

**CITY OF EL PASO, TEXAS
AGENDA ITEM
DEPARTMENT HEAD'S SUMMARY FORM**

AGENDA DATE: February 15, 2022

PUBLIC HEARING DATE: Not Applicable

CONTACT PERSON(S) NAME AND PHONE NUMBER:

Sam Rodriguez, Chief Operations and Transportation Officer, Aviation Director and City Engineer, (915) 212-1845

DISTRICT(S) AFFECTED: 2 & 7

STRATEGIC GOAL: 4 - Enhance El Paso's Quality of Life through Recreational, Cultural and Educational Environments

SUB GOAL: 4.1 - Deliver bond projects impacting quality of life across the city in a timely, efficient manner

SUBJECT:

That the City Council approves a deductive change order in the amount of -\$343,430.79 to Arrow Building Corp. for Contract Number 2018-520R New Regional Aquatic Parks: Lost Kingdom & Chapoteo water parks.

BACKGROUND / DISCUSSION:

In accordance with Texas statute, any increase or decrease to the contract value exceeding \$50,000 requires approval by the governing body. This change order is to reduce the Guaranteed Maximum Price (contract value) by \$343,430.79 returning unused contingency that was incorporated in the GMP. Funds will go to the PCP Balance (savings) account and be available for use on other projects requiring additional funding.

SELECTION SUMMARY:

Construction Manager at Risk Contract was approved on April 3rd, 2018
Guaranteed Maximum Price Amendment was approved on February 5th, 2019

CONTRACT VARIANCE:

N/A

PROTEST

NA

PRIOR COUNCIL ACTION:

N/A

AMOUNT AND SOURCE OF FUNDING:

Amount: -\$343,430.79

Funding Source: Quality of Life

Account: 190 – 4800 – 29010 – 580270 – PCP13PRKC01

HAVE ALL AFFECTED DEPARTMENTS BEEN NOTIFIED? X YES ___ NO

PRIMARY DEPARTMENT: Capital Improvement

SECONDARY DEPARTMENT: Purchasing & Strategic Sourcing

*****REQUIRED AUTHORIZATION*****

DEPARTMENT HEAD: *Jerry DeMuro/for*

Assistant Director Capital Improvement

Sam Rodriguez, Chief Operations and Transportation Officer, Aviation Director and City Engineer

Contract Change Order Coversheet /Checklist City of El Paso Capital Improvements Department

Project Name: Two Regional Aquatic Parks: Chelsea & Lionel Forti Date Received: _____
 Solicitation Number: 2018-520R Contractor: Arrow Building Corp.
 Change Order Number: 18 Date CO was Identified: _____
 Funding Type: QOL General Fund TXDOT CDBG FTA FAA
 Contingency: Original Budget: \$ 1,763,417.00 Current Remaining Budget: \$ 343,430.79 PO No.(s): CEP35-190000225
 Identified by: DOR Contractor User Dept. CID Other: _____
 Impacts: Cost Time* (Check all that Apply)* Identify Schedule activity impacted, **attach** frag-net justifying time.

No change order shall be approved unless work is ordered in writing by the Owner Designated Rep

If written Order provided prior to formal execution of CO **attach** copy of the written directive, and justification, as why the direction was necessary prior to a formal agreement. Attach concurrence of representative having authority to execute change order(s) for the city of El Paso, Contract Specific by Resolution. If formal RFP was provided to contractor **attach** copy. If E-mail was direction provided to contractor **attach** copy.

Change order Type Check One:

Mandatory Discretionary
 (Mandatory Violates Written code/standard, or will not function for intended purpose) If mandatory **attach** justification, Direction from DOR and /or code/ standards references that the CO corrects, or Documentation from User Department Head explaining why the change is required.

Differing site condition: Engineering Change/Construction Deficiency:
 User requested change**: Substitution Contractor Initiated:
 Designer Directive (ASI): Error and Omission:
 Value Engineering Change: Quantity Adjustment:

** Identify Funding source Certificate of Obligation Grant Funded Projects **attach** concurrence of Grant Funded program Director.

Justification:

This Change Order is required to do final adjustments to the GMP Value
 *The PM reviewed all applications for payment and all executed change orders to review final balance of the GMP
 *Time: Due to Covid 19 pandemic and restrictions impacting the critical path of the project 310 calendar days are to be added to the substantial completion date.

Method Utilized for implementing change

- (Reference general conditions 2.5.2) Check all that apply
- .1 Unit Bid Prices Previously Approved (Attach Copy of supporting documents)
 - .2 An Agreed upon Lump Sum (Attach record of Negotiations, and cost Analysis)
 - .3 Actual Cost (Force Account Change) (Attach Detailed record as per 2.2.5.2.3)

Independent Cost Estimate prepared Yes No , Validated, Vendor Quotes, Published Data, Previously agreed Cost, Other (attach documentation of cost analysis).

Cost/Price/Time Analysis

Attach Copy of analyst justifying cost and quantities

Contractors proposed cost: **-\$343,430.79**
 Final Negotiated amount: **-\$343,430.79**
 Time: requested 310 days, justified 310 day

Contract Change Reference: Reference Plan /Spec change, Describe Change (Attach additional sheets if necessary)

Narrative Description of Change SOW:

Reduction of GMP Per:

ARTICLE 2 - CONSTRUCTION MANAGER'S RESPONSIBILITIES
 § 2.05 Guaranteed Maximum Price Proposal
 § C. If the Owner and Construction Manager agree on a proposal, the Owner and Construction Manager shall execute the Guaranteed Maximum Price Amendment setting forth the terms of their agreement. If the Owner accepts the inclusion of a contingency fund as part of the Guaranteed Maximum Price, the Construction Manager may use the contingency fund to pay for increases to the Cost of the Work. Construction Manager will not have right or entitlement to the contingency fund and use of such funds will be subject to the prior written approval and issuance of a Change Order by the Owner. Any contingency funds remaining at the completion of the Project will be credited from the GMP.

Initial GMP: \$17,981,778.00
 Total Change Orders 1 through 17: \$1,202,154.58 With in GMP
 Remaining Contingency balance: \$343,430.79
 Total GMP Reduction \$343,430.79
 Revised GMP: \$17,638,347.21

**Unless specifically note this Change Order addresses all compensation for time and money, including an all direct and indirect cost, associated with the above scope of work.*

Existing Drawing Reference: _____

Existing Specification Reference: _____

New Drawings/Specifications Reference: _____

User Department Concurrence (If required)

N/A

Date: _____

Request by Project /Construction Manager:

Brad Thompson
 Brad R. Thompson, Project Manager

Date: 1/24/2022

Recommended for Approval by City Engineer:

Michael J. Vonasek
 Michael J. Vonasek, P.E., Assistant Director Construction

Date: 1/24/2026

GG
1/25/2022

CITY OF EL PASO CONSTRUCTION CHANGE ORDER

CONSTRUCTION CHANGE ORDER NO.: 18 DATE: January 20, 2022 SCOPE CHANGE
PROJECT: Two Regional Aquatic Parks: Chelsea & Lionel Forti SOLICITATION NO. 2018-520R CONSTRUCTION CHANGE

Original Contract Amount: \$	<u>17,981,778.00</u>	Contract Time to Substantial Completion	<u>365</u>
Net Change by previous Change Orders: \$	<u>-</u>	Total days added due to Change Orders and CQN's	<u>7</u>
Net Change by previous Construction Quantity Notices: \$	<u>-</u>	Total days added for this Change Order	<u>310</u>
Amount of this Construction Change Order: \$	<u>(343,430.79)</u>	New Contract Time to Substantial Completion:	<u>682</u>
New Amended Contract Amount:	<u>\$17,638,347.21</u>	Current Substantial Completion Due Date	<u>2/12/2021</u>
Change Order Percentage:	<u>-2%</u>		

CONTRACTOR NAME: Arrow Building Corp.

