

## CONSTRUCTION MANAGEMENT AGREEMENT

**THIS CONSTRUCTION MANAGEMENT AGREEMENT** ("Agreement") is made effective as of this \_\_\_ day of \_\_\_\_\_, 2022 by and between:

**Owner ("City"):**

CITY OF FRUITA

a Colorado home rule municipality

325 E. Aspen. Ave.

Fruita, CO 81521

e-mail

AND

**Construction Manager ("CM"):**

HENSEL PHELPS CONSTRUCTION CO.

a Delaware General Partnership

address

address

e-mail

FOR

**Project:**

Multiple Projects as determined by the City during the pendency of this Agreement for which CM is overseeing the same.

**Engineer:**

TETRA TECH

## **AGREEMENT:**

In consideration of the mutual covenants and conditions hereinafter contained and the good and valuable consideration of which is hereby acknowledged, the parties mutually agree as follows:

### **I.** **SCOPE OF SERVICES**

CM shall provide the following construction management services (the "Services"):

**1.1. Purpose.** The City and CM acknowledge and agree that the purpose of this Agreement is to set forth specific Services to be performed by CM during the Term of this Agreement for the possible construction of more than one Project for the City. The City has contracted separately with Tetra Tech ("Engineer") for architectural and engineering design services for the Project(s). Nothing in this Agreement shall affect the rights, duties, and obligations of the City and Engineer as provided in the City's contract with Engineer, attached hereto as Exhibit B. At the end of the design phase, at the City's discretion, the City may enter into a separate agreement with CM for construction of any Project.

For the purposes of this Agreement, the term "Project" shall mean the total construction of which the Work may be a whole or part of the Project. During the term of this Agreement, there will be multiple Projects for the City covered by this Agreement. The term "Work" required for the Project used in this Agreement shall mean the various parts of total construction to be performed under this Agreement. For clarification, the Project will be constructed in a series of phases, each phase, until completion, constituting the Project. Any reference to the Project includes a reference to any phase thereof.

**1.2. Project Schedule.** When Project requirements have been sufficiently identified by City, CM shall prepare a preliminary Project schedule (the "Project Schedule") for Engineer's review and the City's approval. CM shall coordinate and integrate the Project Schedule with the services and activities of the City and Engineer. As the design of the Project proceeds, CM shall update the Project Schedule to indicate proposed activity sequences, durations and/or milestone dates for such services and activities upon receipt and approval of pertinent information from the City and Engineer. If the Project Schedule updates indicate that milestone dates contained in prior Project Schedules will not be met, CM shall notify and make recommendations to the City.

**1.3. Budgets.** When the City and CM agree that the documents for construction of the Project (the "Construction Documents") are sufficiently complete, the CM shall prepare and submit to the City in writing a budget for construction including data from any Contractor (the "Construction Budget"). The Construction Budget shall include the estimated cost of the Project, the clarifications and assumptions upon which it is based, allowances and reasonable contingencies. CM shall meet with the City and Engineer to review the Construction Budget. In the event that the City or Engineer discover any inconsistencies, inaccuracies or omissions in the information presented, they shall promptly notify CM, who shall make appropriate adjustments to the Construction Budget. The City shall then give written approval of the Construction Budget. If any budget submitted to the City exceeds previously approved budgets, CM shall notify and make recommendations to the City.

**1.4. Procurement.** With the assistance of Engineer, CM shall prepare and solicit bids for the Project. CM shall manage delivery of bid documents to the prospective bidders. The bid documents shall

include a reference that this Project is to be built for a tax-exempt public entity; no sale or use taxes are payable with respect to the Work. As such, all bids shall exclude all sales and use tax. As part of CM's duties, CM shall apply and present the appropriate documents to the Colorado Department of Revenue to obtain such exemption and ensure that no taxes are incurred. To the extent applicable, said exemption number shall be used by CM and/or each Contractor for the purchase of all property to be built into the Work. Engineer and CM shall develop and coordinate procedures to provide answers to bidders' questions.

