

**TOWN OF COPPER CANYON  
RESOLUTION NO. 24-03**

**A RESOLUTION OF THE TOWN COUNCIL OF THE TOWN OF COPPER CANYON, TEXAS, APPROVING THE TERMS AND CONDITIONS OF A CONSTRUCTION MANAGER AT-RISK (CMAR) SERVICES AGREEMENT BY AND BETWEEN STEVE KOEHLER D/B/A THE KOEHLER COMPANY, A SOLE PROPRIETORSHIP, FOR THE CONSTRUCTION OF TOWN HALL ADDITION AND PARKING LOTS, WHICH IS ATTACHED HERETO AND INCORPORATED HEREIN AS EXHIBIT 'A'; ESTABLISHING A GUARANTEED MAXIMUM PRICE AT \$960,427.00 AND AUTHORIZE TOWN STAFF TO MAKE FUNDING CHANGES NOT TO EXCEED \$25,000.00 ON SAID PROJECT; AUTHORIZING THE MAYOR TO EXECUTE THE NECESSARY DOCUMENTS; AND, PROVIDING FOR AN EFFECTIVE DATE.**

**WHEREAS**, the Town Administration searched for Architects/Engineers to design the construction of Town Hall Addition and parking lots to use the Construction Manager At-Risk (CMAR) method of contracting for construction; and

**WHEREAS**, the Town Council after requesting proposals for CMAR and reviewing the same selected Steve Koehler d/b/a The Koehler Company, a sole proprietorship for the construction of Town Hall Addition and parking facilities; and

**WHEREAS**, the Town of Copper Canyon, Texas ("Town") desires to enter into an agreement with Steve Koehler d/b/a The Koehler Company, a sole proprietorship for the construction of Town Hall Addition and parking lots; and,

**WHEREAS**, the Town Council of the Town of Copper Canyon believes it is in the best interest of the Town and its citizens to approve said agreement.

**NOW, THEREFORE, BE IT RESOLVED BY THE TOWN COUNCIL OF THE TOWN OF COPPER CANYON, TEXAS, THAT:**

**SECTION 1.** The Town Council hereby approves, the terms and conditions of a Construction Manager At-Risk (CMAR) Services Agreement by and between Steve Koehler D/B/A The Koehler Company, a sole proprietorship, for the construction of Town Hall Addition and parking lots, which is attached hereto and incorporated herein as Exhibit 'A'.

**SECTION 2.** The Town Council hereby establishes a guaranteed maximum price at \$960,427.00; and hereby authorizes Town staff to make funding changes not to exceed \$25,000.00 on said project; and authorizes the Mayor to execute the necessary documents.

**SECTION 3.** That this Resolution shall take effect immediately from and after its passage.

**DULY RESOLVED AND ADOPTED** by the Town Council of the Town of Copper Canyon, Texas, on the \_\_\_\_ day of \_\_\_\_\_, 2024.

**TOWN OF COPPER CANYON, TEXAS**

\_\_\_\_\_  
Ron Robertson, Mayor

**ATTEST:**

\_\_\_\_\_  
Sheila B. Morales, TRMC  
Town Secretary

**APPROVED AS TO FORM:**

\_\_\_\_\_  
Robert Hager, Town Attorney

# EXHIBIT

# A

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**TOWN OF COPPER CANYON, TEXAS**  
**CONSTRUCTION MANAGER-AT-RISK CONTRACT**

THIS CONTRACT is made as of the \_\_\_ day of \_\_\_\_\_, 2024, (the “Effective Date”), and is by and between:

The Town:  
The Town of Copper Canyon  
400 Woodland Drive  
Copper Canyon, Tx. 75077

and the Construction Manager:

Steve Koehler d/b/a  
The Koehler Company  
Sole Proprietorship  
214-957-7188  
5900 Windridge Lane  
Flower Mound TX 75028

For the following project:

The project consists of a 1,530 square foot wood framed support building with offices, restrooms, and support spaces. The exterior of the building consists of siding, asphalt shingles, covered walkway and covered parking spaces. A new monument sign is included. Site work includes minor demolition, new concrete parking lots on east and west sides, and miscellaneous flatwork.

The Project Architect is:  
Greg Frnka, AIA  
GPF Architects, LLC  
549 E. Sandy Lake Road, Suite 100  
Coppell, TX 75019  
972-824-7966

The Town and the Construction Manager agree as follows:

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## ARTICLE 1 SCOPE OF WORK

The Construction Manager has overall responsibility for, and shall provide, complete Pre-Construction Phase and Construction Phase Services and furnish all materials, equipment, tools and labor as necessary or reasonably inferable to complete the Work, or any phase of the Work, in accordance with the Town's requirements and the terms of the Contract Documents. Any Work that may be required, implied or inferred by the Contract Documents, or any one or more of them, as necessary to produce the intended result shall be provided by the Construction Manager without increase to the GMP.

## ARTICLE 2 CONTRACT DOCUMENTS

2.1 The Contract Documents consist of:

- a. This Contract and all exhibits and attachments listed, contained or referenced in this Contract;
- b. The General Conditions Addendum;
- c. All Addenda issued prior to the Effective Date of this Contract;
- d. The Guaranteed Maximum Price Proposal when accepted by the Town and executed by the parties;
- e. All Change Orders issued after the Effective Date of this Contract;
- f. The Drawings, Plans and Specifications, details, Critical Path Method Schedule, and other documents developed by the Project Architect, the Town and/or the Construction Manager to describe the Project and the Work; and
- g. The Drawings, Plans and Specifications developed or prepared by Town's other consultants, if any, and accepted by the Town.

2.2 The Contract Documents form the entire and integrated Contract between Town and Construction Manager and supersede all prior negotiations, representations or agreements, written or oral.

2.3 The term "Construction Manager" shall be interchangeable with the terms "Contractor" and "General

Contractor" or other similar terms as appropriate in the Contract Documents.

## ARTICLE 3 DEFINITIONS

The terms, words and phrases used in the Contract Documents shall have the meanings given as follows.

3.1 "Construction Cost Limitation" (CCL) means the maximum monetary amount payable to the Construction Manager for all Construction Phase services, materials, labor and other work required for completion of the Work in accordance with the Contract Documents. The CCL includes, without limitation, the General Conditions Costs, the Cost of the Work, the Construction Phase Fee and any Construction Manager's contingency. The CCL may be adjusted by the parties for changes in the scope of the Project before or after acceptance of the Guaranteed Maximum Price Proposal. The CCL does not include the Construction Manager's Pre-Construction Phase Fee, or any Town contingencies or special cash allowance.

3.2 "Construction Phase Services" means the coordination, implementation and execution of the Work following the Pre-Construction Phase and encompasses the provision of labor, materials and equipment in accordance with the Drawings, Plans and Specifications to construct and complete the Project as required by the Contract Documents.

3.3 "Contract Sum" means the total amount of all compensation payable to the Construction Manager for the Project and shall not exceed the sum total amount of the Pre-Construction Phase Fee plus the Guaranteed Maximum Price Proposal accepted by the parties, subject to adjustment for Additional Services or Change Orders. Any costs that exceed the Contract Sum shall be borne solely by Construction Manager without reimbursement by Town.

3.4 "Estimated Construction Cost" (ECC) means the amount calculated by the Construction Manager for the total cost of all elements of the Project including, without limitation, all alternates, allowances and contingencies, designed and specified by the Project Architect or reasonably inferable as a usual and customary component of the Project or otherwise necessary for complete installation and operation of the Project. The Estimated Construction Cost shall include, at current market rates with a reasonable allowance for overhead, profit and price escalation, the cost of labor and materials furnished by the Construction Manager and any equipment which has been

shown in the plans, specified, and specially provided for by the Project Architect. The ECC shall include and consider the cost of labor and materials necessary for installation of Town furnished equipment. The ECC does not include Construction Manager's Pre-Construction Phase Fee, the Town's Construction Contingency, the Town's Special Cash Allowance, Project Architect Fees, cost of the land, rights-of-way, or any other costs that are the direct responsibility of the Town.

3.5 "Final Completion" means the full and final completion of the Work, including the resolution and completion of all punch-list items after Substantial Completion.

3.6 "Guaranteed Maximum Price" (GMP) means the amount proposed by the Construction Manager and accepted by the Town as the maximum cost to the Town for construction of the Work in accordance with the Contract Documents. The GMP includes Construction Manager's Construction Phase Fee, all Costs of the Work to final completion, and any contingencies and/or allowances.

3.7 "Plans and Specifications" and/or "Drawings, Plans and Specifications" mean the construction and contract administration requirements and standards detailed in the General Conditions Addendum and the shop drawings, drawings, plans, specifications, and construction details for the Work as presented by the Project Architect and as developed during the Pre-Construction Phase by the Project Architect, Construction Manager and Town.

3.8 "Pre-Construction Phase Services" means the participation, documentation and execution of the Construction Manager's Pre-Construction Phase deliverables as required by the Contract Documents.

3.9 "Preliminary Project Cost" (PPC) means the total estimated cost of the entire Project, including design, construction, and other associated costs and services that are established by the Town prior to the commencement of design.

3.10 "Project Architect" means the professional architect or engineer employed by the Town as architect or engineer of record for the Project, and its consultants.

3.11 "Project Team" means the Town, Construction Manager, Project Architect, any separate contractors

employed by Town, and other consultants employed for the purpose of programming, design, and construction of the Project. The members of the Project Team will be designated by Town and may be modified from time to time by Town.

3.12 "Subcontractor" means a person or entity who has an agreement with the Construction Manager, or who has a direct agreement with the Town as selected or recommended by the Construction Manager, to perform any portion of the Work. The term subcontractor does not include the Project Architect.

3.13 "Total Project Cost" (TPC) means the total budget established for the Project by the Town at the end of the design development phase (subject to subsequent modification by Town). The TPC includes, but is not limited to, Construction Manager's Pre-Construction Fee, Guaranteed Maximum Price Proposal(s), Project Architect and other professional service fees, and other miscellaneous Project costs.

3.14 "Work" means the provision of all services, labor, materials, supplies, and equipment that are required of the Construction Manager to complete the Project and achieve Final Completion in strict accordance with the requirements of the Contract and the Contract Documents. Work includes, but is not limited to, the Pre-Construction Phase Services, the GMP Proposal(s), the Construction Phase Services, additional work required by Change Orders, and any other work reasonably inferable from the Contract Documents. The term "reasonably inferable" takes into consideration the understanding of the parties that some details necessary for completion of the Work may not be shown on the drawings or included in the Town's Plans and Specifications, but they are a requirement of the Work if they are a usual and customary component of the Work or otherwise necessary for complete installation and operation of the Work.

#### **ARTICLE 4 CONSTRUCTION MANAGER'S GENERAL RESPONSIBILITIES**

4.1 Construction Manager shall perform all services specifically allocated to it by the Contract Documents as well as those services reasonably inferable from the Contract Documents as necessary for final completion of the Work and the Project such that the Town is provided with a completely functional building. Construction Manager agrees to perform these services using its best



efforts, skills, judgments and abilities, and shall perform according to industry standards.

4.2 Construction Manager shall cooperate with the Project Architect and endeavor to further the interests of the Town and the Project. Construction Manager shall furnish Pre-Construction Phase Services and Construction Phase Services and complete the Project in an expeditious and economical manner consistent with the interests of the Town and in accordance with the Project Schedule.

4.3 Construction Manager shall designate a representative authorized to act on the Construction Manager's behalf with respect to the Project.

4.4 Construction Manager shall establish procedures for communication and coordination among the Project Team, Subcontractors, separate contractors, and others with respect to all aspects of the construction of the Project, and, upon Town's approval, implement such procedures.

4.5 Construction Manager shall establish and maintain a numbering and tracking system for all Project records, including changes, requests for information, submittals, and supplementary instructions and shall provide updated records at each Town's meeting and when requested.

4.6 Fast Track/Multiple Completion Times. If the Town elects to "fast-track" or develop the Project in multiple stages, Construction Manager shall organize and perform its services as appropriate to each stage. Each stage of the Project may have a unique schedule for completion.

4.7 Construction Manager shall identify to the Town the employees and other personnel that it will assign to the Project. Construction Manager shall also identify any consultants that will be performing services for the Project. After execution of this Contract by the Town, Construction Manager shall not add, remove or replace the persons or entities assigned to the Project except with the Town's written consent, which consent shall not be unreasonably withheld. Construction Manager shall not assign to the Project or contract with any person or entity to which Town has a reasonable objection. Construction Manager shall promptly remove any employee that Town determines, at Town's sole discretion, to be unacceptable. Construction Manager shall promptly update and resubmit its identification of personnel, indicating the list of persons by name and title and consultants if they

change during the course of the Project. Construction Manager's employees and other personnel that it assigns to the Project shall be identified on the Schedule of Values by name and title.

4.8 In the selection of subcontractors, Construction Manager shall comply with Section 252.0215 regarding the use and retention of historically underutilized businesses for Pre-Construction Phase and Construction Phase Services.

## **ARTICLE 5 PRE-CONSTRUCTION PHASE SERVICES**

The Pre-Construction Phase shall be deemed to commence upon the date specified in a Notice to Proceed with Pre-Construction Phase Services issued by Town and shall continue through completion of the Contract Documents and procurement of all major subcontractor agreements. Construction Manager is not entitled to reimbursement for any costs incurred for Pre-Construction Phase Services performed before issuance of the Notice to Proceed. Pre-Construction Phase Services may overlap Construction Phase Services. The Construction Manager shall perform the following Pre-Construction Phase Services.

### **5.1 General Coordination**

5.1.1 The Construction Manager's Pre-Construction Phase Services team shall attend Project Team meetings with the Town, the Town's representatives, and the Project Architect at regularly scheduled intervals throughout the Pre-Construction Phase. Frequent Project Team meetings are anticipated prior to the Town's acceptance of the GMP and during completion of the Contract Documents.

5.1.2 Provide a preliminary evaluation of the Town's design criteria and the Construction Cost Limitation, each in terms of the other.

5.1.3 Review and understand the standards and requirements in Town's Specifications and perform all services in accordance with those standards and requirements.

5.1.4 Visit the site and inspect the existing facilities, systems and conditions to ensure an accurate understanding of the existing conditions as required.

5.1.5 Provide recommendations and information to the Project Team on: site usage and site improvements; building systems, equipment and construction feasibility; selection and availability of materials and labor; time requirements for installation and construction; assignment of responsibilities for safety precautions and programs; temporary Project facilities; equipment, materials and services for common use of the Construction Manager and Town's separate contractors, if any; cost factors, including costs of alternative materials or designs, preliminary budgets, and possible cost savings; recognizing and tracking the resolution of conflicts in the proposed Drawings, Plans and Specifications; methods of delivery of materials, systems, and equipment; and any other matters necessary to accomplish the Project in accordance with the Project Schedule (as defined below) and the CCL.

5.1.6 Assist the Town in selecting and directing the services of surveyors, soils engineers, existing facility surveys, testing and balancing, commissioning, environmental surveys or other special consultants hired by the Town to develop additional information for the design or construction of the Project.

5.1.7 At Town's request, attend public meetings and hearings concerning the development and schedule of the Project.

## 5.2 Constructability Program

5.2.1 Implement and conduct a constructability program to identify and document Project cost and schedule savings opportunities. The constructability program shall follow accepted industry practices. Whenever the term "value engineering" is used in conjunction with this Contract or the Project, it has its commonly accepted meaning within the construction industry and does not imply the practice of professional engineering without a license. If any value engineering activities constitute the professional practice of engineering, then such activities shall be performed by an engineer licensed in Texas.

5.2.2 Prepare a "Constructability Report" that identifies items that, in the Construction Manager's opinion, may negatively impact construction of the Project. The Constructability Report shall address the

overall coordination of Project Drawings, Plans and Specifications, and details and identify discrepancies that may generate Change Orders or claims once Project construction commences. The Constructability Report shall be updated at least monthly during the Pre- Construction Phase.

5.2.3 Provide and implement a system for tracking questions, resolutions, decisions, directions and other information matters that arise during the development of the Drawings, Plans and Specifications for the Project. The decision tracking system shall be in a format approved by the Town and updated at least monthly during the Pre-Construction Phase.

## 5.3 Scheduling; Critical Path Method Schedule

5.3.1 Develop a Critical Path Method Schedule (CPM Schedule) for Project Team review and the Town's approval, that establishes a clear construction schedule with milestones and coordinates and integrates activities on the Project, including the Construction Manager's services, the Project Architect's design services, commissioning, the work of other consultants and suppliers, and the Town's activities with the anticipated construction schedules for other contractors. The CPM Schedule must identify all major milestones through Project Final Completion.

5.3.2 The Construction Manager shall update the CPM Schedule throughout the Pre-Construction and Construction Phases as described in the Town's Specifications. Time is of the essence and adherence to the CPM Schedule and its milestones is material to this contract.

5.3.3 The CPM Schedule shall include other detailed schedule activities as directed by the Town including, but not limited to, Town-managed work under separate contracts such as equipment, furniture and furnishings, telephones, project security, property protection, life-safety systems, integration with central campus monitoring systems, information and instructional technology data-transmission systems, and computer technology systems.

## 5.4 Budget and Cost Consultation

5.4.1 The Construction Manager is responsible for preparing and updating all procurement and construction cost estimates and distributing them to the

Project Team throughout the duration of the Project.

5.4.2 Provide Estimated Construction Cost (ECC) reports at the required stages of completion of the schematic design, design development, and construction documents phases of the Project as required in Article 25. The Estimated Construction Cost reports for the design development and construction documents phases shall be detailed estimates derived from cost quantity surveys based on unit prices for labor, materials, overhead and profit, organized in current Construction Specifications Institute Division format for each portion of the Work.

5.4.3 Provide continuous cost consultation services throughout the duration of the Project, including identification and tracking of decisions that affect the scope or quality of the Project and providing ongoing updates of their cost and budget impact. Advise the Project Team immediately if the Construction Manager has reason to believe that the most current estimated construction costs will exceed the Construction Cost Limitation (CCL) or not meet CPM Schedule requirements and recommend reasonable strategies for bringing the Project in line with the CCL and the CPM Schedule.

5.4.4 Construction Manager shall promptly identify all variances between estimated costs and actual costs during the Construction Phase and shall promptly report such variances to the Project Team along with recommendations for action, but in any event no more than two (2) business days after acquiring such information.

5.4.5 Should any ECC exceed or fall significantly below the approved CCL, the Town and Construction Manager shall negotiate changes to the Project requirements or the CCL as required.

#### 5.5 Coordination of Design and Construction Contract Documents

The Construction Manager shall:

5.5.1 Review all Drawings, Specifications, and other construction documents as they are developed by the Project Architect during the schematic design, design development, and construction documents design phases of the Project.

5.5.2 Consult with Town, Project Architect, and Town's consultants on the selection of materials, equipment, component systems, and types of construction used on the Project. Advise Town on site use, construction feasibility, availability of labor and materials, procurement time requirements, and construction coordination.

5.5.3 Advise Town of any error, inconsistency or omission discovered in the Drawings, Plans and Specifications, and other construction documents.

5.5.4 Advise Town on reasonable adjustments in the Project scope, quality or other options for keeping the Project cost within the CCL.

5.5.5 Review the construction documents for compliance with all applicable laws, rules and regulations and with Town, State and federal requirements.

#### 5.6 Construction Planning and Procurement Package Strategy

The Construction Manager shall:

5.6.1 Identify equipment or material requiring extended delivery times and advise Town on expedited procurement of those items. Advise Town and Project Architect on the preparation of performance specifications and requests for technical proposals for the procurement and installation of systems and components and for the procurement of long lead items. If requested by Town, and subject to Town's prior approval, issue requests for technical proposals to qualified sources and receive proposals and assist in their evaluation.

5.6.2 Make recommendations to the Project Team regarding organization of the construction documents to facilitate the soliciting of offers and awarding of construction subcontracts in a manner that promotes the interests of the Project and the Town. These recommendations may include, but are not limited to, phased or staged construction or multiple separate contracts. The recommendations shall take into consideration such factors as time of performance, type and scope of work, availability of labor and materials, overlapping trade jurisdictions, provisions for temporary facilities, comparisons of factory and on-site production costs, shipping costs, code restrictions, the Town's goals for HUB contractor

participation, and other constraints.

5.6.3 Review the construction documents with the Project Team to eliminate areas of conflict and overlap in the work to be performed by the various subcontractors or Town's separate contractors.

