

AGREEMENT

for

CONSTRUCTION MANAGEMENT AT RISK
SERVICES

between

VILLAGE OF ESTERO (AS OWNER)

and

_____ (AS CONSTRUCTION MANAGER)

**AGREEMENT FOR
CONSTRUCTION MANAGEMENT AT RISK SERVICES
[PROJECT NAME]**

THIS AGREEMENT (“Agreement”) is made and entered into this ___ day of _____, 2023 (the “Effective Date”), by and between the Village of Estero, a Florida municipal corporation, referred to herein as “Owner”, and the firm of _____, incorporated in the State of _____ and registered and licensed to do business in the State of Florida (License # _____), referred to herein as “Construction Manager.”

WHEREAS, the Owner intends to construct site preparation and subsequent construction of the common area infrastructure improvements, including utilities, drainage, parking, and landscaping/irrigation facilities (the “Project”) on an approximately 9.85 acre parcel located at 9000 Williams Road, Estero (the “Property”), to create common are infrastructure in support of two, and possibly three private entities which will acquire individual parcels of the Property (the “Parcels”) on which they will construct certain entertainment facilities; and

WHEREAS, Owner desires Construction Manager to provide the professional construction management services requisite to the implementation of the Project, and

WHEREAS, in response to Owner’s Request for Proposal No. 23-** (the “RFP”), Construction Manager has submitted its Proposal (the “Proposal”) to provide the aforementioned services.

NOW THEREFORE, the Owner and the Construction Manager, in consideration of the mutual covenants hereinafter set forth, the sufficiency of which is hereby acknowledged, agree as follows:

**ARTICLE 1
GENERAL PROVISIONS**

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

1.2 GENERAL CONDITIONS. The general conditions of the contract shall be the attached General Conditions of the Construction Agreement, which is incorporated herein by reference. The term “Contractor” as used in the General Conditions shall mean the Construction Manager. The term “Contract Sum” as used in the General Conditions shall mean Guaranteed Maximum Price (GMP).

ARTICLE 2
CONSTRUCTION MANAGER'S RESPONSIBILITIES

The Construction Manager shall perform the services described in this Article. The services to be provided under Sections 2.1 and 2.2 constitute the Preconstruction services. If the Owner and Construction Manager agree, after consultation with the Architect/Engineer, the Construction Phase may commence before the Preconstruction Phase is completed, in which case both phases will proceed concurrently.

2.1 PRECONSTRUCTION PHASE.

A. PRELIMINARY EVALUATION. The Construction Manager shall provide a preliminary evaluation of the Owner's program and Project budget requirements, each in terms of the other.

B. CONSULTATION. The Construction Manager, with the Architect/Engineer, shall jointly schedule and attend regular meetings with the Owner. The Construction Manager shall consult with the Owner and Architect/Engineer regarding site use and improvements and the selection of materials, building systems and equipment. The Construction Manager shall provide recommendations on construction feasibility; actions designed to minimize adverse effects of labor or material shortages; time requirements for procurement, installation and construction completion; and factors related to construction cost, including estimates of alternative designs or materials, preliminary budgets and possible economies.

C. PRELIMINARY PROJECT SCHEDULE. When Project requirements described in Section 3.1.A have been sufficiently identified, the Construction Manager shall prepare, and periodically update, a preliminary Project schedule for the Architect/Engineer's review and the Owner's approval. The Construction Manager shall obtain the Architect/Engineer's approval of the portion of the preliminary Project schedule relating to the performance of the Architect/Engineer's services. The Construction Manager shall coordinate and integrate the preliminary Project schedule with the services and activities of the Owner, Architect/Engineer and Construction Manager. As design proceeds, the preliminary Project schedule shall be updated to indicate proposed activity sequences and durations, milestone dates for receipt and approval of pertinent information, submittal of a Guaranteed Maximum Price (GMP) proposal, preparation and processing of shop drawings and samples, delivery of materials or equipment requiring long-lead-time procurement, Owner's occupancy requirements showing portions of the Project having occupancy priority, and proposed date of Substantial Completion. If preliminary Project schedule updates indicate that previously approved schedules may not be met, the Construction Manager shall make appropriate recommendations to the Owner and Architect/Engineer.

D. PHASED CONSTRUCTION. The Construction Manager shall make recommendations to the Owner and Architect/Engineer regarding the phased issuance of Project Plans and Specifications to facilitate phased construction of the Work, if such phased

construction is appropriate for the Project, taking into consideration such factors as economies, time of performance, availability of labor and materials, and provisions for temporary facilities.

E. PRELIMINARY COST ESTIMATES.

1. When the Owner has sufficiently identified the Project requirements and the Architect/Engineer has prepared other basic design criteria, the Construction Manager shall prepare, for the review of the Architect/Engineer and approval of the Owner, a preliminary cost estimate utilizing area, volume or similar conceptual estimating techniques.
2. When schematic design documents have been prepared by the Architect/Engineer and approved by the Owner, the Construction Manager shall prepare, for the review of the Architect/Engineer and approval of the Owner, a more detailed estimate with supporting data. During the preparation of the design development documents, the Construction Manager shall update and refine this estimate at appropriate intervals agreed to by the Owner, Architect/Engineer and Construction Manager.
3. When design development documents have been prepared by the Architect/Engineer and approved by the Owner, the Construction Manager shall prepare a detailed estimate with supporting data for review by the Architect/Engineer and approval by the Owner. During the preparation of the construction documents, the Construction Manager shall update and refine this estimate at appropriate intervals agreed to by the Owner, Architect/Engineer and Construction Manager.
4. If any estimate submitted to the Owner exceeds previously approved estimates or the Owner's budget, the Construction Manager shall make appropriate recommendations to the Owner and Architect/Engineer.

F. SUBCONTRACTORS AND SUPPLIERS. The Construction Manager shall seek to develop Subcontractor interest in the Project and shall furnish to the Owner and Architect/Engineer for their information a list of possible Subcontractors, including suppliers who are to furnish materials or equipment fabricated to a special design, from whom proposals will be requested for each principal portion of the Work. The Architect/Engineer will promptly reply in writing to the Construction Manager if the Architect/Engineer or Owner know of any objection to such Subcontractor or supplier. The receipt of such list shall not require the Owner or Architect/Engineer to investigate the qualifications of proposed Subcontractors or suppliers, nor shall it waive the right of the Owner or Architect/Engineer later to object to or reject any proposed Subcontractors or suppliers.

G. LONG-LEAD-TIME ITEMS. The Construction Manager shall recommend to the Owner and Architect/Engineer a schedule for procurement of long-lead-time items which will constitute part of the Work as required to meet the Project schedule. If such long-lead-time items are procured by the Owner, they shall be procured on terms and conditions acceptable to the Construction Manager. Upon the Owner's acceptance of the Construction

Manager's GMP proposal, all contacts for such items shall be assigned by the Owner to the Construction Manager, who shall accept responsibility for such items as if procured by the Construction Manager. The Construction Manager shall expedite the delivery of long-lead-time items.

H. EXTENT OF RESPONSIBILITY. The Construction Manager does not warrant or guarantee estimates and schedules except as may be included as part of the GMP. The recommendation and advice of the Construction Manager concerning design alternatives shall be subject to the review and approval of the Owner and the Owner's professional consultants. It is not the Construction Manager's responsibility to ascertain that the Project Plans and Specifications are in accordance with applicable laws, statutes, ordinances, building codes, rules and regulations. However, if the Construction Manager recognizes that portions of the Project Plans and Specifications are at variance therewith, the Construction Manager shall promptly notify the Architect/Engineer and Owner in writing.

I. EQUAL EMPLOYMENT OPPORTUNITY AND AFFIRMATIVE ACTION. The Construction Manager shall comply with applicable laws, regulations and special requirements of the Contract Documents regarding equal employment opportunity and affirmative action programs.