Please provide a detailed scope of work of the change order (see back for reason/justification):

Reduction of GMP Per:

ARTICLE 2 - CONSTRUCTION MANAGER'S RESPONSIBILITIES

§ 2.05 Guaranteed Maximum Price Proposal

§ C. If the Owner and Construction Manager agree on a proposal, the Owner and Construction Manager shall execute the Guaranteed Maximum Price Amendment setting forth the terms of their agreement. If the Owner accepts the inclusion of a contingency fund as part of the Guaranteed Maximum Price, the Construction Manager may use the contingency fund to pay for increases to the Cost of the Work. Construction Manager will not have right or entitlement to the contingency fund and use of such funds will be subject to the prior written approval and issuance of a Change Order by the Owner. Any contingency funds remaining at the completion of the Project will be credited from the GMP.

Initial GMP: \$17,981,778.00

Total Change Orders 1 through 17: \$1,202,154.58 With in GMP

Remaining Contingency balance: \$343,430.79

Total GMP Reduction \$343,430.79

Revised GMP: \$17,638,347.21

*Unless specifically note this Change Order addresses all compensation for time and money, including an all direct and indirect cost, associated with the above scope of work.

CONSECUTIVE CALENDAR DAYS ADDED TO COMPLETION TIME:

310

TOTAL CHANGE ORDER AMOUNT:

\$ (343,430.79)

CONTRACTOR

I, David Diaz, of Arrow Building Corp agree and accept the terms and conditions of this change order.

Signature: 

Date: 01/28/2021

CITY OF EL PASO (OWNER)

I, Sam Rodriguez, P.E. of the City of El Paso hereby authorize and direct the Contractor to proceed with additional work as described in this form.

Signature: _____

Date: _____

Sam Rodriguez, P.E., City Engineer

CITY OF EL PASO CONSTRUCTION CHANGE ORDER- Pg. 2

CONSTRUCTION CHANGE ORDER NO.: 18 DATE: January 20, 2022 SCOPE CHANGE
PROJECT: Two Regional Aquatic Parks: Chelsea & Lionel Forti SOLICITATION NO. 2018-520R CONSTRUCTION CHANGE

Project Number CP13PRKC011, PCP13PRKC04, PURCHASE ORDER # CEP35-1900000225
Class 0
Department 190
Fund 560, 4690, 4710, 4740, 4800, 474
Account 0

CONTRACTOR NAME: Arrow Building Corp.

PROVIDE REASON/JUSTIFICATION FOR CHANGE ORDER:

This Change Order is required to do final adjustments to the GMP Value

*The PM reviewed all applications for payment and all executed change orders to review final balance of the GMP

*Time: Due to Covid 19 pandemic and restrictions impacting the critical path of the project 310 calendar days are to be added to the substantial completion date.

CONSECUTIVE CALENDAR DAYS ADDED TO COMPLETION TIME: 310 TOTAL CHANGE ORDER AMOUNT: \$ (343,430.79)

Project Manager recommends approval: Brad Thompson
Brad Thompson, Project Manager

Engineering Division Manager recommends approval: Gilbert Guerrero 1/25/2022
Gilbert Guerrero

Financing Department approval: _____
(If Required)

REQUEST FOR PO INCREASE/DECREASE FOR CHANGE ORDER

CONSTRUCTION CHANGE ORDER NO.: 18

DATE: January 20, 2022

INCREASE

PROJECT: Two Regional Aquatic Parks: Chelsea & Lionel Forti

SOLICITATION NO. 2018-520R

DECREASE

Project Number PCP13PRKC01, PCP13PRKC01

Class 0

PURCHASE ORDER # CEP35-1900000225

Department 190

Fund 4500, 4560, 4690, 4710, 4740, 4

Account 0

CONTRACTOR NAME: Arrow Building Corp.

AS A RESULT OF THIS CHANGE ORDER, PLEASE MAKE THE FOLLOWING ADJUSTMENT TO THE PURCHASE ORDER:

LINE	ADDED AMOUNT
1	\$ (343,430.79)

TOTAL NET CHANGE TO PURCHASE ORDER

-343430.79

(should match cost below)

Additional funding/direction:

TOTAL CHANGE ORDER AMOUNT: **-\$343,430.79**

Project Manager Brad Thompson

Engineering Division Manager recommends approval: Gilbert Guerrero 1/25/2022

Contract Compliance _____

4.1

RESOLUTION

WHEREAS, on September 5, 2017, authorized through resolution the use of construction manager-at risk project delivery method for the Lionel Forti and Chelsea Aquatic Facilities construction project and approved for the Director of the Capital Improvement to issue a solicitation for the Project; and

WHEREAS, the City of El Paso ("City") issued a Request for Proposal as part of the construction manager-at risk project delivery method through Two Regional Aquatic Parks: Chelsea & Lionel Forti 2018-520R; and

WHEREAS, Arrow Building Corp. ("Contractor"). a Texas Corporation, submitted the proposal offering the best value for the City on the basis of the published selection criteria and on the ranking evaluations; and

WHEREAS, the City negotiated a contract with Contractor and desires to award the Two Regional Aquatic Parks: Chelsea & Lionel Forti 2018-520R for construction manager-at risk services to Contractor; and

WHEREAS, the initial contract award will commence the preconstruction services and the parties understand that an amendment to establish the Guaranteed Maximum Price for the project will be subject to City Council approval.

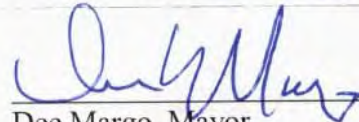
BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF EL PASO:

THAT the City Manager is authorized to execute the construction manager-at risk agreement ("Contract") between the City of El Paso and Arrow Building Corp. ("Contractor"), a Texas Corporation, for the project known as the Two Regional Aquatic Parks: Chelsea & Lionel Forti 2018-520R in an initial amount of Ten Thousand and No/100 Dollars (\$10,000.00) for preconstruction services for the Chelsea aquatic park and Ten Thousand and No/100 Dollars (\$10,000.00) for preconstruction services for the Lionel Forti aquatic center, for a total of Twenty Thousand and No/100 Dollars (\$20,000.00) for preconstruction services, and that the City Engineer is authorized to approve additional preconstruction services administratively, for an additional amount of Twenty Thousand and No/100 Dollars (\$20,000.00), if such services are necessary, for a total not to exceed preconstruction services contract amount not to exceed Forty Thousand and No/100 Dollars (\$40,000.00).


Adopted this 3rd day of April, 2018.

(Signatures begin on the following page)

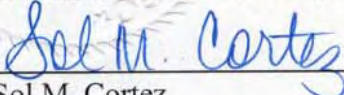
CITY CLERK DEPT.
CITY OF EL PASO: 2018 MAR 23 PM 3:12


Dee Margo, Mayor

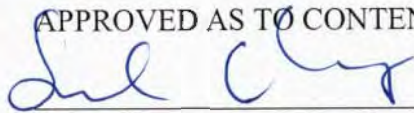
ATTEST:


Laura D. Prine, City Clerk

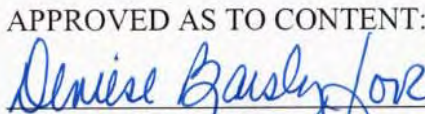

APPROVED AS TO FORM:


Sol M. Cortez
Senior Assistant City Attorney

APPROVED AS TO CONTENT:


Samuel Rodriguez, P.E., City Engineer
Capital Improvement Department

APPROVED AS TO CONTENT:

 
Bruce D. Collins, Director
Purchasing & Strategic Sourcing Dept.

4.1

STANDARD FORM OF AGREEMENT
BETWEEN OWNER AND CONSTRUCTION MANAGER AT-RISK

CITY CLERK DEPT.
2018 MAR 23 PM3:13

This Agreement is made and entered into as of the 3rd day of April, 2018 by and between the:

"Owner"
The City of El Paso
300 N. Campbell
El Paso, Texas 79901
(915) 212-2803

and

Arrow Building Corp.
6095 Surety Drive
El Paso, Texas 79905

for the following Project:

Two New Regional Aquatic Parks: Chelsea & Lionel Forti 2018-520R

The Project Design Professional is:

Parkhill, Smith & Cooper, Inc.
501 W. San Antonio
El Paso, Texas 79901

The Owner and Construction Manager agree as follows:

ARTICLE 1 - GENERAL PROVISIONS

1.01 *Contract Documents*

The Contract Documents are enumerated in the Standard Form of Agreement Between Owner and Construction Manager At-Risk (hereinafter the Agreement) and consist of the Agreement, General Conditions of the Contract, Drawings, Specifications, Addenda issued prior to execution of the Contract, performance and payment bonds, insurance rider, if any, and other documents listed in the Agreement and Modifications issued after execution of the Contract.