5.6.4 Develop a procurement package strategy in coordination with the Project Architect that addresses the entire scope of Work for each phase and stage of the Project. In developing the procurement package strategy, the Construction Manager shall identify all procurement packages on which the Construction Manager intends to submit a self-performance bid or proposal. The procurement package strategy shall be reviewed with the Town on a regular basis and revised throughout the buyout of the Project so as to best promote the interests of the Project and the Town.

5.6.5 Assist the Town, the Project Architect, Town's other consultants, and the Town's separate contractors in obtaining all applicable risk management, code, and regulatory agency reviews and approvals for the Project including, without limitation, the Texas Department of Licensing and Regulation, the Fire Marshal, and the Town's insurance provider.

5.6.6 Advise Town of any tests to be performed, and assist Town in selecting testing laboratories and consultants, without assuming direct responsibility for the work of such laboratories and consultants.

5.6.7 Construction Manager shall review the construction documents to ensure that they contain adequate provision for all temporary facilities necessary for performance of the Work, and provisions for all of the job site facilities necessary to manage, inspect, and supervise construction of the Work.

5.6.8 Provide an analysis of the types and quantities of labor required for the Project and review the appropriate categories of labor required for critical phases or stages. Make recommendations that minimize adverse effects of labor shortages.

5.6.9 Consult with and make recommendations to the Town on the acquisition schedule for fixtures, furniture and equipment, and coordinate with the Town as may be required to meet the Schedule.

## 5.7 Obtaining Offers for the Work

5.7.1 The Construction Manager shall publicly advertise and solicit competitive lump sum bids or competitive lump sum proposals from trade contractors or subcontractors for the performance of all major elements of the Work involving a cost of at least \$50,000.00. Subcontracts awarded on the basis of competitive bids shall be awarded to the lowest responsible bidder. All invitations to bid and requests for proposals shall require a demonstration by bidders of financial stability and prior similar project performance. For subcontracts awarded on the basis of competitive sealed proposals, criteria for determining the proposals that provide the best value to the Town shall be established by the Project Team and included in the request for proposals. The Construction Manager shall notify the Town in advance in writing of the date(s) it will receive the bids and proposals. Construction Manager shall comply with the procurement procedures mandated by state law.

5.7.2 Schedule and conduct pre-submittal conferences with interested offerors, subcontractors, material suppliers, and equipment suppliers, and record minutes of the conferences.

5.7.3 Construction Manager and Town shall review all trade contractor or subcontractor offers in a manner that does not disclose the contents of any bid or proposal to persons outside of the Project Team during the selection process. Based on the selection criteria included in the requests for bids or requests for proposals, Construction Manager shall recommend to the Town the bid submitted by the lowest responsible bidder if soliciting competitive bids, or the proposal that provides the best value for the Project if soliciting competitive proposals. Upon Town's concurrence in the recommendation, Construction Manager may negotiate the terms of the subcontract with the apparent lowest responsible bidder or best value offeror.

5.7.4 All subcontracts must be on a lump sum basis unless other payment terms are approved in writing and in advance by the Town. Upon Town's concurrence in the final terms of the subcontract, Construction Manager shall enter into a written subcontract for the subcontract work and provide a copy to the Town. All offers shall be publicly available

after award of the subcontract or within seven (7) days after the date of final selection, whichever is later.

5.7.5 If Construction Manager reviews, evaluates, and recommends to Town an offer from a trade contractor or subcontractor, but Town requires another offer to be accepted, Town shall compensate Construction Manager by a change in price, time, or Guaranteed Maximum Price for any additional cost and risk that Construction Manager incurs because of Town's requirement that the other offer be accepted.

5.7.6 Construction Manager may seek to self-perform portions of the Work identified for self-performance in the procurement package strategy. The Construction Manager must submit an offer for the self-performance work in the same manner as all other trade contractors or subcontractors. The Town will determine whether the Construction Manager's offer provides the best value for Town or constitutes the lowest responsible bid, which determination is final. Construction Manager must perform approved self-performance work in accordance with the same terms and conditions as its other subcontractors. For payment purposes, the Construction Manager shall account for self-performance work in the same manner as it does all other subcontract costs.

5.7.7 For scope of work procurement packages typically performed by subcontractors, Construction Manager may "self-perform" such work on a cost-plus fee (Not-To-Exceed 7.5%) basis subject to an agreed upon guaranteed maximum price for the "self-performed work". The Construction Manager shall submit its Guaranteed Maximum Price for the work to be "self-performed" against at least three other interested trade contractors. Any subcontract for "self-performed work" will provide for payment in an amount equal to the Cost of the Work (as defined in this Contract) and will not exceed the agreed upon subcontract guaranteed maximum price. All terms and provisions of any subcontract for "self-performed work" will be consistent with the terms and conditions of this Contract with the exception of the agreed upon Fee percentage. All savings under any such subcontract for "self-performed work" shall be applied to reduce the Cost of the Work under this Contract and the Guaranteed Maximum Price of this Contract. For purposes of defining "self-performed work" subject to this contract provision, any division of Construction Manager, or any separate Construction Manager or subcontractor that is partially owned or wholly owned

by the Construction Manager or any of their employees or employee's relatives will be considered a related party entity and will be subject to this provision regarding "self-performed work".

5.7.8 Construction Manager shall identify every subcontractor it intends to use on the Project, including subcontractors used for self-performed work, to the Town in writing at least ten (10) days before entering into any subcontract. Construction Manager shall not use any subcontractor to which Town has a reasonable objection. Construction Manager shall not be required to subcontract with any subcontractor to which it has reasonable objection. Following Town acceptance of a subcontractor, that subcontractor shall not be changed without Town's written consent, which shall not be unreasonably withheld.

5.7.9 If a selected trade contractor or subcontractor fails to execute a subcontract after being selected in accordance with this section or defaults in the performance of its work, the Construction Manager may, in consultation with the Town and without further advertising, fulfill the subcontract requirements itself or select a replacement trade contractor or subcontractor to do so.

## 5.8 Safety

5.8.1 Construction Manager is responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the Work. The safety program shall comply with all applicable requirements of the Occupational Safety and Health Act of 1970 and all other applicable federal, state and local laws and regulations and with the requirements of a Town controlled insurance program, if any, and with Town's safety program.

5.8.2 Construction Manager shall provide recommendations and information to Town and Project Architect regarding the assignment of responsibilities for safety precautions and programs, temporary Project facilities, and equipment, materials, and services for common use of the subcontractors. Construction Manager shall verify that appropriate safety provisions are included in the construction documents.

## **ARTICLE 6 PRE-CONSTRUCTION PHASE FEE**

6.1 The Pre-Construction Phase Fee is the total compensation payable to the Construction Manager for the performance of Pre-Construction Phase Services, except for any additional Pre-Construction Phase Services approved in advance and in writing by the Town. The Pre-Construction Phase Fee shall be a lump sum amount based on the CCL established in this Contract.

6.2 Except as specifically allowed in paragraph 6.3, the Construction Manager shall not be entitled to any increase in the Pre-Construction Phase Fee for any costs, expenses, liabilities or other obligations arising from the performance of Pre-Construction Phase Services.

6.3 If the scope of the Pre-Construction Phase Services is changed materially, the Pre-Construction Phase Fee may be equitably adjusted. If the CCL is changed materially due to a change in the project scope before acceptance of the GMP Proposal, the Pre-Construction Phase Fee may be equitably adjusted solely at the discretion of the Town in proportion to the change in the CCL. There shall be no adjustments in the Pre-Construction Phase Fee following acceptance of the GMP Proposal.

6.4 For additional Pre-Construction Phase Services that are approved in advance and in writing by the Town, Construction Manager shall be entitled to additional compensation computed as a:

6.4.1 A pre-established lump sum amount; or

6.4.2 The hourly cost of Construction Manager's employee's or consultants who actually perform the Additional Services based on the employee's Worker Wage Rate or prorated Monthly Salary Rate plus the actual cost of allowable expenses incurred in the performance of the Additional Services plus an overhead and profit markup of seven percent (7%) of the total cost; or

6.4.3 As otherwise agreed to by the parties in advance of performing the Additional Pre- Construction Phase Services.

## **ARTICLE 7 GUARANTEED MAXIMUM PRICE PROPOSAL**

7.1 The Guaranteed Maximum Price is intended by the

parties to constitute the maximum amount to be paid by the Town to the Construction Manager for successful and strict performance of the project. It is inclusive of all costs of construction throughout the Construction Phase to final completion, plus increases allowed through approved change orders. The parties acknowledge that cost overruns, unanticipated expenses and all risks of construction cost overruns are borne by the Construction Manager. Nevertheless, any and all cost underruns or savings shall be passed on to the Town and if the total cost of the Work is less than the GMP amount, the GMP shall be reduced accordingly.

7.2 When the Parties agree that the design of the Project is sufficiently developed and documented to allow detailed pricing of its construction, Construction Manager shall prepare and submit a Guaranteed Maximum Price (GMP) Proposal to Town. The GMP Proposal must be prepared in accordance with the guidelines and delivered in the format specified by Town in the attached exhibits. Town, at its sole option and discretion, may specify different requirements for the GMP Proposal. Construction Manager shall not withdraw its Guaranteed Maximum Price Proposal for ninety (90) days following submission to the Town.

7.3 In developing the GMP Proposal, the Construction Manager shall coordinate efforts with the Project Architect to identify qualifications, clarifications, assumptions, exclusions, value engineering and any other factors relevant to establishment of a GMP. The Construction Manager shall review development of the GMP Proposal with the Town on an ongoing basis to address clarifications of scope and pricing, distribution of contingencies, schedule, assumptions, exclusions, and other matters relevant to the establishment of a GMP.

7.4 The GMP Proposal must include a written description of how it was derived that specifically identifies the clarifications and assumptions made by the Construction Manager in developing the GMP and the monetary amounts attributable to them. The GMP Proposal shall include, without limitation, a breakdown of Construction Manager's estimated Costs of the Work organized by trade; contingency amounts; the Construction Phase Fee; and the proposed Contract Time, including dates for Notice to Proceed, Substantial Completion and Final Completion.

7.5 The Guaranteed Maximum Price Proposal shall allow for reasonably expected changes and refinements in the drawings and Plans and Specifications through completion

of the construction documents, except for material changes in scope.

7.6 The GMP Proposal may include a Construction Manager's Contingency amount as allowed under Cost of the Work.

7.7 Included with its GMP Proposal, Construction Manager shall provide two complete, bound sets of the drawings, specifications, plans, sketches, instructions, requirements, materials, equipment specifications and other information or documents that fully describe the Project as developed at the time of the GMP Proposal and that are relevant to the establishment of the GMP. The bound supporting documents shall be referenced in and incorporated into the GMP Proposal.

7.8 The GMP Proposal and all supporting documents shall identify and describe all items, assumptions, costs, contingencies, schedules and other matters necessary and relevant for proper execution and completion of the Work and for establishment of the Guaranteed Maximum Price. The GMP Proposal and the supporting documents are complementary and, in the event of an irreconcilable conflict between or among them, the interpretation that provides for the higher quality of material and workmanship shall prevail over all other interpretations.

7.9 In submitting the GMP Proposal, the Construction Manager represents that it will provide every item, system or element of Work that is identified, shown or specified in the GMP Proposal or the supporting documents, along with all necessary or ancillary materials and equipment for their complete operating installation, unless specifically excepted by the Town. Upon Town's acceptance of the GMP Proposal, the Construction Manager shall not be entitled to any increase in the Guaranteed Maximum Price due to the continued refinement of the construction documents, the subsequent discovery of latent or unknown conditions or factors, or the absence or addition of any detail or specification that may be required in order to complete the construction of the Project as described in and reasonably inferable from the GMP Proposal or the supporting documents used to establish the GMP. In this regard, the Construction Manager is attributed with knowledge of and familiarity with the job site, costs of labor and materials, market conditions that may affect costs, and latent conditions that could have been discovered through reasonable inspection and testing.

7.10 The GMP Proposal shall adopt and incorporate all

of the terms and conditions of this Contract and all attachments to this Contract. Any proposed deviation from the terms and conditions of this Contract must be clearly and conspicuously identified to the Town in writing and specifically accepted by the Town. In the event of a conflict between any term of the GMP Proposal that was not clearly and conspicuously identified and approved by the Town and the terms of this Contract and its attachments, the terms of this Contract and its attachments shall control.

7.11 Town may accept or reject the Guaranteed Maximum Price Proposal or attempt to negotiate its terms with Construction Manager. Upon acceptance by the Town of the GMP Proposal in writing, both parties shall execute the GMP Proposal and the terms of the GMP Proposal, including the Guaranteed Maximum Price and the supporting documents, shall become part of the Contract between the Town and the Construction Manager. If the Town rejects the GMP Proposal or the parties are unable or unwilling to agree on a GMP, the Town may terminate this Contract.

7.12 Following Town acceptance of the GMP Proposal, Construction Manager shall continue to monitor the development of the construction documents so that, when complete, the construction documents adequately incorporate and resolve all qualifications, assumptions, clarifications, exclusions and value engineering issues identified in the GMP Proposal. During the construction documents stage, the Construction Manager and the Project Architect shall jointly deliver a monthly status report to the Town describing the progress on the incorporation of all qualifications, assumptions, clarifications, exclusions, value engineering issues and all other matters relevant to the establishment of the GMP into the construction documents. The monthly status report shall also include an updated start-to-finish project schedule and refinements to the CPM Schedule that encompasses the Project Architect's activities, the Contractor's activities, and the Town's commissioning and occupancy activities, short-term schedules, and production rates for key elements of the Project as determined by the Town.

## **ARTICLE 8 CONSTRUCTION PHASE SERVICES**

The Construction Phase shall be deemed to commence upon the date specified in a signed Notice to Proceed issued by Town after approval of the Guaranteed Maximum Price Proposal and shall continue until Final

Completion of all Work. Pre-Construction Phase Services may overlap Construction Phase Services. Construction Manager shall not incur any subcontractor costs for construction of the Work prior to issuance by Town of written authorization to commence such Work. The Construction Manager shall perform the following Construction Phase Services:

8.1 Construct the Work in strict accordance with the Contract Documents and as required by the Town's Drawings, Plans and Specifications within the time required by the CPM and Project Schedule approved by Town.

8.2 Organize and maintain a competent, full-time staff at the Project site with clearly defined lines of authority and communication as necessary to coordinate construction activities, monitor and direct progress of the Work, and further the goals of the Project Team.

8.3 Designate in writing a representative who is responsible for the day-to-day management of the Construction Phase Services. The designated representative shall be the Town's primary contact during the Construction Phase and shall be available as required for the benefit of the Project and the Town. The designated representative shall be authorized to act on behalf of and bind the Construction Manager in all matters related to Construction Phase Services including, but not limited to, execution of Change Orders and Applications for Payment.

8.4 Attend Town's regularly scheduled Project progress meetings and fully advise the Project Team of the Project status including schedule, costs, quality and changes.

8.5 In addition to attending Town's regularly scheduled Project progress meetings, Construction Manager shall schedule, direct and attend interim progress meetings with other members of the Project Team as required to maintain Project progress. Construction Manager shall record and distribute the minutes of each meeting to each Project Team member. The minutes shall identify critical activities that require action and the dates by which each activity must be completed.

8.6 Coordinate delivery and installation of Town-procured material and equipment.

8.7 Provide and pay for all labor, materials, equipment, tools, construction equipment and machinery,

transportation, and all other facilities and services necessary for the proper execution and completion of the Work in strict accordance with the requirements of the Contract Documents.

8.8 Obtain building permits and special permits for permanent improvements as required by law or the Contract Documents. Assist Town or Project Architect in obtaining all approvals required from authorities having jurisdiction over the Project.

8.9 Coordinate, monitor and inspect the work of subcontractors to ensure conformance with the Contract Documents.

8.10 Be responsible for all construction means, methods, techniques, sequences and procedures, and for coordinating all portions of the Work. The Construction Manager shall keep the Town informed of the progress and quality of the Work.

8.11 Construction Manager shall promptly correct any defective Work at Construction Manager's sole expense, unless the Town specifically agrees to accept the Work.

8.12 Warrant that the materials and equipment provided for the Project will be of good quality and new unless otherwise required or permitted by the Contract Documents; that the construction will be free from faults and defects; and that the construction will conform with the requirements of the Contract Documents. The Construction Manager shall be responsible for correcting Work that does not comply with the Contract Documents at its sole expense without cost to the Town.

8.13 Construction Manager shall maintain and deliver the required documents that describe changes or deviations from the Contract Documents that occurred during construction and that reflect the actual "As Built" conditions of the completed Work.

## **ARTICLE 9 TOWN'S RESPONSIBILITIES**

9.1 The Town will designate a Project Architect for the Project.

9.2 The Town will provide the Preliminary Project Cost and general schedule for the Project. The PPC will include the Construction Cost Limitation, contingencies for changes in the Work during construction, and other costs



that are the responsibility of the Town. The general schedule will set forth the Town's plan for milestone dates and completion of the Project.

9.3 The Town will identify a person as its Town Designated Representative (TDR) who is authorized to act in the Town's behalf with respect to the Project. The TDR shall examine the documents submitted by the Construction Manager and shall render decisions pertaining thereto.

9.4 The TDR shall be authorized to administer this Contract on behalf of the Town, including final determination of fees and costs earned by the Construction Manager and equitable back-charges against the Construction Manager.

9.5 The Town, at Town's cost, will secure the services of surveyors, soils engineers, existing facility surveys, testing and balancing, commissioning, environmental surveys or other special consultants to develop such additional information as may be necessary for the design or construction of the Project.

9.6 The Town shall arrange and pay for materials, structural, mechanical, chemical and other laboratory tests as required by the Contract Documents.

9.7 The Town shall furnish all legal, accounting, auditing and insurance counseling services for itself as may be necessary for the Project.

9.8 The Town shall furnish required information and services and shall render approvals and decisions as expeditiously as is consistent with reasonable skill and care and the orderly progress of the Construction Manager's services and of the Work.

9.9 The Town may designate one or more construction inspectors who shall be given access to the Work as requested or needed. The provision of inspection services by Town shall not reduce or lessen Construction Manager's responsibility for the Work. Construction Manager is fully and solely responsible for constructing the Project in strict accordance with the Construction Documents.

9.10 Town shall have the right to reject any defective Work on the Project. Should Construction Manager refuse or neglect to correct any such Work within a reasonable time after notice, Town may have the Work corrected and recover all expenses incurred from Construction Manager on demand.

## **ARTICLE 10 OWNERSHIP AND USE OF DOCUMENTS**

10.1 The Contract Documents, construction documents, and all Drawings, Plans and Specifications are instruments of service and shall remain the property of the Town whether or not the Project for which they are made is completed. The Construction Manager shall be permitted to retain one record set of the construction documents. All other copies shall be returned to the Town or suitably accounted for. The Construction Manager and its subcontractors are authorized to reproduce and use portions of the construction documents as necessary and appropriate for the execution of the Work. The Construction Manager and its subcontractors shall not use the documents on any other projects without the written consent of the Town.

10.2 Submission or distribution of the construction documents to meet official regulatory requirements or for other purposes in connection with the Project shall not diminish the Project Architect's or other author's rights.

## **ARTICLE 11 TIME**

11.1 TIME LIMITS STATED IN THE CONTRACT DOCUMENTS ARE OF THE ESSENCE OF THIS CONTRACT; THE DEADLINE FOR SUBSTANTIAL AND FINAL COMPLETION AND COMPLIANCE WITH THE CPM AND PROJECT SCHEDULE ARE MATERIAL TERMS OF THIS CONTRACT. UNLESS EXPRESSLY STATED AS "BUSINESS DAYS," EACH TIME STATED IN DAYS SHALL MEAN CALENDAR DAYS REGARDLESS OF WEEKENDS OR LEGAL HOLIDAYS. DELAYS ASSOCIATED WITH ADVERSE WEATHER HAVE BEEN CONTEMPLATED AND INCLUDED IN THE DEADLINES SET FOR COMPLETION AND IN THE CONTRACT PRICE.

11.2 Unless otherwise approved, the Town and the Construction Manager shall perform their respective obligations under the Contract as expeditiously as is consistent with reasonable skill and care and the orderly progress of the Work.