**1.4.1.** CM shall conduct bid openings and shall evaluate the bids to determine the lowest responsive and qualified bidder in accordance with the City's Procurement Policy. Engineer and CM shall make recommendations to the City concerning the acceptance or rejection of bids. Upon approval of a Contractor, CM shall prepare a Notice of Award.

**1.4.2.** CM shall prepare, execute, and deliver the Contract Documents between CM and the Contractors. CM shall also issue notices to proceed to any Contractor. CM shall inform the bidders of their responsibilities regarding the Schedule.

**1.4.3.** The CM shall contract directly with such Contractors as may be necessary for construction of or supply of materials for the Project. All such contracts shall be issued consistent with the applicable provisions of this Agreement.

**1.4.4.** CM shall be responsible for securing, without limitation, all necessary approvals, authorizations, permits, agreements, and licenses necessary for the construction, use and occupancy of the Project (collectively, the "Permits").

**1.5. Project Meetings.** CM shall schedule and conduct meetings at which the City, CM, Engineer and the Contractor(s) will discuss the status of the Project. CM shall prepare and promptly distribute meeting minutes. CM shall provide bi-weekly written reports to the City and Engineer on the progress of the Project. The log containing the minutes and bi-weekly reports shall be available to the City and Engineer.

**1.6. Substantial Completion.** Engineer, in consultation with CM, shall determine when the Project and/or a phase of the Project is substantially complete. Engineer, in consultation with CM, shall, prior to issuing a Certificate of Substantial Completion, prepare a list of work that does not conform to the Contract Documents. This list shall be attached to the Certificate of Substantial Completion.

For the purposes of this Agreement, "substantial completion" shall mean the point in the progress of the Project, or any phase thereof, sufficiently complete in accordance with the Contract Documents so the City can occupy or utilize the Project and/or any phase thereof for its intended use. Upon the issuance of the Certificate of Substantial Completion for the Project and/or any phase thereof, the City shall assume responsibility for security, maintenance, utilities, and insurance for the Project and/or phase. Prior to the issuance of a Certificate of Substantial Completion, Engineer and CM shall recommend the issuance of said certificate to the City, who shall have the ultimate decision regarding acceptance of the Work as substantially complete. The City shall not unreasonably withhold acceptance of the Project, or any phase thereof, as substantially complete.

**1.7. Final Completion.** Engineer, in consultation with CM, shall determine when the Project and/or any phase thereof is finally completed and, following completion of corrections and recommendation to the City to accept the Project and/or any phase thereof, shall issue a Certificate of Final Completion to the City. Upon final acceptance of the Project and/or any phase thereof by the City, CM, with the assistance of

Engineer, shall prepare and publish a Notice of Final Payment, as required by C.R.S. § 38-26-107. Following the expiration of the time provided in said Notice of Final Payment, and subject to the other requirements provided by law regarding final payment, the City shall make final payment for the Project and/or any phase thereof to CM. CM shall then make all remaining payments, if any, due to Contractors. CM shall ensure that all Contractors are paid on the Project and upon payment of any part or parcel thereof, obtain the appropriate lien waivers from Contractors, suppliers, laborers, or any other person who provided labor or supplies on the Project. Nothing in this paragraph shall modify any retainage rights of the City, as provided for elsewhere in this Agreement.

For the purposes of this Agreement, “final completion” shall mean the point where the Project, or any phase thereof, has been constructed in accordance with the Contract Documents, all corrective or “punch list” items have been completed to the satisfaction of the City, and is fully operational for its intended purpose. “Final acceptance” shall mean the date which the City, through action taken by its City Council, accepts the Project, or any phase thereof, as finally complete. For clarification, a Certificate of Final Completion shall be issued at (1) completion of each phase of the Project, and (2) completion of the overall Project. Accordingly, there shall be final acceptance by the City for (1) each phase of the Project, and (2) upon completion of the overall Project. A Certificate of Final Completion or final acceptance by the City of a phase of the Project shall not in any way constitute an acceptance of the overall Project.