2.2 GUARANTEED MAXIMUM PRICE PROPOSAL AND CONTRACT TIME.

A. TIMING. When the Project Plans and Specifications are sufficiently complete, the Construction Manager shall propose a GMP, which shall be the sum of the estimated Cost of the Work and the Contractor's Fee.

B. FURTHER DEVELOPMENT OF PROJECT PLANS AND SPECIFICATIONS. As the Project Plans and Specifications may not be finished at the time the GMP proposal is prepared, the Construction Manager shall provide in the GMP for further development of the Project Plans and Specifications by the Architect/Engineer that is consistent with the Contract Documents and reasonably inferable therefrom. Such further development does not include such things as changes in scope, systems, kinds and quality of materials, finishes or equipment, all of which, as required, shall be incorporated by Change Order.

C. CONTINGENCY. The estimated Cost of the Work shall include the Construction Manager's contingency, a sum established by the Construction Manager for the Construction Manager's exclusive use to cover costs arising under Section 2.2.B and other costs which are properly reimbursable as Cost of the Work but not the basis for a Change Order.

D. BASIS OF GUARANTEED MAXIMUM PRICE. The Construction Manager shall include with the GMP proposal a written statement of its basis, which shall include:

1. A list of the Project Plans and Specifications, including all addenda thereto and the Conditions of the Contract, which were used in preparation of the GMP proposal.
2. A list of allowances and a statement of their basis.

3. A list of the clarifications and assumptions made by the Construction Manager in the preparation of the GMP proposal to supplement the information contained in the Project Plans and Specifications.
4. The proposed GMP, including a statement of the estimated costs organized by trade categories, allowances, contingency, and other items and the Fee that comprise the GMP.
5. The Date of Substantial Completion upon which the proposed GMP is based, and a schedule of the construction documents issuance dates upon which the date of Substantial Completion is based.

E. MEETING OF CONSTRUCTION TEAM. The Contractor shall meet with the Owner and Architect/Engineer to review the GMP proposal and the written statement of its basis. In the event the Owner or Architect/Engineer discover any inconsistencies or inaccuracies in the information presented, they shall promptly notify the Construction Manager, who shall make appropriate adjustments to the GMP proposal, its basis, or both.

F. ACCEPTANCE. Unless the Owner accepts the GMP proposal in writing on or before the date specified in the proposal for such acceptance and so notifies the Construction Manager, the GMP proposal shall not be effective without written acceptance by the Construction Manager.

G. NO COSTS IN ADVANCE. Prior to the Owner's acceptance of the Construction Manager's GMP proposal and issuance of a Notice to Proceed, the Construction Manager shall not incur any cost to be reimbursed as part of the Cost of the Work, except as the Owner may specifically authorize in writing.

H. GMP ADDENDUM. Upon acceptance by the Owner of the GMP proposal, the GMP and its basis shall be set forth in the GMP Addendum. The GMP shall be subject to additions and deductions by a change in the Work as provided in the Contract Documents, and the Date of Substantial Completion shall be subject to adjustment as provided in the Contract Documents.

I. REVISIONS TO PROJECT PLANS AND SPECIFICATIONS. The Owner shall authorize and cause the Architect/Engineer to revise the Project Plans and Specifications to the extent necessary to reflect the agreed-upon assumptions and clarifications contained in the GMP Addendum. Such revised Project Plans and Specifications shall be furnished to the Construction Manager in accordance with schedules agreed to by the Owner, Architect/Engineer and Construction Manager. The Construction Manager shall promptly notify the Architect/Engineer and Owner if such revised Project Plans and Specifications are inconsistent with the agreed-upon assumptions and clarifications.

J. TAXES. The GMP shall include in the Cost of the Work only those taxes which are enacted at the time the GMP is established.

2.3 CONSTRUCTION PHASE.

A. GENERAL.

1. The Construction Phase shall commence on the earlier of:
 - i. the Owner's acceptance of the Construction Manager's GMP proposal and issuance of a Notice to Proceed, or
 - ii. the Owner's first authorization to the Construction Manager to:
 - (a) award a Subcontract,
 - (b) undertake construction Work with the Construction Manager's own forces, or
 - (c) issue a purchase order for materials or equipment required for the Work.

B. ADMINISTRATION.

1. Those portions of the Work that the Construction Manager does not customarily perform with the Construction Manager's own personnel shall be performed under Subcontracts or by other appropriate agreements with the Construction Manager. The Construction Manager shall obtain bids from Subcontractors and from suppliers of materials or equipment fabricated to a special design for the Work from the list previously reviewed and, after analyzing such bids, shall deliver such bids to the Owner and Architect/Engineer. The Owner will then determine, with the advice of the Construction Manager and subject to the reasonable objection of the Architect/Engineer, which bids will be accepted. The Owner may designate specific persons or entities from whom the Construction Manager shall obtain bids; however, if the GMP has been established, the Owner may not prohibit the Construction Manager from obtaining bids from other qualified bidders. The Construction Manager shall not be required to contract with anyone to whom the Construction Manager has reasonable objection.
2. If the GMP has been established, and a specific bidder among those whose bids are delivered by the Construction Manager to the Owner and Architect/Engineer (1) is recommended to the Owner by the Construction Manager; (2) is qualified to perform that portion of the Work; and (3) has submitted a bid which conforms to the requirements of the Contract Documents without reservations or exceptions, but the Owner requires that another bid be accepted, then the Construction Manager may require that a change in the Work be issued to adjust the Contract Time and the GMP by the difference between the bid of the person or entity recommended to the Owner

by the Construction Manager and the amount of the Subcontract or other agreement actually signed with the person or entity designated by the Owner.

3. Subcontracts and agreements with suppliers furnishing materials or equipment fabricated to a special design shall conform to the payment provisions of Sections 7.1.H and 7.1.I and shall not be awarded on the basis of cost plus a fee without the prior consent of the Owner.
4. The Construction Manager shall schedule and conduct a meeting at which the Owner, Architect/Engineer, Construction Manager and appropriate Subcontractors can discuss the status of the Work. The Construction Manager shall prepare and promptly distribute meeting minutes.
5. Promptly after the Owner's acceptance of the GMP proposal, the Construction Manager shall prepare a schedule in accordance with Section 2.3 of the General Conditions, including the Owner's occupancy requirements.
6. The Construction Manager shall provide monthly written reports to the Owner and Architect/Engineer on the progress of the entire Work. The Construction Manager shall maintain a daily log containing a record of weather, Subcontractors working on the Project Site, number of workers, Work accomplished, problems encountered and other similar relevant data as the Owner may reasonably require. The log shall be available to the Owner and Architect/Engineer.
7. The Construction Manager shall develop a system of cost control for the Work, including regular monitoring of actual costs for activities in progress and estimates for uncompleted tasks and proposed changes. The Construction Manager shall identify variances between actual and estimated costs and report the variances to the Owner and Architect/Engineer at regular intervals.

2.4 PROFESSIONAL SERVICES. Sections 2.1 and 2.2 of the General Conditions shall apply to both the Preconstruction and Construction Phases.

2.5 HAZARDOUS MATERIALS. Sections 2.4.U and 5.5 of the General Conditions shall apply to both the Preconstruction and Construction Phases.

ARTICLE 3 OWNER'S RESPONSIBILITIES

3.1 INFORMATION AND SERVICES.

A. GENERAL INFORMATION. The Owner shall provide full information in a timely manner regarding the requirements of the Project, including a program which sets forth the Owner's objectives, constraints and criteria, including space requirements and relationships, flexibility and expandability requirements, special equipment and systems, and site requirements.

B. BUDGET. The Owner shall establish and update an overall budget for the Project, based on consultation with the Construction Manager and Architect/Engineer, which shall include contingencies for changes in the Work and other costs which are the responsibility of the Owner.

