

## **ATTACHMENT A**

### **Sample Construction Management Contract**

Agreement made this \_\_\_\_\_ day of \_\_\_\_\_ in the year Two Thousand and Twelve between the COUNTY OF WALKER, a political and legal subdivision of the State of Texas, ("Owner"), and \_\_\_\_\_ ("Construction Manager"), for services in connection with the following described Project:

Proposed new Walker County Jail located at Huntsville, Texas.

The Architect for the Project is Burns Architecture, LLC located at 316 Bailey Ave, Fort Worth, Texas 76107.

The Owner and the Construction Manager agree as set forth below:

#### **TABLE OF ARTICLES**

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#### **ARTICLE 1**

##### **THE CONSTRUCTION TEAM AND EXTENT OF AGREEMENT**

The CONSTRUCTION MANAGER accepts the relationship of trust and confidence established between him and the Owner by this Agreement. He covenants with the Owner to furnish his best skill and judgment and to cooperate with the Architect in furthering the interests of the Owner. He agrees to furnish efficient business administration and superintendence and to use his best efforts to complete the Project in an expeditious and economical manner consistent with the interest of the Owner.

**1.1 The Construction Team:** The Construction Manager, the Owner, or designated representative "Insert name of PM here if applicable" and the Architect called the "Construction Team" will work from a Notice to Proceed from the Owner through construction

completion. The Construction Manager will provide leadership to the Construction Team on all matters relating to construction.

**1.2 Extent of Agreement:** This Agreement represents the entire agreement between the Owner and the Construction Manager and supersedes all prior negotiations, representations or agreements. This Agreement includes the General Conditions of the Contract for Construction (AIA Document A201-2007) as modified by the attached Supplementary Conditions of Walker County and other exhibits listed in Article 14. This Agreement will not be superseded by any provisions of the documents for construction unless amended by subsequent written instrument signed by both the Owner and the Construction Manager.

**1.3 Definitions:** The Project is the total construction to be performed under this Agreement. The Work is that part of the Construction Phase Services that the Construction Manager is to perform or that part of the construction that a particular Trade Contractor under contract with the Construction Manager is to perform. The term day will mean calendar day unless otherwise specifically designated.

## **ARTICLE 2**

### **CONSTRUCTION MANAGER'S SERVICES**

The CONSTRUCTION MANAGER will perform the following services:

#### **2.1 Pre-Construction Phase Services**

"" The Pre-Construction Services will include, but not necessarily be limited to preparation of the following documents and completion of the following services:

- 2.1.1.** Attend regularly scheduled project team meetings.
- 2.1.2.** Review of the design documents for constructability, completeness, accuracy, and proper coordination of disciplines.
- 2.1.3.** Continual review of design documents and preparation of detailed construction estimates to confirm conformance to the approved project budget.
- 2.1.4.** Continual value analysis of the design and identification of opportunities to meet or reduce construction costs and/or improve facility performance.
- 2.1.5.** Development of a detailed construction schedule for the project, include identification of long lead items and owner supplied equipment and materials.
- 2.1.6.** Development of detailed budget estimates at critical milestones including a 50% Construction Document Estimate.
- 2.1.7.** Development of a comprehensive list of subcontractors and suppliers.
- 2.1.8.** Development of Bid Packages.
- 2.1.9.** Establish bid schedules and conduct pre-bid conferences.
- 2.1.10.** Analyze responses, conduct pre-award conferences and negotiations with successful bidders and recommend responses to be accepted or rejected.

**2.1.11.** Obtain permits and other governmental reviews and approvals.

**2.1.12.** Development of a Guaranteed Maximum Price (GMP). If a mutually agreeable GMP cannot be reached, services can be terminated and Walker County will pay Construction Manager for services up to that time.

**2.1.13.** The Construction Manager will advertise the bid packages for the trade contractors as described in Section 2267.255 of the Texas Government Code.

**2.1.14.** The Construction Manager may perform portions of the work if it complies with Section 2267.256 of the Texas Government Code.

**2.1.15.** The Construction Manager will review the bids as outlined in Section 2267.256 of the Texas Government Code.

**2.1.16.** The Construction Manager will cooperate with the owner and architect in the procurement, coordination and incorporation into the construction of products supplied to the owner by Texas Correctional Industries (TCI) or others.

## **2.2 Construction Phase Services:**

**2.2.1. Project Control:** Monitor the Work of the Trade Contractors and coordinate the Work with the activities and responsibilities of the Owner, Architect and Construction Manager to complete the Project in accordance with the Owner's objectives of cost, time, quality and safety all of which are enumerated in the contract documents for construction.

**2.2.1.1** Maintain a competent full-time staff at the Project site to coordinate and provide general direction of the Work and progress of the Trade Contractors on the Project.

**2.2.1.2** Establish on-site organization and lines of authority in order to carry out the overall plans of the Construction Team.

**2.2.1.3** Establish procedures for coordination among the Owner, Architect, Trade Contractors and Construction Manager with respect to all aspects of the Project and implement such procedures.

**2.2.1.4** Schedule and conduct progress meetings at which Trade Contractors, Owner, Architect and Construction Manager can discuss jointly such matters as procedures, progress, problems and scheduling.

**2.2.1.5** Provide regular monitoring of the schedule as construction progresses. Identify potential variances between scheduled and probable completion dates. Review the schedule for Work not started or incomplete and recommend to the Owner and Trade Contractors adjustments in the schedule to meet the probable completion date. Provide summary reports for each adjustment and document all changes in the schedule.

**2.2.1.6** Determine the adequacy of the Trade Contractors' personnel and equipment and the availability of materials and supplies to meet the schedule.

Recommend courses of action to the Owner when requirements of a Trade Contract are not being met.

**2.2.1.7** Construction Manager will submit a proposed Project Schedule "Exhibit C" for Owner's acceptance and provided monthly updates of the schedule. The proposed Project Schedule will include a detailed and comprehensive construction schedule utilizing a critical path method arrow diagram network that (i) shows all major design, procurement and construction elements and phases of the Project and Owner furnished items with milestone dates; (ii) breaks down each element or phase by trade; (iii) shows early and late start dates so that all "float" time will be accurately identified; (iv) clearly identifies critical path activities; (v) discloses relationship in number of days and types of linkage between all linked activities; (vi) identifies, coordinates and integrates design and construction schedules, Owner's responsibilities, governmental approvals, early access dates for certain portions of the Work by Owner, and other activities necessary for the timely completion of the Project in accordance with the scheduled dates of Substantial and Final Completion; and (vii) otherwise is in a form satisfactory to Owner. Owner's acceptance is expressly limited to Owner's acknowledgment that based upon Owner's limited review, the dates of Substantial Completion and milestone dates are acceptable and the latest dates of Owner-provided information, materials, approvals and the like identified in the Project Schedule are reasonable.

**2.2.1.8** The Construction Manager will provide the monthly update schedule in the format described in 2.2.1.7 and provide a monthly update sheet entitled "Project Critical Path This Month and 3 Month Look Ahead". Construction Manager will provide this update as part of their monthly progress payment application. This update schedule requires that the listing of critical path activities separately from the normal project management software program. The Construction Manager will list the critical path activities in tabular format (Microsoft Office Word or Excel document). This list will include the critical path activities (completed percentage of each and those not completed) for the month of the current progress payment application and the upcoming 3 months ahead (Month 1, Month 2 and Month 3, all listed as separate months). The document should be titled "Project Critical Path This Month and the 3 Month Look-Ahead".

**2.2.1.9** The Construction Manager will cooperate with the owner and architect in the procurement, coordination and incorporation into the construction of products supplied to the owner by Texas Correctional Industries (TCI) or others.

