attached to this Agreement as Exhibit C. (There may be one or more Guaranteed Maximum Price Proposals for a Project as specified by City Engineer). Based on Project requirements and the development of the Project design, City Engineer, at his sole option and discretion, may reasonably specify a different format than that contained in Exhibit C. The Proposal shall include the following:

- 3.3.5.1.1. a Schedule of Values showing a breakdown of the Guaranteed Maximum Price of the Project, including the estimated Cost of the Work, Construction Manager’s Contingency, and the Construction Phase Fee;
- 3.3.5.1.2. a list of drawings and specifications, including all addenda, used in preparation of the Proposal;
- 3.3.5.1.3. a list of Cash Allowances;
- 3.3.5.1.4. a list of the clarifications and assumptions made by Construction Manager in the Proposal;
- 3.3.5.1.5. a list of the Alternates used in calculating the Guaranteed Maximum Price;
- 3.3.5.1.6. the proposed Contract Time, including dates for Notice to Proceed, Date of Commencement of the Work, Date of Substantial Completion (which may be expressed in terms of amount of time after a Notice to Proceed is issued), Date of Final Completion, and any other milestone dates upon which the Proposal is based;
- 3.3.5.1.7. Construction Manager’s Contingency;
- 3.3.5.1.8. Construction Phase Fee;
- 3.3.5.1.9. Performance, payment and maintenance bonds;
- 3.3.5.1.10. Insurance certificates and endorsements;
- 3.3.5.1.11. MWBE Plan and other related documents as requested by the City Engineer;
- 3.3.5.1.12. Drug Policy compliance documents;
- 3.3.5.1.13. Pay or Play compliance documents; and
- 3.3.5.1.14. any other items required by City Engineer.

- 3.3.5.2. Construction Manager shall not include contingency amounts in other portions of the proposed Guaranteed Maximum Price, and the other portions of the proposed Guaranteed Maximum Price shall be based on the cost of actual bids, proposals, and subcontracts for the Work where they exist, or if they do not exist, then on the Construction Manager's best good faith estimate of what the costs for those portions of the Work will be.
- 3.3.5.3. Construction Manager is not bound to a Guaranteed Maximum Price unless the City allocates sufficient funds, and the City Engineer accepts the Proposal. Construction Manager shall not withdraw the Proposal for 60 days. If City Engineer accepts a Proposal for any phase of the Project, the Proposal shall be incorporated into this Agreement As if it were executed at the time this Agreement was executed, subject to the limit of appropriation in Section 4.4.
- 3.3.5.4. City Engineer, at his sole discretion, may reject the Proposal (with no liability to City except for accrued but unpaid invoices, or attempt to renegotiate the Proposal with Construction Manager (with the right to cease negotiations at any time and reject the Proposal). If the City Engineer ultimately rejects all Proposals for the Projects listed in Section 2.18, this Agreement shall terminate upon five days' advance written notice from the City Engineer to Construction Manager. City shall have no liability to any of Construction Manager's subcontractors in the event of such termination. Construction Manager shall include a provision in each subcontract that is legally sufficient to eliminate any legal or equitable liability the City may have for such termination as to the subcontractors. If the City terminates the Contract in its entirety without proceeding with any portion of the Construction Phase services, then the City will not owe Construction Manager anything under this Contract for construction.
- 3.3.5.5. Construction Manager shall not be entitled to an increase in the Guaranteed Maximum Price for Work that is not detailed in the Contract but is reasonably inferable, in the City Engineer's sole discretion, from the Contract. If an item or system is either shown or specified, Construction Manager shall provide, at no extra cost to the City, all labor, material and equipment required for the proper installation of such item or system and needed to make a complete operating installation, whether or not detailed or specified, omitting only such parts as are specifically excepted by the City. Any costs incurred by the Construction Manager under this section shall be legitimate use of the Construction Manager's Contingency.

#### **3.4. Additional Preconstruction Phase Services**

- 3.4.1. Additional Preconstruction Phase Services shall be performed by the Construction Manager, if authorized by the City Engineer, in addition to Construction Manager's services required under this Agreement and shall be paid for by the City as provided for in Section 4.2.2. Additional Preconstruction Phase Services shall only be provided when necessary and related to the purposes of this Agreement, when

authorized in writing by the City Engineer, and when sufficient funding has been allocated for such services.

### **3.5. Construction Phase Services**

Construction Manager shall perform the following Construction Phase Services:

#### **3.5.1. *Project Control***

- 3.5.1.1. Supervise and pay for the Work in strict accordance with the Contract. Construction Manager shall timely award and enter into, as a general contractor, all subcontracts necessary and appropriate to provide all labor and materials for the Work in accordance with the requirements of Texas Government Code Section 2269.255 and 2269.256. Construction Manager shall self-perform only General Conditions Work and other Work that the City awards to Construction Manager in accordance with the requirements of Texas Government Code Sections 2269.251 et seq. and this Agreement. City reserves the right to perform work related to the Project and to award separate contracts for work related to the Project.
- 3.5.1.2. Review drawings and specifications, including any geotechnical data/reports that are available, and notify the Design Consultant and City Engineer of any defects or omissions in the drawings and specifications it discovers with respect to the existing conditions. Upon discovering a defect or omission in the drawings or specifications or other Contract, Construction Manager shall submit a written request within ten days from discovery for an explanation or decision to the Design Consultant and the City Engineer. Construction Manager shall cooperate with the City Engineer and Design Consultant to resolve the discovered defects or omissions so as not to unnecessarily impede the progress of the Work. Should the defect be determined as Work that is reasonably inferable from the Contract or should have been reasonably discovered during the Preconstruction Phase, Construction Manager shall proceed with the Work and the Construction Manager shall be responsible for all resulting costs, including the cost of redoing or remedying the Work and resulting time delays; such costs shall be a legitimate use of the Construction Manager's Contingency. Any claims for concealed or unknown conditions must comply with the requirements of Section 4.3.5 of Document 00700-General Conditions (Exhibit A).
- 3.5.1.3. Monitor the Work of the subcontractors and coordinate with the Project Team to complete the Work for a cost not to exceed the Guaranteed Maximum Price and attain Substantial Completion by the date(s) required by the Guaranteed Maximum Price.
- 3.5.1.4. Attend City's Project progress meetings (separate from the meetings described in Section 3.4.1.5 below) scheduled by City Engineer (which will occur no less often than biweekly), and fully advise the Project Team, to the City Engineer's satisfaction, at such meetings as to

Project status; which shall include construction schedule updates, proposal log, Change Order log, Submittal Log, Safety, Risks, Action/Outstanding Items with Responsible party and due date, daily log summary and daily logs. Receipt of daily logs shall not relieve Construction Manager of liability responsibility or serve as notice. Record and distribute the minutes of each meeting within seven days of the meeting in a format acceptable to the City Engineer.

- 3.5.1.5. Schedule, direct, and attend regular meetings with other members of the Project Team during the construction of the Project to discuss jointly such matters as procedures, progress, problems, and scheduling. Before each meeting, prepare and distribute to the other Project Team members a written agenda for the meeting and a memorandum setting forth the list of critical activities that require immediate action and the dates by when the activities must be completed. Record and distribute the minutes of each meeting within seven days of the meeting.
- 3.5.1.6. Maintain a competent, full-time staff at the Project site to coordinate and provide general direction over the Work and progress of the subcontractors on the Project. Project must be supervised by Construction Manager whenever work is being performed or when project site is open.
- 3.5.1.7. Establish on-site organization of personnel and clearly defined lines of authority to effectuate the overall plans of the Project Team.
- 3.5.1.8. Establish and implement procedures for coordination among the Project Team, Subcontractors, separate contractors, Design Consultants, and other consultants with respect to all aspects of the construction of the Project.
- 3.5.1.9. Expedite and coordinate delivery and installation of City-procured material and equipment, if any.

3.5.2. *Scheduling*

- 3.5.2.1. Perform Project scheduling in compliance with the Document 00700-General Conditions (Exhibit A), or otherwise provide regular monitoring, updating, and reissuing of Project schedules as construction progresses, including, without limitation, Master Project Schedules (Exhibit E), detailed construction schedules, submittal schedules, inspection schedules, and occupancy schedules. Identify potential and actual variances between scheduled and probable completion dates. Review the schedules for Work not started or incomplete and recommend to the City Engineer adjustments in the schedules to conform with the probable completion dates. Provide summary reports to the City Engineer of each schedule update and document all changes in construction schedules. Incorporate activities of subcontractors and other parties affecting the progress of the Work into scheduling, including lead time of critical path materials. Include

City's occupancy requirements and occupancy priorities in scheduling. Evaluate Subcontractor's personnel and equipment, and availability of supplies and materials, with respect to each subcontractor's ability to meet schedules. Recommend action to City Engineer when any subcontract requirements are not met or appear unlikely to be met.

3.5.3. *Cost Control*

- 3.5.3.1. Maintain cost accounting records in good form and in accordance with generally accepted accounting practices on all Project expenditures. Allow the City unrestricted access to such records and preserve them for a period of three years after the City makes final payment to Construction Manager for the Project.
- 3.5.3.2. Provide to City Engineer the subcontractors' schedule of values, subcontractors' sworn statements and waivers of lien, subcontract or purchase order, contract and disbursement summaries, change order listings and change orders, and budget cost summary reports as reasonably required by City Engineer.
- 3.5.3.3. Promptly identify all significant variances between estimated costs and actual costs, and promptly report such variances to the City Engineer along with recommendations for action monthly.

3.5.4. *Documents, Shop Drawings, and Submissions*

- 3.5.4.1. Request interpretations from the Design Consultant, with the City Engineer's consent, regarding the design intent of the Contract in order to perform Construction Manager's obligations under this Agreement.
- 3.5.4.2. In collaboration with the other members of the Project Team, establish and implement procedures for expediting the processing of Design Consultants' approval of shop drawings and other submissions. Receive and review all shop drawings and other submissions for conformance with the Contract. Coordinate shop drawings and other submissions with the Contract and other related documents prior to transmitting them to other members of the Project Team.
- 3.5.4.3. Keep a daily log of Project construction activities available to the other members of the Project Team in accordance with the Document 00700-General Conditions (Exhibit A).
- 3.5.4.4. Maintain at the Project site and make available to City Engineer a current set of record drawings, the Contract, updated records of subcontracts, drawings, examples, purchases, materials, equipment, maintenance and operating manuals and instructions, and other construction related documents, including all changes and revisions, a directory of personnel, Project correspondence, inspection procedures (as prepared by others), testing laboratory procedures (as prepared by others), contract changes, time extensions, progress payment data, final acceptance procedures, and instructions from City.

3.5.4.5. Provide City Engineer, at his request, with complete and unaltered copies of all subcontracts, including any amendments.

3.5.5. *Construction Manager’s Contingency*

3.5.5.1. Construction Manager may not use the Construction Manager’s Contingency without the prior written consent of the City Engineer. Construction Manager may not charge a Construction Phase Fee on costs attributable to the Construction Manager’s Contingency.

3.5.6. *Prevailing Wage Rates*

3.5.6.1. The prevailing Wage Rates set out in Exhibit D are applicable to this Contract.

**3.6. Liquidated Damages**

3.6.1. Failure to achieve Substantial Completion of the Project by the date set forth in the agreed upon Guaranteed Maximum Price Proposal will cause damages to City and actual damages from such harm are difficult to estimate accurately. Therefore, Construction Manager and Surety are liable for and shall pay to City the amount of \$1,200 per day as liquidated damages. Construction Manager and Surety are liable for and shall pay to City, as liquidated damages and not as a penalty, the amounts set forth above, on a cumulative basis, for each and every day of delay beyond the date of Substantial Completion established in the approved Guaranteed Maximum Price. The amount of liquidated damages fixed in this Section is a reasonable forecast of just compensation for harm to City resulting from Construction Manager’s failure to achieve Substantial Completion of the Project by the date set forth in this Section. These liquidated damages shall be City’s sole remedy for damages from delay by Construction Manager in achieving Substantial Completion to which such liquidated damages apply.

**3.7. Minority and Women Business Enterprise Compliance**

3.7.1. When the anticipated sum of all GMPs is greater than \$1,000,000, Construction Manager shall comply with the City’s Minority and Women Business Enterprise (“MWBE”) programs as set out in Chapter 15, Article V of the City of Houston Code of Ordinances, and the applicable Office of Business Opportunity’s (“OBO”) Policies and Procedures. Construction Manager shall make good faith efforts to award subcontracts or supply agreements in at least the percentages set out below of the value of the GMPs to MWBEs (“Stated MWBE goal(s)”).:

3.7.1.1. the MBE goal is \_\_\_ percent,

3.7.1.2. the WBE goal is \_\_\_ percent, and

3.7.1.3. the PDBE goal is \_\_\_ percent.

3.7.1.4. The Construction Manager may substitute SBE participation of no more than four percent of the MBE goal, the WBE goal, or portions of the MBE Goal and WBE Goal.



- 3.7.1.5. The Construction Manager may not use Native-American-owned firms that are certified as MBEs to meet MBE contract goals. Native-Americans firms can only be used as SBEs in fulfillment of the above stated goals.
  - 3.7.1.6. The Construction Manager may not use MWSBE Suppliers to account for more than 50% of the MWSBE participation plan.
  - 3.7.1.7. If the Construction Manager is a certified MBE or WBE, Construction Manager may count toward goals the work that it commits to perform with its own work force, capped at 50% of the total advertised goal. Construction Manager acknowledges that it has reviewed the requirements for good faith efforts on file with OBO and will comply with them.
- 3.7.2. For purposes of this Section, “Contract Year” means a 12-month period during the term of the contract commencing on the Countersignature Date of this Agreement and each anniversary thereof. If the term of this Agreement exceeds one Contract Year and Construction Manager’s MWBE participation level in a Contract Year is less than the Stated MWBE goal(s), then within 30 calendar days of the end of each Contract Year Construction Manager must provide a written explanation to both the Director and Office of Business Opportunity Director (“OBO Director”) of the following: (1) the discrepancy between Construction Manager’s MWBE participation level and the Stated MWBE goal(s); (2) the reason for the discrepancy, and (3) Construction Manager’s good faith efforts (in accordance with the City’s policy) towards achieving the Stated MWBE goal(s). As part of the good faith efforts assessment, the OBO Director may consider Construction Manager’s failure to timely submit the notice or explanation required by this provision, and the OBO Director may impose sanctions or other penalties on Construction Manager for said failures in accordance with this Section of this Agreement, Chapter 15 of the Code of Ordinances, OBO’s policies and procedures, and the City’s good faith efforts policy.
- 3.7.3. The OBO Director, in consultation with the Director, may review, at any time during the Term of this Agreement, Construction Manager’s progress toward attainment of the Stated MWBE goal(s), by reviewing the percentage of work to MWBE subcontractors and the payments Construction Manager has made to such MWBE subcontractors. If the OBO Director determines that Construction Manager is not in compliance with this Section of this Agreement, Chapter 15 of the Code of Ordinances, OBO’s policies and procedures, and the City’s good faith efforts policy, the OBO Director may:
- 3.7.3.1. After consultation with the Director and the Chief Procurement Officer, determine whether any of the following actions should be taken and notify Construction Manager of such determination:

- 3.7.3.1.1. Enter a written agreement with Construction Manager allowing Construction Manager to cure the noncompliance matter;
- 3.7.3.1.2. Suspend Construction Manager from engaging in any contract with the City for a period up to , but not to exceed, five years, pursuant to Section 15-88 of the City's Code of Ordinances, as may be amended from time to time; or
- 3.7.3.1.3. Take any other appropriate remedy.

The determination of the OBO Director is final.

- 3.7.3.2. Make a recommendation to the Director and the Chief Procurement Officer, to:

- 3.7.3.2.1. Withhold payment or reimbursement under this Agreement;
- 3.7.3.2.2. Make a finding that Construction Manager is in default or has breached this Agreement;
- 3.7.3.2.3. Determine not to renew this Agreement;
- 3.7.3.2.4. Terminate for cause this Agreement; or
- 3.7.3.2.5. Take any other appropriate remedy.

- 3.7.4. Construction Manager shall maintain records showing;

- 3.7.4.1. Subcontracts and supply agreements with Minority Business Enterprises;
- 3.7.4.2. Subcontracts and supply agreements with Women Business Enterprises;
- 3.7.4.3. Subcontracts and supply agreements with Small Business Enterprises (if any);
- 3.7.4.4. Written confirmation from MWBE subcontractors and suppliers that they are participants on the contract; and
- 3.7.4.5. Specific efforts to identify and award subcontracts and supply agreements to MWBEs. Construction Manager shall submit periodic reports of its efforts under this Section to the OBO Director in the form and at the times he or she prescribes.

- 3.7.5. Construction Manager shall ensure that all subcontracts with MWBE subcontractors and suppliers contain the following terms:

- 3.7.5.1. [Name of MWBE subcontractor } shall permit representatives of the City of Houston, at all reasonable times, to perform (1) audits of the books and records of the subcontractor, and (2) inspections of all places where work is to be undertaken in connection with this subcontract. Subcontractor shall keep such books and records available for such purpose for at least four (4) years after the end of its performance under this subcontract. Nothing in this provision shall affect the time for bringing a cause of action nor the applicable statute of limitations.
- 3.7.5.2. Within five (5) business days of execution of this subcontract, Construction Manager [prime Construction Manager] and Subcontractor shall designate, in writing, to the City of Houston's OBO Director ("the OBO Director") an agent for receiving any notice required or permitted to be given pursuant to Chapter 15 of the Houston City Code of Ordinances, along with the street, mailing address, phone number, and email address of such agent.
- 3.7.5.3. After reasonable attempt(s) to resolve disputes between the parties involving the terms, covenants, or conditions of this subcontract, a request for dispute resolution may be submitted to the Director. The Director may prescribe procedures to provide dispute resolution services in accordance with the requirements of Chapter 15 of the Houston City Code of ordinances.

### **3.8. Bonds And Insurance**

- 3.8.1. Construction Manager shall submit with the Guaranteed Maximum Price proposal and before commencement of any construction work, performance, payment, and maintenance bonds on forms prescribed by City, in accordance with the requirements set forth in the General Conditions (Exhibit A). The penal sum of the payment and performance bonds shall be equal to the Guaranteed Maximum Price.
- 3.8.2. Prior to commencing the Work, Construction Manager shall be required to purchase and maintain the insurance coverages set forth in Article 11 of the General Conditions (Exhibit A); provided however, that Construction Manager may delay purchase and maintenance of Owner's and Contractor's Protective Liability, Installation Floater, and Property and Casualty Coverage until no later than 10 days of the date the City Engineer accepts the Guaranteed Maximum Price Proposal. The Construction Manager shall not commence Construction Phase Services unless all insurance coverages set forth in Article 11 of the General Conditions (Exhibit A) are in full force and effect.
- 3.8.3. Construction Manager shall not request payment, and City shall not be required to pay for Construction Manager's additional general liability insurance, builder's all risk insurance or any other form of insurance coverage that is in excess of the required coverage amounts specified in this Agreement and in Article 11 of the General Conditions (Exhibit A), and City shall be entitled to repayment of any amounts paid in excess of what City is required to pay. The additional costs for

coverages in addition to those coverages specifically required by this Agreement shall be the sole responsibility of Construction Manager.

#### 4. DUTIES OF CITY

##### 4.1. Generally

- 4.1.1. The City hereby designates and appoints the Construction Manager to be the Construction Manager-at-Risk under this Agreement and authorizes the Construction Manager to so act in connection with the scope of Work set forth in the Agreement.
- 4.1.2. City Engineer will be reasonably acquainted with the Project. Upon Construction Manager's request, City Engineer shall furnish the written authorization of each City employee authorized to represent him in connection with the Project.
- 4.1.3. City shall cooperate in providing information to the other members of the Project Team regarding its requirements for the Project.
- 4.1.4. If City has actual knowledge of any fault or defect in the Project or non-conformance with the drawings and specifications, City shall give prompt written notice thereof to Construction Manager.
- 4.1.5. City hereby expressly reserves the right from time to time to designate by written notice to Construction Manager one or more representatives to act partially or wholly for City in connection with the performance of City's obligations hereunder. Construction Manager shall act only upon instructions from such representatives unless otherwise specifically notified to the contrary.

##### 4.2. Preconstruction Phase Payment Terms

###### 4.2.1. *Basic Preconstruction Phase Services*

4.2.1.1. The City shall pay a lump sum fee of \$\_\_\_\_\_ for Basic Preconstruction Phase Services that Construction Manager renders under this Agreement as set out below:

4.2.1.1.1. Upon submittal and approval of a construction estimate and constructability report at Schematic Design, an amount not to exceed \$\_\_\_\_\_.

4.2.1.1.2. Upon submittal and approval of a construction estimate and constructability report at Design Development, an amount not to exceed \$\_\_\_\_\_.

4.2.1.1.3. Upon submittal and approval of a construction estimate and constructability report at 50% Construction Documents, an amount not to exceed \$\_\_\_\_\_.

4.2.1.1.1.4. Upon submittal and approval of a construction estimate and constructability report at 95% Construction Documents, an amount not to exceed \$\_\_\_\_\_.

4.2.1.1.1.5. Upon submittal of a GMP Proposal, an amount not to exceed \$\_\_\_\_\_.

4.2.1.2. The City shall pay Construction Manager based on invoices showing the percentage of total services performed during the preceding month.

4.2.1.3. Construction Manager shall not be entitled to any increase in the Basic Preconstruction Services fee because of Project Schedule extensions or delays, or changes in the scope of the proposed Project, unless such changes are material, as determined by City Engineer in his sole discretion.

4.2.2. *Additional Preconstruction Phase Services*

4.2.2.1. For Additional Preconstruction Phase Services provided by personnel of the Construction Manager, as described in Section 3.4, but excluding Reimbursable Expenses and Additional Preconstruction Phase Services of subcontractors, compensation to the Construction Manager shall be the billable rates set out in Exhibit B for each personnel classification (where the total salary cost is calculated by multiplying billable rates times the necessary hours to complete the Additional Preconstruction Phase Service) incurred in the interest of the Project.

4.2.2.2. For Additional Preconstruction Phase Services as described in Section 3.4 provided by subcontractors under contract with the Construction Manager, compensation to the Construction Manager shall be a multiple of 1.1 times the Subcontract Cost incurred in the interest of the Project.

4.2.3. *Reimbursable Expenses*

4.2.3.1. Reimbursable Expenses means only those reasonable costs necessarily incurred by Construction Manager in performing Additional Preconstruction Phase Services. A maximum amount for each Reimbursable Expense shall be proposed by Construction Manager at the time that Reimbursable Expenses are requested by the Construction Manager and shall be negotiated and agreed upon by Construction Manager and the City Engineer prior to such expenses being incurred. The compensation for each Reimbursable Expense shall not exceed the agreed upon maximum amount including a 10% mark-up. Reimbursable Expenses are to be paid by the actual expenditures Construction Manager is legally required to pay in the interest of the Project.

### **4.3. Construction Phase Services Payment Terms**

#### **4.3.1. *General***

4.3.1.1. City shall pay Construction Manager for the Work based on the sum of the Cost of the Work plus the Construction Phase Fee. The sum of the Cost of the Work and Construction Phase Fee shall not exceed the Guaranteed Maximum Price, subject to changes authorized by Modifications. Construction Manager shall pay, without reimbursement from City, any cost not authorized by the Contract and Guaranteed Maximum Price, except as per agreed upon Modifications.

4.3.1.2. If the sum of the Cost of the Work and the Construction Phase Fee is less than the Guaranteed Maximum Price, then City shall retain all savings. For items in the Contract and on Exhibit C noted as "Allowances", City shall retain 100% of any savings. The Cost of the Work included in the Allowances shall be determined in accordance with Document 00700-General Conditions (Exhibit A).

#### **4.3.2. *Cost of the Work. The Cost of the Work includes only the following:***

4.3.2.1. Self-Performed Work performed on a Non-Lump Sum Basis- Labor: Work self-performed must be approved by City Engineer in accordance with Section 3.3.4.3 of this Agreement.

