

CONSTRUCTION AGREEMENT

This Construction Agreement (this “Construction Agreement”) is made and entered into effective as of _____, 2018 (the “Effective Date”) by and between Houston First Corporation, a Texas local government corporation (“HFC”), as owner, and _____ (“Construction Manager”), as construction manager.

RECITALS

WHEREAS, on August 27, 2017, floodwater resulting from Hurricane Harvey inundated the basement of the Wortham Theater Center and filled the Theater District Parking Garages with millions of gallons of water, causing extensive damage and resulting in the closure of the facilities;

WHEREAS, to prevent further damage and deterioration, and address exigent conditions, HFC retained Gilbane Reconstruction Services, LLC to pump out standing water, removing debris, providing temporary ventilation, and performing other emergency mitigation services required to stabilize critical life-safety systems at the facilities;

WHEREAS, on _____, 2017, HFC awarded a Project Management Services contract to the Project Manager, being the highest ranked of the proposers responding to the October 5, 2017, request for proposals issued by HFC to identify a qualified project manager to act as owner’s representative to help control costs and provide consulting services to HFC, including independent cost analysis as needed, throughout the course of the Project;

WHEREAS, on _____, 2017, HFC awarded a Recovery Architectural Services contract to the Architect, being the highest ranked of the architectural firms having submitted their statement of qualifications in response to the October 27, 2017 request for qualifications issued by HFC to identify a qualified architectural firm to develop and generate design and construction documents pertaining to the Project including, in addition to phased architectural services, engineering services (structural, mechanical, electrical, plumbing, civil and acoustical), and specialty sub-consultants (parking systems, wayfinding, and theater design, including soundproofing and spring wood stage design);

WHEREAS, on November 8, 2017, at a duly convened and held meeting, the HFC Board of Directors authorized use of the construction manager-at-risk method in accordance with the provisions of Texas Government Code Chapter 2269, Subchapter F to restore the facilities to their pre-loss condition;

WHEREAS, substantive construction work with respect to the Project includes electrical, HVAC, building automation/control, wood stage erection, rough carpentry, masonry, millwork/finish carpentry, waterproofing/caulking, glass/mirrors, painting/wall covering, striping, elevators, drywall, plaster, tilework (ceramic, vinyl, stone and terrazzo), acoustical wall panels, and doors (including frames and hardware);

WHEREAS, Construction Manager further acknowledges that Construction Manager is not permitted to, and shall not, self-perform any of the Work in connection with the Project,

notwithstanding the provisions of Sections 2269.225(b) and 2269.257 of the Texas Government Code; and

WHEREAS, Construction Manager acknowledges that FEMA financial reimbursement assistance will be sought with respect to payments due by HFC under the Construction Documents.

AGREEMENTS

NOW, THEREFORE, in light of the foregoing recitals, which are incorporated herein by this reference, and in consideration of the mutual promises contained herein, the parties hereby agree as follows:

ARTICLE 1 GENERAL PROVISIONS

As used in this Construction Agreement, the following terms shall have the meanings assigned below:

“**Applicable Law**” shall mean all applicable federal, state and local laws, statutes, codes, ordinances, rules, regulations, and lawful orders of any governmental agency, authority, court, board, bureau, instrumentality, regulatory body, or other government entity, including without limitation executive orders and FEMA policies, procedures and directives.

“**Architect**” shall mean _____, the architectural and design services firm selected by HFC as the architect for the Project.

“**Component**” is a reference to either the Garage Project or the Wortham Project (as the context may require). The “**Components**” as used herein is a reference to both the Garage Project and the Wortham Project.

“**Construction Terms & Conditions**” means the Construction Terms & Conditions attached hereto as Schedule 1.

“**FEMA**” shall mean the Federal Emergency Management Agency.

“**FEMA Requirements**” means all rules, regulations, and requirements of FEMA with respect to the Work that must be complied with or adhered to in order to qualify payments due and payable by HFC under the Contract Documents for reimbursement by FEMA.

“**Garage Project**” shall mean the Component consisting of the planned construction project to repair damage to the Theater District Parking Garages stemming from Hurricane Harvey and restore the facilities to their pre-loss condition utilizing contemporary materials of like kind and quality, including all requisite phases of planning, design, and construction work.

“**Owner Supplied Materials**” means the equipment and other items described on Schedule 7 attached hereto.

"Pre-Construction Phase Period" means the period commencing on the Effective Date and ending on the date HFC issues a Notice to Proceed (defined hereafter).

"Project" shall mean the Garage Project and the Wortham Project, collectively and, as the context may require, each singularly.

"Project Manager" shall mean _____, the vendor selected by HFC to provide construction consulting services to HFC in connection with the Project and act as owner's representative to the extent set forth in the Contract Documents.

"Theater District Parking Garages" means the interconnected underground parking garages, totaling 3,369 spaces, spanning nearly six city blocks in the Houston Theater District known as Civic Center, Tranquility and Small Tranquility, color-coded respectively as green, yellow and blue.

"Wortham Project" shall mean the Component consisting of the planned construction project to repair damage to the Wortham Theater Center stemming from Hurricane Harvey and restore the facilities to their pre-loss condition utilizing contemporary materials of like kind and quality, including all requisite phases of planning, design, and construction work.

"Wortham Theater Center" shall mean the 437,500 square-foot performing arts facility having a street address of 500 Texas Ave., Houston, Texas 77002 and featuring two theaters, the 2,405-seat Alice and George Brown Theater and the 1,100-seat Lillie and Roy Cullen Theater.

§ 1.1 RELATIONSHIP OF PARTIES

Construction Manager accepts the relationship of mutual trust and confidence established with HFC by this Construction Agreement, and covenants with HFC to furnish Construction Manager's reasonable skill and judgment and to cooperate with Architect in furthering the interests of HFC. Construction Manager shall furnish construction administration and management services and use Construction Manager's best efforts to perform the Work in an expeditious and economical manner consistent with the interests of HFC. HFC shall endeavor to promote harmony and cooperation among HFC, Architect, Construction Manager and other persons or entities employed by HFC for the Project.

§ 1.2 CONSTRUCTION TERMS & CONDITIONS; CONTRACT DOCUMENTS; COMPONENTS; PUBLIC WORKS PROJECT

§1.2.1 Words with initial capital letters used but not defined in this Construction Agreement shall have the meaning ascribed to them in the Construction Terms & Conditions.

§1.2.2 For the convenience of the parties, HFC and Construction Manager intend and desire that this Construction Agreement and the other Contract Documents, including the Construction Terms & Conditions govern, collectively, the Garage Project and the Wortham Project.

§1.2.3 Notwithstanding the differences in scope of each and timing for construction of each, HFC and Construction Manager desire and intend that each Component collectively constitute the “Project” and the “Work” for purposes of Contract Documents.

§1.2.4 CONSTRUCTION MANAGER AND HFC ACKNOWLEDGE AND AGREE THAT THE WORK AND PROJECT CONSTITUTE AND SHALL FOR ALL PURPOSES BE CONSIDERED A PUBLIC WORKS PROJECT OF A MUNICIPALITY, INCLUDING CHAPTER 151 OF THE INSURANCE CODE.

ARTICLE 2 CONSTRUCTION MANAGER’S RESPONSIBILITIES

Construction Manager shall perform the services described in this Article with respect to each of the Components. The services to be provided under Sections 2.1 and 2.2 constitute the Preconstruction Phase services. If HFC and Construction Manager agree, after consultation with Architect, the Construction Phase with respect to any one or more of the Components may commence before the Preconstruction Phase is completed, in which case both phases will proceed concurrently. Construction Manager acknowledges that services performed under this Construction Agreement after the execution hereof shall also include Preconstruction Phase services and, with regard thereto, the compensation set forth in Article 4 hereof includes all fees, compensation and payments to Construction Manager for such Preconstruction Phase services.

§ 2.1 PRECONSTRUCTION PHASE

§2.1.1 Construction Manager shall provide a preliminary evaluation of the HFC’s program, schedule and construction budget requirements, each in terms of the other.

§2.1.2 CONSULTATION

Construction Manager with Architect shall jointly schedule and attend regular meetings with HFC. Construction Manager shall consult with HFC and Architect regarding site use and improvements and the selection of materials and equipment. Construction Manager shall provide recommendations consistent with the Project requirements to HFC and Architect on construction feasibility; availability of materials and actions designed to minimize adverse effects of labor or material shortages; time requirements for procurement, installation and construction completion; preliminary cost estimating; advice regarding design elements that materially impact cost; value engineering advice; and factors related to construction cost, including estimates of alternative designs or materials, preliminary budgets; life-cycle data, and possible cost reductions.

§2.1.3 PROJECT SCHEDULE

Attached hereto as **Schedule 2** is a preliminary schedule for the Work (the “Preliminary Schedule of the Work”), separately reflecting each of the Components, which has been approved by HFC, Construction Manager and Architect as of the date of this Construction Agreement. The Preliminary Schedule of the Work shall be updated from time to time by Construction Manager and each update shall be subject to approval of Architect and HFC (with each update, when so approved, then constituting an “Updated Preliminary Schedule of the Work”). The Preliminary Schedule of the Work shall reflect (and each Updated Preliminary Schedule of the Work shall

reflect) items or activities with regard to the Work which constitute critical path activities (each a “Critical Path Activity”) for each Component, in addition to other matters. Furthermore, each Updated Preliminary Schedule of the Work shall coordinate and integrate Construction Manager’s services, Architect’s services, other HFC consultants’ services (if any), and the HFC’s responsibilities and identify items that could affect the timely completion of any Component. Each Updated Preliminary Schedule of the Work shall also include the following: submission of a preliminary cost estimate of the Cost of the Work for each Component (each a “Cost Estimate”); components of the Work; times of commencement and completion required of each Subcontractor; and ordering and delivery of products, including those that must be ordered well in advance of construction.

The term “Schedule of Work” as used in the Contract Documents shall, with respect to each Component, mean the final Updated Preliminary Schedule of the Work delivered by Construction Manager, and approved by Architect and HFC, with the final submission and approval of, with respect to each Component, the applicable Component Cost of the Work Maximum Agreement (as defined below).

§2.1.4 PHASED CONSTRUCTION

§2.1.4.1 Construction Manager shall provide recommendations with regard to accelerated or fast-track scheduling, procurement, or phased construction. Construction Manager shall take into consideration cost reductions, cost information, constructability, provisions for temporary facilities and procurement and construction scheduling issues.

§2.1.5 PRELIMINARY COST ESTIMATES

§2.1.5.1 Based on the preliminary design and other design criteria prepared by Architect, Construction Manager shall prepare, from time to time upon request of HFC, Cost Estimates or the cost of program requirements for each of the Components using area, volume or similar conceptual estimating techniques for Architect’s review and HFC’s approval, and shall include the same in each Cost Estimate. If Architect or Construction Manager suggests alternative materials and systems, Construction Manager shall provide cost evaluations of those alternative materials and systems.

§2.1.5.2 As Architect progresses with the preparation of the Schematic Design, Design Development and Construction Documents Construction Manager shall update and refine the Cost Estimates at appropriate intervals agreed to by HFC, Architect and Construction Manager. Each such update shall be of increasing detail and refinement and allowing for the further development of the design until such time as, with respect to a Component, HFC and Construction Manager agree upon the Component Cost of the Work Maximum Agreement for such Component. Such estimates shall be provided for Architect’s review and HFC’s approval. Construction Manager shall inform HFC and Architect when Cost Estimates exceed the latest approved Project budget and make recommendations to HFC and Architect in writing for corrective action.

§2.1.6 SUBCONTRACTORS AND SUPPLIERS

Construction Manager shall seek to develop Subcontractor interest in the Project in accordance with Applicable Law and shall furnish to HFC and Architect for their information a list of possible Subcontractors, including suppliers who are to furnish materials or equipment fabricated to a

special design, from whom proposals will be requested for each principal portion of the Work. The receipt of such list shall not require HFC or Architect to investigate the qualifications of proposed Subcontractors or suppliers, nor shall it waive the right of HFC or Architect later to object to or reject any proposed subcontractor or supplier.

§2.1.7 LONG-LEAD-TIME ITEMS; OWNER SUPPLIED MATERIALS

§ 2.1.7.1 Construction Manager shall recommend to HFC and Architect a schedule for procurement of long-lead-time items which will constitute part of the Work as required to meet, with respect to each Component, the Preliminary Schedule of the Work for such Component. Subject to HFC's prior approval and taking into consideration any FEMA Requirements, Construction Manager shall expedite and coordinate the ordering and delivery of materials that must be ordered well in advance of construction. If HFC agrees to procure any items prior to the establishment of, with respect to a Component, the Component Cost of the Work Maximum Agreement with respect to such Component, then HFC shall procure the items on terms and conditions reasonably acceptable to Construction Manager (provided, that, the provisions of this sentence shall not apply to the Owner Supplied Items). Upon issuance of a Notice to Proceed with respect to a Component, HFC shall assign to Construction Manager all contracts and purchase orders entered into by HFC for purchase of long lead items applicable to such Component and Construction Manager shall assume such contracts and purchase orders, and accept responsibility for them as if the same had been procured by Construction Manager.

§ 2.7.1.2 HFC has heretofore purchased the Owner Supplied Materials. Construction Manager shall be obligated to use, in the performance of the Work, the Owner Supplied Materials. The costs of installation and incorporation of the Owner Supplied Materials into the Work shall constitute part of the Cost of the Work, but the costs incurred by HFC to purchase the Owner Supplied Materials shall not constitute part of the Cost of the Work. Upon issuance of a Notice to Proceed with respect to a Component, HFC shall assign (or cause to be assigned) to Construction Manager all contracts and purchase orders entered into by HFC for the Owner Supplied Materials (to the extent applicable to such Component) and Construction Manager shall assume such contracts and purchase orders, and accept responsibility for the Owner Supplied Materials, as if the same had been procured by Construction Manager.

§2.1.8 EXTENT OF RESPONSIBILITY

Construction Manager shall exercise reasonable care in preparing schedules and estimates. Construction Manager, however, does not warrant or guarantee estimates and schedules except as may be included as part of, with respect to a Component, the Component Cost of the Work Maximum Agreement with respect to such Component. It is not Construction Manager's responsibility to ascertain that the Drawings and Specifications are in accordance with applicable laws, statutes, ordinances, building codes, rules and regulations. However, if Construction Manager recognizes that portions of the Drawings and Specifications are at variance therewith, then Construction Manager shall promptly notify Architect and HFC in writing. The provisions of this Section 2.1.8 and Section 3.1.4 below shall not, however, release or relieve Construction Manager of any of its obligations or responsibilities under the Construction Terms & Conditions regarding the exercise of the Standard of Care and, to the extent of any conflict between the provisions of this Section 2.1.8 or said Section 3.1.4 and those set forth in the Construction Terms

& Conditions regarding the exercise of the Standard of Care, such terms and provisions of the Construction Terms & Conditions shall control.