**2.2.2.** The Construction Manager will publicly advertise, as prescribed under Section 2267.255 through 2267.256 of the Texas Government Code, and receive bids from trade contractors for the performance of all major elements of the work other than work authorized as general conditions by the County. The Construction Manager will prepare bid documents setting forth criteria for the selection of a responsible bidder and for selection of the lowest and

best bid. Owner has discretion to modify these criteria in the manner the Owner believes meets the requirements of Texas law before bids are advertised by the Construction Manager.

**2.2.2.1** The Construction Manager may seek to perform portions of the work if the Construction Manager submits its bid for those portions of the work in the same manner as all other trade contractors and if the County independently determines that the Construction Manager's bid provides the best value for the County. In the event that the Construction Manager submits a bid for a portion of the Work, the County will conduct the review contemplated by Section 2.2.2.2 without the assistance of the Construction Manager. If the Construction Manager submits a bid, then the Construction Manager must submit the bid to the Walker County Purchasing Department Contracts Administrator 24 hours in advance of the advertised bid opening.

**2.2.2.2** The Construction Manager and the County or its representative will review all trade contractor bids in a manner that does not disclose the contents of the bid during the selection process to a person not employed by the construction manager-at-risk, engineer, architect, or governmental entity. All bids will become public in accordance with Texas law.

**2.2.2.3** Prevailing Wage Rates: The selected Construction Manager shall be responsible for compliance with prevailing wage rates and other labor and employment laws per Chapter 2258 of the Texas Government Code (as described in Exhibit "A").

**2.2.3. Cost Control:** Develop and monitor an effective system of Project cost control. Revise and refine the initially approved Project Construction Budget, incorporate approved changes as they occur, and develop cash flow reports and forecasts as needed. Identify variances between actual and budgeted or estimated costs and advise Owner and Architect whenever projected cost exceeds budgets or estimates. Identify scope changes and costs as requested by the Owner prior to performing the Work.

**2.2.3.1** Maintain cost accounting records on authorized Work performed under unit costs, actual costs for labor and material, or other bases requiring accounting records, unless provided for by the Trade Contractor. Afford the Owner access to these records and preserve them for a period of three (3) years after final payment.

**2.2.4. Change Orders:** Develop and implement a system for the preparation, review and processing of Change Orders. Recommend necessary or desirable changes to the Owner and the Architect, review requests for changes, submit recommendations to the Owner and the Architect, and assist in negotiating Change Orders.

**2.2.5. Payments to Trade Contractors:** Develop and implement a procedure for the review, processing and payment of applications by Trade Contractors for progress and final payments. The Construction Manager will pay Trade Contractors the appropriate share of any payment received from the Owner not later than the 10th day after the date such payment is received by the Construction Manager. The foregoing requirement does not apply to any payment withheld because of a bona fide dispute between the Construction Manager and a Trade Contractor.

**2.2.6. Permits and Fees:** Obtain all building permits and special permits for permanent improvements, excluding permits for inspection or temporary facilities required to be obtained directly by the various Trade Contractors. Assist in obtaining approvals from all the authorities having jurisdiction. The Owner will pay for the permit and all utility assessment fees.

**2.2.7. Owner's Consultants:** If required, assist the Owner in selecting and retaining professional services of a surveyor, testing laboratories and special consultants, and coordinate these services, without assuming any responsibility or liability of or for these consultants.

**2.2.8. Inspection:** Inspect the Work of Trade Contractors for defects and deficiencies in the Work.

**2.2.8.1** Provide a project specific site safety program. Review the safety programs of each of the Trade Contractors. The Construction Manager will retain overall responsibility for safety precautions and programs in the performance of the Work, including the Trade Contractors. While this paragraph establishes the responsibility for safety between the Owner and the Construction Manager, it does not relieve Trade Contractors of their responsibility for the safety of persons or property in the performance of their work, nor for their compliance with the provisions of applicable federal, state and local law, regulations and orders applicable to the conduct of the Work.

**2.2.8.2 Quality Review:** The Construction Manager will establish and implement a program to monitor the quality of the construction. The program will protect the Owner from defects and deficiency in the work of the Trade Contractors. The Construction Manager must reject work and transmit to the Trade Contractor a written notice of nonconforming work with a copy to the owner when it is the opinion of the Construction Manager that the Work does not conform to the requirements of the Contract Documents. Except for minor variations as stated herein, the Construction Manager is not authorized as part of this contract to change, evoke, relax, alter, or release any requirement of the Construction Documents or to approve or accept any portion of the Work not performed in accordance with the Construction Documents.

**2.2.9. Document Interpretation:** Refer all questions for interpretation of the documents prepared by the Architect to the Architect and a copy to the Owner.

**2.2.10. Shop Drawings and Samples:** In collaboration with the Architect, establish and implement procedures for expediting the processing and Architect's approval of shop drawings, samples, and other submittals. Receive from the Trade Contractors and review all such submittals, coordinate them with the information contained in related documents, and transmit them to the Architect for its approval.

**2.2.11. Reports and Project Site Documents:** Record the progress of the Project. Submit monthly written progress reports to the Owner and the Architect including information on the Trade Contractors' Work, and the percentage of completion. Keep a daily log available to the Owner and the Architect. Submit the daily logs to the Owner and Architect monthly.

**2.2.11.1** Maintain at the Project site, on a current basis: records of all necessary Contracts, Drawings, samples, purchases, materials, equipment, maintenance and operating manuals and instructions, and other construction related documents, including all revisions. Obtain data from Trade Contractors and maintain a current set of record and as-built Drawings, Specifications and operating manuals. Review as-built/record drawings each month prior to sign-off of Trade Contractor applications for payment to determine if documents are being kept up to date. The recording of record and as-built drawings will be done by hand and does not include any computer aided product by the Construction Manager except that the Construction Manager shall provide electronic copies in PDF format of record drawings. At the completion of the Project, deliver all such records to the Owner.

**2.2.12. Substantial Completion:** Discuss any work required after the substantial completion date that the Respondent will have to complete after the building is deemed substantially complete (i.e. site work, etc.), or state that there is no work beyond substantial completion. Substantial completion for this project is defined as the date that the Texas Commission on Jail Standards certifies the completed jail for occupancy.

**2.2.13. Start-Up:** With the Owner's maintenance personnel direct the checkout of utilities, operations systems and equipment for readiness and assist in their initial start-up and testing by the Trade Contractors. Prior to Owner's maintenance personnel acceptance, the Construction Manager will verify that the Work has been completed in accordance with the contract documents and is ready for the Owner's operation. Construction Manager will debug the system and prepare the list of minor deficiencies.

**2.2.14. Final Completion:** Determine final completion and provide written notice to the Owner and Architect that the Work is ready for final inspection. Secure and transmit to the Architect required guarantees, affidavits, releases, bonds and waivers. Turn over to the Owner all keys, manuals, record drawings and maintenance stocks.

**2.2.15. Warranty:** Where any Work is performed by the Construction Manager's own forces or by Trade Contractors under contract with the Construction Manager, the Construction Manager will warrant that all materials and equipment included in such Work will be new, unless otherwise specified by the Contract Documents, and that such Work will be of good quality, free from improper workmanship and defective materials and in conformance with the Drawings and Specifications. If, within one year after the date of Substantial Completion of the Work or designated portion thereof or after the date for commencement of warranties established under any other provision of the contract documents, or by terms of an applicable special warranty required by the Contract Documents, any of the Work is found to be not in accordance with the Requirements of the Contract Documents, the Construction Manager will correct it promptly after receipt of written notice from the Owner to do so. The Owner will give this notice promptly after discovery of the condition. The Construction Manager will collect and deliver to the Owner any specific written warranties given by others. If Construction Manager fails or refuses to correct the Work in accordance with its obligations under the Contract Documents after written notice from the Owner, then Owner may correct the Work and Construction Manager will remain liable for the costs to correct the Work, any related architectural, engineering or other consulting costs, legal fees and expenses and fines or

penalties, if any. Any amounts due to Owner from Construction Manager under this Paragraph will be deducted from the GMP by a Change Order. If the balance remaining in the GMP is not sufficient to cover the amounts due, the Construction Manager must pay to Owner the amount remaining due. The foregoing warranty does not cover normal wear and tear and/or damage where the non-conformance is due to abuse, lack of proper maintenance or casualty losses.