11.3 Prior to commencement of the Construction Phase Services and concurrently with submission of the Guaranteed Maximum Price Proposal, the Construction Manager shall submit an up-to-date CPM Schedule for the

performance of Construction Phase Services as specified. The CPM Schedule shall include reasonable periods of time for the Town's and Project Architect's review and approval of shop drawings and submissions and for the approval of other authorities having jurisdiction over the Project.

## **ARTICLE 12 PAYMENTS**

### **12.1 General Requirements**

12.1.1 Each Schedule of Values submitted with an Application for Payment shall include the originally established value for each work classification line item or subcontract and shall identify any revisions to the costs or cost estimates for each work classification or subcontract. The format and tracking method of the original Schedule of Values and of all updates shall be subject to approval by the Town. At all times, the estimated cost of performing the uncompleted and unpaid portion of the Work, including Construction Manager's overhead and profit, shall not exceed the unpaid balance of the Guaranteed Maximum Price, less retainage on Work previously completed.

12.1.2 Retainage as specified in the General Conditions Addendum will be withheld from the entire amount approved in an Application for Payment including the Cost of the Work, General Conditions, and the Construction Manager's Construction Phase Fee. Retainage will not be withheld from payments for Pre-Construction Phase Services.

12.1.3 The Town is a municipality of the State of Texas and materials and services utilized in the construction of the Project may be exempted from state and local taxes. Construction Manager is responsible for taking full advantage of all tax exemptions applicable to the Project. Town will deduct from each Application for Payment and from the Request for Final Payment any taxes paid for materials or services that were otherwise entitled to tax exemption.

12.1.4 This Contract is subject to the assessment of liquidated damages against Construction Manager. Amounts assessed as liquidated damages, and other amounts to which Town is entitled by way of setoff or recovery, may be deducted from any moneys due Construction Manager.

12.1.5 Town shall have the right to withhold from payments due Construction Manager such sums as are necessary to protect Town against any loss or damage which may result from negligence by Construction Manager or any subcontractor or failure of Construction Manager or any subcontractor to perform their obligations under this Contract.

12.1.6 Notwithstanding any other contractual provision to the contrary, Town shall not be obligated to make any payment, to Construction Manager under any of the following circumstances:

12.1.6.1 Construction Manager persistently fails to perform the Work in accordance with the Contract Documents or is otherwise in material breach or default under this Contract;

12.1.6.2 The payment request includes services that are not performed in accordance with the Contract Documents; provided, however, Town shall pay for those services performed in accordance with the documents;

12.1.6.3 The payment request has insufficient documentation to support the amount of payment requested for Project costs; provided, however, Town shall pay for allowable Project costs for which there is sufficient documentation;

12.1.6.4 Construction Manager is in violation of the Prevailing Wage Rate requirements or has failed to make payments promptly to subcontractors or other third parties used in connection with any services or materials for which Town has made payment to Construction Manager;

12.1.6.5 If Town, in its good faith judgment, determines that the unpaid balance of the GMP is not sufficient to complete the Work in accordance with the Contract Documents;

12.1.6.6 Construction Manager has failed to complete the Work in accordance with the CPM Schedule or if Town, in its good faith judgment, determines that the remaining Work will not be completed within the Contract Time;

12.1.6.7 Construction Manager is insolvent, makes a general assignment for the benefit of its creditors or otherwise seeks protection under the laws and

regulations of the bankruptcy courts; or

12.1.6.8 Construction Manager fails to obtain, maintain or renew insurance coverage as required by the Contract Documents.

12.1.7 No partial payment made by the Town shall constitute, or be construed to constitute, final acceptance or approval of the work to which the partial payment relates or of the documentation provided in support of the partial payment. No partial payment made by the Town shall constitute, or be construed to constitute, a release of Construction Manager from any of its obligations or liabilities with respect to the Work.

12.1.8 Town shall have the right to verify and audit the details of Construction Manager's billings, certificates, accountings, cost data, and statements, either before or after payment, by (1) inspecting the books and records of Construction Manager during normal business hours; (2) examining any reports with respect to this Project; (3) interviewing Construction Manager's employees; (4) visiting the Project site; and (5) any other reasonable action. Construction Manager's records shall be kept on the basis of generally accepted accounting principles and organized by each Application for Payment period.

## 12.2 Pre-Construction Phase Payments

12.2.1 Payments for Pre-Construction Phase Services shall be made monthly based on the percentage completion of the Construction Manager's required services for each stage of development and the procurement of goods and services needed for the Project in accordance with the schedule set forth in Article 24, Compensation.

12.2.2. All payment requests for Pre-Construction Phase Services shall be submitted on an Application for Payment and Schedule of Values approved by the Town and include all required attachments identifying payments to all subcontractors.

## 12.3 Construction Phase Payments

12.3.1 Payments for Construction Phase Services shall be made as provided for in the General Conditions Addendum. All payment requests shall be submitted on an Application for Payment with a Schedule of Values approved by the Town, certified by the Project Architect, and include all required attachments identifying payments to all subcontractors. Payment for approved Change Orders

shall be made as part of the Construction Manager's Application for Payment.

12.3.2 The Construction Manager's Construction Phase Fee shall be shown as a separate line item on the Schedule of Values. Payment of the Construction Manager's Construction Phase Fee shall be made with each Application for Payment in the same proportion as the percentage completion of the Cost of the Work of the Project.

12.3.3 For General Conditions Costs, Construction Manager's Application for Payment shall include complete copies of all receipts, invoices with check vouchers or other evidence of payment, payrolls, and all other evidence which Town or its designated representatives shall deem necessary to support the amount requested. This information is subject to audit and payment for these costs is dependent on Town's receipt of accurate and complete records of all transactions. Town may reduce the amount requested in any Application for Payment if the Town, in its good faith judgment, determines that the unpaid balance of the General Conditions line item in the Schedule of Values is not sufficient to fund necessary costs for the remainder of the Project.

12.3.4 Pay requests for subcontractor work included in an Application for Payment shall not exceed the percentage of Work allocated to that subcontractor for each respective Schedule of Values work classification which has been actually completed and shall not exceed the total value of the subcontract amount. Commissioning activities for the Construction Manager and subcontractors shall be a deliverable item identified on the schedule of values and broken out sufficiently to allow for monthly review of progress by the Town.

12.3.5 Construction Manager's Request for Final Payment shall not be made until all Work is completed and all requirements of the Contract Documents have been satisfied including, without limitation: delivery to Town of a complete release of all liens and claims arising out of the Work; written consent of surety to release of Final Payment; and an affidavit that, to the best of Construction Manager's information, knowledge and belief, the release includes and covers all materials and services over which Construction Manager has control and that all known debts and claims arising from the

Project have been satisfied. Alternatively, Construction Manager may, at its sole expense, furnish a bond satisfactory to Town to indemnify Town against any lien or unpaid claims arising out of the Work. If any lien or claim is asserted against Town after all payments are made, Construction Manager shall reimburse Town for all damages and costs Town may incur in discharging such lien or claim, including all costs or court and reasonable attorneys' fees, and Town shall retain all other remedies available to it at law and in equity.

12.3.6 Town shall have no obligation to make Final Payment or release of retainage until a complete and final accounting of the total Cost of the Work has been submitted by Construction Manager, has been audited and verified by Town or Town's representatives, and the Town has officially accepted the Project.

12.3.7 Nothing contained herein shall require the Town to pay the Construction Manager an aggregate amount for Construction Phase Services that exceeds the Guaranteed Maximum Price or to make any payment if, in the Town's belief, the cost to complete the Work would exceed the Guaranteed Maximum Price less previous payments to Construction Manager. The total amount of all Construction Phase payments to the Construction Manager shall not exceed the actual verified Direct Construction Cost for the Project plus the Construction Manager's Construction Phase Fee.

12.3.8 The acceptance by Construction Manager of Final Payment under this Contract, shall constitute a full and complete release of Town from any and all claims, demands, and causes of action whatsoever that Construction Manager, its subcontractors, suppliers and consultants or any of their successors or assigns have or may have against Town arising from the Project or any provision(s) of this Contract except for those previously made in writing and identified by Construction Manager as unsettled at the time of the Request for Final Payment.

### **ARTICLE 13 DIRECT CONSTRUCTION COST**

Direct Construction Cost means the sum of the amounts that the Construction Manager actually and necessarily incurs constructing the Work in strict compliance with the Contract Documents. Direct Construction Cost includes only the cost categories set forth in this Article and does not include the Pre-Construction Phase Fees or the Construction Phase Fees unless specifically noted.

#### **13.1 Cost of the Work**

Construction Manager is entitled to receive payment for the actual cost of the allowable Cost of the Work items incurred after receipt of Town's written authorization to commence the Construction Phase Work through Final Completion of the Project. Construction Manager is not entitled to reimbursement for Cost of the Work costs incurred before receipt of Town's written authorization. Cost of the Work includes the following:

13.1.1 Costs of materials and equipment purchased directly by the Construction Manager and incorporated into or consumed in the performance of the Work, including transportation charges, and a reasonable and customary allowance for waste and spoilage.

13.1.2 Costs of site debris removal and disposal in accordance with all applicable laws and regulations if not otherwise included in General Conditions Costs.

13.1.3 Payments made to subcontractors and their Construction Managers or suppliers for subcontract work in accordance with the Contract Documents and the requirements of the subcontracts with the subcontractors, Construction Managers or suppliers.

13.1.4 Payments earned by Construction Manager for self-performed subcontract work in accordance with the Contract Documents and the terms of this Contract and approved by the Town.

13.1.5 Testing fees.

13.1.6 Intellectual property royalties and licenses for items specifically required by the Contract Documents which are, or will be, incorporated into the Work.

13.1.7 Costs associated with any subcontractor default insurance program (sometimes referred to as SUBGUARD) provided or required by the Construction Manager are explicitly excluded from the Cost of the Work.

#### **13.2 Construction Manager's Contingency**

13.2.1 The Guaranteed Maximum Price Proposal may include a Construction Manager's Contingency amount to be used to fund increases in the Direct Construction Cost of the Project identified through the refinement,

development, procurement or completion of the Work.

13.2.2 Any re-allocation of funds from the Construction Manager's Contingency to cover increases in the Direct Construction Cost must be approved by the Town in advance and in writing, such approval not to be unreasonably withheld. In written requests to use the Construction Manager's Contingency, the Construction Manager shall provide detailed documentation of the scope of work affected and the bases for any increases in costs. The Construction Manager's Contingency is specifically not to be used for rework, unforeseen conditions, cost increases caused by lack of coordination or communication with the Project Architect or trade subcontractors, or to correct errors or omissions in the Contract Documents.

13.2.3 As the construction documents are finalized and the Work progresses the Construction Manager's Contingency amount may be reduced by mutual agreement of Town and Contractor. Any balance in the Construction Manager's Contingency fund remaining at the end of the Project shall be returned to or retained by the Town as savings.

#### **ARTICLE 14 CONSTRUCTION PHASE FEE**

The Construction Manager's Construction Phase Fee is the maximum amount payable to the Construction Manager for any cost or profit expectation incurred in the performance of the Work that is not specifically identified as being eligible for reimbursement by the Town elsewhere in the Contract. References in the contract documents to Contractor's "overhead" and "profit" mean the Construction Manager's Construction Phase Fee. The Construction Phase Fee includes, but is not limited to, the following items.

14.1 All profit, profit expectations and costs associated with profit sharing plans such as personnel bonuses, incentives, and rewards; company stock options; or any other like expenses of the Construction Manager.

14.2 Salaries of Construction Manager's officers, project manager(s), estimators, schedulers and all other employees not stationed at the Project site and performing services directly related to the Project.

14.3 Any and all overhead, labor or general expenses of any kind unless specifically allowed as General

Conditions Costs. These costs include, but are not limited to: costs for the purchase, lease, rental, allowance or maintenance of vehicles, radios/communication equipment, jobsite computers, copiers and other business equipment, specialized telephone systems and cellular/digital phones; trade or professional association dues; costs for hiring, relocation, or hiring and relocation of any of the Construction Manager's personnel; and travel, per diem and subsistence expense of Construction Manager, its officers or employees.

14.4 In the event that the Construction Manager elects to provide or require participation in a subcontractor default insurance program (sometimes referred to as SUBGUARD), the entire cost of the insurance program and all costs related to the administration of the program shall be included in the Construction Phase Fee.

14.5 All costs associated with payment, two-year maintenance bond and performance bonds obtained from trade contractors or Subcontractors, including bonds for change orders to subcontracts and the cost of any bonds for minor work.

14.6 Any financial costs incurred by the Construction Manager including the cost of capital or interest on capital, regardless of whether it is related to the Project, and costs associated with construction warranty reserves.

14.7 Any legal, accounting, professional or other similar costs incurred by the Construction Manager, including costs incurred in connection with the prosecution or defense any dispute, mediation, arbitration, litigation or other such proceeding related to or arising from the Project. Any Federal and/or State income and franchise taxes paid by Construction Manager. Any fines, penalties, sanctions or other levies assessed by any governmental body against Construction Manager.

14.8 Any cost arising out of a breach of this Contract or the fault, failure or negligence of Construction Manager, its subcontractors, or any person or entity for whom they may be liable. These costs include, without limitation: costs to remedy defective, rejected, or nonconforming work, materials or equipment; costs due to failure to coordinate the Work or meet CPM Schedule milestones; costs arising from Construction Manager's contractual indemnification obligations; liquidated or actual damages imposed by Town for failure to complete

the Work within the Contract Time; costs due to the bankruptcy or insolvency of any subcontractor; and damage or losses to persons or property.

14.9 The cost of any and all insurance deductibles payable by the Construction Manager and costs due to the failure of Construction Manager or any subcontractor to procure and maintain insurance as and to the extent required by the Contract Documents.

14.10 Any and all costs that would cause the Guaranteed Maximum Price, minus the amounts allocated in the GMP for Town's Contingency and Town's Special Cash Allowance, to be exceeded.

14.11 Any and all costs not specifically identified as an element of the Direct Construction Cost.

#### **ARTICLE 15 CONTRACT ALLOWANCES, SAVINGS, REBATES & REFUNDS**

15.1 If the allowable, final, verified, audited amount of the Cost of the Work, allowance items and Construction Manager's Contingency is less than the amount established for each of those categories in the originally approved Guaranteed Maximum Price Proposal, the entire difference shall be credited to the Town as savings and the final Contract Sum shall be adjusted accordingly. When the Project is at least 85% complete, the Town may recognize any savings achieved to that point by issuing a deductive change order for the saved amount.

15.2 The Town shall be entitled to deduct amounts for the following items from any Application for Payment or from the Request for Final Payment submitted by the Construction Manager:

15.2.1 The fair market value of all tools, surplus materials, construction equipment, and temporary structures that were charged to the Work (other than rental items) but were not consumed during construction or retained by the Town. Upon completion of the Work or when no longer required, Construction Manager shall either credit the Town for the fair market value (as approved by the Town) for all surplus tools, construction equipment and materials retained by the Construction Manager or, at Town's option, use commercially reasonable efforts to sell the surplus tools, construction equipment and materials for the highest available price and credit the

proceeds to the Town's account. The Construction Manager shall obtain all possible trade and time discounts on bills for material furnished and shall pay bills within the highest discount periods. The Construction Manager shall purchase materials for the Project in quantities that provide the most advantageous prices to the Town.

15.2.2 Rebates, discounts, or commissions obtained by the Construction Manager from material suppliers or subcontractors, together with all other refunds, returns, or credits received for materials, bond premiums, insurance and sales taxes.

15.2.3 Deposits made by Town and forfeited due to the fault of the Construction Manager.

15.2.4 Balances remaining on any allowances, the Construction Manager's Contingency, or any other identified contract savings.

15.3 Town shall be entitled to recognize and recover 100% of any savings identified by cost review or audit at any time, before or after Final Payment.

#### **ARTICLE 16 PRE-EXISTING CONDITIONS AND DESIGN ERRORS AND OMISSIONS**

16.1 The Construction Manager acknowledges that it has been provided unrestricted access to the existing improvements and conditions on the Project site and that it has thoroughly investigated those conditions. Construction Manager's investigation was instrumental in preparing its Guaranteed Maximum Price Proposal for the Work. Construction Manager shall not make or be entitled to any claim for any adjustment to the Contract Time or the Contract Sum for Pre-Construction Phase Services or for Construction Phase Services arising from Project conditions that Construction Manager discovered or, in the exercise of reasonable care, should have discovered in Construction Manager's investigation. The Construction Manager assumes all risk of latent defects in job site conditions, inaccuracies in Drawings, Plans and Specifications, or in equipment or materials.

16.2 The Construction Manager acknowledges that as part of its Pre-Construction Phase Services it shall participate in the development and review of the

construction documents. Construction Manager's participation in the design development process will be instrumental in preparing its Guaranteed Maximum Price Proposal for the Work. Before submitting its Guaranteed Maximum Price Proposal, the Construction Manager shall review the drawings, specifications and other documents upon which the GMP Proposal is to be based and notify the Town of any errors, omissions or discrepancies in the documents of which it becomes aware or in the exercise of reasonable care should have become aware. Construction Manager shall not make or be entitled to any claim for any adjustment to the CPM Schedule or the Contract sum for errors or omissions in the construction documents that Construction Manager discovered or, in the exercise of reasonable care, should have discovered in Construction Manager's Pre-Construction Phase design review process that Construction Manager did not bring to the attention of the Town and the Project Architect in a timely manner.

## ARTICLE 17 BONDS AND INSURANCE

17.1. Bid/Security Bond. Upon execution of this Contract, Construction Manager shall not be required to provide a security bond in the amount of 5% of the Construction Cost Limitation. The security bond will expire upon the acceptance and approval of the Guaranteed Maximum Price Proposal and will secure the Town should Construction Manager fail to submit or otherwise execute the Guaranteed Maximum Price Proposal or fail to provide performance and payment bonds as required by this Contract. The surety for a security bond shall meet the same requirements as set forth for payment and performance bonds.

17.2. Payment and Performance Bonds. Upon acceptance by the Town of a Guaranteed Maximum Price Proposal, Construction Manager shall provide performance and payment bonds on forms prescribed by Town. The penal sum of the payment and performance bonds shall be equal to the Guaranteed Maximum Price. If changes to the GMP are made following the Town's acceptance of the GMP, the penal sum of the bonds shall be automatically adjusted accordingly.

17.3. Two-year Maintenance Bonds. Upon acceptance of the Guaranteed Maximum Price Proposal, the Construction Manager shall provide a maintenance bond insuring the Town that the Construction Manager will 1) maintain and keep in good repair, and replace or repair

and correct any and all defects arising in the Work, whether resulting from defective materials or defective workmanship; and 2) make and perform all necessary repairs, reconstruction and renewal of any part of said Work, and furnish the labor and materials to make good and to repair any defective condition growing out of or on account of the breakage or failure of any substance or the improper function of any part of the Work. The maintenance bond's duration shall be for a period of two (2) years after the date of the Town's final payment to the Construction Manager.

17.4. Insurance. The Construction Manager will be required to provide the insurance coverages in the types and amounts detailed in the General Conditions Addendum. The cost of premiums for any additional insurance coverage desired by the Construction Manager in excess of that required by this Contract shall be borne solely by the Construction Manager out of its fees and not included in the GMP Proposal as a Direct Construction Cost.

17.5. The Construction Manager shall furnish the Town with certificates of insurance identifying the Town as an additional insured (except for Workers Compensation and Automobile Liability) entitled to prompt notice of any changes or lapses in coverage. The Construction Manager shall not cause or allow any of its required insurance to be canceled nor permit any insurance to lapse during the term of the Contract or as required in the Contract. If the Construction Manager fails to obtain, maintain or renew any insurance required by the Contract, the Town may obtain insurance coverage directly and recover the cost of that insurance from the Construction Manager through any means, including deduction in any payment, including retainages or the final payment, made to the Construction Manager.

17.6. The Town reserves the right to review the insurance requirements set forth in this Article during the effective period of the Contract and to make reasonable adjustments to the insurance coverages and their limits when deemed necessary and prudent by the Town based upon changes in statutory law, court decisions, or the claims history of the industry as well as the Construction Manager.

17.7. The Town shall be entitled, upon request, and without expense, to receive complete copies of the policies with all endorsements and may make any reasonable requests for deletion, or revision or

modification of particular policy terms, conditions, limitations, or exclusions, except where policy provisions are established by law or regulation binding upon the Parties or the underwriter of any of such policies. Damages caused by the Construction Manager and not covered by insurance shall be paid by the Construction Manager.