A Modification is (1) a written amendment to the Contract signed by both parties, (2) a Change Order, (3) a Construction Change Directive or (4) a written order for a minor change in the Work issued by the Architect. Unless specifically enumerated in the Agreement, the Contract Documents do not include the advertisement or invitation to bid, Request for Qualifications, Request for Proposal, Instructions to Bidders, sample forms, other information furnished by the Owner in anticipation of receiving bids or proposals, the Contractor's bid or proposal, or portions of Addenda relating to bidding requirements.

Upon the Owner's acceptance of the Construction Manager's Guaranteed Maximum Price proposal, the Contract Documents will also include the documents described in Section 2.04 and Section 2.05 and identified in the Guaranteed Maximum Price Amendment and revisions prepared by the Designer and furnished by the Owner. The Agreement, as described in this Section 1.01, represents the entire and integrated agreement between the Parties and supersedes prior negotiations, representations or agreements, either written or oral. If anything in the other Contract Documents, other than a Modification, is inconsistent with this Agreement, this Agreement shall govern.

1.02 *Relationship of the Parties*

The Parties each agree to proceed with the Project on the basis of mutual trust, good faith, and fair dealing. The relationship between the Parties is intended to facilitate each Party's interest in the Project but is not intended in any way to create a fiduciary obligation between them.

- A. The Construction Manager agrees to cooperate with the Owner and Designer and exercise the Construction Manager's skill and judgment in furthering the interests of the Owner. The Construction Manager shall (a) furnish efficient construction administration, management services and supervision; (b) furnish, at all times, an adequate supply of workers and materials; and (c) perform the Work in an expeditious and economical manner consistent with the Contract Documents.
- B. The Construction Manager is an independent contractor and shall not act on behalf of or in the name of the Owner except as may be provided in this Agreement or the Contract Documents and as expressly authorized by the Owner's Representative.

1.03 *Definitions*

Unless otherwise stated in this Section, the Terms used in this Agreement will have the meanings indicated in the General Conditions.

A. *Contract Documents*

The Contract Documents represent the entire and integrated agreement between the Parties and supersede prior negotiations, representations or agreements. The Contract Documents may be amended or modified only by a Modification. The Contract Documents shall not be construed to create a contractual relationship of any kind between any persons or entities other than the Owner and the Construction Manager.

- B. ***Work***
The term “Work” means the preconstruction and construction services and performance items required to fulfill the Construction Manager’s obligations under the Contract Documents, whether completed or partially completed, and includes all labor, materials, equipment and services provided or to be provided by the Construction Manager. The Work may constitute the whole or a part of the Project.
- C. ***Project***
The Project is the cumulative design and construction of the facility or improvements which the Work performed under the Contract Documents may be the whole or a part, and may include design and construction by the Owner, Designer, and by separate consultants and contractors.
- D. ***Instruments of Service***
Instruments of Service are representations, in any medium of expression now known or later developed, of the tangible and intangible creative work performed by the Designer and Consultant(s) under their respective agreements. Instruments of Service may include, without limitation, studies, surveys, models, sketches, drawings, specifications, digital models and other similar materials.
- E. ***Submittals***
A Submittal is any submission to the Owner for review and approval demonstrating how the Construction Manager proposes to conform to the Contract Documents for those portions of the Work for which the Contract Documents require Submittals. Submittals include, but are not limited to, shop drawings, product data, and samples. Submittals are not Contract Documents unless incorporated into a Modification.
- F. ***Owner***
The Owner is the person or entity identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number. The term “Owner” means the Owner or the Owner’s authorized representative.
- G. ***Construction Manager***
A Construction Manager is a person or entity identified as such in the Agreement and is responsible for performing all or a portion of the construction required in connection with the Work for the Owner. The Construction Manager is referred to throughout the Contract Documents as if singular in number and means a Construction Manager or an authorized representative of the Construction Manager.
- H. ***Engineer***
The individual or entity named as such in the Agreement. The individual or entity may be an employee of Owner, whether that individual holds the title of City Engineer or is an individual within the City Engineer’s department. In any event, the Engineer will serve as Owner’s agent during design and construction phases, and provide technical guidance and recommendations, subject to Owner’s approval.
- I. ***Designer***
The Designer is a person or entity providing design services for the Owner for all or a portion of the Work, and is lawfully licensed to practice engineering in the applicable jurisdiction.

J. *Guaranteed Maximum Price Amendment*

The Guaranteed Maximum Price ("GMP") Amendment is executed when the Construction Drawings and Specifications are ninety-five percent (95%) complete, Construction Manager provides the Owner with a GMP Proposal and Owner accepts such GMP Proposal. Upon agreement to a proposal, the Owner and Construction Manager are required to execute the GMP Amendment, which becomes a part of the Agreement. The GMP Amendment establishes the Contract Sum and Contract Time and sets forth the agreed upon design documents and other information upon which the Contract Sum and Contract Time are based. In establishing the Contract Sum, the parties can choose a Stipulated Sum or Cost of the Work (with or without a GMP). If the parties choose Cost of the Work, the Amendment establishes the items included within the Cost of the Work.

ARTICLE 2 - CONSTRUCTION MANAGER'S RESPONSIBILITIES

2.01 The Construction Manager shall perform all preconstruction, procurement, construction, start-up and performance testing services required by the Contract Documents. The Construction Manager shall provide all material, equipment, tools, labor, and supervision and coordination necessary to complete the Work in full accord with and reasonably inferable from the Contract Documents. The Construction Manager shall be responsible for its own construction means, methods, techniques, sequences, and procedures unless the Contract Documents provide other specific instructions or requirements.

The Construction Manager shall permit only fit and skilled persons to perform the Work. The Construction Manager shall enforce safety procedures, discipline, security, and good order among persons performing all aspects of the Work. The Construction Manager shall maintain good order and cleanliness at the site.

2.02 *General Responsibilities*

A. The Construction Manager shall comply with any applicable licensing requirements in the jurisdiction where the Project is located.

B. The Construction Manager, with the assistance of the Owner, shall prepare and file documents required to obtain necessary approvals of governmental authorities having jurisdiction over the Project.

C. The Construction Manager shall designate in writing a representative who is authorized to act on the Construction Manager's behalf with respect to the Project. Such designation may not be changed without written notice to and approval of the Owner, such approval may not be unreasonably withheld.

D. The Construction Manager shall perform the Work in strict accordance with the Contract Documents. This obligation shall be absolute. The Construction Manager shall not be relieved of the obligation to perform the Work in accordance with the Contract Documents by the activities, tests, inspections or approvals of the Owner.

1. The Construction Manager shall perform the Work in compliance with applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities. If the Construction Manager performs Work contrary to applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities, the Construction Manager shall assume responsibility for such Work and shall bear the costs attributable to correction.

