



CITY OF TOMBALL, TEXAS

Tomball South Wastewater Treatment Plant Expansion

**City of Tomball Project No.: 2023-10003
FNI Project No.: TMB24038**

**CONSTRUCTION MANAGER AT RISK
CONSTRUCTION PHASE SERVICES AGREEMENT**

CONTRACT NO. _____

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CITY OF TOMBALL, TEXAS

Construction Manager at Risk Agreement for Tomball South Wastewater Treatment Plant Expansion
CONSTRUCTION MANAGER AT RISK CONSTRUCTION PHASE SERVICES

GMP No. 1

Project No. 2023-10003 Contract No. _____

THIS AGREEMENT, made and entered by and between City of Tomball, hereinafter designated the “Owner” and Webber Waterworks, LLC, hereinafter designated the “Construction Manager at Risk” or “CM@Risk”.

RECITALS

- A. The **City Manager of the City of Tomball, Texas**, or their designee, is authorized and empowered by provisions of the City Charter to execute contracts for construction services.
- B. The Owner intends to construct Tomball South Wastewater Treatment Plant Expansion Project as more fully described in the Approved Guaranteed Maximum Price and its amendments.
- C. To undertake the construction administration of said Project, the Owner has entered into a contract with Freese and Nichols, Inc., hereinafter referred to as the “Design Professional.”
- D. The CM@Risk has represented to the Owner the ability to provide construction management services and to construct the Project. Based on this representation, the Owner engages the CM@Risk to provide these services and construct the Project.
- E. Contract for Design Phase Services has been executed previously between Owner and CM@Risk to perform Design Phase services. Those services may continue during the duration of this Contract.

NOW THEREFORE, for and in consideration of the mutual covenants and considerations hereinafter contained, it is agreed by and between the Owner and the CM@Risk as follows:

Article 1 – Definitions

1.0 Defined Terms

- 1.1** Wherever used in the Proposal Documents or Contract Documents, a term printed with initial capital letters, including the term's singular and plural forms, will have the meaning indicated in the definitions below. In addition to terms specifically defined, terms with initial capital letters in the Contract Documents include references to identified articles and Paragraphs, and the titles of other documents or forms.
- 1.2** "Agreement" or "Contract" means this written document signed by the Owner and CM@Risk covering the construction phase of the Project, and including other documents itemized and referenced in or attached to and made part of this Contract. The terms Agreement and Contract shall be used interchangeably throughout unless specifically stated otherwise.
- 1.3** "Application for Payment" means the Owner form used by the CM@Risk to request progress payments for Work in accordance with Article 7.
- 1.4** "Approved GMP" means any GMP or GMP amendment agreed to by the parties in accordance with this Agreement.
- 1.5** "Certificate of Substantial Completion" has the meaning given such term in Subsection 4.1.5.
- 1.6** "Change Directive" means a written order prepared and signed by Owner, directing a change in the Work prior to agreement on an adjustment in the Contract Price and the Contract Time.
- 1.7** "Change Order" means a type of contract amendment issued after execution of this Agreement or future GMP Amendments signed by Owner and CM@Risk, agreeing to changes to an agreement. The Change Order will state the following: the addition, deletion, or revision in the scope of Work; the amount of the adjustment to the Contract Price; and the extent of the adjustment to the Contract Times or other modifications to Contract terms.
- 1.8** "Change Proposal" means a written request by Construction Manager at Risk, duly submitted in compliance with the procedural requirements set forth herein, seeking an adjustment in Guaranteed Maximum Price or Contract Times; contesting a decision by the Owner, in consultation with Design Professional, concerning the requirements of the Contract Documents or the acceptability of Work under the Contract Documents; challenging a set-off against payments due; or seeking other relief with respect to the terms of the Contract.
- 1.9** "Claim" means a demand or assertion by Owner or Design Builder seeking an adjustment of Contract Price or Contract Times, or both, or other relief with respect to the terms of the Contract. A request or proposal for a Change Order is not a Claim. A demand for money or services by a third party is not a Claim.

- 1.10** “Owner” means the City of Tomball, a municipal corporation, with whom CM@Risk has entered into this Contract and for whom the services are to be provided pursuant to said Contract. Regulatory activities handled by the City of Tomball Developmental Services, Fire and Planning Departments or any other City Department are not subject to the responsibilities of the Owner under this Agreement.
- 1.11** “Owner’s Representative” means the person designated in Subsection 8.3.1.2.
- 1.12** “Owner’s Senior Representative” means the person designated in Subsection 8.3.1.1.
- 1.13** “CM@Risk” or “Construction Manager at Risk” means the firm selected by the Owner to provide construction services as detailed in this Agreement.
- 1.14** “CM@Risk’s Contingency” or “CM@Risk’s Contingency Allowance” means a fund to cover cost growth during the project used at the discretion of the CM@Risk usually for costs that result from project circumstances. The amount of the CM@Risk’s Contingency will be negotiated as a separate line item in each GMP package. Use and management of the CM@Risk’s Contingency is described in Subsection 5.1.2.3.
- 1.15** “CM@Risk’s Representative” means the person designated in Subsection 8.3.2.2.
- 1.16** “CM@Risk’s Senior Representative” means the person designated in Subsection 8.3.2.1.
- 1.17** “Contract Amendment” means a document signed by Owner and Construction Manager at Risk which modifies the terms and conditions of the Contract, including but not limited to modifications of the time or compensation provisions of the Agreement and the scope of CM@Risk Services. A Contract Amendment is not used to make changes in the Work, such changes properly being made in a Change Order.
- 1.18** “Contract Documents” means the following items and documents in descending order of precedence executed by the Owner and the CM@Risk: (i) all written modifications, amendments and Change Orders; (ii) this Agreement, including all exhibits and attachments; (iii) written specifications; (iv) Drawings; (v) other Construction Documents; and (vi) GMP Plans and Specifications.
- 1.19** “Construction Documents” means the plans, specifications, and Drawings prepared by the Design Professional and issued as approved for construction meaning the documents are sealed by the Design Professional, signed and acceptable for permitting.
- 1.20** “Construction Fee” means the lump sum amount for CM@Risk’s administrative costs for branch or home office overhead, and profit at the time of GMP.
- 1.21** “Contract” means the entire and integrated written agreement between Owner and Construction Manager at Risk concerning the Work.
- 1.22** “Contract Price” means the amount or amounts set forth in Article 5.

- 1.23** “Contract Time” means the Days as set forth in Article 4 the period of time, including authorized adjustments, allotted in the Contract Documents for Substantial Completion of the Project.
- 1.24** “Constituent of Concern” means asbestos, petroleum, radioactive materials, polychlorinated biphenyls (PCBs), lead-based paint (as defined by the HUD/EPA standard), hazardous waste, and any substance, product, waste, or other material of any nature whatsoever that is or becomes listed, regulated, or addressed pursuant to Laws and Regulations regulating, relating to, or imposing liability or standards of conduct concerning, any hazardous, toxic, or dangerous waste, substance, or material.
- 1.25** “Cost of the Work” means the direct costs or stipulated rates necessarily incurred by the CM@Risk in the proper performance of the Work as set forth in Exhibit D – Construction Drawings. The Cost of the Work shall not include the CM@Risk’s Construction Fee.
- 1.26** “Critical Path” means the sequence of activities from the start of the Work to the Substantial Completion of the Project. Any delay in the completion of these activities will extend the Substantial Completion date.
- 1.27** “Day(s)” means calendar days unless otherwise specifically noted in the Contract Documents.
- 1.28** “Design Phase Contract” or “Preconstruction Phase Agreement” means the agreement between the Owner and CM@Risk for services provided by the CM@Risk during the design phase which may include the following: design recommendations, project scheduling, constructability reviews, alternate systems evaluation, cost estimates, MBE/WBE/SBE utilization, subcontractor bid phase services, and GMP preparation.
- 1.29** “Design Professional” or “Engineer” means a qualified, licensed design professional who furnishes design and/or construction administration services required for the Project. The Project Design Professional is referenced in Recital C, above.
- 1.30** “Differing Site Conditions” means concealed or latent physical conditions or subsurface conditions at the Site that, (i) materially differ from the conditions indicated in the Contract Documents, or (ii) are of an unusual nature, differing materially from the conditions ordinarily encountered and generally recognized as inherent in the Work.
- 1.31** “Drawings” means the part of the Contract that graphically shows the scope, extent, and character of the Work to be performed by CM@Risk.
- 1.32** “Electronic Document” means Project-related correspondence, attachments to correspondence, data, documents, drawings, information, or graphics, including but not limited to, Shop Drawings and other Submittals, that are in an electronic or digital format.
- 1.33** “Electronic Means” means electronic mail (email), upload/download from a secure Project website, or other communications methods that allow: (a) the transmission or communication of Electronic Documents; (b) the documentation of transmissions, including sending and receipt; (c) printing of the transmitted Electronic Document by the recipient; (d) the storage and archiving of the Electronic Document by sender and

recipient; and (e) the use by recipient of the Electronic Document for purposes permitted by this Contract. Electronic Means does not include the use of text messaging, or of Facebook, Twitter, Instagram, or similar social media services for transmission of Electronic Documents.

- 1.34** “Engineer” means the same as “Design Professional.” See 1.29.
- 1.35** “Final Acceptance” or “Final Completion” means the completion of the Work as prescribed in Section 4.2. The terms “final completion” as applied to all or part of the Work refer to Final Acceptance of such Work. The point at which the Work is complete in accordance with the Contract Documents, items and documents required by the Contract Documents have been accepted by the Owner, all required services have been completed, and the Contract is ready for final payment.
- 1.36** “Float” means the number of Days by which an activity can be delayed without lengthening the Critical Path and extending the Substantial Completion date.
- 1.37** “General Conditions Costs” Includes, but is not limited to, the following types of costs for the CM@Risk during the construction phase: payroll costs for project manager or construction manager for Work conducted at the site; payroll costs for the superintendent and full-time general foremen; payroll costs for other management personnel resident and working on the site; workers not included as direct labor costs engaged in support (e.g. loading/unloading, clean-up, etc.); administrative office personnel; costs of offices and temporary facilities including office materials, office supplies, office equipment, minor expenses; utilities, fuel, sanitary facilities and telephone services at the site; costs of liability insurance premiums not included in labor burdens for direct labor costs; costs of bond premiums; costs of consultants not in the direct employ of the CM@Risk or Subcontractors; and fees for licenses. The General Conditions Costs shall be included in the Cost of the Work.
- 1.38** “Guaranteed Maximum Price” or “GMP” means the sum of the maximum Cost of the Work; the Construction Fee; General Conditions Costs, taxes, and CM@Risk’s Contingency including authorized adjustments.
- 1.39** “GMP Amendment” means an amendment, executed in writing and signed by both parties, to the GMP.
- 1.40** “GMP Plans and Specifications” means the plans and specifications upon which the Guaranteed Maximum Price proposal is based as listed in the GMP proposal.
- 1.41** “Hazardous Environmental Condition” means the presence at the Site of Constituents of Concern in such quantities or circumstances that may present a danger to persons or property exposed thereto.
- 1.41.1** The presence at the Site of materials that are necessary for the execution of the Work, or that are to be incorporated into the Work, and that are controlled and contained pursuant to industry practices, Laws and Regulations, and the requirements of the Contract, is not a Hazardous Environmental Condition.
- 1.41.2** The presence of Constituents of Concern that are to be removed or remediated as part

of the Work is not a Hazardous Environmental Condition.

- 1.41.3** The presence of Constituents of Concern as part of the routine, anticipated, and obvious working conditions at the Site, is not a Hazardous Environmental Condition.
- 1.42** “Legal Requirements” or “Laws and Regulations” or “Laws or Regulations” means all applicable federal, state, and local laws, codes, ordinances, rules, regulations, orders, and decrees of any government or quasi-government entity having jurisdiction over the Project or Site, the practices involved in the Project or Site, or any Work.
- 1.43** “Liens” means charges, security interests, or encumbrances upon Contract-related funds, real property, or personal property.
- 1.44** “Milestone” means a principal event in the performance of the Work that the Contract requires CM@Risk to achieve by an intermediate completion date, or by a time prior to Substantial Completion of all the Work.
- 1.45** “Notice to Proceed” or “NTP” means the directive issued by the Owner, authorizing the CM@Risk to start Work. Such notice shall be provided to the CM@Risk at least seven (7) Days prior to the commencement date stipulated herein and shall be provided no later than thirty (30) Days after the GMP proposal is approved by the Owner and all the required documentation is received by the Owner.
- 1.46** “Owner” means the entity with which CM@Risk has contracted regarding the CM@Risk Services and the Work, and which has agreed to pay CM@Risk for the performance of the CM@Risk Services and the Work, pursuant to the terms of the Contract.
- 1.47** “Owner’s Contingency” means a fund to cover cost growth during the Project used at the discretion of the Owner usually for costs that result from Owner directed changes or unforeseen site conditions. The amount of the Owner’s Contingency will be set solely by the Owner and will be in addition to the Project costs included in the CM@Risk’s GMP packages. Use and management of the Owner’s Contingency is described in Subsection 5.1.3.
- 1.48** “Performance Period” means the period of time allotted in the Contract Documents to substantially complete the Work comprised within a GMP. The Performance Period shall be stated with each GMP proposal and shown on the Project Schedule.
- 1.49** “Preconstruction Phase Agreement” or “Design Phase Contract” means the agreement between the Owner and CM@Risk for services provided by the CM@Risk during the design phase which may include the following: design meetings and recommendations, project scheduling, constructability reviews, alternate systems evaluation, cost estimates, MBE/WBE/SBE utilization, subcontractor bid phase services, and GMP preparation.
- 1.50** “Product Data” means illustrations, standard schedules, performance charts, instructions, brochures, diagrams and other information furnished by the CM@Risk to illustrate materials or equipment for some portion of the Work.