17.8 The cost of premiums for any additional insurance coverage, subcontractor default insurance programs or subcontractor payment and performance bonds, desired by the Construction Manager in excess of that required by this Contract or the Contract Documents shall be borne solely by the Construction Manager out of its fees and not included in the GMP Proposal as a Direct Construction Cost.

#### **ARTICLE 18 DISPUTE RESOLUTION**

18.1 The Project Architect shall have authority to provide interpretations of the Project plans and specifications and to resolve disputes over the Work and the progress of the Work. The Project Architect may also order minor changes in the Work not involving Additional Work, a change in the GMP or in Contract Time, and not inconsistent with the intent of the Contract. Such determinations and changes shall be effected by Field Order and shall be binding upon the Construction Manager. The Construction Manager shall carry out such Field Orders promptly.

18.2 In the event that a dispute arises under the terms of this Contract, following an adverse determination by the Project Architect and proper preservation of the issue as required herein, the parties agree to submit to mediation. In such event, the parties shall agree to a designated person to serve as mediator and each party shall be responsible for payment of one-half of the total mediation fees. The parties shall submit the dispute to mediation as soon as practical and in no event later than one (1) year after the Project Architect's written decision on the matter. At least one designated representative of each party must attend and participate in good faith in an effort to resolve the matters in dispute.

18.3 In no event shall the foregoing provision justify or authorize any delay in the progress of the Work; the parties shall abide by the decision of the Project Architect in accomplishing the timely completion of the Project. In no event shall a dispute survive the Town's final payment to

the Construction Manager and the Town's acceptance of the Project.

#### **ARTICLE 19 PROJECT TERMINATION AND SUSPENSION**

19.1 This Contract may be terminated during the Pre-Construction Phase by either party upon fifteen (15) days written notice should the other party fail substantially to perform in accordance with its terms through no fault of the party initiating the termination and breach is not cured or an acceptable plan to cure the breach is not established within the fifteen (15) day period.

19.2 This Contract may be terminated by the Town during the Pre-Construction Phase upon at least three (3) days written notice to the Construction Manager in the event that the Project is to be temporarily suspended or permanently abandoned.

19.3 This Contract may be terminated by the Town at the GMP Proposal stage upon at least three (3) days written notice to the Construction Manager in the event that the parties are unable or unwilling to agree on a GMP Proposal.

19.4 This Contract may be terminated by the Town during the Construction Phase upon at least three (3) days written notice to the Construction Manager.

19.5 In the event of termination that is not the fault of the Construction Manager, the Construction Manager shall be entitled to compensation for all services performed to the termination date provided, however, Construction Manager has delivered to Town such statements, accounts, reports and other materials as required together with all reports, documents and other materials prepared by Construction Manager prior to termination. Upon such payment, Town shall have no further obligation to the Construction Manager.

19.6 Termination of this Contract shall not relieve Construction Manager or any of its employees, subcontractors, or consultants of liability for violations of this Contract or for any act or omission, or negligence, of Construction Manager related to the Project. In the event of a termination, Construction Manager hereby consents to employment by Town of a substitute Construction Manager to complete the services under this Contract.



19.7 In the event of termination, Town shall have the right to use any documents or other materials prepared for the Project and the ideas and designs they contain for the completion of the services described by this Contract, for completion of the Project, or for any other purpose.

19.8 If the Project is suspended or abandoned in whole or in part for more than ninety (90) consecutive days during the Pre-Construction Phase, the Construction Manager shall be compensated for all services performed prior to receipt of written notice from the Town of such suspension or abandonment. If the Project is resumed after being suspended for more than ninety (90) consecutive days, the Construction Manager's compensation for Pre-Construction Services shall be equitably adjusted if, in the Town's reasonable opinion, such adjustment is warranted.

**ARTICLE 20 INDEMNITY**

20.1 THE TOWN SHALL NOT BE LIABLE OR RESPONSIBLE FOR, AND SHALL BE INDEMNIFIED, DEFENDED, HELD HARMLESS AND RELEASED BY CONSTRUCTION MANAGER FROM AND AGAINST ANY AND ALL SUITS, ACTIONS, LOSSES, DAMAGES, CLAIMS, OR LIABILITY OF ANY CHARACTER, TYPE, OR DESCRIPTION, INCLUDING ALL EXPENSES OF LITIGATION, COURT COSTS, AND ATTORNEY'S FEES, FOR INJURY OR DEATH TO ANY PERSON, INJURY OR LOSS TO ANY PROPERTY, OR ECONOMIC LOSS, RECEIVED OR SUSTAINED BY ANY PERSON OR PERSONS, INCLUDING THE CONSTRUCTION MANAGER, OR PROPERTY, DIRECTLY OR INDIRECTLY ARISING OUT OF, OR OCCASIONED BY THE PERFORMANCE OF CONSTRUCTION MANAGER UNDER THIS CONTRACT, INCLUDING CLAIMS AND DAMAGES ARISING IN WHOLE OR IN PART FROM THE NEGLIGENCE OF TOWN, WITHOUT WAIVING THE TOWN'S GOVERNMENTAL, SOVEREIGN OR OTHER IMMUNITIES OR DEFENSES AVAILABLE TO THE TOWN UNDER TEXAS LAW AND WITHOUT WAIVING ANY DEFENSES OF THE PARTIES UNDER TEXAS LAW. IT IS THE EXPRESS INTENT OF THE PARTIES TO THIS CONTRACT THAT THE INDEMNITY PROVIDED FOR HEREIN IS AN INDEMNITY EXTENDED BY CONSTRUCTION MANAGER TO INDEMNIFY AND PROTECT TOWN FROM THE CONSEQUENCES OF THE CONSTRUCTION MANAGER'S AS WELL AS THE

TOWN'S NEGLIGENCE, WHETHER SUCH NEGLIGENCE IS THE SOLE OR PARTIAL CAUSE OF ANY SUCH INJURY, DEATH, OR DAMAGE.

20.2 The provisions of the foregoing indemnification are solely for the benefit of the parties hereto and not intended to create or grant any rights, contractual or otherwise, to any other person or entity.

**ARTICLE 21 SPECIAL WARRANTIES**

21.1 Notwithstanding anything to the contrary contained in this Contract, Town and Construction Manager agree and acknowledge that Town is entering into this Contract in reliance on Construction Manager's represented expertise and ability to provide construction management services. Construction Manager agrees to use its best efforts, skill, judgment, and abilities to perform its obligations and to further the interests of Town in accordance with Town's requirements and procedures.

21.2 The Construction Manager warrants, represents and agrees that all equipment, fixtures and materials incorporated in the Work shall be new and of good and suitable quality. The Construction Manager represents and agrees that it will perform its services in accordance with the usual and customary standards of Construction Manager's profession or business, in a good and workmanlike manner, and in compliance with all applicable national, federal, state, and municipal laws, regulations, codes, ordinances, and orders and with those of any other body having jurisdiction over the Project. Construction Manager agrees to bear the full cost of correcting Construction Manager's negligent or improper work and services, those of its consultants, and any harm caused by the negligent or improper work or services.

21.3 The Construction Manager's duties shall not be diminished by any approval by Town nor shall the Construction Manager be released from any liability by any approval by Town, it being understood that the Town is ultimately relying upon the Construction Manager's skill and knowledge in performing the services required hereunder.

21.4 The Construction Manager represents and agrees that all persons connected with the Construction Manager directly in charge of its services are duly registered or licensed as required under the laws, rules and regulations of any authority having jurisdiction over the Project if

registration or licensing is required.

21.5 The Construction Manager represents and agrees to advise Town of anything of any nature in any drawings, specifications, plans, sketches, instructions, information, requirements, procedures, and other data supplied to the Construction Manager (by the Town or any other party) that is, in its opinion, unsuitable, improper, or inaccurate for the purposes for which the document or data is furnished.

21.6 The Construction Manager represents and agrees to perform its services under this Contract in an expeditious and economical manner consistent with good business practices and the interests of Town.

21.7 Construction Manager represents and agrees that there are no obligations, commitments, or impediments of any kind that will limit or prevent performance of its obligations under this Contract.

21.8 Construction Manager represents and agrees that the individual executing this Contract on behalf of Construction Manager has been duly authorized to act for and to bind Construction Manager to its terms.

21.9 Except for the obligation of Town to pay Construction Manager certain fees, costs, and expenses pursuant to the terms of this Contract, Town shall have no liability to Construction Manager or to anyone claiming through or under Construction Manager by reason of the execution or performance of this Contract. Construction Manager waives, and agrees that it shall not claim, any damages against the Town for delays or back-charges, regardless of cause, and agrees that a Town-approved Change order granting an extension in the deadline for Final Completion shall be the Construction Manager's sole and exclusive remedy. Notwithstanding any obligation or liability of Town to Construction Manager, no present or future agent, officer or employee of Town or anyone claiming under Town has or shall have any personal liability to Construction Manager or to anyone claiming through or under Construction Manager by reason of the execution or performance of this Contract.

## **ARTICLE 22 CERTIFICATION OF NO ASBESTOS CONTAINING MATERIALS OR WORK**

22.1 The Construction Manager shall provide a certification statement with each materials submittal stating that no asbestos containing materials or work is

included within the scope of the proposed submittal.

22.2 The Construction Manager shall insure that Texas Department of Health licensed individuals, consultants or companies are used for any required asbestos work including asbestos inspection, asbestos abatement plans/specifications, asbestos abatement, asbestos project management and third-party asbestos monitoring.

22.3 The Construction Manager shall provide at Substantial Completion, a notarized affidavit to the Town and the Architect stating that no asbestos-containing materials or work was provided, installed, furnished or added to the Project.

22.4 The Construction Manager shall take whatever measures he deems necessary to ensure that all employees, suppliers, fabricators, materialmen, Subcontractors, or their assigns, comply with this requirement.

22.5 The Construction Manager shall provide, in hard copy and electronic form, all necessary material safety data sheets (MSDS) of all products used in the construction of the Project to the Texas Department of Health licensed inspector or Project Architect or Engineer who will compile the information from the MSDS and, finding no asbestos in any of the product, make a certification statement.

## **ARTICLE 23 MISCELLANEOUS PROVISIONS**

23.1 Assignment. This Contract is a personal service contract for the services of Construction Manager, and Construction Manager's interest in this Contract, duties hereunder and any fees due hereunder may not be assigned or delegated to a third party.

23.2 Records of expenses pertaining to Additional Services and services performed on the basis of a Worker Wage Rate or Monthly Salary Rate shall be kept on the basis of generally accepted accounting principles and in accordance with cost accounting standards promulgated by the Federal Office of Management and Budget Cost Accounting Standards Board and shall be available for audit by the Town or the Town's authorized representative on reasonable notice.

23.3 Tax Certification. If Construction Manager is a taxable entity as defined by Chapter 171, Texas Tax Code (“Chapter 171”), then it certifies that it is not currently delinquent in the payment of any taxes due under Chapter 171, or that it is exempt from the payment of such taxes, or that it is an out-of-state taxable entity that is not subject to those taxes, whichever is applicable.

23.4 Entire Agreement; Modifications. This Contract supersedes all prior agreements, written or oral, between Construction Manager and Town and shall constitute the entire Contract and understanding between the parties with respect to the Project. This Contract and each of its provisions shall be binding upon the parties and may not be waived, modified, amended or altered except by a writing signed by Construction Manager and Town.

23.5 Captions. The captions of paragraphs in this Contract are for convenience only and shall not be considered or referred to in resolving questions of interpretation or construction.

23.6 Governing Law and Venue. This Contract will be construed under and in accordance with the laws of the State of Texas without reference to its conflicts of law provisions, and all obligations of the parties created under this Contract are performable in Dallas County, Texas. Subject to the sovereign and governmental immunity of the Town, any lawsuit brought against the Town under this Contract may only be filed in a State court of proper jurisdiction in Dallas County, Texas.

23.7 Waivers. No delay or omission by either party in exercising any right or power arising from non-compliance or failure of performance by the other party with any of the provisions of this Contract shall impair or constitute a waiver of any such right or power. A waiver by either party of any covenant or condition of this Contract shall not be construed as a waiver of any subsequent breach of that or of any other covenant or condition of the Contract.

23.8 Binding Effect. This Contract shall be binding upon and inure to the benefit of the parties and their respective permitted assigns and successors.

23.9 Appointment. Town hereby expressly reserves the right from time to time to designate by notice to Construction Manager a representative(s) to act partially or wholly for Town in connection with the performance

of Town's obligations. Construction Manager shall act only upon instructions from the designated representative(s) unless otherwise specifically notified to the contrary.

23.10 Records. Records of Construction Manager’s costs, reimbursable expenses pertaining to the Project and payments shall be available to Town or its authorized representative during business hours and shall be retained for four (4) years after Final Payment or abandonment of the Project, unless Town otherwise instructs Construction Manager in writing.

23.11 Notices. All notices, consents, approvals, demands, requests or other communications relied on by the parties shall be in writing. Written notice shall be deemed to have been given when delivered in person to the designated representative of the Construction Manager or Town for whom it is intended; or sent by U.S. Mail to the last known business address of the designated representative. Mailed notices are deemed effective upon receipt or on the third business day after the date of mailing, whichever is sooner.

23.12 Severability. Should any term or provision of this Contract be held invalid or unenforceable in any respect, the remaining terms and provisions shall not be affected, and this Contract shall be construed as if the invalid or unenforceable term or provision had never been included.

23.13 Illegal Dumping. The Construction Manager shall ensure that it and all of its subcontractors and assigns prevent illegal dumping of litter in accordance with Title 5, *Texas Health and Safety Code*, Chapter 365.

23.14 By signature hereon, Construction Manager certifies that no member of the governing body of the Town, nor any Town official or employee, has a financial interest, directly or indirectly, in the transaction that is the subject of this Contract. Construction Manager shall submit a completed Conflicts of Interest Questionnaire to the Town prior to commencement of work in the Pre-Construction Phase and shall submit amendments or supplements thereto if the required information changes throughout the duration of the Project.

23.15 Neither Construction Manager nor its employees, agents, representatives or subcontractors will assist or cause Town employees to violate the Town’s Code of Ethics or applicable state ethics laws or rules. Construction Manager represents and warrants that no member of the governing body of the Town has a direct or indirect financial interest

in the transaction that is the subject of this Contract.

**ARTICLE 24 COMPENSATION**

**24.1 Construction Cost Limitation**

24.1.1 As of the Effective Date, the anticipated Construction Cost Limitation for the Project is:

\_\_\_\_\_.

**24.2 Pre-Construction Phase Fee**

24.2.1 For Pre-Construction Phase Services, Town shall pay Construction Manager a Pre-Construction Phase Fee in the total amount as follows:

Does not apply.

24.2.2 Town may elect, at its option, to stage or “fast-track” portions of the work. If Town elects to implement the Project in multiple stages, the Construction Manager shall allocate the Pre-Construction Phase Fee across all stages of the Project, unless the Town and Construction Manager agree otherwise.

**ARTICLE 25 OTHER TERMS AND CONDITIONS**

**25.1 Time of Completion**

25.1.1 As of the Effective Date, the number of days allowed for achieving Substantial Completion of the Project, following the date that the Town issues a Notice to Proceed for Construction Phase Services, is:

180 Calendar Days,

and the contractual deadline for Final Completion, from the date of the issuance of the Notice to Proceed for Construction Phase Services, is:

180 Calendar Days.

25.1.2 The Construction Phase shall be deemed to commence on the date specified in a Notice to Proceed issued by Town after acceptance of the Guaranteed Maximum Price Proposal.

25.1.3 The Construction Manager shall achieve

Substantial Completion of the Work and Final Completion of the Work on or before the dates agreed to in the Guaranteed Maximum Price Proposal, subject to time extensions granted by Change Order.

25.1.4 THE TIMES SET FORTH FOR COMPLETION OF THE WORK IN THE NOTICE TO PROCEED WITH CONSTRUCTION AND THE GUARANTEED MAXIMUM PRICE PROPOSAL ARE AN ESSENTIAL ELEMENT OF THIS CONTRACT, AND TIME IS OF THE ESSENCE IN THE PERFORMANCE OF THIS CONTRACT. The Town may elect, at its option, to stage or “fast-track” portions of the work. The Town shall issue a separate Change Order and a separate Notice to Proceed for each such stage, or phase, and each such stage, or phase, shall have a separate Substantial Completion date and a separate liquidated damages amount.

**25.2 Liquidated Damages**

25.2.1 For each consecutive calendar day after the Substantial Completion date that the Work is not substantially completed, the Town may deduct the daily amount of:

\$1.00.

from any money due or that becomes due the Construction Manager, not as a penalty but as liquidated damages representing the parties' estimate at the time of contract execution of the damages that the Town will sustain for late completion.

25.2.2 The parties stipulate and agree that calculating Town's actual damages for late completion of the Project would be impractical, unduly burdensome, and cause unnecessary delay and that the amount of daily liquidated damages set forth is reasonable.

**25.3 Estimated Construction Cost Reports**

Construction Manager shall prepare and update an Estimated Construction Cost report as required by Article 5.4 at fifty percent (50%) and ninety-five percent (95%) completion of the schematic, design development and Contract Documents phases.

**25.4 Notices**

Notices of claims or disputes or other legal notices required by this Contract shall be sent to the following persons at the indicated locations.

If to Town:  
Town of Copper canyon  
400 Woodland Drive  
Copper Canyon Tx 75077

If to Construction Manager  
Steve Koehler d/b/a  
The Koehler Company  
Sole Proprietorship  
214-957-7188  
5900 Windridge Lane  
Flower Mound TX 75028

or place designated for receipt of notices upon advance written notice to the other party.

25.5 Party Representatives

The parties may make reasonable changes in their designated representatives upon advance written notice to the other party.

25.6 Construction Document Sets

The Project Architect shall coordinate the printing, binding and distribution of the initial issuance of all Contract Documents for all subcontract offerors requesting documents in order to provide proposals to the Construction Manager. A maximum of twenty-five (25) sets will be furnished at the expense of the Town. The Construction Manager shall utilize all Contract Documents returned to the Project Architect from the subcontract offerors.

The parties may make reasonable changes in the person

BY SIGNING BELOW, the Construction Manager has executed and bound itself to this Contract as of the Effective Date. The Contract shall become effective only upon the execution of the Contract by both parties.

THE TOWN OF COPPER CANYON, TEXAS  
400 Woodland Drive  
Copper Canyon Tx 75077

By: \_\_\_\_\_  
Mayor Ron Robertson  
The Town of Copper Canyon  
400 Woodland Drive  
Copper Canyon, Tx. 75077

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

ATTEST:

\_\_\_\_\_  
Town Secretary Sheila Morales

CONSTRUCTION MANAGER  
Steve Koehler d/b/a  
The Koehler Company  
Sole Proprietorship

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

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



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## GENERAL CONDITIONS ADDENDUM

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### CONSTRUCTION MANAGER-AT-RISK CONTRACT

#### ARTICLE I INTENT AND INTERPRETATION

##### 1.1 IN GENERAL

1.1.1 The intent of this General Conditions Addendum to Construction Manager at Risk Contract ("Addendum") is to require complete, correct and timely execution of the Work and the Project described in the Construction Manager at Risk Contract. This Addendum is an integral part of that Contract and is to be read in harmony with the Contract; hence, this Addendum's provisions refer to itself as the "Contract." In the event that any term or provision of this Addendum is in conflict with the Construction Manager at Risk Contract, the Contract shall prevail. This Addendum shall control where the Contract is silent.

1.1.2 The Contract is intended to be an integral whole and shall be interpreted as internally consistent. What is required by any one Contract Document shall be considered as required by the Contract.

1.1.3 When a word, term or phrase is used in the Contract, it shall be interpreted or construed, first, as defined herein; second, if not defined, according to its generally accepted meaning in the construction industry; and third, if there is no generally accepted meaning in the construction industry, according to its common and customary usage.

1.1.4 The word "Town" includes the Town of Copper Canyon, Texas, a municipal corporation, and its public officials, officers, employees, agents and employees. The word "Construction Manager" includes the Construction Manager and its officers, employees, agents and representatives. The word "include", "includes", or "including", as used in this subparagraph and in this Contract, shall be deemed to be followed by the phrase, "without limitation".