**1.8. Change Orders.** All proposed City/Engineer-initiated change orders shall be detailed in writing by Engineer to CM accompanied by technical drawings and specifications. In response to a change order request, CM shall submit detailed information concerning the costs and time adjustments, if any, necessary to perform the proposed change order work. CM shall determine the basis for the cost and time to perform the Work and, if any, the effect on the Guaranteed Maximum Price. CM shall present its findings to Engineer, who shall make the appropriate recommendation to the City. Engineer shall prepare change order documents for signature by CM and the City.

**1.8.1.** CM and Engineer shall review any Contractor-requested change orders to determine the effect, if any, on the Guaranteed Maximum Price. CM shall provide Engineer a copy of each change order request, and CM shall consider Engineer’s comments regarding the proposed changes in its evaluation of the Contractor’s request. Engineer shall present its findings to the City regarding the proposed changes, and at the City’s direction, shall prepare change order documents for signature by CM and the City. Upon execution of such documents, CM shall prepare change order documents for signature by the Contractor.

**1.9. Retainage.** The City will retain five percent (5%) from any progress payment made to CM, which shall be retained until final payment on the Contract Package. Upon receipt of an application for final payment of a Contract Package of the Project by a Contractor, CM shall notify the City regarding same. The City shall make sufficient funds available to compensate CM in order to pay the Contractor the final amounts due on any contract of the Project. This shall not affect the amounts retained by the City in relation to CM’s progress payments made hereunder, as provided below.

For the purposes of this Agreement, “Contract Package” shall mean all Work necessary for any Project pursuant to this Agreement.

**1.10. Post-Construction.** CM shall coordinate submittals of information for preparation of record drawings and specifications, and shall coordinate transmittal of such documents to Engineer. Prior to final completion of the Project, CM shall compile manufacturers’ operations and maintenance manuals, warranties and guarantees and bind such documents in an organized manner. CM shall then provide such information to

Engineer for review. Upon review and revision, if applicable, by Engineer, such information shall be delivered to CM for implementation or appropriate modification, then provided to the City.

**II.**  
**DURATION OF CM'S SERVICES**

**2.1. Commencement.** The commencement date for CM's Services shall be the date of execution of this Agreement by City as stated herein or the date on which City issues to CM a written instruction to proceed with Services, whichever is earlier.

**2.2. Term.** The duration of CM's Services under this Agreement shall be from the commencement date to December 31, 2027 ("Term"). The Term of this Agreement can be extended upon the execution of an Amendment between the City and CM to this Agreement.

**2.3. Liquidated Damages.** The parties agree that under this Agreement, time is of the essence. If CM does not complete its services provided for under this Agreement within the time periods specified in a Contract Package, after allowance for any extensions granted by City, CM shall pay to City as liquidated damages, and not as a penalty, the amount amount designated per day within the Contract Package for each calendar day CM is in default. City shall have the right to deduct the liquidated damages then due from any monies due to CM, or to bring legal action against CM to obtain the liquidated damages.

**III.**  
**PROJECT COST AND PAYMENT**

**3.1. Guaranteed Maximum Price.** CM shall propose a Guaranteed Maximum Price for each Contract Package, or any phase thereof. The Guaranteed Maximum Price shall be documented by CM and, once established, shall be subject to modification only as defined in this Agreement. The Guaranteed Maximum Price shall be submitted to City within sixty (60) days after the City and CM agree the documents are sufficiently complete. City shall accept the Guaranteed Maximum Price within fifteen (15) days of the receipt thereof, unless such time is extended by agreement of the parties. If City does not accept the Guaranteed Maximum Price and/or elects not to proceed with the Project, this Agreement shall terminate and CM shall be compensated only for Services actually performed to date.

The Guaranteed Maximum Price is the total cost of each Contract Package, defined herein. The Guaranteed Maximum Price includes the cost of labor, equipment, supplies, materials, services and allowances to complete the scope defined in the Contract Documents for the Contract Package. The Guaranteed Maximum Price shall include those taxes applicable to the Project that are legally enacted at the time the Guaranteed Maximum Price is established. Any increase or decrease in taxes that affect the Guaranteed Maximum Price and that are enacted after the Guaranteed Maximum Price is submitted shall be incorporated into that price by change order signed by CM and the City.