- 1.51** “Project” means the Work to be completed in the execution of this Agreement as amended and as described in the Recitals above and in each Approved GMP.
- 1.52** “Project Schedule” or “Progress Schedule” means a schedule, prepared and maintained by CM@Risk, describing the sequence and duration of the activities comprising the CM@Risk’s plan to accomplish the Work within the Contract Times.
- 1.53** “Project Record Documents” means the documents created pursuant to Section 2.9.
- 1.54** “Samples” means physical examples which illustrate materials, equipment, or workmanship and establish standards by which the Work will be evaluated.
- 1.55** “Shop Drawings” means all drawings, diagrams, illustrations, schedules, and other data or information that are specifically prepared or assembled by or for Construction Manager at Risk and submitted by Construction Manager at Risk to illustrate some portion of the Work. Shop Drawings, whether approved or not, are not Drawings and are not Contract Documents.
- 1.56** “Site” means the land or premises indicated in the Contract Documents on which the Project is located and upon with the Work is to be performed generally described in Exhibit A, including rights-of-way and easements, and such other lands or areas furnished by Owner which are designated for the use of CM@Risk.
- 1.57** “Specifications” means the part(s) of the Contract Documents for the construction phase consisting of written technical descriptions of materials, equipment, construction systems, standards, and workmanship as applied to the Work and certain administrative details applicable thereto as listed in the GMP proposal.
- 1.58** “Subcontractor” means an individual or firm having a direct contract with the CM@Risk who undertakes to perform a part of the construction phase Work for which the CM@Risk is responsible.
- 1.59** “Subconsultant” means a person, firm or corporation having a contract with the CM@Risk to furnish services required as its independent professional associate or consultant with respect to the Project.
- 1.60** “Sub-subcontractor or -subconsultant” means an individual or firm having a direct contract with any Subcontractor or any other individual firm having a contract with aforesaid contractors at any tier, who undertakes to perform a part of the design phase services or construction phase Work at the site for which the CM@Risk is responsible or furnishes services required as its independent profession associate or consultant with respect to the Project, as applicable.
- 1.61** “Submittal” means a written or graphic document, prepared by or for CM@Risk, which the Contract Documents require CM@Risk to submit. Submittals may include Shop Drawings; Samples; Project Schedules; Product Data; Owner-delegated designs; sustainable design information; information on special procedures; testing plans; results of tests and evaluations, source quality-control testing and inspections, and field or Site quality-control testing and inspections; warranties and certifications; Suppliers’ instructions and reports; records of delivery of spare parts and tools; operations and

maintenance data; project photographic documentation; record documents; and other such documents required by the Contract Documents. Submittals, whether approved or accepted by Owner or Design Professional, are not Contract Documents. Change Directives, Change Orders, notices, Applications for Payment, and requests for interpretation or clarification are not Submittals.

- 1.62** “Substantial Completion” means when the Work, or an agreed upon portion of the Work, is sufficiently complete so that Owner can occupy and use the Project or a portion thereof for its intended purposes. The terms “substantially complete” and “substantially completed” as applied to all or part of the Work refer to Substantial Completion of such Work. This may include: (i) approval by City Fire Marshal and local authorities; (ii) all materials and equipment installed; (iii) all systems in place, functional, and displayed to the Owner or its representative; (iv) all systems reviewed and accepted by the Owner; (v) successful start-up process with any required documentation and witnessing, (vi) draft O&M manuals and record documents reviewed and accepted by the Owner; (vii) Owner operation and maintenance training complete; (viii) landscaping and site work; and (ix) final cleaning. The conditions of Substantial Completion that do not apply to a specific GMP will be listed in the Notice to Proceed letter pursuant to Subsection 2.3.3.
- 1.63** “Supplier” means a manufacturer, fabricator, supplier, distributor, material man, or vendor having a direct contract with CM@Risk or any Subcontractor to furnish materials or equipment to be incorporated in the construction phase Work by CM@Risk or any Subcontractor.
- 1.64** “Technical Data” means those items expressly identified as Technical Data with respect to either (1) existing subsurface conditions at or adjacent to the Site, or existing physical conditions at or adjacent to the Site including existing surface or subsurface structures, except Underground Facilities, or (2) Hazardous Environmental Conditions at the Site.
- 1.64.1** If no such express identifications of Technical Data have been made with respect to conditions at the Site, then Technical Data is defined as the data contained in boring logs, recorded measurements of subsurface water levels, assessments of the condition of subsurface facilities, laboratory test results, and other factual, objective information regarding conditions at the Site that are set forth in any geotechnical, environmental, or other Site or facilities conditions report prepared for the Project and made available to CM@Risk.
- 1.64.2** Information and data regarding the presence or location of Underground Facilities are not intended to be categorized, identified, or defined as Technical Data, and instead Underground Facilities are shown or indicated in the Drawings.
- 1.65** “Underground Facilities” means all active or not-in-service underground lines, pipelines, conduits, ducts, encasements, cables, wires, manholes, vaults, tanks, tunnels, or other such facilities or systems at the Site. An abandoned facility or system is not an Underground Facility.
- 1.66** Unit Price Work means Work to be paid for based on unit prices.
- 1.67** “Work” means the entire completed construction or the various separately identifiable

parts thereof, required by the Agreement to be furnished during the construction phase. "Work" includes and is the result of performing or furnishing labor and furnishing and incorporating materials, resources, and equipment into the construction, and performing or furnishing services and documents as required by the Contract Documents for the construction phase.

Article 2 – CM@Risk’s Services and Responsibilities

2.0 The CM@Risk shall furnish labor, materials, equipment, transportation, utilities, services, and facilities required and necessary to perform all Work required by the contract document, and to completely and totally construct the same and install the material therein for the Owner. All Work will be performed in a good, workmanlike, and substantial manner within the care and skill of a qualified CM@Risk in Tomball, Texas. The Work shall be to the satisfaction of the Owner and strictly pursuant to and in conformity with the Project’s Contract Documents as modified. It is not required that the services be performed in the sequence in which they are described.

2.1. General Services

2.1.1. CM@Risk’s Representative shall be reasonably available to Owner and shall have the necessary expertise and experience required to supervise the Work. CM@Risk’s Representative shall communicate regularly with Owner but not less than once a week and shall be vested with the authority to act on behalf of CM@Risk. CM@Risk’s Representative may be replaced only with the written consent of Owner.

2.1.2 Owner’s Project Management Information System (FNI Manager)

2.1.2.1 The CM@Risk will be required to maintain all project records in electronic format. Any documents submitted to the Owner or Design Professional in electronic format shall be considered an equivalent to the original of such document.

2.1.2.2 The CM@Risk can expect to use FNI Manager to process all primary contract documents related to the construction phase of the Project including requests for interpretation/information, potential Change Orders, Change Orders, construction meeting minutes, Submittals, Design Professional’s supplemental instructions, Project Schedules, and Applications for Payment.

2.1.2.3 The CM@Risk will be required to process information into electronic digital form. In order to fulfill this requirement, the CM@Risk shall provide all necessary equipment to perform the functions necessary to generate, convert, store, maintain, connect to FNI Manager, and transfer electronic data.

2.1.2.4 CM@Risk shall provide a computerized networked office platform with broadband internet connectivity. Wired or wireless is acceptable. This platform shall function well in a web-based environment utilizing an internet browser compatible with the FNI Manager system.

2.2 Government Approvals and Permits

2.2.1 Unless otherwise provided, CM@Risk shall obtain or assist the Owner to obtain all necessary permits, approvals, and licenses required for the prosecution of the Work from any government or quasi-government entity having jurisdiction over the Project. **The CM@Risk is specifically reminded of the need to obtain the necessary environmental permits and file the necessary environmental notices.**

2.2.2 Copies of these permits and notices must be provided to the Owner’s Representative prior to starting the permitted activity. In the case of Fire Department permits, a copy of the application for permit shall also be provided to the Owner’s Representative. This provision does not constitute an assumption by the Owner of an obligation of any kind for violation of said permit or notice requirements.

2.2.3 Owner shall be responsible for all City of Tomball review and permit(s) fees for building and demolition permits. Owner will also pay the review and permit fees for grading and drainage,

water, sewer right-of-way, and landscaping. Owner shall also pay the utility design fees for permanent services.

2.2.4 CM@Risk shall be responsible for all other permits and review fees not specifically listed in Subsection 2.2.3 above. CM@Risk is responsible for the cost of water meter(s), and all water bills on the project meters until Substantial Completion of the Project. Arrangements for construction water are the CM@Risk's responsibility.

2.3 Pre-construction Conference

2.3.1 Prior to the commencement of any Work, the Owner's Representative will schedule a pre-construction conference.

2.3.2 The purpose of this conference is to establish a working relationship between the CM@Risk, various City agencies, and other stakeholders. The agenda will include critical elements of the work schedule, submittal schedule, cost breakdown of major lump sum items, Application for Payment and processing, coordination with the involved stakeholders, the level of Record Project Documents required, and emergency telephone numbers for all representatives involved in the course of construction.

2.3.3 The Notice to Proceed date will be decided by the mutual acceptance of the Owner and CM@Risk. After the conference, a Notice to Proceed letter will be issued confirming the construction start date, Performance Period, and, if applicable, the Substantial Completion date. If a Substantial Completion date is established, the conditions of the Substantial Completion will be listed.

2.3.4 The CM@Risk shall provide a schedule of values based on the categories used in the buyout of the Work but not greater than the approved GMP and identifying the CM@Risk's Contingency. The schedule of values will subdivide the Work into all items comprising the Work.

2.3.5 Minimum attendance by the CM@Risk shall be the CM@Risk's Representative, who is authorized to execute and sign documents on behalf of the firm, the job superintendent, and the CM@Risk's safety officer.

2.4 Control of the Work

2.4.1 Unless otherwise provided in the Contract Documents to be the responsibility of Owner or a separate contractor, CM@Risk shall provide through itself or Subcontractors the necessary supervision, labor, inspection, testing, start-up, material, equipment, machinery, temporary utilities, and other temporary facilities to permit CM@Risk to complete the Work consistent with the Contract Documents.

2.4.2 CM@Risk shall perform all construction activities efficiently and with the requisite expertise, skill, and competence to satisfy the requirements of the Contract Documents. CM@Risk shall at all times exercise complete and exclusive control over the means, methods, sequences, and techniques of construction.

2.4.3 CM@Risk, the CM@Risk's Representative or other authorized representative shall be present at the Site at all times that construction activities are taking place.

2.4.3.1 All elements of the Work will be under the direct supervision of a foreman or their designated representative on the Site who shall have the authority to take actions required to properly carry out that particular element of the Work.

2.4.4 In the event of noncompliance with this Section, the Owner may require the CM@Risk to stop or suspend the Work in whole or in part. Where the Contract Documents require that a particular product be installed and/or applied by an applicator approved by the manufacturer, it is the

CM@Risk's responsibility to ensure the Subcontractor employed for such Work is approved by the manufacturer.

- 2.4.5 Before ordering materials or doing work, the CM@Risk and each Subcontractor shall verify measurements at the Site and shall be responsible for the correctness of such measurements. With the exception of subsurface and otherwise mutually agreed upon inaccessible conditions, no increase to the approved GMP will be allowed because of differences between actual dimensions and the dimensions indicated in the Contract Documents; differences, which may be found, shall be submitted to the Owner for resolution before proceeding with the Work.
- 2.4.6 The CM@Risk shall take field measurements and verify field conditions and shall carefully compare such field measurements and conditions and other information known to the CM@Risk with the Contract Documents before commencing activities. Errors, inconsistencies, or omissions discovered shall be reported to the Owner at once.
- 2.4.7 The CM@Risk shall establish and maintain all primary building and construction grades, lines, levels, and benchmarks, and shall be responsible for accuracy and protection of same. This Work shall be performed or supervised by a licensed civil Design Professional or surveyor in the State of Texas.
- 2.4.8 Any person employed by the CM@Risk or any Subcontractor who, in the reasonable opinion of the Owner, does not perform their work in a proper, skillful, and safe manner or is intemperate or disorderly shall, at the written request of the Owner, be removed from the Work by CM@Risk or Subcontractor employing such person, and shall not be employed again in any portion of Work without the written approval of the Owner. **THE CM@RISK OR SUBCONTRACTOR SHALL KEEP THE OWNER HARMLESS FROM DAMAGES OR CLAIMS WHICH MAY OCCUR IN THE ENFORCEMENT OF THIS SECTION.**
- 2.4.9 CM@Risk assumes responsibility to the Owner for the proper performance of the work of Subcontractors and any acts and omissions in connection with such performance. Nothing in the Contract Documents is intended or deemed to create any legal or contractual relationship between Owner and any Subcontractor or Sub-subcontractor, including any third-party beneficiary rights.
- 2.4.10 CM@Risk shall coordinate the activities of all Subcontractors. If Owner performs other work on the Project or at the Site with separate contractors under Owner's control, CM@Risk agrees to reasonably cooperate and coordinate its activities with those of such separate contractors so that the Project can be completed in an orderly and coordinated manner without unreasonable disruption.

2.5 Control of the Work Site

- 2.5.1 Throughout all phases of construction, including suspension of Work, CM@Risk shall keep the Site reasonably free from debris, trash, and construction wastes to permit CM@Risk to perform its construction services efficiently, safely and without interfering with the use of adjacent land areas. Upon Substantial Completion of the Work, or a portion of the Work, CM@Risk shall remove all debris, trash, construction wastes, materials, equipment, machinery, and tools arising from the Work or applicable portions thereof to permit Owner to occupy the Project or a portion of the Project for its intended use.
- 2.5.2 CM@Risk shall take all reasonable steps, procedures, or means to prevent any dust nuisance due to construction operations. The dust control measures shall be maintained at all times to the satisfaction of the Owner and in accordance with the local requirements.
- 2.5.3 CM@Risk shall maintain ADA and ANSI accessibility requirements during construction activities in an occupied building or facility. ADA and ANSI accessibility requirements may include, parking, building access, entrances, exits, restrooms, areas of refuge, and emergency

exit paths of travel. CM@Risk shall be responsible for the coordination of all work to minimize disruption to building occupants and facilities.