4.3.2.1.1. Reasonable and customary wages paid to construction workers directly employed by Construction Manager who perform the construction of the Self Performed Work. If requested by City Engineer, Construction Manager shall provide certified payrolls and any other documentation to verify wages and hours for non-salaried employees.

4.3.2.1.2. Reasonable and customary wages or salaries of Construction Manager's on-site direct supervisory personnel but only for documented time when directly involved in performance of the Self- Performed Work.

4.3.2.1.3. Costs paid or incurred by Construction Manager for labor costs arising out of taxes, insurance, and benefits which are (i) required by law, (ii) required by collective bargaining agreements, (iii), or Construction Manager's standard fringe benefits, so long as such costs are based on wages and salaries which are properly included in the Cost of the Work as defined herein.

4.3.2.2. Self-Performed Work performed on a Non-Lump Sum Basis- Materials, Equipment, Tools, and Rentals: Work self-performed must be approved by City Engineer in accordance with Section 3.3.4.3 of this Agreement.

- 4.3.2.3. Costs of materials and equipment to be incorporated into the Work, including transportation charges, and a reasonable and customary allowance for waste and spoilage. City shall be entitled to take possession of excess materials not incorporated into the Work. This requirement only applies to materials that the City reimbursed the Construction Manager as a Cost of the Work. Payment for stored materials is subject to City's Document 00700-General Conditions (Exhibit A).
- 4.3.2.4. Costs of materials, supplies, equipment, and hand tools except for those customarily owned by construction workers, all provided at the site by Construction Manager, if such items are fully consumed in the construction of the Work. Cost for items used shall be based on fair market value and may include costs of transportation, installation, minor maintenance costs, and removal. If the item is not fully consumed, then the cost shall be based on cost of the item minus its fair market salvage value.
- 4.3.2.5. Rental charges for machinery, equipment, and hand tools except for those customarily owned by construction workers, all provided at the site by Construction Manager, and may include transportation, installation, and minor maintenance costs, and removal. Cumulative rental charges for equipment or tools shall not exceed the purchase price of the equipment or tools.
- 4.3.2.6. Site debris removal and disposal costs in accordance with all applicable laws and regulations.
- 4.3.2.7. Subcontracts. Payments made or owed to Subcontractors by Construction Manager for the construction of the Work in accordance with the Contract and the requirements of the Subcontracts with such Subcontractors, but only for Subcontracts consented to by City in accordance with the requirements of the Contract.
- 4.3.2.8. Other costs:
  - 4.3.2.8.1. Governmental sales and use taxes directly attributable to the Work. City is a home-rule municipal corporation and Construction Manager shall avail itself of all exemptions which may exist for such taxes based on City's status.
  - 4.3.2.8.2. Intellectual property royalties and licenses for items specifically required by the Contract that are, or will be, incorporated into the Work.
  - 4.3.2.8.3. Costs associated with emergency actions taken to prevent damage to property or persons.
  - 4.3.2.8.4. Other costs approved in advance in writing by City Engineer at City Engineer's sole option and discretion.

- 4.3.2.8.5. Construction Manager's General Conditions Work expenses.
- 4.3.2.8.6. Work self-performed on a lump sum basis. Work self-performed on a lump sum basis must be approved by City Engineer in accordance with Section 3.3.4.3 of this Agreement.
- 4.3.2.8.7. Construction Manager's Contingency approved by the City Engineer in accordance with Section 3.3.5.2.
- 4.3.2.9. Cost of the Work does not include:
  - 4.3.2.9.1. Construction Manager's Contingency unless approved by the City Engineer in accordance with Section 3.3.5.2.
  - 4.3.2.9.2. Construction Phase Fee.
  - 4.3.2.9.3. Legal and administrative costs to review and negotiate the Contract.
  - 4.3.2.9.4. Costs resulting from the failure of Construction Manager or any Subcontractor to procure and maintain insurance as and to the extent required by the Contract.
  - 4.3.2.9.5. Liquidated or actual, direct or consequential damages imposed by City for failure of Construction Manager to complete the Work within the Contract Time.
  - 4.3.2.9.6. Costs not specifically authorized, including any cost that would cause the Guaranteed Maximum Price for any portion of the Work to be exceeded.
- 4.3.2.10. Construction Manager shall credit the following discounts, rebates, and refunds to the Cost of the Work paid by City:
  - 4.3.2.10.1. If City makes funds available to Construction Manager, discounts earned by the Construction Manager through advance or prompt payments. Construction Manager shall provide sufficient advance notice of available discounts and the need for funds to be available to City Engineer for City to obtain the benefit of the discounts. The Construction Manager shall purchase materials and rental equipment for this Project in such quantities as will provide the most advantageous prices to the City.
  - 4.3.2.10.2. Reasonable market value as approved by the City Engineer at the time of removal of all materials, tools, and equipment actually purchased for the Work and charged as a Cost of the Work and which is retained by the Construction Manager upon completion of the Work.



4.3.2.10.3. Rebates, discounts, or commissions allowed to and collected by the Construction Manager from Suppliers of materials or from subcontractors, together with all other refunds, returns, or credits received for return of materials, and sales taxes.

4.3.2.10.4. Deposits made by City and not returned to City due to the negligent or intentional acts of the Construction Manager. Should Construction Manager not promptly so reimburse City upon demand, City shall be entitled to recover said amount from Construction Manager, including, but not limited to, by deducting the amount from payments due the Construction Manager.

#### 4.3.3. *Miscellaneous Payment Terms*

In addition to the payment procedures described in Document 00700-General Conditions (Exhibit A), the following payment terms shall apply:

4.3.3.1. In the Document 00700-General Conditions (Exhibit A), references to adjustments in “cost” or “costs” refer to Costs of the Work as defined in this Agreement. References to Construction Manager’s “overhead” and “profit” refer to Construction Manager’s Construction Phase Fee.

4.3.3.2. At all times, the estimated cost of performing the uncompleted and unpaid portion of the Work (including Construction Phase Fee) shall not exceed the unpaid balance of the Guaranteed Maximum Price (less retainage on Work previously completed). If City Engineer determines that the amount remaining under the Guaranteed Maximum Price will not be sufficient to pay Construction Manager for services in accordance with this Agreement, the City may withhold payments until Construction Manager, at its sole cost, performs a sufficient portion of the remaining services so that the portion of the amount remaining under the Guaranteed Maximum Price is determined by City to be sufficient to so complete the then remaining Work.

4.3.3.3. Any partial payments made by the City shall not be construed as the City’s final acceptance or approval of that part of the Work to which the partial payment relates or as a release of Construction Manager of any of its obligations or liabilities with respect to the Work.

4.3.3.4. The schedule of values may be revised from time to time to adjust allocations of costs to various line items as the costs become better known, but such adjustment shall be subject to the approval of the City Engineer, which shall not be unreasonably withheld. Under no circumstances shall the schedule of values for all or any portion of the Work exceed the Guaranteed Maximum Price. The Construction Phase Fee, the General Conditions Work, and the Construction Manager’s Contingency shall be shown as separate line items on the schedule of values.

- 4.3.3.5. Each schedule of values submitted shall maintain the originally established value for each work classification line item and shall contain any revisions to costs or cost estimates for each such classification. The format and tracking method of the original schedule of values and of all updates to it shall be subject to the approval of City Engineer.
- 4.3.3.6. Payment for Construction Phase Fee shall be in the same proportion to the total fee as the amount requested for the Cost of the Work relative to the total Cost of the Work used in deriving the then current Guaranteed Maximum Price.
- 4.3.3.7. Construction Manager shall submit a monthly cost breakdown, including cost elements, for General Conditions Work over the duration of the construction period to City Engineer for approval. City shall pay for General Conditions Work on a monthly basis per the approved breakdown.
- 4.3.3.8. Payment for the Cost of the Work shall be made based on percentages of completion of each portion of the Work listed in Schedule of Values with approved back up including subcontractor invoices, actual labor, equipment and material costs as of the end of the period covered by the Application for Payment, in accordance with City's Document 00700-General Conditions (Exhibit A).
- 4.3.3.9. Retainage as specified in City's Document 00700-General Conditions (Exhibit A) will be applied to the entire amount requested including the Cost of the Work and the Construction Manager's Construction Phase Fee. Construction Manager shall make payments to subcontractors based on the same percentage of Work completed that is allocable to that subcontractor for each respective schedule of values classification, including applicable retainage.

**4.4. Limit Of Appropriation**

- 4.4.1. The City's duty to pay money to Construction Manager for any purpose under this Agreement is limited in its entirety by the provisions of this Section.
- 4.4.2. The fees specified in Section 4.2 and Section 4.3 above are Construction Manager's total compensation for its services under this Agreement. Construction Manager recognizes that, under its Charter, the City may not obligate itself by contract to pay more money than the amount the City Council appropriates, and further recognizes that the City Council has appropriated and allocated only \$\_\_\_\_\_ to pay for services under this Agreement. Unless the City Council makes further appropriations for this Agreement, the City's obligation to Construction Manager under this Agreement must not exceed \$\_\_\_\_\_.
- 4.4.3. If the appropriated funds are exhausted and the City would otherwise owe Construction Manager additional payments for continuing Work, Construction Manager has the right to suspend performance of the Work by seven days' advance written notice to City Engineer describing the cause and Construction

Manager's planned suspension. After the City makes further appropriations, Construction Manager shall resume Work and may be entitled to equitable adjustment in accordance with Section 14.3.3 of Document 00700-General Conditions (Exhibit A). If, after more than 180 days after receiving notice of Construction Manager's planned suspension the City has not made further appropriations, Construction Manager shall have the right to terminate its performance under Section 14.4 of the Document 00700-General Conditions (Exhibit A).

## **5. TERM AND TERMINATION**

### **5.1. Contract Term**

5.1.1. The City Engineer shall issue a Preconstruction Phase Notice to Proceed to authorize the start of Preconstruction Phase services. Construction Manager shall complete Preconstruction Phase Services in accordance with the Master Project Schedule in Exhibit E, subject to any time extensions granted under Section 8.2 of Document 00700-General Conditions (Exhibit A). After establishment of the Guaranteed Maximum Price, the City Engineer will issue a Construction Phase Notice to Proceed to authorize the start of Construction Phase Services. Construction Manager shall complete Construction Phase Services within the Contract Time in the agreed upon Guaranteed Maximum Price Proposal in Exhibit C, subject to any time extensions granted under Section 8.2 of Document 00700-General Conditions (Exhibit A).

### **5.2. Termination**

5.2.1. Termination rights shall be as provided in Document 00700-General Conditions (Exhibit A).

5.2.2. A termination under this Agreement above shall not relieve Construction Manager or any of its employees of liability for violations of this Agreement, or for any act, omission, or negligence of Construction Manager.

5.2.3. As of the date of termination of this Agreement, Construction Manager shall furnish to City Engineer all statements, accounts, reports and other materials that Construction Manager has prepared in connection with its responsibilities under this Agreement. City shall have the right to use the ideas and designs therein contained for the completion of the services described by this Agreement, and for completion of the Project, or otherwise. All drawings, plans, specifications, renderings and models, etc., prepared by the Design Consultant are the property of City or Design Consultant, as set forth in the terms and conditions of the agreement between City and the Design Consultant. They are not to be used by any person or entity other than City on other projects unless expressly authorized by City.

## **6. MISCELLANEOUS**

### **6.1. Subcontractors**

- 6.1.1. Each subcontract agreement is assigned by Construction Manager to City effective only after termination by default of this Agreement by City and effective only for those subcontract agreements that City accepts by notifying the Subcontractor in writing. Construction Manager agrees to execute such additional documents as City may request to confirm such assignments. Construction Manager shall include a provision in each subcontract agreement recognizing the rights of City pursuant to the foregoing contingent assignment. Despite such acceptance by City of any such assignment, City shall not be liable for anything under such subcontract prior to the acceptance by City of the assignment or for any liability of Construction Manager to the Subcontractor. Acceptance of any such assignment shall not relieve Construction Manager or the Subcontractor of their responsibilities and liabilities for any Work performed prior to City's acceptance of such assignment.
- 6.1.2. Nothing contained in the Contract shall create any obligations or liabilities owed by City to any Subcontractor or Supplier. Except as may be required by law, City shall have no liability or responsibility for the performance or nonperformance of any Subcontractor, Supplier, or consultant, even if City designated, required, identified or approved such Subcontractor, Supplier, consultant, or sub-consultant of any tier.

### **6.2. Captions**

- 6.2.1. Captions contained in this Agreement are for reference only, and, therefore, have no effect in construing this Agreement. The captions are not restrictive of the subject matter of any section in this Agreement.

### **6.3. Non-Waiver**

- 6.3.1. If either Party fails to require the other to perform a term of this Agreement, that failure does not prevent the Party from later enforcing that term and all other terms. If either Party waives the others' breach of a term, that waiver does not waive a later breach of this Agreement. An approval by the City Engineer or Director, or by any other employee or agent of the City, of any part of Construction Manager's performance does not waive compliance with this Agreement or establish a standard of performance other than that required by this Agreement and by law. The City Engineer is not authorized to vary from the terms of this Agreement.

### **6.4. Independent Contractor**

- 6.4.1. Construction Manager is an independent contractor and not an agent of City. Construction Manager shall be liable to City for acts and omissions of Construction Manager and Construction Manager's Subcontractors and Suppliers of any tier, and their agents, employees and parties in privity of contract with any of them and anyone acting on behalf of any of them, and any other persons performing any of the Work directly or indirectly under contract with Construction Manager, including any design professionals and their consultants and sub-consultants of any tier.

**6.5. Contractor Debt**

**6.5.1. IF CONSTRUCTION MANAGER, AT ANY TIME DURING THE TERM OF THIS AGREEMENT, INCURS A DEBT, AS THE WORD IS DEFINED IN SECTION 15-122 OF THE HOUSTON CITY CODE OF ORDINANCES, IT SHALL IMMEDIATELY NOTIFY THE CITY CONTROLLER IN WRITING. IF THE CITY CONTROLLER BECOMES AWARE THAT CONSTRUCTION MANAGER HAS INCURRED A DEBT, SHE SHALL IMMEDIATELY NOTIFY CONSTRUCTION MANAGER IN WRITING. IF CONSTRUCTION MANAGER DOES NOT PAY THE DEBT WITHIN 30 DAYS OF EITHER SUCH NOTIFICATION, THE CITY CONTROLLER MAY DEDUCT FUNDS IN AN AMOUNT EQUAL TO THE DEBT FROM ANY PAYMENTS OWED TO CONSTRUCTION MANAGER UNDER THIS AGREEMENT, AND CONSTRUCTION MANAGER WAIVES ANY RECOURSE THEREFOR. CONSTRUCTION MANAGER SHALL FILE A NEW AFFIDAVIT OF OWNERSHIP, USING THE FORM DESIGNATED BY CITY, BETWEEN FEBRUARY 1 AND MARCH 1 OF EVERY YEAR DURING THE TERM OF THIS AGREEMENT.**

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**EXHIBIT A: 00700 – GENERAL CONDITIONS**

Table of Articles

1. General Provisions	8. Time
2. City	9. Payment and Completion
3. Construction Manager	10. Safety Precautions
4. Administration of the Contract	11. Insurance and Bonds
5. Subcontractors and Suppliers	12. Uncovering and Correction of The Work
6. Construction by the City or Separate Contractors	13. Miscellaneous Provisions
7. Changes in the Work	14. Termination or Suspension of the Contract

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## 1. GENERAL PROVISIONS

### 1.1. Definitions

- 1.1.1. “Allowance”: An estimated sum of money to be used only for a limited class of expenditures such as utility relocation costs, fees for special licenses or permits, or other “pass-through” costs that would be the same for any contractor. Cash Allowances may not be used to purchase goods or services that are not specified in the Contract, and exclude profit, overhead, and administrative costs. The unspecified items must be purchased according to the terms of Article 7 of this Exhibit.
- 1.1.2. “Bonds”: Performance Bond, Payment Bond, Maintenance Bond, and other Surety instruments executed by Surety. When in singular form, refers to individual instrument.
- 1.1.3. “Business Enterprise” Policy: Contract and applicable policies relating to Business Enterprises and authorized under 49 C.F.R. § 26 or City Code of Ordinances, Chapter 15, Article V.
- 1.1.4. “Business Enterprise Policy”: Contract and applicable policies relating to Business Enterprises and authorized under 49 C.F.R. § 26 or City Code of Ordinances, Chapter 15, Article II.
- 1.1.5. Certificate of Final Completion: The certificate issued and signed by City Engineer pursuant to Section 9.8 of this Exhibit.
- 1.1.6. “Certificate of Substantial Completion”: The certificate issued and signed by City Engineer pursuant to Section 9.6 of this Exhibit.
- 1.1.7. “Change Order”: Written instrument prepared by City and signed by City Engineer and Construction Manager, specifying the following:
- 1.1.7.1. a change in the Work;
  - 1.1.7.2. a change in Guaranteed Maximum Price; and
  - 1.1.7.3. a change in Contract Time, if any.
- The value of a Change Order is the net amount after offsetting all deductions against all additions affected by the Change Order.
- 1.1.8. “Claim”: Written demand or written assertion by one Party seeking adjustment of the Contract, payment of money, extension of time, or other relief under the Contract and includes, but is not limited to, claims for materials, labor, equipment, delay, changes, adjustments, substitutions, fees, and third party claims. The Party making the Claim has the responsibility to substantiate the Claim.

- 1.1.9. “Conditions of the Contract”: Document 00700-General Conditions and Supplementary Conditions, if any.
- 1.1.10. “Contract Time”: The time period stated in an approved Guaranteed Maximum Price to substantially complete the portion of the Work described in the approved Guaranteed Maximum Price, plus days authorized by Change Order. Contract Time may be delineated by Stages or phases.
- 1.1.11. “Contract Year”: a twelve (12) month period during the term of the contract commencing on the Effective Date of this Agreement and each anniversary thereof.
- 1.1.12. “Date of Commencement of the Work”: Date established in Notice to Proceed with a construction phase on which Contract Time will commence. This date will not be changed by failure of Construction Manager, or persons or entities for whom Construction Manager is responsible, to act. If and to the extent this provision is inconsistent with Section 5.1 of the Agreement, Section 5.1 of the Agreement shall govern.
- 1.1.13. Date of Final Completion or “Final Completion”: The date upon which all Work has been completed to City Engineer’s satisfaction and is certified by City Engineer to be at Final Completion.
- 1.1.14. “Date of Substantial Completion”: Date that a Construction Phase, or portion thereof designated by City Engineer, is certified by City Engineer to be substantially complete.
- 1.1.15. Drawings”: Graphic and pictorial portions of the Contract that define the character and scope of the Work. Until otherwise identified with more specificity in a Modification, the Drawings are the most recent Drawings prepared by the Construction Manager and accepted by City.
- 1.1.16. “Extra Unit Price”: Unit Prices, which may be required for completion of the Work.
- 1.1.17. “Final Completion”: Final Completion occurs when Construction Manager fulfills all requirements for achieving Final Completion as set forth in the Contract, including Section 9.8 of this Exhibit, and City Engineer issues a Certificate of Final Completion.
- 1.1.18. “Furnish”: To supply, initially pay for, deliver to the site, and unload.
- 1.1.19. “General Requirements”: The sections of Division 01 Specifications that specify administrative and procedural requirements and temporary facilities required for the Work.
- 1.1.20. “Good Faith Efforts” (GFE): Steps taken to achieve an MBE, WBE, SBE, or PDDBE goal or other requirements which, by their scope, intensity, and usefulness, demonstrate the bidder’s responsiveness to fulfill the business opportunity objective, as well as the Construction Manager’s responsibility to put forth



measures to meet or exceed the MBE, WBE, SBE, or PDBE goal. These steps apply from before a contract’s award, through its duration, and after its conclusion, in the event the Construction Manager has been unsuccessful in meeting the Contract MBE, WBE, PDBE, or SBE goals. These efforts are required whether a Goal Oriented Contract or a Regulated Contract, as defined in the Office of Business Opportunity’s Policy and Procedures Manual.

- 1.1.21. “Guaranteed Maximum Price” (GMP): The amount agreed upon by City and Construction Manager as the maximum cost to City for the Work defined in the GMP, including the Cost of the Work and the Construction Manager’s Construction Phase Fee for the Work defined in the GMP.
- 1.1.22. “Inspector”: City’s employee or agent authorized to assist with inspection of the Work.
- 1.1.23. “Install”: Unpack, assemble, erect, place, anchor, apply, work to dimension, finish, cure, clean, protect, and similar operations.
- 1.1.24. “Legal Holiday”: Day established by City Council as a holiday.
- 1.1.25. “Minor Change in the Work”: A written change in the Work, ordered by City Engineer, that does not change Guaranteed Maximum Price or Contract Time, and that is consistent with the general scope of the Contract.
- 1.1.26. “Modification”: Change Order, Work Change Directive, or Minor Change in the Work, all of which are required to be in writing.
- 1.1.27. “Notice of Noncompliance”: A written notice by City Engineer to Construction Manager regarding defective or nonconforming work that does not meet the Contract requirements, and that establishes a time by which Construction Manager shall correct the defective or nonconforming work.
- 1.1.28. “Notice to Proceed” or NTP: An authorization issued by City Engineer to Construction Manager authorizing Construction Manager to commence performing the portion of the Work, per the Notice to Proceed.
- 1.1.29. “Pollutant”: Any materials subject to the Texas Solid Waste Disposal Act.
- 1.1.30. “Pollutant Facility”: Any facility regulated by the State of Texas to protect the health and environment from contamination by Pollutants, including without limitation, landfills, oil and gas production and storage facilities, wastewater facilities, waste injection wells, and storage tanks (including drums).
- 1.1.31. “Product”: Materials, equipment, or systems permanently incorporated into the Work (or to be incorporated into the Work) and materials, tools, equipment or systems temporarily used in performance of the Work. Products may include existing construction or components intended for reuse.

- 1.1.32. “Product Data”: Illustrations, standard schedules, performance charts, instructions, brochures, diagrams, and other information furnished by Construction Manager to illustrate a Product.
- 1.1.33. “Project or Program Manager: Professionals, or firms employing professionals, engaged by City to be the City Engineer’s authorized representative for administration of the Work. Titles used within City’s departments may be different from those used in this definition. Unless otherwise designated by City Engineer, references in the Contract to the Project or Program Manager shall refer to City Engineer. More than one Program Manager may be under contract with City.
- 1.1.34. “Provide”: Furnish and Install, complete, ready for intended use.
- 1.1.35. “Safety Impact Position”: A Construction Manager’s employment position involving duties that if performed with inattentiveness, errors in judgment, or diminished coordination, dexterity, or composure may result in mistakes that could present a real and/or imminent threat to the personal health or safety of the employee, co-workers, and/or the public.
- 1.1.36. “Samples”: Physical examples that illustrate Products, or workmanship, and establish standards by which the Work is judged.
- 1.1.37. “Shop Drawings: Drawings, diagrams, schedules, and other data specially prepared for the Work by Construction Manager, Subcontractor or Supplier, to illustrate a portion of the Work.
- 1.1.38. “Specifications”: Divisions 01 through 33 that are incorporated into the Agreement, consisting of written General Requirements and requirements for Products, standards, and workmanship for the Work, and performance of related services.
- 1.1.39. “Subcontractor”: All trade contractors, separate contractors, consultants, and subcontractors entering into contracts (“Subcontracts”) with the Construction Manager for the performance of the Work. The relationship between the Construction Manager and the Subcontractors shall be that of a general contractor to its subcontractors unless otherwise approved in advance in writing by City Engineer, or except when City enters into a separate contract directly with a Subcontractor.
- 1.1.40. “Substantial Completion”: Substantial Completion occurs when Construction Manager fulfills all the requirements for achieving Substantial Completion of a Construction Phase as set forth in the Contract, including Section 9.6 of this Exhibit, and City Engineer issues a Certificate of Substantial Completion.
- 1.1.41. “Superintendent”: Employee of Construction Manager Construction Manager having authority and responsibility to act for and represent Construction Manager.
- 1.1.42. Supplementary Conditions: Part of the Conditions of the Contract that amends or supplements General Conditions.