§2.1.9 PREVAILING WAGE REQUIREMENT

Construction Manager shall comply with the governing statutes providing for labor classification of wage scales for each craft or type of laborer, worker, or mechanic providing labor at the Project site, which wage scales as in effect as of the date of execution hereof are set forth in *Exhibit B* attached hereto. Construction Manager warrants and represents that it has carefully examined the classifications for each craft or type of worker needed to execute the work and determined that such classifications include all necessary categories to perform the work. If Construction Manager believes that an additional classification for a particular craft or type of worker is necessary to perform work under the agreement, then Construction Manager shall make a written request to HFC to use an additional labor classification and specify the proposed new classification. If HFC decides that a new classification is necessary, then it will determine the appropriate prevailing wage rate for any resurveyed, amended, new, or additional craft or type of worker not covered. Such determination will be made by HFC in compliance with Applicable Law. Construction Manager shall submit to HFC and Project Manager with each Application for Payment certified copies of payrolls showing classifications and wages paid by Construction Manager, Subcontractors or suppliers for each employee under the Contract Documents for any day included in such month.

§2.2 COMPONENT COST OF THE WORK MAXIMUM, FINAL COMPONENT GUARANTEED MAXIMUM PRICE PROPOSAL, CONTRACT TIME, AND FINAL GUARANTEED MAXIMUM PRICE

§2.2.1 At a time to be mutually agreed upon, with respect to each Component, by HFC and Construction Manager and in consultation with Architect, Construction Manager shall, with respect to such Component and as part of the Preconstruction Phase Services, prepare and submit to HFC, the Architect and the Project Manager a maximum Cost of the Work proposal for such Component for HFC's review and consideration. The maximum Cost of the Work proposal shall set forth the following (each being a "Component Maximum Cost of the Work Proposal"): (A) Construction Manager's determination of the maximum amount of the Cost of the Work for such Component, including Construction Manager's Contingency defined and described in Section 2.2.4, (B) a proposed allocation of a portion of the General Conditions Amount (defined in Section 5.1.1 below; in no event shall the aggregate of the allocations of the General Conditions Amount exceed the sum set forth in Section 5.1.1 below), and the payment schedule with regard thereto, and (C) all of the other information and materials described in Section 2.2.3. At such time as Construction Manager and HFC have agreed upon, with respect to any Component, the maximum Cost of the Work for such Component (including the allocated portion of the General Conditions Amount and payment schedule therefor) and all of the other items described in Section 2.2.3 with respect to such Component, such agreement shall be set forth in a writing signed by Construction Manager and HFC, which writing shall constitute a Contract Document (herein a "Component Cost of the Work Maximum Agreement"), and shall set forth the agreement between HFC and Construction Manager with regard to (i) the final maximum amount of the Cost of the Work for such Component, (ii) the final schedule for performance and completion of the Work for such Component, (iii) the outside date by which HFC must issue the Notice to Proceed for such Component in order to preserve the Cost of the Work maximum set forth therein, (iv) the allocation

of the General Conditions Amount and proposed schedule for payment thereof, and (v) all of the other information set forth in Section 2.2.3.

At such time as Construction Manager and HFC have executed a Component Cost of the Work Maximum Agreement for the last of the Components, Construction Manager shall prepare a final guaranteed maximum price for the Work for HFC's review and acceptance. The final guaranteed maximum price shall be the sum of the following: (a) the Preconstruction Services Fee, (b) the General Conditions Amount, (c) Construction Manager's estimate of the Cost of the Work, including Construction Manager's Contingency, and (d) Construction Manager's Fee (defined below); provided, that, Construction Manager's estimate of the Cost of the Work, including Construction Manager's Contingency, may not exceed, the sum of the Cost of the Work contained in the Component Cost of the Work Maximum Agreements.

At such time as Construction Manager has prepared, and HFC has approved, the final guaranteed maximum price, such agreement shall be set forth in a writing signed by Construction Manager and HFC, which writing shall constitute a Contract Document (herein called the "Final Guaranteed Maximum Price Amendment") and shall set forth the agreement of HFC and Construction Manager with regard to the final guaranteed maximum price (such identified price therein being herein called the "Final Guaranteed Maximum Price"). A copy of such Final Guaranteed Maximum Price Amendment shall be provided to Architect and Project Manager. The Final Guaranteed Maximum Price Amendment shall set forth the agreed upon final guaranteed maximum price as determined in accordance with the foregoing.

Construction Manager shall meet with HFC, Project Manager and Architect to review the final guaranteed maximum price as calculated by the Construction Manager. In the event that HFC, Project Manager or Architect discover any inconsistencies or inaccuracies in the information presented or otherwise have objection or comment thereto, then they shall promptly notify Construction Manager, who shall meet and confer with HFC to resolve such differences.

§2.2.2 To the extent that the Drawings and Specifications are anticipated to require further development by Architect, Construction Manager shall provide in each proposed Component Maximum Cost of the Work Proposal a contingency to compensate Construction Manager for Cost of the Work arising from further development or refinement of the Drawings and Specifications. Such further development and refinement does not include such things as changes in scope, systems, kinds and quality of materials, finishes or equipment, all of which, if required, shall be incorporated by Change Order. The amount of such contingency shall be determined in accordance with Section 2.2.4.

§2.2.3 Construction Manager shall include with each proposed Component Maximum Cost of the Work Proposal a written statement for the basis thereof, which shall include the following: (1) a list of the Drawings and Specifications, including all Addenda thereto; (2) a list of the clarifications and assumptions made by Construction Manager in the preparation of, as applicable, the Component Maximum Cost of the Work Proposal to supplement the information provided by HFC and contained in the Drawings and Specifications; (3) a statement of the estimated Cost of the Work organized by trade categories or systems, allowances, contingency, and a statement of the Construction Manager's Fee; (4) the allocation of the General Conditions Amount and the payment

schedule therefor; (5) an update to the then most current Updated Preliminary Schedule of the Work for such Component, which update shall for any Component, be included as part of the final Schedule of the Work with regard to such Component and that, when submitted by Construction Manager and approved by HFC, shall constitute Construction Manager's final Schedule of the Work for such Component; and (6) a date (which shall be no sooner than 15 business days following HFC's receipt of the written proposal) by which HFC must accept, as applicable, the Component Maximum Cost of the Work Proposal, and final proposed Schedule of the Work.

§2.2.4 The Contract Sum shall include Construction Manager's Contingency (herein so called), subject to the following provisions and limitations set forth in this Construction Agreement. Construction Manager's Contingency is for Construction Manager's exclusive use to cover costs for the items or categories of Work more particularly described below in this Section 2.2.4 and, to the extent permitted by the provisions of Section 6.6.3 below, costs of repairing or correcting damaged or nonconforming Work. Notwithstanding the foregoing or any other provision of the Contract Documents to the contrary, HFC and Construction Manager have agreed to the following process for establishing the amount of Construction Manager's Contingency and the permitted uses and application of Construction Manager's Contingency. Subject to the following provisions of this sentence and notwithstanding that one or more Cost Estimates may reflect contingency, each Component Cost of the Work Proposal (and, consequently, each Component Cost of the Work Maximum Agreement) shall include, as part of the Construction Manager's estimate of the Cost of the Work, a single line item for contingency in the amount of ¹ _____ (___%) of the aggregate of the Cost of the Work reflected in the Component Cost of the Work Proposal that is accepted by HFC (the "Construction Manager's Contingency"). The Construction Manager's Contingency shall be separately accounted for throughout the Project. However, for the avoidance of doubt, Construction Manager's Contingency, even though established separately in each Component Cost of the Work Maximum Agreement, shall be a single source of funds which may be used for any purposes described in this Section 2.2.4 (i.e., the Construction Manager's Contingency with respect to a particular Component is not tied or limited to use for the Work for such Component). When incorporated into the Contract Documents with each Component Cost of the Work Maximum Agreement, Construction Manager's Contingency shall be available for use by Construction Manager (with notice to HFC, which notice shall set forth the amount being utilized and to what purposes) (a) as provided for in this paragraph with regard to any element of the Work, and (b) to the extent permitted in Section 6.6.3 below to pay costs to repair or correct damaged or nonconforming Work. Construction Manager recognizes that the Drawings and Specifications documents are likely to contain ambiguities as well as coordination issues which will, in each case, require refinement and design and construction document revision by Architect. Consequently, except as otherwise provided below in this paragraph, Construction Manager shall perform such work reasonably inferable from the Drawings and Specifications as being necessary to produce the indicated results and such work manifestly necessary to carry out the expressed or reasonably inferable intent of the Contract Documents, notwithstanding the improper description of details thereof (collectively called "Refinements") as if fully and correctly set forth and described in the Drawings and Specifications. The cost of such Work shall be included in the Cost of the Work and Construction Manager shall use Construction Manager's Contingency (upon notice to HFC in each case) to offset such costs, but in no event shall such work entitle Construction Manager to an increase in the Final Guaranteed Maximum Price. HFC and

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Construction Manager agree, however, that Refinements do not include such things as changes in scope, systems, kinds, quantity, and quality of materials, finishes or equipment, all of which, if required, shall be incorporated by Change Order.

§2.2.5 Construction Manager shall not incur any cost to be reimbursed as part of the Cost of the Work prior to the commencement of the Construction Phase, unless HFC provides prior written authorization for such costs.

§2.2.6 HFC shall authorize Architect to provide the revisions to the Drawings and Specifications to incorporate the agreed-upon assumptions and clarifications contained in, with respect to each Component, the Component Cost of the Work Maximum Agreement for such Component (and, consequently, the Final Guaranteed Maximum Price Amendment). HFC shall promptly furnish those revised Drawings and Specifications to Construction Manager as they are revised. Construction Manager shall notify HFC and Architect of any inconsistencies between the Final Guaranteed Maximum Price Amendment and the revised Drawings and Specifications.

§2.2.7 Construction Manager shall include in each Component Cost of the Work Proposal (and, consequently, each Component Cost of the Work Maximum Agreement) all sales, consumer, use and similar taxes for the Work provided by Construction Manager that are legally enacted, whether or not yet effective, at the time the Component Cost of the Work Maximum Agreement is executed.

§2.3 CONSTRUCTION PHASE

§2.3.1 GENERAL

§2.3.1.1 The Construction Phase shall commence (and the Preconstruction Phase Period shall end) on the issuance of a notice to proceed (“Notice to Proceed”) with respect to either Component. The date of the Notice to Proceed shall constitute the date of the “commencement of the Work” for purposes of the Construction Terms & Conditions. HFC may elect to issue a separate Notice to Proceed for each of the Components and prior to execution of the Final Guaranteed Maximum Price Amendment.

§2.3.2 ADMINISTRATION

§2.3.2.1 Work shall be performed under Subcontracts in accordance with the Contract Documents and Applicable Law.

§2.3.2.2 If the Final Guaranteed Maximum Price has been established or, if prior thereto, a Component Cost of the Work Maximum Agreement has been agreed upon and, in either case, when a specific bidder (1) is qualified to perform that portion of the Work, and (2) has submitted a bid that conforms to the requirements of Applicable Law and the Contract Documents without reservations or exceptions, then another higher bid shall not be accepted.

§2.3.2.3 Construction Manager shall not solicit bids from or recommend a specific bidder that is or may be considered a “related party” according to Section 6.9 below.

§2.3.2.4 Construction Manager shall schedule and conduct weekly meetings at which HFC, Project Manager, Architect, Construction Manager and appropriate Subcontractors shall discuss the status

of the Work. Construction Manager shall prepare and promptly distribute meeting minutes. No meeting minutes shall constitute a Change Order or modification to the Contract Documents.

§2.3.2.5 Construction Manager shall provide monthly written reports to HFC, Project Manager and Architect on the progress of the Work. Construction Manager shall maintain a daily log containing a record of weather, Subcontractors working on the site, number of workers, Work accomplished, problems encountered and other similar relevant data as HFC may reasonably require. The log shall be available to HFC, Project Manager and Architect.

§2.3.2.6 Construction Manager shall develop a system of cost control for the Work (which shall be reasonably satisfactory to HFC and shall be coordinated with the line items in HFC's budget format ("HFC Budget Format") provided by HFC to Construction Manager prior to the execution hereof, a copy of which is attached hereto as Schedule 3), including regular monitoring of actual costs for activities in progress and estimates for uncompleted tasks and proposed changes. When Construction Manager identifies variances between actual and estimated costs Construction Manager shall report the same to HFC in the next following monthly report to HFC.

§2.4 PROFESSIONAL SERVICES

Section 3.12.10 of the Construction Terms & Conditions shall apply to both the Preconstruction and Construction Phases.

§2.5 HAZARDOUS MATERIALS

Section 10.3 of the Construction Terms & Conditions shall apply to both the Preconstruction and Construction Phases.

§2.6 NO SELF PERFORMED WORK

Construction Manager agrees that no bid or proposal shall be submitted by Construction Manager to self-perform any of the Work, nor shall Construction Manager be allowed to fulfill Subcontractor requirements in the event of a Subcontractor default, notwithstanding the provisions of Section 2269.255(b) and 2269.257 of the Texas Government Code.

§2.7 FEMA REQUIREMENTS

Construction Manager agrees to cooperate with HFC in satisfying FEMA Requirements. Construction Manager acknowledges that such cooperation may include and require submittal of document, instruments, written reports and other materials, as well as attending meetings and participation in audits, that may not be customary or industry practice in the construction industry at large. Construction Manager acknowledges and agrees that Construction Manager has taken such matters into account in establishing and agreeing upon the Construction Manager's Fee and that no additional compensation shall be due or payable to Construction Manager under the Contract Documents or otherwise attributable to or arising therefrom.

ARTICLE 3 HFC'S RESPONSIBILITIES

§ 3.1 INFORMATION AND SERVICES

§3.1.1 HFC shall provide information in a timely manner regarding the requirements of the Project, including a program which sets forth HFC's objectives, constraints and criteria, including

flexibility and expandability requirements, special equipment and systems, and site requirements. HFC shall not be deemed to have failed to provide any of such information timely unless Construction Manager has set forth its request therefor in writing and HFC has failed to respond to the request within 10 days following HFC's receipt of the same.

§3.1.2 HFC shall provide advice and direction to Construction Manager with respect to FEMA Requirements.

§3.1.3 [Intentionally Left Blank]

§3.1.4 STRUCTURAL AND ENVIRONMENTAL TESTS, SURVEYS AND REPORTS

In the Preconstruction Phase, to the extent the same are reasonably required by Construction Manager, HFC shall furnish the following with reasonable promptness and at HFC's expense. Except to the extent that Construction Manager knows of any inaccuracy, Construction Manager shall be entitled to rely upon the accuracy of any such information, reports, surveys, drawings and tests described in Sections 3.1.4.1 through 3.1.4.4 but shall exercise customary precautions relating to the safe performance of the Work, all in accordance with the Standard of Care.

§3.1.4.1 Reports, surveys, drawings and tests concerning the conditions of the site which are required by Applicable Law.

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

§3.1.4.3 The services of a geotechnical engineer when such services are reasonably requested by Construction Manager. Such services may include but are not limited to test borings, test pits, determinations of soil bearing values, percolation tests, evaluations of hazardous materials, ground corrosion and resistivity tests, including necessary operations for anticipating subsoil conditions, with reports and appropriate professional recommendations.