1.1.5 The specification herein of any act, failure, refusal, omission, event, occurrence or condition as constituting a material breach of the Contract shall not

imply that any other, non-specified act, failure, refusal, omission, event, occurrence or condition shall be deemed not to constitute a material breach of this Contract.

1.1.6 Words or terms used as nouns in this Contract shall be inclusive of their singular and plural forms, unless the context of their usage clearly requires a contrary meaning.

1.1.7 The Construction Manager shall have a continuing duty to read, carefully study and compare each of the Contract Documents, the Drawings, Plans and Specifications, and Product Data, and shall give written notice to the Town and Project Architect of any inconsistency, ambiguity, error or omission which the Construction Manager may discover with respect to these documents before proceeding with the affected Work. The issuance, or the express or implied approval by the Town or the Project Architect of the Contract Documents, Shop Drawings or Product Data, shall not relieve the Construction Manager of the continuing duties imposed hereby, nor shall any such approval be evidence of the Construction Manager's compliance with this Contract. The Town, the Project Architect and the Construction Manager have participated in the preparation of the Contract Documents for the Project, including the Drawings, Plans and Specifications for the Project, which are accurate, adequate, consistent, coordinated and sufficient for construction. HOWEVER, THE TOWN MAKES NO REPRESENTATION OR WARRANTY OF ANY NATURE WHATSOEVER TO THE CONSTRUCTION MANAGER CONCERNING SUCH DOCUMENTS. THE CONSTRUCTION MANAGER ASSUMES ALL RISK OF ERRORS, AMBIGUITIES AND INACCURACIES. By the execution hereof, the Construction Manager acknowledges and represents that it has received, reviewed and carefully examined such documents, has found them to be complete, accurate, adequate, consistent, coordinated and sufficient for construction, and that the Construction Manager has not, does not, and will not rely upon any representation or warranties by the Town concerning such documents as no such representation or warranties have been or are hereby made. Further, the Construction Manager represents and warrants that it has had a sufficient opportunity to inspect the Project site and assumes any and all responsibility for inadequacies or ambiguities in the plans, drawings or

specifications as well as for latent conditions of the site where the work is to be performed.

1.1.8 As between numbers and scaled measurements on the Drawings, Plans and Specifications, and in the design, the numbers shall govern, as between larger scale and smaller scale drawings, the larger scale shall govern.

1.1.9 Neither the organization of any of the Contract Documents into divisions, sections, paragraphs, articles, (or other categories), nor the organization or arrangement of the design, shall control the Construction Manager in dividing the Work or in establishing the extent or scope of the Work to be performed by subcontractors.

## **1.2 OWNERSHIP OF CONTRACT DOCUMENTS**

1.2.1 The Contract Documents, and each of them individually and collectively, shall remain the property of the Town. The Construction Manager shall have the right to keep one record set of the Contract Documents upon completion of the Project; provided, however, that in no event shall Construction Manager use, or permit to be used, any or all of such Contract Documents on other projects without the Town's prior written authorization.

## **ARTICLE II THE WORK**

2.1 The Construction Manager shall perform all of the Work required, implied or reasonably inferable from the Contract.

## **2.2 THE WORK**

2.2.1 The Construction Manager shall be responsible for paying for and procuring all materials and labor and furnishing all services necessary or appropriate for the full performance of the Work and the for the full completion of the Project. All materials shall be new, and materials and workmanship shall be new and of good quality unless expressly otherwise authorized in writing by the Town. Upon request, the Construction Manager shall furnish satisfactory proof of the type, kind, and quality of materials.

## **ARTICLE III CONTRACT TIME**

### **3.1 SUBSTANTIAL COMPLETION**

3.1.1 "Substantial Completion" shall mean that stage in the progression of the Work when the Work is sufficiently complete in accordance with the Contract that the Town can enjoy beneficial use or occupancy of the Work and can utilize the Work for its intended purpose,

even though minor miscellaneous work and/or adjustment may be required.

3.1.2 "Final Completion" shall mean that all Work has been fully completed, the Construction Manager has achieved all technical and performance requirements of the Contract, including all punch-list items, the Project has passed final inspection, and the Project has been accepted by the Town. Use and occupancy shall not be deemed acceptance of the Work; acceptance shall be by formal action of the Town's governing body.

### **3.2 TIME**

3.2.1 The Construction Manager shall commence the Work within 10 days of receipt of a written Notice to Proceed and shall achieve Substantial Completion of the Work no later than the number of days specified in the Contract from the date of the issuance of the Notice to Proceed. The term "calendar days" shall mean any and all days of the week or month, no days being excepted. The number of calendar days from the date on which the Work is permitted to proceed, through the date set forth for Substantial Completion, shall constitute the "Contract Time" and the "scheduled completion date." The execution of this Contract by the Construction Manager constitutes an agreement that adequate time has been allotted for this Contract, given the Contract Price.

3.2.2 Work may proceed on any day of the week, including weekends, and at any time of the day. However, work shall not occur on such days or at such times as, in the Town's or Project Architect's discretion, may be a violation of noise or environmental regulations or ordinances, or when the presence of workers, equipment or materials may create an abnormally hazardous condition.

3.2.3 The Construction Manager shall submit and comply with construction schedules and the CPM Schedule establishing completion timelines and deadlines for each component of the Project. Construction schedules shall be submitted to and approved by the Project Architect and the Town on a regular basis.

### **3.3 TIME IS OF THE ESSENCE**

3.3.1 The scheduled completion date is based on public necessity. The scheduled completion date is factored into and is a material component of the GMP Proposal. All limitations of time set forth in the Contract Documents are of the essence of this Contract.

3.3.2 TIME IS OF THE ESSENCE IN THE PERFORMANCE OF THE WORK AND THE COMPLETION OF THE PROJECT ON OR BEFORE THE SCHEDULED FINAL COMPLETION DATE. THE SCHEDULED COMPLETION DATE IS A



DEADLINE. THE TOWN EMPLOYS A ZERO-TOLERANCE POLICY REGARDING THE TIME FOR COMPLETION. The time for completion is an essential and material term of this Contract and the Construction Manager's failure to achieve Substantial Completion and Final Completion on the dates stated in the Contract, to comply with work schedules, or achieve milestones in approved construction schedules and the CPM Schedule, shall be a material breach and default of the Contract.

3.3.3 The Town will assess liquidated damages for late or untimely performance and may, at the Town's sole option, elect to allow Construction Manager to continue with the Work, or may declare Construction Manager to be in breach and default of the Contract and order Construction Manager to remove all equipment and personnel from the work site. All remedies for Construction Manager's late performance shall be nonexclusive and cumulative without waiver of any other, and the Town's election of one shall not preclude the Town from pursuing any other. The Town's payment of any Application for Payment that includes late performance shall not be construed as excusing late performance or consent or waiver of any kind. Contractual deadlines and dates for achieving milestones and for completion may be extended only by written change order approved by the Town.

3.3.4 It is contemplated by the parties that the progress of the Work may be delayed by certain conditions beyond the control of the parties; these delays have been considered by the parties and considered in the time allotted for performance specified herein and in the GMP, and includes but is not limited to delays occasioned on account of adverse weather, temporary unavailability of materials, shipment delays, and the presence and potential interference of other contractors or of utilities that may be performing work at the Project site unrelated to the Contract. These delays have been considered and included in the determination of the scheduled completion dates and the GMP.

### **3.4 LIQUIDATED DAMAGES; EARLY COMPLETION BONUS**

3.4.1 Liquidated Damages. Liquidated damages shall be calculated from the date of the Notice to Proceed for Construction Phase Services to the date of Substantial Completion. The Construction Manager shall pay the Town the sum of \$1.00 per day for each and every calendar day of unexcused delay in achieving Substantial Completion beyond the date set forth herein for Substantial Completion of the Work. Any sums due and payable hereunder by the Construction Manager shall be payable, not as a penalty, but as liquidated damages representing an estimate of delay damages likely to be sustained by the Town, estimated at or before the time of

executing this Contract. When the Town reasonably believes that Substantial Completion will be inexcusably delayed, the Town shall be entitled, but not required, to withhold from any amounts otherwise due the Construction Manager an amount then believed by the Town to be adequate to recover liquidated damages applicable to such delays. If and when the Construction Manager overcomes the delay in achieving Substantial Completion, or any part thereof, for which the Town has withheld payment, the Town shall promptly release to the Construction Manager those funds withheld, but no longer applicable, as liquidated damages. If the Construction Manager has submitted a Statement of Delay with the appropriate Application for Payment as required by Subparagraph 5.2.4, and/or has complied with the notice and Change Order requirements of this Contract, the Project Architect shall have sole discretion to determine whether a delay is excused or unexcused and the Project Architect's determination thereof shall be final and binding on the parties.

3.4.2 Early Completion. In the event that the Construction Manager achieves certification by the Project Architect of Final Completion prior to the date specified in the Contract, the Town shall pay to the Construction Manager the sum of \$0 per day for each calendar day that Final Completion is certified in advance of the scheduled Final Completion date, as that date may be modified by written change order. However, early completion bonuses shall not, in the aggregate, exceed the total sum of \$0. Any reduction in the scope of work, evidenced by written change order, shall commensurately reduce the time for completion.

### **3.5 NO DAMAGES FOR DELAY; NO BACK-CHARGES; DAMAGE WAIVER**

3.5.1 No claim shall be made by the Construction Manager to the Town, and no damages, costs or extra compensation shall be allowed or paid by the Town to the Construction Manager for any delay or hindrance from any cause in the progress or completion of the Work or this Contract unless authorized by approved written change order. The Construction Manager's sole remedy in the event of any delay or hindrance, regardless of cause, shall be to request time extensions by written change orders as provided for hereinafter.

The failure to seek or obtain a change order for time extension shall be deemed a waiver thereof and Construction Manager shall be regarded as having decided that the delay will not affect the completion of the Work. Should the Construction Manager be delayed by an act of the Town, or should the Town order a stoppage of the Work for cause unrelated to any act or omission of the Construction Manager, an extension of time shall be granted by the Town by Change Order upon written

application, which extension shall not be unreasonably denied, to compensate for the delay.

3.5.2 The Town shall have the authority to suspend the Work wholly or in part for such period or periods of time as it may deem appropriate due to unsuitable conditions considered unfavorable for the proper prosecution of the Work or for the failure of the Construction Manager to carry out instructions from the Town or Town's representative. During any period in which the Work is stopped or during which any of the Work is not actively in progress for any reason, Construction Manager shall properly protect the site and the Work from damage, loss or harm. The Construction Manager shall not be compensated for periods of delay caused by a suspension of the work by the Town. If work is suspended due to unsuitable conditions through no fault of the Construction Manager, an extension of time shall be granted by the Town by Change Order upon written application, which extension shall not be unreasonably denied, to compensate for the delay.

3.5.3 The Construction Manager shall not have or assert any claim against the Town for damages or back-charges of any kind for any reason, including but not limited to claims for extra work, damages, economic loss, additional costs, unknown latent site conditions, and refusals by the Town to grant extensions of time, unless supported and authorized by a written change order or separate agreement signed by all parties. The Construction Manager, in entering into this Contract, hereby waives, releases, quitclaims, discharges and holds harmless the Town from and against any and all claims, damages, liabilities and losses, save and except those arising under Paragraph 12.1 of this Addendum.

3.5.4 The parties acknowledge that Town has multiple staff and public officials that may be involved in different parts of the Work. The Town's Designated Representative is, however, the only Town representative with the authority to direct the progress of the Work. If conflicting directions are given by Town personnel, Construction Manager shall within three (3) days report the conflict to the Town's Designated Representative, who shall resolve the conflict. Any disagreement between the Town's Designated Representative and Construction Manager shall be resolved by the Project Architect. Should Construction Manager fail to notify the Project Architect in writing of a dispute within three (3) days after the issuance of a directive from the Town's Designated Representative, the Construction Manager shall conclusively be deemed to have waived the issue and does thereby release, discharge and hold harmless the Town from and against any claims for delay damages, back-charges or offsets.

3.5.5 If Construction Manager believes that any delay in performance of the Work is the result of fraud,

misrepresentation, bad faith, active interference, or any willful, unreasoning, arbitrary or wrongful conduct by the Town, the Construction Manager shall notify the Project Architect in writing within not less than ten (10) days of the wrongful act of the Town. The Project Architect shall provide notice of the claim to the Town Manager. The Town Manager, with the advice of the Project Architect, shall determine the merits of the Construction Manager's claim and shall take appropriate action. A failure by Construction Manager to pursue this administrative prerequisite shall be an abandonment of any claim and a conclusive waiver of any claim for delay damages, back-charges, offsets or damages of any kind, including but not limited to lost profits.

#### **ARTICLE IV GUARANTEED MAXIMUM PRICE**

##### **4.1 THE GMP**

4.1.1 The Town shall pay, and the Construction Manager shall accept, as full and complete payment for all of the Work required during the Construction Phase, the fixed sum stated in the accepted Guaranteed Maximum Price Proposal. That sum shall constitute the Contract Price which shall not be increased except by written Change Order as provided in the Contract, or the award of an early completion bonus. Should the total cost of the Work be less than the GMP, the contract price shall be reduced accordingly without reduction in the early completion bonus.

#### **ARTICLE V PAYMENT OF THE CONTRACT PRICE**

##### **5.1 SCHEDULE OF VALUES**

5.1.1 The Schedule of Values, submitted to and accepted by the Town and Project Architect at the time of the Construction Manager's GMP Proposal, allocates the Contract Price to the various portions of the Work. The Construction Manager's Schedule of Values shall have been prepared, or at the Town's or Project Architect's request shall be amended prior to the commencement of construction, in such form, with such detail, and supported by such data as the Project Architect or the Town may require to substantiate its accuracy. The Construction Manager shall not imbalance its Schedule of Values nor artificially inflate any element thereof. The violation of this provision by the Construction Manager shall constitute a material breach of this Contract. The Schedule of Values shall be used only as a basis for the Construction Manager's Applications for Payment and shall only constitute such basis after it has been acknowledged and accepted in writing by the Project Architect and the Town.

## 5.2 PAYMENT PROCEDURE

5.2.1 The Town shall pay the Contract Price to the Construction Manager as provided below.

5.2.2 PROGRESS PAYMENTS - Based on the Construction Manager's Applications for Payment submitted to the Project Architect and upon Certificates for Payment subsequently issued to the Town by the Project Architect, the Town shall make progress payments to the Construction Manager on account of the Contract Price.

5.2.3 APPLICATION FOR PAYMENT - On or before the 25th day of each month after commencement of the Work, the Construction Manager shall submit an Application for Payment for the period ending the 15th day of the month to the Project Architect in such form and manner, and with such supporting data and content, as the Town or the Project Architect may require. The Construction Manager may request payment for that portion of the Contract Price properly allocable to Contract requirements properly provided and to labor, materials and equipment properly incorporated in the Work, less retainage and less the total amount of previous payments received from the Town. Such Application for Payment shall be signed by the Construction Manager and shall constitute the Construction Manager's representation that the Work has progressed to the level for which payment is requested in accordance with the Schedule of Values, that the Work has been properly installed or performed in full compliance with this Contract, and that the Construction Manager knows of no reason why payment should not be made as requested. Thereafter, the Project Architect will review the Application for Payment and may also review the Work at the Project site or elsewhere to determine whether the quantity and quality of the Work is as represented in the Application for Payment and is as required by this Contract. The Project Architect shall determine and certify to the Town the amount properly owing to the Construction Manager. The Town shall make partial payments on account of the Contract Price to the Construction Manager within thirty (30) days following the Project Architect's receipt and approval of each Application for Payment. The amount of each partial payment shall be the amount certified for payment by the Project Architect less such amounts, if any, otherwise owing by the Construction Manager to the Town or which the Town shall have the right to withhold as authorized by this Contract. The Project Architect's certification of the Construction Manager's Application for Payment shall not preclude the Town from the exercise of any of its rights as set forth in Paragraph 5.3 hereinbelow.

5.2.4 STATEMENT OF DELAY - Each Application for Payment shall include a Statement of Delay showing the number of days lost due to inclement weather, conflicts

with other Town contractors, utilities, or design specifications, or other proper reasons. The failure to submit the Statement of Delay shall be a waiver of any claim for additional days or extensions of the scheduled completion date.

5.2.5 RETAINAGE - The Town shall withhold retainage of five (5) percent from each progress payment to secure performance of the Contract and shall deposit in an interest-bearing account that portion of the retainage withheld that exceeds five (5) percent of the progress payment. The Town and Construction Manager may agree to reduce the foregoing retainage percentages but in no event shall retainages be less than 5% if the GMP is at least \$400,000.00.

5.2.6 The Construction Manager warrants that title to all Work covered by an Application for Payment will pass to the Town when installed at the Project site, regardless of the time of payment. The Construction Manager further warrants that upon submittal of an Application for Payment, all Work for which payments have been received from the Town shall be free and clear of liens, claims, security interest or other encumbrances in favor of the Construction Manager or any other person or entity whatsoever.

5.2.7 The Construction Manager shall promptly pay each Subcontractor out of the amount paid to the Construction Manager on account of such Subcontractor's Work, the amount to which such Subcontractor is entitled. In the event the Town becomes informed that the Construction Manager has not paid a Subcontractor, the Town shall have the right, but not the duty, to issue future checks in payment to the Construction Manager of amounts otherwise due hereunder naming the Construction Manager and such Subcontractor as joint payees. Such joint check procedure, if employed by the Town, shall create no rights in favor of any person or entity beyond the right of the named payees to payment of the check and shall not be deemed to obligate the Town to repeat the procedure in the future.

5.2.8 No progress payment nor any use or occupancy of the Project by the Town shall be interpreted to constitute an acceptance of any Work not in strict compliance with this Contract.

## 5.3 WITHHELD PAYMENT

5.3.1 The Town may decline to make payment, may withhold funds, and, if necessary, may demand the return of some or all of the amounts previously paid to the Construction Manager, to protect the Town from loss because of:

(a) defective Work not remedied by the Construction Manager or, in the opinion of the Town, not likely to be remedied by the Construction Manager;

(b) claims of third parties against the Town or the Town's property;

(c) failure by the Construction Manager to pay Subcontractors or others in a prompt and proper fashion;

(d) evidence that the balance of the Work cannot be completed in accordance with the Contract for the unpaid balance of the Contract Price;

(e) evidence that the Work will not be completed in the time required for Substantial or Final Completion;

(f) persistent failure to carry out the Work in accordance with the Contract;

(g) damage to the Town or a third party to whom the Town is, or may be, liable;

(h) failure to submit an updated project schedule in accordance with Subparagraph 3.2.3; or

(i) failure to submit record drawings in accordance with Subparagraph 7.7.1.

In the event that the Town makes written demand upon the Construction Manager for amounts previously paid by the Town as contemplated in this Subparagraph 5.3.1, the Construction Manager shall promptly comply with such demand. The Town shall have no duty to third parties to withhold payment to the Construction Manager and shall incur no liability for a failure to withhold funds.

#### **5.4 UNEXCUSED FAILURE TO PAY**

5.4.1 If within twenty (30) days after the date established herein for payment to the Construction Manager by the Town, the Town, without cause or basis hereunder, fails to pay the Construction Manager any amount then due and payable to the Construction Manager, then the Construction Manager may after ten (10) additional days' written notice to the Town and the Project Architect, and without prejudice to any other available rights or remedies it may have, stop the Work until payment of those amounts due from the Town have been received. Late payments shall not accrue interest or other late charges.

#### **5.5 CERTIFICATE OF SUBSTANTIAL COMPLETION**

5.5.1 When the Construction Manager believes that the Work is substantially complete, the Construction Manager shall submit to the Project Architect a list of items to be completed or corrected. When the Project

Architect and the Town on the basis of an inspection determine that the Work is in fact substantially complete, the Project Architect will prepare a Certificate of Substantial Completion which shall establish the date of Substantial Completion, shall state the responsibilities of the Town and the Construction Manager for Project security, maintenance, heat, utilities, damage to the Work, and insurance, and shall fix the time within which the Construction Manager shall complete the items listed therein. In no event, however, shall the date of Final Completion be delayed. Guarantees required by the Contract shall commence on the date of Substantial Completion of the Work; however, the maintenance bond required herein, and the assurances given thereunder, shall commence of and from the date of final payment by the Town. The Certificate of Substantial Completion shall be submitted to the Town and the Construction Manager for their written acceptance of the responsibilities assigned to them in such certificate.