2. Neither the Construction Manager nor any Subcontractor, Consultant, Engineer, Architect or Designer shall be obligated to perform any act which they believe will violate any applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities. If the Construction Manager determines that implementation of any instruction received from the Owner, including those from the Designer, would cause a violation of any applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities, the Construction Manager shall notify the Owner and the Designer in writing. Upon verification by the Owner that a change to the Construction Documents is required to remedy the violation, the Owner and the Construction Manager shall execute a Modification in accordance with Article 4.
- E. The Construction Manager shall be responsible to the Owner for acts and omissions of the Construction Manager's employees, Consultants, Subcontractors, and their agents and employees, and other persons or entities performing portions of the Work.
 - F. If part of the Work requires design, engineering, or other professional services of the Construction Manager or its consultants, or when applicable law requires that services be performed by licensed professionals, the Construction Manager shall provide those services through qualified, licensed professionals in accordance with the Texas Occupations Code and all applicable legal standards of care applicable to design professionals.
 - G. The Owner and Construction Manager may agree, in consultation with the Engineer, for the Construction Phase to commence prior to completion of the Preconstruction Phase, in which case, both phases will proceed concurrently. The Construction Manager shall identify a representative authorized to act on behalf of the Construction Manager with respect to the Project.
 - H. *Prevailing Wage Rates*
Construction Manager and any subcontractor shall pay not less than the general prevailing wage rates contained herein in Exhibit 1, to all laborers, workmen and mechanics employed by them in the execution of this contract in accordance with the General Conditions.
 - I. *Apprenticeship Program*
Construction Manager and any subcontractor shall also comply with the Owner's Apprenticeship Program attached and incorporated to this Agreement herein in Exhibit 2.
- 2.03 Preconstruction Phase**
- A. The Construction Manager shall provide a preliminary evaluation of the Owner's program, schedule and construction budget requirements, each in terms of the other.
 - B. The Construction Manager shall schedule and attend regular meetings with the Designer and Owner to discuss such matters as procedures, progress, coordination, and scheduling of the Work. The Construction Manager shall advise the Owner on proposed site use and improvements, selection of materials, and systems and equipment. The Construction Manager shall also provide the Owner with recommendations, consistent with the Project requirements, on constructability; availability of materials and labor; time requirements for procurement, installation and construction; and factors related to construction cost including, but not limited to, costs of alternative designs or materials, preliminary budgets, life-cycle data, and possible cost reductions.

- C. During the Preconstruction Phase the Construction Manager shall review the Contract Documents to ascertain whether the components of the Project and its systems may be constructed without interference with each other or other elements and components of the Project. In the event conflicts between such systems are discovered, the Construction Manager shall promptly notify the Owner and the Engineer in writing. Failure to so notify will result in a waiver of any claims for additional time or compensation by the Construction Manager to the extent such interference impacts the Project during the construction phase. Further, any claims by the Construction Manager associated with conflicts of the systems addressed in this Section during the construction phase are waived if such conflicts could have been discovered through careful examination of the Contract Documents.
- D. When Owner's Project requirements have been sufficiently identified, the Construction Manager shall prepare and periodically update a Project Schedule for the Engineer's review and the Owner's acceptance. The Construction Manager shall coordinate and integrate into the Project Schedule the services of the Engineer, the Construction Manager, the Owner and any other governmental entities having jurisdiction over the Project. As the design proceeds, the Construction Manager shall update the Project Schedule to indicate proposed activity sequencing and duration, milestones, phases of the Work, issuance of construction documents, preparation and review of submittals, delivery of materials, construction, and substantial and final completion. In preparing the Project Schedule, the Construction Manager should provide notice to the Engineer and the Owner's upon the identification of items that could affect the Project's timely completion.

2.04 *Preliminary Cost Estimates*

- A. Based on the preliminary design and other design criteria prepared by the Designer, the Construction Manager shall prepare preliminary estimates of the Cost of the Work or the cost of program requirements using area, volume or similar conceptual estimating techniques for the Owner's and Designer's review and Owner's approval. If the Owner or Construction Manager suggests alternative materials and systems, the Construction Manager shall provide cost evaluations of those alternative materials and systems.
- B. At the completion of the Schematic Design, Design Development and Construction Documents, and upon written notice of such phase completion by the Engineer to the Construction Manager and the Owner, the Construction Manager shall prepare and update estimates of the Cost of the Work of increasing detail and refinement and allowing for the further development of the design until such time as the Owner and Construction Manager agree on a Guaranteed Maximum Price for the Work. Such estimates shall be provided for the Owner's and Engineer's review and the Owner's approval. The Construction Manager shall inform the Owner and Engineer when estimates of the Cost of the Work exceed the latest approved Project budget and make recommendations for corrective action to reduce costs and maintain the Project budget.

2.05 *Guaranteed Maximum Price Proposal*

- A. When the Construction Drawings and Specifications are ninety-five percent (95%) complete, upon receipt of notice from the Engineer so indicating, the Construction Manager shall prepare a Guaranteed Maximum Price proposal for the Owner's review and acceptance. The Guaranteed Maximum Price in the proposal shall be the sum of the Construction Manager's estimate of the Cost of the Work, including contingencies described in the Contract Documents, and the Construction Manager's Fee. The Guaranteed Maximum Price proposal shall be submitted to the

Owner no later than fifteen (15) days after the ninety-five percent (95%) completion notice. The Construction Manager's Guaranteed Maximum Price Proposal shall include the following:

1. A list of the Drawings, Specifications, including all Addenda thereto, and other information, including the Construction Manager's clarifications and assumptions, upon which the Construction Manager's GMP Proposal is based;
 2. The proposed Contract Price, including the compensation method and, if based upon the Cost of the Work plus a fee, a written statement of estimated cost organized by trade categories, allowances, contingencies, Construction Manager's Fee, and other items that comprise the Contract Price;
 3. The proposed date the Construction Manager shall achieve Substantial Completion;
 4. An enumeration of any qualifications and exclusions, if applicable;
 5. A list of the Construction Manager's key personnel;
 6. The date on which the Construction Manager's Proposal expires (not less than 60 days), before such time that the Construction Manager may revise proposed pricing;
 7. A statement that the proposed Guaranteed Maximum Price is not based in any part on any subcontract or material supply contract which would require the Owner to compensate the Construction Manager on other than a fixed fee basis; and
 8. If Owner requests, Construction Manager shall make available for inspection the documents and information that form the basis of the Guaranteed Maximum Price proposal.
- B. Submission of the Construction Manager's GMP Proposal shall constitute a representation by the Construction Manager that it has visited the site, evaluated the conditions and features of the site, made determinations relevant to construction relating to such evaluations, and become familiar with local conditions under which the Work is to be completed.
- C. If the Owner and Construction Manager agree on a proposal, the Owner and Construction Manager shall execute the Guaranteed Maximum Price Amendment setting forth the terms of their agreement. If the Owner accepts the inclusion of a contingency fund as part of the Guaranteed Maximum Price, the Construction Manager may use the contingency fund to pay for increases to the Cost of the Work. Construction Manager will not have right or entitlement to the contingency fund and use of such funds will be subject to the prior written approval and issuance of a Change Order by the Owner. Any contingency funds remaining at the completion of the Project will be credited from the GMP.
- D. To the extent that the Drawings and Specifications are anticipated to require further development by the Designer, the Construction Manager shall provide in the Guaranteed Maximum Price for such further development consistent with the Contract Documents and reasonably inferable therefrom. Such further development does not include such things as changes in scope, systems, kinds and quality of materials, finishes or equipment, all of which, if required, shall be incorporated by Change Order.

ARTICLE 3 - WORK FOLLOWING EXECUTION OF THE GUARANTEED MAXIMUM PRICE AMENDMENT

3.01 *General*

Unless otherwise specified herein, all work performed pursuant to this Article shall be governed in accordance with the General Conditions.

3.02 *Construction*

- A. **Commencement.** Except as otherwise permitted in this Section, construction shall not commence prior to execution of the Guaranteed Maximum Price Amendment.
- B. If the Owner and Construction Manager agree in writing, construction may proceed prior to the execution of the Guaranteed Maximum Price Amendment. However, such authorization shall not waive the Owner's right to reject the Construction Manager's GMP Proposal.