2.5.4 Only materials and equipment which are to be used directly in the Work will be brought to and stored on the Site by the CM@Risk. When equipment is no longer required for the Work, it will be removed promptly from the Site. Protection of construction materials and equipment stored at the Site from weather, theft, damage, and all other adversity is solely the responsibility of the CM@Risk.

2.6 Shop Drawings, Product Data and Samples

2.6.1 Shop Drawings, Product Data, Samples, and Submittals are not Contract Documents. The purpose of their submittal is to demonstrate for those portions of the Work for which submittals are required the way the CM@Risk proposes to conform to the information given and the design concept expressed in the Contract Documents.

2.6.2 The CM@Risk shall review, approve, verify, and submit to the Owner each Shop Drawing, Product Data, Sample, and Submittal required by the Contract Documents in accordance with the approved GMP schedule as shown in Exhibit B as to cause no delay in the Work or in the activities of the Owner or of separate contractors. Submittals made by the CM@Risk, which are not required by the Contract Documents, may be returned without action.

2.6.3 The CM@Risk shall perform no portion of the Work requiring Submittal and review of Shop Drawings, Product Data, Samples, or similar Submittals until the respective submittal has been approved by the Owner. Such Work will be in accordance with approved Submittals.

2.6.4 By approving, verifying, and submitting Shop Drawings, Product Data, Samples, and similar Submittals, the CM@Risk represents that the CM@Risk has determined and verified materials, field measurements and field construction criteria related thereto, or will do so, and has checked and coordinated the information contained within such submittals with the requirements of the Work and of the Contract Documents.

2.6.5 The CM@Risk shall not be relieved of responsibility for deviations from requirements of the Contract Documents by the Owner's approval of Shop Drawings, Product Data, Samples, or similar Submittals unless the CM@Risk has specifically informed the Owner in writing of such deviation at the time of submittal and the Owner has given written approval to the specific deviation. The CM@Risk shall not be relieved of responsibility for errors or omissions in Shop Drawings, Product Data, Samples, or similar Submittals by the Owner's approval thereof.

2.6.6 The CM@Risk shall direct specific attention, in writing or on resubmitted Shop Drawings, Product Data, Samples, or similar Submittals, to revisions other than those requested by the Owner on previous submittals.

2.6.7 Informational Submittals upon which the Owner is not expected to take responsive action may be so identified in the Contract Documents.

2.6.8 When professional certification of performance criteria of materials, systems, or equipment is required by the Contract Documents, the Owner shall be entitled to rely upon the accuracy and completeness of such calculations and certifications.

2.7 Quality Control, Testing and Inspection

2.7.1 All materials used in the Work will be new and unused, unless otherwise noted, and shall meet all quality requirements of the Contract Documents.

2.7.2 All construction materials to be used on the Work or incorporated into the Work, equipment, plant, tools, appliances, or methods to be used in the Work may be subject to the inspection

and approval or rejection by the Owner. Any material rejected by the Owner shall be removed immediately and replaced in an acceptable manner.

- 2.7.3** The procedures and methods used to sample and test material will be determined by the Owner.
- 2.7.4** The Owner may select a pre-qualified Owner or independent testing laboratory and may perform additional acceptance testing at the Owner's cost.
 - 2.7.4.1** When the first and subsequent tests indicate noncompliance with the Contract Documents, the cost associated with that noncompliance will be paid for by the CM@Risk. CM@Risk's Contingency cannot be utilized for the cost of re-testing.
 - 2.7.4.2** When the first and subsequent tests indicate noncompliance with the Contract Documents, all retesting shall be performed by the same testing agency.
- 2.7.5** The CM@Risk will cooperate with the selected testing laboratory and all others responsible for testing and inspecting the work and shall provide them with access to the Work at all times.
- 2.7.6** At the option of the Owner, materials may be approved at the source of supply before delivery is started.
- 2.7.7** Code compliance testing and inspections required by codes or ordinances, or by a plan approval authority, and which are made by a legally constituted authority, shall be the responsibility of and will be paid by the CM@Risk as a Cost of the Work, unless otherwise provided in the Contract Documents or unless required by Chapter 2269 of the Texas Government Code.
- 2.7.8** CM@Risk's convenience and quality control testing and inspections shall be the sole responsibility of the CM@Risk and paid by the CM@Risk as a Cost of the Work.
- 2.8 Trade Names and Substitutions**
 - 2.8.1** Contract Document references to equipment, materials, or patented processes by manufacturer, trade name, make or catalog number, unless indicated that no substitutions are permitted, substitute, or alternate items may be permitted, subject to the following:
 - 2.8.2** The proposed substitution will be submitted by CM@Risk in writing to the Owner.
 - 2.8.3** The CM@Risk shall certify that the proposed substitution will perform the functions and achieve the results called for by the general design, be similar and of equal substance, and be suited to the same use as that specified.
 - 2.8.4** The Submittal will state any required changes in the Contract Documents to adapt the design to the proposed substitution.
 - 2.8.5** The Submittal will contain an itemized estimate of all costs and credits that will result directly and indirectly from the acceptance of such substitution, including cost of design, license fees, royalties, and testing. Also, the Submittal will include any adjustment in the Contract Time created by the proposed substitution.
 - 2.8.6** The CM@Risk, if requested by the Owner, shall submit Samples or any additional information that may be necessary to evaluate the acceptability of the proposed substitution.
 - 2.8.7** The Owner will make the final decision and will notify the CM@Risk in writing as to whether the proposed substitution has been accepted or rejected. If the Owner does not respond in a timely

manner, the CM@Risk shall continue to perform the Work in accordance with the Contract Documents and the proposed substitution will be considered rejected.

2.9 Project Record Documents

2.9.1 During the construction period, the CM@Risk shall maintain at the jobsite a set of blue-line or blackline prints of the Construction Document drawings and shop drawings for project record document purposes.

2.9.1.1 The CM@Risk shall mark these drawings to indicate the actual installation where the installation varies from the original Construction Documents, with particular attention to information on concealed elements, which would be difficult to identify or measure and to be recorded later. Items required to be marked include but are not limited to:

- Dimensional changes to the drawings.
- Revisions to details shown on drawings.
- Depths of foundations.
- Locations and depths of underground utilities.
- Revisions to routing of piping and conduits.
- Revisions to electrical circuitry.
- Actual equipment locations.
- Locations of concealed internal utilities.
- Changes made by Change Order.
- Details not on original Contract Drawings.

2.9.1.2 Mark completely and accurately project record drawing prints of Construction Documents or Shop Drawings, whichever is the most capable of indicating the actual physical condition. Where Shop Drawings are marked, show cross-reference on the Construction Documents location.

2.9.1.3 Note the designated number of a request for interpretations, Submittal, Change Order or other documents as required to identify the source of the change to the Construction Documents.

2.9.1.4 The CM@Risk shall as a condition of Substantial Completion, submit project record drawing and Shop Drawings prints to the Owner or its representative for review and comment.

2.9.2 Upon receipt of the reviewed project record drawings from the Owner, the CM@Risk shall correct any deficiencies and/or omissions to the drawings and prepare for submission to the Owner within fourteen (14) Days.

2.10 Project Safety

2.10.1. CM@Risk recognizes the importance of performing the Work in a safe manner so as to prevent damage, injury or loss to (i) all individuals at the Site, whether working or visiting, (ii) the Work, including materials and equipment incorporated into the Work or stored on-Site or off-Site, and (iii) all other property at the Site or adjacent thereto.

2.10.2. CM@Risk assumes responsibility for implementing and monitoring all safety precautions and programs related to the performance of the Work.

2.10.3. CM@Risk shall, prior to commencing construction, designate a safety representative with the necessary qualifications and experience to supervise the implementation and monitoring of all safety precautions and programs related to the Work. Unless otherwise required by the Contract Documents, CM@Risk's safety representative shall be an individual stationed at the Site who may have other responsibilities on the Project in addition to safety.

- 2.10.4.** The safety representative shall make routine daily inspections of the Site and shall hold weekly safety meetings with CM@Risk's personnel, Subcontractors, and others as applicable.
- 2.10.5.** CM@Risk and Subcontractors shall comply with all Legal Requirements relating to safety, as well as any Owner-specific safety requirements set forth in the Contract Documents, provided that such Owner-specific requirements do not violate any applicable Legal Requirement.
- 2.10.6.** CM@Risk will immediately report in writing any safety-related injury, loss, damage, near-miss, or accident arising from the Work to Owner's Representative and, to the extent mandated by Legal Requirements, to all government or quasi-government authorities having jurisdiction over safety-related matters involving the Project or the Work.
- 2.10.7.** CM@Risk's responsibility for safety under this Section is not intended in any way to relieve Subcontractors and Sub-subcontractors of their own contractual and legal obligations and responsibility for (i) complying with all Legal Requirements, including those related to health and safety matters, and (ii) taking all necessary measures to implement and monitor all safety precautions and programs to guard against injury, losses, damages or accidents resulting from their performance of the Work.

2.11 Warranty

- 2.11.1.** CM@Risk warrants to Owner that the construction, including all materials and equipment furnished as part of the construction, shall be new unless otherwise specified in the Contract Documents, of good quality, in conformance with the Contract Documents and free of defects in materials and workmanship.
- 2.11.2.** CM@Risk's warranty obligation excludes defects caused by abuse, alterations, or failure to maintain the Work by persons other than CM@Risk or anyone for whose acts CM@Risk may be liable.
- 2.11.3.** CM@Risk's warranty obligation shall be for two years.

Nothing in this warranty is intended to limit any manufacturer's warranty which provides Owner with greater warranty rights than set forth in this Section or the Contract Documents. CM@Risk will provide Owner with all manufacturers' warranties upon Substantial Completion.

2.12 Correction of Non-Conforming Work

- 2.12.1.** CM@Risk agrees to correct any Work that is found to not be in conformance with the Contract Documents, including that part of the Work subject to Section 2.11 above, within a period of two (2) years from the date of Substantial Completion of the Work or any portion of the Work, or within such longer period to the extent required by the Contract Documents. A progress payment, or partial or entire use or occupancy of the Project by the Owner, shall not constitute acceptance of Work.
- 2.12.2.** During the Work, CM@Risk shall take meaningful steps to commence correction of such nonconforming Work as notified by the Owner within five (5) Days of such notice. This includes the correction, removal or replacement of the nonconforming Work and any damage caused to other parts of the Work affected by the nonconforming Work. If CM@Risk fails to commence the necessary steps during the Work, Owner, in addition to any other remedies provided under the Contract Documents, may provide CM@Risk with written notice that Owner will commence correction of such nonconforming Work with its own forces.
- 2.12.3.** CM@Risk shall take meaningful steps to commence correction of nonconforming Work subject to Section 2.11 above, within seven (7) Days of receipt of written notice from Owner. This includes the correction, removal or replacement of the nonconforming Work and any damage caused to other parts of the Work affected by the nonconforming Work. If CM@Risk fails to

commence the necessary steps within such seven (7) Day period, Owner, in addition to any other remedies provided under the Contract Documents, may provide CM@Risk with written notice that Owner will commence correction of such nonconforming Work with its own forces.

- 2.12.4.** If Owner does perform such corrective Work, CM@Risk shall be responsible for all reasonable costs incurred by Owner in performing such correction.
- 2.12.5.** If the nonconforming Work creates an emergency requiring an immediate response, the CM@Risk will notify the Owner as soon as practicable, and respond and initiate corrections within twenty-four hours. Should Owner choose to respond to the emergency with its own staff or contractors, CM@Risk will cooperate and support the Owner in such response.
- 2.12.6.** The two-year period referenced in Subsection 2.11.3 above applies only to CM@Risk's obligation to correct nonconforming Work and is not intended to constitute a period of limitations for any other rights or remedies Owner may have regarding CM@Risk's other obligations under the Contract Documents.

Article 3 – Owner’s Services and Responsibilities

3.1 Duty to Cooperate.

3.1.1 Owner shall, throughout the performance of the Work, cooperate with CM@Risk and perform its responsibilities, obligations, and services in a timely manner to facilitate CM@Risk’s timely and efficient performance of the Work and so as not to delay or interfere with CM@Risk’s performance of its obligations under the Contract Documents.

3.1.2 Owner shall furnish at the CM@Risk’s request, at no cost to the CM@Risk, a CADD file of the Construction Documents in AutoCAD format.

3.1.3 The Design Professional will provide training in the use and operation of FNiManager.

3.2 Owner’s Representative

3.2.1 Owner’s Representative shall be responsible for providing Owner-supplied information and approvals in a timely manner to permit CM@Risk to fulfill its obligations under the Contract Documents.

3.2.2 Owner’s Representative shall also provide CM@Risk with prompt notice if it observes any failure on the part of CM@Risk to fulfill its contractual obligations, including any default or defect in the Project or non-conformance with the Contract Documents.

3.2.3 The Owner may utilize field inspectors to assist the Owner’s Representative during construction in observing performance of the CM@Risk. The inspector is present for the purpose of assisting the Owner’s Representative and is not an inspector with a regulatory agency or an inspector from a laboratory pursuant to Subsection 2.7.4.

3.2.3.1 Through onsite observation of the Work in progress and field checks of materials and equipment, the inspector will endeavor to provide observations that the Work is in conformance with the Contract Documents.

3.2.3.2 The inspector is authorized to inspect all Work and materials furnished. Such inspection may extend to all or part of the Work and to the preparation, fabrication or manufacture of the materials to be used.

3.2.3.3 The inspector is not authorized to issue instructions contrary to the Construction Documents or to direct the means and methods of the Work performed by the CM@Risk.

3.2.3.4 The inspector shall have the authority to reject work or materials until any questions at issue can be decided by the Owner’s Representative.

3.2.3.5 The furnishing of such services for the Owner shall neither make nor imply the Owner responsible for or give the Owner control over construction means, methods, techniques, sequence or procedures, or for safety precautions or programs or responsibility for the CM@Risk’s failure to perform the work in accordance with Contract Documents.