Upon Substantial Completion of the Work, and execution by both the Town and the Construction Manager of the Certificate of Substantial Completion, the Town shall pay the Construction Manager for all work completed to date, less retainage.

#### **5.6 COMPLETION AND FINAL PAYMENT**

5.6.1 When all of the Work is finally complete and ready for final inspection, the Construction Manager shall notify the Town and the Project Architect thereof in writing. Thereupon, the Town and Project Architect will make final inspection of the Work and, if the Work is complete in full accordance with this Contract and this Contract has been fully performed, the Project Architect will promptly issue a final Certificate for Payment certifying to the Town that the Project is complete and the Construction Manager is entitled to the remainder of the unpaid Contract Price (including retainage), plus an early completion bonus, if any, less any amount withheld pursuant to this Contract. If the Project Architect is unable to issue its final Certificate for Payment and is required to repeat its final inspection of the Work, the Construction Manager shall bear the cost of such repeat final inspection(s) which cost may be deducted by the Town from the Construction Manager's final payment.

5.6.2 If the Construction Manager fails to achieve Final Completion within the time fixed therefor by the Project Architect in its Certificate of Substantial Completion, the Construction Manager shall pay the Town (or the Town may, at its option withhold from final payment) the sum set forth hereinabove as liquidated damages per day for each and every calendar day of unexcused delay in achieving Final Completion beyond the date set forth herein for final completion of the Work. Any sums due and payable hereunder by the Construction Manager shall be payable, not as a penalty, but as

liquidated damages representing an estimate of delay damages likely to be sustained by the Town, estimated at or before the time of executing this Contract. When the Town reasonably believes that final completion will be inexcusably delayed, the Town shall be entitled, but not required, to withhold from any amounts otherwise due the Construction Manager an amount then believed by the Town to be adequate to recover liquidated damages applicable to such delays. If and when the Construction Manager overcomes the delay in achieving final completion, or any part thereof, for which the Town has withheld payment, the Town shall promptly release to the Construction Manager those funds withheld, but no longer applicable, as liquidated damages. Liquidated damages shall be deducted first from any earned early completion bonus, then from any sums otherwise due to the Construction Manager.

5.6.3 The Construction Manager shall not be entitled to final payment unless and until it submits to the Project Architect its affidavit that all payrolls, invoices for materials and equipment, and other liabilities connected with the Work for which the Town, or the Town's property might be responsible, have been fully paid or otherwise satisfied; releases and waivers of lien from all Subcontractors and of any and all other parties required by the Project Architect or the Town; consent of Surety, if any, to final payment. If any third party fails or refuses to provide a release of claim or waiver of lien as required by the Town, the Construction Manager shall furnish a bond satisfactory to the Town to discharge any such lien or indemnify the Town from liability.

5.6.4 The Town shall make final payment of all sums due the Construction Manager within thirty (30) days of the Project Architect's execution of a final Certificate for Payment.

5.6.5 Acceptance of final payment shall constitute a waiver of all claims against the Town by the Construction Manager except for those claims previously made in writing against the Town by the Construction Manager, pending at the time of final payment, and identified in writing by the Construction Manager as unsettled at the time of its request for final payment.

5.6.6 Other than interest on retainage in excess of 5% under Paragraph 5.2.5, under no circumstances shall Construction Manager be entitled to receive interest on any payments or monies due Construction Manager by the Town, whether the amount on which the interest may accrue is timely, late, wrongfully withheld, or an assessment of damages of any kind.

## **ARTICLE VI THE TOWN**

### **6.1 INFORMATION, SERVICES AND THINGS REQUIRED FROM TOWN**

6.1.1 The Town shall furnish to the Construction Manager, at the time of executing the Contract, any and all written and tangible material in its possession concerning conditions below ground at the site of the Project. Such written and tangible material is furnished to the Construction Manager only in order to make complete disclosure of such material and for no other purpose. By furnishing such material, the Town does not represent, warrant, or guaranty its accuracy either in whole, in part, implicitly or explicitly, or at all, and shall have no liability therefor.

6.1.2 Excluding permits and fees normally the responsibility of the Construction Manager, the Town shall obtain all approvals, easements, and the like required for construction and shall pay for necessary assessments and charges required for construction, use or occupancy of permanent structures or for permanent changes in existing facilities.

6.1.3 The Town shall furnish the Construction Manager, free of charge, two copies of the Contract Documents for execution of the Work.

### **6.2 RIGHT TO STOP WORK**

6.2.1 If the Construction Manager persistently fails or refuses to perform the Work in accordance with this Contract, if the Construction Manager fails to meet milestones set forth in approved construction schedules or the CPM Schedule, if the Town has sufficient reason to believe that the Construction Manager is not and will not complete the Project by the scheduled completion date, or if the best interests of the public health, safety or welfare so require, the Town may order the Construction Manager to stop the Work, or any described portion thereof, until the cause for stoppage has been corrected, no longer exists, or the Town orders that Work be resumed. In such event, the Construction Manager shall immediately obey such order.

### **6.3 TOWN'S RIGHT TO PERFORM WORK**

6.3.1 If the Construction Manager's Work is stopped by the Town under Paragraph 6.2, and the Construction Manager fails within seven (7) days of such stoppage to provide adequate assurance to the Town that the cause of such stoppage will be eliminated or corrected, then the Town may, without prejudice to any other rights or remedies the Town may have against the Construction Manager, proceed to carry out the subject Work. In such a situation, an appropriate Change Order shall be issued deducting from the Contract Price the cost of correcting the subject deficiencies, plus compensation for the Project

Architect's additional services and expenses necessitated thereby, if any. If the unpaid portion of the Contract Price is insufficient to cover the amount due the Town, the Construction Manager shall pay the difference to the Town.

## **ARTICLE VII THE CONSTRUCTION MANAGER**

### **7.1 MUST FOLLOW CONTRACT**

7.1.1 The Construction Manager shall perform no part of the Work at any time without adequate Contract Documents or, as appropriate, approved Drawings, Plans and Specifications, Product Data or Samples for such portion of the Work. If the Construction Manager performs any of the Work knowing it involves a recognized error, inconsistency or omission in the Contract Documents without such notice to the Project Architect, the Construction Manager shall bear responsibility for such performance and shall bear the cost of correction. The Construction Manager shall perform the Work strictly in accordance with the Contract

### **7.2 PROSECUTION OF WORK**

7.2.1 The Construction Manager shall supervise and direct the Work using the Construction Manager's best skill, effort and attention. The Construction Manager shall be responsible to the Town for any and all acts or omissions of the Construction Manager, its employees and others engaged in the Work on behalf of the Construction Manager.

7.2.2 The Construction Manager shall give adequate attention to the faithful prosecution of the Work and the timely completion of this Contract, with authority to determine the manner and means of performing such Work, so long as such methods insure timely completion and proper performance.

7.2.3 The Construction Manager shall exercise all appropriate means and measures to insure a safe and secure jobsite in order to avoid and prevent injury, damage or loss to persons or property.

7.2.4 The Town will not interfere with the Construction Manager's manner and means of performing the Work. However, the Town's insistence on strict compliance with the Contract shall not be regarded as an interference with the Construction Manager's manner and means. In the event that any part of the Work is not in strict compliance with the Contract, the Construction Manager is and shall be estopped from claiming any interference by the Town or Project Architect with the Construction Manager's manner and means of performing that part of the Work.

7.2.5 If Construction Manager has reason to believe that the Town or any Town personnel is or may be interfering with Construction Manager's discretion over the manner and means of performance, the Construction Manager must inform the Project Architect in writing and must identify the Town personnel involved and provide a brief description of the circumstances constituting the interference. The Project Architect shall have the responsibility of determining whether the conduct complained of constitutes an improper interference. A failure of the Construction Manager to provide written notice to the Project Architect within ten (10) days of the conduct complained of shall constitute a waiver by the Construction Manager. The Project Architect's determination shall be final and binding.

### **7.3 WARRANTY**

7.3.1 The Construction Manager warrants to the Town that all labor furnished to progress the Work under this Contract will be competent to perform the tasks undertaken, that the product of such labor will yield only first-class results, that materials and equipment furnished will be of good quality and new unless otherwise permitted by this Contract, and that the Work will be of good quality, free from faults and defects and in strict conformance with the Contract. All Work not conforming to these requirements may be considered defective. THE CONSTRUCTION MANAGER WARRANTS AND GUARANTIES THAT IT SHALL COMPLETE THE WORK AND ACHIEVE SUBSTANTIAL COMPLETION BY THE SCHEDULED COMPLETION DATE, STRICTLY IN ACCORDANCE WITH THIS CONTRACT. DEFECTIVE WORK OR MATERIALS SHALL BE FIXED, REPAIRED OR REPLACED FREE OF CHARGE OR COST TO THE TOWN.

### **7.4 PERMITS; FEES; LICENSES**

The Construction Manager shall obtain and pay for all permits, fees and licenses necessary and ordinary for the Work. The Construction Manager shall comply with all lawful requirements applicable to the Work and shall give and maintain any and all notices required by applicable law pertaining to the Work.

### **7.5 SUPERVISION**

7.5.1 The Construction Manager shall employ and maintain at the Project site only competent supervisory personnel. Absent written instruction from the Construction Manager to the contrary, the superintendent shall be deemed the Construction Manager's authorized representative at the site and shall be authorized to receive and accept any and all communications from the Town or the Project Architect.

7.5.2 Key supervisory personnel assigned by the Construction Manager to this Project are as follows:

NAME	FUNCTION
<u>Steve Koehler</u>	<u>Construction Manager</u>
<u>Marshall Koehler</u>	<u>Assistant Construction Manager</u>

So long as the individuals named above remain actively employed or retained by the Construction Manager, they shall perform the functions indicated next to their names unless the Town agrees to the contrary in writing. In the event one or more individuals not listed above subsequently assume one or more of those functions listed above, the Construction Manager shall be bound by the provisions of this subparagraph as though such individuals had been listed above.

#### 7.6 WORK SCHEDULE

7.6.2 The Construction Manager's schedule for completing the Work, the CPM Schedule, and any revised schedules shall demonstrate achievement of substantial completion by the scheduled completion date. Failure by the Construction Manager to strictly comply with the provisions of this Subparagraph shall constitute a default and a material breach of the Contract.

#### 7.7 ON-SITE DRAWINGS

7.7.1 The Construction Manager shall continuously maintain at the site, for the benefit of the Town and the Project Architect, one record copy of the Contract marked to record on a current basis changes, selections and modifications made during construction. Additionally, the Construction Manager shall maintain at the site for the Town and Project Architect the approved Drawings, Plans and Specifications, Product Data, Samples and other similar required submittals. Upon final completion of the Work, all of these record documents shall be delivered to the Town.

#### 7.8 RECORD DRAWINGS/PLANS, AS-BUILT PLANS, SHOP DRAWINGS, PRODUCT DATA, AND SAMPLES

7.8.1 The Construction Manager shall submit, with each Application for Payment, As-Built plans for any and each part or portion of the Project that varies from the Project Architect's plans and specifications and the Contract Documents.

7.8.2 The Construction Manager shall not perform any portion of the Work requiring submittal and review of Shop Drawings, Product Data or Samples unless and until such submittal shall have been approved by the Project Architect. Approval by the Project Architect, however,

shall not be evidence that Work installed pursuant thereto conforms to the requirements of this Contract.

#### 7.9 CLEANING THE SITE AND THE PROJECT

The Construction Manager shall keep the site reasonably clean during performance of the Work. The Construction Manager shall clean the site and the Project and remove all waste, rubbish, temporary structures, and other materials during construction and, upon completion of construction, shall clean the site and remove all such material together with all of the Construction Manager's property therefrom. Construction Manager shall dispose of all refuse at a landfill approved by the Texas Commission on Environmental Quality. The Construction Manager shall further restore all property damaged during the prosecution of the Work and shall leave the site in a clean and presentable condition. No additional payment shall be made by the Town for this work, the compensation having been considered and included in the contract price.

#### 7.10 ACCESS TO WORK AND INSPECTIONS

The Town and the Project Architect shall have access to the Work at all times from commencement of the Work through final completion. The Construction Manager shall take whatever steps necessary to provide access when requested. When reasonably requested by the Town or the Project Architect, the Construction Manager shall perform or cause to be performed such testing as may be necessary or appropriate to insure suitability of the jobsite or the Work's compliance with the Contract requirements.

#### 7.11 INDEMNITY AND DISCLAIMER

7.11.1 TOWN SHALL NOT BE LIABLE OR RESPONSIBLE FOR, AND SHALL BE INDEMNIFIED, DEFENDED, HELD HARMLESS AND RELEASED BY CONSTRUCTION MANAGER FROM AND AGAINST ANY AND ALL SUITS, ACTIONS, LOSSES, DAMAGES, CLAIMS, OR LIABILITY OF ANY CHARACTER, TYPE, OR DESCRIPTION, INCLUDING ALL EXPENSES OF LITIGATION, COURT COSTS, AND ATTORNEY'S FEES, FOR INJURY OR DEATH TO ANY PERSON, INJURY OR LOSS TO ANY PROPERTY, OR ECONOMIC LOSS, RECEIVED OR SUSTAINED BY ANY PERSON OR PERSONS, INCLUDING THE CONSTRUCTION MANAGER, OR

PROPERTY, DIRECTLY OR INDIRECTLY ARISING OUT OF, OR OCCASIONED BY THE PERFORMANCE OF CONSTRUCTION MANAGER UNDER THIS CONTRACT, INCLUDING CLAIMS AND DAMAGES ARISING IN WHOLE OR IN PART FROM THE NEGLIGENCE OF TOWN, WITHOUT WAIVING THE TOWN'S GOVERNMENTAL, SOVEREIGN OR OTHER IMMUNITIES OR DEFENSES AVAILABLE TO THE TOWN UNDER TEXAS LAW AND WITHOUT WAIVING ANY DEFENSES OF THE PARTIES UNDER THE LAW. IT IS THE EXPRESS INTENT OF THE PARTIES TO THIS CONTRACT THAT THE INDEMNITY PROVIDED FOR HEREIN IS AN INDEMNITY EXTENDED BY CONSTRUCTION MANAGER TO INDEMNIFY AND PROTECT TOWN FROM THE CONSEQUENCES OF THE CONSTRUCTION MANAGER'S AS WELL AS THE TOWN'S NEGLIGENCE, WHETHER SUCH NEGLIGENCE IS THE SOLE OR PARTIAL CAUSE OF ANY SUCH INJURY, DEATH, OR DAMAGE.

The provisions of this indemnification are solely for the benefit of the parties hereto and not intended to create or grant any rights, contractual or otherwise, to any other person or entity.

7.11.2 The Construction Manager will secure and maintain contractual liability insurance to cover this indemnification agreement that will be primary and non-contributory as to any insurance maintained by the Town for its own benefit, including self-insurance. In addition, Construction Manager shall obtain and file with Town a standard form Certificate of Insurance evidencing the required coverage.

7.11.3 In claims against any person or entity indemnified under this Paragraph 7.11 by an employee of the Construction Manager, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under this Paragraph 7.11 shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for the Construction Manager or a Subcontractor under workers' compensation acts, disability benefit acts or other employee benefit acts.

## 7.12 NONDISCRIMINATION

The Construction Manager shall not discriminate in any way against any person, employee or job applicant on the basis of race, color, creed, national origin, religion, age, sex, or disability where reasonable accommodations can be effected to enable the person to perform the essential functions of the job. The Construction Manager shall further ensure that the foregoing nondiscrimination requirement shall be made a part and requirement of each subcontract on this Project.

## 7.13 PREVAILING WAGE RATES

The Construction Manager shall comply in all respects with all requirements imposed by any laws, ordinances or resolutions applicable to the Project with regard to the minimum prevailing wage rates for all classes of employees, laborers, subcontractors, mechanics, workmen and persons furnishing labor and services to the Project. The Town has adopted a Prevailing Wage Rate Schedule, available to the Construction Manager by request (or attached to this contract as a part of the exhibits), which specifies the classes and wage rates to be paid to all persons. The Construction Manager shall pay not less than the minimum wage rates established thereby for each class, craft or type of labor, workman, or mechanic employed in the execution of the Contract. The failure of the Construction Manager to comply with this requirement shall result in the forfeiture to the Town of a sum of not less than Sixty Dollars (\$60.00) for each person per day, or portion thereof, that such person is paid less than the prevailing rate. Upon request by the Town, Construction Manager shall make available for inspection and copying its books and records, including but not limited to its payroll records, account information and other documents as may be required by the Town to verify compliance with this provision.

## 7.14 JOB SITE SAFETY PRECAUTIONS

7.14.1 The Construction Manager shall at all times exercise reasonable precautions for the safety of its employees, laborers, subcontractors, mechanics, workmen and others on and near the jobsite and shall comply with all laws, ordinances, regulations, and standards of federal, state and local safety laws and regulations. The Construction Manager shall provide such machinery guards, safe walkways, ladders, bridges, and other safety devices as may be necessary or appropriate to insure a safe and secure jobsite and shall require its subcontractors to comply with this requirement. The Construction Manager shall immediately comply with any and all safety requirements imposed by the Project Architect during the progress of the Work.



## **7.15 WARNING DEVICES AND BARRICADES**

The Construction Manager shall furnish and maintain such warning devices, barricades, lights, signs, pavement markings, and other devices as may be necessary or appropriate or required by the Project Architect to protect persons or property in, near or adjacent to the jobsite. No separate compensation shall be paid to the Construction Manager for such measures. Where the Work is being conducted in, upon or near streets, alleys, sidewalks, or other rights-of-way, the Construction Manager shall insure the placement, maintenance and operation of any and all such warning devices as may be required by the Town and shall do so until no longer required by the Town. Such devices shall be in compliance with and conform to the manual and specifications for the uniform system of traffic control devices adopted by the Texas Department of Transportation.

## **7.16 PROTECTION OF UTILITIES AND OTHER CONTRACTORS**

7.16.1 The Construction Manager shall use best efforts to leave undisturbed and uninterrupted all utilities and utility services provided to the jobsite or which presently exists at, above or beneath the location where the Work is to be performed. In the event that any utility or utility service is disturbed or damaged during the progress of the Work, the Construction Manager shall forthwith repair, remedy or restore the utility at Construction Manager's sole expense. The Construction Manager shall coordinate any utility conflicts with the owner of the utility and no extension of time will be requested or given if adequate coordination is not provided by Construction Manager.

7.16.2 The Construction Manager understands and acknowledges that other contractors of the Town or of other entities may be present at the jobsite performing other work unrelated to the Project. The Construction Manager shall use best efforts to work around other contractors without impeding the work of others while still adhering to the scheduled completion date. In the event that the Construction Manager's work is or may be delayed by any other person, the Construction Manager shall immediately give notice thereof to the Project Architect and shall request a written Change Order in accordance with the procedures set forth by this Contract. The Construction Manager's failure to provide such notice and to request such Change Order shall constitute a waiver of any and all claims associated therewith.

## **ARTICLE VIII CONTRACT ADMINISTRATION**

### **8.1 THE PROJECT ARCHITECT**

8.1.1 The Project Architect may be an employee of the Town or may be retained by the Town as an independent

contractor but, in either event, the Project Architect's duties and authority shall be as set forth hereinafter. The Construction Manager understands and agrees that it shall abide by the decisions and instructions of the Project Architect notwithstanding the contractual relationship between the Town and Project Architect, the title of Contract Administrator, or the fact that the Project Architect may be an employee of the Town.

In the event the Town should find it necessary or convenient to replace the Project Architect, the Town shall retain a replacement Project Architect and the status of the replacement Project Architect shall be that of the former Project Architect.

### **8.2 PROJECT ARCHITECT'S ADMINISTRATION**

8.2.1 The Project Architect, unless otherwise directed by the Town in writing, will perform those duties and discharge those responsibilities allocated to the Project Architect as set forth in this Contract.

8.2.2 The Town and the Construction Manager shall communicate with each other in the first instance through the Project Architect.

8.2.3 The Project Architect shall be the initial interpreter of the requirements of the drawings and specifications and the judge of the performance thereunder by the Construction Manager. The Project Architect shall render written or graphic interpretations necessary for the proper execution or progress of the Work with reasonable promptness on request of the Construction Manager.

8.2.4 The Project Architect will review the Construction Manager's Applications for Payment and will certify to the Town for payment to the Construction Manager, those amounts then due the Construction Manager as provided in the Contract.