- 1.1.43. “Supplier”: Manufacturer, distributor, materialman, or vendor having a direct agreement with Construction Manager or Subcontractor for Products, or services and its authorized representatives.
- 1.1.44. “Surety”: Corporate entity that is bound by one or more Bonds and is responsible for completion of the Work, including the correction period, and for payment of debts incurred in fulfilling the contract. Surety shall include co-surety or reinsurer, as applicable.
- 1.1.45. “Ultra Low Sulfur Diesel Fuel”: As defined in Section 3.9.1.1 of this Exhibit.
- 1.1.46. “Underground Facilities”: Pipes, conduits, ducts, cables, wires, manholes, vaults, tanks, tunnels, or other such facilities or attachments and encasements containing such facilities that exist below ground level.
- 1.1.47. “Unit Price”: An amount stated in the Contract for an individual, measurable item of work, which, when multiplied by actual quantities incorporated into the Work, amounts to full compensation for completion of the item, including work incidental to it.
- 1.1.48. “Unit Price Quantities”: Quantities indicated in the Contract that are approximations made by City for contracting purposes.
- 1.1.49. “Work”: All services, supervision, labor, materials, supplies, equipment, Products and other items for a Construction Phase required to perform this Agreement (whether completed or partially completed) in strict accordance with the Contract (as such may be modified or amended), including all things reasonably inferable from the Contract and all of the foregoing provided or to be provided by Construction Manager to fulfill Construction Manager’s obligations under the Contract.
- 1.1.50. “Work Change Directive”: A written change in the Work, ordered by City Engineer, that is within the general scope of the Contract and consisting of additions, deletions, or other revisions. A Work Change Directive will state the proposed basis for adjustment, if any, in or Guaranteed Maximum Price, or Contract Time, or both.

**1.2. Execution, Correlation, And Intent**

- 1.2.1. The Construction Documents have been read and carefully considered by Construction Manager who understands and agrees to their sufficiency for the Work. Construction Manager represents that it is not aware of any insufficiency or defect in the Contract. Execution of the Contract by Construction Manager is conclusive that it has visited the Work site, become familiar with local conditions under which the Work will be performed, and fully informed itself as to conditions and matters that can affect the Work or costs. Construction Manager further agrees that it has carefully correlated personal observations with requirements of the Contract. The Contract shall not be more strongly construed against City than

against Construction Manager and Surety. Construction Manager shall include all items necessary for proper execution and completion of the Work in strict accordance with the Contract and reasonably inferable therefrom.

- 1.2.2. Reference to standard specifications, manuals, or codes of a technical society, organization, or association, or to laws or regulations of a governmental authority, whether specific or implied, mean the latest edition in effect as of date of written agreement as to the Guaranteed Maximum Price for the portion of the Work covered by that Guaranteed Maximum Price, except as may be otherwise specifically stated in the Contract.
- 1.2.3. No provision of any referenced standard, specification, or manual changes the duties and responsibilities of City or City Engineer from those set forth in the Contract.
- 1.2.4. Organization of Specifications into divisions, sections, and articles and arrangement of Drawings does not control Construction Manager in dividing the Work among Subcontractors or in establishing the extent of Work to be performed by any trade.
- 1.2.5. Unless otherwise defined in the Contract, words which have well-known construction industry technical meanings are used in the Contract in accordance with these recognized meanings.
- 1.2.6. Any ambiguity or uncertainty in Drawings, Specifications, Addenda, and Modifications shall be interpreted and construed by City Engineer and City Engineer's decision shall be final and binding upon all parties.
- 1.2.7. Where the words "directed," "required," "permitted," "ordered," "designated," "prescribed," or words of like import are used, it shall mean the direction, requirement, permission, order, designation, or prescription of City Engineer unless explicitly stated otherwise. The words "approved," "acceptable," "satisfactory," or words of like import, shall mean approved by, or acceptable to, or satisfactory to City Engineer, unless explicitly stated otherwise.
- 1.2.8. Reference to a specific requirement of a cited standard shall include all general requirements of the entire cited standard pertinent to the specific reference.
- 1.2.9. When the Contract uses the capitalized term "Contractor," that term shall be deemed to refer to Construction Manager unless otherwise indicated.

### **1.3. Ownership And Use Of Documents**

- 1.3.1. Drawings, Specifications, and other documents prepared by City or by Construction Manager are instruments of service through which the Work to be executed by Construction Manager is described. Construction Manager may retain one Contract record set.

- 1.3.2. Neither Construction Manager, Subcontractor, nor Supplier will own or claim a copyright to documents contained in the Contract or any part of the Contract.
- 1.3.3. Documents contained in the Contract, prepared by City or by Construction Manager, and copies furnished to Construction Manager, are for use solely with respect to the Work. They may not be used by Construction Manager, Subcontractors or Suppliers on other projects or for additions to the Work, outside the scope of the Work, without the specific written consent of City Engineer.
- 1.3.4. Construction Manager, Subcontractors, and Suppliers are granted a limited license to use and reproduce applicable portions of the Contract appropriate to and for use in execution of their Work under the Contract.

**1.4. Interpretation**

- 1.4.1. Specifications are written in an imperative streamlined form and are directed to Construction Manager, unless noted otherwise. When written in this form, words “shall be” are included by inference where a colon (:) is used within sentences or phrases.
- 1.4.2. In the interest of brevity, the Contract frequently omits modifying words such as “all” and “any” and articles such as “the” and “an”, but an absent modifier or article is not intended to affect interpretation of a statement.

**2. CITY**

**2.1. Limitations Of City’s Officers And Employees**

- 2.1.1. No officer or employee of City may authorize Construction Manager to perform an act or work contrary to the Contract, except as otherwise provided in the Contract.

**2.2. Duties Of City**

- 2.2.1. If a building permit is required, the City will process an application for, and Construction Manager shall purchase and obtain the building permit before Date of Commencement of the Work or applicable Construction Phase of the Work.
- 2.2.2. City will make available to Construction Manager a reproducible set of Drawings. Additional copies will be furnished, on Construction Manager’s request, at the cost of reproduction.
- 2.2.3. When necessary for performance of the Work, City will provide surveys describing physical characteristics, legal limitations, legal description of site, and horizontal and vertical control adequate to lay out the Work.

- 2.2.4. Information or services that City is required to provide under the Contract will be provided by City with reasonable promptness to avoid delay in orderly progress of the Work.
- 2.2.5. The Contract imposes no implied duty on the City. The City does not warrant any plans or specifications associated with the Contract.
- 2.2.6. Except as expressly stated in this Article, the City owes no duty to the Construction Manager or any Subcontractor or Supplier.

**2.3. Availability Of Land And Use Of Site**

- 2.3.1. City will furnish, as indicated in the Contract, rights-of-way, land on which the Work is to be performed, and other land designated in the Contract for use by Construction Manager unless otherwise provided in the Contract. Construction Manager shall confine operations at site to those areas permitted by law, ordinances, permits, and the Contract, and shall not unreasonably encumber the Project site with materials or equipment.
- 2.3.2. In addition to land provided by City under Section 2.3 of this Exhibit, City shall provide all land and access to land that may be required for use by Construction Manager for temporary construction facilities or for storage of materials and Construction Manager equipment, and Construction Manager shall indemnify City during its use of the land as stated in Section 3.25 of this Exhibit.

**2.4. City's Right To Stop The Work**

- 2.4.1. If Construction Manager fails to carry out the Work in accordance with the Contract, or fails to correct Work that is not in accordance with requirements of the Contract as required in Section 12.1.1 of this Exhibit and Section 12.2 of this Exhibit, City may, by Notice of Noncompliance, order Construction Manager to stop the Work or any portion of the Work until the cause for the order has been eliminated. However, the right of City to stop the Work will not give rise to a Claim for delay or an increase in compensation or to a duty on the part of City to exercise this right for the benefit of Construction Manager or any other person or entity, except to the extent required by Section 6.2 of this Exhibit. If Construction Manager corrects the defective or nonconforming work within the time established in Notice of Noncompliance, City Engineer will give written notice to Construction Manager to resume performance of the Work.

**2.5. City's Right To Carry Out Work**

- 2.5.1. If Construction Manager fails to carry out work in accordance with the Contract, and fails within the period established in a Notice of Noncompliance to correct the nonconforming work, City may, after expiration of the required period, correct the deficiencies without prejudice to other remedies City may have, including rights of City under Section 14.1 of this Exhibit.

2.5.1.1. When City corrects deficiencies, City Engineer will issue an appropriate Change Order and deduct from payments then or thereafter due Construction Manager the cost of correcting the deficiencies, including compensation for other design consultants and City Engineer's additional services and expenses made necessary by such default, neglect, or failure. This action by City and amounts charged to Construction Manager are both subject to prior approval of City Engineer. If payments, then or thereafter due Construction Manager are not sufficient to cover these amounts, Construction Manager shall pay the difference to City. Costs of correcting deficiencies which would have otherwise been reimbursable to Construction Manager, as determined by the City Engineer in his sole discretion, shall not be deducted from sums otherwise due Construction Manager, but shall be considered a Cost of the Work, as determined by the City Engineer in his sole discretion, in determining Guaranteed Maximum Price and any savings shall revert to the City.

2.5.2. Notwithstanding City's right to carry out Work, maintenance and protection of the Work remains Construction Manager's responsibility, as provided in the Contract.

## **2.6. City's Right To Reject Work**

2.6.1. City shall have the right to reject Work that does not conform to the Contract. City shall also have the right to require special inspection or testing of the Work, whether or not such Work is then fabricated, installed, or completed. Neither City's right to act under this Section nor any decision by City either to exercise or not to exercise such right shall give rise to any duty or responsibility of City to Construction Manager or to any other person or entity, or result in a waiver of any of City's rights or relieve Construction Manager of its obligations.

## **3. CONSTRUCTION MANAGER**

### **3.1. Responsibilities**

3.1.1. Construction Manager shall maintain an office within the greater City of Houston area during Construction Manager's performance under the Contract. Construction Manager shall file its street address with City Engineer. Construction Manager may use the job site office of Construction Manager to meet this requirement.

3.1.2. Construction Manager and Construction Manager's employees shall not give or lend money or anything of value to an officer or employee of City. Should this Section 3.1.2 be violated, City Engineer may terminate the Contract under Section 14.1 of this Exhibit.

3.1.3. Construction Manager shall submit to City Engineer written monthly progress reports ("Progress Reports"). Such Progress Reports shall be submitted to City Engineer on forms approved by City Engineer with each Application for Payment. Such monthly reports shall include: (i) an updated Project Schedule, including a

description of any deviations from City's approved Project Schedule; (ii) a complete cost report, including a description of deviations from the line items contained in the Guaranteed Maximum Price for that particular Construction Phase of the Project and a description of the amounts committed against Allowances, if any; (iii) a report of all Subcontractor Change Orders and pending claims; (iv) a description of problems, claims, disputes of any sort and potential problems, claims, or disputes of any sort arising in connection relating to the Work, including potential delays, materials and supplies availability, disputes with Subcontractors or suppliers, and similar items; (v) a statement indicating methods of overcoming any past delay; (vi) all past and an estimate of all future cash flow requirements; and (vii) any additional information as may be reasonably required by City Engineer.

### **3.2. Review Of Contract And Field Conditions By Construction Manager**

- 3.2.1. Construction Manager shall carefully prepare and study the Contract and any information furnished by City and shall immediately report, in writing, any known or reasonably inferable errors, inconsistencies, or omissions to City Engineer. If Work is affected, Construction Manager shall obtain a written interpretation or clarification from City Engineer before proceeding with the affected Work.
- 3.2.2. Construction Manager shall take field measurements and verify field conditions, and shall carefully compare the conditions and other information known to Construction Manager with the Contract, before commencing activities. Construction Manager shall immediately report, in writing, to City Engineer for interpretation or clarification of discrepancies, inconsistencies, or omissions discovered during this process.

### **3.3. Supervision And Construction Procedures**

- 3.3.1. Construction Manager shall supervise, direct, and inspect the Work competently and efficiently, devoting the attention and applying the skills and expertise as necessary to perform the Work in accordance with the Contract. Construction Manager is solely responsible for and has control over construction means, methods, techniques, sequences, and procedures of construction; for safety precautions and programs in connection with the Work; and for coordinating all Work under the Contract.
- 3.3.2. Regardless of observations or inspections by City or City's consultants, Construction Manager shall perform and complete the Work in accordance with the Contract and submittals approved pursuant to Section 3.18 of this Exhibit. City is not liable or responsible to Construction Manager or Surety for Work performed by Construction Manager that is not in accordance with the Contract regardless of whether such nonconformities are discovered during construction or after acceptance of the Work.



**3.4. Superintendent**

- 3.4.1. Construction Manager shall employ a competent Superintendent and necessary assistants who shall be present at the site during performance of the Work. Communications given to Superintendent are binding on the Construction Manager.
- 3.4.2. Construction Manager shall notify City Engineer in writing of its intent to replace the Superintendent. Construction Manager shall not replace the Superintendent if City Engineer makes a reasonable objection in writing.

**3.5. Labor**

- 3.5.1. Construction Manager shall provide competent, qualified personnel to survey and lay out the Work and perform construction as required by the Contract. City may, by written notice, require Construction Manager to remove from the Work any employee of Construction Manager or Subcontractors to whom City Engineer makes reasonable objection.
- 3.5.2. Construction Manager shall comply with the applicable Business Enterprise Policy set out in this Agreement.

**3.6. Prevailing Wage Rates**

- 3.6.1. Construction Manager shall comply with governing statutes providing for labor classification of wage scales for each craft or type of laborer, worker, or mechanic.
- 3.6.2. Prevailing wage rates applicable to the Work shall be as stated in the Agreement.
- 3.6.3. Prevailing wage rates applicable to the Work may be one or the other of the following wage rates (Federal or City) identified in the Agreement:
  - 3.6.3.1. Federal Wage Rate General Decisions
    - 3.6.3.1.1. Highway Rates
    - 3.6.3.1.2. Building Rates
    - 3.6.3.1.3. Heavy Construction Rates
    - 3.6.3.1.4. Residential Rates
  - 3.6.3.2. City Prevailing Wage Rates
    - 3.6.3.2.1. Building Construction Rates
    - 3.6.3.2.2. Engineering Construction Rates
    - 3.6.3.2.3. Asbestos Worker Rates

- 3.6.4. Each week Construction Manager shall submit to Mayor's Office of Business Opportunity certified copies of payrolls showing classifications and wages paid by Construction Manager, Subcontractors, and Suppliers for each employee under the Contract, for any day included in the Contract.

**3.7. Labor Conditions**

- 3.7.1. In the event of labor disputes affecting Construction Manager or Construction Manager's employees, Construction Manager shall utilize all reasonable means to resolve disputes in order that the Work not be delayed to any extent. These means will include seeking injunctive relief and filing unfair labor practice charges, and any other action available to Construction Manager.
- 3.7.2. When Construction Manager has knowledge that any actual or potential labor dispute is delaying or is threatening to delay timely performance of the Work, Construction Manager shall immediately notify City Engineer in writing. No Claims will be accepted by City Engineer for costs incurred as a result of jurisdictional or labor disputes.

**3.8. Drug Detection And Deterrence**

- 3.8.1. It is the policy of City to achieve a drug-free work force and to provide a workplace that is free from the use of illegal drugs and alcohol. It is also the policy of City that manufacture, distribution, dispensation, possession, sale, or use of illegal drugs or alcohol by contractors while on City's premises is prohibited. By executing the Contract, Construction Manager represents and certifies that it meets and will comply with all requirements and procedures set forth in the Mayor's Policy on Drug Detection and Deterrence, City Council Motion No. 92-1971 ("Mayor's Policy") and the Mayor's Drug Detection and Deterrence Procedures for Contractors, Executive Order No. 1-31, (Revised) ("Executive Order"). Mayor's Policy is on file in the office of City Secretary. Copies of Executive Order may be obtained at the location specified in the Advertisement for Proposals.
- 3.8.2. The Executive Order applies to City's contracts for labor or services except the following:
  - 3.8.2.1. contracts authorized by Emergency Purchase Orders,
  - 3.8.2.2. contracts in which imposition of requirements of the Executive Order would exclude all potential bidders or proposers, or would eliminate meaningful competition for the Contract,
  - 3.8.2.3. contracts with companies that have fewer than 15 employees during any 20-week period during a calendar year and no safety impact positions,
  - 3.8.2.4. contracts with non-profit organizations providing services at no cost or reduced cost to the public, and

- 3.8.2.5. contracts with federal, state, or local governmental entities.
- 3.8.3. Prior to execution of the Contract, Construction Manager shall have filed with City:
  - 3.8.3.1. a Drug Policy Compliance Agreement form (Attachment “A” to the Executive Order), and
  - 3.8.3.2. a copy of Construction Manager’s drug free workplace policy, and
  - 3.8.3.3. a written designation of all safety impact positions, if applicable, or a Construction Manager’s Certification of a No Safety Impact Positions form (Attachment “C” to the Executive Order).
- 3.8.4. Every six months during performance of the Contract and upon completion of the Contract, Construction Manager shall file a Drug Policy Compliance Declaration form (Attachment “B” to the Executive Order). The Construction Manager shall submit the Drug Policy Compliance Declaration within 30 days of expiration of each six-month period of performance and within 30 days of the Date of Final Completion of the Work. The first six- month period shall begin on Date of Commencement of the Work.
- 3.8.5. Construction Manager shall have a continuing obligation to file updated designation of safety impact positions when additional safety impact positions are added to Construction Manager’s employee workforce during performance of the Work.
- 3.8.6. Construction Manager shall require its Subcontractors and Suppliers to comply with the Mayor’s Policy and Executive Order. Construction Manager is responsible for securing and maintaining required documents from Subcontractors and Suppliers for City inspection throughout the term of the Contract.
- 3.8.7. Failure of Construction Manager to comply with requirements will be a material breach of the Contract entitling City to terminate in accordance with Section 14.1 of this Exhibit.

**3.9. Materials & Equipment**

- 3.9.1. Unless otherwise provided in the Contract, Construction Manager shall provide and assume full responsibility for Products, labor, transportation, construction equipment and machinery, tools, appliances, fuel, power, light, heat, telephone, water, sanitary facilities, transportation, temporary facilities, supplies, and other facilities and incidentals necessary for Furnishing, performing, testing, starting-up, and completing the Work.
- 3.9.2. Construction Manager, Subcontractors, and Suppliers shall use Ultra Low Sulfur Diesel Fuel in all diesel operating vehicles and motorized equipment utilized in performing the Work. Ultra Low Sulfur Diesel Fuel is defined as diesel fuel having 15 ppm or the applicable standard set by state or federal law or rules and regulations

of the Texas Commission on Environmental Quality, or the Environmental Protection Agency, whichever is less, in sulfur content. Off-road Ultra Low Sulfur Diesel Fuel may be used in lieu of on-road Ultra Low Sulfur Diesel Fuel. Construction Manager shall provide, upon request by City Engineer, proof that Construction Manager, Subcontractors, and Suppliers are using Ultra Low Sulfur Diesel Fuel.

3.9.3. Construction Manager shall provide Products that are:

3.9.3.1. new, unless otherwise required or permitted by the Contract, and

3.9.3.2. of specified quality.

If required by City Engineer, Construction Manager shall furnish satisfactory evidence, including reports of required tests, as to kind and quality of Products.

3.9.4. Construction Manager shall store Products in a safe, neat, compact, and protected manner. Construction Manager shall also store Products:

3.9.4.1. so as to cause the least inconvenience to property owners, tenants, and general public; and

3.9.4.2. so as not to block access to, or be closer than, three feet to any fire hydrant.

Construction Manager shall protect trees, lawns, walks, drives, streets, and other improvements that are to remain, from damage. If private or public property is damaged by Construction Manager, Construction Manager shall, at its sole expense, restore the damaged property to at least its original condition.

3.9.5. Construction Manager shall obtain City Engineer's approval for storage areas used for Products for which payment has been requested under Section 9.1.8 of this Exhibit. Construction Manager shall provide City access to the storage areas for inspection purposes. Products, once paid for by City, become the property of City and may not be removed from place of storage, without City Engineer's written permission except for a movement to the site. Construction Manager's Installation Floater, required under Section 11.2 of this Exhibit, shall cover all perils, including loss or damage to Products during storage, loading, unloading, and transit to the site.

### **3.10. Product Options And Substitutions**

3.10.1. For Products specified by reference standards or by description only, Construction Manager may provide any Product meeting those standards or description.

3.10.2. For Products specified by naming one or more manufacturers with provision for substitutions or equal, Construction Manager may submit a request for substitution for any manufacturer not named.

- 3.10.3. City Engineer will consider requests for substitutions only within the first 15 percent of Contract Time or first 90 days after date of Notice to Proceed of a Construction Phase, whichever is less.
- 3.10.4. Construction Manager shall document each request for substitution with complete data substantiating compliance of proposed substitution with the Contract.
- 3.10.5. A request for substitution constitutes a representation that Construction Manager:
  - 3.10.5.1. has investigated the proposed Product and determined that it meets or exceeds the quality standard of the specified Product;
  - 3.10.5.2. shall provide the same warranty for the substitution as for the specified Product;
  - 3.10.5.3. shall coordinate installation of the proposed substitution and make changes to other work which may be required for the Work to be completed, with no additional cost or increase in time to City;
  - 3.10.5.4. confirms that cost data is complete and includes all related costs under the Contract;
  - 3.10.5.5. waives related Claim for additional costs or time extensions that may subsequently become apparent; and
  - 3.10.5.6. shall provide review or redesign services by a design consultant with appropriate professional license and shall obtain re-approval and permits from authorities.
- 3.10.6. City Engineer will not consider and will not approve substitutions when:
  - 3.10.6.1. they are indicated or implied on Shop Drawing or Product Data submittals without separate written request; or
  - 3.10.6.2. acceptance will require revision to the Contract.
- 3.10.7. City Engineer may reject requests for substitution, and his decision will be final and binding on the Parties.

**3.11. Allowances**

- 3.11.1. The Guaranteed Maximum Price for each Construction Phase may include Allowances as identified in the Contract.
- 3.11.2. City will pay the actual costs of Allowance item and they will not be considered a Cost of the Work. If actual costs exceed the Allowance, City Engineer must approve a Change Order for the additional costs.

### 3.12. Warranty

3.12.1. Construction Manager warrants to City that Products furnished under the Contract are:

3.12.1.1. free of defects in title;

3.12.1.2. of good quality;

3.12.1.3. new, unless otherwise required or permitted by the Contract; and

3.12.1.4. free from defects and in strict conformance with the requirements of the Contract.

If required by City Engineer, Construction Manager shall furnish satisfactory evidence as to kind, quality and title of Products, and that Products conform to requirements of the Contract.

3.12.2. In the event of a defect in a Product, either during construction or warranty period, Construction Manager shall take appropriate action with manufacturer of Product to assure correction or replacement of defective Product with minimum delay.

3.12.3. Construction Manager warrants that the Work is free of defects not inherent in the quality required or permitted, and that the Work does conform with the requirements of the Contract. Construction Manager further warrants that the Work has been performed in a good and workmanlike manner.

3.12.3.1. If required in writing by the City Engineer, Construction Manager shall furnish satisfactory evidence, including reports or required tests, as to kind, quality and title of Products, and that Products conform to requirements of the Contract.

3.12.3.2. In the event of a defect in a Product, either during construction or correction period, Construction Manager shall take appropriate action with the manufacturer of the Product to assure correction or replacement of the defective Product with minimum delay.

3.12.4. Construction Manager warrants that the Work is free of concentrations on polychlorinated biphenyl (PCB) and other substances defined as hazardous by the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) or any other applicable law or regulation.