**2.2.16.** Conduct with the Owner and Architect, post-completion inspections during the one year warranty period to ascertain defects in material and workmanship and determine corrective action. Assign, if possible, the causes of the defects, the responsible Trade Contractor, and recommend reasonable corrective action. Aid the Owner in obtaining this corrective action and in filing insurance and bond claims where coverage is available. Ultimate responsibility for correcting defects in material and workmanship will rest with the Construction Manager at no expense to the Owner.

**2.2.17.** Conduct with the Owner and Architect a Final Warranty Inspection within thirty (30) days of the end of the one (1) year warranty period.

**2.2.18.** Coordinate construction and operations of the work with Owner's portion of the work. Inform Owner of preferred construction schedule for owner's portion of the work. Adjust construction schedule based on a mutually agreeable timetable.

**2.2.19.** Assist the Owner with the coordination of built-in, Owner-furnished equipment, furniture, and furnishings.

**2.2.20.** After taking all steps necessary to assure that the Trade Contractors perform their contracts in accordance with their terms, the Construction Manager will notify the Owner of the necessity of any legal action including but not limited to litigation, mediation, etc. against the Trade Contractor.

## **2.3 Additional Services**

**2.3.1.** At the request of the Owner the Construction Manager will provide the following additional services upon written agreement between the Owner and Construction Manager defining the extent of such additional services and the amount and manner in which the Construction Manager will be compensated for such additional services.

**2.3.2.** Services related to investigation, appraisals or valuations of existing conditions, facilities or equipment, or verifying the accuracy of existing drawings or other Owner-furnished information.

**2.3.3.** This is intentionally left blank.

**2.3.4.** Performing "Auto-Cad" As-Built or Record Documents.



## **2.4 Standard of Care**

**2.4.1.** Construction Manager will proceed with sufficient qualified personnel necessary to expedite and fully complete all Services required under this Contract in the highest professional manner consistent with the requirements of the Contract Documents.

**2.4.2.** Construction Manager's personnel assigned to the Project may be subject to Owner's approval, and no change in key personnel set out in the organization chart will be made unless approved by Owner. Owner may request replacement of any employee assigned by Construction Manager to the Project with reasonable cause and with agreement by the Construction Manager.

**2.4.3.** The Construction Manager covenants with the owner to furnish its skills and judgment with due care in accordance with applicable federal, state and local laws and regulations.

## **ARTICLE 3 OWNER'S RESPONSIBILITIES**

**3.1** The Owner will provide full information regarding his requirements for the Project.

**3.2** The Owner may designate in writing a representative who will be fully acquainted with the Project and has authority to issue and approve Project Construction Budgets, issue Change Orders, render decisions promptly and furnish information expeditiously. This representative has the authority outlined in 6.5. Any limitations of the foregoing will be indicated to the Construction Manager in writing. The Construction Manager agrees that any of the above decisions increasing the guaranteed maximum price and the project time will be made by Commissioners Court in a properly noticed meeting.

**3.3** The Architect, employed by the Owner, has provided design services and prepared construction documents for the project. The Construction Manager is not responsible for the accuracy or completeness of the construction documents prepared by the design professionals employed by Owner.

**3.4** The Owner will furnish for the site of the Project all necessary surveys describing the physical characteristics, soil reports and subsurface investigations, legal limitations, utility locations, and a legal description. These surveys describe the physical characteristics, legal limitations and utility locations for the site of the Project, and a written legal description of the site. The surveys and legal information will include, as applicable, grades and lines of streets, alleys, pavements and adjoining property and structures; adjacent drainage; rights-of-way, restrictions, easements, encroachments, zoning, deed restrictions, boundaries and contours of the site; locations, dimensions and necessary data pertaining to existing buildings, other improvements and trees; and information concerning available utility services and lines, both public and private, above and below grade, including inverts and depths. All information on the survey will be referenced to a project benchmark.

**3.5** The Owner will secure and pay for necessary approvals, easements, assessments and charges required for the construction, use or occupancy of permanent structures or for permanent changes in existing facilities.

**3.6** The Owner will furnish such legal services as may be necessary for providing the items set forth in Paragraph 3.5 and such auditing services as he may require.

**3.7** The Construction Manager will be furnished without charge all copies of Drawings and Specifications reasonably necessary for the execution of the Work.

**3.8** The Construction Manager will provide the insurance for the Project as provided in Paragraph 9.2 and 9.4.

**3.9** The services, information, surveys and reports required by the above paragraphs or otherwise to be furnished by other consultants employed by the Owner, will be furnished with reasonable promptness at the Owner's expense and the Construction Manager will be entitled to rely upon the accuracy and completeness thereof.

**3.10** If the Owner becomes aware of any fault or defect in the Project or nonconformance with the Drawings and Specifications, he will give prompt written notice thereof to the Construction Manager.

**3.11** The Owner will furnish, prior to commencing work and at such future times as may be requested, reasonable evidence satisfactory to the Construction Manager that sufficient funds are available and committed for the entire cost of the Project. Unless such reasonable evidence is furnished, the Construction Manager is not required to commence or continue any Work, or may, if such evidence is not presented within a reasonable time, stop the Project upon 15 days' notice to the owner. The failure of the Construction Manager to insist upon the providing of this evidence at any one time will not be a waiver of the Owner's obligation to make payments pursuant to this Agreement nor will it be a waiver of the Construction Manager's right to request or insist that such evidence be provided at a later date.

**3.12** The Owner will communicate with the Trade Contractors only through the Construction Manager.

**3.13** The Owner, at its discretion, may provide materials and equipment purchased from Texas Correctional Industries and others for incorporation into the work by the Construction Manager.

**3.14** The Owner will provide or contract for, independently of the Construction Manager, the inspection services, the testing of construction materials engineering, and the verification testing services necessary for acceptance of the facility by the Owner.

#### **ARTICLE 4** **SCHEDULE**

**4.1** This is intentionally left blank.

**4.2** At the time a Guaranteed Maximum Price is established, as provided for in Article 5, the Construction Manager will establish a Date of Substantial Completion of the Project.

**4.3** The Date of Substantial Completion of the Project is defined as the date that the Texas Commission on Jail Standards certifies the completed jail for occupancy. . Warranties called for by this Agreement or by the Drawings and Specifications will commence on the Date of Substantial Completion of the Project.

**4.4** If the Construction Manager is delayed at any time in the progress of the Project by any act or neglect of the Owner or the Architect or by any employee of either, or by any separate contractor employed by the Owner, or by changes ordered in the Project, or by labor disputes, fire, unusual delay in transportation, adverse weather conditions not reasonably anticipatable, unavoidable casualties or any causes beyond the Construction Manager's control and substantiated by the Critical Path Schedule, the Substantial Completion Date will be extended by Change Order.