3.03 *Concerning Subcontractors, Suppliers, and Others*

- A. The Construction Manager shall develop bidders' interest in the Project and may prequalify bidders. Any prequalification or award of subcontracts must conform with this Article 3, the General Conditions, and chapter 2269 of the Texas Government Code.
- B. All portions of the Work, other than minor work, shall be performed by trade contractors, subcontractors, or self-performed by the Construction Manager. For each major scope of work, the performing contractor shall be selected using competitive bids or competitive sealed proposals pursuant to chapter 2269 of the Texas Government Code. The Construction Manager shall submit the competitive bids or sealed proposal to the Owner for approval prior to advertising the bids or proposals. The Construction Manager shall include specific notices of the following statutory requirements in the information to bidders:
 - 1. The successful bidder's responsibility to provide workers' compensation insurance in accordance with chapter 406 of the Texas Labor Code;
 - 2. The successful bidder's responsibility to pay prevailing wages pursuant to chapter 2258 of the Texas Government Code Chapter 2258; and
 - 3. A notice of the sales tax exemption for the project and the procedure for obtaining any required exemption verification or certificates.
- C. The information required with publication in Section 3.03.B is not exclusive. The Construction Manager may include other information in such notices at its discretion or as may be required by law.
- D. On all portions of the Work for which the Construction Manager does not submit a bid or proposal, the Construction Manager and the Owner shall receive and open all bids or proposals in a manner compliant with chapter 2269 of the Texas Government Code. On any portion of the Work for which the Construction Manager submits a bid or proposal to self-perform, the Owner shall receive and open the bids or proposals, in accordance with chapter 2269 of the Texas Government Code. After opening the bids or proposals, the Owner shall meet with the Construction Manager to evaluate and rank the bidders or offerors. All bids or proposals shall be made public within seven (7) days after the date of final selection.
- E. The Construction Manager shall prepare, for the Owner's and Owner's Engineer's review and the Owner's acceptance, a procurement schedule for items that must be ordered well in advance of construction. The Construction Manager shall expedite and coordinate the ordering and delivery of materials that must be ordered well in advance of construction. If the Owner agrees to procure any items prior to the establishment of the Guaranteed Maximum Price, the Owner shall procure the items on terms and conditions acceptable to the Construction Manager. Upon the establishment of the Guaranteed Maximum Price, the Owner shall assign all contracts for these items to the Construction Manager and the Construction Manager shall thereafter accept responsibility for them.

3.04 *Consultation and Scheduling*

- A. The Construction Manager shall schedule and conduct progress meetings with the Owner, on a weekly basis, to review matters such as procedures, progress in construction, coordination, and scheduling of the Work.
- B. *Progress Reports*
1. The Construction Manager shall keep the Owner informed of the progress and quality of the Work. On a monthly basis, or otherwise as agreed to by the Owner and Construction Manager, the Construction Manager shall submit written progress reports to the Owner. The reports shall be generated using the software specified by the Owner. The reports shall show estimated percentages of completion and other information identified below:
 - a. Work completed for the period;
 - b. Project schedule status;
 - c. Submittal schedule and status report, including a summary of outstanding Submittals;
 - d. Responses to requests for information to be provided by the Owner;
 - e. Approved Change Orders and Change Directives;
 - f. Pending Change Order and Change Directive status reports;
 - g. Tests and inspection reports;
 - h. Status report of Work rejected by the Owner;
 - i. Status of Claims previously submitted in accordance with Article 14;
 - j. Cumulative total of the Cost of the Work to date including the Construction Manager's compensation and Reimbursable Expenses, if any;
 - k. Current Project cash-flow and forecast reports; and
 - l. Additional information as agreed to by the Owner and Construction Manager.
 2. In addition, where the Contract Price is the Cost of the Work, the Construction Manager shall include the following additional information in its progress reports:
 - a. Construction Manager's work force report;
 - b. Equipment utilization report; and
 - c. Cost summary, comparing actual costs to updated cost estimates.
 3. The Construction Manager shall perform the Work in general accordance with the most recent schedules submitted to and approved by the Owner. The schedule shall be updated regularly and in advance of periodic Project meetings with the Owner and Owner's Engineer. Such schedules shall be posted at the Project meetings in a convenient location for review and approval by the Owner. Construction Manager shall request approval of Owner of any change to the approved schedule. Subcontractors completing the scope of work are also subject to the approved schedules.
 4. The Construction Manager shall exercise reasonable care in preparing schedules and estimates. The Construction Manager, however, does not warrant or guarantee estimates and schedules except as may be included as part of the Guaranteed Maximum Price. The Construction Manager is not required to ascertain that the Drawings and Specifications are in accordance with applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities, but the Construction Manager shall promptly report to the Engineer and Owner any nonconformity discovered by or made known

to the Construction Manager as a request for information in such form as the Engineer may require. Any failure by Construction Manager to report known deviations or noncompliance will result in a waiver of any associated claims by the Construction Manager and shall require the Construction Manager to indemnify and hold the Owner harmless for any costs associated with the Construction Manager's failure in this regard.

3.05 *Certifications*

If applicable and upon the Owner's written request, the Construction Manager shall obtain from its Consultants and Subcontractors, and furnish to the Owner, certifications with respect to the documents and services provided by Construction Manager's Consultants and Subcontractors (a) that, to the best of their knowledge, information and belief, the documents or services to which the certifications relate (i) are consistent with the Contract Documents, except to the extent specifically identified in the certificate, and (ii) comply with applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities governing the design of the Project; and (b) that the Owner and Owner's Engineer shall be entitled to rely upon the accuracy of the representations and statements contained in the certifications.

3.06 *Construction Manager's Submittals*

- A. Prior to submission of any Submittals, the Construction Manager shall prepare a Submittal schedule, and shall submit the schedule for the Owner's and Designer's approval. The Owner's approval shall not unreasonably be delayed or withheld. The Submittal schedule shall (1) be coordinated with the Engineer's schedule provided in this Section, (2) allow the Owner and Designer reasonable time to review Submittals, and (3) be periodically updated to reflect the progress of the Work. If the Construction Manager fails to submit a Submittal schedule, the Construction Manager shall not be entitled to any increase in Contract Price or extension of Contract Time based on the time required for review of Submittals.
- B. By providing Submittals the Construction Manager represents to the Owner that it has (1) reviewed and approved them, (2) determined and verified materials, field measurements and field construction criteria related thereto, and (3) checked and coordinated the information contained within such Submittals with the requirements of the Work and of the Contract Documents.
- C. The Construction Manager shall perform no portion of the Work for which the Contract Documents require Submittals until the Owner and Designer's have approved the respective Submittal.
- D. The Work shall be in accordance with approved Submittals. Work done in compliance of an approved Submittal does not relieve the Construction Manager of its responsibility to perform the Work consistent with the requirements of the Contract Documents and the design intent if the Work subject to an approved Submittal fails or is deemed defective by the Owner or Owner's Engineer. The Work may deviate from the Contract Documents only if the Construction Manager has notified the Owner and Owner's Engineer in writing of a deviation from the Contract Documents at the time of the Submittal and a Modification is executed authorizing the identified deviation. The Construction Manager shall not be relieved of responsibility for errors or omissions in Submittals or by the Owner's or Designer's approval of the Submittals.
- E. Any professional design services or certifications to be provided by the Construction Manager, including all drawings, calculations, specifications, certifications, shop drawings and other Submittals, shall contain the signature and seal of the licensed design professional preparing them. Submittals related to the Work designed or certified by the licensed design professionals, if prepared by others, shall bear the licensed design professional's written approval. The Owner

and Owner's Engineer shall be entitled to rely upon the adequacy, accuracy and completeness of the services, certifications or approvals performed by such design professionals. All design work product shall be generated using the software specified by Owner.

ARTICLE 4 - CHANGES IN THE WORK

4.01 *General*

A Change Order or Change Directive may accomplish a change or Modification in the Work after execution of the Contract, and without invalidating the Contract, subject to the limitations stated in the General Conditions. No change in the Work, whether by way of alteration or addition to the Work, shall be the basis of an addition to the Guaranteed Maximum Price or a change in the Contract Time unless and until such alteration or addition has been authorized by a Change Order executed and issued in accordance with and in strict compliance with the requirements of the Contract Documents. This requirement is of the essence of the Contract Documents. Accordingly, no course of conduct or dealings between the parties, nor express or implied acceptance of alterations or additions to the Work, and no claim that the Owner has been unjustly enriched by any alteration or addition to the Work, whether or not there is in fact any such unjust enrichment, shall be the basis for any claim to an increase in the Guaranteed Maximum Price or change in the Contract Time.