3.12.5. Work not conforming to requirements of Section 3.12 of this Exhibit, including substitutions not properly approved and authorized, may be considered nonconforming work.

3.12.6. Construction Manager's warranty excludes remedy for damage or defect caused by:

3.12.6.1. improper or insufficient maintenance by City;

- 3.12.6.2. normal wear and tear under normal usage; or
  - 3.12.6.3. claim that hazardous material was incorporated into the Work, if that material was specified in the Contract.
- 3.12.7. Construction Manager warrants that title to all Work covered by Construction Manager's request for payment passes to City upon incorporation into the Work or upon Construction Manager's receipt of payment, whichever occurs first. Construction Manager further warrants that the title is free of all liens, claims, security interests or other interests ("Encumbrances"). If not, upon written demand from City Engineer, Construction Manager shall immediately take legal action necessary to remove Encumbrances.

**3.13. Taxes**

- 3.13.1. Construction Manager shall pay all applicable sales, consumer, use, and similar taxes, which are related to work provided by Construction Manager and to which any sales or use tax exemption is not applicable.
- 3.13.2. Construction Manager shall obtain, and require Subcontractors and Suppliers to obtain, necessary permits from applicable state and local taxing authorities to perform contractual obligations under the Contract, including sales tax permits (to the extent any sales or use tax exemption is not applicable).
- 3.13.3. City is exempt from the Federal Transportation and Excise Tax. Construction Manager shall comply with federal regulations governing the exemptions.
- 3.13.4. Products incorporated into the Work are exempt from state sales tax according to provisions of the Tex. Tax Code Ann. Ch. 151, Subsection H.

**3.14. Permits, Fees, And Notices**

- 3.14.1. Unless otherwise provided in the Contract, Construction Manager shall secure and pay for all construction permits, licenses, and inspections.
  - 3.14.1.1. necessary for proper execution and completion of the Work; and
  - 3.14.1.2. legally required at time the Guaranteed Maximum Price for a construction Phase is approved by the City Engineer.
- 3.14.2. The Construction Manager shall comply with and give notices required by laws, ordinances, rules, regulations and lawful orders of public authorities bearing on performance of the Work, including Construction Manager's or Subcontractor's licenses; neither City nor its agents, nor design consultant, shall be responsible for monitoring Construction Manager's compliance with this requirement.

### **3.15. Construction Schedules**

- 3.15.1. Upon receipt of a Notice to Proceed for a particular Construction Phase, Construction Manager shall promptly prepare and submit a construction schedule for such Construction Phase for City Engineer's review. The schedule must reflect the minimum time required to complete the Work of the Construction Phase, not to exceed Contract Time.
- 3.15.2. Construction Manager shall give 24-hour written notice to City Engineer before commencing work or resuming work where work has been stopped. Construction Manager shall also give the same notice to inspectors.
- 3.15.3. Construction Manager shall incorporate milestones specified in Section 01326 (Construction Sequencing) of the Specifications into the construction schedule. Construction Manager's failure to meet a milestone, as determined by City Engineer, may be considered a material breach of the Contract. Such failure shall not be a material breach of the Contract if Construction Manager has submitted an updated construction schedule reasonably acceptable to the City Engineer under Section 8.1.5 of this Exhibit and is complying therewith.
- 3.15.4. Each month, Construction Manager shall submit to City Engineer a copy of the updated construction schedule indicating actual progress, incorporating applicable changes, and indicating courses of action required to assure completion of each Construction Phase of the Work within Contract Time.
- 3.15.5. Construction Manager shall keep a current schedule of all submittals that correlates with the schedules for each Construction Phase, and shall submit the initial schedule of submittals and any subsequent changes to City Engineer for approval.

### **3.16. Documents And Samples At The Site**

- 3.16.1. Construction Manager shall maintain at the site, and make available to City Engineer, one record copy of Drawings, Specifications, and Modifications. Construction Manager shall maintain the documents in good order and marked currently to record changes and selections made during construction. In addition, Construction Manager shall maintain at the site, approved Shop Drawings, Product Data, Samples, and similar submittals, which will be delivered to City Engineer prior to final inspection as required in Section 9.8.4 of this Exhibit.
- 3.16.2. Construction Manager shall maintain all books, documents, papers, accounting records, and other relevant documentation pursuant to the Work and shall make the books, documents, papers, and accounting records available to representatives of City for review and audits during the Contract term and for the greater of three years following Date of Substantial Completion of each Construction Phase or until all litigation or audits are fully resolved.
- 3.16.3. Construction Manager shall provide to City Attorney all documents and records that City Attorney deems necessary to assist in determining Construction



Manager's compliance with the Contract, with the exception of those documents made confidential by federal or state law or regulation.

**3.17. Manufacturer's Specifications**

- 3.17.1. Construction Manager shall handle, store, protect, and Install Products and perform all Work in the manner required by Product manufacturer. Should the Contract and manufacturer's instructions conflict, Construction Manager shall report conflict to City Engineer for resolution prior to proceeding with the affected portions of the Work.
- 3.17.2. References in the Contract to the manufacturer's specifications, directions, or recommendations, mean manufacturer's current published documents in effect as of date of receipt of a Guaranteed Maximum Price, or in the case of a Modification, as of date of Modification.

**3.18. Shop Drawings, Product Data, And Samples**

- 3.18.1. Shop Drawings, Product Data, and Samples are not part of the Contract. The purpose of Construction Manager submittals is to demonstrate, for those portions of the Work for which submittals are required, the way Construction Manager proposes to conform to information given and design concept expressed in the Contract.
- 3.18.2. Construction Manager shall submit to City Engineer, if required by City Engineer for review the Shop Drawings, Product Data, and Samples, which are required by the Contract. Review by City Engineer is subject to limitations of Section 4.1.4 of this Exhibit. Construction Manager shall transmit the submittals to the City Engineer with reasonable promptness and in a sequence, so as to cause no delay in the Work or in activities of City or of separate contractors. Construction Manager shall transmit submittals in time to allow a minimum of 30 days for City Engineer's review prior to date Construction Manager needs reviewed submittals returned. This time may be shortened for a particular job requirement if approved by City Engineer in advance of submittal.
- 3.18.3. Construction Manager shall certify that the content of submittals conforms to the Contract without exception by affixing Construction Manager's approval stamp and signature. By certifying and submitting Shop Drawings, Product Data, and Samples, Construction Manager represents, and Construction Manager's stamp of approval shall state, that Construction Manager has determined and verified materials, quantities, field measurements, and field construction criteria related to the submittal, and has checked and coordinated information contained within the submittals with requirements of the Contract and for compatibility with other submittals.
- 3.18.4. Construction Manager shall not perform any work requiring submittal and review of Shop Drawings, Product Data, or Samples until the submittal has been returned

with appropriate review decision by the City Engineer. Construction Manager shall perform Work in accordance with the review.

- 3.18.5. If Construction Manager performs any Work requiring submittals prior to review and acceptance of the submittals by City Engineer, such Work is at Construction Manager's risk and City is not obligated to accept work if the submittals are later found to be unacceptable.
- 3.18.6. If, in the opinion of City Engineer, the submittals are incomplete, or demonstrate an inadequate understanding of the Work or lack of review by the Construction Manager, then submittals may be returned to the Construction Manager for correction and resubmittal.
- 3.18.7. Construction Manager shall direct specific attention in writing and on the resubmitted Shop Drawings, Product Data, or Samples to any additional proposed revisions, other than those revisions requested by City Engineer on previous submittals.
- 3.18.8. Construction Manager is not relieved of responsibility for deviations from requirements of the Contract by City Engineer's review or approval of Shop Drawings, Product Data, or Samples unless Construction Manager has specifically informed City Engineer in writing of the deviation at the time of the submittal, and City Engineer has given written approval of the deviation.
- 3.18.9. When professional certification of performance criteria of Products is required by the Contract, City may rely upon accuracy and completeness of the calculations and certifications.
- 3.18.10. For Product colors or textures to be selected by City, Construction Manager shall submit all samples together to allow preparation of a complete selection schedule.
- 3.18.11. Construction Manager shall submit informational submittals, on which City Engineer is not expected to take responsive action, as required by the Contract.
- 3.18.12. Submittals made by Construction Manager which are not required by the Contract may be returned to Construction Manager without action.

### **3.19. Cultural Resources And Endangered Species**

- 3.19.1. Construction Manager shall not remove or disturb, or cause to be removed or disturbed, any historical, archaeological, architectural, or other cultural artifacts, relics, vestiges, remains, or objects of antiquity. If Construction Manager discovers one of these items, Construction Manager shall immediately notify City Engineer and further comply with the requirements of 13 Tex. Admin. Code Chs. 25 and 26 (2002), or successor regulation. Construction Manager shall protect site and cultural resources from further disturbance until professional examination can be made or until clearance to proceed is authorized in writing by City Engineer.

- 3.19.2. Should either threatened or endangered plant or animal species be encountered, Construction Manager shall cease work immediately in the area of encounter and notify City Engineer.

**3.20. Cutting and Patching**

- 3.20.1. Construction Manager is responsible for necessary cutting, fitting, and patching to accomplish the Work and shall suitably support, anchor, attach, match, and trim or seal materials to work of other contractors. Construction Manager shall coordinate the Work with work of other contractors to minimize conflicts, as provided in Article 6 of this Exhibit.
- 3.20.2. Construction Manager shall not endanger work by cutting, digging, or other action, and may not cut or alter work of other contractors except by written consent of City Engineer and affected contractor.
- 3.20.3. If authorized by City, cutting shall be accurately located and neatly done. Unnecessary cutting shall be avoided. Patching shall be done by skilled mechanics experienced in the particular type of work involved. Patching work shall conform to the standards of the Drawings and Specifications where applicable, and where not specified, such work shall conform to the highest standards of the trade. Finished patching in the work of a separate contractor shall be acceptable to the contractor whose work has been patched.
- 3.20.4. Construction Manager shall leave all holes, chases, and other openings in its construction required by other contractors for the installation of their work, provided such openings are accurately located by the party requiring them before the execution of the construction. Construction Manager shall afford other contractors a reasonable opportunity to locate such openings.

**3.21. Cleaning**

- 3.21.1. Construction Manager shall perform daily cleanup of all dirt, debris, scrap materials and other disposable items resulting from Construction Manager's operations, whether on-site or off- site. Unless otherwise authorized in writing by City Engineer, Construction Manager shall keep all streets, access streets, driveways, areas of public access, walkways, and other designated areas clean and open at all times.
- 3.21.2. Failure of Construction Manager to maintain a clean site, including access streets, is the basis for City Engineer to issue a Notice of Noncompliance. Should compliance not be attained within the time period in the Notice of Noncompliance, City Engineer may authorize necessary cleanup to be performed by others and the cost of the cleanup will be deducted from monies due Construction Manager.
- 3.21.3. Construction Manager shall legally dispose off site all waste products and debris resulting from Construction Manager's on site and off site operations.

**3.22. Sanitation**

3.22.1. Construction Manager shall provide and maintain sanitary facilities at site for use of all construction forces under the Contract. Newly-constructed or existing sanitary facilities may not be used by Construction Manager.

**3.23. Access to Work and To Information**

3.23.1. Construction Manager shall provide City, City's design consultant(s), testing laboratories, and governmental agencies that have jurisdictional interests, access to the Work in preparation and in progress wherever located. Construction Manager shall provide proper and safe conditions for the access.

3.23.2. If required by City Engineer, Construction Manager shall furnish information concerning character of Products and progress and manner of the Work, including information necessary to determine cost of the Work, such as number of employees, pay of employees, and time employees worked on various classes of the Work.

**3.24. Trade Secrets**

3.24.1. Construction Manager will not make any claim of ownership of trade secrets as to Products used in the Work, or preparation of any mixture for the Work. City Engineer will at all times have the right to demand and Construction Manager shall furnish information concerning materials or samples of ingredients of any materials used, or proposed to be used, in preparation of concrete placed or other work to be done. Mixtures, once agreed on, shall not be changed in any manner without knowledge and consent of City Engineer. City will make its best efforts to protect confidentiality of proprietary information.

**3.25. Release and Indemnification**

3.25.1. **CONSTRUCTION MANAGER AGREES TO AND SHALL RELEASE THE CITY, ITS AGENTS, EMPLOYEES, OFFICERS AND LEGAL REPRESENTATIVES (COLLECTIVELY THE "CITY") FROM ALL LIABILITY FOR INJURY, DEATH, DAMAGE, OR LOSS TO PERSONS OR PROPERTY SUSTAINED IN CONNECTION WITH OR INCIDENTAL TO PERFORMANCE UNDER THIS AGREEMENT, EVEN IF THE INJURY, DEATH, DAMAGE, OR LOSS IS CAUSED BY THE CITY'S CONCURRENT (BUT NOT SOLE) NEGLIGENCE AND/OR THE CITY'S STRICT PRODUCT'S LIABILITY OR STRICT STATUTORY LIABILITY. CONSTRUCTION MANAGER HEREBY COVENANTS AND AGREES NOT TO SUE THE CITY FOR ANY CLAIMS, DEMANDS, OR CAUSES OF ACTION DIRECTLY OR INDIRECTLY RELATED TO ITS RELEASE UNDER THIS SECTION. FOR THE AVOIDANCE OF DOUBT, THIS COVENANT NOT TO SUE DOES NOT APPLY TO CLAIMS FOR BREACH OF THIS AGREEMENT.**

3.25.2. **CONSTRUCTION MANAGER AGREES TO AND SHALL DEFEND, INDEMNIFY, AND HOLD THE CITY, ITS AGENTS, EMPLOYEES, OFFICERS, AND LEGAL REPRESENTATIVES (COLLECTIVELY THE “CITY”) HARMLESS FOR ALL CLAIMS, CAUSES OF ACTION, LIABILITIES, FINES, AND EXPENSES (INCLUDING, WITHOUT LIMITATION, ATTORNEYS’ FEES, COURT COSTS, AND ALL OTHER DEFENSE COSTS AND INTEREST) FOR INJURY, DEATH, DAMAGE, OR LOSS TO PERSONS OR PROPERTY SUSTAINED IN CONNECTION WITH OR INCIDENTAL TO PERFORMANCE UNDER THE CONTRACT INCLUDING, WITHOUT LIMITATION, THOSE CAUSED BY:**

3.25.2.1. **CONSTRUCTION MANAGER’S AND/OR ITS AGENTS’, EMPLOYEES’, OFFICERS’, DIRECTORS’, CONTRACTORS’, OR SUBCONTRACTORS’ (COLLECTIVELY IN NUMBERED SECTION 3.25.2.1 OF THIS EXHIBIT THROUGH 3.25.2.3, “CONSTRUCTION MANAGER”) ACTUAL OR ALLEGED NEGLIGENCE OR INTENTIONAL ACTS OR OMISSIONS;**

3.25.2.2. **THE CITY’S AND CONSTRUCTION MANAGER’S ACTUAL OR ALLEGED CONCURRENT NEGLIGENCE, WHETHER CONSTRUCTION MANAGER IS IMMUNE FROM LIABILITY OR NOT; AND**

3.25.2.3. **THE CITY’S AND CONSTRUCTION MANAGER’S ACTUAL OR ALLEGED CONCURRENT STRICT PRODUCTS LIABILITY, WHETHER CONSTRUCTION MANAGER IS IMMUNE FROM LIABILITY OR NOT.**

**CONSTRUCTION MANAGER SHALL DEFEND, INDEMNIFY, AND HOLD THE CITY HARMLESS DURING THE TERM OF THE CONTRACT AND FOR FOUR YEARS AFTER THE CONTRACT TERMINATES. CONSTRUCTION MANAGER SHALL NOT INDEMNIFY THE CITY FOR THE CITY’S SOLE NEGLIGENCE.**

3.25.3. **THE INDEMNIFICATION OBLIGATIONS UNDER SECTION 3.25.2 OF THIS EXHIBIT SHALL NOT BE LIMITED IN ANY WAY BY THE LIMITS OF ANY INSURANCE COVERAGE OR ANY LIMITATION ON THE AMOUNT OR TYPE OF DAMAGES, COMPENSATION, OR BENEFITS PAYABLE BY, FOR, OR TO CONSTRUCTION MANAGER OR ANY SUBCONTRACTOR, SUPPLIER, OR ANY OTHER INDIVIDUAL OR ENTITY UNDER ANY INSURANCE POLICY, WORKERS’ COMPENSATION ACTS, DISABILITY BENEFIT ACTS, OR OTHER EMPLOYEE BENEFITS ACTS.**

3.25.4. **NOTWITHSTANDING ANYTHING TO THE CONTRARY, THE LIABILITY OF CONSTRUCTION MANAGER FOR THE CITY’S CONCURRENT NEGLIGENCE SHALL NOT EXCEED \$1,000,000.**

**3.26. Release and Indemnification – Patent, Copyright, Trademark, and Trade Secret Infringement**

3.26.1. **UNLESS OTHERWISE SPECIFICALLY REQUIRED BY THE CONTRACT, CONSTRUCTION MANAGER AGREES TO AND SHALL RELEASE AND DEFEND, INDEMNIFY, AND HOLD HARMLESS THE CITY, ITS AGENTS, EMPLOYEES, OFFICERS, AND LEGAL REPRESENTATIVES (COLLECTIVELY THE “CITY”) FROM ALL CLAIMS OR CAUSES OF ACTION BROUGHT AGAINST THE CITY BY ANY PARTY, INCLUDING CONSTRUCTION MANAGER, ALLEGING THAT THE CITY’S USE OF ANY EQUIPMENT, SOFTWARE, PROCESS, OR DOCUMENTS CONSTRUCTION MANAGER FURNISHES DURING THE TERM OF THE CONTRACT INFRINGES ON A PATENT, COPYRIGHT, OR TRADEMARK, OR MISAPPROPRIATES A TRADE SECRET. CONSTRUCTION MANAGER SHALL PAY, SUBJECT TO REIMBURSEMENT IF ALLOWED UNDER THE AGREEMENT, ALL COSTS (INCLUDING, WITHOUT LIMITATION, ATTORNEYS’ FEES, COURT COSTS, AND ALL OTHER DEFENSE COSTS, AND INTEREST) AND DAMAGES AWARDED.**

3.26.2. **CONSTRUCTION MANAGER SHALL NOT SETTLE ANY CLAIM ON TERMS WHICH PREVENT THE CITY FROM USING THE EQUIPMENT, SOFTWARE, PROCESS, OR PRODUCT WITHOUT THE CITY ENGINEER’S PRIOR WRITTEN CONSENT.**

3.26.3. **UNLESS OTHERWISE SPECIFICALLY REQUIRED BY THE CONTRACT, WITHIN 60 DAYS AFTER BEING NOTIFIED OF THE CLAIM, CONSTRUCTION MANAGER SHALL, AT ITS OWN EXPENSE, EITHER:**

3.26.3.1. **OBTAIN FOR THE CITY THE RIGHT TO CONTINUE USING THE EQUIPMENT, SOFTWARE, PROCESS, OR PRODUCT, OR**

3.26.3.2. **IF BOTH PARTIES AGREE, REPLACE OR MODIFY THEM WITH COMPATIBLE AND FUNCTIONALLY EQUIVALENT PRODUCTS.**

**IF NONE OF THESE ALTERNATIVES IS REASONABLY AVAILABLE, THE CITY MAY RETURN THE EQUIPMENT, SOFTWARE, OR PRODUCT, OR DISCONTINUE THE PROCESS, AND CONSTRUCTION MANAGER SHALL REFUND THE PURCHASE PRICE.**

**3.27. Indemnification Procedures**

3.27.1. *Notice of Indemnification Claims.* If City or Construction Manager receives notice of any claim or circumstances which could give rise to an indemnified loss, the

receiving party shall give written notice to the other Party within 10 days. The notice must include the following:

- 3.27.1.1. a description of the indemnification event in reasonable detail,
- 3.27.1.2. the basis on which indemnification may be due, and
- 3.27.1.3. the anticipated amount of the indemnified loss.

This notice does not estop or prevent City from later asserting a different basis for indemnification for a different amount of indemnified loss than that indicated in the initial notice. If City does not provide this notice within the 10-day period, it does not waive any right to indemnification except to the extent that Construction Manager is prejudiced, suffers loss, or incurs expense because of the delay.

3.27.2. *Defense of Indemnification Claims.*

3.27.2.1. Assumption of Defense. Construction Manager may assume the defense of the claim at its own expense with counsel chosen by it that is reasonably satisfactory to City. Construction Manager shall then control the defense and any negotiations to settle the claim. Within 10 days after receiving written notice of the indemnification request, Construction Manager must advise City as to whether or not it will defend the claim. If Construction Manager does not assume the defense, City shall assume and control the defense, and all defense expenses constitute an indemnified loss.

3.27.2.2. Continued Participation. If Construction Manager elects to defend the claim, City may, at its own expense, retain separate counsel to participate in, but not control, the defense and to participate in, but not control, any settlement negotiations. Construction Manager may settle the claim without the consent or agreement of City, unless it:

3.27.2.2.1. would result in injunctive relief or other equitable remedies or otherwise require City to comply with restrictions or limitations that adversely affect City ;

3.27.2.2.2. would require City to pay amounts that Construction Manager does not fund in full; or

3.27.2.2.3. would not result in City's full and complete release from all liability to the plaintiffs or claimants who are parties to or otherwise bound by the settlement.

**3.28. Preservation Of Contracting Information**

3.28.1. The requirements of Subchapter J, Chapter 552, Texas Government Code, may apply to this Agreement and the Construction Manager agrees that this Agreement can be terminated if the Construction Manager knowingly or intentionally fails to

comply with a requirement of that subchapter. If the requirements of Subchapter J, Chapter 552, Texas Government Code, apply to this Agreement, then for the duration of this Agreement (including the initial term, any renewal terms, and any extensions), Construction Manager shall preserve all Contracting Information, as defined by Section 552.003 of the Texas Government Code, related to this Agreement as provided by the records retention requirements applicable to the City pursuant to federal or state law or regulation, city ordinance or city policy, which record retention requirements include but are not limited to those set forth in Chapters 201 and 205 of the Texas Local Government Code and Texas Administrative Code Title 13, Chapter 7. Within five business days after receiving a request from the Director, Construction Manager shall provide any Contracting Information related to this Agreement that is in the custody or possession of Construction Manager. Upon the expiration or termination of this Agreement, Construction Manager shall, at the Director’s election, either (a) provide, at no cost to the City, all Contracting Information related to this Agreement that is in the custody or possession of Construction Manager, or (b) preserve the Contracting Information related to this Agreement as provided by the records retention requirements applicable to the City pursuant to federal or state law or regulation, city ordinance or city policy.

- 3.28.2. If Construction Manager fails to comply with any one or more of the requirements of this Section, PRESERVATION OF CONTRACTING INFORMATION, or Subchapter J, Chapter 552, Texas Government Code, then, in accordance with and pursuant to the processes and procedures set forth in Sections 552.373 and 552.374 of the Texas Government Code, the City Engineer shall provide notice to the Construction Manager and may terminate this Agreement. To effect final termination, the City Engineer must notify Construction Manager in writing with a copy of the notice to the City’s Chief Procurement Officer. After receiving the notice, Construction Manager shall, unless the notice directs otherwise, immediately discontinue all services under this Agreement, and promptly cancel all orders or subcontracts chargeable to this Agreement.

**4. ADMINISTRATION OF THE CONTRACT**

**4.1. Contract Administration**

- 4.1.1. City Engineer will provide administration of the Contract, and, subject to Section 7.1.2 of this Exhibit, City Engineer is authorized to issue Change Orders, Work Change Directives, and Minor Changes in the Work.
- 4.1.2. City Engineer may act through its design consultant(s), or Inspector. When the term “City Engineer” is used in the Contract, action by City Engineer is required unless City Engineer delegates his authority in writing.
- 4.1.3. City does not have control over or charge of, and is not responsible for, supervision, construction, and safety procedures enumerated in Section 3.3 of this Exhibit. City



does not have control over or charge of and is not responsible for acts or omissions of Construction Manager, Subcontractors, or Suppliers.