3.3 Design Professional Services

3.3.1 The Owner may contract separately with one or more Design Professionals to provide construction administration of the Project. The Design Professional’s contract as well as other firms hired by the Owner shall be furnished to the CM@Risk. The CM@Risk shall not have any right, however, to limit or restrict any contract modifications that are mutually acceptable to the

Owner and Design Professional.

3.3.2 The Owner may contract with the Design Professional to provide some or all of the following services during the performance of the Work.

3.3.2.1 Provide oversight of the Work and facilitate project communications. The Owner and CM@Risk shall endeavor to communicate through the Design Professional. Communications by and with the Design Professional's consultants shall be through the Design Professional.

3.3.2.2 Site visits at intervals appropriate to the stage of construction to become generally familiar with the progress and quality of the completed Work and work in progress and to determine in general if the Work is being performed in accordance with the Contract Documents. The Design Professional will keep the Owner informed of progress of the Work and will endeavor to guard the Owner against defects and deficiencies in the Work. The Design Professional may have authority to reject construction which does not conform to the Construction Documents and to require additional inspection or testing of the construction in accordance with Section 2.7.

3.3.2.3 Review and approve or take other appropriate action upon the CM@Risk's Submittals such as Shop Drawings, Product Data, and Samples in accordance with Section 2.6.

3.3.2.4 Interpret and decide matters concerning performance under and requirements of the Contract Documents on written request of either the Owner or CM@Risk. The Design Professional's response to such requests will be made with reasonable promptness.

3.3.2.5 Prepare Change Orders and may authorize minor changes in the Work as provided in Article 6.

3.3.2.6 Conduct inspections to determine Substantial Completion and Final Acceptance.

3.3.2.7 Receive and forward to the Owner for the Owner's review and records written warranties and related documents required by the Contract Documents and assembled by the CM@Risk.

3.4 Owner's Separate Contractors

Owner is responsible for all work performed on the Project or at the Site by separate contractors under Owner's control. Owner shall contractually require its separate contractors to cooperate with and coordinate their activities so as not to interfere with the CM@Risk in order to enable CM@Risk to timely complete the Work consistent with the Contract Documents. Any Owner separate contractors will be subject to Owner insurance and subrogation requirements.

3.5 Permit Review and Inspections.

3.5.1 If requested by the CM@Risk, the Owner's Representative will provide assistance and guidance in obtaining necessary reviews, permits, and inspections.

3.5.2 Regulating agencies of the Owner, such as Public Works and Fire Department, enforce Legal Requirements. These enforcement activities are not subject to the responsibilities of the Owner under this Agreement.

Article 4 – Contract Time

4.0. Contract Time.

- 4.0.1.** Contract Time shall start with the commencement date established in the Notice to Proceed for GMP No. 1 and end with Substantial Completion of all Work.
- 4.0.2.** Each GMP will establish a separate commencement date and a date of Substantial Completion and a Performance Period. The Performance Periods may not be sequential and may run concurrently. The Period to achieve Substantial Completion for each GMP shall be set forth in each GMP submission.
- 4.0.3.** CM@Risk agrees that it will commence performance of the Work and achieve the Performance Periods and Contract Time.
- 4.0.4.** All of the times set forth in this Article 4 shall be subject to adjustment in accordance with Article 6.

4.1. Substantial Completion

- 4.1.1.** Substantial Completion shall be for the entire Project unless a partial Substantial Completion is identified in the approved GMP schedule and stated in the Notice to Proceed letter. Substantial Completion shall be in accordance with its definition in Article 1, and with the criteria set forth in the Notice to Proceed.
- 4.1.2.** Prior to notifying the Owner in accordance with Subsection 4.1.3 below, the CM@Risk shall inspect the Work and prepare and submit to the Owner a comprehensive list of items to be completed or corrected. The CM@Risk shall proceed promptly to complete and correct items on the list. Failure to include an item on such list does not alter the responsibility of the CM@Risk to complete all Work in accordance with the Contract Documents.
- 4.1.3.** CM@Risk shall notify Owner when it believes the Work, or to the extent permitted in the Contract Documents, a portion of the Work, is substantially complete.
- 4.1.4.** Within five (5) Days of Owner's receipt of CM@Risk's notice, Owner and CM@Risk will jointly inspect such Work to verify that it is substantially complete in accordance with the requirements of the Contract Documents.
- 4.1.5.** If such Work is substantially complete, Owner shall prepare and issue a Certificate of Substantial Completion that will set forth (i) the date of Substantial Completion of the Work or portion thereof, (ii) the remaining items of Work that have to be completed within sixty (60) calendar days before Final Acceptance, (iii) provisions (to the extent not already provided in the Contract Documents) establishing Owner's and CM@Risk's responsibility for the Project's security, maintenance, utilities, and insurance pending Final Acceptance, and (iv) an acknowledgment that warranties commence to run on the date of Substantial Completion, except as may otherwise be noted in the Certificate of Substantial Completion.
- 4.1.6.** Owner, at its option, may use a portion of the Work which has been determined to be substantially complete, provided, however, that (i) a Certificate of Substantial Completion has been issued for the portion of Work addressing the items set forth in Subsection 4.1.5 above, (ii) CM@Risk and Owner have obtained the consent of their sureties and insurers, and to the extent applicable, the appropriate government authorities having jurisdiction over the Project, and (iii) Owner and CM@Risk agree that Owner's use or occupancy will not interfere with CM@Risk's completion of the remaining Work.

- 4.2. Final Acceptance.** Upon receipt of written notice that the Work or identified portions of the Work is ready for final inspection and acceptance, Owner and CM@Risk will jointly inspect to verify that the remaining items of Work have been completed as set forth in Subsection 4.1.5. The Owner will issue a Final Acceptance Letter and payment pursuant to Section 7.5.
- 4.3. Liquidated Damages.**
- 4.3.1.** CM@Risk recognizes that *time is of the essence* for the CM@Risk to achieve Substantial Completion and Owner will suffer financial loss if the Work is not completed within the Contract Time. The Contractor also recognizes the delays, expense and difficulties involved in proving in a legal proceeding, the actual loss suffered by the Owner if the Work is not completed on time. Accordingly, instead of requiring any such proof, Contractor agrees that as liquidated damages for delay (but not as a penalty), Contractor shall pay Owner Two Thousand Dollars (\$2,000.00) for each day that expires after the Contract Time, as adjusted in accordance with this Contract, until the Day that Substantial Completion occurs.
- 4.3.2.** The Owner may at its sole discretion deduct from any monies due or which may become due the CM@Risk, a sum as specified herein, for each and every calendar day that the Work shall remain uncompleted. This sum shall be considered, not as penalty, but as the cost(s) for substantial losses suffered by the public and the Owner. Liquidated damages are intended to compensate the Owner for the CM@Risk's failure to meet the deadlines set forth herein and shall not excuse the CM@Risk from liability from any other breach of requirements of the Contract Documents, including any failure of the Work to conform to applicable requirements. The CM@Risk agrees that the sums in Section 4.3.1 are reasonable in light of the anticipated or actual harm caused by the delay and breach, the difficulties of the proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy.
- 4.3.3.** The parties acknowledge, covenant, and agree that the daily basis and the amount set forth above for liquidated damages are reasonable because of the unique nature of the Project as a benefit to the public; the fact that inconvenience to the public will be one of the significant impacts of any failure by the CM@Risk to timely complete the Work; and that it is impracticable and extremely difficult to ascertain and determine the actual losses which would accrue to the Owner and the public. Permitting the CM@Risk to continue and finish the Work, or any portion thereof, after the time fixed for its completion, shall in no way operate as a waiver on the part of the Owner of any of its rights under the Contract.
- 4.4.** The CM@Risk and Owner waive claims against each other for consequential damages arising out of or relating to this Contract. This mutual waiver includes damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons and damages incurred by the CM@Risk for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit, except actual profit arising directly from the completed Work. This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination in accordance with Article 9. Nothing contained in this Section 4.4 shall be deemed to preclude assessment of liquidated damages, when applicable, in accordance with the requirements of the Contract Documents.
- 4.5. Project Schedule**
- 4.5.1.** The Project Schedule approved as part of a GMP shall be updated and maintained throughout the Work.
- 4.5.2.** The Project Schedule shall be revised as required by conditions and progress of the Work, but such revisions shall not relieve CM@Risk of its obligations to complete the Work within the

Contract Time, as such dates may be adjusted in accordance with the Contract Documents.

- 4.5.3.** Updated Project Schedules shall be submitted monthly in electronic forms to the Owner as part of the Payment Request.
- 4.5.4.** CM@Risk shall provide Owner with a monthly status report with each Project Schedule detailing the progress of the Work, including: (i) if the Work is proceeding according to Project Schedule, (ii) any discrepancies, conflicts, or ambiguities found to exist in the Contract Documents that require resolution, and (iii) other items that require resolution so as not to jeopardize ability to complete the Work as presented in the GMP proposal and within the Contract Time. Each status report shall also include the following:
- Description of problem tasks (referenced to field instructions, or requests for interpretation, as appropriate)
 - Current and anticipated delays including:
 - Cause of the delay
 - Corrective action and schedule adjustments to correct the delay
 - Known or potential impact of the delay on other activities, Milestones, and the date of Substantial Completion
 - Changes in construction sequence
 - Pending items and status thereof including:
 - Time Extension requests
 - Other items
 - Substantial Completion date status:
 - If ahead of schedule, the number of calendar Days ahead
 - If behind schedule, the number of calendar Days behind
 - Other project or scheduling concerns
- 4.5.5.** Owner's review of and response to the Project Schedule is only for general conformance with the scheduling requirements of the Contract Documents. The review will not relieve the CM@Risk from compliance with the requirements of the Contract Documents or be construed as relieving the CM@Risk of its complete and exclusive control over the means, methods, sequences, and techniques for executing the Work.
- 4.5.6.** The Project Schedule will include a Critical Path Method (CPM) diagram schedule that will show the sequence of activities, the interdependence of each activity, and indicate the Critical Path.
- 4.5.6.1.** The CPM diagram schedule will be in Days and indicate duration, earliest and latest start and finish dates for all activities, and total Float times for all activities except critical activities. The CPM diagram shall be presented in a time-scaled graphical format for the Project as a whole.
- 4.5.6.2.** The CPM diagram schedule will indicate all relationships between activities.
- 4.5.6.3.** The activities making up the schedule will be in sufficient detail to assure that adequate planning has been done for proper execution of the Work and such that it provides an appropriate basis for monitoring and evaluating the progress of the Work.
- 4.5.6.4.** The CPM diagram schedule will be based upon activities, which would coincide with the schedule of values, but the Project Schedule is not required to be cost-loaded.
- 4.5.6.5.** The CPM diagram schedule will show all critical submittals associated with each work activity and the reasonable review time for each submittal.
- 4.5.6.6.** The Project Schedule will show Milestones, including Milestones for Owner-furnished information, and shall include activities for Owner-furnished equipment and furniture when those activities are interrelated with the CM@Risk activities.

- 4.5.6.7.** The Project Schedule will include a Critical Path activity that reflects anticipated rain delay during the performance of the Contract. The duration shall reflect the average climatic range and usual industrial conditions prevailing in the locality of the site. Weather data shall be based on information provided by the National Weather Services or other approved source.
- 4.5.7.** The Project Schedule will consider the Owner's occupancy requirements showing portions of the Project having occupancy priority, and Contract Time.
- 4.5.8.** Float time will be as prescribed below.
- 4.5.8.1.** The total Float within the overall Project Schedule, is not for the exclusive use of either the Owner or the CM@Risk but is jointly owned by both and is a resource available to and shared by both parties as needed to meet contract Milestones and the Project Contract Time.
- 4.5.8.2.** The CM@Risk shall not sequester shared Float through such strategies as extending activity duration estimates to consume available Float, using preferential logic, or using extensive crew/resource sequencing, etc. Since Float time within the Project Schedule is jointly owned, no time extensions will be granted or delay damages paid until a delay occurs which extends the Work beyond the Substantial Completion date.

Since Float time within the Project Schedule is jointly owned, it is acknowledged that delays on the Project may be offset by time savings.

Article 5 – Guaranteed Maximum Price

- 5.0.** The CM@Risk agrees to do all Work as aforesaid for the construction of said improvements and to completely construct the same and install the material therein, as called for by this Agreement free and clear of all liens, provided that Owner has met its payment obligations under this Agreement, in the manner and under the conditions specified within the time, or times, stated in the approved GMP proposal.
- 5.1. Guaranteed Maximum Price.**
- 5.1.1.** The Guaranteed Maximum Price will be as approved in the Guaranteed Maximum Price proposal attached as an Exhibit.
- 5.1.2.** Guaranteed Maximum Price is composed of the following lump sum amounts defined below. The CM@Risk is at risk to cover any additional Project costs.
- 5.1.2.1** Cost of the Work, General Conditions Costs and the Construction Fee are firm fixed lump sums, but subject to adjustments as permitted in the contract Documents.
- 5.1.2.2** Any additional fees tied to use of the Owner's Contingency shall not exceed **0.5%** of any approved use of Owner's Contingency, subject to adjustments as permitted in the Contract Documents.
- 5.1.2.3** CM@Risk's Contingency is a firm fixed lump sum amount the CM@Risk may use under the following conditions: (1) at its discretion for increases in the Cost of the Work, or (2) with written approval of the Owner for increases in General Condition Costs, which approval will not be unreasonably withheld. CM@Risk's Contingency is assumed to be a direct project cost so will have received all markups at the time of GMP submission.
- 5.1.2.3.1** As part of the proposal to release contingency funds, the CM@Risk shall make the appropriate changes to the schedule of values and include them in the package for approval. The CM@Risk shall deduct the amount of CM@Risk's Contingency funds used from the CM@Risk's Contingency line item and add the same amount to the line item on the schedule of values where the funds were used. If the CM@Risk's Contingency funds are used for a new line item that was not given with the original schedule of values, that will be so indicated.
- 5.1.2.4** As a public procurement project this Project is tax exempt appropriate tax exemption forms shall be provided to the CM@Risk.
- 5.1.3** Owner's Contingency are funds to be used at the discretion of the Owner to cover any increases in Project costs that result from Owner directed changes or unforeseen site conditions. Owner's Contingency will be added to the GMP amount provided by the CM@Risk, the sum of which will be the total contract price for construction. Markups for Construction Fee and taxes will be applied by the CM@Risk at the time that Owner's Contingency is used.
- 5.1.4** The GMP is subject to adjustments made in accordance with Article 6 and by GMP amendments to this Agreement.
- 5.1.5** GMPs are cumulative including CM@Risk Contingency. The amount of CM@Risk Contingency for each GMP amendment will be negotiated separately and shall reflect the CM@Risk's risk from that point in the project forward.
- 5.1.5.1** If the GMP requires an adjustment due to changes in the Work or other causes as allowed in the Contract Documents, the cost of such changes is determined subject to Article 6. The markups that shall be allowed on such changes shall be no greater than the markups delineated in Article 6.