§3.1.4.4 Structural, mechanical, chemical, air and water pollution tests, tests for hazardous materials, and other laboratory and environmental tests, inspections and reports which are required by Applicable Law and where the need for such services is not the result of any failure of Construction Manager to perform its obligations under the Contract Documents in accordance with the Contract Documents.

§3.1.4.5 The services of other consultants when such services are reasonably required by the scope of the Project, are reasonably requested by Construction Manager.

§3.1.4.6 By its execution of a Component Maximum Cost of the Work Maximum Agreement and by its execution of the Final Guaranteed Maximum Price Amendment, Construction Manager shall be agreeing, in addition to the other matters set forth therein, that it has been provided, and has reviewed and appropriately considered, all of the materials and information described in Section 3.1.4.1 through 3.1.4.5 above as to the applicable Component or, in the case of the Final Guaranteed Maximum Price Amendment, the entire Work. To the extent that updates or further refinement of any of such materials are thereafter necessary for the performance of the Work and the need for such services is not the result of any failure of Construction Manager to perform its obligations under the Contract Documents in accordance with the Contract Documents, Construction Manager may request such additional information from HFC and HFC shall provide the same at HFC's cost and expense (and not as part of the Cost of the Work).

§ 3.2 DESIGNATED REPRESENTATIVES

HFC will designate a representative with authority to bind HFC with respect to all matters requiring HFC's approval or authorization. Furthermore, Project Manager shall have the authority to bind HFC to the extent provided for in Section 2.1.3 through and including 2.1.6 of the Construction Terms & Conditions. HFC's designated representative and (subject to Section 2.1.3 through 2.1.6 of the Construction Terms & Conditions) Project Manager shall each have the authority to make decisions on behalf of HFC concerning estimates and schedules, construction budgets, and changes in the Work, and shall render such decisions promptly and furnish information expeditiously, so as to avoid unreasonable delay in the services or Work of Construction Manager. HFC's designated representative may be changed by HFC at any time upon written notice to Construction Manager.

Neither HFC's designated representative nor Project Manager, acting on behalf of HFC, shall be deemed to have failed to render a decision promptly or furnish information expeditiously unless HFC's representative fails to respond to a request therefor within 15 days following receipt of a written request therefor and such failure shall continue for a period of 10 days following a second request (marked, in bold text, "**SECOND REQUEST – FAILURE TO RESPOND IN 10 DAYS MAY CONSTITUTE THE BASIS FOR A DELAY CLAIM**") from Construction Manager to HFC and Project Manager.

§3.2.1 Construction Manager hereby designates _____ as its representative with express authority to bind Construction Manager with respect to all matters requiring Construction Manager's approval or authorization, or with regard to any other or determination under or with respect to the Contract Documents.

§ 3.3 ARCHITECT

HFC has retained Architect to provide professional design services, including normal structural, mechanical and electrical engineering services, other than cost estimating services. HFC shall authorize and cause Architect to provide those construction administration services requested by Construction Manager which must necessarily be provided by Architect. Such services shall be provided in accordance with time schedules agreed to by HFC, Architect and Construction Manager. Construction Manager acknowledges that it has received a copy of HFC's agreement with Architect.

**ARTICLE 4 COMPENSATION FOR PRECONSTRUCTION
PHASE SERVICES**

§ 4.1 Compensation

§4.1.1 For Construction Manager’s Preconstruction Phase services for the Project, HFC shall pay to Construction Manager _____ per month (the “Preconstruction Services Fee”) commencing on the Effective Date and ending at the expiration of the Preconstruction Phase Period.

§4.1.2 If a Notice to Proceed has not been issued, through no fault of Construction Manager, within, _____ (____) months (sometimes herein called the “Scheduled Preconstruction Phase Period”) following the Effective Date, then the Preconstruction Services Fee shall be adjusted as set forth in the follow paragraph of this Section 4.1.2. If, by reason of the fault of the Construction Manager, a Notice to Proceed has not been issued prior to the expiration of the Scheduled Preconstruction Phase Period, Construction Manager shall continue to perform the Preconstruction Phase services, but no further monthly fee, or other compensation, shall be due or payable in regard thereto.

Note to Daft: Basis for adjustment is TBD

§ 4.2 Payments

§4.2.1 Payments of the installments of the Preconstruction Services Fee are due and payable within 30 days following presentation of Construction Manager’s invoice.

ARTICLE 5 COMPENSATION FOR CONSTRUCTION PHASE SERVICES

§ 5.1 COMPENSATION

§5.1.1 For Construction Manager’s performance of the Work, HFC shall pay Construction Manager the Contract Sum in current funds. The term “Contract Sum” as used herein is an amount equal to the sum of (w) the Preconstruction Phase Services Fee, plus (x) the Cost of the Work as defined in Article 6 below plus, (y) the General Conditions Amount, plus (z) Construction Manager’s Fee, but in no event shall the Contract Sum ever exceed the Final Guaranteed Maximum Price (as the same may be adjusted upward or downward by Change Order after the Final Guaranteed Maximum Price has been determined).

The term “General Conditions Amount” means _____ and No/100 Dollars (\$_____). The General Conditions Amount represents payment to Construction Manager for all costs incurred by Construction Manager for the items, personnel, or costs (collectively, the “General Conditions Items”) described on **Schedule 4A** attached hereto.

The General Conditions Amount is a stipulated amount. The General Conditions Amount has been agreed upon based upon a scope of work for each of the Components set forth on **Schedule 4B** attached hereto. If the final scope of Work, as reflected in the applicable Final Guaranteed Maximum Price Amendment, for any of the Components is materially greater than reflected in **Schedule 4B** attached hereto and, as a result thereof, the anticipated Schedule of the Work is materially greater than that reflected in **Schedule 4B** attached hereto, then the General Conditions

Amount shall be fairly and equitably increased by applying the rates and costs set forth in Schedule 4A attached hereto. For any extensions of the Contract Time authorized by the Contract Documents after execution of the Final Guaranteed Maximum Price Amendment, the General Conditions Amount shall be increased fairly and equitably applying the rates and costs set forth in Schedule 4A attached hereto.

§5.1.2 The term “Construction Manager’s Fee” means, with respect to each Component, an amount equal to (a) ²_____ percent (____%) multiplied by (b) the Adjusted Cost of the Work. The term “Adjusted Cost of the Work” means, with respect to each Component, the actual Cost of the Work, subject to the following adjustments: (1) the premiums for the builder’s risk insurance shall be included for purposes of calculating Construction Manager’s Fee and (2) the premiums for the bonds and insurance obtained by Construction Manager shall not be included for purposes calculating Construction Manager’s Fee.

§ 5.2 Guaranteed Maximum Price

§5.2.1 Construction Manager guarantees that the Contract Sum for the Work shall not exceed the Final Guaranteed Maximum Price, as it is adjusted from time to time pursuant to Change Orders. To the extent that the sum of the Preconstruction Services Fee, Cost of the Work, the General Conditions Amount and Construction Manager’s Fee exceeds the Final Guaranteed Maximum Price, Construction Manager shall bear such costs in excess of the Final Guaranteed Maximum Price without reimbursement or additional compensation from HFC.

§5.2.2 The Final Guaranteed Maximum Price is subject to additions and deductions only by Change Order as provided in the Contract Documents.

§ 5.3 CHANGES IN THE WORK

§5.3.1 Adjustments to the Final Guaranteed Maximum Price on account of changes in the Work subsequent to the establishment of the Final Guaranteed Maximum Price shall be determined on the basis of the Cost of the Work attributable thereto plus Construction Manager’s Fee thereon.

ARTICLE 6 COST OF THE WORK FOR CONSTRUCTION PHASE

§ 6.1 Costs to Be Reimbursed

§6.1.1 The term Cost of the Work shall mean costs necessarily incurred by Construction Manager in the proper performance of such portion of the Work. Construction Manager shall allocate and account for the Cost of the Work separately for each of the Components. Such costs shall be at rates not higher than the standard paid at the place of the Project except with prior consent of HFC. The Cost of the Work shall include only the items set forth in Sections 6.1 through 6.6.

§6.1.2 Where any cost is subject to HFC’s prior approval, Construction Manager shall obtain this approval prior to incurring the cost. The parties shall, with respect to each Component, identify any such costs prior to executing the Component Cost of the Work Maximum Agreement for such Component.

² The percentage inserted shall be based upon the fee per \$100,000 of Cost of the Work proposed by the successful respondent in the response to the HFC Request for Proposal.

§ 6.2 Subcontract Costs

Payments shall be made by Construction Manager to subcontractors in accordance with the requirements of the Subcontracts and Applicable Law. It is the expectation of the parties that Construction Manager will enter into subcontracts or other agreements for the performance of all portions of the Work. Payments made by Construction Manager to subcontractors for Work performed pursuant to subcontracts or other agreements approved by HFC under this Construction Agreement shall be a Cost of the Work. Where possible, agreements with subcontractors shall be for a stipulated sum and shall include the premium for any payment and performance bond required to be provided by such subcontractor, which premium shall not, unless expressly approved by HFC, exceed **TBD** % of the amount of the subcontract. If any subcontract or other agreement is awarded on other than a lump sum basis, the only costs to be reimbursed by HFC shall be those costs to which HFC, Construction Manager, and subcontractor agree.

§ 6.3 Costs of Materials and Equipment Incorporated in the Completed Construction

§6.3.1 Costs, including transportation and storage, of materials and equipment incorporated or to be incorporated in the completed construction.

§6.3.2 Costs of materials described in the preceding Section 6.3.1 in excess of those actually installed to allow for reasonable waste and spoilage. Unused excess materials, if any, shall become HFC's property at the completion of the Work or, at HFC's option, shall be sold by Construction Manager for no less than fair market value. Any amounts realized from such sales shall be credited to HFC as a deduction from the Cost of the Work.

§ 6.4 Costs of Other Materials and Equipment, Temporary Facilities and Related Items

§6.4.1 Costs of transportation, storage, installation, maintenance, dismantling and removal of materials, supplies, temporary facilities, machinery, equipment and hand tools not customarily owned by construction workers that are provided by Construction Manager at the Project site and are fully consumed in the performance of the Work. Costs of materials, supplies, temporary facilities, machinery, equipment and tools that are not fully consumed shall be based on the cost or value of the item at the time it is first used on the Project site less the value of the item when it is no longer used at the Project site. Costs for items not fully consumed by Construction Manager shall mean fair market value.

§6.4.2 That portion of the reasonable expenses of Construction Manager's personnel incurred while traveling (excluding daily travel to and from the site or any other travel within a 100 mile radius of Houston, Texas) in discharge of duties associated with the Work. This provision only applies to personnel whose work is considered Cost of Work under this section and not for personnel whose work would be covered by the General Conditions Items or whose work is included in the Construction Manager's Fee.

§6.4.3 Costs of materials and equipment suitably stored off the site at a mutually acceptable location, subject to HFC's prior approval.

§ 6.5 Miscellaneous Costs

§6.5.1 Premiums for (x) the payment and performance bond required by the Contract Documents to be provided by Construction Manager, which premiums are hereby stipulated to be **TBD** % of

the Contract Sum, and (y) payment and performance bonds required to be provided by Subcontractors, which premiums shall not exceed, in each case, **TBD%** of the applicable Subcontract amount. Construction Manager may elect, with the prior approval of HFC (such approval not to be unreasonably withheld, conditioned or delayed) to provide a separate payment and performance bond for each Component. HFC recognizes that, to the extent a single payment and performance bond applies to more than one Component and the period of construction scheduled for such Components exceeds, in the aggregate, _____ (___) months, the costs of such bonds may exceed the above quoted and agreed upon **TBD%** of the Contract Sum and that, in such case, Construction Manager shall be entitled to include such increased costs as part of the Cost of the Work.

The premiums for Construction Manager's commercial general liability and excess liability insurance required under the Contract Documents that shall be included in the Cost of the Work shall be an amount equal to **TBD%** of the Contract Sum.

§6.5.2 Sales, use or similar taxes imposed by a governmental authority that are related to the Work and for which Construction Manager is liable and from which HFC is not exempt.

§6.5.3 Fees and assessments for the building permit and for other permits, licenses and inspections for which Construction Manager is required by the Contract Documents to pay.

§6.5.4 Fees of laboratories for tests required by the Contract Documents, except those related to defective or nonconforming Work for which reimbursement is excluded by Section 13.5.3 of the Construction Terms & Conditions or by other provisions of the Contract Documents, and which do not fall within the scope of Section 6.6.3.

§6.5.5 Royalties and license fees paid for the use of a particular design, process or product required by the Contract Documents; the cost of defending suits or claims for infringement of patent rights arising from such requirement of the Contract Documents; and payments made in accordance with legal judgments against Construction Manager resulting from such suits or claims and payments of settlements made with HFC's consent. However, such costs of legal defenses, judgments and settlements shall not be included in the calculation of Construction Manager's Fee or subject to the Final Guaranteed Maximum Price, and if such royalties, fees and costs are excluded by Section 3.17 of the Construction Terms & Conditions, they shall not be included in the Cost of the Work.

§6.5.6 Deposits lost for causes other than Construction Manager's negligence or failure to fulfill a specific responsibility in the Contract Documents.

§6.5.7 Legal, mediation and arbitration costs, including attorneys' fees, reasonably incurred by Construction Manager after the execution of this Construction Agreement in the performance of the Work and with HFC's prior approval, which shall not be unreasonably withheld; provided, that, legal, mediation and arbitration costs shall (i) not include those arising from disputes between HFC and Construction Manager and (ii) not be included as part of the Cost of the Work for purposes of calculating the Construction Manager's Fee.

§ 6.6 Other Costs and Emergencies

§6.6.1 Other costs incurred in the performance of the Work if, and to the extent, approved in advance in writing by HFC.

§6.6.2 Costs incurred in taking action to prevent threatened damage, injury or loss in case of an emergency affecting the safety of persons and property, as provided in Section 10.4 of the Construction Terms & Conditions.

§6.6.3 Costs of repairing or correcting damaged or nonconforming Work executed by Construction Manager, Subcontractors or suppliers, provided that such damaged or nonconforming Work was not caused by negligence or failure to fulfill a specific responsibility of Construction Manager and only to the extent that the cost of repair or correction is not recovered by Construction Manager from insurance, sureties, Subcontractors, suppliers, or others. Furthermore and notwithstanding any contrary provision of the Contract Documents, the costs described in the preceding sentence which may be included in the Cost of the Work shall (1) be paid from Construction Manager's Contingency, and (2) shall not exceed Fifty Thousand and No/100 Dollars (\$50,000.00) in any single occurrence or Two Hundred Fifty Thousand and No/100 Dollars (\$250,000.00) in the aggregate.

§6.6.4 The costs described in Sections 6.1 through 6.6 shall be included in the Cost of the Work, notwithstanding any provision of the Construction Terms & Conditions which may require Construction Manager to pay such costs, unless such costs are excluded by the provisions of Section 6.7 or the provisions of Section 6.6.3 above, or constitute costs associated with the General Conditions Items.