8.2.5 The Project Architect shall have authority to reject Work which is defective or does not conform to the requirements of this Contract. If the Project Architect deems it necessary or advisable, the Project Architect shall have authority to require additional inspection or testing of the Work for compliance with Contract requirements.

8.2.6 The Project Architect will review and approve, or take other appropriate action as necessary, concerning the Construction Manager's submittals including Shop Drawings, Drawings, Plans and Specifications, Product Data and Samples. Such review, approval or other action shall be for the sole purpose of determining conformance with the design concept and information given through the Contract Documents.

8.2.7 The Project Architect will prepare Change Orders and may authorize minor changes in the Work by Field Order as provided elsewhere herein.

8.2.8 The Project Architect shall, upon written request from the Construction Manager, conduct inspections to determine the date of Substantial Completion and the date of final completion, will receive and forward to the Town for the Town's review and records, written warranties and related documents required by this Contract and will issue a final Certificate for Payment upon compliance with the requirements of this Contract.

8.2.9 The Project Architect's decisions in matters relating to aesthetic effect shall be final if consistent with the intent of this Contract.

### **8.3 CLAIMS BY THE CONSTRUCTION MANAGER**

8.3.1 The Project Architect shall determine all claims and matters in dispute between the Construction Manager and Town with regard to the execution, progress, or sufficiency of the Work or the interpretation of the Contract Documents, including but not limited to the plans and specifications. Any dispute shall be submitted in writing to the Project Architect within seven (7) days of the event or occurrence or the first appearance of the condition giving rise to the claim or dispute and the Project Architect shall render a written decision within a reasonable time thereafter. The Project Architect's decisions shall be final and binding on the parties. In the event that either party objects to the Project Architect's determination as to any submitted dispute, that party shall submit a written objection to the Project Architect and the opposing party within ten (10) days of receipt of the Project Architect's written determination in order to preserve the objection. Failure to so object shall constitute a waiver of the objection for all purposes.

8.3.2 Pending final resolution of any claim of the Construction Manager, the Construction Manager shall diligently proceed with performance of the Contract and the Work and the Town shall continue to make payments to the Construction Manager in accordance with the Contract.

8.3.3 CLAIMS FOR CONCEALED, LATENT OR UNKNOWN CONDITIONS - The Construction Manager expressly represents that it has been provided with an adequate opportunity to inspect the Project site and thoroughly review the Contract Documents and plans and specifications prior to submission of its GMP Proposal and the Town's acceptance of the GMP Proposal. Subject to the conditions hereof, Construction Manager assumes full responsibility and risk for any concealed, latent or unknown condition which may affect the Work. No claims for extra work or additional compensation shall be made by Construction Manager in connection with

concealed, latent or unknown conditions except as expressly provided herein. Should concealed, latent or unknown conditions encountered in the performance of the Work (a) below the surface of the ground or (b) in an existing structure be at variance with the conditions indicated by this Contract, or should unknown conditions of an unusual nature differing materially from those ordinarily encountered in the area and generally recognized as inherent in Work of the character provided for in this Contract, be encountered, the Contract Price shall be equitably adjusted by Change Order upon the written notice and claim by either party made within seven (7) days after the first observance of the condition. As a condition precedent to the Town having any liability to the Construction Manager for concealed or unknown conditions, the Construction Manager must give the Town and the Project Architect written notice of, and an opportunity to observe, the condition prior to disturbing it. The failure by the Construction Manager to make the written notice and claim as provided in this Subparagraph shall constitute a waiver by the Construction Manager of any claim arising out of or relating to such concealed, latent or unknown condition and the Construction Manager thereby assumes all risks and additional costs associated therewith.

### **8.4 ADDITIONAL WORK**

8.4.1 The Construction Manager shall not claim, request or demand any sum from the Town for Additional Work or for additional costs, and hereby waives all such claims, requests and demands and any right to assert same, unless the conditions of this subparagraph are strictly complied with. "Additional Work" is defined herein to mean any labor, service, materials, equipment, supplies or charges that are directly or indirectly related to the Work, the Project or the Project site, that is not necessarily or fairly required or implied by the Contract Documents.

8.4.2 The parties acknowledge and agree that there shall be no payment made by the Town to the Construction Manager without a written agreement (either a separate contract or a written Change Order) signed by the parties. Should the Construction Manager perform Additional Work or be requested to perform Additional Work by the Project Architect or Town, it shall be the Construction Manager's obligation and duty to first apply for and obtain a written Change Order, approved by the Project Architect and executed by the Town. The Construction Manager's failure to obtain a written, signed Change Order prior to commencement of Additional Work shall constitute a complete and final waiver of any right for compensation for the Additional Work.

### **8.5 CLAIMS FOR ADDITIONAL COSTS OR TIME; CONTRACT PRICE INCREASE**

8.5.1 If the Construction Manager wishes to make a claim for an increase in the Contract Price, as a condition precedent to any liability of the Town therefor, the Construction Manager shall give the Project Architect written notice of such claim within seven (7) days after the occurrence of the event, or the first appearance of the condition, giving rise to such claim. Such notice shall be given by the Construction Manager before proceeding to execute any additional or changed Work. The failure by the Construction Manager to give such notice and to give such notice prior to executing the Work shall constitute a waiver of any right to or claim for additional compensation.

8.5.2 In connection with any claim by the Construction Manager against the Town for compensation in excess of the Contract Price, any liability of the Town for the Construction Manager's costs shall be strictly limited to direct costs incurred by the Construction Manager and shall in no event include indirect costs or consequential damages of the Construction Manager. The Town shall not be liable to the Construction Manager for claims of third parties, including Subcontractors.

8.5.3 If the Construction Manager is delayed in progressing any task which at the time of the delay is then critical or which during the delay becomes critical, as the sole result of any act or neglect to act by the Town or someone acting in the Town's behalf, or by changes ordered in the Work, unusual delay in transportation, unusually adverse weather conditions not reasonably anticipated, fire or any causes beyond the Construction Manager's control, then the date for achieving Substantial Completion of the Work shall be extended upon the written notice and claim of the Construction Manager to the Town and the Project Architect, for such reasonable time as the Project Architect may determine. Any notice and claim for an extension of time by the Construction Manager shall be made not more than seven (7) days after the occurrence of the event or the first appearance of the condition giving rise to the claim and shall set forth in detail the Construction Manager's basis for requiring additional time in which to complete the Project. In the event the delay to the Construction Manager is a continuing one, only one notice and claim for additional time shall be necessary. If the Construction Manager fails to make such claim as required in this Subparagraph, any claim for an extension of time shall be waived. The procedures and remedies provided by this provision shall be the sole remedy of Construction Manager and Construction Manager shall not assert nor be entitled to any additional delays or damages associated therewith.

## **8.6 FIELD ORDERS**

8.6.1 The Project Architect shall have authority to order minor changes in the Work not involving a change

in the Contract Price or in Contract Time and not inconsistent with the intent of the Contract. Such changes shall be effected by Field Order and shall be binding upon the Construction Manager. The Construction Manager shall carry out such Field Orders promptly.

## **8.7 MEDIATION**

8.7.1 In the event that a dispute arises under the terms of this Contract, following an adverse determination by the Project Architect and proper preservation of the issue as required herein, the parties agree to submit to mediation. In such event, the parties shall agree to a designated person to serve as mediator and each party shall be responsible for payment of one-half of the total mediation fees. The parties shall submit the dispute to mediation as soon as practical and in no event later than one (1) year after the Project Architect's written decision on the matter. At least one designated representative of each party must attend and participate in good faith in an effort to resolve the matters in dispute.

8.7.2 In no event shall the foregoing provision justify or authorize any delay in the progress of the Work; the parties shall abide by the decision of the Project Architect in accomplishing the timely completion of the Project.

## **ARTICLE IX SUBCONTRACTORS**

### **9.1 DEFINITION**

9.1.1 A Subcontractor is 1) a person or entity that has a direct contract with the Construction Manager to perform a portion of the Work or 2) a person or entity selected by the Construction Manager with the approval of the Town following compliance with competitive bidding or authorized procurement methods, that may be in privity with the Town or Construction Manager, acting as the Town's representative, and managed, supervised or directed by the Construction Manager.

### **9.2 AWARD OF SUBCONTRACTS**

9.2.1 Upon submission of its GMP Proposal, the Construction Manager shall furnish the Town, in writing, the names of persons or entities proposed by the Construction Manager to act as a Subcontractor on the Project. The Town shall promptly reply to the Construction Manager, in writing, stating any objections the Town may have to such proposed subcontractor. The Construction Manager shall not enter into a subcontract with a proposed Subcontractor with reference to whom the Town has made timely objection. The Construction Manager shall not be required to subcontract with any party to whom the Construction Manager has objection.

9.2.2 All subcontracts shall afford the Construction Manager rights against the Subcontractor which correspond to those rights afforded to the Town against the Construction Manager herein, including those rights afforded to the Town by Subparagraph 12.2.1 below. All subcontracts shall incorporate by reference the provisions hereof and shall provide that no claims, causes or demands shall be made by any Subcontractor against the Town.

9.2.3 The Construction Manager shall indemnify, defend and hold harmless the Town from and against any and all claims, demands, causes of action, damage, and liability asserted or made against the Town by or on behalf of any Subcontractor, regardless of whether the Subcontractor is in privity with the Town.

## **ARTICLE X CHANGES IN THE WORK**

### **10.1 CHANGES PERMITTED**

10.1.1 Changes in the Work within the general scope of this Contract, consisting of additions, deletions, revisions, or any combination thereof, may be ordered without invalidating this Contract, by Change Order or by Field Order.

10.1.2 Changes in the Work shall be performed under applicable provisions of this Contract and the Construction Manager shall proceed promptly with such changes.

### **10.2 CHANGE ORDER DEFINED**

10.2.1 Change Order shall mean a written order to the Construction Manager executed by the Town and the Project Architect, issued after execution of this Contract, authorizing and directing a change in the Work or an adjustment in the GMP or the Contract Time, or any combination thereof. The GMP and the Contract Time may be changed only by written Change Order.

### **10.3 CHANGES IN THE CONTRACT PRICE**

10.3.1 Any change in the GMP resulting from a Change Order shall be determined as follows: (a) by mutual agreement between the Town and the Construction Manager as evidenced by (1) the change in the GMP being set forth in the Change Order, (2) such change in the GMP, together with any conditions or requirements related thereto, being initialed by both parties, and (3) the Construction Manager's execution of the Change Order, or (b) if no mutual agreement occurs between the Town and the Construction Manager, then, as provided in Subparagraph 10.3.2 below.

10.3.2 If no mutual agreement occurs between the Town and the Construction Manager as contemplated in Subparagraph 10.3.1 above, the change in the GMP, if any, shall then be determined by the Project Architect on the basis of the reasonable expenditures or savings of those performing, deleting or revising the Work attributable to the change, including, in the case of an increase or decrease in the GMP, a reasonable allowance for direct job site overhead and profit. In such case, the Construction Manager shall present, in such form and with such content as the Town or the Project Architect require, an itemized accounting of such expenditures or savings, plus appropriate supporting data for inclusion in a Change Order.

10.3.3 If unit prices are provided in the Contract, and if the quantities contemplated are so changed in a proposed Change Order that application of such unit prices to the quantities of Work proposed will cause substantial inequity to the Town or to the Construction Manager, the applicable unit prices shall be equitably adjusted.

### **10.4 MINOR CHANGES**

10.4.1 The Project Architect shall have authority to order minor changes in the Work not involving a change in the GMP or an extension of the Contract Time and not inconsistent with the intent of this Contract. Such minor changes shall be made by written Field Order and shall be binding upon the Town and the Construction Manager. The Construction Manager shall promptly carry out such written Field Orders.

### **10.5 EFFECT OF EXECUTED CHANGE ORDER**

10.5.1 The execution of a Change Order by the Construction Manager shall constitute conclusive evidence of the Construction Manager's agreement to the ordered changes in the Work, this Contract as thus amended, the GMP and the Contract Time. The Construction Manager, by executing the Change Order, waives and forever releases any claim against the Town for additional time or compensation for matters relating to or arising out of or resulting from the Work included within or affected by the executed Change Order.

### **10.6 NOTICE TO SURETY; CONSENT**

10.6.1 The Construction Manager shall notify and obtain the consent and approval of the Construction Manager's surety with reference to all Change Orders if such notice, consent or approval are required by the Construction Manager's surety or by law. The Construction Manager's execution of the Change Order shall constitute the Construction Manager's warranty to the Town that the surety has been notified of and consents to, such Change Order and the surety shall be

conclusively deemed to have been notified of such Change Order and to have expressly consented thereto.

#### **ARTICLE XI**

#### **UNCOVERING AND CORRECTING WORK**

##### **11.1 UNCOVERING WORK**

11.1.1 If any of the Work is covered contrary to the Project Architect's request or to any provisions of this Contract, it shall, if required by the Project Architect or the Town, be uncovered for the Project Architect's inspection and shall be properly replaced at the Construction Manager's expense without change in the Contract Time or GMP.

11.1.2 If any of the Work is covered in a manner consistent with the Project Architect's request or the provisions of this Contract, it shall, if required by the Project Architect or Town, be uncovered for the Project Architect's inspection. If such Work conforms strictly to this Contract, costs of uncovering and proper replacement shall by Change Order be charged to the Town. If such Work does not strictly conform to this Contract, the Construction Manager shall pay the costs of uncovering and proper replacement.

##### **11.2 CORRECTING WORK**

11.2.1 The Construction Manager shall immediately proceed to correct Work rejected by the Project Architect as defective or failing to conform to this Contract. The Construction Manager shall pay all costs and expenses associated with correcting such rejected Work, including any additional testing and inspections, and reimbursement to the Town for the Project Architect's services and expenses made necessary thereby.

11.2.2 If within two (2) years after Substantial Completion of the Work any of the Work is found to be defective or not in accordance with this Contract, the Construction Manager shall correct it promptly upon receipt of written notice from the Town. This obligation shall survive final payment by the Town and termination of this Contract. With respect to Work first performed and completed after Substantial Completion, this obligation to specifically correct defective and nonconforming Work shall be extended by the period of time which elapses between Substantial Completion and completion of the subject Work.

11.2.3 Nothing contained in this Paragraph 11.2 shall establish any period of limitation with respect to other obligations which the Construction Manager has under this Contract. The two-year time period in Subparagraph 11.2.2 relates only to the duty of the Construction Manager to specifically correct the Work.

##### **11.3 TOWN MAY ACCEPT DEFECTIVE OR NONCONFORMING WORK**

11.3.1 If the Town chooses to accept defective or nonconforming Work, the Town may do so at its sole discretion. In such event, the GMP shall be reduced by the greater of (a) the reasonable cost of removing and correcting the defective or nonconforming Work, and (b) the difference between the fair market value of the Project as constructed and the fair market value of the Project had it not been constructed in such a manner as to include defective or nonconforming Work. If the remaining portion of the unpaid GMP, if any, is insufficient to compensate the Town for its acceptance of defective or nonconforming Work, the Construction Manager shall, upon written demand from the Town, pay the Town such remaining compensation for accepting defective or nonconforming Work.

#### **ARTICLE XII CONTRACT DEFAULT AND TERMINATION**

##### **12.1 TERMINATION BY THE CONSTRUCTION MANAGER**

12.1.1 If the Work is stopped for a period of ninety (90) days by an order of any court or other public authority, or as a result of an act of the Government, through no fault of the Construction Manager or any person or entity working directly or indirectly for the Construction Manager, the Construction Manager may, upon fifteen (15) days' written notice to the Town and the Project Architect, terminate performance under this Contract and recover from the Town payment for the actual reasonable expenditures of the Construction Manager (as limited in Subparagraph 10.3.2 above) for all Work executed and for materials, equipment, tools, construction equipment and machinery actually purchased or rented solely for the Work, less any salvage value of any such items.

12.1.2 If the Town shall persistently or repeatedly fail to perform any material obligation to the Construction Manager for a period of fifteen (15) days after receiving written notice from the Construction Manager of its intent to terminate hereunder, the Town shall have fifteen (15) days to remedy its failure and if not so cured, the Construction Manager may terminate performance under this Contract by written notice to the Project Architect and the Town. In such event, the Construction Manager shall be entitled to recover from the Town as though the Town had terminated the Construction Manager's performance under this Contract for convenience pursuant to Subparagraph 12.2.1 hereunder.

##### **12.2 TERMINATION BY THE TOWN**

###### **12.2.1 FOR CONVENIENCE**

12.2.1.1 The Town may for any reason whatsoever terminate performance under this Contract by the Construction Manager for convenience. The Town shall give written notice of such termination to the Construction Manager specifying when termination becomes effective.

12.2.1.2 The Construction Manager shall incur no further obligations in connection with the Work and the Construction Manager shall stop Work when such termination becomes effective. The Construction Manager shall also terminate outstanding orders and subcontracts. The Construction Manager shall settle the liabilities and claims arising out of the termination of subcontracts and orders. The Town may direct the Construction Manager to assign the Construction Manager's right, title and interest under terminated orders or subcontracts to the Town or its designee.

12.2.1.3 The Construction Manager shall transfer title and deliver to the Town such completed or partially completed Work and materials, equipment, parts, fixtures, information and Contract rights as the Construction Manager has.

12.2.1.4 (a) The Construction Manager shall submit a termination claim to the Town and the Project Architect specifying the amounts due because of the termination for convenience together with costs, pricing or other data required by the Project Architect. If the Construction Manager fails to file a termination claim within one (1) year from the effective date of termination, the Town shall pay the Construction Manager, an amount derived in accordance with subparagraph (c) below.

(b) The Town and the Construction Manager may agree to the compensation, if any, due to the Construction Manager hereunder.

(c) Absent agreement to the amount due to the Construction Manager, the Town shall pay the Construction Manager the following amounts:

(i) Contract prices for labor, materials, equipment and other services accepted under this Contract;

(ii) Reasonable costs incurred in preparing to perform and in performing the terminated portion of the Work, and in terminating the Construction Manager's performance, plus a fair and reasonable allowance for overhead and profit thereon (such profit shall not include anticipated profit or consequential damages), provided however, that if it appears that the Construction Manager would have not profited or would have sustained a loss if the entire Contract would have been completed, no profit shall be allowed or included and the amount of

compensation shall be reduced to reflect the anticipated rate of loss, if any;

(iii) Reasonable costs of settling and paying claims arising out of the termination of subcontracts or orders pursuant to Subparagraph 12.2.1.2 of this Paragraph. These costs shall not include amounts paid in accordance with other provisions hereof.

12.2.1.5 The total sum to be paid the Construction Manager under this Subparagraph 12.2.1 shall not exceed the GMP, as properly by amounts withheld by the Town and reduced by the amount of payments otherwise made and shall in no event include duplication of payment.

## 12.2.2 FOR CAUSE

12.2.2.1 The following constitute grounds for termination of this Contract by the Town:

(a) the Construction Manager's failure or refusal to prosecute the Work in a timely manner;

(b) The Construction Manager abandons the jobsite and fails to resume work within five (5) days of written notice thereof by the Town;

(c) the Construction Manager fails to meet CPM Schedule milestones or comply with approved construction schedules;

(d) the Construction Manager fails to grant or allow access to the jobsite by the Town or Project Architect;

(e) the Construction Manager fails to supply sufficient properly skilled workers, supervisory personnel or proper equipment or materials;

(f) the Construction Manager incorporates or uses defective, substandard or previously used materials or equipment in the Project;

(g) the Construction Manager fails to make prompt payment to Subcontractors or for materials, equipment or labor;

(h) the Construction Manager persistently disregards laws, ordinances, rules, regulations or orders of any public authority having jurisdiction; or,

(i) the Construction Manager is otherwise guilty of a violation of a material provision of this Contract.

In the event of the occurrence of any one or more of the above events, the Town may by written notice to the Construction Manager, without prejudice to any other right or remedy, terminate the employment of the Construction Manager, exclude the Construction

Manager from the job site, and take possession of the site and of all materials, equipment, tools, construction equipment and machinery thereon owned by the Construction Manager and may finish the Work by whatever methods it may deem expedient. In such case, the Construction Manager shall not be entitled to receive any further payment until the Work is finished.

12.2.2.2 If the unpaid balance of the Contract Price does not exceed the cost of finishing the work, including compensation for the Project Architect's additional services and expenses made necessary thereby, such difference shall be paid by the Construction Manager to the Town. This obligation for payment shall survive the termination of the Contract.