ARTICLE 5 - OWNER'S RESPONSIBILITIES

5.01 *General*

The Owner's responsibilities shall be governed in accordance with the General Conditions.

ARTICLE 6- CONTRACT TIME AND COMPLETION

6.01 *General*

The Construction Manager's obligations with respect to the Contract Time shall be governed in accordance with the General Conditions, unless otherwise stated in this Article.

- A. Time limits stated in the Contract Documents are of the essence of the Contract. In all aspects of the Work, time is of the essence of the Contract. Additionally, time limits stated in the Project Schedule are of the essence. By executing the Guaranteed Maximum Price Amendment the Construction Manager confirms that the Contract Time is a reasonable period for performing the Work.
- B. The Construction Manager shall not, except by agreement of the Owner in writing, commence the Work prior to the effective date of insurance, other than property insurance, required by this Contract. The Contract Time shall not be adjusted as a result of the Construction Manager's failure to obtain insurance required under this Contract.
- C. The Construction Manager shall proceed expeditiously with adequate forces and shall achieve Substantial Completion within the Contract Time.
- D. The date of commencement of the Work shall be stated in a Notice to Proceed issued by the Owner. The date of commencement, as that term is used in the Contract Documents, shall mean the commencement of the Construction Phase which will be evidenced by the Owner's acceptance of the Construction Manager's Guaranteed Maximum Price proposal or the Owner's issuance of a Notice to Proceed, whichever occurs earlier.

- E. The Contract Time shall be measured from the date of commencement.
- F. **Substantial Completion.** The Construction Manager shall achieve Substantial Completion of the entire Work not later than TBD calendar days from the date of commencement, subject to and adjustments of this Contract Time as provided in the Contract Documents and Changer Orders modifying and extending this Agreement. It is specifically understood and agreed to by and between Owner and Construction Manager that time is of the essence in the substantial completion of the Work, and that failure to substantially complete the Work within the designated period, or as it may be extended, shall be construed as a breach of this Agreement.
- G. **Final Completion.** The Construction Manager shall achieve Final Completion of the entire Work not later than TBD calendar days from the date of commencement, subject to and adjustments of this Contract Time as provided in the Contract Documents and Changer Orders modifying and extending this Agreement. It is specifically understood and agreed to by and between Owner and Construction Manager that time is of the essence in the substantial completion of the Work, and that failure to substantially complete the Work within the designated period, or as it may be extended, shall be construed as a breach of this Agreement.

6.02 *Delays and Extensions of Time:* Unless otherwise set forth in this Section, Project delays shall be governed in accordance with the General Conditions.

- A. Claims relating to time shall be made in accordance with applicable provisions of Article 12 of the General Conditions.
- B. This Section 6.02 does not preclude recovery of damages for delay by Owner under other provisions of the Contract Documents.
- C. The Construction Manager shall receive no financial compensation for delay or hindrance of the Work. In no event shall the Owner be liable to the Construction Manager for any damages arising out of or associated with any delay or hindrance to the Work, regardless of the source of the delay or hindrance. The Construction Manager's sole remedy for delay or hindrance shall be an extension of time, provided the delay must be beyond the control and without the fault of negligence of the Construction Manager.
- D. The procedure for the determination of time extensions for unusually severe weather. In order for the Owner to award a time extension under this clause, the following conditions must be satisfied.
 - 1. The weather experienced at the Project site during the Contract period must be found to be unusually severe, that is, more severe than the adverse weather anticipated for the Project location during any given month.
 - 2. The unusually severe weather must actually cause a delay to the completion of the Project.
- E. The following schedule of monthly anticipated adverse weather delays is based on National Oceanic and Atmospheric Administration (NOAA) or similar data for the Project location and will constitute the base line for monthly weather time evaluations. The Construction Manager's activity durations provided in the progress schedule must reflect these anticipated adverse weather delays in all weather dependent activities.

MONTHLY ANTICIPATED ADVERSE WEATHER DELAY
WORK DAYS BASED ON FIVE (5) DAY WORK WEEK

JAN	FEB	MAR	APR	MAY	JUNE	JULY	AUG	SEPT	OCT	NOV	DEC
(1)	(3)	(0)	(1)	(1)	(2)	(0)	(8)	(5)	(1)	(1)	(2)

F. For the duration of the Contract, the Construction Manager shall maintain in its daily reports an accurate and contemporaneous record of the occurrence of adverse weather and resultant impact to normally scheduled Work. Delay from adverse weather unless Work on the overall Project's critical activities is prevented for 50 percent or more of the Construction Manager's scheduled work day. The number of actual adverse weather days shall be calculated monthly. If the number of actual adverse weather delay days in a month exceed the number of days for that month as referenced above, the Owner upon notification by the Construction Manager, will convert any qualifying delays to calendar days, giving full consideration for equivalent fair weather work days, and a modification shall be issued in accordance with the Contract.

G. *Liquidated Damages*

The Construction Manager acknowledges and recognizes that the Owner is entitled to full and beneficial occupancy and use of the completed work following expiration of the Contract Time. The Construction Manager further acknowledges and agrees that, if the Construction Manager fails to substantially, or cause the Substantial Completion of any portion of the Work within the Contract time, the Owner will sustain actual damages as a result of such failure. The exact amount of such damages will be difficult to ascertain. Therefore, the Owner and Construction Manager agree that, if the Construction Manager shall neglect, fail, or refuse to achieve substantial completion of the Work by the Substantial Completion date, subject to proper extension granted by the Owner, then the Construction Manager agrees to pay the Owner as liquidated damages ("Liquidated Damages"), not as a penalty, for the damages that would be suffered by Owner as a result of delay the sum of:

- TBD and no/00 dollars for each consecutive calendar day after the date of Substantial Completion in which the Work is not completed.

ARTICLE 7 - CONTRACT PRICE

7.01 *General*

Owner shall pay Construction Manager in accordance with the General Conditions a Contract Price equal to Construction Manager's Fee (as defined in this Article) plus the Cost of the Work (as defined in this Article), subject to the GMP established in Section 7.05 hereof and any adjustments made in accordance with the General Conditions.

7.02 *Construction Manager's Fee*

A. Construction Manager's Fee shall be TBD% of the Cost of the Work as defined in Section 7.03, and as adjusted in accordance with Section 7.02.B below, and less any applicable discounts, rebates, refunds and other amounts received from the sale of surplus materials and equipment. Such Fee shall not be earned with respect to Construction Manager's in-house personnel. Soft Costs and travelling and lodging expenses and bonding and insurance cost as set forth in

the Proposal of Construction Manager attached hereto. Such Soft Costs include (i) project manager, (ii) accounting personnel and services, (iii) construction supervisor, (iv) travel and out-of-office living expenses, including airfare, lodging, food, ground transportation, (v) administrative or overhead costs and expenses related to insurance and bonding not specifically by the Contract Documents.

- B. Construction Manager's Fee will be adjusted as follows for any Change Orders approved by Owner:
 - 1. For additive Change Orders, including additive Change Orders arising from both additive and deductive items, it is agreed that Construction Manager shall receive a Fee of TBD % of the additional Costs of the Work incurred for that Change Order, exclusive of Construction Manager's Soft Costs as defined in Section 7.02.A.
 - 2. For deductive Change Orders, including deductive Change Orders arising from both additive and deductive items, Construction Manager shall receive a fee of TBD % on that portion of the Cost of Work that is eliminated by any deductive Change Order.
- C. Amounts due for self-performed work shall include in The Cost of the Work a lump-sum cost for work competitively bid and awarded in accordance with the terms of this Agreement. For such scopes, the Construction Manager may not exceed five percent (5%) overhead and five percent (5%) profit in the lump sum amount.
- D. For any self-performance of minor work that is not subject to competitive bidding, Section 7.03 will control.