§ 6.7 Costs Not To Be Reimbursed

§6.7.1 The Cost of the Work shall not include the items listed below:

- .1** Any costs associated with any of the General Conditions Items (the exclusion set forth in this clause shall not be deemed or interpreted to affect or impair HFC's obligations set forth in the Contract Documents to pay the General Conditions Amount);
- .2** Salaries and other compensation of Construction Manager's personnel stationed at Construction Manager's principal office or offices other than the site office, except as specifically provided in Section 6.2;
- .3** Expenses of Construction Manager's principal office and offices other than the site office;
- .4** Overhead and general expenses, except as may be expressly included in Sections 6.1 to 6.6;
- .5** Construction Manager's capital expenses, including interest on Construction Manager's capital employed for the Work;
- .6** Except as provided in Section 6.6.3 of this Construction Agreement, costs due to the negligence or failure of Construction Manager, Subcontractors and suppliers or anyone directly or indirectly employed by any of them or for whose acts any of them may be liable to fulfill a specific responsibility of Construction Manager;
- .7** Any cost not specifically and expressly described in Sections 6.1 to 6.6;
- .8** Costs, other than costs included in Change Orders approved by HFC, that would cause the Final Guaranteed Maximum Price to be exceeded;
- .9** Costs for services incurred during the Preconstruction Phase;

- .10 Construction Manager's capital expenses, including interest on the Construction Managers capital employed for the Work;
- .11 Any cost or expense incurred with respect to Construction Manager's indemnification obligations under the Contract Documents;
- .12 The portion of the cost of additional forces, equipment or supervision or overtime wages that causes the Cost of the Work to exceed the Final Guaranteed Maximum Price, unless expressly requested by HFC in writing;
- .13 Losses and expenses sustained by Construction Manager, Subcontractors or sub-Subcontractors, not compensated by insurance or otherwise if such losses and expenses are due to infidelity or dishonesty on the part of any employee of Construction Manager, Subcontractors, or sub-Subcontractors, or others to whom their respective property may be entrusted, inventory shortage or unexplained disappearance;
- .14 Dues and assessments of construction organizations or associations;
- .15 The deductibles or self-insured retentions from Construction Manager's liability issuance policies; and
- .16 Any costs for the purchase or storage of any of the Owner Supplied Materials.

§ 6.8 DISCOUNTS, REBATES AND REFUNDS

§6.8.1 Cash discounts obtained on payments made by Construction Manager shall accrue to HFC if (1) before making the payment, Construction Manager included them in an Application for Payment and received payment therefor from HFC, or (2) HFC has deposited funds with Construction Manager with which to make payments; otherwise, cash discounts shall accrue to Construction Manager. Trade discounts, rebates, refunds and amounts received from sales of surplus materials and equipment shall accrue to HFC, and Construction Manager shall make provisions so that they can be secured.

§6.8.2 Amounts which accrue to HFC in accordance with the provisions of Section 6.8.1 shall be credited to HFC as a deduction from the Cost of the Work.

§ 6.9 Related Party Transactions

§6.9.1 For purposes of Section 6.9, the term "related party" shall mean a parent, subsidiary, affiliate or other entity having common ownership or management with Construction Manager; any entity in which any stockholder in, or management employee of, Construction Manager owns or has any financial or other interest; or any person or entity which has the right to control the business or affairs of Construction Manager; and any person in which Construction Manager has or holds a financial interest or that holds a financial interest in Construction Manager. The term "related party" includes any member of the immediate family of any person identified above.

§6.9.2 If any of the costs to be reimbursed arise from a transaction between Construction Manager and a related party, then Construction Manager shall notify HFC of the specific nature of the contemplated transaction, including the identity of the related party and the anticipated cost to be incurred, before any such transaction is consummated or cost incurred. If HFC, after such notification, authorizes the proposed transaction, then the cost incurred shall be included as a cost to be reimbursed, and Construction Manager shall procure the Work, equipment, goods or service from the related party, as a Subcontractor, according to the terms of the Contract Documents. If

HFC fails to authorize the transaction, Construction Manager shall procure the Work, equipment, goods or service from some person or entity other than a related party according to the terms of the Contract Documents.

ARTICLE 7 CONSTRUCTION PHASE

§ 7.1 PROGRESS PAYMENTS

§7.1.1 Based upon Applications for Payment submitted to Architect by Construction Manager and, subject to the applicable provisions of the Construction Terms & Conditions, HFC shall make progress payments on account of the Contract Sum to Construction Manager as provided below and elsewhere in the Contract Documents. A single Application for Payment shall be delivered covering each Component, with the amounts requested being based upon the applicable Schedule of Values for each Component.

§7.1.2 The period covered by each Application for Payment shall be one calendar month ending on the last day of the month.

§7.1.3 Provided a signed Application for Payment is received by Architect, Project Manager and HFC not later than the 5th day of a month and subject to the Pencil Application procedures below, HFC shall make payment to Construction Manager not later than the 5th day of the following month. If a signed Application for Payment is received by Architect, Project Manager and HFC after the application date fixed above, then payment shall be made by HFC not later than 30 days after HFC, Project Manager and Architect receive the signed Application for Payment.

To facilitate prompt review and payment of each signed Application for Payment, Construction Manager shall deliver to HFC, with a copy to Architect and Project Manager, a preliminary application for payment (the "Pencil Application for Payment"). The Pencil Application for Payment shall be accompanied by all of the materials described in Section 7.1.4 below. Each Pencil Application for Payment shall be delivered by Construction Manager to HFC and Architect not less than twenty-fifth (25th) day of each calendar month and shall reflect the Cost of the Work for such month as incurred and projected to be incurred through the end of such calendar month. Each Pencil Application for Payment shall separately state, and provide supporting documentation for, all Costs of the Work for which Construction Manager seeks payment. HFC, Architect and Construction Manager shall review, consult with one another and, through such process, alter and adjust the Pencil Application for Payment until the same is reasonably acceptable to all parties. Upon receipt of HFC's and Architect's comments with regard to the Pencil Application, Construction Manager shall submit a signed Application for Payment to HFC and Architect and such signed Application for Payment shall be used as the basis for payment to Construction Manager.

§7.1.4 With each Pencil Application for Payment, Construction Manager shall submit payrolls, petty cash accounts, receipted invoices or invoices with check vouchers attached and any other evidence required by HFC, Project Manager or Architect to demonstrate that cash disbursements already made by Construction Manager on account of the Cost of the Work equal or exceed (1) progress payments already received by Construction Manager; less (2) that portion of those

payments attributable to Construction Manager's Fee; plus (3) payrolls for the period covered by the present Application for Payment.

§7.1.5 Each Application for Payment shall be based upon the most recent schedule of values for each of the Components submitted by Construction Manager in accordance with the Contract Documents and which has been approved by HFC (the schedule of values for each Component shall be based upon the applicable Cost of the Work therefor reflected in each Component Cost of the Work Maximum Agreement). The schedule of values shall allocate the entire Final Guaranteed Maximum Price among the various portions of the Work (but is only an allocation for purposes of payment and is not a guarantee by Construction Manager that the Cost of the Work for any line item in the schedule of values will not exceed the amount set forth in such line item; nothing in this clause shall, however, be deemed or interpreted as permitting the Contract Sum to exceed the Final Guaranteed Maximum Price) in a manner consistent with the line items in each of the Component Cost of the Work Maximum Agreements and HFC Budget Format, except that Construction Manager's Fee and the General Conditions Amount shall each be shown as a single separate item. The schedule of values shall be prepared in such form and supported by such data to substantiate its accuracy as Architect or HFC may require. This schedule, unless objected to by Architect or HFC, shall be used as a basis for reviewing Construction Manager's Applications for Payment.

§7.1.6 Applications for Payment shall, with respect to each Component, show the percentage completion of such portion of the Work as of the end of the period covered by the Application for Payment. The percentage completion shall be the percentage obtained by dividing (a) the expense which has actually been incurred by Construction Manager on account of that portion of the Work for which Construction Manager has made or intends to make actual payment prior to the next Application for Payment by (b) the share of the Final Guaranteed Maximum Price allocated to that portion of the Work in the schedule of values.

§7.1.7 Subject to other provisions of the Contract Documents, the amount of each progress payment shall be computed as follows:

- .1** Take that portion of the Final Guaranteed Maximum Price properly allocable to completed Work, less such retainage as authorized under Section 7.1.8. Pending final determination of cost to HFC of changes in the Work, amounts not in dispute may be included as provided in Section 7.3.9 of the Construction Terms & Conditions, even though the Final Guaranteed Maximum Price has not yet been adjusted by Change Order.
- .2** Add the actual costs incurred for the materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work or, if approved in advance by HFC, suitably stored off the site at a location agreed upon in writing, and subtract the retainage described in Section 7.1.8.
- .3** Add Construction Manager's Fee and the installment of the General Conditions Amount then due; provided that there shall be no retainage withheld from or calculated on Construction Manager's Fee or General Conditions Amount. Construction Manager's Fee shall be computed upon the Cost of the Work described in the two preceding Sections at the rate stated in Section 5.1.2.
- .4** Subtract the aggregate of previous payments made by HFC.

- .5 Subtract the shortfall, if any, indicated by Construction Manager in the documentation required by Section 7.1.4 to substantiate prior Applications for Payment, or resulting from errors subsequently discovered by HFC's accountants in such documentation.
- .6 Subtract amounts, if any, for which HFC is entitled to withhold payment as provided in Section 9.5 of the Construction Terms & Conditions.

For purposes of determining the amount properly allocable to the completed Work, the costs arising from the Work performed by the Subcontractors shall be a percentage of the portion of the Final Guaranteed Maximum Price allocated to such Work in the schedule of values, such percentage being based upon a percentage of completion of such Work. HFC and Construction Manager shall endeavor in good faith to resolve these issues on a monthly basis so as to prevent material prejudice to either party caused by continuing incurrence of costs which may be subject to dispute.

§7.1.8 Except with HFC's prior written approval, payments to Subcontractors shall be subject to retention of not less than five percent (5%).

§7.1.9 Except with HFC's prior written approval, Construction Manager shall not make advance payments to suppliers for materials or equipment which have not been delivered and stored at the site.

§7.1.10 Upon Construction Manager's request and subject to HFC's prior approval, HFC shall release retainage to Subcontractors subject to the following: (a) the Work performed by such Subcontractor has been finally completed and accepted by Construction Manager and Architect, (b) such Subcontractor has provided a final and unconditional lien waiver and release, (c) Construction Manager has obtained and provided to HFC approval of the release of such retainage from each surety under each payment and performance bond with respect to the Work (but only to the extent such approval is required under the terms of such payment and performance bond), and (d) if such release relates to retainage with respect to the purchase of materials, then such release shall be further conditioned upon, in the case of payments made on account of materials or equipment not incorporated in the Work but delivered and suitably stored on the Project site, or at some other location, HFC's approval thereof and HFC's determination that HFC has good title thereto, and that such other safeguards as HFC may require have been established. Additionally, any retainage not previously released pursuant to the preceding provisions of this paragraph with respect to Work for any Component shall be released within 30 days after (1) the Contract Documents applicable to such Component have been fully performed by Construction Manager (including completion of all punch list work) except for Construction Manager's responsibility to correct nonconforming Work, as provided in Section 12.2.2 of the Construction Terms & Conditions, and to satisfy other requirements, if any, which necessarily survive final payment; and (2) a final Application for Payment for such Component has been submitted by Construction Manager to HFC.

§ 7.2 FINAL PAYMENT

§7.2.1 Final payment shall be made by HFC to Construction Manager not more than 30 days after (1) the Contract Documents have been fully performed by Construction Manager (including completion of all punch list work) except for Construction Manager's responsibility to correct

nonconforming Work, as provided in Section 12.2.2 of the Construction Terms & Conditions, and to satisfy other requirements, if any, which necessarily survive final payment; and (2) a final Application for Payment and a final accounting for the Cost of the Work in compliance with the requirements of the Contract Documents have been submitted by Construction Manager to HFC.

§7.2.2 The amount of the final payment shall be calculated as follows:

- .1 Take the sum of the Cost of the Work substantiated by Construction Manager's final accounting, the General Conditions Amount and Construction Manager's Fee, but not more than, when aggregated with the Preconstruction Services Fee, the Final Guaranteed Maximum Price.
- .2 Subtract amounts, if any, for which Architect or HFC withholds, in whole or in part, a final Certificate for Payment as provided in Section 9.5.1 of the Construction Terms & Conditions or other provisions of the Contract Documents.
- .3 Subtract the aggregate of previous payments made by HFC.

If the aggregate of previous payments made by HFC exceeds the amount due Construction Manager, then Construction Manager shall reimburse the difference to HFC.

§7.2.3 If, subsequent to final payment and at HFC's written request, Construction Manager incurs costs described in Article 6 and not excluded by Article 6 to correct defective or nonconforming Work, then HFC shall reimburse Construction Manager such costs on the same basis as if such costs had been incurred prior to final payment, but not in excess of an amount, that when aggregated with all other payments made to Construction Manager, would exceed the Final Guaranteed Maximum Price.

ARTICLE 8 INSURANCE AND BONDS

§ 8.1 INSURANCE REQUIRED OF CONSTRUCTION MANAGER

Construction Manager agrees to all of the terms and provisions set forth in *Exhibit A* attached hereto and shall observe and comply with the same, which provisions are hereby incorporated herein for all purposes; provided, that, at any time prior to the date of execution of the Final Guaranteed Maximum Price Amendment, HFC may, at its election and upon written notice to Construction Manager, elect to procure and pay for builder's risk insurance (in which event the cost thereof shall not constitute a part of the Cost of the Work).

ARTICLE 9 MISCELLANEOUS PROVISIONS

§9.1.1 CLAIMS AND DISPUTES. During both the Preconstruction and Construction Phases, Claims, disputes or other matters in question between the parties to this Construction Agreement shall be resolved as provided in Article 15 of the Construction Terms & Conditions.

§9.1.2 CHAPTER 2267, GOVERNMENT CODE; OTHER STATUTORY PROVISIONS

Construction Manager acknowledges that HFC is a governmental entity and, accordingly, is subject to Chapter 2267 of the Texas Government Code as well as Applicable Law regarding procurement of goods and services (collectively, the "Procurement Statutes"). Construction

Manager agrees to and shall to comply with Procurement Statutes, including, without limitation, in the solicitation of and contracting with Subcontractors.

§9.1.3 REPRESENTATIONS. Each party represents and warrants to the other party as follows:

(a) It is duly organized, validly existing and in good standing under the laws of its jurisdiction of formation with all requisite power and authority to enter into the Contract Documents and to conduct its respective business.

(b) The Contract Documents constitute the legal, valid and binding obligation of the party enforceable in accordance with its terms.

(c) No consents or approvals are required from any governmental authority or other person or entity for the party to enter into and perform the Contract Documents. All corporate or partnership action on the part of the party necessary for the authorization, execution and delivery of the Contract Documents, and the consummation of the transactions contemplated hereby, have been duly taken.