#### **4.5 Liquidated Damages**

"It is agreed that the date of beginning and the time for completion of the Project are essential conditions of this Agreement. If the Construction Manager shall neglect, fail or refuse to complete the Project within the time specified, including any proper extension of time granted by the Owner, then the Construction Manager does hereby agree as part of the consideration for this Agreement, that the Owner may withhold permanently from the Construction Manager's total compensation hereunder the sum of \$1,000.00 for each and every calendar day that the Project is not complete beyond the time specified for completion set forth herein, including any proper extensions granted by the Owner; not as a penalty, but as liquidated damages for the breach of that commitment under this Agreement. It is expressly understood and agreed by and between the Owner and the Construction Manager that the time for completion of the work as set forth herein is a reasonable time for completion of the same. The liquidated damages sum is agreed upon as a reasonable and proper measure of damages for delay which the Owner would sustain in the event of the Construction Manager's failure to timely complete the Project; it being recognized by the Owner and Construction Manager that the injury to the Owner by such delay, including the lost use of the facility, incurrence of interest expense and other expenses is uncertain and cannot be exactly computed.

To the extent that there are insufficient amounts remaining owing to the Construction Manager to cover the liquidated damages incurred, the Construction Manager agrees to pay the same to the Owner and agrees that such are recoverable against the Construction Manager as damages for breach of this Agreement, along with attorneys' fees and costs incurred to recover the same. The Owner shall retain the right to terminate this Agreement for excessive delay.

**ARTICLE 5**  
**CONSTRUCTION MANAGER COMPENSATION AND GUARANTEED MAXIMUM PRICE**

**5.1 Pre-Construction Phase Services**

For Services performed by the Construction Manager as described in Paragraph 2.1, a fixed cost of \$\_\_\_\_\_ will be paid to the Construction Manager for Pre-Construction Services.

**5.2 Construction Phase Services and Guaranteed Maximum Price Deliverables**

The Construction Manager will prepare and deliver to the Owner a Guaranteed Maximum Price ("GMP") proposal. The Construction Manager will, at a minimum, include in the GMP proposal:

**5.2.1.** a recital of the specific Construction Documents and their issuance dates, including drawings, specifications, and all addenda there to, used in preparation of the GMP proposal;

**5.2.2.** the elements of the GMP, including:

- a) General Conditions line item detail and cost of each line.
- b) Trade Contracts cost, detailed by each subcontract, trade or bid division.
- c) Construction Management Fee cost.
- d) Construction Contingency cost
- e) Other costs as determined by the CM and Owner.

**5.2.3.** a description of all other inclusions to or exclusions from the GMP;

**5.2.4.** a list of allowances and a statement of their basis;

**5.2.5.** all assumptions and clarifications;

**5.2.6.** the proposed Date of Substantial Completion upon which the GMP is based;

**5.2.7.** an outline of preliminary Construction Schedule showing proposed start and finish dates of major components of construction;

**5.2.8.** a Construction Manager staffing plan that breaks down the required Construction Manager staff (including any consultants or teamed members of the Construction Manager that are to be paid from the Construction Phase Services) for each calendar month during the project and summary cost associated with each staff member (or teamed member) by month or lump sum for the Project.

**5.3 Price Guarantees**

**5.3.1.** Construction Manager is responsible for all costs, expenses and fees, as defined in paragraph 5.1.2 above, incurred in excess of the GMP plus any adjustments thereto to which the Construction Manager is entitled under the terms of this Contract.

## 5.4 Cost Components of the Guaranteed Maximum Price

**5.4.1. Trade Contracts:** Construction Manager will select Trade Contracts in compliance with Section 2267.256 of the Texas Government Code. If the Owner refuses to accept a Trade Contractor recommended by the Construction Manager in accordance with the procedures proscribed by Section 2267.256 of the Texas Government Code, the Construction Manager will recommend an acceptable substitute and the Owner will compensate the Construction Manager by a change in price, time, or Guaranteed Maximum Cost for any additional cost and risk that the Construction Manager may incur because of the governmental entity's requirement that another bid be accepted. Trade Contracts will be between the Construction Manager and the Trade Contractors. Payments made by the Construction Manager to Trade Contractors for Work performed pursuant to Trade Contracts under this Agreement will be forwarded to the Trade Contractors in accordance with the applicable Trade Contract and Section 2.2.5 of this Agreement. Trade Contracts will be with the Construction Manager, and will contain the necessary provisions, in the Construction Managers opinion, to allow the Construction Manager to control the performance of the Work.

**5.4.2. General Conditions:** General Conditions Allowance - the provision of facilities or performance of work by the Construction Manager through separate contracts or purchase orders for items which do not lend themselves readily to inclusion in one of the separate Trade Contracts. The attached Exhibit "A" lists the estimated value of each of these items in the amount of \$\_\_\_\_\_. The General Conditions will be reimbursable by the Owner to the Construction Manager at cost (without any additional markup). At the time the Final Guaranteed Maximum Price is established, the cost of this Allowance will be adjusted, based on known job conditions, either up or down and become a Reimbursable cost item to the Construction Manager. The General Conditions Allowance items may include (but are not limited to) the following: field office rental charges, furniture, set-up, maintenance and repair, utilities, janitorial service and office equipment; computers, software and maintenance; copy machines, supplies and maintenance; telephone, communications and radios; stationary, messenger and postage; drinking water; first aid supplies; blueprinting costs other than contract drawings; field office travel; surveyor services, equipment and supplies; project signage; project photos; field staff vehicles or auto allowances, insurance and maintenance; miscellaneous permits; AGC dues; jobsite safety incentive programs and random employee drug testing; temporary toilets; temporary fencing; rubbish removal and cleanup; glass cleaning; temporary power consumption during construction and startup power costs; jobsite security; temporary fire extinguishers; temporary storage requirements for long lead items and minor construction work when it is not feasible for the Construction Manager to secure competitive bids thereon. The General Conditions items described in this paragraph may be provided by the Owner under separate contracts or incorporated into other Trade Contracts.

**5.4.3. Construction Management Fee:** In consideration of the performance of the Contract, the Owner will pay the Construction Manager in current funds a Construction Manager's Fee using the following formula:

For Services performed during the construction phases, a fixed percentage of \_\_ percent of the total cost of the Work (less the Construction Management Fee) completed to the date of the billing period less retainage multiplied by the fixed percentage equals a sum

that is then reduced by the previous billings. The resulting sum represents the monthly payment due the Construction Manager.

Adjustments in Fee will be made in compliance with Article 6.

Included in the Construction Manager's Fee are the following:

- a) Salaries or other compensation of the Construction Manager's employees at the principal office and branch offices, except as included in Construction Phase Services defined above;
- b) General operating expenses of the Construction Manager's principal and branch offices other than the field office;
- c) Any part of the Construction Manager's capital expenses, including interest on the Construction Manager's capital employed for the project;
- d) Overhead or general expenses of any kind, except as may be expressly included in the General Conditions or in Construction Phase Services defined above; and
- e) Cost in excess of the Guaranteed Maximum Price.

**5.4.4. Construction Contingency:** The Guaranteed Maximum Price will contain a separately identified contingency factor (the "Construction Contingency") in the amount of \$ \_\_\_\_\_. The Construction Contingency is not allocated to any particular item of the Cost of the Project, and is established for the Construction Manager's use as may be required for costs incurred in the Work from unforeseen causes or details which should have been anticipated by the Construction Manager at the time of the Owner's approval of the Guaranteed Maximum Price. Such unanticipated causes or details include, but are not limited to, refinement of details of design within the scope of standards, quality and quantities which are reasonably inferable from the Guaranteed Maximum Price documents, the correction of minor defects not relating to design, delays in receipt of materials due to the fault of the Construction Manager, corrections in the Work provided the Construction Manager has exhausted all reasonable means to obtain correction of same from the responsible Trade Contractor, labor and material overruns, and additional costs relating to Trade Contractor defaults, provided any such default is not due to the Owner's actions or failure to act, costs incurred by the Owner caused by the Construction Manager or Trade Contractors such as additional roof inspection, additional furniture move costs, furniture damage and costs associated with more than two (2) punch list visits to the same area. In the event the default of a Trade Contractor is due to the Owner's actions or failure to act, the Construction Manager will be entitled to an appropriate adjustment in the Guaranteed Maximum Price in accordance with the terms of this Agreement. The Construction Manager may utilize the Construction Contingency for any items within the Cost of the Project without the necessity of a Change Order, without constituting a Change in the Project, and without resulting in any change in the Guaranteed Maximum Price. At the conclusion of the project any remaining balance in the Construction Contingency becomes the property of the Owner. The Construction Contingency will not be used to increase the Construction Manager's fee.