Article 6 – Changes to the Contract Price and Time

6.0. Delays to the Work

- 6.0.1.** If CM@Risk is delayed in the performance of the Work that will cause a change in the date of Substantial Completion due to acts, omissions, conditions, events, or circumstances beyond its control and due to no fault of its own or those for whom CM@Risk is responsible, the Contract Times for performance shall be reasonably extended by Change Order.
- 6.0.2.** The CM@Risk shall request an increase in the Contract Time by written notice including an estimate of probable effect of delay on progress of the Work. In the case of a continuing delay only one request is necessary. Such notice shall not be later than fourteen (14) Days after such condition or event has been encountered.
- 6.0.3.** By way of example, events that will entitle CM@Risk to an extension of the Contract Time include acts or omissions of Owner or anyone under Owner's control (including separate contractors), changes in the Work, Differing Site Conditions, Hazardous Conditions, delays by regulating agencies, wars, floods, labor disputes, unusual delay in transportation, epidemics, earthquakes, adverse weather conditions not reasonably anticipated, and other acts of God.
- 6.0.4.** If adverse weather conditions (see General Conditions) are the basis for a request for additional Contract Time, such requests shall be documented by data substantiating that weather conditions were abnormal for the period of time and that weather conditions had an adverse effect on the scheduled Substantial Completion.
- 6.0.5.** It is understood, however, that permitting the CM@Risk to proceed to complete any Work, or any part of the Work, after the date to which the time of completion may have been extended, shall in no way act as a waiver on the part of the Owner of any of its legal rights herein.
- 6.0.6.** In addition to CM@Risk's right to a time extension for those events set forth in this Section, CM@Risk shall also be entitled to an appropriate adjustment of the Contract Price provided, however, that the Contract Price shall not be adjusted for those events set forth in this Section that are beyond the control of both CM@Risk and Owner, including the events of war, floods, labor disputes, earthquakes, epidemics, adverse weather conditions not reasonably anticipated, and other acts of God. In the event of an occurrence under this Section, the CM@Risk and any Subcontractors or Sub-Subcontractors, as applicable, will be excused from any further performance or observance of the requirements so affected for as long as such circumstances prevail and the CM@Risk and any Subcontractors or Sub-Subcontractors, as applicable, continues to use commercially reasonable efforts to recommence performance or observance whenever and to whatever extent possible without delay. The CM@Risk and any Subcontractors or Sub-Subcontractors, as applicable, shall immediately notify the Owner's Representative by telephone (to be confirmed in writing within five (5) calendar days of the inception of such occurrence) and describe at a reasonable level of detail the circumstances causing the non-performance or delay in performance.

6.1. Differing Site Conditions

- 6.1.1.** If CM@Risk encounters a Differing Site Condition, CM@Risk will be entitled to an adjustment in the Contract Price and/or Contract Times to the extent CM@Risk's cost and/or time of performance are adversely impacted by the Differing Site Condition so long as CM@Risk complies with the provisions of the Contract Documents in notification, coordination, and resolution of the Differing Site Condition.
- 6.1.2.** Upon encountering a Differing Site Condition, CM@Risk shall provide prompt written notice to

Owner of such condition, which notice shall not be later than seven (7) Days after such condition has been encountered. CM@Risk shall, to the extent reasonably possible, provide such notice before the Differing Site Condition has been substantially disturbed or altered.

6.2. Errors, Discrepancies and Omissions

6.2.1. If the CM@Risk observes errors, discrepancies, or omissions in the Contract Documents, they shall promptly notify the Design Professional and request clarification.

6.2.2. If the CM@Risk proceeds with the Work affected by such known errors, discrepancies, or omissions, without receiving such clarifications, they do so at their own risk. Adjustments involving such circumstances made by the CM@Risk prior to clarification by the Design Professional shall be at the CM@Risk's risk.

6.3. Owner Requested Change in Work

6.3.1. The Owner reserves the right to make, at any time during the progress of the Work, such alterations as may be found necessary or in the Owner's best interest.

6.3.2. Such alterations and changes will not invalidate this Agreement nor release the surety and the CM@Risk agrees to perform the Work as altered, the same as if it has been a part of the original Contract Documents.

6.3.3. The Owner will request a proposal for a change in Work from CM@Risk, and an equitable adjustment in the Contract Price and/or Contract Times shall be made based on a mutual agreed upon cost and time.

6.4. Legal Requirements

6.4.1. The Contract Price and/or Contract Times shall be adjusted to compensate CM@Risk for the effects of any changes in the Legal Requirements enacted after the date of the Agreement or the date of the GMP proposal, affecting the performance of the Work.

6.5. Change Directives and Change Orders

6.5.1. Owner and CM@Risk shall negotiate in good faith and as expeditiously as possible the appropriate adjustments for a Change Directive. Upon reaching an agreement, the parties shall prepare and execute an appropriate Change Order reflecting the terms of the adjustment.

6.5.2. All changes in Work authorized by Change Orders shall be performed under the conditions of the Contract Documents.

6.6. Minor Changes in the Work

6.6.1. Minor changes in Work will not involve an adjustment in the Contract Price and/or Contract Times.

6.6.2. The Owner has authority to order minor changes in Work that do not materially and adversely affect the Contract Price or Contract Time, including the design, quality, performance, and workmanship required by the Contract Documents. Such changes shall be affected by written order and shall be binding on the Owner and CM@Risk. The CM@Risk shall carry out such written orders promptly.

6.6.3. CM@Risk may make minor changes in Work, provided, however that CM@Risk shall promptly

inform Owner, in writing, of any such changes and record such changes, if appropriate, on the Project Record Documents maintained by CM@Risk.

6.7. Contract Price Adjustments

- 6.7.1.** The increase or decrease in Contract Price resulting from a change in the Work shall be determined by one or more of the following methods:
 - 6.7.1.1.** Unit prices set forth in the Agreement or as subsequently agreed to between the parties;
 - 6.7.1.2.** A mutually accepted, lump sum, properly itemized and supported by sufficient substantiating data to permit evaluation by Owner; or
 - 6.7.1.3.** Estimated cost of the Work, General Conditions Costs, if applicable, Construction Fee, and tax.
- 6.7.2.** The markups that shall be allowed on such changes shall be no greater than the agreed upon Construction Fee.
- 6.7.3.** If an increase or decrease cannot be agreed to as set forth in Subsections 6.7.1.1 through 6.7.1.3 above and Owner issues a Change Directive, the cost of the change of the Work shall be determined by the reasonable expense and savings in the performance of the Work resulting from the change, including a reasonable overhead and profit as shown in each GMP exhibit, as may be set forth in the Agreement. CM@Risk shall maintain a documented, itemized accounting evidencing the expenses and savings associated with such changes.
- 6.7.4.** If unit prices are set forth in the Contract Documents or are subsequently agreed to by the parties, but application of such unit prices will cause substantial inequity to Owner or CM@Risk because of differences in the character or quantity of such unit items as originally contemplated, such unit prices shall be equitably adjusted.
- 6.7.5.** If Owner and CM@Risk disagree upon whether CM@Risk is entitled to be paid for any services required by Owner, or if there are any other disagreements over the scope of Work or proposed changes to the Work, Owner and CM@Risk shall resolve the disagreement pursuant to Article 8 hereof.
 - 6.7.5.1.** As part of the negotiation process, CM@Risk shall furnish Owner with a good faith estimate of the costs to perform the disputed services in accordance with Owner's interpretations.
 - 6.7.5.2.** If the parties are unable to agree and Owner expects the CM@Risk to perform the services in accordance with Owner's interpretations, CM@Risk shall proceed to perform the disputed services, conditioned upon Owner issuing a written order to CM@Risk (i) directing CM@Risk to proceed and (ii) specifying Owner's interpretation of the services that are to be performed.
- 6.7.6. Emergencies.** In any emergency affecting the safety of persons and/or property, CM@Risk shall act, at its discretion, to prevent threatened damage, injury or loss. Any change in the Contract Price and/or Contract Time resulting from emergency work under this Section shall be determined as provided in this Article.

Article 7 – Procedure for Payment

7.0. For and in consideration of the faithful performance of the Work herein embraced as set forth in the Contract Documents, which are a part hereof and in accordance with the directions of the Owner and to its satisfaction, the Owner agrees to pay the said CM@RISK the actual Cost of the Work and any applicable General Conditions Costs including, insurance and bonding, taxes, if any, and the CM@Risk's Construction Fee, but no more than the GMP as adjusted by any Change Orders. Payment for the specific work under this Agreement will be made in accordance with payment provisions detailed below.

7.1. GMP Payment Request

7.1.1. At the pre-construction conference prescribed in Section 2.3, CM@Risk shall submit for Owner's review and approval a schedule of values. The schedule of values will serve as the basis for monthly progress payments made to CM@Risk throughout the Work.

7.1.2. At least five (5) working days prior to the date established for a Payment Request, the CM@Risk shall submit an updated Project Schedule and meet with the Owner's Representative to review the progress of the Work as it will be reflected on the Payment Request.

7.1.3. The Payment Request shall constitute CM@Risk's representation that the Work has been performed consistent with the Contract Documents, has progressed to the point indicated in the Payment Request, and that all Work will pass to Owner free and clear of all claims, liens, encumbrances, and security interests upon the incorporation of the Work into the Project and payment, therefore.

7.1.4. The Payment Request may request payment for stored equipment and materials if construction progress is in reasonable conformance with the approved Project Schedule.

7.1.4.1. For equipment and materials suitably stored at the Site, the equipment and materials shall be protected by suitable insurance and Owner shall receive the equipment and materials free and clear of all liens and encumbrances upon payment, therefore.

7.1.4.2. For materials and equipment stored off the Site and included in Payment Request, the Owner must approve the storage. The material and equipment must be stored within **Harris** County and be accessible for Owner's inspection. The CM@Risk must protect the Owner's interest and shall include applicable insurance, bonding, storage, and transportation to the Site.

7.1.4.3. All bonds and insurance required for stored materials shall name the Owner as the loss payee to the extent of its interest in the stored materials.

7.1.5. CM@Risk shall submit Applications for Payment to the Owner at the beginning of each month beginning with the first month after the construction Notice to Proceed.

7.1.6. With every Payment Request for the Work, CM@Risk will submit an affidavit stating that the CM@Risk has complied with the requirements of Chapter 2258 of the Texas Government Code. The parties hereto agree that any electronic copy of such affidavit shall be treated as an original for all intents and purposes.

7.2. Payment of GMP

7.2.1. Owner shall make payment in accordance with the provisions of this Contract and Chapter 2251 of the Texas Government Code. Payment will be made no later than thirty (30) Days after the Payment Request is received by the Owner, but in each case less the total of payments

previously made, and less amounts properly retained under Section 7.3 below.

7.2.2. Owner shall pay CM@Risk all amounts properly due. If Owner determines that there is an error in the Payment Request and the CM@Risk is not entitled to all or part of a Payment Request, it will notify CM@Risk in writing within twenty-one (21) Days after the date Payment Request is received by the Owner. The notice shall indicate the specific amounts Owner intends to withhold, the reasons and contractual basis for the withholding, and the specific measures CM@Risk must take to rectify Owner's concerns. CM@Risk and Owner will attempt to resolve Owner's concerns. If the parties cannot resolve such concerns, CM@Risk may pursue its rights under the Contract Documents, including those under Article 8 hereof.

7.3. Retention on GMP

7.3.1. Owner will retain five percent (5%) of each Payment Request amount provided.

7.4. Substantial Completion. Upon Substantial Completion of the entire Work or, if applicable, any portion of the Work, Owner shall release to CM@Risk all retained amounts relating, as applicable, to the entire Work or substantially completed portion of the Work, less an amount of the reasonable value of all remaining or incomplete items of Work as noted in the Certificate of Substantial Completion.

7.5. Final Payment

7.5.1. After receipt of a final Payment Request, Owner shall make final payment 30 Days after the receipt by the Owner, provided that CM@Risk has completed all of the Work in conformance with the Contract Documents and a Final Acceptance Letter has been issued by the Owner.

7.5.2. At the time of submission of its final Payment Request, CM@Risk shall provide the following information:

7.5.2.1. An affidavit that there are no claims, obligations, or liens outstanding or unsatisfied for labor, services, material, equipment, taxes, or other items performed, furnished or incurred for or in connection with the Work which will in any way affect Owner's interests;

7.5.2.2. A general release executed by CM@Risk waiving, upon receipt of final payment by CM@Risk, all claims, except those claims previously made in writing to Owner and remaining unsettled at the time of final payment;

7.5.2.3. Conditional waivers and releases executed by all Subcontractors; and

7.5.2.4. Consent of CM@Risk's surety, if any, to final payment (original with raised seal).

7.6. Payments to Subcontractors or Suppliers

7.6.1. CM@Risk shall pay its Subcontractors or suppliers within ten (10) Days of receipt of each progress payment from the Owner. The CM@Risk shall pay for the amount of Work performed or materials supplied by each Subcontractor or supplier as accepted and approved by the Owner with each progress payment. In addition, any reduction of retention by the Owner to the CM@Risk shall result in a corresponding reduction to Subcontractors or suppliers who have performed satisfactory work. CM@Risk shall pay Subcontractors or suppliers the reduced retention within ten (10) Days of the payment of the reduction of the retention to the CM@Risk. No contract between CM@Risk and its Subcontractors and suppliers may materially alter the rights of any Subcontractor or supplier to receive prompt payment and retention reduction as provided herein.