(d) The execution and delivery of the Contract Documents by the party, and the consummation of the transactions contemplated hereby, do not conflict with or contravene the provisions of its organizational documents or any agreement or instrument by which it or its properties are bound or any law, rule, regulation, order or decree to which it or its properties are subject.

(e) The party has not retained any broker, finder or other commission or fee agent, and no such person has acted on its behalf in connection with the execution and delivery of the Contract Documents.

§9.1.4 The Contract Documents constitutes the entire agreement between HFC and Construction Manager relating to the subject matter hereof and supersede all prior or contemporaneous oral or written agreements between the parties.

§9.1.5 The waiver of any of the terms and conditions of the Contract Documents on any occasion or occasions shall not be deemed as waiver of such terms and conditions on any future occasion. No waiver shall be implied by any isolated or repeated action or non-action. To be effective, any waiver must be in writing executed by the party to be bound thereby.

§9.1.6 The Contract Documents may not be amended, modified or terminated by oral communication. No written amendment or modification shall be binding upon HFC unless signed by HFC.

§9.1.7 Each party has received independent legal advice from its attorneys with respect to the advisability of executing the Contract Documents and their provision shall be construed as to their fair meaning, and not for or against any party based upon any attribution to such party as the source of the language in question. Headings used in the Contract Documents are for convenience of reference only and shall not be used in construing the Contract Documents.

§9.1.8 The prevailing party in any litigation or legal proceeding arising out of the Contract Documents shall also be entitled to recover from the other party attorneys' fees and other costs incurred by may not be amended, modified or terminated by oral communication.

§9.1.9 Any sums due and payable by HFC or Construction Manager to the other that are not paid when due shall bear interest from the date due until paid at the Past Due Rate.

§9.2. OTHER PROVISIONS

§9.2.1 Unless otherwise noted, the terms used in this Construction Agreement shall have the same meaning as those in the Construction Terms & Conditions, as attached hereto.

§9.2.2 EXTENT OF CONTRACT

The Contract Documents, which include this Construction Agreement and the other documents incorporated herein by reference, represents the entire and integrated agreement between HFC and Construction Manager and supersedes all prior negotiations, representations or agreements, either written or oral. This Construction Agreement may be amended only by written instrument signed by both HFC and Construction Manager. If anything in any document incorporated into this Construction Agreement is inconsistent with this Construction Agreement, then this Construction Agreement shall govern.

§9.2.3 OWNERSHIP AND USE OF DOCUMENTS

Article 1.6 of the Construction Terms & Conditions shall apply to both the Preconstruction and Construction Phases.

§9.2.4 GOVERNING LAW

This Construction Agreement shall be governed by the laws of the State of Texas without regard to conflicts of laws principles. The district courts of the State of Texas located in Harris County, Texas shall be the exclusive place of venue in respect to any legal action or proceeding in respect to or arising out of the Contract Documents.

§9.2.5 ASSIGNMENT

HFC and Construction Manager respectively bind themselves, their partners, successors, assigns and legal representatives to the other party hereto and to partners, successors, assigns and legal representatives of such other party in respect to covenants, agreements and obligations contained in the Contract Documents. Neither party to this Construction Agreement shall assign this Construction Agreement as a whole without written consent of the other; provided, that HFC may assign this Construction Agreement to the City of Houston, Texas and, in such respect, Construction Manager shall cooperate with HFC. Otherwise, if either party attempts to make such an assignment without such consent, that party shall nevertheless remain legally responsible for all obligations under this Construction Agreement.

§9.2.6 ATTORNEY'S FEES

The prevailing party in any arbitration conducted pursuant to the Contract Documents shall, in addition to any other award, relief or recovery, be entitled to reasonable attorneys' fees and other costs and expenses incurred in connection therewith.

§9.2.7 KEY PERSONNEL

Attached hereto as Schedule 6 is a chart depicting the management staffing commitment of Construction Manager to the Project, and a list of certain personnel who will be involved in the Project and the positions to be held by such persons (“Key Personnel”). Construction Manager will supplement such management staff with whatever additional supervisory personnel are required to ensure that the Work will be completed by the time for completion set forth in the approved Schedule of the Work. HFC shall have the right to approve all Construction Manager’s management staff and at HFC’s request Construction Manager will replace any personnel unacceptable to HFC. Construction Manager shall not replace any of its Key Personnel without the prior written consent of HFC, which consent shall not be unreasonably withheld (HFC shall have reasonably withheld consent if HFC does so because HFC believes that such replacement will materially impact the efficient prosecution of the Work).

§9.2.8 SPECIAL PROVISIONS

Schedule 5 attached hereto contains certain additional provisions which shall be applicable to the Work. To the extent of any conflict between the terms and provisions of Schedule 5 and those set forth elsewhere in the Contract Documents, the terms and provisions of Schedule 5 shall control.

ARTICLE 10 TERMINATION OR SUSPENSION PRIOR TO NOTICE TO PROCEED

§ 10.1 Prior to execution of the initial Notice to Proceed, HFC may terminate this Construction Agreement in whole or as to any Component without cause. After execution of the initial Notice to Proceed, HFC may terminate this Construction Agreement as to any Component for which a Notice to Proceed has not been issue, all without cause. If HFC exercises its right to terminate this Construction Agreement as to a Component but not as to both Components, then the Final Guaranteed Maximum Price Amendment shall be executed promptly following the execution of the Component Cost of the Work Maximum Agreement shall be based solely thereon.

§ 10.2 TERMINATION SUBSEQUENT TO NOTICE TO PROCEED

Subsequent to execution of the Notice to Proceed, this Notice to Proceed may be terminated as provided in Article 14 of the Construction Terms & Conditions.

ARTICLE 11 SEGREGATED CONTRACT / SALES TAX

§11.1.1 Construction Manager will cooperate with HFC to comply with applicable statutory and governmental requirements regarding separated or segregated contracts for the purpose of maintaining the exemption from state sales and use tax for the Sales Tax Exempt Items (as defined below).

§11.1.2 HFC has represented to Construction Manager that HFC is exempt from paying sales tax and that such exemption shall, subject to applicable laws, rules and regulations with regard thereto, apply to various components of the Cost of the Work to be identified by HFC from time to time in writing to Construction Manager (the “Sales Tax Exempt Items”). Based on such representation, none of any Component Cost of the Work Proposal, Component Cost of the Work Maximum Agreement, the Final Guaranteed Maximum Price or any Change Order shall include any amount for sales tax on the Sales Tax Exempt Items. If such representation by HFC is inaccurate and sales

taxes on the Sales Tax Exempt Items is assessed, HFC shall be fully responsible for and shall pay the same (but such taxes shall not constitute a part of the Cost of the Work).

ARTICLE 12: DIVERSITY

§12.1 Good Faith Diversity Efforts. Construction Manager shall make good faith efforts to award subcontracts equal to **thirty percent (30%)** of the value of this Construction Contract to certified, diverse suppliers of goods and services in accordance with the Diversity Program established by HFC, as may amended from time to time, which is made a part hereof for all purposes. Construction Manager shall disclose to HFC the manner and extent to which it has made good faith efforts to achieve such goal and submit reports on forms provided by HFC with each invoice, or as directed by HFC.

§12.2 Affirmative Steps. If Construction Manager intends to subcontract any portion of its services, then Construction Manager must take all necessary affirmative steps to assure that small and minority businesses, women's business enterprises and labor surplus area contractors are solicited and used when possible. Affirmative steps must include:

- (1) Placing qualified small and minority businesses and women's business enterprises on solicitation lists;
- (2) Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;
- (3) Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority businesses, and women's business enterprises;
- (4) Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority businesses, and women's business enterprises; and
- (5) Using the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Minority Business Development Agency of the Department of Commerce.

These affirmative steps must be taken by Construction Manager in addition to the "good faith efforts" required by the Diversity Program established by HFC, and Construction Manager represents that it shall take these affirmative steps whenever subcontractors are solicited, regardless of whether Construction Manager has achieved the aforementioned 30% of the total value of this Construction Contract.

ARTICLE 13: REQUIRED CONTRACT CLAUSES

§13.1. Equal Employment Opportunity. During the performance of this Construction Agreement, Construction Manager agrees as follows:

- (1) Construction Manager will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. Construction Manager will take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to the following: Employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. Construction Manager agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided setting forth the provisions of this nondiscrimination clause.
- (2) Construction Manager will, in all solicitations or advertisements for employees placed by or on behalf of Construction Manager, state that all qualified applicants will receive considerations for employment without regard to race, color, religion, sex, or national origin.
- (3) Construction Manager will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice to be provided advising the said labor union or workers' representatives of Construction Manager's commitments under this section, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.
- (4) Construction Manager will comply with all provisions of Executive Order 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.
- (5) Construction Manager will furnish all information and reports required by Executive Order 11246 of September 24, 1965, and by rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the administering agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.
- (6) In the event of Construction Manager's noncompliance with the nondiscrimination clauses of this Construction Agreement or with any of the said rules, regulations, or orders, this Construction Agreement may be canceled, terminated, or suspended in whole or in part and Construction Manager may be declared ineligible for further Government contracts or federally assisted construction contracts in accordance with procedures authorized in Executive Order 11246 of September 24, 1965, and such other sanctions as may be imposed and remedies invoked as provided in Executive Order 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.
- (7) Construction Manager will include the portion of the sentence immediately preceding paragraph (1) and the provisions of paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order 11246 of September 24, 1965, so that

such provisions will be binding upon each subcontractor or vendor. Construction Manager will take such action with respect to any subcontract or purchase order as the administering agency may direct as a means of enforcing such provisions, including sanctions for noncompliance: Provided, however, that in the event a contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the administering agency the contractor may request the United States to enter into such litigation to protect the interests of the United States.

§13.2. Contract Work Hours and Safety Standards Act. Construction Manager shall comply with the Contract Work Hours and Safety Standards Act, 40 U.S.C. sections 3702 and 3704, as supplemented by Department of Labor regulations (29 CFR part 5), including all of the following requirements:

- (1) Overtime requirements. No contractor or subcontractor contracting for any part of the contract work which may require or involve the employment of laborers or mechanics shall require or permit any such laborer or mechanic in any workweek in which he or she is employed on such work to work in excess of forty hours in such workweek unless such laborer or mechanic receives compensation at a rate not less than one and one-half times the basic rate of pay for all hours worked in excess of forty hours in such workweek.
- (2) Violation; liability for unpaid wages; liquidated damages. In the event of any violation of the clause set forth in this section, Construction Manager and any subcontractor responsible therefor shall be liable for the unpaid wages. In addition, such Construction Manager and subcontractor shall be liable to the United States for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic, including watchmen and guards, employed in violation of the clause set forth in this section, in the sum of \$25 for each calendar day on which such individual was required or permitted to work in excess of the standard workweek of forty hours without payment of the overtime wages required by the clause set forth in paragraph (1) of this section.
- (3) Withholding for unpaid wages and liquidated damages. HFC shall upon its own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld, from any moneys payable on account of work performed by the Construction Manager or subcontractor under any such contract or any other Federal contract with the same prime contractor, or any other federally-assisted contract subject to the Contract Work Hours and Safety Standards Act, which is held by the same prime contractor, such sums as may be determined to be necessary to satisfy any liabilities of such contractor or subcontractor for unpaid wages and liquidated damages as provided in the clause set forth in this section.
- (4) Subcontracts. Construction Manager and its subcontractors shall insert in any subcontracts the clauses set forth in this section and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. Construction Manager, as prime contractor, shall be responsible for compliance by any subcontractor or lower tier subcontractor with the clauses set forth in this section.

§13.3. Clean Air Act. Construction Manager agrees to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act, as amended, 42 U.S.C. § 7401 et seq. Construction Manager agrees to report each violation to HFC and understands and agrees that HFC will, in turn, report each violation as required to assure notification to the Texas Division of Emergency Management, FEMA, and the appropriate regional office of the Environmental Protection Agency. Construction Manager agrees to include these requirements in each subcontract exceeding \$150,000.

§13.4. Federal Water Pollution Control Act. Construction Manager agrees to comply with all applicable standards, orders or regulations issued pursuant to the Federal Water Pollution Control Act, as amended, 33 U.S.C. 1251 et seq. Construction Manager shall report all violations to HFC, and understands and agrees that HFC will, in turn, report each violation as required to assure notification to the Texas Division of Emergency Management, FEMA, and the appropriate regional office of the Environmental Protection Agency. Construction Manager agrees to include these requirements in each subcontract exceeding \$150,000.

§13.5 Suspension and Debarment. Construction Manager acknowledges that this Construction Agreement is a covered transaction for purposes of 2 C.F.R. pt. 180 and 2 C.F.R. pt. 3000. As such, Construction Manager is required to verify that none of the contractor, its principals (defined at 2 C.F.R. § 180.995), or its affiliates (defined at 2 C.F.R. § 180.905) are excluded (defined at 2 C.F.R. § 180.940) or disqualified (defined at 2 C.F.R. § 180.935). Construction Manager must comply with 2 C.F.R. pt. 180, subpart C and 2 C.F.R. pt. 3000, subpart C and must include a requirement to comply with these regulations in any lower tier covered transaction it enters into so as to verify that none of any such contractor, its principals (defined at 2 C.F.R. § 180.995), or its affiliates (defined at 2 C.F.R. § 180.905) are excluded (defined at 2 C.F.R. § 180.940) or disqualified (defined at 2 C.F.R. § 180.935). Such certifications are a material representation of fact relied upon by HFC. If it is later determined that Construction Manager did not comply with 2 C.F.R. pt. 180, subpart C and 2 C.F.R. pt. 3000, subpart C, then in addition to remedies available to HFC, the City of Houston, and the State of Texas, and the Federal Government (including any department, agency or division thereof) may pursue available remedies, including but not limited to suspension and/or debarment. Construction Manager agrees to comply with the requirements of 2 C.F.R. pt. 180, subpart C and 2 C.F.R. pt. 3000, subpart C throughout the period of this Construction Agreement. Construction Manager further agrees to include a provision requiring such compliance in its lower tier covered transactions, including but not limited to offers from bidders or proposers, to require their agreement to comply with 2 C.F.R. pt. 180, subpart C and 2 C.F.R. pt. 3000, subpart C while their offer is valid and throughout the period of any contract that may arise from their offer or proposal.

§13.6 Byrd Anti-Lobbying Amendment. Construction Manager and its contractors of any tier who apply or bid for an award of \$100,000 or more shall file the required certification in accordance with 31 U.S.C. §1352 (as amended). Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant, or any other award covered by 31 U.S.C. § 1352. Each tier shall also disclose any

lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. Construction Manager shall promptly forward each such disclosure from tier to tier up to HFC.

§13.7 Certification Regarding Lobbying. Construction Manager shall cause each of its contractors of any tier to complete and submit the following certification regarding lobbying (See Appendix A, 44 C.F.R. Part 18) with each bid or offer exceeding \$100,000:

[Name of contractor], the undersigned, certifies, to the best of his or her knowledge, that:

1. No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of an agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of this Construction Agreement or any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.
2. If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Construction Agreement or any Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.
3. The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by 31, U.S.C. § 1352 (as amended by the Lobbying Disclosure Act of 1995). Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

[Name of contractor] certifies or af Construction Managers the truthfulness and accuracy of each statement of its certification and disclosure, if any. In addition, the Construction Manager understands and agrees that the provisions of 31 U.S.C. § 3801 *et seq.*, apply to this certification and disclosure, if any.