C. STRUCTURAL AND ENVIRONMENTAL TESTS, SURVEYS AND REPORTS. In the Preconstruction Phase, the Owner shall furnish the following with reasonable promptness and at the Owner's expense. Except to the extent that the Construction Manager knows of any inaccuracy, the Construction Manager shall be entitled to rely upon the accuracy of any such information, reports, surveys, drawings and tests described in subsections 1 through 4, below, but shall exercise customary precautions relating to the performance of the Work.

1. Reports, surveys, drawings and tests concerning the conditions of the Project Site which are required by law.
2. Surveys describing physical characteristics, legal limitations and utility locations for the Project Site, and a written legal description of the Project Site. The surveys and legal information shall include, as applicable, grades and lines of streets, alleys, pavements and adjoining property and structures; adjacent drainage; rights-of-way, restrictions, easements, encroachments, zoning, deed restrictions, boundaries and contours of the Project Site; locations, dimensions and necessary data pertaining to existing buildings, other improvements and trees; and information concerning available utility services and lines, both public and private, above and below grade, including inverts and depths. All information on the survey shall be referenced to a Project benchmark.
3. The services of a geotechnical engineer when such services are requested by the Construction Manager. Such services may include but are not limited to test borings, test pits, determinations of soil bearing values, percolations tests, evaluations of hazardous materials, ground corrosion and resistivity tests, including necessary operations for anticipating subsoil conditions, with reports and appropriate professional recommendations.
4. Structural, mechanical, chemical, air and water pollution tests, tests for hazardous materials, and other laboratory and environmental tests, inspections and reports which are required by law.
5. The services of other consultants when such services are reasonably required by the scope of the Project and are requested by the Construction Manager.

3.2 OWNER'S DESIGNATED REPRESENTATIVE. The Owner shall designate in writing its Owner's Project Representative who shall have express authority to bind the Owner with respect to all matters requiring the Owner's approval or authorization. This Representative shall have the authority to make decisions on behalf of the Owner concerning estimates and schedules, construction budgets, and changes in the Work, and shall render such decisions

promptly and furnish information expeditiously, so as to avoid unreasonable delay in the services or Work of the Construction Manager. Except as otherwise provided in Section 5.2 of the General Conditions, the Architect/Engineer does not have such authority.

3.3 ARCHITECT/ENGINEER. The Owner shall retain an Architect/Engineer to provide Basic Services, including normal structural, mechanical and electrical engineering services, other than cost estimating services, described in Article VI of the General Conditions. The Owner shall authorize and cause the Architect/Engineer to provide those additional services requested by the Construction Manager which must necessarily be provided by the Architect/Engineer for the Preconstruction and Construction Phases of the Work. Such services shall be provided in accordance with time schedules agreed to by the Owner, Architect/Engineer and Construction Manager. Upon request of the Construction Manager, the Owner shall furnish to the Construction Manager a copy of the Owner's Agreement with the Architect/Engineer.

3.4 LEGAL REQUIREMENTS. The Owner shall determine and advise the Architect/Engineer and Construction Manager of any special legal requirements relating specifically to the Project which differ from those generally applicable to construction in the jurisdiction of the Project. The Owner shall furnish such legal services as are necessary to provide the information and services required under Section 3.1.

ARTICLE 4 COMPENSATION AND PAYMENTS FOR PRECONSTRUCTION SERVICES

The Owner shall compensate and make payments to the Construction Manager for Preconstruction Services as follows:

4.1 COMPENSATION.

A. PRECONSTRUCTION SERVICES. For the Preconstruction Services described in Section 2.1, the Construction Manager's compensation shall be calculated as follows:

(State basis of compensation, whether a stipulated sum, multiple of Direct Personnel Expense, actual cost, etc. Include a statement of reimbursable cost items as applicable.)

B. ADJUSTMENT. Compensation for Preconstruction Services shall be equitably adjusted if such services extend beyond _____ () days from the date of this Agreement or if the originally contemplated scope of services is significantly modified.

C. PERSONNEL EXPENSE. If compensation is based on a multiple of Direct Personnel Expense, "Direct Personnel Expense" shall mean the direct salaries of the Construction Manager's personnel engaged in the Project and the portion of the cost of their mandatory and customary contributions and benefits related thereto, such as employment taxes and other statutory employee benefits, insurance, sick leave, holidays, vacations, pensions and similar contributions and benefits.

4.2 PAYMENTS.

A. TIMING. Subject to the requirements of Article III of the General Conditions, payments for Preconstruction Services shall be made monthly following presentation of the Construction Manager's invoice and, where applicable, shall be in proportion to services performed.

B. DUE DATES. Payments shall be made by Owner in accordance with the requirements of Florida Statutes §218.735.

ARTICLE 5 COMPENSATION FOR CONSTRUCTION PHASE SERVICES

The Owner shall compensate the Construction Manager for Construction Phase services as follows:

5.1 COMPENSATION. For the Construction Manager's performance of the Work as described in Section 2.3, the Owner shall pay the Construction Manager in current funds the Contract Sum consisting of the Cost of the Work as defined in Article 6 and the Construction Manager's Fee determined as follows:

(State a lump sum, percentage of actual Cost of the Work or other provision for determining the Construction Manager's Fee, and explain how the Construction Manager's Fee is to be adjusted for changes in the Work.)

5.2 GUARANTEED MAXIMUM PRICE. The sum of the Cost of the Work and the Construction Manager's Fee are guaranteed by the Construction Manager not to exceed the amount provided as the GMP in the GMP Addendum, subject to additions and deductions by changes in the Work as provided in the Contract Documents. Such maximum sum as adjusted by approved changes in the Work is referred to in the Contract Documents as the GMP. Costs which would cause the GMP to be exceeded shall be paid by the Construction Manager without reimbursement by the Owner.

(Insert specific provisions if the Construction Manager is to participate in any savings, otherwise delete.)

5.3 CHANGES IN THE WORK

A. ADJUSTMENTS TO GMP. Adjustments to the GMP on account of changes in the Work subsequent to the execution of the GMP Addendum may be determined by any of the methods listed in Article V of the General Conditions.

B. "COST". In calculating adjustments to Subcontracts (except those awarded with the Owner's prior consent on the basis of cost plus a fee), the Owner and

Construction Manager shall proceed in accordance with Section 5.6 of the General Conditions. Adjustments to subcontracts awarded with the Owner’s prior consent on the basis of cost plus a fee shall be calculated in accordance with the terms of those subcontracts. In calculating adjustments to the Agreement, the terms “cost” and “costs” as used in the above-referenced General Conditions shall mean the Cost of the Work as defined in Article 6 of this Agreement.

C. CONSTRUCTION MANAGER’S FEE. If no specific provision is made in Section 5.1. for adjustment of the Construction Manager’s Fee in the case of changes in the Work, or if the extent of such changes is such that, in the aggregate, the application of the adjustment provisions of Section 5.1. will cause substantial inequity to the Owner or Construction Manager, the Construction Manager’s Fee shall be equitably adjusted on the basis of the Fee established for the original Work.

ARTICLE 6
COST OF THE WORK FOR CONSTRUCTION PHASE

6.1 COSTS TO BE REIMBURSED

A. COST OF WORK. The term “Cost of the Work” shall mean costs necessarily incurred by the Construction Manager in the proper performance of the Work. Such costs shall be at rates not higher than those customarily paid at the place of the Project except with prior consent of the Owner. The Cost of the Work shall include only the items set forth in this Article 6.

B. LABOR COSTS.

1. Wages of construction workers directly employed by the Construction Manager to perform the construction of the Work at the Project Site or, with the Owner’s agreement, at off-site workshops.
2. Wages or salaries of the Construction Manager’s supervisory and administrative personnel when stationed at the Project Site with the Owner’s agreement.