7.03 *Cost of the Work*

The term Cost of the Work shall mean costs reasonably incurred by Construction Manager in the proper performance of the Work. The Cost of the Work shall include only the following:

- A. Fees for direct employees of Construction Manager performing the Work at the Site or, with Owner's agreement, at locations off the Site, calculated at the prevailing rates for such personnel.
- B. Fees for Construction Manager's supervisory and administrative personnel engaged in the performance of the Work and who are located at the Site or working off-Site to assist in the production or transportation of material and equipment necessary for the Work at the prevailing rates for such personnel.
- C. Fees for Construction Manager's personnel stationed at Construction Manager's principal offices, but only to the extent said personnel are identified and compensated in accordance with the prevailing rates for such personnel.
- D. The reasonable portion of the cost of travel, accommodations and meals for Construction Manager's personnel necessarily and directly incurred in connection with the performance of the Work.
- E. Payments properly made by Construction Manager to Subcontractors for performance of portions of the Work, including any insurance and bond premiums incurred by Subcontractors.

- F. Costs, including transportation, inspection, testing, storage and handling, of materials, equipment and supplies incorporated or reasonably used in completing the Work.
- G. Costs less salvage value of materials, supplies, temporary facilities, machinery, equipment and hand tools not customarily owned by the workers that are not fully consumed in the performance of the Work and which remain the property of Construction Manager, including the costs of transporting, inspecting, testing, handling, installing, maintaining, dismantling and removing such items. Costs for items not fully consumed by the Construction Manager shall mean fair market value. The actual cost of such excess materials as was originally billed to Owner shall be credited to the Owner as a deduction from the Cost of the Work.
- H. Costs of removal of debris and waste from the Site.
- I. The reasonable costs and expenses incurred in establishing, operating and demobilizing the Site office, including the cost of facsimile transmissions, long-distance telephone calls, postage and express delivery charges, telephone service, photocopying and reasonable petty cash expenses.
- J. Rental charges and the costs of transportation, installation, minor repairs and replacements, dismantling and removal of temporary facilities, machinery, equipment and hand tools not customarily owned by the workers, which are provided by Construction Manager at the Site, whether rented from Construction Manager or others, and incurred in the performance of the Work. The total rental cost of any Construction Manager-owned item may not exceed the purchase price of any comparable item. Rates of Construction Manager-owned equipment and quantities of equipment shall be subject to the Owner's prior approval.
- K. Premiums for insurance and bonds required by this Agreement or the performance of the Work.
- L. All fuel and utility costs incurred in the performance of the Work.
- M. Sales, use or similar taxes, tariffs or duties incurred in the performance of the Work. Provided that if the Owner is exempt from such taxes and provides a tax exemption certificate or certificates to Construction Manager that effect, no such taxes shall apply. The Construction Manager shall use that certificate to exempt any purchases made for the Work from otherwise applicable taxes. As such, the Construction Manager shall not include in the Guaranteed Maximum Price any sales, consumer, use and similar taxes for the Work provided by the Construction Manager which are exempted because of the Owner's tax exempt status. Subject to the above terms, the Construction Manager shall pay sales, consumer, use and similar taxes that are legally enacted, whether yet effective, at the time the Guaranteed Maximum Price Amendment is executed.
- N. Costs for permits, royalties, licenses, tests and inspections incurred by Construction Manager as a requirement of the Contract Documents.
- O. Deposits which are lost, except to the extent caused by Construction Manager's negligence or default under this Agreement.
- P. Costs incurred in preventing damage, injury or loss in case of an emergency affecting the safety of persons and property, except to the extent caused by Construction Manager or anyone performing Work on its behalf.
- R. Accounting and data processing costs related to the Work.

- S. Other costs reasonably and properly incurred in the performance of the Work to the extent approved in writing by Owner.
- T. Costs incurred by Construction Manager to provide the payment and performance bonds, warranties and guarantees with respect to the Work as provided herein.
- U. Costs paid or incurred by the Construction Manager as labor burden for payroll taxes, insurance, and customary benefits such as sick leave, medical and health benefits, holidays, vacations and pensions, provided such costs are based on wages and salaries included in the Cost of the Work under Section 7.03, and provided that such costs are directly attributable to work performed on this Project only and provided further that such costs do not exceed Twenty five percent (25%) of such wages and salaries.
- V. Fees of laboratories for tests required by the Contract Documents, except those related to defective or nonconforming Work for which reimbursement is excluded by Section 14.03 of the General Conditions or by other provisions of the Contract Documents, and which do not fall within the scope of Section 7.03.

7.04 *Non-Reimbursable Costs* The following shall be excluded from the Cost of the Work:

- A. Compensation for Construction Manager's personnel stationed at Construction Manager's principal or branch offices, except as provided for in Sections 7.03.A, 7.03.B and 7.03.C hereof.
- B. Overhead and general expenses, except as provided for in Section 7.03 hereof, or which may be recoverable for changes to the Work.
- C. The cost of Construction Manager's capital used in the performance of the Work.
- D. If the parties have agreed on a GMP, costs that would cause the GMP, as adjusted in accordance with the Contract Documents, to be exceeded.
- E. Any and all costs incurred by Construction Manager, including but not limited to costs for project management and costs to comply with the General Conditions, to the extent that such costs would cause the GMP to be exceeded.
- F. Costs for services incurred during the Preconstruction Phase.
- G. Construction Manager's fee of __% on all self-performed scopes of work competitively bid and awarded to the Construction Manager.

7.05 *The Guaranteed Maximum Price ("GMP")*

- A. *GMP Established Upon Execution of this Agreement*
Construction Manager guarantees that the total charge to Owner for completion of all Work shall not exceed the GMP of TBD Dollars (\$ _____). Construction Manager agrees that it will be responsible for paying or absorbing all costs of completing the Work which exceed the GMP, as said GMP may be adjusted in accordance with the Contract Documents, including but not limited to the markups for Change Orders set forth herein.

- B. It is the intent of the parties that the GMP will be increased or decreased by any additive or deductive Change Orders that change the scope of the Work with commensurate changes to the Cost of Work in accordance with Article 4.
- C. In the event of any "buy out" transactions, agreements by the Construction Manager with a subcontractor for the subcontractor's cost of its portion of the Work, or other savings due to early completion or value engineering after execution of the Guaranteed Maximum Price addendum, then such savings shall be shared with the Owner in the following percentages: 50% to Owner, 50% to Construction Manager up to an amount not exceed \$150,000.00. Said savings shall be memorialized by appropriate change order. Documentation regarding such "buy out" transactions/agreements shall be subject to the Owner's audit and inspection rights set forth in the General Conditions.

ARTICLE 8 - COMPENSATION AND PROGRESS PAYMENTS

8.01 *General*

Payments to Construction Manager are governed in accordance with this Article and the General Conditions.

- A. Construction Manager shall submit to Owner on the twenty fifth (25th) day of each month, beginning with the first month after the Date of Commencement, Construction Manager's Application for Payment in accordance with the General Conditions.
- B. Owner shall make payment within thirty (30) days after Owner's receipt of each properly submitted and accurate Application for Payment in accordance with the General Conditions, but in each case less the total of payments previously made, and less amounts properly withheld under the General Conditions.
- C. If Construction Manager's Fee under Section 7.02.A hereof is a fixed amount, the amount of Construction Manager's Fee to be included in Construction Manager's monthly Application for Payment and paid by Owner shall be proportional to the percentage of the Work completed, less payments previously made on account of Construction Manager's Fee.
- D. All payments to Construction Manager exclusive of those made directly by Owner to any vendor to Construction Manager will be made by electronic transfer to Construction Manager's bank account. Construction Manager shall promptly provide Owner with wire transfer instructions for the making of such wire transfers to Construction Manager's bank account.

8.02 *Retainage on Progress Payments*

Owner will retain five percent (5%) of each Application for Payment. Upon Substantial Completion of the Work, the retainage shall be reduced in accordance with the Guaranteed Maximum Price Amendment.

8.03 *Interest*

Timeliness and interest due on payments to the Construction Manager are subject to and controlled by Chapter 2251 of the Texas Government Code.