#### **5.4.5. Other Costs**

**5.4.5.1** Cost of all materials, supplies and equipment incorporated in the Project, including costs of transportation and storage thereof.

**5.4.5.2** Cost, including transportation and maintenance, of all materials, supplies, equipment, vehicles, temporary facilities and hand tools not owned by the workmen, which are employed or consumed in the performance of the Work, and less salvage value on such items used but not consumed which remain the property of the Construction Manager.

**5.4.5.3** Rental charges of all necessary machinery and equipment, exclusive of hand tools, used at the site of the Project, whether rented from the Construction Manager or others, including installation, repairs and replacements, dismantling, removal, costs of lubrication, transportation and delivery costs thereof, at rental charges consistent with those prevailing in the area.

**5.4.5.4** Cost of the premiums and deductible amounts for all insurance and bonds which the Construction Manager is required to procure by this Agreement or is deemed necessary by the Construction Manager on approval of Commissioners Court, which approval will not be unreasonably withheld.

**5.4.5.5** Sales, use, gross receipts or similar taxes related to the Project imposed by any governmental authority, and for which the Construction Manager is liable.

**5.4.5.6** Permit fees, licenses, tests, royalties, damages for infringement of patents and costs of defending suits therefore, and deposits lost for causes other than the Construction Manager's negligence. If royalties or losses and damages, including costs of defense, are incurred which arise from a particular design, process, or the product of a particular manufacturer or manufacturers specified by the Owner or Architect, and the Construction Manager has no reason to believe there will be infringement of patent rights, such royalties, losses and damages will be paid by the Owner and not considered as within the Guaranteed Maximum Price.

**5.4.5.7** Losses, expenses or damages to the extent not compensated by insurance or otherwise, including settlement of Trade Contractor claims or suits, subject, however, to the Guaranteed Maximum Price if one is established. The foregoing is not intended to waive the Construction Manager's right to seek additional compensation from the owner for Trade Contractor claims or suits which arise as a result of the actions or failure to act of the Owner, its consultants, other than the Construction Manager's, agents, or employees.

**5.4.5.8** The cost of corrective or warranty work provided such work results from causes other than the negligence of the Construction Manager.

**5.4.5.9** Cost of removal of all debris.

**5.4.5.10** Cost incurred due to an emergency affecting the safety of persons and property.

**5.4.5.11** Reasonably incurred legal costs of the Construction Manager in the performance of the Work, unless those legal costs arise from dispute between the Owner and the Construction Manager or the Owner does not provide written permission to incur the costs, which permission may not be unreasonably withheld.

**5.4.5.12** Cost of storage of Project records beyond Project completion.

**5.4.5.13** Cost of jobsite computer hardware, software, supplies and communications, cost of Corporate and regional data processing/MIS services to the extent used specifically for this Project.

## **ARTICLE 6**

### **CHANGES IN THE PROJECT**

**6.1** The Owner, without invalidating this Agreement, may order Changes in the Project within the general scope of this Agreement consisting of additions, deletions or other revisions, the Guaranteed Maximum Price, if established, the Construction Phase Services and the Construction Manager's Fee and the Substantial Completion Date being adjusted accordingly. All such Changes in the Project will be authorized by Change Order. The Construction Manager will provide an estimate of the cost of the Change and the impact the Change will have on the Project Time Schedule to the Owner.

**6.1.1.** A Change Order is a written order to the Construction Manager signed by the Owner or his authorized agent issued after the execution of this Agreement, authorizing a Change in the Project, or the method or manner of performance, and/or an adjustment in the Guaranteed Maximum Price, the Construction Manager's Fee, or the Substantial Completion Date. Each adjustment in the Guaranteed Maximum Price resulting from a Change Order will clearly separate the amount attributable to the Cost of the Project and the Construction Manager's Fee.

**6.1.2.** The Cost of a Change in the Project will be calculated as the sum of the following: The cost of the additive change to the work performed by the Trade Contractors plus (B) an overhead factor of ten percent (10%) of the additive cost of the change. The addition of the overhead factor will not be included until the Guaranteed Maximum Price is exceeded by 2% and will only apply to amounts over the 2%.

**6.1.2.1** The amount of increase in the Guaranteed Maximum Price resulting from a Change in the Project will be the sum of the Cost of the Change in the Project calculated pursuant to Subparagraph 6.1.2 and the Construction Manager's fee calculated pursuant to Subparagraph 5.4.4.

**6.1.3.** The amount of decrease in the Guaranteed Maximum Price to be allowed by the Construction Manager to the Owner for any deletion or change which results in a net decrease in cost will be the amount of the actual net decrease. When both additions and credits are



involved in any one change, the increase in Fee will be figured on the basis of net increase, if any, subject to the limitations set forth in the Contract Documents.

**6.1.4.** If unit prices are stated in the Agreement or subsequently agreed upon, and if the quantities originally contemplated are so changed in a proposed Change Order or as a result of several Change Orders that application of the agreed unit prices to the quantities of Work proposed will cause substantial inequity to the Owner or the Construction Manager, the applicable unit prices and Guaranteed Maximum Price will be equitably adjusted.

**6.1.5.** Should concealed conditions be encountered in the performance of the Work below the surface of the ground or should concealed or unknown conditions in an existing structure be at variance with the conditions indicated by the Drawings, Specifications, or Owner-furnished information or should unknown physical conditions below the surface of the ground or should concealed or unknown conditions in an existing structure of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in this Agreement, be encountered, the Guaranteed Maximum Price and the Substantial Completion Date may be equitably adjusted by Change Order upon claim by either party made within a reasonable time after the first observance of the conditions.

## **6.2 Claims for Additional Cost or Time**

**6.2.1.** If the Construction Manager wishes to make a claim for an increase in the Guaranteed Maximum Price, an increase in his fee in accordance with Subparagraph 5.4.4., or an extension in the Substantial Completion Date, he must give the owner written notice thereof within a reasonable time after the occurrence of the event giving rise to such claim. This notice must be given by the Construction Manager before proceeding to execute any Work, except in an emergency endangering life or property in which case the Construction Manager will act, at his discretion, to prevent threatened damage, injury or loss. Claims arising from delay must be made within a reasonable time after the delay. No such claim will be valid unless so made.

**6.2.2.** Claims for extension of time because of unusual inclement weather will be granted only because such inclement weather prevented the execution of major items of work on normal working days. Unusual inclement weather as used herein means unusually severe weather which is beyond the normal weather recorded and expected for the locality and/or the season or seasons of the year. Time extensions may also be granted for any day following a period of precipitation during which muddy conditions exist and prevent the performance of major items of work conducted on normal working days. Time may be granted for weather days over and above the normal rains days as outlined below.