Classification

Name

(If it is intended that the wages or salaries of certain personnel stationed at the Construction Manager’s principal office or offices other than the site office shall be included in the Cost of the Work, such personnel shall be identified in this space.)

3. Wages and salaries of the Construction Manager’s supervisory or administrative personnel engaged, at factories, workshops or on the road, in expediting the production or transportation of materials or equipment required for the Work, but only for that portion of their time required for the Work.

4. Costs paid or incurred by the Construction Manager for taxes, insurance, contributions, assessments and benefits required by law or collective bargaining agreements, and, for personnel not covered by such agreements, customary benefits such as sick leave, medical and health benefits, holidays, vacations and pensions, provided that such costs are based on wages and salaries included in the Cost of the Work under Sections 6.1.B.1 through 6.1.B.3.

C. SUBCONTRACT COSTS. Payments made by the Construction Manager to Subcontractors in accordance with the requirements of the Subcontracts.

D. COSTS OF MATERIALS AND EQUIPMENT INCORPORATED IN THE COMPLETED CONSTRUCTION.

1. Costs, including transportation, of materials and equipment incorporated or to be incorporated in the completed construction.
2. Costs of materials described in the preceding Section 6.1.D.1 in excess of those actually installed but required to provide reasonable allowance for waste and for spoilage. Unused excess materials, if any, shall be handed over to the Owner at the completion of the Work or, at the Owner's option, shall be sold by the Construction Manager; amounts realized, if any, from such sales shall be credited to the Owner as a deduction from the Cost of the Work.

E. COSTS OF OTHER MATERIALS AND EQUIPMENT, TEMPORARY FACILITIES AND RELATED ITEMS.

1. Costs, including transportation, installation, maintenance, dismantling and removal of materials, supplies, temporary facilities, machinery, equipment, and hand tools not customarily owned by the construction workers, which are provided by the Construction Manager at the Project Site and fully consumed in the performance of the Work; and cost less salvage value on such items if not fully consumed, whether sold to others or retained by the Construction Manager. Cost for items previously used by the Construction Manager shall mean fair market value.
2. Rental charges for temporary facilities, machinery, equipment and hand tools not customarily owned by the construction workers, which are provided by the Construction Manager at the Project Site, whether rented from the Construction Manager or others, and costs of transportation, installation, minor repairs and replacements, dismantling and removal thereof. Rates and quantities of equipment rented shall be subject to the Owner's prior approval. The total rental cost of any Construction Manager-owned item may not exceed the purchase price of any comparable item.
3. Costs of removal of debris from the Project Site, including proper and legal disposal of same.

4. Reproduction costs, costs of telegrams, facsimile transmissions and long-distance telephone calls, postage and express delivery charges, telephone at the Project Site and reasonable petty cash expenses of the Project Site office.
5. That portion of the reasonable travel and subsistence expenses of the Construction Manager's personnel incurred while traveling in discharge of duties connected with the Work.

F. MISCELLANEOUS COSTS.

1. That portion directly attributable to this Contract of premiums for insurance and bonds.

(If charges for self-insurance are to be included, specify the basis of reimbursement.)

2. Sales, use or similar taxes imposed by a governmental authority which are related to the Work and for which the Construction Manager is liable.
3. Fees and assessments for the building permit and for other permits, licenses and inspections for which the Construction Manager is required by the Contract Documents to pay.
4. Fees of testing laboratories for tests required by the Contract Documents, except those related to nonconforming Work other than that for which payment is permitted by Section 6.1.H.2, reproduction costs, costs of postage and express delivery charges, Project Site communications equipment, and reasonable petty cash expenses of the Project Site office.
5. Royalties and license fees paid for the use of a particular design, process or product required by the Contract Documents; the cost of defending suits or claims for infringement of patent or other intellectual property rights arising from such requirement by the Contract Documents; payments made in accordance with legal judgments against the Construction Manager resulting from such suits or claims and payments of settlements made with the Owner's consent; provided, however, that such costs of legal defenses; judgment and settlements shall not be included in the calculation of the Construction Manager's Fee or the GMP and provided that such royalties, fees and costs are not excluded by the Contract Documents.
6. Costs for electronic equipment and software, directly related to the Work and with the Owner's prior approval.
7. Deposits lost for causes other than the Construction Manager's negligence or failure to fulfill a specific responsibility to the Owner set forth in this Agreement.

8. Legal, mediation and arbitration costs, other than those arising from disputes between the Owner and Construction Manager, reasonably incurred by the Construction Manager in the performance of the Work and with the Owner's written permission, which permission shall not be unreasonably withheld.
9. Expenses incurred in accordance with Construction Manager's standard personnel policy for relocation and temporary living allowances of personnel required for the Work, in case it is necessary to relocate such personnel from distant locations.
10. Other costs incurred in the performance of the Work if and to the extent approved in advance in writing by the Owner.

G. EMERGENCIES AND REPAIRS TO DAMAGED OR NONCONFORMING WORK. The Cost of the Work shall also include costs described in Section 6.1.A which are incurred by the Construction Manager:

1. In taking action to prevent threatened damage, injury or loss in case of emergency affecting the safety of persons and property, as provided in Section 2.4.P of the General Conditions.
2. In repairing or correcting damaged or nonconforming Work executed by the Construction Manager or the Construction Manager's Subcontractors or suppliers, provided that such damage or nonconforming Work was not caused by the negligence or failure to fulfill a specific responsibility to the Owner set forth in this Agreement or by the Construction Manager's foremen, engineers or superintendents, or other supervisory, administrative or managerial personnel of the Construction Manager, or by the failure of the Construction Manager's personnel to supervise adequately the Work of the Subcontractors or suppliers, and only to the extent that the cost of repair or correction is not recoverable by the Construction Manager from insurance, sureties, Subcontractors, suppliers or others.

H. COSTS TO BE INCLUDED. The costs described in Sections 6.1.A through 6.1.G shall be included in the Cost of the Work notwithstanding any provisions of the General Conditions which may require the Construction Manager to pay such costs, unless such costs are excluded by the provisions of Section 6.2.

6.2 COSTS NOT TO BE REIMBURSED. The Cost of the Work shall not include:

1. Salaries and other compensation of the Construction Manager's personnel stationed at the Construction Manager's principal office or offices other than the Project Site office, except as specifically provided in Sections 6.1.B.2 and 6.1.B.3.
2. Expenses of the Construction Manager's principal office and offices other than the Project Site office, except as specifically provided in Section 6.1.
3. Overhead and general expenses, except as may be expressly included in Section 6.1.

4. The Construction Manager's capital expenses, including interest on the Construction Manager's capital employed for the Work.
5. Rental costs of machinery and equipment, except as specifically provided in Section 6.1.E.2.
6. Except as provided in Section 6.1.H.2, costs due to the negligence of the Construction Manager or to the failure of the Construction Manager to fulfill a specific responsibility to the Owner set forth in this Agreement.
7. Costs incurred in the performance of Preconstruction Services.
8. Except as provided in Section 6.1.F.10, any cost not specifically and expressly described in Section 6.1.
9. Costs which would cause the GMP to be exceeded.
10. Costs for services performed during the Preconstruction Phase.

6.3 DISCOUNTS, REBATES AND REFUNDS

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

B. DEDUCTION FROM COST OF WORK. Amounts which accrue to the Owner in accordance with the provisions of Section 6.3.A shall be credited to the Owner as a deduction from the Cost of the Work.

6.4 ACCOUNTING RECORDS. The Construction Manager shall keep full and detailed accounts and exercise such controls as may be necessary for proper financial management, in order to substantiate all costs incurred under this Agreement. The accounting and control systems shall be satisfactory to the Owner. The Owner and the Owner's accountants or other Owner-authorized personnel shall be afforded access to the Construction Manager's records, books, correspondence, instructions, drawings, receipts, subcontracts, purchase orders, vouchers, memoranda and other data relating to this Project, and the Construction Manager shall preserve these for a period of three years after final payment, or for such longer period as may be required by law.