7.6.2. If the CM@Risk fails to make payments in accordance with these provisions, the Owner may take any one or more of the following actions and CM@Risk agrees that the Owner may take

such actions:

- 7.6.2.1. To hold the CM@Risk in default under this Agreement;
- 7.6.2.2. Withhold future payments including retention until proper payment has been made to Subcontractors or suppliers in accordance with these provisions;
- 7.6.2.3. Reject all future offers to perform work for the Owner from the CM@Risk for a period not to exceed one year from Substantial Completion date of this Project; or
- 7.6.2.4. Terminate this Agreement.
- 7.6.3. All funds paid to the CM@Risk are paid in trust and shall be used for payment of the Subcontractors and Suppliers who have performed work on the Project before the CM@Risk may use any of the funds for any other purpose. Nothing in this provision shall prohibit the CM@Risk from withholding any funds in dispute or back charges or offsets under the provisions of the Subcontract. The CM@Risk shall include a trust fund provision in each subcontract requiring the subcontractor to hold any payment it receives in trust and to use them for payment of its subcontractors and suppliers who have performed work on the Project before Subcontractor may use the funds for any other purpose.
- 7.6.4. Should the Owner fail or delay in exercising or enforcing any right, power, privilege, or remedy under this Section, such failure or delay shall not be deemed a waiver, release, or modification of the requirements of this Section or of any of the terms or provisions thereof.
- 7.6.5. CM@Risk shall include prompt-payment provisions in every subcontract, including procurement of materials and leases of equipment for this Agreement.
- 7.7. **Record Keeping and Finance Controls**
- 7.7.1. Records of the CM@Risk's direct personnel payroll, reimbursable expenses pertaining to this Project and records of accounts between the Owner and CM@Risk shall be kept on a generally recognized accounting basis and shall be available for three years after Final Acceptance of the Project.
- 7.7.2. The Owner, its authorized representative, and/or the appropriate federal agency, reserve the right to audit the CM@Risk's records to verify the accuracy and appropriateness of all pricing data, including data used to negotiate Contract Documents and any Change Orders. Notwithstanding the foregoing, the composition of any stipulated rates shall not be subject to audit.
- 7.7.3. The Owner reserves the right to decrease Contract Price and/or payments made on this Agreement if, upon audit of the CM@Risk's records, the audit discloses the CM@Risk has provided false, misleading, or inaccurate cost and pricing data.

Article 8 – Claims and Disputes

8.0. Requests for Contract Adjustments and Relief

8.0.1. If either CM@Risk or Owner believes that it is entitled to relief against the other for any event arising out of or related to the Contract, such party shall provide written notice to the other party of the basis for its claim for relief.

8.0.2. Such notice shall, if possible, be made prior to incurring any cost or expense and in accordance with any specific notice requirements contained in applicable sections of the Agreement.

8.0.3. In the absence of any specific notice requirement, written notice shall be given within a reasonable time, not to exceed twenty-one (21) Days, after the occurrence giving rise to the claim for relief or after the claiming party reasonably should have recognized the event or condition giving rise to the request, whichever is later.

8.0.4. Such notice shall include sufficient information to advise the other party of the circumstances giving rise to the claim for relief, the specific contractual adjustment or relief requested and the basis of such request.

8.1. Dispute Avoidance and Resolution

8.1.1. The parties are fully committed to working with each other throughout the Project and agree to always communicate regularly with each other so as to avoid or minimize disputes or disagreements. If disputes or disagreements do arise, CM@Risk and Owner each commit to resolving such disputes or disagreements in an amicable, professional, and expeditious manner so as to avoid unnecessary losses, delays and disruptions to the Work.

8.1.2. CM@Risk and Owner will first attempt to resolve disputes or disagreements at the field level through discussions between CM@Risk's Representative and Owner's Representative.

8.1.3. If a dispute or disagreement cannot be resolved through CM@Risk's Representative and Owner's Representative, CM@Risk's Senior Representative and Owner's Senior Representative, upon the request of either party, shall meet as soon as conveniently possible, but in no case later than thirty (30) Days after such a request is made, to attempt to resolve such dispute or disagreement. Prior to any meetings between the Senior Representatives, the parties will exchange relevant information that will assist the parties in resolving their dispute or disagreement. Should this effort be unsuccessful then the parties may proceed to take appropriate action to enforce any rights or obligations pursuant to the provisions of the Contract.

8.2. Duty to Continue Performance Unless provided to the contrary in the Contract Documents or as provided by statute, CM@Risk shall continue to perform the Work and Owner shall continue to satisfy its payment obligations to CM@Risk, pending the final resolution of any dispute or disagreement between CM@Risk and Owner.

8.3. Representatives of the Parties

8.3.1. Owner's Representatives

8.3.1.1. Owner designates the Design Professional or their designee as its Senior Representative ("Owner's Senior Representative"), which individual has the authority and responsibility for avoiding and resolving disputes under Subsection 8.1.3.

8.3.1.2. Owner designates the Owner's project manager as its Owner's Representative, which individual has the authority and responsibility set forth in Subsection 8.1.2.

8.3.2. CM@Risk’s Representatives

8.3.2.1. CM@Risk designates the individual listed below as its Senior Representative (“CM@Risk’s Senior Representative”), which individual has the authority and responsibility for avoiding and resolving disputes under Subsection 8.1.3:

Peter T. Bailey
281-907-8600
pbailey@plwus.com

8.3.2.2. CM@Risk designates the individual listed below as its CM@Risk’s Representative, which individual has the authority and responsibility set forth in Subsection 8.1.2:

Alejandro Vazquez
713-412-2298
avazquez@plwus.com

Article 9 – Suspension and Termination

9.0. Owner’s Right to Stop Work

- 9.0.1.** Owner may, at its discretion and without cause, order CM@Risk in writing to stop and suspend the Work. Such suspension shall not exceed one hundred and eighty (180) consecutive Days.
- 9.0.2.** CM@Risk may seek an adjustment of the Contract Price and/or Contract Time if its cost or time to perform the Work has been adversely impacted by any suspension or stoppage of Work by Owner.

9.1. Termination for Convenience

- 9.1.1.** Upon receipt of written notice to CM@Risk, Owner may, at its discretion and without cause, elect to terminate this Agreement. In such event, Owner shall pay CM@Risk only the direct value of its completed Work and materials supplied as of the date of termination and the reasonable costs and expenses attributable to such termination. CM@Risk shall be entitled to profit and overhead on completed Work only but shall not be entitled to anticipated profit or anticipated overhead.
- 9.1.2.** If the Owner suspends the Work for 181 consecutive Days or more, such suspension shall be deemed a termination for convenience.
- 9.1.3** Upon such termination, the CM@Risk shall proceed with the following obligations:
 - 9.1.3.1** Stop Work as specified in the notice;
 - 9.1.3.2** Place no further subcontracts or orders;
 - 9.1.3.3** Terminate all subcontracts to the extent they relate to the Work terminated;
 - 9.1.3.4** Assign to the Owner all right, title and interest of the CM@Risk under the subcontracts terminated, in which case the Owner shall have the right to settle or to pay any termination settlement proposal arising out of those terminations; and
 - 9.1.3.5** Take any action that may be necessary for the protection and preservation of the property related to the Contract that is in the possession of the CM@Risk and which the Owner has or may acquire an interest.
- 9.1.4** The CM@Risk shall submit complete termination inventory schedules no later than 120 Days from the date of the notice of termination.
- 9.1.5** The Owner shall pay CM@Risk the following:
 - 9.1.5.1** The direct value of its completed Work and materials supplied as of the date of termination;
 - 9.1.5.2** The reasonable costs and expenses attributable to such termination; and
 - 9.1.5.3** CM@Risk shall be entitled to profit and overhead on completed Work only but shall not be entitled to anticipated profit or anticipated overhead. If it appears the CM@Risk would have sustained a loss on the entire Work, had it been completed, the CM@Risk shall not be allowed profit, and the Owner shall reduce the settlement to reflect the indicated rate of loss.
- 9.1.6** The CM@Risk shall maintain all records and documents for three (3) years after final settlement. These shall be maintained and subject to auditing as prescribed in Section 7.7.

9.2. Owner's Right to Perform and Terminate for Cause

- 9.2.1.** If the Owner provides the CM@Risk with a written order to provide adequate maintenance of traffic, adequate cleanup, adequate dust control or to correct deficiencies or damage resulting from abnormal weather conditions, and the CM@Risk fails to comply in a time frame specified, the Owner may have a portion of the Work included in the written order accomplished by other sources.
- 9.2.2.** If CM@Risk persistently fails to (i) provide a sufficient number of skilled workers, (ii) supply the materials required by the Contract Documents, (iii) comply with applicable Legal Requirements, (iv) timely pay, without cause, Subconsultants and/or Subcontractors, (v) prosecute the Work with promptness and diligence to ensure that the Work is completed within the Contract Times, as such times may be adjusted, or (vi) perform material obligations under the Contract Documents, then Owner, in addition to any other rights and remedies provided in the Contract Documents or by law, shall have the rights set forth in Subsections 9.2.3 and 9.2.4 below.
- 9.2.3.** Upon the occurrence of an event set forth in Subsection 9.2.2 above, Owner may provide written notice to CM@Risk that it intends to terminate the Agreement unless the problem cited is cured, or commenced to be cured, within seven (7) Days of CM@Risk's receipt of such notice.
- 9.2.3.1.** If CM@Risk fails to cure, or reasonably commences to cure, such problem, then Owner may give a second written notice to CM@Risk of its intent to terminate within an additional seven (7) Day period.
- 9.2.3.2.** If CM@Risk, within such second seven (7) Day period, fails to cure, or reasonably commences to cure, such problem, then Owner may declare the Agreement terminated for default by providing written notice to CM@Risk of such declaration.
- 9.2.4.** Upon declaring the Agreement terminated pursuant to Subsection 9.2.3.2 above, Owner may enter upon the premises and take possession, for the purpose of completing the Work, of all materials which have been purchased for the performance of the Work, all of which CM@Risk hereby transfers, assigns and sets over to Owner for such purpose, and to employ any person or persons to complete the Work and provide all of the required labor, services, materials, equipment and other items.
- 9.2.5.** In the event of such termination, CM@Risk shall not be entitled to receive any further payments under the Contract Documents until the Work shall be finally completed in accordance with the Contract Documents. At such time, the CM@Risk will only be entitled to be paid for Work performed and accepted by the Owner prior to its default.
- 9.2.6.** If Owner's cost and expense of completing the Work exceeds the unpaid balance of the Contract Price, then CM@Risk shall be obligated to pay the difference to Owner. Such costs and expense shall include not only the cost of completing the Work, but also losses, damages, costs and expense, including attorneys' fees and expenses, incurred by Owner in connection with the procurement and defense of claims arising from CM@Risk's default.
- 9.2.7.** If Owner improperly terminates the Agreement for cause, the termination for cause shall be converted to a termination for convenience in accordance with the provisions of Section 9.1.

Article 10 – Insurance and Bonds

10.0. Insurance Requirements

10.0.1 CM@Risk and Subcontractors shall procure and maintain until all of their obligations under this agreement have been discharged, including until any warranty periods under this Agreement are satisfied, insurance against claims for injury to persons or damage to property that may arise from or in connection with the performance of the Work hereunder by the CM@Risk, their agents, representatives, employees or Subcontractors.

10.0.2 The insurance requirements herein are minimum requirements for this Agreement and in no way limit the indemnity covenants contained in this Agreement.

10.0.3 The Owner in no way warrants that the minimum limits contained herein are sufficient to protect the CM@Risk from liabilities that might arise out of the performance of the Work under this Agreement by the CM@Risk, their agents, representatives, employees, or subcontractors. CM@Risk is free to purchase such additional insurance as may be determined necessary.

10.1 Minimum Scope and Limits of Insurance. CM@Risk shall provide coverage with limits of liability not less than those stated below:

10.1.1 Commercial General Liability – Occurrence Form

Policy shall include bodily injury, property damage, broad form contractual liability and XCU coverage in the following amounts:

- General Aggregate/for this Project \$2,000,000/\$1,000,000
- Products – Completed Operations Aggregate \$1,000,000
- Personal and Advertising Injury \$1,000,000
- Each Occurrence \$1,000,000

The policy shall be endorsed to include the following additional insured language: **“The City of Tomball, its Officials, and Employees, as well as Design Professional shall be named as an additional insured with respect to liability arising out of the activities performed by, or on behalf of the CM@Risk. This policy shall provide a blanket waiver of subrogation in favor of the City of Tomball and Design Professional. A copy of the endorsement or other policy provisions naming the City of Tomball and Design Professional as an additional insured to the insurance policy and providing a blanket waiver of subrogation in favor of the City of Tomball, its Officials, and Employees, as well as Design Professional shall be attached to the certificate of insurance.”**

10.1.2 Automobile Liability – Bodily injury and property damage for any owned, hired, and non-owned vehicles used in the performance of this Agreement:

- Combined Single Limit (CSL) \$1,000,000

The policy shall be endorsed to include the following additional insured language: **“The City of Tomball, its Officials, Employees, and Volunteers, as well as Design Professional, shall be named as an additional insured with respect to liability arising out of the activities performed by, or on behalf of the CM@Risk, including automobiles owned, leased, hired or borrowed by the CM@Risk This policy shall provide a blanket waiver of subrogation in favor of the City of Tomball and Design Professional. A copy of the endorsement or other policy provisions naming the City and Design Professional as an additional insured to the insurance policy and providing a blanket waiver of subrogation in favor of the City of Tomball, its Officials, and Employees, as well as Design Professional, shall be attached to the certificate of insurance.”**

10.1.3 Workers' Compensation and Employers' Liability

- Workers' Compensation Statutory

- Employers' Liability:
 - Each Accident \$100,000
 - Disease – Each Employee \$100,000
 - Disease – Policy Limit \$500,000

This policy shall provide a blanket waiver of subrogation in favor of the City of Tomball and Design Professional. A copy of the endorsement or other policy provisions providing a blanket waiver of subrogation in favor of the City of Tomball, its Officials, and Employees, as well as Design Professional, shall be attached to the certificate of insurance.