**6.2.3.** Time extensions may be granted for rain days in any month when the cumulative number of rain days during that month exceeds the number expected as shown in the Rainfall Table provided the rainfall prevented the execution of major items of work on normal working days. A rain day is defined as a day when rainfall exceeds one-one hundredth (.01) inch of rain and one (1.0) inch of snow pellets during a 24-hour period. The number of rain days expected for each month during the term of the Contract is provided by the National Oceanic and

Atmospheric Administration based on recorded information reported from Huntsville, Texas, for the period of 1981-2000 as shown in the Rainfall Table as follows:

January	10 calendar days
February	9 calendar days
March	9 calendar days
April	6 calendar days
May	8 calendar days
June	10 calendar days
July	8 calendar days
August	7 calendar days
September	8 calendar days
October	8 calendar days
November	9 calendar days
December	10 calendar days

**6.2.4.** No additional payment, Change Order or extension of time will be provided to the Construction Manager because of hindrances or delays from any cause which is the fault of Construction Manager or Construction Manager's Trade Contractors or under Construction Manager's control whether such hindrances or delays be avoidable or unavoidable. Claims for extension of time and/or payment of General Conditions, Construction Phase Services and Construction Management Fee will be considered because of hindrances or delays which are not the fault of the Construction Manager.

**6.2.5.** Claims for extension of time may be considered because of hindrances or delays not the fault of Construction Manager or Owner, but only to the extent that Substantial Completion of the Project exceeds the original Substantial Completion date of the Project because of the delay. Requests for time extension will be submitted on a monthly basis and will specify the time delay, the cause of the delay and the fault of the delay.

### **6.3 Minor Changes in the Project**

**6.3.1.** The Architect will have authority to order minor Changes in the Project not involving an adjustment in the Guaranteed Maximum Price or an extension of the Substantial Completion Date and not inconsistent with the intent of the Drawings and Specifications. Such Changes may be effected by written order and will be binding on the Owner, the Trade Contractor and the Construction Manager, provided notice and reasonable opportunity to object have been given.

### **6.4 Emergencies**

**6.4.1.** In any emergency affecting the safety of persons or property, the Construction Manager will act, at his discretion, to prevent threatened damage, injury or loss. Any increase in the Guaranteed Maximum Price or extension of time claimed by the Construction Manager on account of emergency work will be determined as provided in this Article.

## **6.5 Change Order Review Time**

Construction Manager understands that proper review and authorization of Change Orders by Commissioners Court may require up to thirty days.

## **6.6 Proof Required**

**6.6.1.** In support of any request for an extension of the Contract Time, Construction Manager must demonstrate to the reasonable satisfaction of Owner that the critical path of the Project Schedule was delayed and such change delayed the Date of Substantial Completion. Construction Manager will be entitled to an increase in the Contract Time for the number of days that the Date of Substantial Completion was delayed solely as a result of the compensable or excusable event. Construction Manager will compare the critical path of the Project Schedule to the actual critical path of the Work, identifying the specific impact of the compensable or excusable event.

**6.6.2.** Construction Manager will submit to the Owner a written time impact analysis illustrating the influence of each compensable or excusable event on the Date of Substantial Completion. Each time impact analysis will include a fragmentary network (network analysis) demonstrating how the Construction Manager proposes to incorporate the time impact based on the date of the delay in time and the event time computation of all affected activities.

## **ARTICLE 7 DISCOUNTS**

All discounts for prompt payment will accrue to the Owner to the extent the Cost of the Project is paid directly by the Owner or from a fund made available by the Owner to the Construction Manager for such payments. All trade discounts, rebates and refunds, and all returns from sale of surplus materials and equipment, will be credited to the Cost of the Project.

## **ARTICLE 8 PAYMENTS TO THE CONSTRUCTION MANAGER**

**8.1** The Construction Manager will submit monthly to the Owner a statement, sworn to if required, showing all moneys paid out, costs accumulated or costs incurred on account of the Cost of the Project during the previous month, cost for work performed by Trade Contractors and the amount of the Construction Manager's Fee due as provided in Article 5. Payment by the Owner to the Construction Manager, for the services provided by the Construction Manager, will be paid within thirty days (30) after it is received by the County's Representatives from the Construction Manager. The Owner will withhold from each monthly payment an amount equal to five percent (5%) as Retainage on account of the Construction Manager. The General Conditions and Construction Phase Services costs will not be subject to Retainage. Owner may release partial retainage to Construction Manager on written approval of the Construction Manager's surety on the performance and payment bonds.

**8.1.1.** The Construction Manager will maintain detailed statements, including without limitation, payroll records, receipted invoices, check vouchers, and any other evidence demonstrating costs incurred by the Construction Manager on account of the Cost of the

Project, which records will be available for the Owner's examination during regular business hours.

**8.2** Final payment will be made by the Owner to the Construction Manager when the Contract has been fully performed by the Construction Manager, including the correction of nonconforming work, except for the Construction Manager's responsibility to satisfy other requirements, if any, which Owner agrees necessarily survive final payment: (2) a final Application for Payment and a final accounting for the Cost of the Project have been submitted by the Construction Manager and reviewed and commented on by the Owner and (3) Architect has inspected the work and a final Certificate for Payment has then been issued by the Architect, such final payment will be made by the Owner not more than 30 days after the issuance of the Architect's final Certificate for Payment. If Final Payment is withheld, the amount withheld will equal a sum 150% of the estimated cost of completing any unfinished items, provided that said unfinished items are listed separately together with the estimated cost of completing each unfinished item. Thereafter, Owner will pay to the Construction Manager, monthly, the amount retained for incomplete items as each of said items is completed.

**8.3** If the Owner should fail to pay the Construction Manager within thirty (30) days after the time the payment of any amount becomes due, then the Construction Manager may, upon seven (7) additional days written notice to the Owner and the Architect, stop the Project until payment of the amount owing has been received. The Contract performance time will be extended appropriately and the GMP will be increased by the amount of the Construction Manager's reasonable costs of shut-down, delay and start-up, all of which costs will be reimbursed the Construction Manager.

**8.4** Payments due but unpaid will bear interest as provided by law.

**8.5** As a part of his monthly progress payment application the Construction Manager will list the critical path activities in tabular format (Microsoft Office Word or Excel document). This list will include the critical path activities (completed percentage of each and those not completed) for the month of the current progress payment application and the upcoming 3 months ahead (Month 1, Month 2 and Month 3, all listed as separate months). The document should be titled "Project Critical Path This Month and the 3 Month Look-Ahead".

## **ARTICLE 9**

### **INSURANCE, WAIVER OF SUBROGATION, AND BONDS**

#### **9.1 "Construction Manager's Liability Insurance"**

**9.1.1.** The Construction Manager will purchase and maintain such insurance as will protect him from the claims set forth below which may arise out of or result from the Construction Manager's operations under this Agreement whether such operations be by himself or by anyone directly or indirectly employed by him, or by anyone for whose acts he may be liable.

**9.1.1.1** Claims under workers' compensation, disability benefit and other similar employee benefit acts which are applicable to the Work to be performed.

**9.1.1.2** Claims for damages because of bodily injury, occupational sickness or disease, or death of his employees under any applicable employer's liability law.

**9.1.1.3** Claims for damages because of bodily injury, death of any person other than his employees.

**9.1.1.4** Claims for damages insured by usual personal injury liability coverage.

**9.1.1.5** Claims for damages, other than to the Work itself, because of injury to or destruction of tangible property, including loss of use therefrom.

**9.1.1.6** Claims for damages because of bodily injury or death of any person or property damage arising out of the ownership, maintenance or use of any motor vehicle.

**9.1.2.** The Construction Manager's Commercial General Liability insurance will include premises/operations (including explosion, collapse and underground coverage), independent contractors, completed operations, and blanket contractual liability on all written contracts, all including broad form property damage coverage.

**9.1.3.** The Construction Manager's Commercial General and Automobile Liability Insurance will be written for not less than limits of liability as follows:

a. Commercial General Liability

1. Bodily Injury \$1,000, 000 Each Occurrence \$2,000,000 Aggregate - Completed Operations
2. Property Damage \$1,000,000 Each Occurrence \$2,000,000 Aggregate

b. Business Automobile Liability

1. Bodily Injury \$1,000,000 Each Person \$1,000,000 Each Occurrence
2. Property Damage \$1,000,000 Each Occurrence

c. Excess Umbrella Liability Minimum of \$5,000,000 Each Occurrence.