Signature of Authorized Official

Date

Name/Title of Authorized Official

§13.8. Procurement of Recovered Materials. In the performance of this Construction Agreement, Construction Manager shall make maximum use of products containing recovered materials that are Environmental Protection Agency (“EPA”)-designated items, unless the product cannot be acquired competitively within a timeframe providing for compliance with the contract performance schedule; meeting contract performance requirements; or at a reasonable price. Information about this requirement, along with the list of EPA-designate items, is available online at <https://www.epa.gov/smm/comprehensive-procurement-guideline-cpg-program>, the EPA’s Comprehensive Procurement Guidelines site.

§13.9 Changes. This Construction Agreement may not be changed or altered except in the form of a written amendment signed by authorized representatives of Construction Manager and HFC. Any such amendment requiring payment of additional fees shall include a defined scope of services and a detailed description of the specific methodology used to determine the additional fees, which Construction Manager agrees shall be reasonable and calculated in good faith in a manner substantially similar to the method used to determine the fee under this Construction Agreement.

§13.10 Access to Records. Construction Manager grants HFC, FEMA, the Texas Department of Emergency Management, and the Comptroller General of the United States, including any of their authorized representatives, access and the right to examine and review Construction Manager’s books, documents, papers, and records that are directly pertinent to this contract for the purposes of making audits, examinations, excerpts, and transcriptions. Construction Manager agrees to permit any of the foregoing parties to reproduce by any means whatsoever or to copy excerpts and transcriptions as reasonably needed. Construction Manager shall maintain such books, records, and billing documents for 3 years after the cessation of Construction Manager’s services under this Construction Agreement. Nothing in this Section shall affect the time for bringing a cause of action or the applicable statute of limitations. Construction Manager agrees to provide HFC, FEMA, the Texas Department of Emergency Management, and the Comptroller General of the United States, including any of their authorized representatives, access to construction or other work sites pertaining to the work being completed under this Construction Agreement.

§13.11 DHS Seal, Logo, and Flags. Construction Manager shall not use the Department of Homeland Security (“DHS”) seal(s), logos, crests, or reproductions of flags or likenesses of DHS agency officials without specific FEMA pre- approval.

§13.12 Compliance with Federal Law, Regulations, and Executive Orders. This is an acknowledgement that FEMA financial assistance will be used to fund this Construction Agreement only. Construction Manager will comply will Applicable Law, including but not limited to federal law, regulations, executive orders, FEMA policies, procedures, and directives.

§13.13 No Obligation by Federal Government. The Federal Government is not a party to this Construction Agreement and is not subject to any obligations or liabilities to HFC, Construction Manager, or any other party pertaining to any matter resulting from this Construction Agreement.

§13.14 Program Fraud and False or Fraudulent Statements or Related Acts. Construction Manager acknowledges that 31 U.S.C. Chap. 38 (Administrative Remedies for False Claims and Statements) applies to Construction Manager's actions pertaining to this Construction Agreement.

[End of Page; See Following Page for Signatures]

Signature Page to Construction Contract

HFC:

HOUSTON FIRST CORPORATION

By: _____

Dawn Ullrich,
President

Approved as to Form:

Counsel to HFC

Construction Manager:

By: _____

Name: _____

Title: _____

Exhibits

A – Insurance and Indemnity

B – Prevailing Wage Rates

Schedules

Schedule 1 – Construction Terms & Conditions

Schedule 2 – Preliminary Schedule of the Work

Schedule 3 – HFC Budget Format

Schedule 4A – General Conditions Items

Schedule 4B – Scope and Schedule Basis for General Conditions Amount

Schedule 5 – Special Provisions

Schedule 6 – Key Personnel

Schedule 7 – Owner Supplied Materials

EXHIBIT "A" TO CONSTRUCTION AGREEMENT

Insurance Requirements; Bond Requirements; Indemnity

1. Specific Insurance Requirements

The following insurance shall be maintained in effect with limits not less than those set forth below at all times during the term of the Contract Documents and thereafter as required:

Insurance	Coverage/Limits	Other Requirements
Commercial General Liability (Occurrence Basis)	Amounts of coverage shall be no less than: <ul style="list-style-type: none">▪ \$2,000,000 Per Occurrence▪ \$4,000,000 General Aggregate▪ \$2,000,000 Personal and Advertising Injury▪ Designated Construction Project(s) General Aggregate Limit▪ \$1,000,000 Electronic Data Liability if performing any underground work	<ul style="list-style-type: none">▪ Current ISO edition of CG 00 01▪ The personal injury contractual liability exclusion shall be deleted.▪ Additional insured status shall be provided in favor of HFC Parties (as defined below) on a combination of ISO forms CG 20 10 10 01 and CG 20 37 10 01.▪ This coverage shall be endorsed to provide primary and non-contributing liability coverage. It is the intent of the parties to this Construction Agreement that all insurance coverage required herein shall be primary to and will not seek contribution from any other insurance held by HFC Parties, with HFC Parties' insurance being excess, secondary and non-contributing.▪ The following exclusions/limitations (or their equivalent(s)), are prohibited:<ul style="list-style-type: none">○ Contractual Liability Limitation CG 21 39○ Amendment of Insured Contract Definition CG 24 26○ Limitation of Coverage to Designated Premises or Project, CG 21 44○ Exclusion-Damage to Work Performed by Subcontractors On Your Behalf, CG 22 94 or CG 22 95○ Exclusion-Explosion, Collapse and Underground Property Damage Hazard, CG 21 42 or CG 21 43○ Any Classification limitation○ Any Construction Defect Completed Operations exclusion

Business Auto Liability

Amounts of coverage shall be no less than:

- \$1,000,000 Per Accident

Workers' Compensation and Employer's Liability

Amounts of coverage shall be no less than:

- Statutory Limits
- \$1,000,000 Each Accident and Disease

- Any endorsement modifying the Employer's Liability exclusion or deleting the exception to it
- Any endorsement modifying or deleting Explosion, Collapse or Underground coverage
- Any Habitational or Residential exclusion
- Any "Insured vs. Insured" exclusion except Named Insured vs. Named Insured
- Any Punitive, Exemplary or Multiplied Damages exclusion
- Any Subsidence exclusion
- Current ISO edition of CA 00 01 Arising out of any auto (Symbol 1), including owned, hired and no-owned
- The State in which work is to be performed must be listed under Item 3.A. on the Information Page
- Such insurance shall cover liability arising out of CMAR'S employment of workers and anyone for whom CMAR may be liable for workers' compensation claims. Workers' compensation insurance is required, and no "alternative" forms of insurance shall be permitted.
- Where a Professional Employer Organization (PEO) or "leased employees" are utilized, CMAR shall require its leasing company to provide Workers' Compensation insurance for said workers and such policy shall be endorsed to provide an Alternate Employer endorsement in favor of CMAR and HFC.
- Where CMAR uses leased employees with Workers' Compensation insurance provided by a PEO or employee leasing company, CMAR is strictly prohibited from subletting any of its Work without the express written agreement of HFC.
- Such insurance shall be excess over and be no less broad than all coverages described above.

Excess Liability (Occurrence Basis)

Amounts of coverage shall be no less than:

- \$10,000,000 Each Occurrence

Professional Liability	<ul style="list-style-type: none"> ▪ \$75,000,000 Annual Aggregate <p>Amounts of coverage shall be no less than:</p> <ul style="list-style-type: none"> ▪ \$1,000,000 Each Occurrence ▪ \$2,000,000 Annual Aggregate ▪ If a combined Contractor's Pollution Liability and Professional Liability policy is utilized, the limits shall be \$3,000,000 Each Loss and Aggregate. ▪ Such insurance shall cover all services rendered by the Contractor and its consultants under this Construction Agreement, including but not limited to design or design/build services. 	<ul style="list-style-type: none"> ▪ Drop-down coverage shall be provided for reduction and/or exhaustion of underlying aggregate limits and shall include a duty to defend any insured. ▪ Such insurance shall cover all services rendered by the Construction Manager and its subcontractors under this Construction Agreement. ▪ This insurance is not permitted to include any type of exclusion or limitation of coverage applicable to claims arising from: <ul style="list-style-type: none"> ○ bodily injury or property damage where coverage is provided in behalf of design professionals or design/build contractors ○ habitational or residential operations ○ mold and/or microbial matter and/or fungus and/or biological substance ○ punitive, exemplary or multiplied damages. ▪ Any retroactive date must be effective prior to beginning of services for HFC. ▪ Policies written on a Claims-Made basis shall be maintained for at least two years beyond termination of this Construction Agreement. ▪ The purchase of an extended discovery period or an extended reporting period on a Claims-Made policy will not be sufficient to meet the terms of this provision. ▪ This insurance is not permitted to include any type of exclusion or limitation of coverage applicable to claims arising from: <ul style="list-style-type: none"> ○ Insured vs. insured actions. However exclusion for claims made between insured within the same economic family are acceptable. ○ impaired property that has not been physically injured ○ materials supplied or handled by the named insured. However, exclusions for the sale and manufacture of products are allowed. Exclusionary
Contractors Pollution Liability	<p>Amounts of coverage shall be no less than:</p> <ul style="list-style-type: none"> ▪ \$1,000,000 Each Loss ▪ \$2,000,000 Annual Aggregate ▪ If a combined Contractor's Pollution Liability and Professional Liability policy is utilized, the limits shall be \$3,000,000 Each Loss and Aggregate. ▪ The policy must provide coverage for: <ul style="list-style-type: none"> ○ the full scope of the named insured's operations (on- 	

going and completed) as described within the scope of work for this Construction Agreement

- loss arising from pollutants including but not limited to fungus, bacteria, biological substances, mold, microbial matter, asbestos, lead, silica and contaminated drywall
- third party liability for bodily injury, property damage, clean up expenses, and defense arising from the operations;
- diminution of value and Natural Resources damages
- contractual liability
- claims arising from owned and non-owned disposal sites utilized in the performance of this Construction Agreement.
- The policy must insure contractual liability, name HFC Parties as an Additional Insured, and be primary and noncontributory to all coverage available to the Additional Insured.

language pertaining to materials supplied by the insured shall be reviewed by the certificate holder for approval.

- property damage to the work performed by the contractor
- faulty workmanship as it relates to clean up costs
- punitive, exemplary or multiplied damages
- work performed by subcontractors
- If coverage is provided on a Claims Made basis, coverage will at least be retroactive to the earlier of the date of this Construction Agreement or the commencement of contractor services relation to the Work.
- Completed Operations coverage shall be maintained through the purchase of renewal policies to protect the insured and additional insured for at least ten (10) years after the property owner accepts the project or this contract is terminated
- The purchase of an extended discovery period or an extended reporting period on a Claims Made policy or the purchase of occurrence based Construction Manager's Environmental Insurance will not be sufficient to meet the terms of this provision.

Builders Risk

- Coverage shall be provided in an amount equal at all times to the full contract value, including change orders, and cost of debris removal for any single occurrence.
- Coverage shall be at least as broad as an unmodified ISO Special form, shall be provided on a completed-value basis, and shall be primary to any other insurance coverage available to the named insured parties, with that other insurance being excess,
- Insureds shall include HFC, CMAR General, all Loss Payees and Mortgagees, and subcontractors of all tiers in the Work as Insureds.
- Such insurance shall cover:
 - all structure(s) under construction, including retaining walls, paved surfaces and roadways, bridges, glass, foundation(s), footings, underground pipes and wiring, excavations, grading, backfilling or filling;
 - all temporary structures (e.g., fencing, scaffolding, cribbing, false work, forms, site lighting, temporary

secondary and non-contributing.

- The policy must provide coverage for:
 - Additional expenses due to delay in completion of project, (per endorsement) in an amount approved by HFC
 - Agreed Value (Included)
 - Damage arising from error, omission or deficiency in construction methods, design, specifications, workmanship or materials, including collapse (Included)
 - Debris removal additional limit (\$1,000,000)
 - Earthquake and Earthquake Sprinkler Leakage (Included)
 - Flood [STBD]
 - Freezing (Included)
 - Mechanical breakdown including hot & cold testing (Included)
 - Ordinance or law (Included)
 - Pollutant clean-up and removal (\$1,000,000)
 - Preservation of property (Included)
 - Theft (Included)
- Deductibles shall not exceed
 - All Risks of Direct Damage, Per Occurrence, except \$10,000
 - Named Storm: 1%, subject to a minimum not to exceed \$50,000
 - Delayed Opening Waiting Period (5 Days)
 - Earthquake and Earthquake Sprinkler Leakage, \$25,000 Per Occurrence
 - Flood, \$25,000 Per Occurrence or excess of

utilities and buildings) located at the site;

- all property including materials and supplies on site for installation;
 - all property including materials and supplies at other locations but intended for use at the site;
 - all property including materials and supplies in transit to the site for installation by all means of transportation other than ocean transit; and
 - other Work at the site identified in this Construction Agreement to which this Exhibit is attached.
 - No protective safeguard warranty shall be permitted.
 - The termination of coverage provision shall be endorsed to permit occupancy of the covered property being constructed. This insurance shall be maintained in effect, unless otherwise provided for the Contract Documents, until the earliest of:
 - the date on which all persons and organizations who are insureds under the policy agree that it shall be terminated;
 - the date on which release of substantial completion is executed; or
 - the date on which the insurable interests of Construction Manger in the Covered Property has ceased.
- A waiver of subrogation provision shall be provided in favor of all insureds.

2. General Insurance Requirements

A. Definitions. For purposes of this Construction Agreement:

- i. "ISO" means Insurance Services Office.
- ii. "CMAR" means Construction Manager and shall include sub-contractors of any tier.
- iii. "HFC Parties" means (a) Houston First Corporation ("HFC"), (b) the City of Houston, (c) the Project Manager, (d) the Project, (e) Architect, (f) Architect, and (g) their respective shareholders, members, partners, joint venturers, affiliates, subsidiaries, successors and assigns, and (h) any directors, officers, employees, or agents of such persons or entities.