ARTICLE 7 CONSTRUCTION PHASE

7.1 PROGRESS PAYMENTS.

A. PROGRESS PAYMENTS. Subject to the requirements of Article III of the General Conditions, based upon Applications for Payment submitted to the Architect/Engineer by the Construction Manager and Certificates for Payment issued by the Architect/Engineer, the Owner shall make progress payments on account of the GMP to the Construction Manager as provided below and elsewhere in the Contract Documents.

B. PERIOD COVERED. The period covered by each Application for Payment shall be one calendar month ending on the last day of the month, or as follows:

(State period to be covered by Applications for Payment.)

C. DATE OF PAYMENT. Payments shall be made by Owner in accordance with the requirements of Florida Statutes § 218.735.

D. SUPPORTING DOCUMENTATION. With each Application for Payment, the Construction Manager shall submit payrolls, petty cash accounts, receipted invoices or invoices with check vouchers attached and any other evidence required by the Owner or Architect/Engineer to demonstrate that cash disbursements already made by the Construction Manager on account of the Cost of the Work equal or exceed (1) progress payments already received by the Construction Manager; less (2) that portion of those payments attributable to the Construction Manager's Fee; plus (3) payrolls for the period covered by the present Application for Payment.

E. SCHEDULE OF VALUES. Each Application for Payment shall be based upon the most recent schedule of values submitted by the Construction Manager in accordance with the Contract Documents. The schedule of values shall allocate the entire GMP among the various portions of the Work, except that the Construction Manager's Fee shall be shown as a single separate item. The schedule of values shall be prepared in such form and supported by such data to substantiate its accuracy as the Architect/Engineer may require. This schedule, unless objected to by the Architect/Engineer, shall be used as a basis for reviewing the Construction Manager's Application for Payment.

F. Applications for Payment shall show the percentage completion of each portion of the Work as of the end of the period covered by the Application for Payment. The percentage completion shall be the lesser of (1) the percentage of that portion of the Work which has actually been completed or (2) the percentage obtained by dividing (a) the expense which has actually been incurred by the Construction Manager on account of that portion of the Work for which the Construction Manager has made or intends to make actual payment prior to the next Application for Payment by (b) the share of the GMP allocated to that portion of the Work in the schedule of values.

G. COMPUTATION. Subject to other provisions of the Contract Documents, the amount of each progress payment shall be computed as follows:

1. Take that portion of the GMP properly allocable to completed Work as determined by multiplying the percentage completion of each portion of the

Work by the share of the GMP allocated to that portion of the Work in the schedule of values. Pending final determination of cost to the Owner of changes in the Work, amounts not in dispute may be included as provided in Section 5.6 of the General Conditions, even though the GMP has not yet been adjusted by Change Order.

2. Add that portion of the GMP properly allocable to materials and equipment delivered and suitably stored at the Project Site for subsequent incorporation in the Work or, if approved in advance by the Owner, suitably stored off the Project Site at a location agreed upon in writing, supported by paid receipts.
3. Add the Construction Manager's Fee, less retainage of ten percent (10%). The Construction Manager's Fee shall be computed upon the Cost of the Work described in the two preceding Sections at the rate stated in Section 5.1. or, if the Construction Manager's Fee is stated as a fixed sum in that Section, shall be an amount which bears the same ratio to that fixed-sum Construction Manager's Fee as the Cost of the Work in the two preceding Sections bears to a reasonable estimate of the probable Cost of the Work upon its completion.
4. Subtract the aggregate of previous payments made by the Owner.
5. Subtract the shortfall, if any, indicated by the Construction Manager in the documentation required by Section 7.1.D to substantiate prior Applications for Payment, or resulting from errors subsequently discovered by the Owner in such documentation.
6. Subtract amounts, if any, for which the Architect/Engineer has withheld or nullified a Certificate for Payment as provided in Section 3.3.C of the General Conditions.

H. SUBCONTRACTOR RETAINAGE. Except with Owner's prior approval, per Florida Statutes § 255.078, Subcontractor payments shall be subject to retention of not less than five percent (5%). The Owner and the Construction Manager shall agree upon a mutually acceptable procedure for review and approval of payments and retention for Subcontracts.

I. REDUCTION IN RETAINAGE. Notwithstanding the foregoing, upon completion of at least fifty percent (50%) of the Work, as determined by the Architect/Engineer and Owner, the Owner shall reduce to three percent (3%) the amount of retainage withheld from the Construction Manager's Fee in each subsequent progress payment.

J. NO ADVANCE PAYMENTS. Except with the Owner's prior approval, the Construction Manager shall not make advance payments to suppliers for materials or equipment which have not been delivered and stored at the Project Site.

K. RELIANCE ON INFORMATION. In taking action on the Construction Manager's Applications for Payment, the Architect/Engineer shall be entitled to rely on the accuracy and completeness of the information furnished by the Construction Manager and shall not be deemed to represent that the Architect/Engineer has made a detailed examination, audit or

arithmetic verification of the documentation submitted in accordance with Section 7.1.D or other supporting data, that the Architect/Engineer has made exhaustive or continuous on-site inspections or that the Architect/Engineer has made examinations to ascertain how or for what purposes the Construction Manager has used amounts previously paid on account of the Contract. Such examinations, audits and verifications, if required by the Owner, will be performed by the Owner acting in the sole interest of the Owner.

7.2 FINAL PAYMENT.

A. CONDITIONS OF FINAL PAYMENT. Final payment shall be made by the Owner to the Construction Manager when (1) the Agreement has been fully performed by the Construction Manager except for the Construction Manager's responsibility to correct nonconforming Work, as provided in Section 2.4.C of the General Conditions, and to satisfy other requirements, if any, which necessarily survive final payment; (2) a final Application for Payment and a final accounting for the Cost of the Work have been submitted by the Construction Manager and reviewed by the Owner; and (3) a final Certificate for Payment has then been issued by the Architect/Engineer; such final payment shall be made by the Owner not more than thirty (30) days after the issuance of the Architect/Engineer's final Certificate for Payment, or as follows:

B. CALCULATION. The amount of the final payment shall be calculated as follows:

1. Take the sum of the Cost of the Work substantiated by the Construction Manager's final accounting and the Construction Manager's Fee, but not more than the GMP.
2. Subtract amounts, if any, for which the Architect/Engineer withholds, in whole or in part, a final Certificate for Payment as provided in Section 2.4.C of the General Conditions or other provisions of the Contract Documents.
3. Subtract the aggregate of previous payments made by the Owner.

If the aggregate of previous payments made by the Owner exceeds the amount due the Construction Manager, the Construction Manager shall reimburse the difference to the Owner. Failing reimbursement by the Construction Manager and notwithstanding any other provisions of the Contract Documents to the contrary, Owner shall have the right to bring a direct action in the Circuit Court to recover such overpayment.

C. REVIEW. The Owner's fiscal staff will review and report in writing on the Construction Manager's final accounting within thirty (30) days after delivery of the final accounting to the Architect/Engineer by the Construction Manager. Based upon such Cost of the Work as the Owner's fiscal staff report to be substantiated by the Construction Manager's final accounting, and provided the other conditions of Section 7.2.A have been met, the Architect/Engineer will, within seven days after receipt of the written report of the Owner's fiscal staff, either issue to the Owner a final Certificate for Payment with a copy to the Construction Manager or notify the Construction Manager and Owner in writing of the

Architect/Engineer's reasons for withholding a certificate as provided in Section 3.5.C of the General Conditions.