**9.1.4.** Commercial General Liability Insurance may be arranged under a single policy for the full limits required or by a combination of underlying policies with the balance provided by an Excess or Umbrella Liability policy.

**9.1.5.** The policies will contain provisions giving the Owner 60 days written notice of cancellation, non-renewal, or any endorsements restricting or reducing coverage. Certificates of Insurance showing such coverage to be in force will be filed with the Owner prior to commencement of the Work.

**9.2** This is intentionally left blank.

**9.3 Insurance to Protect Project**

**9.3.1.** The Construction Manager will purchase and maintain property insurance in a form acceptable to the Owner upon the entire Project for the full cost of replacement as of the

time of any loss. This insurance will include as named insured, the Owner and the Construction Manager, Trade Contractors and their Trade Subcontractors and will insure against loss from the perils of Fire, Extended Coverage, and will include "All Risk" insurance for physical loss or damage including, without duplication of coverage, at least theft, vandalism, malicious mischief, transit, collapse, flood, and earthquake. The Construction Manager will increase limits of coverage, if necessary, to reflect estimated replacement cost. The Construction Manager will be responsible for any coinsurance penalties or deductibles.

**9.3.1.1** If the Owner finds it necessary to occupy or use a portion or portions of the Project prior to Substantial Completion thereof, such occupancy will not commence prior to a time mutually agreed to by the Owner and Construction Manager and to which the insurance company or companies providing the property insurance have consented by endorsement to the policy or policies. This insurance will not be canceled or lapsed on account of such partial occupancy. Consent of the Construction Manager and of the insurance company or companies to such occupancy or use will not be unreasonably withheld.

**9.3.2.** The Construction Manager will purchase and maintain such boiler and machinery insurance as may be required or necessary. This insurance will include the interests of the Owner, the Construction Manager, Trade Contractors and their Trade Subcontractors in the Work.

**9.3.3.** The Construction Manager will file a copy of all policies with the Owner before an exposure to loss may occur. Copies of any subsequent endorsements will be furnished to the Construction Manager and the Owner. The Owner will be given sixty (60) days' notice of cancellation, non-renewal, or any endorsements restricting or reducing coverage.

#### **9.4 Property Insurance Loss Adjustment**

**9.4.1.** Any insured loss will be adjusted with the Owner and the Construction Manager and made payable to the Owner and Construction Manager as trustees for the insured's, as their interests may appear, subject to any applicable mortgagee clause.

**9.4.2.** Upon the occurrence of an insured loss, monies received will be deposited in a separate account and the trustees will make distribution in accordance with the agreement of the parties in interest.

#### **9.5 Waiver of Subrogation**

**9.5.1.** The Owner and Construction Manager waive all rights against each other, the Architect, Trade Contractors, and their Trade Subcontractors for damages caused by perils covered by insurance provided under Paragraph 9.4, except such rights as they may have to the proceeds of such insurance held by the Owner and Construction Manager as trustees. The Construction Manager will require similar waivers from all Trade Contractors and their Trade Subcontractors.

**9.5.2.** The Owner and Construction Manager waive all rights against each other and the Architect, Trade Contractors and their Trade Subcontractors for loss or damage to any

equipment used in connection with the Project and covered by any property insurance. The Construction Manager will require similar waivers from all Trade Contractors and their Trade Subcontractors.

**9.5.3.** The Owner waives subrogation against the Construction Manager, Architect, on all property and consequential loss policies carried by the Owner under property and consequential loss policies purchased for the Project after its completion.

**9.5.4.** If the policies of insurance referred to in this Paragraph require an endorsement to provide for continued coverage where there is a waiver of subrogation, the owners of such policies will cause them to be so endorsed.

## **9.6 Bonds**

The Construction Manager will provide performance and payment bonds as required in accordance with Chapter 2253, Texas Government Code. If a fixed contract amount or Guaranteed Maximum Price has not been determined at the time this contract is awarded, the penal sums of the performance and payment bonds delivered to the Owner must each be in an amount of \$\_\_\_\_\_. The Construction Manager will deliver the bonds not later than the 10th day after the date the Construction Manager executes the contract.

## **ARTICLE 10**

### **TERMINATION OF THE AGREEMENT AND OWNER'S RIGHT TO PERFORM CONSTRUCTION MANAGER'S OBLIGATIONS**

#### **10.1 Termination by the Construction Manager**

**10.1.1.** If the Project, in whole or substantial part, is stopped for a period of thirty days under an order of any court or other public authority having jurisdiction, or as a result of an act of government, such as a declaration of a national emergency making materials unavailable, through no act or fault of the Construction Manager, or if the Project should be stopped for a period of thirty days by the Construction Manager for the Owner's failure to make payment thereon, then the Construction Manager may, upon seven days' written notice to the Owner and the Architect, terminate this Agreement and recover from the Owner payment for all Work executed, the Construction Manager's Fee earned to date, and for any proven loss sustained upon any materials, equipment, tools, construction equipment and machinery, cancellation charges on existing obligations of the Construction Manager.

#### **10.2 Owner's Right to Perform Construction Manager's Obligations and Termination by the Owner for Cause.**

**10.2.1.** If the Construction Manager fails to perform any of his obligations under this Agreement including any obligation he assumes to perform Work with his own forces, the Owner may, after seven days written notice during which period the Construction Manager fails to perform such obligation, make good such deficiencies. The Guaranteed Maximum Price, if any, will be reduced by the cost to the Owner of making good such deficiencies.

**10.2.2.** This Agreement may be terminated by Owner for cause should the Construction Manager fail to perform any provision of this Agreement, including without limitation, for any of the following reasons:

- a. Construction Manager abandons the Work;
- b. Construction Manager assigns or attempts to assign its rights or obligations
- c. under this Agreement or any part thereof to any third-party without the prior written
- d. consent of Owner;
- e. Construction Manager is adjudged bankrupt or insolvent, makes a general assignment for the benefit of creditors, has a trustee or receiver appointed for its property, or files a petition to take advantage of any debtor's acts;
- f. Construction Manager fails or refuses to perform any material obligation under the Agreement, or fails to remedy such nonperformance within seven (7) days after its occurrence;
- g. Construction Manager fails to comply with any applicable Laws and fails to remedy such nonperformance within seven (7) days after its occurrence; and
- h. Construction Manager fails to achieve the required dates of Substantial and/or Final Completion.

**10.2.3.** The Owner's right of termination as set forth herein will be in addition to, and not a limitation of, any and all other remedies available to Owner at law, in equity, or under the terms and provisions of this Agreement.

**10.2.4.** In the event of termination of the Agreement for cause, Owner may use Construction Managers material and leased equipment to complete the Work, and may complete the Work in any reasonable manner. Construction Manager will receive no further payment, if any is due, until the Work is complete. If the completion costs incurred by Owner exceed the balance of the applicable Guaranteed Maximum Price, the Construction Manager will pay the difference to the Owner within ten (10) days of Owner's demand for payment. If the completion costs incurred by Owner are less than the balance of the applicable Guaranteed Maximum Price, the Owner will pay any unpaid balance due the Construction Manager for work performed prior to the termination, up to an amount equal to the unpaid balance of the GMP.

**10.2.5.** If, after a termination for cause, it is determined that the Construction Manager was not in default, the rights or obligations of the parties will be the same as if the termination had been issued for the convenience of the Owner. The Owner will then be liable to the Construction Manager for any payments required by the termination for convenience clause.