**3.2. Cost of the Contract Package.** The term "cost of Contract Package" shall include all amounts paid by City to CM for the payment of all separate Contractors, suppliers and equipment lessors for all work, bonds, insurance material, labor, and equipment supplied each Contract Package, including the fee charged by CM for its Services on the Project, said fee which shall be included as a separate line item in the Guaranteed Maximum Price. The cost of the Project shall not include: all professional fees paid by City to Engineer or other consultants retained directly by City; all costs paid directly by City to contractors or suppliers retained directly by City and outside the scope of the Guaranteed Maximum Price; or all other costs not within the control of CM or identified as not being within the Guaranteed Maximum Price not required to

complete the Work.

**3.3. Statements; Payment.** CM will submit invoices to City monthly. City has the right to withhold from any progress payment or final payment an amount necessary to protect City, as determined in the City's sole discretion, under the following circumstances: (1) defective work not remedied by CM or a Contractor; (2) claims filed against the Project or reasonable evidence indicating the probable filing of claims; (3) failure of CM to make timely payment to a Contractor for material and/or labor; or (4) a reasonable doubt that the Project can be completed for the balance of the total Project costs then unpaid.

**3.4. Suspension.** When any invoice is outstanding and unpaid thirty (30) days after the date of billing, CM may, at its discretion, suspend its performance of the Services. CM's suspension is in addition to all other rights and remedies available to CM under this Agreement and at law or in equity.

**3.5. Changes in CM's Services.** Without invalidating this Agreement, City may make changes in CM's Services. CM shall promptly notify City of changes that increase or decrease CM's compensation, the duration of Services, or both. CM may receive additional compensation and additional time when the scope of CM's Services is increased or extended through no fault of CM. CM shall make a written request to City for additional compensation within thirty (30) days of the occurrence of the event giving rise to such request. Any additional compensation to be paid and any extension of the duration of this Agreement shall be determined on the basis of CM's cost, a customary and reasonable adjustment in CM's fee consistent with the provisions of this Article III, and a determination of the length of the extensions of the duration of this Agreement.

**3.6 Delays and Force Majeure.** If CM is delayed at any time in the commencement or progress of the Work by labor disputes, fire, unusual delay in deliveries, pandemics, epidemics, unavoidable casualties, adverse weather conditions, or other causes beyond the CM's control, then CM shall be entitled to an extension of the duration of this Agreement. If CM is delayed at any time in the commencement or progress of the Work by an act or neglect of the Owner or Engineer, of an employee of either, or anyone for whom they are responsible, then CM shall be entitled to additional compensation, which amount shall be agreed to by the Parties, and an extension of the duration of this Agreement.

### **III.** **CITY'S RESPONSIBILITIES**

**3.1.** The City shall see to it that all information regarding the Project is provided to CM in a reasonably timely manner so that CM can perform its Services. If the City becomes aware of any matter, condition or development in the Project that could affect CM's performance of the Services, City shall give notice to CM of such condition as soon as a reasonably possible.

**3.2.** The City shall provide reasonable access to the Project so that CM can perform its Services.

**3.3.** The City shall see to it that CM shall be furnished, without charge to the CM, copies of drawings, specifications and any other documentation in connection with the Project reasonably necessary for CM's performance of the Services.

**3.4.** The City shall provide evidence to CM that sufficient funds are available and have been appropriated for the Project.