D. ISSUANCE. If the Owner's fiscal staff report the Cost of the Work as substantiated by the Construction Manager's final accounting to be less than claimed by the Construction Manager, the Construction Manager shall be entitled to proceed in accordance with Article 9 without a further decision of the Architect/Engineer. Unless agreed to otherwise, a demand for mediation or arbitration of the disputed amount shall be made by the Construction Manager within sixty (60) days after the Construction Manager's receipt of a copy of the Architect/Engineer's final Certificate for Payment. Failure to make such demand within this 60-day period shall result in the substantiated amount reported by the Owner's fiscal staff becoming binding on the Construction Manager. Pending a final resolution of the disputed amount, the Owner shall pay the Construction Manager the amount certified in the Architect/Engineer's final Certificate for Payment.

E. ADDITIONAL REIMBURSEMENTS. If, subsequent to final payment and at the Owner's request, the Construction Manager incurs costs described in Section 6.1 and not excluded by Section 6.2, (1) to correct nonconforming Work or (2) arising from the resolution of disputes, the Owner shall reimburse the Construction Manager such costs and the Construction Manager's Fee, if any, related thereto on the same basis as if such costs had been incurred prior to final payment, but not in excess of the GMP. If the Construction Manager has participated in savings, the amount of such savings shall be recalculated and appropriate credit given to the Owner in determining the net amount to be paid by the Owner to the Construction Manager.

ARTICLE 8 INSURANCE AND BONDS

8.1 INSURANCE. If and to the extent required by the RFP documents, the Construction Manager shall furnish insurance coverage for (but not necessarily limited to) workers' compensation, commercial general liability, auto liability, excess liability, and builder's risk. The Construction Manager shall furnish the Owner all appropriate policies and Certificate(s) of Insurance.

8.2 PAYMENT AND PERFORMANCE BOND.

A. BOND REQUIRED. The Construction Manager shall post a Payment and Performance Bond in the amount of the GMP, in a form provided and approved by the Owner.

B. DELIVERY. The Construction Manager shall file in the county records and deliver a recorded version of the required bond to the Owner at least three days before the commencement of any Construction Phase services.

ARTICLE 9 MISCELLANEOUS PROVISIONS

9.1 DISPUTE RESOLUTION. During both the Preconstruction and Construction Phases, claims, disputes or other matters in question between the parties to this Agreement shall be resolved as provided in Article VIII of the General Conditions.

9.2 OTHER PROVISIONS. Unless otherwise noted, the terms used in this Agreement shall have the same meaning as those in the General Conditions.

9.3 EXTENT OF CONTRACT. This Agreement and the other documents incorporated herein by reference, represents the entire and integrated agreement between the Owner and the Construction Manager and supersedes all prior negotiations, representations or agreements, either written or oral. This Agreement may be amended only by written instrument signed by both the Owner and Construction Manager. Except as provided in Section 9.13 below, if anything in any document incorporated into this Agreement is inconsistent with this Agreement, this Agreement shall govern.

9.4 OWNERSHIP AND USE OF DOCUMENTS. Section 10.4 of the General Conditions shall apply to both the Preconstruction and Construction Phases.

9.5 GOVERNING LAW; VENUE. This Agreement shall be governed by the laws of the State of Florida. Venue for any petition for writ of certiorari or other court action allowed by this Agreement shall be in the Circuit Court of the 12th Judicial Circuit in and for Lee County, Florida.

9.6 ASSIGNMENT. The Owner and Construction Manager respectively bind themselves, their partners, successors, assigns and legal representatives to the other party hereto and to partners, successors, assigns and legal representatives of such other party in respect to covenants, agreements and obligations contained in the Contract Documents. Neither party to the Agreement shall assign the Agreement as a whole without written consent of the other. If either party attempts to make such an assignment without such consent, that party shall nevertheless remain legally responsible for all obligations under the Agreement.

9.7 SUBSTANTIAL COMPLETION DEFINED. Substantial Completion shall be defined as provided in Article I of the General Conditions. In the event a temporary certificate of occupancy or completion is issued establishing Substantial Completion, the Construction Manager shall diligently pursue the issuance of a permanent certificate of occupancy or completion.

9.8 PROJECT MEETINGS. During the Construction Phase, there shall be project meetings, at the jobsite or other location acceptable to the parties, on a regularly scheduled basis. The meetings will be attended by a representative of the Construction Manager, Architect/Engineer and Owner. These representatives shall be authorized to make decisions that are not otherwise contrary to the requirements of this Agreement.

9.9 WEATHER. During the Construction Phase, any rainfall, temperatures below 32 degrees Fahrenheit or winds greater than 25 m.p.h. which actually prevents Work on a given day, shall be considered lost time and an additional day added to the Contract Time, provided no work could be done on site, and provided written notice has been submitted to the Owner by the Construction Manager documenting same.

9.10 SHOP DRAWINGS; CRITICAL SUBMITTALS. In consideration of the impact of timely review of submittals and shop drawings on the overall progress of the Work, it is hereby agreed that the Owner shall cause his agents and design professionals to accomplish the review of any particular “critical” submittals and/or shop drawings and return same to the Construction Manager within fourteen (14) days.

9.11 PUNCH LIST. Within 30 days after obtainment of Substantial Completion, the Owner shall generate a “punch list” of all work items requiring remedial attention by the Construction Manager. Within 5 days thereafter the Architect/Engineer shall assign a fair value to the punch list items, which sum shall be deducted from the next scheduled progress payment to the Construction Manager. Upon satisfactory completion of the punch list items, as certified by the Architect/Engineer, the previously deducted sum shall be paid to the Construction Manager.

9.12 CLOSEOUT DOCUMENTATION. Within 30 days after obtainment of Substantial Completion and before final payment, Construction Manager shall gather and deliver to Owner all warranty documentation, all manufacturer’s product and warranty literature, all manuals (including parts and technical manuals), all schematics and handbooks, and all as-built drawings.

9.13 GOVERNING PROVISIONS; CONFLICTS. In the event of a conflict between this Agreement and the Specifications or General Conditions, this Agreement shall prevail. In the event of a conflict between the Specifications and the General Conditions, the Specifications shall govern. In the event of a conflict between any of the foregoing documents and the Construction Manager’s proposal, the foregoing documents shall prevail.

9.14 IMMIGRATION COMPLIANCE; E-VERIFY. Construction Manager acknowledges that it is responsible for complying with the provisions of the Immigration Reform and Control Act of 1986, U.S.C. § 1324, *et seq.*, and regulations relating thereto. Failure to comply with the above statutory provisions shall be considered a material breach and shall be grounds for immediate termination of this Agreement. The Construction Manager’s employment of unauthorized aliens is a violation of § 274(e) of the Federal Immigration and Employment Act. The Construction Manager shall utilize the U.S. Department of Homeland Security’s E-Verify system to verify the employment eligibility of all new employees hired during the term of this Agreement, and shall require the same verification procedure of any Subcontractors authorized by the Owner. Pursuant to Florida Statutes § 448.095(2), Construction Manager shall register with and use the E-Verify system to verify the work authorization status of all newly hired employees. Construction Manager’s contract with the Owner cannot be renewed unless, at the time of renewal, Construction Manager certifies in writing to the Owner that it has registered with and uses the E-Verify system. If Construction Manager enters into a contract with a subcontractor, the subcontractor must provide the contractor with an affidavit stating that the subcontractor does not employ, contract with, or subcontract with an unauthorized alien and Construction Manager shall maintain a copy of such affidavit for the duration of the contract. If Construction Manager develops a good faith belief that any subcontractor with which it is contracting has knowingly violated Florida Statutes § 448.09(1) (making it unlawful for any person knowingly to employ, hire, recruit, or refer, either for herself or himself or on behalf of another, for private or public employment within the state, an alien who is not duly authorized to

work by the immigration laws or the Attorney General of the United States) Construction Manager shall terminate the contract with the subcontractor. If the Owner develops a good faith belief that Construction Manager has knowingly violated Florida Statutes § 448.09(1) (making it unlawful for any person knowingly to employ, hire, recruit, or refer, either for herself or himself or on behalf of another, for private or public employment within the state, an alien who is not duly authorized to work by the immigration laws or the Attorney General of the United States) Owner shall terminate this contract. Pursuant to Florida Statutes § 448.095(2)(c)(3), termination under the above-circumstances is not a breach of contract and may not be considered as such.