- 4.1.4. City Engineer and City's design consultant(s) may attend project meetings and visit the site to observe progress and quality of the Work. City Engineer and its design consultant(s) are not required to make exhaustive or continuous on-site inspections or to check quality or quantity of the Work.
- 4.1.5. City Engineer will review and approve or take other appropriate action on Construction Manager's submittals, but only for limited purpose of checking for conformance with information given and design concept expressed in the Contract.
  - 4.1.5.1. City Engineer's review of the submittals is not conducted for purpose of determining accuracy and completeness of other details, such as dimensions and quantities, or for substantiating instructions for installation or performance of Products, all of which remain the responsibility of Construction Manager.
  - 4.1.5.2. City Engineer's and City's design consultant's review and/or approval of submittals shall not relieve Construction Manager of Construction Manager's obligations to perform the Work in strict conformance with the Contract, including without limitation Construction Manager's obligations under Sections 3.3, 3.10, 3.12, 3.16 and 3.18 of these Document 00700-General Conditions and shall not constitute approval of safety precautions or, unless otherwise specifically stated by City Engineer or City's design consultant(s), of any construction means, methods, techniques, sequences, or procedures. City Engineer's or City's design consultant's review and/or approval of a specific item shall not indicate approval of an assembly of which the item is a component.
  - 4.1.5.3. City's design consultant's decisions on matters relating to aesthetic effect shall be final if consistent with the intent expressed in the Contract.
- 4.1.6. Based on field observations and evaluations, City Engineer will process Construction Manager's progress payments, certify amounts due Construction Manager, and issue Certificates for Payment in the amount certified.
- 4.1.7. Construction Manager shall deliver to City Engineer for his review and records, written warranties and related documents required by the Contract and assembled by Construction Manager.
- 4.1.8. Upon written request by Construction Manager or City, City Engineer will resolve matters of interpretation of or performance of the Contract, which are not Claims. City Engineer's decisions are final and binding on the Parties.
- 4.1.9. City Engineer may reject Work that does not conform to the Contract.

- 4.1.10. When City Engineer considers it necessary to implement the intent of the Contract, City Engineer may require additional inspection or testing of work in accordance with Sections 13.6.3 and 13.6.4 of the Specifications, whether such work is fabricated, Installed, or completed.
- 4.1.11. Except as expressly stated in this Article or other provisions of this Contract, the City owes no duty to the Construction Manager or any subcontractor.

**4.2. Communications In Administration Of The Contract**

- 4.2.1. Except as otherwise provided in the Contract or when authorized by City Engineer in writing, Construction Manager shall communicate with City Engineer. Construction Manager shall communicate with City's design consultant(s), design consultant's subconsultants, and separate contractors through City Engineer. City Engineer will communicate with Subcontractors and Suppliers through Construction Manager, but City Engineer is entitled to communicate directly with Subcontractors and Suppliers at any time to obtain information.

**4.3. Claims And Disputes**

- 4.3.1. *Documentation by City Engineer:* Construction Manager shall submit Claims, including those alleging an error or omission by City or City's design consultant(s), to City Engineer.
- 4.3.2. *Decision of City Engineer:* Upon submission of Claim by Construction Manager, City Engineer will resolve Claims in accordance with Section 4.4 of this Exhibit.
- 4.3.3. *Time Limits on Claims:* Claims by Construction Manager shall be made within 90 days after the occurrence of the event giving rise to such Claim. Claims by Construction Manager not made within the time required in the required manner shall be deemed waived by Construction Manager.
- 4.3.4. *Continuing the Contract Performance:* Pending final resolution of a Claim including referral to non-binding mediation, unless otherwise agreed in writing, Construction Manager shall proceed diligently with the performance of the Contract and City will continue to make payments in accordance with the Contract.
  - 4.3.4.1. Pending final resolution of a Claim including referral to non-binding mediation, Construction Manager is responsible for safety and protection of physical properties and conditions at the Project site.
- 4.3.5. *Claims for Concealed or Unknown Conditions:* Concealed or unknown physical conditions may include utility lines, other man-made structures, storage facilities, Pollutants and Pollutant Facilities, and the like, but do not include conditions discovered or that should have been discovered through reasonable visual site inspection, geotechnical testing, geotechnical information available to Construction Manager, or otherwise, or that do not materially differ from those indicated in the Contract, or information provided by City or those that should reasonably be

anticipated, arising from Construction Manager's operations, or failure of Construction Manager to properly protect and safeguard subsurface facilities, or that do not materially differ from those indicated in the Contract, or information provided by City or those that should reasonably be anticipated. Subject to the foregoing, concealed conditions also include naturally-occurring soil conditions outside the range of soil conditions identified through geotechnical investigations, but do not include conditions arising from groundwater, rain, or flood.

4.3.5.1. If conditions are encountered at the site which are Underground Facilities or otherwise concealed or unknown conditions as defined in Section 4.3.5 of this Exhibit, then Construction Manager will give written notice to City Engineer no later than five days after Construction Manager's first observation of the condition and before condition is disturbed. Construction Manager's failure to provide notice constitutes a waiver of a Claim.

4.3.5.2. City Engineer will promptly investigate concealed or unknown conditions. If City Engineer determines that conditions at the site are not materially different and that no change in the Guaranteed Maximum Price or Contract Time is justified, City Engineer will notify Construction Manager in writing, stating reasons. If City Engineer determines the conditions differ materially and cause increase or decrease in Construction Manager's cost or time required for performance of part of the Work, City Engineer will recommend an adjustment in the Guaranteed Maximum Price, or Contract Time, or all, as provided in Article 7 of this Exhibit. Opposition by a Party to City Engineer's determination must be made within 21 days after City Engineer has given notice of the decision. If the Parties cannot agree on adjustment to the Guaranteed Maximum Price or Contract Time, adjustment is subject to further proceedings pursuant to Section 4.4 of this Exhibit.

4.3.6. *Claims for Additional Cost:* If Construction Manager wishes to make a Claim for increase in Guaranteed Maximum Price, Construction Manager shall give written notice before proceeding with work for which Construction Manager intends to submit a Claim. Prior notice is not required for Claims relating to an emergency endangering life or property arising under Section 10.4 of this Exhibit.

4.3.6.1. Construction Manager may file a Claim in accordance with Section 4.4 of this Exhibit if Construction Manager believes it has incurred additional costs, for the following reasons:

4.3.6.1.1. written interpretation of City Engineer contrary to the terms of the Contract;

4.3.6.1.2. order by City Engineer to stop the Work when Construction Manager is not at fault; suspension of the

Work by City Engineer when Construction Manager is not at fault;

4.3.6.1.3. errors or omissions in the Drawings or Specifications that are not the responsibility of Construction Manager; or

4.3.6.1.4. City's non-compliance with another provision of the Contract.

4.3.6.2. No increase in the Guaranteed Maximum Price is allowed for delays or hindrances to the Work, except for direct and unavoidable extra costs to Construction Manager that qualify as a Cost of the Work caused by failure of City to perform City's obligations under the Contract. Any increase claimed is subject to the provisions of Section 4.4 of this Exhibit and Article 7 of this Exhibit.

4.3.6.3. City is not liable for Claims for delay when Date of Substantial Completion of a Construction Phase occurs prior to expiration of Contract Time.

4.3.7. *Claims for Additional Time:* If Construction Manager wishes to make a Claim for an increase in Contract Time, Construction Manager shall give written notice as provided in Section 8.2 of this Exhibit. In case of continuing delay, only one Claim is necessary.

#### **4.4. Resolution Of Claims And Disputes**

4.4.1. City Engineer will review Claims and take one or more of the following preliminary actions within 30 days of receipt of Claim:

4.4.1.1. submit a suggested time to meet and discuss the Claim with claimant;

4.4.1.2. reject Claim, in whole or in part, stating reasons for rejection;

4.4.1.3. recommend approval of the Claim by the other Party;

4.4.1.4. suggest a compromise; or

4.4.1.5. take other actions as City Engineer deems appropriate to resolve the Claim.

4.4.2. City Engineer may request additional supporting data from claimant. Party making Claim shall, within 10 days after receipt of City Engineer's request, submit additional supporting data requested by City Engineer.

4.4.3. At any time prior to rendering a written decision regarding a Claim, City Engineer may refer Claim to non-binding mediation. If Claim is resolved, City Engineer will prepare and obtain all appropriate documentation.

4.4.4. If Claim is not referred to non-binding mediation, City Engineer will render a written decision within 75 days of receipt of the Claim, or a time mutually agreed upon by the Parties in writing. City Engineer may notify Surety and request Surety's assistance in resolving a Claim. City Engineer's decision is final and binding on the Parties.

**4.5. Condition Precedent To Suit; Waiver Of Attorney Fees And Interest**

4.5.1. A final decision by the City Engineer is a condition precedent to file suit in any jurisdiction for a claim made in connection with this Contract.

4.5.2. Neither the City nor Construction Manager may recover attorney fees for any claim brought in connection with this Contract.

4.5.3. Neither the City nor the Construction Manager may recover interest for any damages claim brought in connection with this Contract except as allowed by Texas Local Government Code Chapter 2251.

**4.6. Interim Payment Waiver & Release**

4.6.1. In accordance with section 4.3 of this Exhibit, the Construction Manager shall use due diligence in the discovery and submission of any Claim against the City related to the Construction Manager's work.

4.6.2. The Construction Manager shall submit any Claim to the City not later than the 90th day after the occurrence of the event giving rise to the Claim.

4.6.3. Any failure to timely comply with the requirements of section 4.6.2 of this Exhibit waives and releases any Claim when the Construction Manager submits an application for payment after the 90th day.

4.6.4. This waiver does not cover any retainage. In case of any conflict of law, this language shall be revised to the minimum extent necessary to avoid legal conflict. This waiver is made specifically for the benefit of the City.

**5. SUBCONTRACTORS AND SUPPLIERS**

**5.1. Award Of Subcontracts Other Contracts For Portions Of The Work**

5.1.1. Construction Manager may not contract with a Subcontractor, Supplier, person, or entity that City Engineer has made a reasonable and timely objection to.

- 5.1.2. If City Engineer has a reasonable objection to person proposed by Construction Manager, Construction Manager shall propose another with whom City Engineer has no reasonable objection.
- 5.1.3. Construction Manager shall execute contracts with approved Subcontractors and Suppliers, persons or entities before the Subcontractors, Suppliers, persons or entity begins work under the Contract.
- 5.1.4. Construction Manager shall notify City Engineer in writing of any proposed change of Subcontractor or Supplier, person or entity previously approved by City Engineer.
- 5.1.5. Construction Manager shall make timely payments to Subcontractors, Suppliers, persons and entities for performance of the Contract. **CONSTRUCTION MANAGER SHALL PROTECT, DEFEND, AND INDEMNIFY CITY FROM ANY CLAIMS OR LIABILITY ARISING OUT OF CONSTRUCTION MANAGER'S FAILURE TO MAKE PAYMENTS.** Disputes relating to payment of MWBE, PDBE and SBE Subcontractors, Suppliers, persons, or entities will be submitted to mediation in the same manner as other disputes under those subcontracts. Failure of Construction Manager to comply with decisions of mediator may be determined by City Engineer a material breach leading to termination of the Contract.

**5.2. Construction Manager Responsibility For Subcontractors**

- 5.2.1. Construction Manager is responsible to City, as may be required by laws and regulations, for all acts and omissions of Subcontractors, Suppliers, and other persons and organizations performing or furnishing any of the Work under direct or indirect contract with Construction Manager.
- 5.2.2. Construction Manager shall make available to each proposed Subcontractor, prior to execution of subcontract, copies of the Contract to which Subcontractor is bound by this Section
- 5.2.3. 5.2. Construction Manager shall notify Subcontractor of any terms of proposed subcontract which may be at variance with the Contract.
- 5.2.4. City Engineer's approval of Subcontractor or Suppliers does not relieve Construction Manager of its obligation to perform, or to have performed to the full satisfaction of City, the Work required by the Contract.
- 5.2.5. Unless there is a contractual relationship between Construction Manager and a Subcontractor or Supplier to the contrary, Construction Manager shall withhold no more retainage from Subcontractors or Suppliers than City withholds from Construction Manager under this Contract. However, once a Subcontractor or Supplier completes performance, Construction Manager shall release all retainage to that Subcontractor or Supplier regardless if City continues to retain under this Contract.

- 5.2.6. Prior to a Subcontractor or Supplier commencing performance for Construction Manager, Construction Manager shall meet with that Subcontractor or Supplier to provide instructions on invoicing procedures, dispute resolution procedures, and statutory rights, such as Section 2253 of the Texas Government Code. Subcontractors and Suppliers must certify to the City Engineer that Construction Manager has fulfilled the requirements of this Section.

## **6. CONSTRUCTION BY CITY OR BY SEPARATE CONTRACTORS**

### **6.1. The City's Right To Perform Construction And To Award Separate Contracts**

- 6.1.1. City shall have the right to perform on-site construction operations related to the Work and as part of the Project with its own forces or with separate contractors.

### **6.2. Coordination**

- 6.2.1. City will coordinate activities of City's workforce and of each separate contractor with work of Construction Manager, and Construction Manager shall cooperate with City and separate contractors.
- 6.2.2. Construction Manager shall participate with other separate contractors and City in reviewing their construction schedules when directed to do so by the City Engineer. Construction Manager shall make revisions to construction schedule and Guaranteed Maximum Price deemed necessary after joint review and mutual agreement. Construction schedules shall then constitute schedules to be used by Construction Manager, separate contractors, and City, until subsequently revised.
- 6.2.3. Construction Manager shall afford to City and separate contractors reasonable opportunity for introduction and storage of their materials and equipment, and for performance of their activities.
- 6.2.4. If part of Construction Manager's work depends on proper execution of construction or operations by City or a separate contractor, Construction Manager shall, prior to proceeding with that portion of the Work, inspect the other work and promptly report to City Engineer apparent discrepancies or defects in the other construction that would render it unsuitable for the proper execution of the Work. Failure of Construction Manager to report apparent discrepancies or defects in the other construction shall constitute acknowledgment that City's or separate contractor's completed or partially completed construction is fit and proper to receive Construction Manager's work, except as to discrepancies or defects not then reasonably discoverable.

### **6.3. Mutual Responsibility**

- 6.3.1. The responsible Party bears the costs caused by delays due to improperly timed activities, or by nonconforming construction.

- 6.3.2. Construction Manager shall promptly remedy damage caused by Construction Manager to completed or partially completed construction or to property of City or separate contractor.
- 6.3.3. Claims or disputes between Construction Manager and other City contractors, or subcontractors of other City contractors, working on the Project shall be submitted to binding mediation in accordance with Construction Industry Arbitration and Mediation Rules of the American Arbitration Association upon demand by any party to the dispute or by City. City is not required to arbitrate and is not bound by the result of any such mediation.

**6.4. City's Right To Clean Up**

- 6.4.1. If a dispute arises among Construction Manager, separate contractors, and City as to responsibility under their respective contracts for maintaining premises and surrounding area free from waste materials and rubbish as described in Section 3.21 of this Exhibit, City may clean up and allocate cost among those responsible, as determined by City Engineer.

**7. CHANGES IN THE WORK**

**7.1. Changes**

- 7.1.1. Changes in scope of the Work, subject to limitations in Article 7 of this Exhibit and elsewhere in the Contract, may be accomplished without invalidating the Contract, or without notifying Surety by:
  - 7.1.1.1. Change Order;
  - 7.1.1.2. Work Change Directive; or
  - 7.1.1.3. Minor Change in the Work.
- 7.1.2. The following types of Change Orders require City Council approval:
  - 7.1.2.1. a single Change Order that exceeds ten percent of the Guaranteed Maximum Price,
  - 7.1.2.2. a Change Order which, when added to previous Change Orders, exceeds ten percent of the Guaranteed Maximum Price,
  - 7.1.2.3. a Change Order, in which the total value of increases outside of the general scope of work approved by City Council, when added to increases outside the general scope of work approved by City Council in previous Change Orders, exceeds 40 percent of the Guaranteed Maximum Price, even if the net increase to the Guaranteed Maximum Price is ten percent or less. In this context, "increase" means an increase in quantity resulting from the addition of locations not within the scope



of work approved by City Council, or the addition of types of goods or services not bid as unit price items.

- 7.1.3. Construction Manager shall proceed promptly to perform changes in the Work provided in Modifications, unless otherwise stated in the Modification.

**7.2. Work Change Directives**

- 7.2.1. A Work Change Directive cannot change the Guaranteed Maximum Price or Contract Time, but is evidence that the Parties agree that a change, ordered by directive, will be incorporated in a subsequently issued Change Order as to its effect, if any, on the Guaranteed Maximum Price or the Contract Time.
- 7.2.2. Failure by Construction Manager to commence work identified in a Work Change Directive within the time specified by City Engineer, or to complete the work in a reasonable period of time, may be determined by City Engineer to be a material breach of the Contract.
- 7.2.3. A Work Change Directive is used in the absence of total agreement of the terms of a Change Order. Interim payments are made in accordance with Section 9.3.1 of this Exhibit. Construction Manager may include a request for payment for undisputed Work under a Work Change Directive with Applications for Payment submitted in accordance with the Contract.
- 7.2.4. If Construction Manager signs a Work Change Directive, then Construction Manager agrees to its terms including adjustment in the Guaranteed Maximum Price and Contract Time or method for determining them. Agreement by the Parties to adjustments in the Guaranteed Maximum Price or Contract Time shall immediately be recorded as a Change Order.
- 7.2.5. City Engineer, by Work Change Directive, may direct Construction Manager to take measures as necessary to expedite construction to achieve Date of Substantial Completion on or before expiration of Contract Time. When the Work is expedited solely for convenience of City and not due to Construction Manager's failure to prosecute timely completion of the Work, then Construction Manager is entitled to an adjustment in the Guaranteed Maximum Price equal to actual Cost of the Work described in Section 4.2.2 of the Agreement. The Construction Manager's agreed to fee, as defined in Section 2.4 of the Agreement, shall be applied to the incremental increase in the Cost of the Work, if any, resulting from any such Work Change Directive.

**7.3. Adjustments In Contract Time Or Guaranteed Maximum Price**

- 7.3.1. Adjustments in the Guaranteed Maximum Price or Contract Time shall be accomplished only by Change Order after the parties have agreed to amending the approved GMP Proposal in Article 7 of this Exhibit and under Article 4 of the Agreement. All changes must be documented with properly itemized and supported by sufficient data to permit evaluation.

7.3.2. If the City Engineer deletes or makes a change which results in a net decrease in the GMP, City is entitled to a credit by Construction Manager in the GMP and the Cost of the Work.

7.3.3. Unless otherwise provided in the Contract, maximum allowances for overhead and profit due to changes in the Work, whether additive or deductive, are limited by the following:

7.3.3.1. to Construction manager for change in the Work performed by the Construction manager or its subcontractors: the percentage set out in the definition of Construction phase Fee in the Agreement,

7.3.3.2. to first tier Subcontractors for change in the Work performed by its Subcontractors: 10% Overhead and 0% Profit.

7.3.3.3. to first tier Subcontractors for change in the Work performed by their respective firms: 10% Overhead and 5% Profit.

#### **7.4. Minor Changes In The Work**

7.4.1. A Minor Change in Work is binding on the Parties. Construction Manager shall acknowledge, in a written form acceptable to City Engineer, that there is no change in Contract Time or Guaranteed Maximum Price and shall carry out the written orders promptly.

#### **7.5. Changes In Applicable Law**

7.5.1. To the extent that a change in Applicable Law enacted after the Guaranteed Maximum Price for an affected Phase is agreed upon affects to a material extent Construction Manager's time or cost of performing the Work for the affected Construction Phase, Construction Manager shall give City Engineer written notice within 90 Days of the effective date of such a change in Applicable Law, setting forth the details of the change in Applicable Law and Construction Manager's good faith determination of its impact on Construction Manager's performance obligations under the Contract. The City Engineer will investigate such change in Applicable Law and, if the City Engineer determines that it causes an increase or decrease in Construction Manager's cost of, or time required for, performance of the Work for the affected Construction Phase and that the notice was given timely, City and Construction Manager shall enter into a Change Order in accordance with the provisions of Article 7 of this Exhibit .

### **8. TIME**

#### **8.1. Progress And Completion**

8.1.1. Time is of the essence in the Contract. By executing a Guaranteed Maximum Price and any amendment or change order, as determined by the City, Construction Manager agrees that Contract Time is a reasonable period for performing the Work.

- 8.1.2. *Computation of Time:* In computing any period of time prescribed or allowed by the Document 00700-General Conditions, the day of the act, event, or default after which designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Sunday or Legal Holiday, in which event the period runs until end of the next day that is not a Sunday or Legal Holiday. Sundays and Legal Holidays are considered to be days and are to be included in all other time computations relative to Contract Time.
- 8.1.2.1. Construction Manager shall provide City Engineer an accounting of inclement weather delay days.
- 8.1.2.2. City Engineer may grant an extension of Contract Time due to inclement weather where the Construction Manager establishes an actual delay impacting the critical path of the Construction Schedule and otherwise complies with the requirements of Article 8 of this Exhibit.
- 8.1.3. Construction Manager may not commence the Construction Phase Work prior to the effective date of insurance and Bonds required by Article 11 of this Exhibit.
- 8.1.4. Construction Manager shall proceed expeditiously and without interruption, with adequate forces, and shall achieve Substantial Completion within the Contract Time.
- 8.1.5. Should progress of the Work fall behind construction schedule, except for reasons stated in Section 8.2.1 of this Exhibit, Construction Manager shall promptly submit at the request of City Engineer, updated construction schedule to City Engineer for approval. Construction Manager's failure to submit updated schedule may, at City Engineer's discretion, constitute a material breach of the Contract. Construction Manager shall take action necessary to restore progress by working the hours, including night shifts and lawful overtime operations as necessary, to achieve Date of Substantial Completion within Contract Time.
- 8.1.6. Except in connection with safety or protection of persons or the Work or property at the site or adjacent to the site, and except as otherwise indicated in the Contract, all the Work at the site will be performed Monday through Saturday between the hours of 7:00 a.m. and 7:00 p.m. Construction Manager shall not perform work between 7:00 p.m. and 7:00 a.m., on a Sunday, or on a Legal Holiday, without giving City Engineer 24 hour prior written notice and receiving written consent of City Engineer, which consent shall not unreasonably be withheld.

## **8.2. Delays And Extensions Of Time**

- 8.2.1. Construction Manager may request extension of Contract Time for a delay in performance of work that arises from causes beyond Construction Manager's control and without fault or negligence of Construction Manager. Examples of these causes are:
- 8.2.1.1. acts of God or of the public enemy,

- 8.2.1.2. acts of government in its sovereign capacity,
  - 8.2.1.3. fires,
  - 8.2.1.4. floods,
  - 8.2.1.5. epidemics,
  - 8.2.1.6. quarantine restrictions,
  - 8.2.1.7. strikes,
  - 8.2.1.8. freight embargoes,
  - 8.2.1.9. unusually severe weather; and
  - 8.2.1.10. discovery of Pollutants or Pollutant Facilities at the site.
- 8.2.2. For any reason other than those listed in Section 4.3.6.2 of this Exhibit, if the Construction Manager's work is delayed in any manner or respect, the Construction Manager shall have no claim for damages and shall have no right of additional compensation from the City by reason of any delay or increased expense to the Construction Manager's work, except for an extension of time as provided in this provision.
- 8.2.3. Construction Manager may request and may be entitled to an extension of Contract Time for delay only if:
- 8.2.3.1. delay is not caused by failure of Construction Manager or any of its Subcontractors or Suppliers to perform (or cause to be performed) or make progress for a cause within its control; and
  - 8.2.3.2. cause of the delay was not reasonably anticipated and is beyond control of Construction Manager; and
  - 8.2.3.3. the delay has been mitigated by all reasonable available efforts; and
  - 8.2.3.4. Construction Manager can fully document and prove the impact of the event on Construction Manager's critical path of planned Work in the Project Schedule.
- 8.2.4. Claims relating to Contract Time must be made in accordance with Section 4.3.7 of this Exhibit.
- 8.2.5. Claims for extending or shortening Contract Time are based on written notice promptly delivered by Construction Manager to City Engineer. A Claim must accurately describe occurrence generating the Claim, and a statement of probable effect on progress of the Work.