B. Policies.

- i. CMAR shall maintain such General Liability, Excess Liability, Professional and Pollution insurance in identical coverage, form and amount, including required endorsements, for at least 10 years following Substantial Completion of Work to be performed under this Construction Agreement. CMAR shall provide written representation to HFC stating Work completion date.
- ii. All policies must:
 - a. Be written through insurance companies authorized to do business in the State in which the Services are to be performed and rated no less than A-: VII in the most current edition of A. M. Best's Key Rating Guide at all times Work is to be performed.
 - b. Provide a waiver of subrogation in favor of HFC Parties on all insurance coverage carried by CMAR, whether required herein or not.
 - c. Contain an endorsement providing for 30 days prior written notice of cancellation to HFC.
 - d. Be provided to the HFC Parties in compliance with the requirements herein and shall contain no endorsements that restrict, limit, or exclude coverage required herein in any manner without the prior express written approval of HFC.
- iii. Failure of any HFC Party to demand such certificate or other evidence of full compliance with these insurance requirements or failure of any HFC Party to identify a deficiency from evidence that is provided shall not be construed as a waiver of CMAR's obligation to maintain such insurance.
- iv. CMAR shall provide to HFC a certified copy of all insurance policies required herein within 10 days of any such request. Renewal policies, if necessary, shall be delivered to CMAR prior to the expiration of the previous policy.
- v. Commencement of Work without provision of the required certificate of insurance, evidence of insurance and/or required endorsements, or without compliance with any other provision of this Construction Agreement, shall not constitute a waiver by any HFC Party of any rights. HFC shall have the right, but not the obligation, of prohibiting CMAR or any sub-contractor from performing any Services until such certificate of insurance, evidence of insurance and/or required endorsements are received and approved by HFC.

C. Limits, Deductibles and Retentions

- i. No deductible or self-insured retention shall exceed \$25,000 without prior written approval of HFC, except as otherwise specified herein. All deductibles and/or retentions shall be paid by, assumed by, for the account of, and at CMAR's sole risk. CMAR shall not be reimbursed for same.

D. Forms

- i. If the forms of policies, endorsements, certificates or evidence of insurance required by this Exhibit are superseded or discontinued, then HFC will have the right to require other equivalent forms.
- ii. Any policy or endorsement form other than a form specified in this Exhibit must be approved in advance by HFC.

E. Evidence of Insurance. Insurance must be evidenced as follows:

- i. ACORD Form 25 Certificate of Liability Insurance for liability coverages.
- ii. ACORD Form 28 Evidence of Commercial Property Insurance for property coverages
- iii. Evidence shall be provided to HFC prior to commencing Work and prior to the expiration of any required coverage.
- iv. ACORD Forms specify:
 - a. HFC as certificate holder at its mailing address;
 - b. Insured's name, which must match that on this Construction Agreement;
 - c. Insurance companies producing each coverage and the policy number and policy date of each coverage;
 - d. Producer of the certificate with correct address and phone number and have the signature of the authorized representative of the producer;
 - e. Additional Insured status in favor of HFC Parties on General Liability, Excess Liability and Pollution Liability policies;
 - f. Amount of any deductible or self-insured retention in excess of \$25,000;
 - g. Designated Construction Project(s) General Aggregate Limit on General Liability and Excess Liability policies;
 - h. Personal Injury Contractual Liability;
 - i. Primary and non-contributory status;
 - j. Waivers of subrogation; and
 - k. All exclusions and limitations added by endorsement to the General Liability coverage. This can be achieved by attachment of the Schedule of Forms and Endorsements page.
- v. Copies of the following shall also be provided:
 - a. General Liability Additional insured endorsement(s);
 - b. General Liability Schedule of Forms and Endorsements page(s); and
 - c. 30 Day Notice of Cancellation endorsement applicable to all required policies.

F. CMAR's Insurance Representations to HFC Parties

- i. It is expressly understood and agreed that the insurance coverages required herein (a) represent HFC Parties' minimum requirements and are not to be construed to void or limit the CMAR's indemnity obligations as contained in this Construction Agreement nor represent in any manner a determination of the insurance coverages CMAR should or should not maintain for its own protection; and (b) are being, or have been, obtained by CMAR in support of CMAR's

liability and indemnity obligations under this Construction Agreement. Irrespective of the requirements as to insurance to be carried as provided for herein, the insolvency, bankruptcy or failure of any insurance company carrying insurance of CMAR, or the failure of any insurance company to pay claims accruing, shall not be held to affect, negate or waive any of the provisions of this Construction Agreement.

- ii. Failure to obtain and maintain the required insurance shall constitute a material breach of, and default under, this Construction Agreement. If CMAR shall fail to remedy such breach within 5 business days after notice by HFC, then CMAR will be liable for any and all costs, liabilities, damages and penalties resulting to the HFC Parties from such breach, unless a written waiver of the specific insurance requirement(s) is provided to CMAR by HFC. In the event of any failure by CMAR to comply with the provisions of this Construction Agreement, HFC may, without in any way compromising or waiving any right or remedy at law or in equity, on notice to CMAR, purchase such insurance, at CMAR's expense, provided that HFC shall have no obligation to do so and if HFC shall do so, CMAR shall not be relieved of or excused from the obligation to obtain and maintain such insurance amounts and coverages.
- iii. This Exhibit is an independent contract provision and shall survive the termination or expiration of the Contract Documents.

G. Insurance Requirements of CMAR's Subcontractors

- i. Insurance similar to that required of CMAR shall be provided by all subcontractors, except Commercial General Liability shall be at least \$1,000,000 Per Occurrence and \$2,000,000 General Aggregate (or provided by CMAR on behalf of subcontractors) to cover operations performed under any consultant agreement. CMAR shall be held responsible for any modification in these insurance requirements as they apply to subcontractors. CMAR shall maintain certificates of insurance from all subcontractors containing provisions similar to those listed herein (modified to recognize that the certificate is from consultant) enumerating, among other things, the waivers of subrogation, additional insured status, and primary liability as required herein, and make them available to HFC upon request.
- ii. CMAR is fully responsible for loss and damage to its property on the site, including tools and equipment, and shall take necessary precautions to prevent damage to or vandalism, theft, burglary, pilferage and unexplained disappearance of property. Any insurance covering CMAR's or its subcontractor's property shall be CMAR's and its subcontractor's sole and complete means or recovery for any such loss. To the extent any loss is not covered by said insurance or subject to any deductible or co-insurance, CMAR shall not be reimbursed for same. Should CMAR or its subcontractors choose to self-insure this risk, it is expressly agreed that CMAR hereby waives, and shall cause its subcontractors to waive, any claim for damage or loss to said property in favor of the HFC Parties.

H. Use of HFC Equipment

CMAR, its agents, employees, sub-consultants or suppliers shall use HFC's equipment only with express written permission of HFC's designated representative and in accordance with HFC's terms and condition for such use. If CMAR or any of its agents, employees, or sub-consultants utilize any of HFC's equipment for any purpose, including machinery, tools, scaffolding, hoists, lifts or similar items owned, leased or under the control of HFC, then CMAR shall defend, indemnify and be liable to the HFC Parties for any and all loss or damage which may arise from such use.

3. Bond Requirements

Unless waived in writing by HFC, CMAR shall arrange and furnish (the cost thereof shall constitute part of the Cost of the Work) statutory performance and payment bonds, each for the full amount of the construction budget guaranteeing the faithful performance of all of the provisions of the construction contract as well as payment to all persons for labor and materials used in the performance of the construction contract. The bonds shall be executed on a form acceptable to HFC and shall become a part of the construction contract. HFC may withhold payments on account until such time as said bonds have been furnished and accepted. No change, alteration or modification in the terms and conditions of the construction contract, or in the terms or manner of payment shall in any way exonerate or release, in whole or in part, any surety on any bond furnished on behalf of CMAR. The cost of the bonds is included in the amount of the GMP. Any net additive Change Orders that increase the GMP will include any additional bond premiums.

4. Indemnity and Related Matters

(a) Definitions.

Parties. The “CMAR Parties” are (A) CMAR, (B) CMAR’s officers, members, partners, agents, and employees, and (C) all other persons and entities over whom CMAR has control. The “HFC Parties” with respect to the Property are (1) HFC, (2) the City of Houston, (3) the Project Manager, (4) Architect, (5) Architect, (6) the respective shareholders, members, partners, affiliates, and subsidiaries, and (7) any officers, directors, employees, agents, independent contractors, and tenants of such persons or entities or entities referred to in clause (1) through (6) of this sentence. A “Beneficiary” is the intended recipient of the benefits of another party’s Indemnity, Waiver or obligation to Defend.

Claims, Injuries. “Claims” means all foreseeable and unforeseeable claims, demands, proceedings, liabilities, damages (including actual, consequential, and punitive), expenses, Legal Costs, judgments, fines and penalties of any nature or description. “Injury” means (i) harm to, impairment or loss of or impairment or loss of use of property, including income, (ii) harm to (including sickness or disease) or death of a person, or (iii) personal and advertising injury. “Legal Costs” means court costs, attorneys’ fees, experts’ fees or other expenses incurred in investigating preparing, prosecuting or settling any legal action or proceeding or arbitration, mediation, or other method of alternative dispute resolution.

Indemnify, Waive, and Defend. “Indemnify” means to protect a party against a potential Claim and/or to compensate a party for a Claim actually incurred. “Waive” means to knowingly and voluntarily relinquish a right and/or to release another party from liability in connection with a Claim. “Defend” means to provide and pay for the legal defense of a Beneficiary against a Claim in litigation, arbitration, mediation or other proceeding with counsel reasonably acceptable to such Beneficiary and to pay all costs associated with the preparation or prosecution of such Defense. “Arising From” means directly or indirectly, in whole or in part, (i) occurring in connection with or as a result of (ii) causing, (iii) resulting in, or (iv) based upon.

(b) Indemnity as to Performance. **CMAR AGREES TO INDEMNIFY AND DEFEND THE OWNER PARTIES AGAINST ALL CLAIMS ARISING, OR ALLEGED TO ARISE, FROM ANY CMAR PARTY’S (i) PERFORMANCE OF SERVICES, (ii) BREACH OF**

THE CONSTRUCTION CONTRACT WHICH DOES NOT CONSTITUTE A CMAR'S INJURY, OR (iii) VIOLATION OF OR FAILURE TO COMPLY WITH APPLICABLE LAW.

(c) Indemnity and Waiver as to Injuries. **CMAR AGREES TO INDEMNIFY AND DEFEND THE OWNER PARTIES AGAINST, AND WAIVES AS TO ALL THE OWNER PARTIES, ALL CLAIMS ARISING, OR ALLEGED TO ARISE, FROM (I) INJURIES ARISING OUT OF CMAR'S ONGOING OR COMPLETED OPERATIONS ON THE PROPERTY OR (II) ANY INJURY SUFFERED OR CAUSED BY A CMAR PARTY WHILE ON THE PROPERTY, BUT NOT ARISING FROM CMAR'S ONGOING OR COMPLETED OPERATIONS.**

(d) Scope of Indemnities and Waivers. The Indemnities, Waivers, and obligations to Defend in this Contract are independent of and will not be limited by each other or any insurance obligations in this Contract (whether or not complied with) or damages or benefits payable under workers compensation or other employee benefit acts, and will survive the contract expiration date until all related Claims against the Beneficiaries are fully and finally barred by applicable law. All applicable law affecting the validity or enforceability of any Indemnity, Waiver or obligation to Defend contained in the contract documents is made a part of such provision and will operate to amend such Indemnity, Waiver or obligation to Defend to the minimum extent necessary to bring the provision into conformity with applicable law and cause the provision, as amended, to continue in full force and effect.

(e) Negligence of HFC Parties. CMAR'S INDEMNITY, WAIVER AND OBLIGATION TO DEFEND AN OWNER PARTY AGAINST A CLAIM WILL BE ENFORCED TO THE FULLEST EXTENT PERMITTED BY LAW FOR THE BENEFIT OF THE APPLICABLE BENEFICIARY THEREOF, EVEN IF WE APPLICABLE CLAIM IS CAUSED BY THE ACTIVE OR PASSIVE, JOINT, CONCURRENT, COMPARATIVE, ORDINARY, GROSS OR SOLE NEGLIGENCE OF THE BENEFICIARY, AND REGARDLESS OF WHETHER OR NOT LIABILITY WITHOUT FAULT OR STRICT LIABILITY IS IMPOSED OR SOUGHT TO BE IMPOSED ON THE BENEFICIARY; PROVIDED, THAT IN THE CASE OF ARCHITECT ONLY, ONLY TO THE EXTENT PERMITTED BY APPLICABLE LAW.

(f) Indemnification Procedures. If HFC or CMAR receives notice of any claim or circumstances which could give rise to an indemnified loss, the receiving party shall give written notice to the other Party within 10 days. The notice must include the following: (1) a description of the indemnification event in reasonable detail, (2) the basis on which indemnification may be due and (3) the anticipated amount of the indemnified loss.

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

CMAR may assume the defense of the claim at its own expense with counsel chosen by it that is reasonably qualified. CMAR shall then control the defense and any negotiations to settle the claim.

Within 10 days after receiving written notice of the indemnification request, CMAR must advise HFC as to whether or not it will defend the claim. If CMAR does not assume the defense, then HFC shall assume and control the defense, and all defense expenses constitute an indemnified loss.

If CMAR elects to defend the claim, then HFC may retain separate counsel to participate in, but not control, the defense and to participate in, but not control, any settlement negotiations. CMAR may settle the claim without the consent or agreement of HFC, unless it: (1) would result in injunctive relief or other equitable remedies or otherwise require HFC to comply with restrictions or limitations that adversely affect HFC; (2) would require HFC to pay amounts that CMAR does not fund in full; or (3) would not result in HFC's full and complete release from all liability to the plaintiffs or claimants who are parties to or otherwise bound by the settlement.

SCHEDULE 1 TO CONSTRUCTION AGREEMENT

Construction Terms & Conditions of the Contract

SCHEDULE 2 TO CONSTRUCTION AGREEMENT

Preliminary Schedule of the Work

SCHEDULE 3 TO CONSTRUCTION AGREEMENT

HFC Budget Format

SCHEDULE 4A TO CONSTRUCTION AGREEMENT

General Conditions Items

SCHEDULE 4B TO CONSTRUCTION AGREEMENT

Scope and Schedule Basis for General Conditions Amount

(See Following Page(s))

Page

SCHEDULE 5 TO CONSTRUCTION AGREEMENT

Special Provisions

Part A Subcontractor Bidding.

- 1.01 Construction Manager shall prepare the requests for proposal for all Subcontractors, vendors, and suppliers as directed by HFC. Construction Manager shall use commercially reasonable efforts to include minority-women and disadvantage business enterprises as part of the subcontractors solicited by Construction Manager and will be assisted by HFC's consultant.
- 1.02 Construction Manager shall solicit competitive proposals from subcontractors and vendors for all bid packages, as required by Sections 2267.255 and 2267.256 of the Government Code. Construction Manager shall make reasonable efforts to assemble for HFC's approval a schedule of a minimum of five (5) pre-qualified Subcontractors, vendors and suppliers for all bid packages.
- 1.03 Construction Manager shall not submit a bid to self-perform any of the Work.
- 1.04 Construction Manager shall respond to timely requests for information or questions from Subcontractor bidders during the Subcontractor bidding phase. Upon request, Construction Manager shall furnish HFC copies of all responses.
- 1.05 Construction Manager shall conduct individual pre-bid conferences with the major Subcontractors, preparing agendas, minutes and formal written responses to all the bidders questions.
- 1.06 Construction Manager shall receive bids and conduct bid interviews with bidders, as needed.
- 1.07 Subcontractor bidding will be accomplished by Construction Manager implementing a bid process and presenting all proposals and bid tabulations to HFC. Copies of bids shall be made available to HFC upon HFC's request.
- 1.08 Construction Manager shall review all bids and the information submitted with the bids for compliance with the Construction Documents and Construction Manager shall prepare a comprehensive analysis and review of each bid and provide its written recommendation to HFC. Construction Manager shall use diligent, good faith efforts to secure and negotiate for the best pricing from each Subcontractor, with the interests of HFC in this regard being foremost.