12.2.2.3 In the event the employment of the Construction Manager is terminated by the Town for cause pursuant to Subparagraph 12.2.2 and it is subsequently determined by a court of competent jurisdiction that such termination was without cause, such termination shall thereupon be deemed a Termination for Convenience under Subparagraph 12.2.1 and the provisions of Subparagraph 12.2.1 shall apply.

**12.3 USE OF THIRD-PARTY OVERSIGHT OR CONSTRUCTION MANAGER**

12.3.1 Should the Town allow the Construction Manager to continue its performance of Work notwithstanding an event of default specified in Subparagraph 12.2.2.1, or should there be an imminent potential of default, the Town, at its sole option and within its sole discretion, may retain a third-party construction manager to document the events of default and oversee further progress of the Work. The use of a third-party construction manager shall not prevent the Town from declaring the Construction Manager to be in default and the Town may, at its sole option and within its sole discretion, terminate the Contract at any time. Should the Town retain a third-party construction manager, the costs thereof shall be withheld from any amounts due Construction Manager. The Town's exercise of this option shall be without prejudice to any other right or remedy available to the Town by law or under this Contract.

**ARTICLE XIII  
INSURANCE**

**13.1 CONSTRUCTION MANAGER SHALL MAINTAIN INSURANCE**

13.1.1 The Construction Manager at its own expense shall purchase, maintain and keep in force during the life of the Contract, adequate insurance that will protect the Construction Manager and/or any Additional Insured from claims which may arise out of or result from

operations under the Contract. The insurance required shall provide adequate protections from all claims, whether such operations be by the Construction Manager or by any Additional Insured or by any Subcontractor or by anyone directly or indirectly employed by any of them, or by anyone whose acts of any of them may be liable and from any special hazards, such as blasting, which may be encountered in the performance of the Contract in the minimum amounts listed below in Paragraph 13.2.1.

13.1.2 The Construction Manager shall not commence work on any Contract in the Town until the Construction Manager has obtained all the insurance required under this paragraph and such insurance has been approved by the Town.

**13.2 TYPES AND AMOUNTS OF CONSTRUCTION MANAGER'S INSURANCE**

13.2.1. The Construction Manager shall furnish and maintain during the life of the contract adequate Worker's Compensation and Commercial General Liability (Public) Insurance in such amounts as follows:

<u>Type of Insurance</u>	<u>Coverage Amount</u>
Worker's Compensation	As set forth in the Worker's Compensation Act.
Commercial General	\$1,000,000 Each Accident/Occurrence.
Liability (Public)	\$1,000,000 Aggregate, \$1,000,000 Products & Completed Operations Aggregate.
Town's Protective Liability Insurance	\$1,000,000 aggregate, \$1,000,000 per occurrence,
Excess/Umbrella Insurance	\$1,000,000 per occurrence with drop down coverage
Endorsement CG 2503	Amendment Aggregate Limit of Insurance per Project or Town's and Contractor's Protective Liability Insurance for the Project.
Builder's Risk Insurance	\$1,000,000 Aggregate, \$1,000,000 per occurrence
Automobile Liability	\$1,000,000 Combined single limit per occurrence.

### 13.3 ADDITIONAL INSURED

13.3.1 The Town and the Project Architect shall be named as an additional insured on the Commercial General Liability (Public), Town's Protective Liability, and Excess/Umbrella Liability Insurance Policies furnished by the Construction Manager.

### 13.4 WRITTEN NOTIFICATION

13.4.1 Each insurance policy shall contain a provision requiring that thirty (30) days prior to expiration, cancellation, non-renewal or any material change in coverage, a notice there of shall be given by certified mail to the Town Manager, Town of Copper Canyon, Texas.

### 13.5 PREMIUMS AND ASSESSMENTS; SUBROGATION

13.5.1 Companies issuing the insurance policies shall have no recourse against the Town for payment of any premiums or assessments for any deductibles which are at the sole responsibility and risk of the Construction Manager. Insurance Companies shall have no right of subrogation against the Town or the Project Architect.

### 13.6 CERTIFICATE OF INSURANCE

13.6.1 Proof that the insurance is in force shall be furnished to the Town on Standard Certificate of Insurance Forms. In the event any insurance policy shown on the Certificate of Insurance has an expiration date that is prior to the completion and final acceptance of the project by the Town, the Construction Manager shall furnish the Town proof of identical continued coverage no later than thirty(30) days prior to the expiration date shown on the Certificate of Insurance.

### 13.7 PRIMARY COVERAGE

13.7.1 The coverages provided herein shall be primary and noncontributory with any other insurance maintained by the Town, for its benefit, including self-insurance.

### 13.8 WORKER'S COMPENSATION INSURANCE COVERAGE

13.8.1 The Construction Manager shall:

(1) provide coverage for its employees providing services on a project, for the duration of the project based on proper reporting of classification codes and payroll amounts and filing of any coverage agreements;

(2) provide a certificate of coverage showing workers' compensation coverage to the Town prior to beginning work on the project;

(3) provide the Town prior to the end of the coverage period, a new certificate of coverage showing extension of coverage, if the coverage period shown on the

Construction Manager's current certificate of coverage ends during the duration of the project;

(4) obtain from each person providing services on a project, and provide to the Town:

(i) a certificate of coverage, prior to that person beginning work on the project, so the Town will have on file certificates of coverage showing coverage for all persons providing services on the project; and

(ii) no later than seven days after receipt by the Construction Manager, a new certificate of coverage showing extension of coverage, if the coverage period shown on the current certificate of coverage ends during the duration of the Project;

(5) retain all required certificates of coverage on file for the duration of the project and for one year thereafter;

(6) notify the Town in writing by certified mail or personal delivery, within 10 days after the Construction Manager knew or should have known, of any change that materially affects the provision of coverage of any person providing services on the project;

(7) post a notice on each project site informing all persons providing services on the project that they are required to be covered and stating how a person may verify current coverage and report failure to provide coverage. This notice shall comply with the requirements established by the Division of Workers Compensation of the Texas Department of Insurance, or its successor agency.

and

(8) contractually require each Subcontractor and person with whom it contracts to provide services on a project, to:

(i) provide coverage based on proper reporting of classification codes and payroll amounts and filing of any coverage agreements for all of its employees providing services on the project, for the duration of the project;

(ii) provide a certificate of coverage to the Construction Manager prior to that person beginning work on the project;

(iii) provide the Construction Manager, prior to the end of the coverage period, a new certificate of coverage showing extension of coverage, if the coverage period shown on the current certificate of coverage ends during the duration of the project;



(iv) obtain from each other person with whom it contracts, and provide to the Construction Manager:

(A) a certificate of coverage, prior to the other person beginning work on the project; and

(B) prior to the end of the coverage period, a new certificate of coverage showing extension of the coverage period, if the coverage period shown on the current certificate of coverage ends during the duration of the project;

(v) retain all required certificates of coverage on file for the duration of the project and for one year thereafter;

(vi) notify the Town in writing by certified mail or personal delivery, within 10 days after the person knew or should have known, of any change that materially affects the provision of coverage of any person providing services on the project; and

(vii) contractually require each other person with whom it contracts, to perform as required by subparagraphs (i) - (v) of this paragraph, with the certificate of coverage to be provided to the person for whom they are providing services.

#### **ARTICLE XIV MISCELLANEOUS**

##### **14.1 LAWS AND ORDINANCES**

14.1.1 The Construction Manager shall at all times and in all respects observe and comply with all federal, state and local laws, ordinances, and regulations applicable to the Project and Work. The Construction Manager shall further ensure that all Subcontractors observe and comply with said laws, ordinances and regulations.

##### **14.2 GOVERNING LAW**

14.2.1 The Contract shall be governed by the laws of the State of Texas. Exclusive venue for any causes of action arising under the terms or provisions of this Contract or the Work to be performed hereunder shall be in the state courts of Dallas County, Texas.

##### **14.3 SUCCESSORS AND ASSIGNS**

14.3.1 The Town and Construction Manager bind themselves, their successors, assigns and legal representatives to the other party hereto and to successors, assigns and legal representatives of such other party in respect to covenants, agreements and obligations contained in this Contract. The Construction Manager shall not assign this Contract without written consent of the Town.

##### **14.4 SURETY BONDS**

14.4.1 In addition to the Security Bond required by the Contract, the Construction Manager shall furnish separate performance and payment bonds to the Town, according to the requirements set out in the Contract and state statutes to guaranty full and faithful performance of the Contract by the Construction Manager and the full and final payment of all persons supplying labor or materials to the Project. Each bond required shall set forth a penal sum in an amount not less than the full Contract Price. Each bond furnished by the Construction Manager shall incorporate by reference the terms of this Contract as fully as though they were set forth verbatim in such bonds. In the event the GMP is adjusted by Change Order executed by the Construction Manager, the penal sum of both the performance bond and the payment bond shall be deemed increased by like amount. The performance and payment bonds furnished by the Construction Manager shall be in form suitable to the Town and shall be executed by a surety, or sureties, reasonably suitable to the Town and authorized to do business in the State of Texas.

14.4.2 The Construction Manager, upon acceptance of the GMP Proposal, and prior to commencement of the Work, shall furnish to the Town a two-year maintenance bond in the amount of one hundred percent (100%) of the Contract Price covering the guaranty and maintenance prescribed herein, written by an approved surety authorized and duly licensed to conduct business in the State of Texas. The cost of said maintenance bond shall be included in the GMP and shall be paid by the Construction Manager.

##### **14.5 FORCE MAJEURE**

14.5.1 As used herein, "force majeure" means an incident, situation, or act of a third party that is beyond a party's reasonable control such as an act of God, an act of the public enemy, strikes or other labor disturbances (other than strikes within such party's own labor force), hurricanes, earthquakes, fires, floods, epidemics, embargoes, war, and riots. The Construction Manager will not be liable or responsible for its failure to perform any obligation under this Contract because of an event of Force Majeure, provided, however, that the Construction Manager shall submit notice thereof to the Town and Project Architect within seven (7) days of such an event, obtains a written Change Order, signed by all parties, that allows an extension of the scheduled completion date, and identifies the specific causes and number of days in the Statement of Delay submitted with the next ensuing Application for Payment. Notwithstanding, if the Construction Manager's failure to perform continues for more than twenty (20) calendar days, the Town may at its option terminate this Agreement immediately and pursue such rights and remedies as may be allowed under Subparagraph 12.2.2 of this Contract. In no event shall

adverse market conditions or unavailability of materials, equipment or labor constitute an event of force majeure.

#### **14.6 IMMUNITIES; DEFENSES**

14.6.1 Nothing in this Contract shall be deemed to waive any immunity, sovereign, governmental, official, qualified or otherwise, from liability or suit, which the Town may have or assert, except as may be expressly provided by law, all such immunities being hereby expressly retained.

#### **14.7 NO RIGHTS IN THIRD PARTIES**

14.7.1 The indemnification provisions of this Contract and the rights and remedies afforded herein are solely for the benefit of the parties to this Contract. Nothing in this Contract is intended nor shall be construed to grant, create or confer any right, benefit, interest or cause of action in any person not a party to this Contract, or to the public in general.

#### **14.8 SEVERABILITY**

14.8.1 The provisions of this Contract are herein declared to be severable; in the event that any term, provision or part hereof is determined to be invalid, void or unenforceable, such determination shall not affect the validity or enforceability of the remaining terms, provisions and parts, and this Contract shall be read as if the invalid, void or unenforceable portion had not been included herein.

#### **14.9 AMENDMENTS; NO WAIVER**

14.9.1 This Contract may be amended by the parties only by a written agreement duly executed by both parties. The failure of the Town to object to any nonperformance or nonconforming work or to enforce any provision hereof shall in no event be regarded as or construed to be a waiver, release or modification of any term or provision in this Contract, nor shall such failure to object or enforce estop the Town from insisting on strict compliance with this Contract or from recovering damages, costs or expenses arising as a result of such nonperformance or nonconforming work.

#### **14.10 NOTICES**

14.10.1 All notices required by this Contract shall be in writing and presumed received three days after when deposited in the mail properly addressed to the other party or Project Architect at the address set forth herein or set forth in a written designation of change of address delivered to all parties and the Project Architect.

**14.11 Certificate of Interested Parties (TEC Form 1295).** For contracts that require Town Council approval

or that is for services that would require a person to register as a lobbyist under Chapter 305 of the Government Code, the Town may not accept or enter into a contract until it has received from the Construction Manager a completed and signed Texas Ethics Commission (TEC) Form 1295 complete with a certificate number assigned by the (TEC), pursuant to Texas Government Code § 2252.908 and the rules promulgated thereunder by the TEC. The Construction Manager understands that failure to provide said form complete with a certificate number assigned by the TEC may prohibit the Town from entering into the Contract.

Pursuant to the rules prescribed by the TEC, the TEC Form 1295 must be completed online through the TEC's website, assigned a certificate number, printed, signed and provided to the Town. The TEC Form 1295 may accompany the bid or may be submitted separately but must be provided to the Town prior to the award of the contract. Neither the Town nor its consultants have the ability to verify the information included in a TEC Form 1295, and neither have an obligation nor undertake responsibility for advising any potential Construction Manager with respect to the proper completion of the TEC Form 1295.

**14.12 Energy Boycott.** In accordance with Chapter 2274, Texas Government Code (Acts 2021, 87<sup>th</sup> Leg., S.B. 13), the Town may not enter into a contract with a company, excluding a sole proprietorship, with 10 or more full-time employees for goods or services valued at \$100,000 or more unless the contract contains a written verification from the company that the company: (1) does not boycott energy companies; and (2) will not boycott energy companies during the term of the contract. The signatory executing the Contract on behalf of Construction Manager verifies Construction Manager does not boycott energy companies and will not boycott energy companies during the term of the Contract. The foregoing verification is made solely to comply with Section 2274.002, Texas Government Code, and does not apply if the Town determines the requirements of Subsection 2274.002(b) are inconsistent with the Town's constitutional or statutory duties related to the issuance, incurrence or management of debt obligations or the deposit, custody, management, borrowing or investment of funds.

**14.13 Firearms.** In accordance with Chapter 2274, Texas Government Code (Acts 2021, 87<sup>th</sup> Leg., S.B. 19) the Town may not enter into a contract with a company, excluding a sole proprietorship, with 10 or more full-time employees for goods or services valued at \$100,000 or more unless the contract contains a written verification from the company that the company: (1) does not have a practice, policy, guidance, or directive that discriminates against a firearm entity or firearm trade association; and (2) will not discriminate during the term of the contract

against a firearm entity or firearm trade association. The signatory executing the Contract on behalf of Construction Manager verifies Construction Manager does not have a practice, policy, guidance, or directive that discriminates against a firearm entity or firearm trade association and will not discriminate during the term of the contract against a firearm entity or firearm trade association. The foregoing verification is made solely to comply with Section 2274.002, Texas Government Code, and does not apply if the Town contracts with a sole-source provider or if the Town does not receive any bids, if applicable, from a company that is able to provide the required verification.

**14.14 Critical Infrastructure.** In accordance with Chapter 2274, Texas Government Code, the Town may not enter into a contract or agreement with a company, excluding a sole proprietorship, with 10 or more full-time employees for goods or services valued at \$100,000 or more (1) if the company would be granted direct or remote access to or control of critical infrastructure in Texas, excluding access specifically allowed by the Town for product warranty and support purposes and (2) if the Town knows the company is (A) owned by or the a majority of stock or other ownership interest of the company is held or controlled by (i) individuals who are citizens of China, Iran, North Korea, Russia, or a designated country or (ii) a company or other entity, including a governmental entity, that is owned or controlled by citizens of or is directly controlled by the government of such countries, or (B) headquartered in such countries. The signatory executing the Contract on behalf of Construction Manager represents that neither Construction Manager nor any of its parent companies, wholly-owned subsidiaries, majority-owned subsidiaries, and other affiliates is a company of which the Town may not contract pursuant to Section 2274.0102, Texas Government Code. The foregoing verification is made solely to comply with Section 2274.0102, Texas Government Code.

**14.15 Anti-Boycott Israel Verification.** In accordance with Chapter 2270, Texas Government Code, the Town may not enter into a contract with a company, excluding a sole proprietorship, with 10 or more full-time employees for goods or services valued at \$100,000 or more unless the contract contains a written verification from the company that it: (1) does not boycott Israel; and (2) will not boycott Israel during the term of the contract.

The signatory executing the Contract on behalf of Construction Manager verifies that Construction Manager and its parent company, wholly-owned subsidiaries, majority-owned subsidiaries, and other affiliates, if any, do not boycott Israel and, to the extent the Contract is a contract for goods or services, will not boycott Israel during the term of the Contract. The foregoing verification is made solely to comply with

Section 2270.002, Texas Government Code, and to the extent such Section does not contravene applicable Federal law. As used in the foregoing verification, "boycott Israel" means refusing to deal with, terminating business activities with, or otherwise taking any action that is intended to penalize, inflict economic harm on, or limit commercial relations specifically with Israel, or with a person or entity doing business in Israel or in an Israeli-controlled territory, but does not include an action made for ordinary business purposes. The signatory understands "affiliate" to mean an entity that controls, is controlled by, or is under common control with the signatory and exists to make a profit. This section does not apply to a Construction Manager which is a sole proprietorship and/or which has less than 10 full-time employees. This section does not apply to a contract valued at less than \$100,000.

**14.16 Iran, Sudan, and Foreign Terrorist Organizations.** The signatory executing the Contract on behalf of Construction Manager represents that neither Construction Manager nor any of its parent company, wholly-owned subsidiaries, majority-owned subsidiaries, and other affiliates is a company identified on a list prepared and maintained by the Texas Comptroller of Public Accounts under Section 2252.153 or Section 2270.0201, Texas Government Code, and posted on any of the following pages of such officer's internet website:

<https://comptroller.texas.gov/purchasing/docs/sudan-list.pdf>,

<https://comptroller.texas.gov/purchasing/docs/iran-list.pdf>, or

<https://comptroller.texas.gov/purchasing/docs/fto-list.pdf>.

The foregoing representation is made solely to comply with Section 2252.152, Texas Government Code, and to the extent such Section does not contravene applicable federal law and excludes the entity and each of its parent company, wholly-owned subsidiaries, majority-owned subsidiaries, and other affiliates, if any, that the United States government has affirmatively declared to be excluded from its federal sanctions regime relating to Sudan or Iran or any federal sanctions regime relating to a foreign terrorist organization. The signatory understands "affiliate" to mean any entity that controls, is controlled by, or is under common control with the signatory and exists to make a profit.

[Signatures on following page]

CONSTRUCTION MANAGER

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

Steve Koehler d/b/a

The Koehler Company

Sole Proprietorship

ACCEPTED BY TOWN:

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

THE TOWN OF COPPER CANYON, TEXAS

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

Mayor Ron Robertson

The Town of Copper Canyon

400 Woodland Drive

Copper Canyon, Tx. 75077

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

**EXHIBIT A  
GUARANTEED MAXIMUM PRICE PROPOSAL**

The Construction Manager hereby submits to the Town of Copper Canyon, Texas, pursuant to the Construction Manager At Risk Contract, by and between the Town and Steve Koehler d/b/a The Koehler Company Sole Proprietorship, the Construction Manager, dated \_\_\_\_\_, 2024, (the "Contract"), a Guaranteed Maximum Price (GMP), as defined in the Contract, for the ~~hereinafter~~ defined Project, based on the Contract Documents (as defined by the Contract) developed for the Project, as follows:

1. The Guaranteed Maximum Price GMP) is: \$960,427.00.
  
2. A not-to exceed amount for the Construction Manager's Contingency for fast-tracked items, Special Allowances and Change Orders (any unused portion of this amount shall be retained by Town): \$30,000.00

The foregoing GMP is the Guaranteed Maximum Price for Final Completion of the Work, which we hereby guarantee to the Town.

**CONSTRUCTION MANAGER**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Steve Koehler d/b/a  
The Koehler Company  
Sole Proprietorship 214-957-7188  
5900 Windridge Lane  
Flower Mound TX 75028

**ACCEPTED BY TOWN:**

**THE TOWN OF COPPER CANYON, TEXAS**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Mayor Ron Robertson

The Town of Copper Canyon  
400 Woodland Drive  
Copper Canyon, Tx. 75077