- 8.2.6. Claims for extension of Contract Time are considered only when a Claim is filed within the time limits stated in Section 4.3.3 of this Exhibit.
- 8.2.7. Written notice of a Claim must be accompanied by claimant's written statement that adjustment claimed is entire adjustment to which claimant is entitled as a result of the occurrence of the event. When the Parties cannot agree, Claims for adjustment in Contract Time are determined by City Engineer in accordance with Section 4.4 of this Exhibit.
- 8.2.8. Adjustments to Contract Time shall be accomplished only by Change Order.

## **9. PAYMENTS AND COMPLETION**

### **9.1. Application For Payment**

- 9.1.1. Ten days before submittal of the first Application for Payment for a Construction Phase of Work, Construction Manager shall submit to City Engineer a Schedule of Values accurately allocating the Guaranteed Maximum Price for such Construction Phase to the various portions of the Work for such Construction Phase, prepared in the form and supported by the data as City Engineer may require to substantiate its accuracy. The Schedule of Values shall contain, at a minimum, separate line items for the close out of the Work for such Construction Phase, the delivery of record "as-built" drawings, delivery of operation and maintenance manuals, delivery of warranty documents, and final cleanup. The Schedule of Values shall be balanced and not contain any "front end loading." The Schedule of Values, as approved by City Engineer, shall be used as a basis for approval of Construction Manager's Applications for Payment.
- 9.1.2. Construction Manager shall submit Applications for Payment to City Engineer each month on a form acceptable to City Engineer in accordance with Schedule of Values. Each Application for Payment shall indicate percentages of completion of each portion of the Work listed in Schedule of Values as of the end of the period covered by the Application for Payment. The period covered by each Application for Payment shall be one calendar month ending on the last day of the month.
- 9.1.3. Each Schedule of Values submitted with an Application for Payment shall include the originally established value for each Work classification line item or subcontract and shall identify, by the addition of new data rows immediately below the previously accepted data rows, any revisions to the costs or cost estimates for each Work classification or subcontract. The format and tracking method of the original Schedule of Values and of all updates shall be subject to approval by City Engineer. At all times, the estimated cost of performing the uncompleted and unpaid portion of the Work, including Construction Manager's Construction Phase Fee, shall not exceed the unpaid balance of the Guaranteed Maximum Price, less retainage on Work previously completed.
- 9.1.4. If previously unpaid, the Pre-Construction Services costs shall be identified separately in each Application for Payment.

- 9.1.5. Construction Manager shall deliver to City Engineer three copies of each itemized Application for Payment in such detail as is required by City Engineer. Applications for Payment must be supported by such substantiating data as City Engineer may require and shall reflect retainages as provided in the Contract. The Application for Payment must be sworn to and notarized.
- 9.1.6. Before submitting the next Application for Payment (and with the Application for Final Payment), Construction Manager shall submit any evidence required by City Engineer to verify the Cost of the Work and to demonstrate that the cash disbursements already made by Construction Manager on account of the Cost of the Work are equal to or exceed (1) progress payments already received by Construction Manager; less (2) that portion of those payments attributable to Construction Manager's Construction Phase Fee; plus (3) payrolls for the period covered by the most recent Application for Payment; less (4) retainage provided for in the Contract applicable to prior progress payments. This documentation of the most recent Application for Payment, if required by City Engineer, shall have a summary sheet (in two copies) that descriptively itemizes all expenses and individuals. No payment is required to be made for Work for which Construction Manager fails to provide required documentation.
- 9.1.7. Each Application for Payment shall be based upon the Cost of the Work and the most recent Schedule of Values submitted by Construction Manager in accordance with the Contract and accepted by City Engineer.
- 9.1.8. Applications for Payment shall show the Cost of the Work actually incurred by Construction Manager through the end of the period covered by the Application for Payment and for which Construction Manager has made or intends to make actual payment prior to the next Application for Payment and the percentage completion of each portion of the Work as of the end of the period covered by the Application for Payment. The percentage completion shall be the lesser of (1) the percentage of that portion of the Work that has actually been completed or (2) the percentage obtained by dividing (a) the Cost of the Work that has actually been incurred by Construction Manager on account of that portion of the Work for which Construction Manager has made or intends to make actual payment prior to the next Application for Payment by (b) the share of the Guaranteed Maximum Price allocated to that portion of the Work in the Schedule of Values.
- 9.1.8.1. The City Engineer, at his sole discretion, may authorize payment of stored materials up to a value of eighty five percent (85%) of the actual invoice amount properly substantiated by certified copies of invoices and freight bills of non-perishable material and equipment delivered and properly stored. Construction Manager must obtain approval from City Engineer for authorization to bill for stored materials in advance of the request for payment.
- 9.1.9. Each Application for Payment, including the Application for Final Payment shall constitute a certification by Construction Manager to City that the Work has

progressed to the point indicated and the Work represented has actually been performed; the quality of the Work covered in the Application for Payment is in accordance with the Contract; Construction Manager is entitled to payment in the amount requested; Construction Manager remains capable of performing the Contract to completion; and Construction Manager is current in payment with Subcontractors and Suppliers.

- 9.1.10. Construction Manager shall promptly and in all events before interest charges accrue to the Subcontractor pay each of its Subcontractors, upon receipt of payment from City, out of the amount paid to Construction Manager on account of such Subcontractor's work, the amount to which such Subcontractor is entitled in accordance with the terms of Construction Manager's Subcontract with such Subcontractor. Construction Manager shall, by appropriate agreement with each Subcontractor, require each Subcontractor to make payments to its sub-subcontractors in similar manner. City shall have no obligation to pay or to be responsible in any way for payment to any Subcontractor or Supplier.
- 9.1.11. With each Application for Payment, Construction Manager shall submit a certified "waiver and release." The waiver and release shall state: "In consideration for the payment received, Construction Manager waives all claims of every sort against City arising out of the Work performed through the effective date of the Application for Payment, except for retainage and such claims as have been properly submitted in accordance with the provisions of the Contract or claims that can be made timely within the requirements of the Contract."
- 9.1.12. Retainage shall be five percent (5%) of the Cost of the Work and the Construction Manager's Construction Phase Fee for each Phase of the Work. There shall be no retainage on the Preconstruction Services. Otherwise, City shall be entitled to withhold retainage from all Applications for Payment by Construction Manager. Retainage is not held by City for the benefit of any others and shall be deemed amounts not yet earned by or owed to Construction Manager.
- 9.1.13. In addition to other rights under the Contract and Applicable Law, City Engineer, in its discretion, may retain amounts owing to Construction Manager as City deems appropriate to protect City's interest. Construction Manager shall not receive payments from City for any amounts Construction Manager retains from its Subcontractors, and Construction Manager shall immediately return to City any amounts paid to Construction Manager on behalf of any Subcontractor or Supplier or other which Construction Manager does not pass on as payment before the next Application for Payment. In the event City withholds all or any portion of the Construction Manager's payments under this Section or under Section 9.4 hereof, City shall provide specific written accounting for same and shall allocate specific amounts for each reason justifying withholding. Such explanation shall be provided at the time payments would otherwise be due and sums withheld shall be paid when each such reason for withholding same has been cured to the reasonable satisfaction of the City.

- 9.1.14. Materials and services utilized in the construction of the Project may be exempted from state and local taxes. Construction Manager is responsible for taking full advantage of all tax exemptions applicable to the Project. City will deduct from the Applications for Payment and from the Request for Final Payment any taxes paid for materials or services that were entitled to tax exemption.
- 9.1.15. The Construction Manager is subject to the assessment of liquidated damages as provided in the Contract. Amounts assessed as liquidated damages, and other amounts to which City is entitled by way of setoff or recovery, may be deducted from any monies otherwise due Construction Manager.
- 9.1.16. Construction Manager's records shall be kept on the basis of generally accepted accounting principles in accordance with cost accounting standards issued by the Federal Office of Management and Budget Cost Accounting Standards Board consistently applied and organized by each Application for Payment period.
- 9.1.17. Applications for Payment must be supported by substantiating back-up data as required by the City Engineer and must reflect retainages as required herein. Evidence satisfactory to the City Engineer of payments made to Subcontractors and Suppliers for the month preceding the month for which the Application for Payment is submitted must accompany each Application for Payment on a form approved by the Director of the Mayor's Office of Business Opportunity. The Application must be sworn and notarized.

## **9.2. Certificates For Payment**

- 9.2.1. Prior to issuing each Application for Payment under Section 9.1 of this Exhibit, Construction Manager shall submit a "Draft" Application for Payment that is valid and has all required documentation no later than the 25th of the same month with Work projected through the end of the month. Within five (5) days of receipt of the Draft, the City Engineer shall review the Draft and provide the Construction Manager with any adjustments to the progress of the Work or amount requested, within reason. The Construction Manager shall make agreed to corrections to the Draft and submit to the City a "Final" Application for Payment that is valid and has all required documentation within five (5) days from receipt of the City Engineer's adjustments. Upon receipt of the Final Application for Payment, the City shall make payment to the Construction Manager not later than thirty (30) days from receipt. If, and in the event, the City Engineer holds all or part of a Final Application for Payment for one or more reasons, the City Engineer will issue a written explanation apportioning the amount withheld to each such cause.
- 9.2.1.1. With its draft Application for Payment, Construction Manager shall submit to City Engineer on a form approved by the Director of Mayor's Office of Business Opportunity, evidence satisfactory to the City Engineer of payments made to Subcontractors and Suppliers for the month preceding the month for which the Application for Payment is prepared.



- 9.2.2. Unless otherwise provided in the Contract, payment for completed Work and for properly stored Products is conditioned upon compliance with procedures satisfactory to and agreed to by City Engineer to protect City's interests. Procedures will include applicable insurance, storage, and transportation to the site (with suitable on site storage and protection) for Products stored off site and proper documentation for such delivered Products, including certified copies of invoices and freight bills. Construction Manager is responsible for maintaining materials and equipment until the Date of Substantial Completion.
- 9.2.3. Construction Manager shall document its use of Low Sulfur Diesel Fuel by providing invoices and receipts evidencing Construction Manager's use.

**9.3. Computations Of Certificates For Payment**

- 9.3.1. Subject to the provisions of the Contract, the amount of each Certificate for Payment is calculated as follows:
- 9.3.1.1. Take that portion of the Guaranteed Maximum Price for a Construction Phase properly allocated to completed Work for such Construction Phase based upon the percentage completion of each portion of the Work as set forth above. Pending final determination of cost to City of changes in the Work, amounts not in dispute may be included after increases and decreases have been netted out against each other, even though the Guaranteed Maximum Price has not yet been adjusted by Change Order.
  - 9.3.1.2. Add the Construction Manager's Construction Phase Fee.
  - 9.3.1.3. Subtract the amount of retainage and such other amounts as City is entitled to withhold.
  - 9.3.1.4. Subtract the aggregate of the previous payments made by City.
  - 9.3.1.5. Subtract the shortfall, if any, indicated by Construction Manager in the documentation required to substantiate prior Applications for Payment or Construction Manager's payment of Costs of the Work covered by previous payments, or resulting from errors subsequently discovered by City Engineer in such documentation.
  - 9.3.1.6. Subtract amounts, if any, for which City has withheld or nullified an Application for Payment.

**9.4. Decisions To Withhold Certification**

- 9.4.1. City Engineer may decline to issue a Certificate for Payment and may withhold payment in whole or in part to the extent reasonably necessary to protect City if, in City Engineer's opinion, there is reason to believe that:

- 9.4.1.1. nonconforming work has not been remedied;
- 9.4.1.2. the Work cannot be completed for unpaid balance of the Guaranteed Maximum Price;
- 9.4.1.3. there is damage to City or another contractor;
- 9.4.1.4. Construction Manager has persistently failed to complete the Work in accordance with the Project Schedule or the Work will not be completed within Contract Time and that unpaid balance will not be adequate to cover actual and liquidated damages;
- 9.4.1.5. evidence that third party claims will probably be filed in court, in mediation, or otherwise;
- 9.4.1.6. Construction Manager has failed to make payments to Subcontractors or Suppliers or other third parties related to the Work;
- 9.4.1.7. Construction Manager has failed to carry out the Work in accordance with the Contract;
- 9.4.1.8. The payment request has insufficient documentation to support the amount of payment requested;
- 9.4.1.9. Construction Manager fails to obtain, maintain or renew insurance coverage as required by the Contract;
- 9.4.1.10. Construction Manager is in breach or default under the Contract or any loss or damage may result from negligence by Construction Manager or any Subcontractor or failure of Construction Manager or any Subcontractor to perform their obligations under the Contract;
- 9.4.1.11. Construction Manager has not paid Subcontractors or Suppliers because of a payment dispute; or,
- 9.4.1.12. Construction Manager has failed to provide satisfactory evidence described in Sections 9.1.16, 9.2.1.1, and 9.5.2 of this Exhibit.
- 9.4.2. When the above reasons for withholding a Certificate for Payment are removed, certification will be made for amounts previously withheld.
- 9.4.3. City Engineer may decline to issue a Certificate for Payment and may withhold request for payment in whole or in part upon failure of Construction Manager to submit initial construction schedule or monthly schedule updates, as required in Section 3.15 of this Exhibit or elsewhere in the Contract.
- 9.4.4. City shall at any time during regular business hours have the right to inspect and copy the books and records (however kept) of Construction Manager for

verification of Work done, costs, bids, estimates, markups, payments due, amounts claimed, obligations owed Subcontractors or Suppliers, or any other aspect of Construction Manager's obligations as they relate to the Project. At City Engineer's request, Construction Manager, shall promptly provide evidence satisfactory to City of Construction Manager's compliance with the Contract. Construction Manager shall require its Subcontractors and Suppliers to comply with this Section, and similarly require their sub- subcontractors and Suppliers of any tier, to comply with this Section.

## **9.5. Progress Payments**

- 9.5.1. The City will make payment, in an amount certified by City Engineer, within 20 days after City Engineer has issued a Certificate for Payment.
- 9.5.2. City has no obligation to pay or to facilitate the payment to any Subcontractor, Supplier, person or entity, except as may otherwise be required by law. Construction Manager shall comply with the prompt payment requirements of Chapter 2251 of the Texas Government Code. However, Construction Manager shall pay Subcontractors and Suppliers within 7 calendar days of Construction Manager's receipt of payment from City unless there is a payment dispute between Construction Manager and a Subcontractor or Supplier evidenced on a form approved by the Director of Mayor's Office of Business Opportunity and submitted to the City Engineer each month with its Application for Payment.
  - 9.5.2.1. City may, upon request and at the discretion of City Engineer, furnish to Subcontractor information regarding percentages of completion or the amounts applied for by Construction Manager, and action taken thereon by City because of Work done by the Subcontractor.
  - 9.5.2.2. Construction Manager shall prepare and submit to City Engineer a Certification of Payment to Subcontractors, Suppliers, persons and entities form to be attached to each monthly Application for Payment.
- 9.5.3. A Certificate for Payment, a progress payment, or partial or entire use or occupancy of the Work by City, does not constitute acceptance of work that is not in accordance with the Contract.

## **9.6. Date Of Substantial Completion**

- 9.6.1. When Construction Manager considers that a Construction Phase, or a portion thereof designated by City Engineer, to be substantially complete, Construction Manager shall prepare and submit to City Engineer a comprehensive punch list of items to be completed or corrected. Failure to include an item on the punch list does not alter the responsibility of Construction Manager to comply with the Contract.
  - 9.6.1.1. 1. By submitting the punch list to City Engineer, Construction Manager represents that work on the punch list will be completed within the time provided for in Section 9.6.4.3 of this Exhibit.

- 9.6.2. Upon receipt of Construction Manager’s punch list, City Engineer will inspect the Work, or designated portion thereof, to verify that the punch list contains all items needing completion or correction. If City Engineer’s inspection discloses items not on Construction Manager’s punch list, the items must be added to the punch list of items to be completed or corrected. If City Engineer’s inspection reveals that Construction Manager is not yet substantially complete, Construction Manager shall complete or correct the deficiencies and request another inspection by City Engineer. City may recover the costs of re-inspection from Construction Manager. City Engineer will use reasonable efforts to inspect the Construction Phase within a reasonable time following receipt of Construction Manager’s punch list, and if City Engineer disagrees that Substantial Completion has been achieved, City Engineer will provide written notice as to what remains before Substantial Completion is achieved (but City Engineer shall not be prohibited from identifying other deficiencies later).
- 9.6.3. Prior to City Engineer’s issuing a Certificate of Substantial Completion for the Work or other portion of the Work designated by City Engineer, Construction Manager shall also provide:
- 9.6.3.1. Certificate of Occupancy (a temporary Certificate of Occupancy is acceptable provided Construction Manager promptly and diligently proceeds to obtain a permanent Certificate of Occupancy without conditions) for new construction, or Certificate of Compliance for remodeled work, as applicable;
  - 9.6.3.2. deliver all operations and maintenance manuals for the Project to City and have them approved by City and provide all training required under the Contract. It is mutually understood and agreed that the Construction Manager will make every effort to deliver the operation and maintenance manuals prior to the building or partial building substantial completion date but the requirement for the delivery of all operation manuals shall not be the sole reason for the delay in the issuance of the Certificate of Substantial Completion; and
  - 9.6.3.3. compliance with Texas Accessibility Standards through state inspection of the Work, if required. If Construction Manager calls for inspection in a timely manner and the inspection is delayed through no fault of the Construction Manager, and City Engineer so confirms, City Engineer may, upon request by Construction Manager, add the inspection to the punch list in Section 9.6.2 of this Exhibit and issue a Certificate of Substantial Completion.
- 9.6.4. When the Work, or designated portion thereof, is determined by City Engineer to be sufficiently complete in accordance with the Contract so City can occupy or utilize the Construction Phase, or designated portion thereof, for the purpose for which it is intended, and all other conditions and requirements are satisfied, City

Engineer will prepare a Certificate of Substantial Completion that incorporates the punch list in Section 9.6.2 of this Exhibit and establishes:

- 9.6.4.1. Date of Substantial Completion;
  - 9.6.4.2. responsibilities of the Parties for security, maintenance, heating, ventilating and air conditioning, utilities, damage to the Work, and insurance; and
  - 9.6.4.3. fixed time within which Construction Manager shall complete all items on punch list to be corrected or completed accompanying the certificate.
- 9.6.5. Warranties required by the Contract shall commence on the Date of Substantial Completion of each Construction Phase unless otherwise provided by City Engineer in Certificate of Substantial Completion. Warranties shall not commence on items not yet completed until the Date of Final Completion.
- 9.6.6. Construction Manager shall complete or correct the items in Section 9.6.2 of this Exhibit within the time period set out in the Certificate of Substantial Completion. If Construction Manager fails to do so, City may issue a Notice of Noncompliance and exercise all of its legal remedies under the Contract, including those remedies set forth in Section 2.5.
- 9.6.7. Construction Manager shall keep the premises free from accumulation of waste materials or rubbish caused by Construction Manager's operations. At the completion of the Work, Construction Manager shall remove from and about the Project Construction Manager's tools, construction equipment, machinery, surplus materials, waste materials and rubbish.
- 9.6.8. Immediately prior to the review of a portion of the Work for Substantial Completion, Construction Manager shall remove all waste materials, rubbish, Construction Manager's tools, construction equipment, machinery and surplus materials from the area to be inspected. Construction Manager shall also remove all protective coatings, temporary work, barriers and other protective devices.
- 9.6.8.1. Finished spaces that are to be inspected shall be cleaned as required to remove all stains, dirt and dust. Glass shall be cleaned on both faces, and carpet shall be vacuumed.
  - 9.6.8.2. Unfinished spaces such as mechanical and electrical equipment rooms that are to be inspected shall be "broom clean."
  - 9.6.8.3. Mechanical work such as duct work, unit heaters, finned tube radiation and its covers, air conditioning units, grilles and registers shall be cleaned as required to remove all stains, dirt and dust.
  - 9.6.8.4. Electrical work shall be cleaned as necessary to remove all stains, dirt and dust.

- 9.6.9. Construction Manager shall maintain the Work in a clean condition until City determines the Date of Substantial Completion for the Construction Phase. After the Date of Substantial Completion of the Construction Phase, Construction Manager is responsible for removing waste materials, rubbish, dirt and dust caused by its continued operations.
- 9.6.10. Prior to final acceptance, or prior to City's partial or complete occupancy of a portion of the Work, Construction Manager shall do the following: (1) clean all spaces of the Work so that they are ready for City's occupancy without additional cleaning; (2) remove from the Project site all temporary buildings or facilities for that Work unless needed for other portions of the Work; (3) replace filters in air handling equipment according to the Specifications; and (4) replace burned out lamps. This obligation is in addition to and not by way of limitation of Construction Manager's obligation to prove the Project complete and ready to use in all respects by the time limits set forth in the Contract.
- 9.6.11. After the Date of Substantial Completion of a Construction Phase and upon application by Construction Manager and approval by City Engineer, City may make payment, reflecting adjustment in retainage, if any, as follows: with the consent of Surety, the City may increase payment to Construction Manager up to 96 % of the Guaranteed Maximum Price, less the value of items to be completed and accrued liquidated damages.

**9.7. Partial Occupancy Or Use**

- 9.7.1. City may occupy or use any completed or partially completed portion of the Work that is less than a completed Construction Phase of the Work, provided the occupancy or use is consented to by Construction Manager and Construction Manager's insurer and authorized by public authorities having jurisdiction over the Work. Consent of Construction Manager to partial occupancy or use may not be unreasonably withheld.
- 9.7.1.1. Occupancy by City of a completed Construction Phase of the Work shall not require any consent.
- 9.7.2. Immediately prior to the partial occupancy or use, City Engineer and Construction Manager shall jointly inspect the area to be occupied or portion of the Work to be used to determine and record condition of the Work.
- 9.7.3. Partial occupancy or use of a portion of the Work does not constitute acceptance of Work not in compliance with requirements of the Contract.

**9.8. Final Completion And Final Payment**

- 9.8.1. Construction Manager shall review the Contract and inspect the Work prior to Construction Manager notification to City Engineer that the Work is complete and ready for final inspection. Construction Manager shall submit an affidavit that

Construction Manager has inspected the Work and that the Work is complete in accordance with the requirements of the Contract.