8.04 *Compensation for Work Performed Prior To Execution of Guaranteed Maximum Price Amendment*

- A. For the Construction Manager's performance of Work prior to the execution of the Guaranteed Maximum Price Amendment, the Owner shall compensate the Construction Manager as follows:

- B. Construction Manager shall be compensated an amount of Ten Thousand and No/100 Dollars (\$10,000.00) for the preconstruction services for the Chelsea aquatic park and Ten Thousand and No/100 Dollars (\$10,000.00) for the preconstruction services provided for the Lionel Forti aquatic park, for a total of Twenty Thousand and No/100 dollars (\$20,000.00) for preconstruction services provided prior to execution of the Guaranteed Maximum Price Amendment. However, should this Agreement be terminated prior to the construction phase, Construction Manager shall be **compensated** in accordance with the General Conditions.
- C. Payments to the Construction Manager Prior To Execution of Guaranteed Maximum Price Amendment **are due and payable to Construction Manager subject to the timeliness and interest provisions in the Government Code Chapter 2251.**
- D. If the Owner terminates the Contract after the commencement of the Construction Phase but prior to the execution of the Guaranteed Maximum Price Amendment, the Owner shall pay to the Construction Manager an amount calculated as follows, which amount shall be in addition to any compensation paid to the Construction Manager under Section 8.04.B:
 1. Take the Cost of the Work incurred by the Construction Manager to the date of termination;
 2. Add the Construction Manager's Fee computed upon the Cost of the Work to the date of termination at the rate stated in Section 7.02; and
 3. Subtract the aggregate of previous payments made by the Owner for Construction Phase services.

8.05 *Contract Price and Payment for Work Performed After Execution of Guaranteed Maximum Price Amendment*

- A. For the Construction Manager's performance of the Work after execution of the Guaranteed Maximum Price Amendment, the Owner shall pay to the Construction Manager the Contract Price in current funds as agreed Section 7.02 herein and in the Guaranteed Maximum Price Amendment. Notwithstanding any terms to the contrary, the provisions of this Article and the General Conditions shall control the obligations of the Parties with respect to payments made pursuant to the Contract Documents.
- B. Should this Agreement be terminated after execution of the Guaranteed Maximum Price Amendment, Construction Manager shall be compensated in accordance with the terms contained in the General Conditions.

8.06 *Construction Trust Funds*

- A. Construction Manager shall comply with the provisions of the Texas Trust Fund Act, Chapter 162 of the Texas Property Code. With respect to payments made by the Owner, such funds are considered Trust Funds and shall be safeguarded and used as represented by Construction Manager to pay any consultants and subcontractors that may be due payment pursuant to the schedule of values.

ARTICLE 9 - PAYMENT APPLICATIONS

- 9.01 After execution of the Guaranteed Maximum Price Amendment this Article shall be governed by the General Conditions unless specified otherwise herein. To the extent there is a conflict between the terms of this Agreement and the terms of the General Conditions, this Agreement shall prevail.

- 9.02 *Contract Price*
The Contract Price is stated in the Guaranteed Maximum Price Amendment.
- 9.03 *Applications for Payment*
Applications for Payment shall be governed in accordance with the General Conditions.
- 9.04 *Progress Payments*
Progress Payments shall be governed in accordance with the General Conditions.
- A. After the Owner has issued a Certificate for Payment, the Owner shall make payment in the manner and within the time limits required by the General Conditions.
- B. The Construction Manager shall pay each consultant, subcontractor, and other person or entity providing services or work for the Construction Manager no later than the time period required by the General Conditions.
- 9.05 *Failure of Payment*
Failure of payment by Owner within the time limits required by the General Conditions shall entitle the Construction Manager to the remedies contained in Article 16 of the General Conditions.

ARTICLE 10 - FINAL COMPLETION

- 10.01 Final completion shall be governed in accordance with the General Conditions, except as otherwise set forth in this Article.
- A. Timely final completion is an essential condition of this contract. Construction Manager agrees to achieve final completion of the Work within 30 days of the designated or extended substantial completion date. The date of Substantial Completion shall be fixed by this Agreement, unless modified by Change Order, and memorialized by a Certificate of Substantial Completion as provided in the General Conditions.

ARTICLE 11 - OWNERSHIP OF WORK PRODUCT, COPYRIGHTS AND LICENSES

- 11.01 Ownership of work product, copyrights and licenses, if applicable, shall be governed in accordance with the General Conditions.

ARTICLE 12- CLAIMS AND DISPUTE RESOLUTION

- 12.01 General Claims and dispute resolution will be governed in accordance with the General Conditions.
- 12.02 *Mutual Waiver of Consequential Damages* - Excluding losses covered by insurance required by the Contract Documents, the Owner and Construction Manager agree to waive all claims against each other for any consequential damages that may arise out of or relate to this Agreement except for those specific items of damages excluded from this waiver as mutually agreed upon by the Parties and identified below. The Owner agrees to waive damages including but not limited to the Owner's loss of use of the Project, loss of reputation, or insolvency. The Construction Manager agrees to waive damages including but not limited to loss of business, loss of financing, principal office overhead and expenses, losses of profits not related to this Project, loss of bonding capacity, loss of reputation, or insolvency. To extent there is a conflict between the terms of this provision and the terms of the General Conditions, this provision shall prevail. The Owner's reasonable rental expenses incurred are excluded from this mutual waiver.

ARTICLE 13 - BONDS AND INSURANCE

13.01 *Insurance*

Construction Manager and Owner shall procure the insurance coverages set forth in the Insurance Exhibit 3 attached hereto and in accordance with Article 6 of the General Conditions.

13.02 *Bonds and Other Performance Security*

In accordance with Article 6 of the General Conditions and Texas Government Code chapter 2253, Construction Manager shall provide performance bond and labor and material payment bonds.

ARTICLE 14 - MISCELLANEOUS PROVISIONS

14.01 *Governing Law*

The Contract shall be governed by the law of the state of Texas.

14.02 *Venue*

This Agreement is entered into and performed in El Paso County, Texas, and the Construction Manager and the Owner agree that mandatory venue for any legal action related to this contract shall be in the District Courts of El Paso County, Texas.

14.03 *Successors and Assigns*

The Owner and Construction Manager, respectively, bind themselves, their partners, successors, assigns and legal representatives to the covenants, agreements and obligations contained in the Contract Documents. Neither party to the Contract shall assign the Contract in whole or in part without the express written consent of the other. If either party attempts to make such an assignment without such consent, that party shall nevertheless remain legally responsible for all obligations under the Contract and the attempted assignment shall be of no legal force or effect as to the other party.

14.04 *Written Notice*

Written notice shall be deemed to have been duly served if delivered in person to the individual, to a member of the firm or entity, or to an officer of the corporation for which it was intended; or if delivered at, or sent by registered or certified mail or by courier service providing proof of delivery to, the last business address known to the party giving notice. Written notice sent or transmitted by electronic mail or facsimile must be actually received to be considered delivered and to comply with notice requirements herein. Transmission alone by electronic mail or facsimile does not constitute delivery.

14.05 *Rights and Remedies*

- A. Duties and obligations imposed by the Contract Documents, and rights and remedies available thereunder, shall be in addition to and not a limitation of duties, obligations, rights and remedies otherwise imposed or available by law.
- B. No action or failure to act by the Owner or Construction Manager shall constitute a waiver of a right or duty afforded them under the Contract, nor shall such action or failure to act constitute approval of or acquiescence in a breach thereunder, except as may be specifically agreed in writing.

14.06 *Interpretation*

Unless otherwise stated in the Contract Documents, words which have well-known technical or construction industry meanings are used in the Contract Documents in accordance with such recognized meanings.

This Agreement is entered into as of the day and year written above ("The Date of Execution"):
Arrow Building Corp.

CITY CLERK DEPT.
2018 MAR 23 PM3:14

For
OWNER



CONSTRUCTION MANAGER

By: Cary S. Westin
Title: Deputy City Manager

By: David McGlohon
Title: President