9.15 INDEPENDENT CONTRACTOR. The Construction Manager acknowledges that it is functioning as an independent contractor in performing under the terms of this Agreement, and it is not acting as an employee of the Owner.

9.16 WAIVERS. Neither this Agreement nor any portion of it may be modified or waived orally. However, each party (through its governing body or properly authorized officer) shall have the right, but not the obligation, to waive, on a case-by-case basis, any right or condition herein reserved or intended for the benefit or protection of such party without being deemed or considered to have waived such right or condition for any other case, situation, or circumstance and without being deemed or considered to have waived any other right or condition. No such waiver shall be effective unless made in writing with an express and specific statement of the intent of such governing body or officer to provide such waiver.

9.17 AUTHORITY. Each of the Owner and Construction Manager represents and warrants to the other its respective authority to enter into this Agreement.

9.18 COVENANT TO DEFEND. Neither the validity of this Agreement nor the validity of any portion hereof may be challenged by any party hereto, and each party hereto hereby waives any right to initiate any such challenge. Furthermore, if this Agreement or any portion hereof is challenged by a third party in any judicial, administrative, or appellate proceeding (each party hereby covenanting with the other party not to initiate, encourage, foster, promote, cooperate with, or acquiesce to such challenge), the parties hereto collectively and individually agree, at their individual sole cost and expense, to defend in good faith its validity through a final judicial determination or other resolution, unless all parties mutually agree in writing not to defend such challenge or not to appeal any decision invalidating this Agreement or any portion thereof.

9.19 DISCLAIMER OF THIRD-PARTY BENEFICIARIES; SUCCESSORS AND ASSIGNS. This Agreement is solely for the benefit of the parties hereto, and no right, privilege, or cause of action shall by reason hereof accrue upon, to, or for the benefit of any third party. Nothing in this Agreement is intended or shall be construed to confer upon or give any person, corporation, partnership, trust, private entity, agency, or other governmental entity any right, privilege, remedy, or claim under or by reason of this Agreement or any provisions or conditions hereof. This Agreement shall be binding upon, and its benefits and advantages shall inure to, the successors and assigns of the parties hereto.

9.20 HEADINGS AND CAPTIONS. The headings and captions of articles, sections, and paragraphs used this Agreement are for convenience of reference only and are not intended

to define or limit their contents, nor are they to affect the construction of or be taken into consideration in interpreting this Agreement.

9.21 OWNER DIRECT PURCHASES. As authorized by Florida Statutes § 212.08(6), Florida Administrative Code § 12A-1.094, and Florida Department of Revenue Tax Information Publication 13A01-01, the Owner reserves the right to require the Contractor to assign some or all of its subcontracts or other agreements with material suppliers directly to the Town. This process will be referred to as Owner Direct Purchases (ODP) and is a method that may be utilized to create savings for the Owner. The Owner saves the amount of the sales tax when it purchases material/equipment required for a construction project directly from the manufacturer/supplier (material/equipment cost only), and simultaneously decreases the amount of the contract for the cost of the materials/equipment plus the sales tax. If the Owner elects to invoke this process, the contract cost reduction will be accomplished through the issuance of a deductive change order.

9.22 LEGAL REFERENCES. All references to statutory sections or chapters shall be construed to include subsequent amendments to such provisions, and to refer to the successor provision of any such provision. References to “applicable law” and “general law” shall be construed to include provisions of local, state and federal law, whether established by legislative action, administrative rule or regulation, or judicial decision.

9.23 SEVERABILITY. The provisions of this Agreement are declared by the parties hereto to be severable. In the event any term or provision of this Agreement shall be held invalid by a court of competent jurisdiction, such invalid term or provision should not affect the validity of any other term or provision hereof; and all such terms and provisions hereof shall be enforceable to the fullest extent permitted by law as if such invalid term or provision had never been part of this Agreement; provided, however, if any term or provision of this Agreement is held to be invalid due to the scope or extent thereof, then, to the extent permitted by law, such term or provision shall be automatically deemed modified in order that it may be enforced to the maximum scope and extent permitted by law.

9.24 ATTORNEY’S FEES AND COSTS. In any claim dispute procedure or litigation arising from this Agreement, each party hereto shall be solely responsible for paying its attorney’s fees and costs regardless of the outcome of any such procedure or litigation, including related appellate and dispute resolution proceedings.

9.25 NOTICES. All notices, comments, consents, objections, approvals, waivers, and elections under this Agreement shall be in writing and shall be given only by hand delivery for which a receipt is obtained, or certified mail, prepaid with confirmation of delivery requested, or by electronic mail with delivery confirmation. All such communications shall be addressed to the applicable addressees set forth below or as any party may otherwise designate in the manner prescribed herein.

To the Owner:

David Willems, P.E., Public Works Director
9401 Corkscrew Palms Circle
Estero, FL 33928
willems@estero-fl.gov

To the Construction Manager: _____

Email: _____

Notices, comments, consents, objections, approvals, waivers and elections shall be deemed given when received by the party for whom such communication is intended at such address herein specified, or such other physical address or email address as such party may have substituted by notice to the other.

**ARTICLE 10
TERMINATION OR SUSPENSION**

10.1 TERMINATION PRIOR TO ESTABLISHING GUARANTEED MAXIMUM PRICE.

A. RIGHT OF TERMINATION. Prior to execution by both parties of the GMP Addendum, the Owner may terminate this Agreement at any time without or without cause pursuant to Sections 14.1 and 14.2 of the General Conditions, and the Construction Manager may terminate this Agreement for any of the reasons described in Section 14.6 of the General Conditions.

B. COMPENSATION FOR PRECONSTRUCTION SERVICES. If the Owner or Construction Manager terminates this Contract pursuant to this Section 10.1 prior to commencement of the Construction Phase, the Construction Manager shall be equitably compensated for Preconstruction Services performed prior to receipt of notice of termination; provided, however, that the compensation for such services shall not exceed the compensation set forth in Section 4.1.A.

C. ADDITIONAL COMPENSATION FOR CONSTRUCTION SERVICES. If the Owner or Construction Manager terminates this Agreement pursuant to this Section 10.1 after commencement of the Construction Phase, the Contractor shall, in addition to the compensation provided in Section 10.1.B, be paid an amount calculated as follows:

1. Take the Cost of the Work incurred by the Contractor.
2. Add the Construction Manager's Fee computed upon the Cost of the Work to the date of termination at the rate stated in Section 5.1 or, of the Construction Manager's Fee is stated as a fixed sum in that Section, an amount which bears the same ratio to that fixed-sum Fee as to Cost of the Work at the time of termination bears to a reasonable estimate of the probable Cost of the Work upon its completion.

3. Subtract the aggregate of previous payments made by the Owner on account of the Construction Phase.

The Owner shall also pay the Construction Manager fair compensation, either by purchase or rental at the election of the Owner, for any equipment owned by the Construction Manager which the Owner elects to retain and which is not otherwise included in the Cost of the Work under Section 10.1.C.1. To the extent that the Owner elects to take legal assignment of Subcontracts and purchase orders (including rental agreements), the Construction Manager shall as a condition of receiving the payments referred to in this Article 10, execute and deliver all such papers and take all such steps, including the legal assignment of such Subcontracts and other contractual rights of the Construction Manager, as the Owner may require for the purpose of fully vesting in the Owner the rights and benefits of the Construction Manager under such Subcontracts or purchase orders.