**IV.**  
**MISCELLANEOUS**

**4.1. Insurance.** Before commencing its services and as a condition precedent to payment, CM shall, at its own cost and expense, procure and maintain in force at all times during the Term of this Agreement: Workers' Compensation Insurance or Employers' Liability Insurance in the amount required by Colorado law; Commercial Automobile Liability Insurance; and Commercial General Liability Insurance ("CGL"), with bodily injury and property damage coverage in accordance with such limits set forth by the Colorado Governmental Immunity Act, C.R.S. § 24-10-114, as amended, or in amounts otherwise acceptable to City. CM shall provide to the City a certificate evidencing such coverage upon execution of this Agreement and attach such certificate hereto as Exhibit D. City and CM waive all rights against each other and against the Contractors for damage occurring during construction and covered by any property insurance required for this Project. CM shall require appropriate similar waivers for all contractors in amounts not less than such limits set forth by the Colorado Governmental Immunity Act, C.R.S. § 24-10-114, as amended.

**4.2. Bonds.** CM shall furnish bonds covering faithful performance of this Agreement and payment of the obligation arising thereunder. The amount of each bond shall be equal to one hundred percent (100%) of the cost of the Guaranteed Maximum Price. CM shall deliver the required bonds to the City at least three (3) days prior to commencement of any work at the Project site.

**4.3. Indemnity.** CM shall indemnify and hold harmless the City, its officers, directors, members, consultants, agents and employees from all claims for bodily injury and property damage including reasonable attorneys' fees, costs and expenses incurred by the City caused by negligent or intentionally wrongful acts or omissions of CM, or any other party for whom CM is legally liable. CM shall cause any Contractor to indemnify and hold harmless the City, CM and Engineer from and against any and all claims, demands, suits and damages, including consequential damages and reasonable attorneys' fees, resulting from personal injury or property damages, costs, expenses and fees that are asserted against the City, CM and Engineer and that arise out of or result from negligent or intentionally wrongful acts or omissions or the breach of the Construction Contract by Contractor, its employees, agents and representatives in performing work for the Project.

**4.4. Termination.** This Agreement may be terminated by the City, in its discretion, after seven (7) days' written notice to CM. This Agreement may be terminated by either party upon a material breach of any provision of this Agreement by the other party. In the event of a material breach any provision of this Agreement, the non-breaching party shall give written notice of such breach to the breaching party. The breaching party shall have ten (10) days from receipt of such notice to cure its breach. If the breach is not so cured, the non-breaching party may terminate this Agreement immediately upon written notice to the breaching party. For purposes hereof, any failure by the City to pay sums owing within the time frame provided shall be deemed a breach. Upon any breach that remains uncured after ten (10) days or after the City fails to pay sums owing when due, the non-defaulting party may terminate this Agreement immediately by delivery of written notice of such termination to the breaching party. In the event of a termination of this Agreement, the City shall pay CM all amounts due by City under this Agreement for Services actually performed prior to such termination.

**4.5. Limitation on Damages.** Neither party shall be liable to the other for, and the parties waive all claims for, any consequential, incidental, indirect or special damages of whatever kind or nature in connection with this Agreement or the Project.

**4.6. Assignment.** Neither party may, without the other party's prior written approval (which shall not be unreasonably withheld, conditioned or delayed), voluntarily or involuntarily assign, convey, transfer, pledge, mortgage or otherwise encumber all or any portion of its interests in this Agreement.

**4.7. Notices.** Whenever under the provisions of this Agreement it shall be necessary or desirable for one party to serve any notice to the other party, such notice shall be addressed as follows:

To the City:                   City of Fruita  
                                      Attn: Kimberly Bullen  
                                      325 E. Aspen Ave.  
                                      Fruita, CO 81521  
                                      kbullen@fruita.org

To CM:                         Hensel Phelps Construction Co.  
                                      Attn: Brian Penner  
                                      77 NW Frontage Road  
                                      Fort Collins, CO 80524  
                                      bpenner@henselpheps.com

Any notice, request, demand, report or other communication served personally shall be deemed delivered upon receipt, if served by mail or independent courier shall be deemed delivered on the date of receipt as shown by the addressee's registry or certification receipt, and if served by facsimile transmission shall be deemed delivered on the date of receipt as shown on the received facsimile (provided the original is thereafter delivered as aforesaid).

**4.8. Binding Effect.** This Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective legal representatives, successors and permitted assigns.