### **10.3 Termination by Owner Without Cause**

**10.3.1.** Notwithstanding anything else contained in the Contract Documents, Owner will have the right at its sole and absolute discretion to terminate the Agreement without cause and solely for the Owner's convenience by giving the Construction Manager written notice that the Agreement is terminated.



**10.3.2.** Construction Manager will, within thirty (30) days of receiving notice of termination under this Section, submit to Owner its statement of costs incurred by Construction Manager for performance of the Work prior to termination plus the costs incurred by Construction Manager in the performance of the Work terminated, less prior payments received. Owner will, within ninety (90) days after receipt of such statement, pay to Construction Manager all amounts it determines are properly included thereon. The phrase "costs incurred by Construction Manager in the performance of the Work terminated" as used herein means the following (and only the following) costs:

- a. Trade Contractor termination costs;
- b. Cancellation fees in regard to equipment and materials ordered;
- c. Cost of all materials and equipment ordered which cannot be cancelled, less actual proceeds received upon the disposition thereof;
- d. Restocking fees incurred in returning ordered materials; and
- e. Construction Manager demobilization costs

Upon payment by Owner of the sums owed under this Section, title to all materials, equipment and other property included or ordered for the terminated Work will pass to Owner. Payment by Owner to Construction Manager of the amounts specified in this Section will constitute a waiver by the Construction Manager of any other claims of any type arising out of the performance or termination of the Work, including any claims for consequential or indirect damages of any type, kind, or description.

## **ARTICLE 11 ASSIGNMENT AND GOVERNING LAW**

**11.1** Neither the Owner nor the Construction Manager may assign his interest in this Agreement without the written consent of the other except as to the assignment of proceeds.

**11.2** Venue for any cause of action concerning this contract must be in the state district courts of Walker County, Texas. The law of the State of Texas governs this contract. Construction Manager will place Paragraph 11.2 in every trade contract Construction Manager executes in performance of this Project.

## **ARTICLE 12 INDEMNITY**

**12.1** TO THE EXTENT CLAIMS, DAMAGES, LOSSES OR EXPENSES ARE NOT COVERED BY INSURANCE PURCHASED BY THE CONSTRUCTION MANAGER UNDER 9.4, THE CONSTRUCTION MANAGER WILL INDEMNIFY AND HOLD HARMLESS THE OWNER FROM AND AGAINST CLAIMS, DAMAGES, LOSSES AND EXPENSES, INCLUDING BUT NOT LIMITED TO ATTORNEYS' FEES, ARISING OUT OF OR RESULTING FROM PERFORMANCE OF THE WORK, PROVIDED THAT SUCH CLAIM, DAMAGE, LOSS OR EXPENSE IS ATTRIBUTABLE TO BODILY INJURY, SICKNESS, DISEASE OR DEATH, OR TO INJURY TO OR DESTRUCTION OF TANGIBLE PROPERTY, (except damage to the Work itself which is insured under the Property Insurance for the Project pursuant to 9.4.1,) BUT ONLY TO THE EXTENT CAUSED BY THE NEGLIGENT ACTS OR OMISSIONS OF THE

CONSTRUCTION MANAGER, A TRADE CONTRACTOR, ANYONE DIRECTLY OR INDIRECTLY EMPLOYED BY THEM OR ANYONE FOR WHOSE ACTS THEY MAY BE LIABLE, REGARDLESS OF WHETHER OR NOT SUCH CLAIM, DAMAGE, LOSS OR EXPENSE IS CAUSED IN PART BY A PARTY INDEMNIFIED HEREUNDER. SUCH OBLIGATION WILL NOT BE CONSTRUED TO NEGATE, ABRIDGE, OR REDUCE OTHER RIGHTS OR OBLIGATIONS OF INDEMNITY WHICH WOULD OTHERWISE EXIST AS TO A PARTY OR PERSON DESCRIBED IN THIS PARAGRAPH.

IN CLAIMS AGAINST ANY PERSON OR ENTITY INDEMNIFIED UNDER THIS PARAGRAPH BY AN EMPLOYEE OF THE CONSTRUCTION MANAGER, A TRADE CONTRACTOR, ANYONE DIRECTLY OR INDIRECTLY EMPLOYED BY THEM OR ANYONE FOR WHOSE ACTS THEY MAY BE LIABLE, THE **INDEMNIFICATION** OBLIGATION UNDER THIS PARAGRAPH WILL NOT BE LIMITED BY A LIMITATION ON AMOUNT OR TYPE OF DAMAGES, COMPENSATION OR BENEFITS PAYABLE BY OR FOR THE CONSTRUCTION MANAGER OR A TRADE CONTRACTOR UNDER WORKERS' COMPENSATION ACTS, DISABILITY BENEFIT ACTS OR OTHER EMPLOYEE BENEFIT ACTS.

### **ARTICLE 13 MISCELLANEOUS PROVISIONS**

**13.1** It is expressly understood that the Owner will be directly retaining the services of an Architect.

**13.2** Notwithstanding anything contained herein, it is expressly understood that the Construction Manager's Project Control Systems, including without limitation - Estimating, Scheduling, Purchasing, Cost Reporting, and Project Engineering Systems, and all modifications, additions, or alterations thereto, are and will remain the sole property of the Construction Manager. The Project information gathered, compiled and stored in the Construction Manager's Project Control System is the property of the Owner. The Construction Manager will provide the estimating, scheduling, purchasing, cost reporting and other project specific information in a format readily transferrable to the Owner such as in paper form or Microsoft based applications.

**13.3**

**13.4** Notwithstanding the event of any claim, dispute, or other matter in question arising out of or relating to this Agreement or the breach thereof, the Construction Manager will carry on the Work and the Owner will continue to make payments in accordance with this Agreement.

**13.5** This contract is a product of negotiation between the parties. The parties disclaim the use of *contra proferentem* in its interpretation.

**13.6** In order to comply with the requirements of written notice in this contract the parties must send written notice to the applicable address by U. S. certified mail, return receipt requested:

**COUNTY:**

Walker County  
Street Address  
City/ State/ Zip

**PROVIDER:**

Vendor Name  
Street Address  
City/State/Zip

**ARTICLE 14  
LIST OF EXHIBITS**

Exhibit "A" – Prevailing Wage Rates (Davis Bacon will be included in final Contract)  
Exhibit "B" – Preliminary Construction Phase Schedule (To be provided by selected CMAR)  
AIA General Conditions A201-2007 (To be included in final Contract)  
Supplementary Conditions (See Attachment B)

**APPROVED** on this day the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, by Commissioners Court.

**PROVIDER**

SIGNATURE: \_\_\_\_\_  
PRINT NAME: \_\_\_\_\_  
TITLE: \_\_\_\_\_  
COMPANY: \_\_\_\_\_

**WALKER COUNTY, TEXAS**

BY: \_\_\_\_\_  
COUNTY JUDGE  
\_\_\_\_\_  
COMMISSIONER, PRECINCT #1  
\_\_\_\_\_  
COMMISSIONER, PRECINCT #2  
\_\_\_\_\_  
COMMISSIONER, PRECINCT #3  
\_\_\_\_\_  
COMMISSIONER, PRECINCT #4

ATTEST:

\_\_\_\_\_  
COUNTY CLERK

APPROVED AS TO FORM:

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District Attorney's Office\*

\*By law, the District Attorney's Office may only advise or approve contracts or legal documents on behalf of its clients. It may not advise or approve a contract or legal document on behalf of other parties. Our review of this document was conducted solely from the legal perspective of our client. Our approval of this document was offered solely for the benefit of our client. Other parties should not rely on this approval, and should seek review and approval by their own respective attorney(s).

AUDITOR'S CERTIFICATE

I do certify that funds are available in the amount of \_\_\_\_\_ to pay the obligation of County under and within the foregoing agreement>

SIGNED this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

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COUNTY AUDITOR