- 9.8.2. City Engineer will make final inspection within 15 days after receipt of Construction Manager's written notice that the Work is ready for final inspection and acceptance. If City Engineer finds the Work has been completed in accordance with the Contract, Construction Manager shall submit items set out in Section 9.8.4 of this Exhibit and a final Application for Payment. Within 30 days of receipt of the items set out in Section 9.8.4 of this Exhibit, the City Engineer may perform an audit to determine the accuracy of Construction Manager's accounting of the Costs of the Work and the Final Application for Payment. City Engineer will, within 10 days thereafter, either notify the Construction Manager that the Construction Manager has not achieved Final Completion of the Construction Phase as provided in Section 9.8.3 or issue a Certificate of Final Completion stating that to the best of City Engineer's knowledge, information, and belief, the Work has been completed in accordance with the Contract. If there is only one Construction Phase, City Engineer will recommend acceptance of the Work and recommend release of the remaining retainage by City Council. If there is more than one Construction Phase, the Parties shall confer upon the issuance of each Certificate of Final Completion to determine whether it is appropriate to seek City Council acceptance of the Work and release of the remaining retainage held for the particular Construction Phase that is certified as complete. Failing mutual agreement of the Parties to seek City Council acceptance and release of the remaining retainage, City shall continue to hold the remaining retainage for the particular Construction Phase until such time as the Parties mutually agree to seek City Council acceptance and release of the remaining retainage for such Construction Phase.
- 9.8.3. Should Work be found not in compliance with requirements of the Contract, City Engineer will notify Construction Manager in writing of items of noncompliance. Upon inspection and acceptance of the corrections by City Engineer, compliance with all procedures of Section 9.8.2 of this Exhibit, and Construction Manager's submission of the items set out in Section 9.8 of this Exhibit.4. City Engineer will issue Certificate of Final Completion to Construction Manager's as provided in Section 9.8.2.
- 9.8.4. Construction Manager shall submit the following items to City Engineer before City Engineer will issue a Certificate of Final Completion:
- 9.8.4.1. affidavit that payrolls, invoices for materials and equipment, and other indebtedness of Construction Manager connected with the Phase of the Work, less amounts withheld by City, have been paid or otherwise satisfied. If required by City Engineer, Construction Manager shall submit further proof including waiver or release of lien or claims from Subcontractors, Suppliers, laborers (which may be conditioned upon City making payment to Construction Manager);

- 9.8.4.2. certificate evidencing that insurance required by the Contract to remain in force after final payment is currently in effect, will not be canceled or materially changed until at least 30 days written notice has been given to City ;
  - 9.8.4.3. written statement that Construction Manager knows of no substantial reason that insurance will not be renewable to cover correction and warranty period required by the Contract;
  - 9.8.4.4. consent of Surety to final payment;
  - 9.8.4.5. copies of record documents, maintenance manuals, tests, inspections, and approvals and deliver the required record documents that describe changes or deviations from the Contract, which occurred during construction and that reflect the actual “as-built” conditions of the completed Work;
  - 9.8.4.6. compliance with Texas Accessibility Standards through state inspections of the Work, if required.
- 9.8.5. If Construction Manager fails to submit required items in Section 9.8.4 of this Exhibit within 10 days of City Engineer’s inspection of the Work under Section 9.8.2 or Section 9.8.3 of this Exhibit, City Engineer may, but is not obligated to:
- 9.8.5.1. 1deduct liquidated damages accrued from monies held;
  - 9.8.5.2. proceed to City Council for acceptance of the Work, minus some or all of the items Construction Manager fails to submit under Section 9.8.4 of this Exhibit; and,
  - 9.8.5.3. upon acceptance by City Council of the portion of the Work completed, either make final payment as set out in Section 9.8.8 of this Exhibit or request that City Attorney interplead the balance due to Construction Manager under the Contract into the registry of a court of appropriate jurisdiction.
- 9.8.6. If final completion is materially delayed through no fault of Construction Manager, or by issuance of Change Orders affecting Date of Final Completion, and City Engineer so confirms, City may, upon application by Construction Manager and certification by City Engineer, and without terminating the Contract, make payment of balance due for that portion of the Work fully completed and accepted.
- 9.8.7. Upon City Engineer’s issuance of a Certificate of Final Completion, Construction Manager may request an increase in payment up to 99% of the Guaranteed Maximum Price of the Construction Phase, less accrued Liquidated Damages.
- 9.8.8. If remaining balance due for work not corrected is less than retainage stipulated in the Contract, Construction Manager shall submit to City Engineer written consent



of Surety to payment of balance due for that portion of the Work fully completed and accepted, prior to certification of the payment. The payment is made under terms governing final payment, except that it does not constitute waiver of Claims.

- 9.8.9. Final Payment. The City will make final payment to Construction Manager within 30 days after the issuance of the Certificate of Final Completion by City Engineer and acceptance of the Work by City Council, subject to limitations, if any, as stated in the Contract. City is entitled to deduct from any payment any amounts owed by Construction Manager to City, including accrued liquidated damages.
- 9.8.10. Acceptance of final payment by Construction Manager shall constitute a waiver of all Claims, whether known or unknown, by Construction Manager, except those previously made in writing and identified by Construction Manager as unsettled at time of final Application for Payment.

**9.9. Liquidated Damages**

- 9.9.1. Construction Manager and the City agree that failure to complete Work within the Contract Time will cause damages to the City and that actual damages from harm are difficult to estimate accurately. Therefore, Construction Manager and City agree that Construction Manager and Surety are liable for and shall pay to the City \$1,200.00 per day as liquidated damages, and that the amount of damages fixed therein is a reasonable forecast of just compensation for harm to the City resulting from Construction Manager's failure to complete the Work within the Contract Time. The amount stipulated will be paid for each day of delay beyond Contract Time until the Date of Substantial Completion.
- 9.9.2. Construction Manager shall pay the City an amount of \$1200.00 per day for each operating vehicle or each piece of motorized equipment using high or low sulfur diesel fuel in any way on the Work site.

**10. SAFETY PRECAUTIONS**

**10.1. Safety Programs**

- 10.1.1. Construction Manager is responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with performance of the Contract. Construction Manager shall submit a safety program to City Engineer prior to mobilizing for the Work, and is solely responsible for safety, efficiency, and adequacy of ways, means, and methods, and for all loss, injury, or damage which might result from failure or improper construction, maintenance, or operation performed by Construction Manager.

**10.2. Pollutants And Pollutant Facilities**

- 10.2.1. If Construction Manager encounters material on-site that it reasonably believes to be a Pollutant or facilities that it reasonably believes to be a Pollutant Facility,

Construction Manager shall immediately stop work in affected area and immediately notify City Engineer, confirming the notice thereafter in writing.

- 10.2.2. If City Engineer determines that the material is a Pollutant or facility is a Pollutant Facility, work in affected area may not be resumed except by Modification, and only if the work would not violate applicable laws or regulations.
- 10.2.3. If City Engineer determines that the material is not a Pollutant or a facility is not a Pollutant Facility, work in affected area will be resumed upon issuance of a Modification.
- 10.2.4. Construction Manager is not required to perform, unless authorized by Change Order, work relating to Pollutants or Pollutant Facilities except for that work relating to Pollutants or Pollutant Facilities specified in the Contract.

**10.3. Safety Of The Environment, Persons, And Property**

- 10.3.1. Construction Manager shall take reasonable precautions for safety and shall provide reasonable protection to prevent damage, injury, or loss from all causes, to:
  - 10.3.1.1. employees performing work on-site, and other persons who may be affected thereby;
  - 10.3.1.2. work, including Products to be incorporated into the Work, whether in proper storage, under control of Construction Manager or Subcontractor; and
  - 10.3.1.3. other property at or adjacent to the site, such as trees, shrubs, lawns, walks, pavements, roadways, structures, utilities, and Underground Facilities not designated for removal or replacement in course of construction.
- 10.3.2. Construction Manager shall give notices and comply with applicable laws, ordinances, rules, regulations, and lawful orders of public authorities bearing on safety of persons, property, or environment.
  - 10.3.2.1. Construction Manager shall comply with requirements of Underground Facility Damage Prevention and Safety Act TEX. UTIL. CODE ANN. Ch. 251 (Vernon Supp. 2002).
  - 10.3.2.2. Construction Manager shall comply with all safety rules and regulations of the Federal Occupational Health and Safety Act of 1970 and subsequent amendments (OSHA).
- 10.3.3. Construction Manager shall erect and maintain, as required by existing conditions and performance of the Contract, reasonable safeguards for safety and protection of persons and property, including posting danger signs and other warnings against

hazards, promulgating safety regulations, and notifying owners and users of adjacent sites and utilities.

- 10.3.4. Construction Manager shall designate a responsible member of Construction Manager's organization at site whose duty is prevention of accidents. This person will be Construction Manager's Superintendent unless otherwise designated by Construction Manager in writing to City Engineer.
- 10.3.5. Construction Manager shall prevent windblown dust and shall not burn or bury trash debris or waste products on-site or use sewers for disposal of trash or debris. Construction Manager shall prevent unlawful and other environmental pollution, including but not limited to particulates, gases and noise, as a result of the Work.
- 10.3.6. When use or storage of hazardous materials or equipment, or unusual methods are necessary for execution of the Work, Construction Manager shall exercise utmost care and carry on the activities under supervision of properly qualified personnel.
- 10.3.7. Construction Manager shall promptly remedy damage and loss to property referred to in Sections 10.3.1.2 and 10.3.1.3 of this Exhibit, caused in whole or in part by Construction Manager, or Subcontractors, which is not covered by insurance required by the Contract. Construction Manager is not required to remedy damage or loss attributable to City, City's design consultant, or other contractors.

#### **10.4. Emergencies**

- 10.4.1. In emergencies affecting safety of persons or property, Construction Manager shall act at Construction Manager's discretion to prevent imminent damage, injury, or loss. Additional compensation or extension of time claimed by Construction Manager because of emergencies are determined as provided in Articles 7 and 8 of this Exhibit.

### **11. INSURANCE AND BONDS**

#### **11.1. General Insurance Requirements**

- 11.1.1. With no intent to limit Construction Manager's liability under indemnification and other provisions set forth in this Contract, Construction Manager shall provide and maintain in full force and effect during term of the Contract and all extensions and amendments thereto, at least the following insurance and available limits of liability.
- 11.1.2. If any of the following insurance is written as "claims made" coverage and City is required to be carried as additional insured, then Construction Manager's insurance shall include a two- year extended discovery period after last date that Construction Manager provides any work under the Contract.
- 11.1.3. Aggregate amounts of coverage, for purposes of the Contract, are agreed to be amounts of coverage available during fixed 12-month policy period.

- 11.1.4. Construction Manager shall be liable to City for any required coverage that City does not have or costs, damage, losses, or liability incurred by City (including attorneys' fees) due to Construction Manager's failure to purchase and maintain required insurance.

**11.2. Insurance To Be Provided By Construction Manager**

- 11.2.1. *Risks and Limits of Liability:* Construction Manager shall provide at a minimum insurance coverage and limits of liability set out in Table 1, with no gaps in coverage between primary and excess coverage.

- 11.2.1.1. If Limit of Liability for Excess Coverage is \$2,000,000 or more, Limit of Liability for Employer's Liability may be reduced to \$500,000.

- 11.2.2. *Form of Policies:* Insurance may be in one or more policies of insurance, form of which is subject to approval by City Engineer. It is agreed, however, that nothing City Engineer does or fails to do with regard to insurance policies relieves Construction Manager from its duties to provide required coverage and City Engineer's actions or inactions will never be construed as waiving City's rights.

- 11.2.3. *Issuers of Policies:* Issuer of any policy shall have:

- 11.2.3.1. a Certificate of Authority to transact business in Texas, or

- 11.2.3.2. have a Best's rating of at least B+ and a Best's Financial Size Category of Class VI or better, according to the most current edition of Best's Key Rating Guide, and the issuer must be an eligible non admitted insurer in the State of Texas.

Each insurer is subject to approval by City Engineer in City Engineer's sole discretion as to conformance with these requirements, pursuant to Section 11.2.2 of this Exhibit.

- 11.2.4. *Insured Parties:* Each policy, except those for Workers' Compensation and Owner's and Contractor's Protective Liability, must name City, its officers, agents, and employees as additional insured parties on original policy and all renewals or replacements during term of the Contract. City's status as additional insured under Construction Manager's insurance does not extend to instances of sole negligence of City unmixed with any fault of Construction Manager.

- 11.2.5. *Deductibles:* Construction Manager assumes and bears any claims or losses to extent of deductible amounts and waives any claim it may ever have for same against City, its officers, agents, or employees. All Construction Manager insurance claim deductibles are a Cost of the Work to the extent such deductibles are paid by Construction Manager.

- 11.2.6. *Cancellation:* Construction Manager shall notify the Director in writing 30 days prior to any cancellation or material change to Construction Manager's insurance coverage. Within the 30 day period, Construction Manager shall provide other

suitable policies in lieu of those about to be canceled or nonrenewed so as to maintain in effect the required coverage. If Construction Manager does not comply with this requirement, the City Engineer, at his or her sole discretion, may:

- 11.2.6.1. immediately suspend Construction Manager from any further performance under this Contract and begin procedures to terminate for default, or
  - 11.2.6.2. purchase the required insurance with City funds and deduct the cost of the premiums from amounts due to Construction Manager under this Contract.
- 11.2.7. *Subrogation:* Each policy except Owner's and Contractor's Protective Liability must contain endorsement to the effect that issuer waives any claim or right in nature of subrogation to recover against City, its officers, agents, or employees.
- 11.2.8. *Endorsement of Primary Insurance:* Each policy, except Workers' Compensation policies must contain an endorsement that the policy is primary insurance to any other insurance available to additional insured with respect to claims arising under the Contract.
- 11.2.9. *Liability for Premium:* Construction Manager is solely responsible for payment to insurers of all insurance premium requirements hereunder and the City is not obligated to pay any premiums to insurers.
- 11.2.10. *Additional Requirements for Workers' Compensation Insurance Coverage:* Construction Manager shall, in addition to meeting the obligations set forth in Table 1, maintain throughout the term of the Contract Workers' Compensation coverage as required by statute, and Construction Manager shall specifically comply with requirements set forth in Section 11.2.10 of this Exhibit. The definitions set out below shall apply only for purposes of this Section 11.2.10 of this Exhibit.
- 11.2.10.1. Definitions:
    - 11.2.10.1.1. Certificate of Coverage: A copy of certificate of insurance, or coverage agreement (TWCC-81, TWCC-82, TWCC-83, or TWCC-84), showing statutory Workers' Compensation insurance coverage for Construction Manager's, Subcontractor's, or Supplier's employees providing services for the duration of the Contract.
    - 11.2.10.1.2. Duration of the Work: Includes the time from Date of Commencement of the Work until Construction Manager's work under the Contract has been completed and accepted by City Council.

- 11.2.10.1.3. *Persons providing services for the Work*; as required under Section 406.096 of the Texas Labor Code, as may be amended from time to time, for employees of Construction Manager and Subcontractor employees
- 11.2.10.2. Construction Manager shall provide coverage, based on proper reporting of classification codes and payroll amounts and filing of coverage agreements, which meets the statutory requirements of Texas Labor Code, Section 401.011(44) for employees of Construction Manager providing services on the Work, for duration of the Work.
- 11.2.10.3. Construction Manager shall provide a Certificate of Coverage to City prior to beginning performance.
- 11.2.10.4. If coverage period shown on Construction Manager's original Certificate of Coverage ends during duration of the Work, Construction Manager shall file new Certificate of Coverage with City showing that coverage has been extended.
- 11.2.10.5. Construction Manager shall obtain from each person providing services on the Work, and provide to City Engineer:
  - 11.2.10.5.1. Certificate of Coverage, prior to that person beginning work on the Work, so City will have on file Certificates of Coverage showing coverage for all persons providing services on the Work; and
  - 11.2.10.5.2. no later than seven days after receipt by Construction Manager, new Certificate of Coverage showing extension of coverage, if coverage period shown on current Certificate of Coverage ends during the duration of the Work.
- 11.2.10.6. Construction Manager shall retain all required Certificates of Coverage for the duration of the Work and for one year thereafter.
- 11.2.10.7. Construction Manager shall notify City Engineer in writing by certified mail or personal delivery, within 10 days after Construction Manager knew or should have known, of any change that materially affects provision of coverage of any person providing services on the Work.
- 11.2.10.8. Construction Manager shall post on-site a notice, in text, form and manner prescribed by Texas Workers' Compensation Commission, informing all persons providing services on the Work that they are required to be covered, and stating how person may verify coverage and report lack of coverage.

- 11.2.10.9. Construction Manager shall contractually require each person with whom it contracts to provide services on the Work to:
- 11.2.10.9.1. provide coverage, based on proper reporting of classification codes, payroll amounts and filing of any coverage agreements, which meets statutory requirements of Texas Labor Code, Section 401.011(44) for all its employees providing services on the Work, for the duration of the Work;
  - 11.2.10.9.2. provide to Construction Manager, prior to that person's beginning work on the Work, a Certificate of Coverage showing that coverage is being provided for all employees of the person providing services on the Work, for the duration of the Work;
  - 11.2.10.9.3. provide Construction Manager, prior to the end of the coverage period, a new Certificate of Coverage showing extension of coverage, if the coverage period shown on the current Certificate of Coverage ends during the duration of the Work; obtain from each other person with whom it contracts, and provide to Construction Manager: (1) Certificate of Coverage, prior to other person's beginning work on the Work; and (2) new Certificate of Coverage showing extension of coverage, prior to end of coverage period, if coverage period shown on the current Certificate of Coverage ends during duration of the Work.
  - 11.2.10.9.4. retain all required Certificates of Coverage on file for the duration of the Work and for one year thereafter;
  - 11.2.10.9.5. notify City Engineer in writing by certified mail or personal delivery within 10 days after person knew, or should have known, of change that materially affects provision of coverage of any person providing services on the Work; and
  - 11.2.10.9.6. contractually require each person with whom it contracts to perform as required by Sections 11.2.10.1 through 11.2.10.7 of this Exhibit, with Certificates of Coverage to be provided to person for whom they are providing services.
- 11.2.10.10. By signing the Contract or providing or causing to be provided a Certificate of Coverage, Construction Manager is representing to City that all employees of Construction Manager who will provide services

on the Work will be covered by Workers' Compensation coverage for the duration of the Work, that coverage will be based on proper reporting of classification codes and payroll amounts, and that all coverage agreements will be filed with appropriate insurance carrier. Construction Manager is not allowed to self-insure Workers' Compensation. Construction Manager may be subject to administrative penalties, criminal penalties, civil penalties, or other civil actions for providing false or misleading information.

11.2.10.11. Construction Manager's failure to comply with Section 11.2.10 of this Exhibit is a breach of the Contract by Construction Manager, which entitles City to declare the Contract void if Construction Manager does not remedy breach within 10 days after receipt of notice of breach from City Engineer.

11.2.11. *Subcontractor Insurance Requirements:* Construction Manager shall require Subcontractors and Suppliers to obtain Commercial General Liability, Workers' Compensation, Employer's Liability and Automobile Liability coverage that meets all the requirements of Section 11.2 of this Exhibit. The amount must be commensurate with the amount of the subcontract, but not less than \$500,000 per occurrence. Construction Manager shall require all Subcontractors with whom it contracts directly, whose subcontracts exceed \$100,000, to provide proof of all insurance coverage meeting the above requirements. Construction Manager shall deliver such certificates of insurance to City. Construction Manager shall comply with all requirements set out under Section 11.2.10 of this Exhibit as to Workers' Compensation Insurance for all Subcontractors and Suppliers.

11.2.12. TABLE 1 REQUIRED COVERAGE

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Coverage	Limit of Liability
<b>1. Workers' Compensation</b>	Texas Statutory Limits for Workers' Compensation
<b>2 Employer's Liability</b>	Bodily Injury by Accident: \$1,000,000 (each accident) Bodily Injury by Disease: \$1,000,000 (policy limit) Bodily Injury by Disease: \$1,000,000 (each employee)
<b>3 Commercial General Liability:</b> Including Construction Manager's Protective, Broad Form Property Damage, Contractual Liability, Explosion, Underground and Collapse, Bodily Injury, Personal Injury, Products, and Completed Operations (for a period of one year following completion of the Work)	\$1,000,000 Limit (each occurrence), subject to general aggregate Limit of \$2,000,000 Products and Completed Operations \$2,000,000 aggregate Limit.
<b>4 Owner's and Contractors' Protective Liability</b>	\$1,000,000 each Occurrence/ aggregate
<b>5 Installation Floater</b> (Unless alternative coverage approved by the City Attorney)	Value of stored material or equipment, listed on Certificates of Payments, but not yet incorporated into the Work
<b>6 Automobile Liability Insurance:</b> (For automobiles furnished by Construction Manager in course of his performance under the Contract, including Owned, Non-owned, and Hired Auto coverage)	\$1,000,000 combined single limit each occurrence for (1) Any Auto or (2) All Owned, Hired, and Non- owned Autos.
<b>7 Excess Coverage</b>	\$1,000,000 each occurrence/ aggregate in excess of limits specified for Commercial General Liability, and Automobile Liability
<b>8 Property &amp; Casualty Coverage:</b> "All Causes of Loss" Builders Risk Form for direct physical damage to building or plant construction on Project site. [Including but not limited to earthquake, flood, boiler and Machinery -- including testing, damage to existing or adjoining property, time element coverage, collapse, soft costs (Management, architecture, financial costs, pre-opening costs, etc.), transit coverage, off-site storage]	100% GMP, including all change orders
Aggregate Limits are per 12-month policy period unless otherwise indicated.	

### **11.3. Proof Of Insurance**

- 11.3.1. Prior to commencing the Construction Work and at the request of City Engineer at any time during the term of the Construction Contract, Construction Manager shall furnish City Engineer with Certificates of Insurance, along with Affidavit from Construction Manager confirming that Certificate accurately reflects insurance coverage that is available during term of the Contract. Additionally, Construction Manager shall furnish the City Engineer with endorsement forms CG24040509-Waiver of Transfer of Rights of Recovery against Others; CA04030604-Additional Insured Endorsement; CAT353-Business Auto Extension Endorsement; WC 42304A-Workers Compensation Waiver of Transfer of Rights of Recovery against Others, or others that may be approved by City Engineer. If requested in writing by City Engineer, Construction Manager shall furnish City Engineer with certified copies of Construction Manager's actual insurance policies. Failure of Construction Manager to provide certified copies, as requested, may be deemed, at City Engineer's or City Attorney's discretion, a material breach of the Contract.
- 11.3.2. Notwithstanding the proof of insurance requirements, Construction Manager shall continuously maintain in effect required insurance coverage set forth in Section 11.2 of this Exhibit. Failure of Construction Manager to comply with this requirement does constitute a material breach by Construction Manager allowing City, at its option, to immediately suspend or terminate Construction Manager from performing the Work, or exercise any other remedy allowed under the Contract. Construction Manager agrees that City has not waived or is not estopped to assert a material breach of the Contract because of any acts or omissions by City regarding its review or non-review of insurance documents provided by Construction Manager, its agents, employees, or assigns.

### **11.4. Performance And Payment Bonds**

- 11.4.1. For Contracts over the value of \$25,000, Construction Manager shall provide Bonds on City's standard forms covering faithful performance of the Contract and payment of obligations arising thereunder as required in the Contract pursuant to Chapter 2253 of the Texas Government Code except for the Preconstruction Services. The Bonds must be for 100 percent of Guaranteed Maximum Price, or if a Guaranteed Maximum Price has not been determined, in the amount of the Project Budget, and in accordance with conditions stated on standard City Performance and Payment Bond and Statutory Payment Bond forms. Bonds may be obtained from Construction Manager's usual source if it meets the requirements of the Contract and is acceptable to City Engineer, and cost for the Bonds are included in the Guaranteed Maximum Price.

### **11.5. Maintenance Bonds**

- 11.5.1. One-year Maintenance Bond: Construction Manager shall provide Bond on standard City One-year Maintenance Bond form, providing for Construction Manager's correction, replacement, or restoration of any portion of the Work which

is found to be not in compliance with requirements of the Contract during one-year correction period required in Section 12.2 of this Exhibit. The Maintenance Bond must be for 100% of the Guaranteed Maximum Price.