**4.9. Waiver.** No waiver by any party of any right or remedy under this Agreement shall be deemed to be a waiver of any other or subsequent right or remedy under this Agreement. No waiver of any term, covenant or condition of this Agreement shall be valid unless affirmed in writing.

**4.10. No Third-Party Beneficiary.** This Agreement is not intended to create any right in, and shall not create any right in, any third party. The parties hereto disclaim any claimed rights of any third party in and to this Agreement.

**4.11. Governing Law; Venue.** This Agreement shall be governed and construed in accordance with the laws of the State of Colorado. Any litigation arising in connection with this Agreement shall be commenced only in the District Court for Mesa County, Colorado.

**4.12. Severability.** If any term or provision of this Agreement, the deletion of which would not adversely affect the receipt of any material benefit by either party hereunder, shall be held by a court of competent jurisdiction to be invalid or unenforceable, the remainder of this Agreement shall not be affected thereby and each other term and provision of this Agreement shall be valid and enforceable to the fullest extent permitted by law.

**4.13. Entire Agreement; Amendment.** This Agreement constitutes the entire and exclusive agreement between the parties relating to the specific matters covered in this Agreement. All prior and



contemporaneous written and oral agreements and understandings between the parties are hereby merged into this Agreement. This Agreement may be altered, amended or revoked only by an instrument in writing signed by the parties hereto.

**4.14. Survival.** Any provision of this Agreement that (i) is expressly stated to survive the expiration or termination of this Agreement, and (ii) by its nature, sense and context could reasonably be expected to survive the expiration or termination of this Agreement, shall be enforced accordingly.

**4.15. Counterparts/Electronic Signatures.** This Agreement may be executed in multiple counterparts, each of which, when taken together, shall constitute one and the same instrument. Electronic signatures shall be deemed binding.

**4.16. Warranty.** CM warrants that all work, materials and equipment furnished or performed on the Project by either CM or any of the awarded Contractors is in conformance with the Contract Documents for the Project, or any phase thereof, and that said work, materials and equipment are free of defect and of good workmanship and quality. CM further warrants that materials and equipment furnished for the Project are new unless otherwise permitted under the Contract Documents or any design specification. Any work, materials and equipment not conforming with these requirements, including substitutions not properly approved and authorized, may be considered defective. CM's warranty excludes remedy for damage or defect caused by abuse, modifications by City not agreed to by CM, improper or insufficient maintenance, improper operation or normal wear and tear under normal usage.

**4.17. Appropriation.** By executing below, the City states that it has appropriated money equal to or in excess of the cost of each executed Guaranteed Maximum Price for each Contract Package. The parties acknowledge and agree that no change order which requires additional compensation and causes the aggregate amount payable under this Agreement to exceed the appropriated amount shall be issued unless appropriation for the costs thereof has been made. CM acknowledges that no City employee has the authority to bind the City with regard to any payment for any work which exceeds the amount appropriated for and payable pursuant to this Agreement. No provision of this Agreement shall be construed or interpreted: i) to directly or indirectly obligate City to make any payment in any year in excess of amounts appropriated for such year; ii) as creating a debt or multiple fiscal year direct or indirect debt or other financial obligation whatsoever within the meaning of Article X, Section 16 or Article X, Section 20 of the Colorado Constitution or any other constitutional or statutory limitation or provision; or iii) as a donation or grant by the City to or in aid of any person, company or corporation within the meaning of the Colorado Constitution.

**4.18. Immunity.** Nothing herein shall be construed as a waiver, or partial waiver, by the City of any portion of the Colorado Governmental Immunity Act ("CGIA"), C.R.S. § 24-10-101, *et seq.*

**[Signature Page(s) to Follow]**

The Parties have executed and delivered this Agreement on the date first written above.

**OWNER:**

**CITY OF FRUITA,**  
a Colorado home rule municipality

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

Name:

Title:

**CM:**

**HENSEL PHELPS CONSTRUCTION CO.,**  
a Delaware General Partnership

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

Name: Brian Penner

Title: Operations Manager