Subcontracts, purchase orders and rental agreements entered into by the Construction Manager with the Owner's written approval prior to the execution of the GMP Addendum shall contain provisions permitting assignment to the Owner as described above. If the Owner accepts such assignment, the Owner shall reimburse or indemnify the Construction Manager with respect to all costs arising under the Subcontract, purchase order or rental agreement except those which would not have been reimbursable as Cost of the Work if the contract had not been terminated. If the Owner elects not to accept the assignment of any Subcontract, purchase order or rental agreement which would have constituted a Cost of the Work had this Agreement not been terminated, the Construction Manager shall terminate such Subcontract, purchase order or rental agreement and the Owner shall pay the Construction Manager the costs necessarily incurred by the Construction Manager by reason of such termination.

10.2 TERMINATION SUBSEQUENT TO ESTABLISHING GUARANTEED MAXIMUM PRICE. Subsequent to execution by both parties of the GMP Addendum, the Agreement may be terminated as provided in Article 14 of the General Conditions.

A. LIMITATION ON PAYMENT; TERMINATION BY OWNER. In the event of such termination by the Owner, the amount payable to the Construction Manager pursuant to Section 14.2 of the General Conditions shall not exceed the amount the Construction Manager would have been entitled to receive pursuant to Sections 10.1.B and 10.1.C of this Agreement.

B. LIMITATION ON PAYMENT; TERMINATION BY CONSTRUCTION MANAGER. In the event of such termination by the Construction Manager, the amount to be paid to the Construction Manager under Section 14.6 of the General Conditions shall not exceed the amount the Construction Manager would have been entitled to receive pursuant to Sections 10.1.B and 10.1.C above, except that the Construction Manager's Fee shall be calculated as if the Work had been fully completed by the Construction Manager, including a reasonable estimate of the Cost of the Work for Work not actually completed.

10.3 SUSPENSION. The Work may be suspended by the Owner as provided in Section 14.3 of the General Conditions. In such case, the term "Contract Sum" in that Section shall be understood to mean Cost of the Work.

WHEREFORE, the Parties hereto have entered into this Agreement as of the Effective Date.

Name of Construction Manager

By: _____

Printed Name: _____

Title: _____

VILLAGE OF ESTERO,
a Florida municipal corporation

By: _____

Printed Name: Steve Sarkozy

Title: Village Manager

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GUARANTEED MAXIMUM PRICE (GMP) ADDENDUM

to

AGREEMENT

for

CONSTRUCTION MANAGEMENT AT RISK SERVICES

THIS GUARANTEED MAXIMUM PRICE (GMP) ADDENDUM TO THE AGREEMENT FOR CONSTRUCTION MANAGEMENT AT RISK SERVICES (“GMP Addendum”) is made and entered into this ___ day of _____, 2023 (the “Effective Date”), by and between the Village of Estero, a Florida municipal corporation, referred to herein as “Owner”, and the firm of _____, incorporated in the State of _____ and registered and licensed to do business in the State of Florida, referred to herein as “Construction Manager”.

WHEREAS, Owner and Construction Manager entered into the Agreement for Construction Management at Risk Services (the “Agreement”) under which Construction Manager is providing the professional construction management services requisite to the implementation of the construction of the infrastructure improvements related to the Village Entertainment Hub project (as further defined in the Agreement as the “Project”); and

WHEREAS, the Agreement provides that prior to commencement of the Construction Phase, Construction Manager and Owner must agree upon a Guaranteed Maximum Price (GMP) for the construction of the Project, to be established and memorialized in an addendum supplementing the Agreement; and

WHEREAS, the Project has been designed and permitted to a point sufficient that Construction Manager and Owner have agreed upon a GMP, as set forth herein.

NOW THEREFORE, Owner and Construction Manager, in consideration of the mutual covenants hereinafter set forth, and the mutual covenants set forth in the Agreement, the sufficiency of which is hereby acknowledged, agree as follows:

1. Establishment of GMP. Pursuant to Article 5 of the Agreement, the Owner and Construction Manager establish a GMP and Contract Time for the Work as set forth below. All capitalized terms not otherwise defined herein shall have the meanings set forth in the Contract Documents and in the General Conditions.

2. GMP; Contract Documents. The Construction Manager’s GMP for the Work, including the estimated Cost of the Work (\$ _____) and the Construction Manager’s Fee (_____), is a total of _____ dollars (\$ _____). This price is for the performance of the Work in accordance with the Contract Documents listed and attached to this Addendum and marked Exhibits A through J, as follows:

- (a) Exhibit A. Project Plans and Specifications, addenda and General, Supplementary and other Conditions of the Agreement on which the GMP is based, pages _____ through _____, dated _____;
- (b) Exhibit B. Allowance items, pages _____ through _____, dated _____;
- (c) Exhibit C. Assumptions and Clarifications made in preparing the GMP, pages _____ through _____, dated _____;
- (d) Exhibit D. Project Schedule, pages _____ through _____, dated _____;
- (e) Exhibit E. Alternate Prices, pages _____ through _____, dated _____; and
- (f) Exhibit F. Unit Prices, pages _____ through _____, dated _____.
- (g) Exhibit G. Affidavit of No Conflict;
- (h) Exhibit H. Certificate(s) of Insurance;
- (i) Exhibit I. Payment and Performance Bond;
- (j) Exhibit J. Standard Forms:
 - 1- Application for Payment
 - 2- Certificate of Substantial Completion
 - 3- Final Reconciliation/Warranty/Affidavit
 - 4- Change Order

Additional Contract Documents include the Agreement and attached General Conditions of the Construction Agreement, Addenda issued prior to execution of the Agreement, the Request for Proposal, the Construction Manager's proposal, permits, notice of intent to award, Notice to Proceed, purchase order(s), written amendments, Change Order(s), Work Directive Change(s) and Field Directive(s). No other documents shall be considered Contract Documents. In case of conflict, the earliest listed document shall prevail over later listed documents.

3. Contract Time; Liquidated Damages. The Construction Manager shall achieve Substantial Completion of the entire Work within _____ () days of receipt of the Notice to Proceed. Time is of the essence in the Contract Documents and all obligations thereunder. If the Construction Manager fails to achieve Substantial Completion of the Work within the Contract Time and as otherwise required by the Contract Documents, the Owner shall be entitled to retain or recover from the Construction Manager, as liquidated damages and not as a penalty, the sum of \$_____ per calendar day, commencing on the first day following expiration of the Contract Time and continuing until the actual date of Substantial Completion.

Such liquidated damages are hereby agreed to be a reasonable estimate of damages the Owner will incur as a result of delayed completion of the Work. The Owner may deduct liquidated damages as described in this paragraph from any unpaid amounts then or thereafter due the Construction Manager under this Agreement. Any liquidated damages not so deducted from any unpaid amounts due the Construction Manager shall be payable to the Owner at the demand of the Owner, together with interest from the date of the demand at the maximum allowable rate.

4. Effect of GMP. This Addendum shall constitute the GMP Addendum for purpose of satisfying the requirements of Article 5 of the Agreement, and shall supplement and amend the Agreement such that all references to the GMP shall be construed to refer to the GMP set forth herein, as such GMP may be adjusted pursuant to the terms of the Agreement. All terms of the Agreement, as supplemented hereby, shall remain in full force and effect.

[Signature Page to Follow]

IN WITNESS WHEREOF, the Parties hereto have caused this GMP Addendum to be duly executed by their authorized representatives:

[CONSTRUCTION MANAGER NAME]

By: _____

Printed Name: _____

Title: _____

VILLAGE OF ESTERO

By: _____

Printed Name: Steve Sarkozy

Title: Village Manager