**11.6. Surety**

- 11.6.1. A Bond that is given or tendered to City pursuant to the Contract must be executed by a surety company that is authorized and admitted to write surety Bonds in the State of Texas.
- 11.6.2. If a Bond is given or tendered to City pursuant to the Contract in an amount greater than 10 percent of Surety's capital and surplus, Surety shall provide certification that Surety has reinsured that portion of the risk that exceeds 10 percent of Surety's capital and surplus. The reinsurance must be with one or more reinsurers who are duly authorized, accredited, or trusted to do business in the State of Texas. The amount reinsured by reinsurer may not exceed 10 percent of reinsurer's capital and surplus. The amount of allowed capital and surplus must be based on information received from State Board of Insurance.
- 11.6.3. If the amount of a Bond is greater than \$100,000, Surety shall:
  - 11.6.3.1. also hold certificate of authority from the United States Secretary of Treasury to qualify as surety on obligations permitted or required under federal law; or,
  - 11.6.3.2. Surety may obtain reinsurance for any liability in excess of \$100,000 from reinsurer that is authorized and admitted as a reinsurer in the State of Texas and is the holder of a certificate of authority from the United States Secretary of the Treasury to qualify as surety or reinsurer on obligations permitted or required under federal law.
- 11.6.4. Determination of whether Surety on the Bond or the reinsurer holds a certificate of authority from the United States Secretary of the Treasury is based on information published in Federal Register covering the date on which Bond was executed.
- 11.6.5. Each Bond given or tendered to City pursuant to the Contract must be on City forms with no changes made by Construction Manager or Surety, and must be dated, executed, and accompanied by power of attorney stating that the attorney in fact executing such the bond has requisite authority to execute such Bond. The Bonds must be dated and must be no more than 30 days old.
- 11.6.6. Surety shall designate in its Bond, power of attorney, or written notice to City , an agent resident in Harris County to whom any requisite notices may be delivered and on whom service of process may be had in matters arising out of the suretyship.
- 11.6.7. Construction Manager shall furnish information to a payment bond beneficiary as required by Tex. Gov't Code Ann. Ch. 2253.

## **11.7. Delivery Of Bonds**

- 11.7.1. Construction Manager shall deliver required Bonds to City within time limits stated in the Contract or such earlier date as required by City Engineer and in any event prior to Date of Commencement of the Work.

## **12. UNCOVERING AND CORRECTION OF THE WORK**

### **12.1. Uncovering Of The Work**

- 12.1.1. If a portion of the Work has been covered that City Engineer has not specifically asked to observe prior to its being covered, City Engineer may request to see such work and it must be uncovered by Construction Manager. If such work is in accordance with the Contract, the costs of uncovering and covering such Work that qualify as Costs of the Work are charged to City by Change Order in accordance with Article 7 of this Exhibit. If such Work is not in accordance with the Contract, Construction Manager shall pay for uncovering and shall correct the nonconforming Work promptly after receipt of Notice of Noncompliance to do so.

### **12.2. Correction Of The Work**

- 12.2.1. Construction Manager shall promptly remove work rejected by City Engineer as failing to conform to requirements of the Contract, whether observed before or after the Date of Substantial Completion of a Construction Phase and whether fabricated, Installed, or completed.
- 12.2.2. Construction Manager bears the costs of correcting the rejected or nonconforming work including additional testing and inspections, and compensation for City's design consultant's services and expenses made necessary thereby.
- 12.2.3. If within one year after Date of Substantial Completion of a Construction Phase or after the date of commencement of warranties established under Section 9.6.5 of this Exhibit, or by other applicable special warranty required by the Contract, whichever is later in time, any of the Work is found not to be in accordance with the requirements of the Contract, Construction Manager shall correct such work promptly after receipt of Notice of Noncompliance to do so.
- 12.2.4. The one-year correction period for portions of the Work completed after Date of Substantial Completion of a Construction Phase will begin on the date of acceptance of that portion of the Work. This obligation under this Section survives acceptance of the Work under the Contract and termination of the Contract.
- 12.2.5. The one-year correction period does not establish a duration for the Construction Manager's general warranty under Section 3.12 of this Exhibit and other obligations under the Contract. City retains the right to recover damages from the Construction Manager as long as may be permitted by the applicable statutes of limitations and repose.

- 12.2.6. If Construction Manager does not proceed with correction of the nonconforming work within the reasonable time fixed by Notice of Noncompliance, City may correct nonconforming work or remove nonconforming work and store salvageable Products at Construction Manager's expense. Construction Manager shall pay the costs of correction of nonconforming work and removal and storage of salvageable Products to City. If Construction Manager does not pay costs of the correction or removal and storage within 10 days after written notice, City may sell the Products at auction or at private sale. City will account for proceeds thereof after deducting costs and damages that would have been borne by Construction Manager, including compensation for services of city's design consultant and necessary expenses. If the proceeds of sale do not cover costs that Construction Manager should have borne, Construction Manager shall pay the value of the deficiency to City.
- 12.2.7. Construction Manager shall pay the cost of correcting work originally installed by Construction Manager, City, or by separate contractors and damaged by Construction Manager's correction or removal of Construction Manager's Work.

### **12.3. Acceptance Of Nonconforming Work**

- 12.3.1. If City Engineer prefers to accept work which is not in accordance with requirements of the Contract, City Engineer may do so only by issuance of Change Order, instead of requiring its removal and correction. City Engineer and the Construction Manager will mutually agree on the Guaranteed Maximum Price reduction. The reduction will become effective even if final payment has been made.

## **13. MISCELLANEOUS PROVISIONS**

### **13.1. Governing Laws**

- 13.1.1. This Agreement shall be construed and interpreted in accordance with the applicable laws of the State of Texas and City of Houston.
- 13.1.2. Venue for any disputes relating in any way to this Agreement shall lie exclusively in Harris County, Texas.

### **13.2. Successors**

- 13.2.1. The Contract binds and benefits the Parties and their legal successors and permitted assigns; however, this Section 13.2.1 of this Exhibit does not alter the restrictions on assignment and disposal of assets set out in Section 13.3. of this Exhibit The Contract does not create any personal liability on the part of any officer or agent of City.

### **13.3. Business Structure And Assignments**

- 13.3.1. Construction Manager may not assign the Contract at law or otherwise, or dispose of all or substantially all of its assets without City Engineer's prior written consent.

Nothing in this Section, however, prevents the assignment of accounts receivable or the creation of a security interest as described in §9.406 of the Texas Business & Commerce Code. In the case of such an assignment, Construction Manager shall immediately furnish City with proof of the assignment and the name, telephone number, and address of the assignee and a clear identification of the fees to be paid to the assignee.

- 13.3.2. Any series, as defined by the TEX. BUS. ORG. CODE ANN., affiliate, subsidiary, or successor to which Construction Manager assigns or transfers assets shall join in privity and be jointly and severally liable under this Contract. Construction Manager shall not delegate any portion of its performance under this Agreement without the City Engineer's prior written consent.

#### **13.4. Written Notice**

- 13.4.1. All notices required or permitted by the Contract must be in writing and must be effected by hand delivery; registered or certified mail, return receipt requested; or facsimile with confirmation copy mailed to receiving Party. Notice is sufficient if made or addressed with proper postage to the address stated in the Agreement for each Party ("Notice Address") or faxed to the facsimile number stated in the Agreement for each Party. The notice is deemed delivered on the earlier of:

13.4.1.1. the date the Notice is actually received;

13.4.1.2. the third day following deposit in a United States Postal Service post office or receptacle; or

13.4.1.3. the date the facsimile is sent unless the facsimile is sent after 5:00 p.m. local time of the recipient and then it is deemed received on the following day.

Any Party may change its Notice Address or facsimile number at any time by giving written notice of the change to the other Party in the manner provided for in this Section at least 15 days prior to the date the change is effected.

#### **13.5. Rights And Remedies**

- 13.5.1. Duties and obligations imposed by the Contract and rights and remedies available thereunder are in addition to and not a limitation of duties, obligations, rights, and remedies otherwise imposed or available by law.

- 13.5.2. No act or failure to act by City or Construction Manager is a waiver of rights or duties afforded them under the Contract, nor does the act or failure to act constitute approval of or acquiescence in a breach of the Contract. No waiver, approval or acquiescence is binding unless in writing and, in the case of City, signed by City Engineer.

### **13.6. Tests And Inspections**

- 13.6.1. Construction Manager shall give City Engineer and City's design consultant(s) timely notice of the time and place where tests and inspections are to be made. Construction Manager shall cooperate with inspection and testing personnel to facilitate required inspections or tests.
- 13.6.2. City will employ and pay for services of an independent testing laboratory to perform inspections or acceptance tests required by the Contract except:
  - 13.6.2.1. inspections or tests covered by Section 13.6.3 of this Exhibit;
  - 13.6.2.2. those otherwise specifically provided in the Contract; or
  - 13.6.2.3. costs incurred in connection with tests or inspections conducted pursuant to Section 12.2.2 of this Exhibit.
- 13.6.3. Construction Manager is responsible for and shall initially pay all costs in connection with inspection or testing required in connection with City Engineer's acceptance of a Product to be incorporated into the Work, or of materials, mix designs, or equipment submitted for approval prior to Construction Manager's purchase thereof for incorporation into the Work.
- 13.6.4. Neither observations by City Engineer or City's design consultant(s), nor inspections, tests, or approvals by others, relieves Construction Manager from Construction Manager's obligations to perform the Work in accordance with the Contract.
- 13.6.5. If testing, inspection, or approval reveal failure of the portions of the Work to comply with requirements established by the Contract, Construction Manager shall bear all costs made necessary by such failure, including those of repeated procedures and compensation for City's services and expenses.

### **13.7. Interest**

- 13.7.1. No interest will accrue on late payments by City except as provided under Chapter 2251 of the Government Code.

### **13.8. Parties In Interest**

- 13.8.1. The Contract does not bestow any rights upon any third party, but binds and benefits the Parties only.

### **13.9. Entire Contract**

- 13.9.1. The Contract merges the prior negotiations and understandings of the Parties and embodies the entire agreement of the Parties. No other agreements, assurances,

conditions, covenants, express or implied, or other terms of any kind, exist between the Parties regarding the Contract.

**13.10. Written Amendment**

- 13.10.1. Changes to the Contract that cannot be made by Modifications, must be made by written amendment, which will not be effective until approved by City Council.

**13.11. Compliance With Laws**

- 13.11.1. Construction Manager shall comply with the Americans with Disabilities Act of 1990 as amended (ADA) and Texas Architectural Barriers Act and all regulations relating to either statute.
- 13.11.2. Construction Manager shall comply with all applicable federal, state, and City laws, ordinances, rules and regulations. Nothing herein shall be construed to require that Construction Manager ensures that the Contract are prepared in accordance with applicable laws.

**13.12. Enforcement**

- 13.12.1. City Attorney or designee will have the right to enforce all legal rights and obligations under the Contract without further authorization.

**13.13. Severability**

- 13.13.1. If any part of the Contract is for any reason found to be unenforceable, all other parts remain enforceable to the extent permitted by law unless the result materially prejudices either Party.

**13.14. Compliance With Certain State Law Requirements**

- 13.14.1. *Anti-Boycott of Israel.* Construction Manager certifies that Construction Manager is not currently engaged in, and agrees for the duration of this Agreement not to engage in, the boycott of Israel as defined by Section 808.001 of the Texas Government Code.
- 13.14.2. *Anti-Boycott of Energy Companies.* Construction Manager certifies that Construction Manager is not currently engaged in, and agrees for the duration of this Agreement not to engage in, the boycott of energy companies as defined by Section 809.001 of the Texas Government Code.
- 13.14.3. *Anti-Boycott of Firearm Entities or Firearm Trade Associations.* Construction Manager certifies that Construction Manager does not have a practice, policy, guidance, or directive that discriminates against a firearm entity or firearm trade association, or will not discriminate against a firearm entity or firearm trade association for the duration of this Agreement, as defined by Section 2274.001 of the Texas Government Code.



- 13.14.4. *Certification of No Business with Foreign Terrorist Organizations.* For purposes of Section 2252.152 of the Texas Government Code, Construction Manager certifies that, at the time of this Agreement neither Construction Manager nor any wholly owned subsidiary, majority-owned subsidiary, parent company or affiliate of Construction Manager, is a company listed by the Texas Comptroller of Public Accounts under Sections 2252.153 or 2270.0201 of the Texas Government Code as a company known to have contracts with or provide supplies to a foreign terrorist organization.

**13.15. zero Tolerance Policy For Human Trafficking & Related Activities**

- 13.15.1. The requirements and terms of the City of Houston’s Zero Tolerance Policy for Human Trafficking and Related Activities, as set forth in Executive Order 1-56, as revised from time to time, are incorporated into this Agreement for all purposes. Construction Manager has reviewed Executive Order 1-56, as revised, and shall comply with its terms and conditions as they are set out at the time of this Agreement’s effective date. Construction Manager shall notify the City’s Chief Procurement Officer, City Attorney, and the Director of any information regarding possible violation by the Construction Manager or its subcontractors providing services or goods under this Agreement.

**14. TERMINATION OR SUSPENSION OF THE CONTRACT**

**14.1. Termination By The City For Cause**

- 14.1.1. Each of the following acts or omissions of Construction Manager or occurrences shall constitute an “Event of Default” under the Contract:
- 14.1.1.1. Construction Manager refuses or fails to supply enough properly skilled workers or proper Products;
  - 14.1.1.2. Construction Manager disregards laws, ordinances, rules, regulations, or orders of a public authority having jurisdiction;
  - 14.1.1.3. Construction Manager is guilty of material breach of any duty or obligation of Construction Manager under the Contract;
  - 14.1.1.4. Construction Manager has had any other contract with City terminated for cause at any time subsequent to the effective date of the Contract as set out in the Agreement; or, Construction Manager fails to utilize Ultra Low Sulfur Diesel Fuel, as required in Section 3.9.1.1 of this Exhibit.
- 14.1.2. If an Event of Default occurs, City Engineer may, at its option and without prejudice to any other rights or remedies which City may have, deliver a written notice to Construction Manager and Surety describing the Event of Default and giving the Construction Manager 10 days to cure the Event of Default. If after the 10 day cure period, Construction Manager has failed or refused to cure the Event of Default, then City Engineer may deliver a second written notice to Construction

Manager and Surety giving notice of the termination of the Contract or of the termination of Construction Manager's performance under the Contract ("Notice of Termination"). If City Engineer issues a Notice of Termination, then City Engineer may, subject to any prior rights of Surety and any other rights of City under the Contract or at law:

- 14.1.2.1. request that Surety take over and restart the Work within thirty (30) days of termination and complete the Work within a reasonable period of time as established by the City Engineer; or
  - 14.1.2.2. take possession of the site and all materials, equipment, tools, and construction equipment and machinery on the site owned by Construction Manager; and
  - 14.1.2.3. finish the Work by whatever reasonable method City Engineer may deem expedient.
- 14.1.3. After Construction Manager's receipt of a Notice of Termination, and except as otherwise directed in writing by City Engineer, Construction Manager shall:
- 14.1.3.1. stop the Work on the date and to the extent specified in the Notice of Termination;
  - 14.1.3.2. place no further orders or subcontracts for Products or services;
  - 14.1.3.3. suspend all orders and subcontracts to the extent that they relate to performance of work terminated;
  - 14.1.3.4. assign to City, in the manner, at the times, and to the extent directed by City Engineer, all rights, title, and interest of Construction Manager, under the terminated supply orders and subcontracts. City may settle or pay claims arising out of termination of the orders and subcontracts;
  - 14.1.3.5. settle all outstanding liabilities and all claims arising out of the termination of supply orders and subcontracts with approval of City Engineer;
  - 14.1.3.6. take action as may be necessary, or as City Engineer may direct, for protection and preservation of property related to the Work that is in possession of Construction Manager, and in which City has or may acquire an interest; and
  - 14.1.3.7. secure the Work in a safe state before leaving the site, return all rented equipment, providing any necessary safety measures, shoring, or other devices.
- 14.1.4. If City terminates the Contract or terminates Construction Manager's performance under the Contract for any one or more of the reasons stated in Section 14.1.1 of

this Exhibit, Construction Manager may not receive any further payment until the Work is complete, subject to Section 14.1.5 of this Exhibit.

- 14.1.5. If the unpaid balance of the Guaranteed Maximum Price exceeds the costs of finishing the Work, including liquidated damages and other amounts due under the Contract, the balance will be paid to City. If the costs of finishing the Work exceed the unpaid balance, Construction Manager shall, within 10 days of receipt of written notice setting out the amount of the excess costs, pay the difference to City. The amount to be paid to Construction Manager or City will be certified by City Engineer in writing, and this obligation for payment shall survive termination of the Contract or termination of Construction Manager's performance under the Contract. Termination of the Construction Manager for cause shall not relieve the Surety from its obligation to complete the Project.

## **14.2. Termination By The City For Convenience**

- 14.2.1. City Engineer may, without cause and without prejudice to any other rights or remedies of City, give Construction Manager and Surety a Notice of Termination with seven days written notice.
- 14.2.2. After receipt of City's Notice of Termination, and except as otherwise approved by City Engineer, Construction Manager shall conform to requirements of Section 14.1.3 of this Exhibit.
- 14.2.3. After receipt of the Notice of Termination, Construction Manager shall submit to City its termination Claim, in forms required by City Engineer. The Claim will be submitted to City promptly, but no later than six months from the effective date of termination, unless one or more extensions are granted by City Engineer in writing. If Construction Manager fails to submit its termination Claim within the time allowed, in accordance with Section 14.2.4 of this Exhibit, City Engineer will determine, on the basis of available information, the amount, if any, due to Construction Manager because of termination, and City Engineer's determination is final and binding on the Parties. City will then pay to Construction Manager the amount so determined.
- 14.2.4. City Engineer will determine, on the basis of information available to City Engineer, the amount due, if any, to Construction Manager for the termination as follows:
  - 14.2.4.1. Payment for all Work performed in accordance with the Contract up to the date of termination determined in the manner prescribed for monthly payments in Article 9 of this Exhibit and other applicable Contract, except no retainage is withheld by City with respect to the terminated Work either for payment determined by percentage of completion or for materials and equipment delivered to the site, in storage or in transit.

14.2.4.2. Reasonable termination expenses that would qualify as Cost of the Work, including, to the extent they qualify as Costs of the Work, costs for settling and paying Subcontractor and Supplier claims arising out of termination of the Work under their respective Subcontracts and purchase orders, reasonable cost of preservation and protection of City's property after termination if required, and the cost of Claim preparation Termination expenses do not include field or central office overhead, salaries of employees of Construction Manager or litigation costs (including, but not limited to, attorneys' fees).

No amount is allowed for anticipated profit or central office overhead on uncompleted work, or any cost or lost profit for other business of Construction Manager alleged to be damaged by the termination. Construction Manager shall promptly remove from the site any construction equipment, tools, and temporary facilities not needed for Work not terminated, except the temporary facilities that City Engineer may wish to purchase and retain.

14.2.5. Construction Manager shall cooperate with City Engineer during the transition period.

14.2.6. City will take possession of the Work and materials delivered to the site, in storage, or in transit, as of date or dates specified in the Notice of Termination, and is responsible for maintenance, utilities, security, and insurance, as stated in Notice of Termination.

### **14.3. Suspension By The City For Convenience**

14.3.1. City Engineer may, without cause, after giving Construction Manager and Surety 24-hour prior written notice, order Construction Manager to suspend, delay, or interrupt the Work in whole or in part for such period of time as City Engineer may determine.

14.3.1.1. An adjustment will be made in Contract Time equivalent to the time of suspension.

14.3.2. Adjustment will be made to Guaranteed Maximum Price for increases in the Cost of the Work, caused by such suspension, delay, or interruption of the Work plus a proportionate increase in the Construction Manager's Construction Phase Fee in accordance with Section 7.3 of this Exhibit. No adjustment shall be made to the extent that:

14.3.2.1. performance was, or would have been, suspended, delayed, or interrupted by another cause for which Construction Manager is responsible; or

14.3.2.2. adjustment is made or denied under another provision of the Contract.

**14.4. Termination By Construction Manager**

14.4.1. Construction Manager may terminate the Contract if the Work is stopped for a period of 30 days through no act or fault of Construction Manager, directly related to one of these events:

14.4.1.1. issuance of an order of a court or other public authority having jurisdiction;

14.4.1.2. act of government, such as a declaration of national emergency that makes material unavailable; or,

14.4.1.3. if repeated suspensions, delays, or interruptions by City as described in Section 14.3 of this Exhibit constitute, in the aggregate, more than 100 percent of the total number of days scheduled for completion, or 120 days in any 365-day period, whichever is less;

Construction Manager shall deliver written notice to City Engineer describing the reason for termination, giving the proposed termination date, and granting City a reasonable opportunity to respond and cure any City default before termination is effective.

14.4.2. If the Contract is terminated pursuant to this Section 14.4 of this Exhibit, Construction Manager shall comply with the requirements of Sections 14.2.2 through 14.2.7 of this Exhibit.

**{End Of Exhibit}**

**EXHIBIT B: KEY PERSONNEL AND BILLABLE RATES**

**EXHIBIT C: GUARANTEED MAXIMUM PRICE**

Subject to the terms and conditions of Contract No. \_\_\_\_\_, Construction Manager and the City agree as follows:

<p><b>Estimated Cost of Work</b></p>		<p>\$ _____</p>
<p>The following Cash Allowances are included in the Estimated Cost of Work above:</p>	<p>\$ _____ \$ _____</p>	
<p>The following Alternates are included in the Estimated Cost of Work above:</p>	<p>\$ _____ \$ _____</p>	
<p><b>Construction Phase Fee</b>  _____ % of the Estimated Cost of Work</p>		<p>\$ _____</p>
<p><b>Construction Manager's Contingency</b>  _____ % of the Estimated Cost of Work</p>		<p>\$ _____</p>
<p><b>Guaranteed Maximum Price</b>  (GMP)(GMP = Estimated Cost of Work +Construction Phase Fee + Construction Manager's Contingency)  For GMP Cost Breakdown see Exhibit 1 Schedule of Values attached hereto.</p>		<p>\$ _____</p>

1. The GMP for the Project includes all Claims, Work, and Change Orders in existence before date of signing this GMP.
2. The Drawings and Specifications upon which the GMP is based are set forth in Exhibit 6 attached hereto.
3. Construction Manager shall provide complete performance of the Work for the GMP. In the event of a conflict among the Contract, the Construction Manager shall fulfill the greater of the requirements set forth in the Agreement, the Document 00700 – General Conditions (Exhibit A), the Specifications and the Drawings.
4. The Clarifications & Assumptions made by the Construction Manager are set forth in Exhibit 3. The clarifications and assumption do not alter the Agreement or Document 00700-General Conditions.
5. Construction Manager shall achieve Substantial Completion within \_\_\_\_ days from issuance of Notice to Proceed.
6. Construction Manager waives all rights to an extension of time or delay damages for any events or circumstances prior to the date of signing this GMP.
7. The following exhibits are incorporated into the GMP:
  - Exhibit 1 – Schedule of Values
  - Exhibit 2 – Project Team and Burden Rates
  - Exhibit 3 – Clarifications & Assumptions
  - Exhibit 4 – Insurance
  - Exhibit 5 – Bonds
  - Exhibit 6 – List of Drawings and Specifications



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- 8. Signatures: The Parties have executed this GMP in multiple copies, each of which is an original. Each person signing this GMP represents and warrants that he or she is duly authorized and has legal capacity to execute and deliver this GMP. Each Party represents and warrants to the other that the execution and delivery of this GMP and the performance of such Party's obligations hereunder have been duly authorized, and that the GMP is a valid and legal GMP binding on such Party and enforceable in accordance with its terms. The Parties hereby agree that each Party may sign and deliver this GMP electronically or by electronic means and that an electronic transmittal of a signature, including but not limited to, a scanned signature page, will be as good, binding, and effective as an original signature.

**CONSTRUCTION MANAGER**

**CITY ENGINEER**

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

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

The insurance and bonds for this Guaranteed Maximum Price form have been reviewed as to form by the undersigned legal assistant and have been found to meet established Legal Department criteria. Legal Department has not reviewed the content of this document or its exhibits, except for Exhibit 4 and Exhibit 5.

By: \_\_\_\_\_  
Legal Assistant  
Date: \_\_\_\_\_

**EXHIBIT D: CITY'S WAGE RATES**

[ TO BE ADDED PRIOR TO EXECUTION OF CONTRACT ]

**EXHIBIT E: MASTER PROJECT SCHEDULE**

[ TO BE ADDED PRIOR TO EXECUTION OF CONTRACT ]