10.1.4 Builders' Risk Insurance or Installation Floater –

In an amount equal to the initial Contract Price plus additional coverage equal to Contract Price for all subsequent Amendments and/or Change Orders.

10.1.4.1 The City of Tomball, its Officials, and Employees, Design Professional, the CM@Risk, and Subcontractors, shall be named as Additional Insureds on the policy.

10.1.4.2 Coverage shall be written on an all risk, replacement cost basis and shall include coverage for flood and earth movement.

10.1.4.3 Policy shall be maintained until whichever of the following shall first occur: (i) final payment has been made; or (ii) until no person or entity, other than the Owner has an insurable interest in the property required to be covered.

10.1.4.4 Policy shall be endorsed such that the insurance shall not be canceled or lapse because of any partial use or occupancy by the Owner.

10.1.4.5 Policy must provide coverage from the time any covered property becomes the responsibility of the CM@Risk, and continue without interruption during construction, renovation, or installation, including any time during which the covered property is being transported to the construction installation site, or awaiting installation, whether on or off site.

10.1.4.6 **This policy shall provide a blanket waiver of subrogation in favor of the City of Tomball and Design Professional. A copy of the endorsement or other policy provisions naming the City of Tomball and Design Professional as additional insureds to the insurance policy and providing a blanket waiver of subrogation in favor of the City of Tomball, its Officials, and Employees, as well as Design Professional, shall be attached to the certificate of insurance.**

10.1.4.7 CM@Risk is responsible for the payment of all policy deductibles.

10.2 Additional Insurance Requirements. The policies shall include, or be endorsed to include the following provisions:

10.2.1 On insurance policies where the City of Tomball is named as an additional insured, the City of Tomball and the Design Professional shall be an additional insured to the full limits of liability purchased by the CM@Risk even if those limits of liability are in excess of those required by this Agreement.

- 10.2.2** The CM@Risk's insurance coverage shall be primary insurance and non-contributory with respect to all other available sources.
- 10.2.3** Coverage provided by the CM@Risk shall not be limited to the liability assumed under the indemnification provisions of this Agreement.
- 10.3** **Notice of Cancellation.** Each insurance policy required by the insurance provisions of this Agreement shall provide the required coverage and shall not be suspended, voided, canceled, reduced in coverage, materially changed, or endorsed to lower limits except after thirty (30) Days prior written notice has been given to the Owner. Such notice shall be sent directly to the Owner Senior Representative and shall be sent by certified mail, return receipt requested.
- 10.4** **Acceptability of Insurers.** Insurance is to be placed with insurers duly licensed or approved unlicensed companies in the state of Texas and with an "A.M. Best" rating of at least A or better. The Owner in no way warrants that the above-required minimum insurer rating is sufficient to protect the CM@Risk from potential insurer insolvency.
- 10.5** **Verification of Coverage**
- 10.5.1** CM@Risk shall furnish the Owner with certificates of insurance (ACORD form or equivalent approved by the Owner) as required by this Agreement. The certificates for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf.
- 10.5.2** All certificates and endorsements are to be received and approved by the Owner before Work commences. Each insurance policy required by this Agreement must be in effect at or prior to commencement of Work under this Agreement and remain in effect for the duration of the Project. Failure to maintain the insurance policies as required by this Agreement or to provide evidence of renewal is a material breach of the contract.
- 10.5.3** All certificates required by this Agreement shall be sent directly to Owner's Senior Representative. The Owner project/contract number and project description shall be noted on the certificate of insurance. The Owner reserves the right to require complete, certified copies of all insurance policies required by this Agreement at any time. **DO NOT SEND CERTIFICATES OF INSURANCE TO THE OWNER'S RISK MANAGEMENT DIVISION.**
- 10.5.4** **If the Certificate of Insurance reflecting policy coverage and cancellation notice does not conform to the Owner's requirements, the CM@Risk must:**
- **Submit a current insurance certificate (dated within fifteen (15) Days of the Payment Request submittal) with each Payment Request form. The Payment Request will be rejected if the insurance certificate is not submitted with the Payment Request.**
- 10.6** **Subcontractors.** CM@Risk's certificate(s) shall include all Subcontractors as additional insureds under its policies **or** CM@Risk shall furnish to the Owner separate certificates and endorsements for each Subcontractor. All coverages for Subcontractors shall be subject to the minimum requirements identified above.
- 10.7** **Approval.** Any modification or variation from the insurance requirements in this Contract shall be made by the Owner whose decision shall be final. Such action will not require a formal Contract amendment but may be made by administrative action.
- 10.8** **Bonds and Other Performance Security.**
- 10.8.1** Prior to execution of this Agreement, the CM@Risk must provide a performance bond and a labor and materials bond, each in an amount equal to the total contract price of the GMP set

forth in this Agreement. In addition to any criteria set forth in this provision, the performance and payment bonds must comply with all requirements of Chapter 2253 of the Texas Government Code.

- 10.8.2** Each such bond shall be executed by a surety company or companies holding a Certificate of Authority to transact surety business in the state of Texas, issued by the Director of the Texas Department of Insurance. A copy of the Certificate of Authority shall accompany the bonds. The Certificate shall have been issued, updated, or certified within two years prior to the execution of this Agreement.
- 10.8.3** The bonds shall be made payable and acceptable to the City of Tomball.
- 10.8.4** The bonds shall be written or countersigned by an authorized representative of the surety who is either a resident of the state of Texas or whose principal office is maintained in this state, as by law required, and the bonds shall have attached thereto a certified copy of Power of Attorney of the signing official.
- 10.8.5** Upon the request of any person or entity appearing to be a potential beneficiary of bonds covering payment of obligations arising under the Contract Documents, the CM@Risk shall promptly furnish a copy of the bonds or shall permit a copy to be made.
- 10.8.6** All bonds submitted for this project shall be provided by a company which has been rated AM Best rating of "A- or better for the prior four quarters" by the A.M. Best Company.

Article 11 – Indemnification

11.1 CM@Risk’s General Indemnification.

11.1.1 CM@Risk agrees to indemnify and save harmless the City of Tomball, its officers, agents and employees, Design Professional, and any jurisdiction or agency issuing permits for any work included in the Project, their officers, agents and employees, hereinafter referred to as indemnitee, from all suits and claims, including attorney’s fees and cost of litigation, actions, loss, damage, expense, cost or claims of any character or any nature arising out of the work done in fulfillment of the terms of the Contract Documents or on account of any act, claim or amount arising or recovered under worker’s compensation law or arising out of the failure of the CM@Risk to conform to any statutes, ordinances, regulation, law or court decree, provided that such indemnification obligation shall not apply to the extent such suits, claims, losses and expenses arise from the negligence or willful misconduct of an indemnitee. It is agreed that the CM@Risk will be responsible for primary loss investigation, defense, and judgment costs where this contract of indemnity applies. In consideration of the award of this Contract, the CM@Risk agrees to waive all rights of subrogation against the City of Tomball, its officers, officials, agents and employees, as well as Design Professional, for losses arising from the work performed by the Contractor for the City of Tomball.

Article 12 – General Provisions

12.1 Contract Documents

12.1.1 Contract Documents are as defined in Article 1. This Agreement, Plans, Standard Specifications and Details, Special Provisions, Addenda (if any) and used as the basis for the Guaranteed Maximum Price Proposal; GMP, Performance Bond, Payment Bond, Certificates of Insurance, Construction Documents and Change Orders (if any) are by this reference made a part of this Agreement to the same extent as if set forth herein in full.

12.1.2 The Contract Documents are intended to permit the parties to complete the Work and all obligations required by the Contract Documents within the Contract Times for the Contract Price. The Contract Documents are intended to be complementary and interpreted in harmony so as to avoid conflict, with words and phrases interpreted in a manner consistent with construction and design industry standards.

12.1.3 In the event of any inconsistency, conflict, or ambiguity between or among the Contract Documents, the Contract Documents shall take precedence in the order in which they are listed in the definition of Contract Documents in Article 1.

12.1.3.1 On the drawings, given dimensions shall take precedence over scaled measurements, and large-scale drawings over small-scale drawings.

12.1.3.2 Specifications take precedence over Plans.

12.1.3.3 In the event of any inconsistency, conflict, or ambiguity between the Contract Documents and the Design Phase Contract, the Contract Documents take precedence over the Design Phase Contract.

12.1.4 The headings used in this Agreement, or any other Contract Documents, are for ease of reference only and shall not in any way be construed to limit or alter the meaning of any provision.

12.1.5 The Contract Documents form the entire agreement between Owner and CM@Risk and by incorporation herein are as fully binding on the parties as if repeated herein. No oral representations or other agreements have been made by the parties except as specifically stated in the Contract Documents.

12.2 **Amendments.** The Contract Documents may not be changed, altered, or amended in any way except in writing signed by a duly authorized representative of each party.

12.3 **Time is of the Essence.** Owner and CM@Risk mutually agree that time is of the essence with respect to the dates and times set forth in the Contract Documents.

12.4 **Mutual Obligations.** Owner and CM@Risk commit at all times to cooperate fully with each other and proceed on the basis of trust and good faith, to permit each party to realize the benefits afforded under the Contract Documents.

12.5 **Cooperation and Further Documentation.** The CM@Risk agrees to provide the Owner with such other duly executed documents as shall be reasonably requested by the Owner to implement the intent of the Contract Documents.

12.6 **Assignment.** Neither CM@Risk nor Owner shall, without the written consent of the other, assign, transfer, or sublet any portion of this Agreement or part of the Work or the obligations required by the Contract Documents.

12.7 **Successorship.** CM@Risk and Owner intend that the provisions of the Contract Documents

are

binding upon the parties, their employees, agents, heirs, successors and assigns.

- 12.8 Third Party Beneficiary.** Nothing under the Contract Documents shall be construed to give any rights or benefits in the Contract Documents to anyone other than the Owner and the CM@Risk, and all duties and responsibilities undertaken pursuant to the Contract Documents will be for the sole and exclusive benefit of Owner and the CM@Risk and not for the benefit of any other party.
- 12.9 Governing Law.** The Agreement and all Contract Documents shall be deemed to be made under and shall be construed in accordance with and governed by the laws of the State of Texas without regard to the conflicts or choice of law provisions thereof. Any action to enforce any provision of this Contract or to obtain any remedy with respect hereto shall be brought and tried in the district courts of Harris County, Texas, and for this purpose, each party hereby expressly and irrevocably consents to the sole and exclusive jurisdiction and venue of such Court with the Owner consenting only to the extent allowed by statute and otherwise reserving all rights and defenses.
- 12.10 Severability.** If any provision of the Contract Documents or the application thereof to any person or circumstance shall be invalid, illegal, or unenforceable to any extent, the remainder of the Contract Documents and the application thereof shall not be affected and shall be enforceable to the fullest extent permitted by law.
- 12.11 Compliance with Federal Laws.** CM@Risk understands and acknowledges the applicability of the American with Disabilities Act, the Immigration Reform and Control Act of 1986 and the Drug Free Workplace Act of 1989 to it. The CM@Risk agrees to comply with these laws, as well as any other federal laws that may apply, in performing the Contract Documents and to permit the Owner to verify such compliance.
- 12.12 Legal Requirements.** CM@Risk shall perform all Work in accordance with all Legal Requirements and shall provide all notices applicable to the Work as required by the Legal Requirements. It is not the CM@Risk's responsibility to ascertain that the Construction Documents are in accordance with applicable laws, statutes, ordinances, building codes, rules and regulations. However, if the CM@Risk recognizes that portions of the Construction Documents are at variance therewith, the CM@Risk shall promptly notify the Design Professional and Owner in writing, describing the apparent variance or deficiency.
- 12.13 Fair Treatment of Workers.** The CM@Risk shall keep fully informed of all Federal and State laws, County and City ordinances, regulations, codes and all orders and decrees of bodies or tribunals having any jurisdiction or authority, which in any way affect the conduct of the work. They shall at all times observe and comply with all such laws, ordinances, regulations, codes, orders and decrees; this includes, but is not limited to laws and regulations ensuring fair and equal treatment for all employees and against unfair employment practices, including OSHA and the Fair Labor Standards Act (FLSA). The CM@Risk shall protect and indemnify the Owner and its representatives against any claim or liability arising from or based on the violation of such, whether by himself or his employees.
- 12.14 Independent Contractor.** The CM@Risk is and shall be an independent contractor. Any provisions in the Contract Documents that may appear to give the Owner the right to direct the CM@Risk as to the details of accomplishing the Work or to exercise a measure of control over the Work means that the CM@Risk shall follow the wishes of the Owner as to the results of the Work only. These results shall comply with all applicable laws and ordinances.
- 12.15 Survival.** All warranties, representations, and indemnifications by the CM@Risk shall survive the completion or termination of this Agreement.

12.16 Covenant Against Contingent Fees. The CM@Risk warrants that no person has been employed or retained to solicit or secure this Agreement upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, and that no member of the City of Tomball Council, or any employee of the City of Tomball has any interest, financially, or otherwise, in the firm. For breach or violation of this warrant, the City of Tomball shall have the right to annul this Agreement without liability, or at its discretion to deduct from the Contract Price or consideration, the full amount of such commission, percentage, brokerage, or contingent fee.

12.17 No Waiver. The failure of either party to enforce any of the provisions of the Contract Documents or to require performance of the other party of any of the provisions hereof shall not be construed to be a waiver of such provisions, nor shall it affect the validity of the Contract Documents or any part thereof, or the right of either party to thereafter enforce each and every provision.