- 1.09 Prior to Construction Manager's execution of any Subcontract with respect to any Work, HFC, in consultation with Construction Manager, shall have the right to approve the successful bidder contingent upon the Subcontractor agreeing to (i) sign Construction Manager's subcontract, (ii) comply with the Schedule of the Work and (iii) include all required scope. HFC shall notify Construction Manager within ten (10) days of HFC's approval or rejection of any recommended Subcontractor. Upon request, Construction Manager shall provide to HFC a copy of each executed subcontract and materials purchase order.
- 1.10 Construction Manager shall ensure that each Subcontract which is not a fixed price, stipulated amount shall require the Subcontractor to agree, for the express benefit of HFC, to the provisions of this Construction Agreement regarding HFC's right to audit.
- 1.11 Construction Manager shall incorporate into its bid instructions to Subcontractors the following information provided by HFC:
- a. unit prices to be provided by Subcontractors, if applicable;
 - b. alternate prices to be provided by Subcontractors, if applicable;
 - c. instructions in regards to scope and terms and conditions to be incorporated into Subcontractor's proposals.
- 1.12 The provisions of this Part A shall not apply to subcontracts entered into by Construction Manager for the performance of any of the General Conditions Items.

PART B **Items Included in the Contract Sum**

For the avoidance of doubt, Construction Manager agrees that the Final Guaranteed Maximum Price includes all of the following as either part of the General Conditions Items to be provided for the General Conditions Amount, or as part of the Cost of the Work:

2.0 Construction Terms & Conditions

2.01 Construction Manager shall provide, and the Final Guaranteed Maximum Price shall include the cost of, proper climate control as required to construct the Work and through the date of Substantial Completion of the Work unless otherwise agreed in a writing signed by HFC. Construction Manager shall pay all utility costs, whether from a permanent or temporary source, including but not limited to gas, electricity, steam, water, through the date of Substantial Completion unless otherwise agreed in a writing signed by HFC. Construction Manager shall also pay all costs for temporary heating, cooling or ventilation facilities, equipment, labor and standby personnel through Substantial Completion.

2.02 Construction Manager may utilize any portions of the permanent mechanical or electrical systems for its own use provided:

- .01 Construction Manager pays for all required standby personnel.

.02 Construction Manager maintains the systems and restores the systems after such temporary use to the condition as required by the manufacturer to provide for the full warranty periods following turnover of the systems to HFC.

All costs incurred by Construction Manager under .01 and .02 immediately above are included in the Final Guaranteed Maximum Price and there shall be no adjustment thereto for such costs.

2.03 Construction Manager may utilize any portions of the permanent elevator system for its own use provided:

.01 Construction Manager pays for all required operating personnel.

.02 Construction Manager pays the elevator Subcontractor to maintain the system and to restore the system after such temporary use to a condition required for the full warranty period so that HFC shall have the benefit of the full warranty.

.03 Construction Manager turns over the system to HFC for occupancy in such manner or grouping so that HFC may operate the system or part of the system automatically and with full certification by all government agencies.

.04 Construction Manager provides adequate protection of all interior cab finishes, doors, frames, equipment and all other elevator work, and restores them to new condition at the final completion of the Work.

.05 All costs incurred by Construction Manager under .01, .02, .03 and .04 immediately above are included in the Final Guaranteed Maximum Price and there shall be no adjustment thereto for such costs.

2.04 The Final Guaranteed Maximum Price includes the cost of all hoisting and associated costs and as otherwise necessary to complete the Work in accordance with the Schedule including but not limited to the following: hoist rentals; testing and maintenance of hoist; machinery; installation and removal; electric power and fuel use; operation and maintenance; premium time use; concrete base and pads; landings, gates, and ramps; equipment and operator enclosures; enclosure of building openings at hoist support penetrations to the structure. Construction Manager agrees that, as necessary to maintain the buildings in good condition and to prevent damage to any systems or equipment therein and, all events prior to the date when interior finish-out begins, openings to the outside of the building shall be weather tight and interior space to be occupied shall be architecturally treated.

2.05 There shall be no charge to the Subcontractors for use of Construction Manager's material and personnel hoisting equipment (including tower cranes) except the premium time associated with off-hours hoisting will be paid for by the Subcontractors or HFC's separate contractors.

2.06 Construction Manager shall provide tower cranes for the Work. These cranes shall be in operation and available for Subcontractor as necessary to complete the Project in accordance with the Schedule of the Work. HFC recognizes that some subcontracts will require the Subcontractor to provide its own hoisting due to weight and scheduling limitations, and that such subcontracts will include costs therefor.

Page

2.07 Construction Manager shall assist in hoisting HFC's (and its tenants') furnishings, fixtures and equipment and otherwise with respect to construction of tenant improvements. Construction Manager will not be reimbursed for such hoisting if such hoisting occurs during normal working hours and if no additional personnel or equipment are required. In the event such hoisting is accomplished during overtime hours or if additional personnel or equipment are required then Construction Manager shall be reimbursed for its actual increased cost.

2.08 Construction Manager shall coordinate and cooperate with HFC's (and its tenants') fixturing contractors and furniture installers in providing them with reasonable access to the building during normal working hours, at no additional cost to either HFC or HFC's contractors, of all loading facilities, temporary utilities, including power, and trash chutes as may be required.

3.0 Final Guaranteed Maximum Price

3.01 The Final Guaranteed Maximum Price includes the cost associated with all obligations required by the Contract Documents, including any standby personnel, for normal working hours and for any overtime hours, if such overtime hours are required to maintain the Schedule of the Work and complete the Work on or before the time for completion set forth in the Schedule of the Work, except in the event of a delay to which Construction Manager is entitled to an extension of the Contract Time under the Contract Documents.

4.0 Temporary Work.

4.01 The Final Guaranteed Maximum Price includes the cost to continuously monitor, and provide, erect, maintain and remove (as applicable and as necessary to perform the Work or as specifically required by the Contract Documents) all temporary rough carpentry and temporary work, including but not limited to: barricades, site security, railing, temporary toilets, toe boards, temporary offices, storage rooms, temporary stair treads, tool sheds for Construction Manager use, protection of finish work, relocations of same, protection of utilities, toilet enclosures inside building, trash and debris chutes, hoist landings and gates, temporary dust protection, temporary elevator cabs, noise abatement measures, temporary gates, weather protection, protection of cabs, vibration protection, sidewalk bridges, site fence, field offices, and temporary buildings.

5.0 Reporting

5.01 Construction Manager's monthly reporting to HFC shall include the following: updated scheduling and Project Schedule using the Primavera software program (which shall be transmitted both electronically and in hard copy); four-week look ahead bar chart of construction activities sorted by trade contractor; detailed written narrative explaining current Project status; a comparison of costs to the Project Budget; a comparison of the progress of the Work to the Work scheduled to have been completed by such date; an update on each of the Critical Path Activities; a report showing total man-hours worked during the prior month (broken down by trade contractor); a detailed recovery schedule and plan for any delayed Critical Path Activity; a Change Order log listing approved, rejected, pending and forecasted changes and Change Order Directives including the relevant dates, amounts, status, source documents and notes related thereto; an RFI log listed by RFI #, including a description of the item, current status, date of submittals and

responses; an injury report; and a log of quality control inspections including the number and type of inspections made, results and follow-up with respect to non-conforming Work.

6.0

Site Logistics

- 6.01 The Final Guaranteed Maximum Price includes the cost to develop and maintain an Emergency Response Plan in a form acceptable to HFC.
- 6.02 [Intentionally omitted.]
- 6.03 The Final Guaranteed Maximum Price includes all costs associated with installing and maintaining temporary roads, staging areas, and temporary utilities necessary for the total construction of the Work.
- 6.04 The Final Guaranteed Maximum Price includes all costs to provide all temporary protection, loading and unloading areas, storage areas, parking areas, temporary utilities, barricades and associated costs as required to complete the Work in accordance with the Schedule of the Work.
- 6.05 The Final Guaranteed Maximum Price includes all costs to provide all miscellaneous small tools and equipment required for the performance of the Work.
- 6.06 The Final Guaranteed Maximum Price includes all costs to provide all weather protection, including weather tight enclosures and temporary roofs as required.
- 6.07 The Final Guaranteed Maximum Price includes all costs to provide all general expenses or incidentals associated with the field office or home office.
- 6.08 The Final Guaranteed Maximum Price includes all costs to provide for safety and security. Construction Manager shall provide security and site safety personnel as it deems appropriate to fulfill its contractual obligations. Construction Manager shall provide site safety meetings and meet all safety requirements. Construction Manager shall provide night watchman service as Construction Manager determines is appropriate to fulfill its contractual obligations.
- 6.09 The Final Guaranteed Maximum Price includes all costs to provide and maintain all fire protection, firewatches, fire extinguishers or any other service device or equipment required for the performance of the Work except that the fire risers and associated fire hoses shall be provided and maintained by the fire protection Subcontractor.
- 6.10 Construction Manager is familiar with all publicly disclosed, planned construction projects adjacent to the Project. Construction Manager shall coordinate all Work with the work of such other projects. Construction Manager shall also become familiar with publicly disclosed private and public activities planned in the Houston Theater District during the period of time the Project is being constructed. The Final Guaranteed Maximum Price includes all costs associated with dealing with difficulties in performing the Work due to reasonably foreseeable congestion in the Theater District, including Project-site adjacent streets and office buildings due to such other construction projects and activities known to Construction Manager at the time that the parties have agreed to the Final Guaranteed Maximum Price.

7.0 Cleaning, Trash and Debris Removal, and Restoration

- 7.01 The Final Guaranteed Maximum Price includes all costs to provide a clean and safe site including extermination as required.

- 7.02 Each Subcontractor shall be responsible, consistent with their Subcontract agreement, for placing their trash and debris in a centrally located suitable container and/or trash chute(s) on each floor as directed by Construction Manager. The Final Guaranteed Maximum Price includes all costs to provide such containers and/or trash chute(s).
- 7.03 The Final Guaranteed Maximum Price includes the costs for Construction Manager to regularly remove and dispose of such trash and debris. Construction Manager may utilize trash chutes, the temporary hoisting equipment or temporary elevators during normal working hours to remove such trash as long as it does not interfere with the progress of the Work.
- 7.04 The Final Guaranteed Maximum Price includes all costs to provide all final interior cleaning (excluding sterile cleaning), which is to be accomplished prior to FF&E installation. The Final Guaranteed Maximum Price includes all costs to provide all final exterior cleaning which is to be accomplished prior to occupancy.
- 7.05 The Final Guaranteed Maximum Price includes all costs to provide all site and street cleaning including trash, debris, mud, snow and water removal. The Final Guaranteed Maximum Price includes the cost of a truck wash-down area during excavation.
- 7.06 The Final Guaranteed Maximum Price includes all costs to repair or replace any sidewalks, fire hydrants, railroad tracks, street lights, traffic signals, streets, curbs, gutters, or utilities damaged during construction. The Final Guaranteed Maximum Price includes all costs to remove, replace, cap or relocate as necessary all utilities, street lamps, traffic lights, controllers, and signage necessary to complete the Work or as is required by law in connection with the performance of the Work. The Final Guaranteed Maximum Price includes all costs to protect and shall not disrupt any existing utility service routed through the site.
- 8.0 Line and Grade
- 8.01 The Final Guaranteed Maximum Price includes all costs to provide the survey, axis lines and benchmarks, layout, or line and grade work necessary for proper execution of the Work except for the original survey provided by HFC and that work normally provided by the Subcontractors.
- 9.0 Schedule
- 9.01 Construction Manager specifically agrees to the terms and conditions relating to the Contract Time as set out in the Contract Documents. The Schedule of the Work indicates the construction time anticipated by Construction Manager. It is mutually understood that Construction Manager shall provide the matters required by the Contract Documents and all matters set out herein required to complete the Work and not that Construction Manager shall provide such matters for certain periods of time.
- 9.02 The Schedule of the Work includes a two-week period to permit all of the following activities (each of which is to complete as part of achieving Substantial Completion): off-gassing and burn-in period of materials for the Work, including but not limited to carpet, paint, furniture, etc., during performance of all punch list work; and start-up, commissioning, testing and balancing of all equipment and systems comprising part of the Work. HFC shall retain the commissioning agent as

a separate contractor but Construction Manager shall support the commissioning agent including, by way of example and not limitation, having Subcontractor personnel available to operate and make adjustments to equipment and systems during commissioning.

10.0 Coordination

10.01 The Final Guaranteed Maximum Price includes all costs to cooperate with and coordinate the Work with the work of HFC and HFC's separate contractors and interior construction contractors and fixturing contractor's special equipment installers and furniture installers.

10.02 The Final Guaranteed Maximum Price includes all costs to coordinate the Work with all utility work performed by others.

11.0 Permits, Taxes, Warranties

11.01 The Final Guaranteed Maximum Price includes the cost of all special or extended warranties for the Work set forth in the Contract Documents.

11.02 The Final Guaranteed Maximum Price includes all taxes and fees as required by authorities having jurisdiction and as provided in the Contract Documents.

11.03 The Final Guaranteed Maximum Price includes all costs to provide and maintain all construction-related permits and approvals including but not limited to, sidewalk and/or street closings, sidewalk crossings, building and interior improvements, certificates of occupancy and any other permits not normally furnished by a Subcontractor.

12.0 Miscellaneous

12.01 The Final Guaranteed Maximum Price includes the cost of all temporary graphics necessary for the performance of the Work and as required by governmental bodies having jurisdiction.

12.02 The Final Guaranteed Maximum Price includes all costs associated with temporary bracing, support, shoring or structural upgrades as necessary to perform the Work.

12.03 If approved by and agreed to in advance, in writing, by HFC, Construction Manager may bill for off-site stored materials meeting the following requirements:

.01 Materials and equipment custom fabricated specifically for the Project or having long lead time ordering requirements wherein delivery to the Project Site by the date required for installation cannot otherwise be guaranteed.

.02 Materials stored in a separate segregated area from other materials and clearly identified for the Project.

.03 Materials protected from damage, theft and weather deterioration.

.04 Materials covered by insurance and a notarized bill of sale in HFC's name.

.05 Notice of intention to bill for the material is given to HFC and Architect by the 15th of the month to allow HFC and/or Architect to inspect the stored material before the monthly Application for Payment due date.

12.04 The Final Guaranteed Maximum Price includes an allowance for the cost of leasing, installation, maintenance, utilities, janitorial services, moving and the provisions of furniture, fixtures and equipment for HFC's and Architect's temporary offices as located by HFC.

SCHEDULE 6 TO CONSTRUCTION AGREEMENT

Management Staffing Chart

Page

SCHEDULE 7 TO CONSTRUCTION AGREEMENT

Owner Supplied Materials