12.18 Notice.

12.18.1 Unless otherwise provided, any notice, request, instruction, or other document to be given under this Agreement by any party to any other party shall be in writing and shall be delivered in person or by courier or mailed by certified mail, postage prepaid, return receipt requested or by e-mail; provided however, that e-mail shall not be a permissible method of delivery for any notice, request, instruction or other document that requires execution by both parties, and shall be deemed given upon (a) confirmation of receipt of an e-mail transmission,(b) confirmed delivery by hand or standard overnight mail, or (c) upon the expiration of three (3) business days after the day mailed by certified mail, as follows:

to CM@Risk:

Webber Waterworks, LLC
Attn: Peter T. Bailey, Executive Vice President
1725 Hughes Landing Blvd., Suite 1200
The Woodlands, TX 77389
pbailey@plwus.com

to Owner:

City Manager
David Esquivel
401 Market Street, Tomball, TX 77375
DEsquivel@tomballtx.gov

With a Copies to:

City Attorney
Loren B. Smith
401 Market Street, Tomball, TX 77375

City Representative

or to such other place and with such other copies as either Party may designate as to itself by written notice to the other Party. Rejection, any refusal to accept or the inability to deliver

because of changed address of which no notice was given shall be deemed to be receipt of the notice as of the date of such rejection, refusal, or inability to deliver.

12.18.2 Notices Related to Payment, Securities-in-lieu, Bonds. Any notice, request, instruction, or other document to be given under this Agreement by any party to any other party related to payment, securities-in-lieu, bonds, or other instrument securing the performance of this Agreement, including but not limited to, bid bonds, performance bonds, payment bonds or letters of credit, shall be in writing and shall be delivered in person or by courier or facsimile transmission or mailed by certified mail, postage prepaid, return receipt requested and shall be deemed given upon (a) confirmation of receipt of a facsimile transmission, (b) confirmed delivery by hand or standard overnight mail or (c) upon the expiration of three (3) business days after the day mailed by certified mail, as follows:

to CM@Risk:

Webber Waterworks, LLC
Attn: Peter T. Bailey, Executive Vice President
1725 Hughes Landing Blvd., Suite 1200
The Woodlands, TX 77389
pbailey@plwus.com

to Owner:

City Manager
David Esquivel
401 Market Street, Tomball, TX 77375
DEsquivel@tomballtx.gov

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or to such other place and with such other copies as either Party may designate as to itself by written notice to the other Party. Rejection, any refusal to accept or the inability to deliver because of changed address of which no notice was given shall be deemed to be receipt of the notice as of the date of such rejection, refusal, or inability to deliver.

12.19 Equal Opportunity/Affirmative Action

12.19.1 The CM@Risk shall comply with the provisions of this Agreement, and the requirements of state, federal, and local law and regulation, pertaining to discrimination and accepting applications or hiring employees. The CM@Risk shall not discriminate against any worker, employee or applicant, or any member of the public, because of race, color, religion, gender, national origin, age, or disability nor otherwise commit an unfair employment practice. The

CM@Risk will take affirmative action to ensure that applicants are employed, and employees are dealt with during employment, without regard to their race, color, religion, gender or national origin, age, or disability. Such action shall include but not be limited to the following: employment, promotion, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship as well as all other labor organizations furnishing skilled, unskilled, and union labor, or who may perform any such labor or services in connection with this Agreement. The CM@Risk further agrees that this clause will be incorporated in all subcontracts, job-consultant contracts of this Contract entered into by the CM@Risk.

12.19.2 The Owner extends to each individual, firm, vendor, supplier, contractor, and Subcontractor an equal economic opportunity to compete for Owner business and strongly encourages voluntary utilization of Disadvantaged and/or Minority-owned or Woman-owned business to reflect both the industry and community ethnic composition.

12.19.3 The following two paragraphs apply to the CM@Risk named herein and shall appear in all contracts between the CM@Risk and any and all Subcontractors who are employed on this Project. The CM@Risk further agrees that the two paragraphs will be incorporated in all subcontracts with all labor organizations furnishing skilled, unskilled, and union labor, or who may perform any such labor or services in connection with this contract.

“Any Party (Subcontractor), in performing under this Contract, shall not discriminate against any worker, employee or applicant, or any member of the public, because of race, color, religion, gender, national origin, age or disability, nor otherwise commit an unfair employment practice.

The Party (Subcontractor) will take affirmative action to ensure that applicants are employed, and employees are dealt with during employment without regard to their race, color, religion, gender or national origin, age or disability. Such action shall include, but not be limited to the following: employment, promotion, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rate of pay or other forms of compensation; and selection for training; including apprenticeship.”

12.20 Confidentiality of Plans & Specifications

12.20.1 Any plans or specifications you receive regarding this Project are for official use only. You may not share them with others except as required to fulfill the obligations of your Contract with the Owner.

12.20.2 All Record Documents, Shop Drawings and other plans or drawings prepared or submitted by the CM@Risk shall include the following language: “These plans are for official use only and may not be shared with others except as required to fulfill the obligations of your contract with the City of Tomball.”

12.21 Hazardous Materials

12.21.1 Unless included in the Work, if the CM@Risk encounters onsite material which they reasonably believe to contain asbestos, polychlorinated biphenyl (PCB), or other hazardous substances or materials regulated by Laws and Regulations, they shall immediately stop work and report the condition to the Owner.

12.21.2 If the material is found to contain asbestos, PCB or other hazardous substances or materials regulated by Public Health Laws, the CM@Risk shall not resume work in the affected area until the material has been abated or rendered harmless. The CM@Risk and the Owner may agree, in writing, to continue work in non-affected areas onsite.

12.21.3 An extension of Contract Time may be granted in accordance with Article 6.

- 12.21.4** The CM@Risk will comply with all applicable laws/ordinances and regulations and take all appropriate health and safety precautions upon discovery.
- 12.22** **Traffic Control.** CM@Risk will comply with all provisions of the then current Manual on Uniform Traffic Control Devices and any other traffic control provisions as may be provided in the technical specifications.
- 12.23** **Immigration Nationality Act.** CM@Risk shall verify the identity and employment eligibility of its employees who perform work under this Agreement, including completing the Employment Eligibility Verification Form (I-9). Upon request by Owner, CM@Risk shall provide Owner with copies of all I-9 forms and supporting eligibility documentation for each CM@Risk employee who performs work under this Agreement. CM@Risk shall adhere to all federal and state laws as well as establish appropriate procedures and controls so that no services will be performed by any CM@Risk employee who is not legally eligible to perform such services. **CM@RISK SHALL INDEMNIFY CITY OF TOMBALL AND HOLD CITY OF TOMBALL HARMLESS FROM ANY PENALTIES, LIABILITIES, OR LOSSES DUE TO VIOLATIONS OF THIS PARAGRAPH BY CM@RISK'S EMPLOYEES.** Owner, upon written notice to CM@Risk, shall have the right to immediately terminate this Agreement for violations of this provision by CM@Risk.
- 12.24** **Prohibition on Contracts with Companies Boycotting Israel.** CM@Risk acknowledges that in accordance with Chapter 2271 of the Texas Government Code, Owner is prohibited from entering into a contract with a company for goods or services unless the contract contains a written verification from the company that it: (1) does not boycott Israel; and (2) will not boycott Israel during the term of the contract. The terms “boycott Israel” and “company” shall have the meanings ascribed to those terms in Section 808.001 of the Texas Government Code. By signing this agreement, CM@Risk certifies that CM@Risk’s signature provides written verification to the Owner that CM@Risk: (1) does not boycott Israel; and (2) will not boycott Israel during the term of the agreement. Failure to meet or maintain the requirements under this provision will be considered a material breach.
- 12.25** **Prohibition on Contracts with Companies Boycotting Certain Energy Companies.** CM@Risk acknowledges that in accordance with Chapter 2274 of the Texas Government Code, Owner is prohibited from entering into a contract with a company for goods or services unless the contract contains written verification from the company that it (1) does not boycott energy companies; and (2) will not boycott energy companies during the term of the contract. The terms “boycott energy company” and “company” shall have the meanings ascribed to those terms in Section 809.001 of the Texas Government Code. By signing this agreement, CM@Risk certifies that CM@Risk’s signature provides written verification to the Owner that CM@Risk: (1) does not boycott energy companies; and (2) will not boycott energy companies during the term of the agreement. Failure to meet or maintain the requirements under this provision will be considered a material breach.
- 12.26** **Prohibition on Contracts with Companies Boycotting Certain Firearm Entities and Firearm Trade Associations.** CM@Risk acknowledges that in accordance with Chapter 2274 of the Texas Government Code, Owner is prohibited from entering into a contract with a company for goods or services unless the contract contains written verification from the company that it (1) does not have a practice, policy, guidance, or directive that discriminates against a firearm entity or firearm trade association; and (2) will not discriminate during the term of the contract against a firearm entity or firearm trade association. The terms “discriminate against a firearm entity or firearm trade association,” “firearm entity,” and “firearm trade association” shall have the meanings ascribed to those terms in Chapter 2274 of the Texas Government Code. By signing this agreement, CM@Risk certifies that CM@Risk’s signature provides written verification to the Owner that CM@Risk: (1) does not have a practice, policy, guidance, or directive that discriminates against a firearm entity or firearm trade association; and (2) will not discriminate during the term of the contract against a firearm entity or firearm

trade association. Failure to meet or maintain the requirements under this provision will be considered a material breach.

12.27 Prohibition on Contracts with Companies Doing Business with Iran, Sudan, or a Foreign Terrorist Organization. Sections 2252 and 2270 of the Texas Government Code restricts Owner from contracting with companies that do business with Iran, Sudan, or a foreign terrorist organization. By signing this agreement, CM@Risk certifies that CM@Risk's signature provides written verification to the Owner that CM@Risk, pursuant to Chapters 2252 and 2270, is not ineligible to enter into this agreement and will not become ineligible to receive payments under this agreement by doing business with Iran, Sudan, or a foreign terrorist organization. Failure to meet or maintain the requirements under this provision will be considered a material breach.

12.28 Termination Right for Contracts with Companies Doing Business with Certain Foreign-Owned Companies. The Owner may terminate this Contract immediately without any further liability if the Owner determines, in its sole judgment, that this Contract meets the requirements under Chapter 2274, and Contractor is, or will be in the future, (i) owned by or the majority of stock or other ownership interest of the company is held or controlled by individuals who are citizens of China, Iran, North Korea, Russia, or other designated country (ii) directly controlled by the Government of China, Iran, North Korea, Russia, or other designated country, or (iii) is headquartered in China, Iran, North Korea, Russia, or other designated country.

IN WITNESS WHEREOF, Owner and CM@Risk have signed this Agreement.

This Agreement will be effective on _____, which is the Effective Date of the Contract.

Owner (**City of Tomball, Texas**):

(typed or printed name of organization)

By: _____
(individual's signature)

Date: _____
(date signed)

Name: _____
(typed or printed)

Title: _____
(typed or printed)

Attest: _____
(individual's signature)

Title: _____

CM@Risk (**Webber Waterworks, LLC**):

(typed or printed name of organization)

By: _____
(individual's signature)

Date: _____
(date signed)

Name: **Peter T. Bailey**
(typed or printed)

Title: **Executive Vice President**
(typed or printed)

Attest: _____
(individual's signature)

Title: **Witness**

License No.: **n/a**
(where applicable)

State: **n/a**

Attachments:	Exhibit A	Project Description
	Exhibit B	Approved GMP Proposal
	Exhibit C	Technical Specifications
	Exhibit D	Construction Drawings

EXHIBIT A – PROJECT DESCRIPTION

The project includes expanding the South Wastewater Treatment Plant (WWTP) from 1.5 million gallons per day (MGD) to 3.0 MGD. The expansion includes the following components:

- Conversion of the existing influent lift station into a coarse screen structure, including a new dumpster building.
- New influent lift station.
- Headworks improvements: addition of a second fine screen, replacement of grit removal system, new dumpster building.
- New aeration basins and blower building.
- Demolition and disposal of existing oxidation ditch and RAS/WAS pump station.
- New clarifiers and RAS/WAS pump station.
- Replacement of existing RAS/WAS pump station (for existing clarifiers).
- New scum pumpstation for new clarifiers.
- New filters.
- New Ultraviolet (UV) disinfection system.
- New sludge rotary drum thickeners.
- New aerobic digester blowers.
- Replacement of existing digested sludge feed pump.
- Replacement of centrifuge in the existing dewatering building.
- New vacuum truck receiving station.
- New natural gas generators.
- Expansion of administration building.
- One new standalone electrical building.
- Electrical and instrumentation improvements associated with the above items.

The estimated construction budget is \$59,546,705.

The project construction will be executed in two separate Guaranteed Maximum Proposal (GMP) packages.

GMP No. 1 will include the following:

- Procurement of switch gear and motor control systems
- Procurement of process equipment as shown in Exhibit B
- General conditions, bonds, and insurance cost at the rate established in CM@Risk's design phase service contract
- CM@Risk fee at the rate established in CM@Risk's design phase service contract

GMP No. 2 will be added to this contract through an amendment and will include the following:

- Balance of Plant (BOP) Package No. 1 – Commercial Package
 - Expansion of administration building
 - Coarse screen dumpster building
- BOP No. 2 – Site Work and Process Facilities Package
- BOP No. 3 – Electrical, Instrumentation and Control
- BOP No. 4 – HVAC
- General conditions, bonds, and insurance cost at the rate established in CM@Risk's design phase service contract
- CM@Risk fee at the rate established in CM@Risk's design phase service contract

EXHIBIT B – APPROVED GMP PROPOSAL

EXHIBIT C – TECHNICAL SPECIFICATIONS

Technical Specifications as specified in EXHIBIT B – APPROVED GMP PROPOSAL are made part of this agreement by reference only and on file with the:

- Design Professional
- Owner Project Manager
- CM@Risk Contractor

EXHIBIT D – CONSTRUCTION DRAWINGS

Construction Drawings as specified in EXHIBIT B – APPROVED GMP PROPOSAL are made part of this agreement by reference and on file with the:

- Design Professional
- Owner Project Manager
- CM@Risk Contractor