

COMPREHENSIVE AGREEMENT

This COMPREHENSIVE AGREEMENT (this “*Agreement*”) is entered into and shall be effective as of the 8th day of July, 2020, by and between the CITY OF HAMPTON, VIRGINIA, a municipal corporation of the Commonwealth of Virginia (“*City*”), and CLANCY & THEYS CONSTRUCTION CO., a North Carolina corporation registered to do business in the Commonwealth of Virginia, having a principal office of 516 West Cabarrus St., Raleigh, North Carolina 27603 (“*Contractor*”). The City and Contractor shall be referred to individually as a “*Party*” and jointly as the “*Parties*.” It is mutually understood and agreed by the Parties as follows:

BACKGROUND RECITALS:

R-1. On May 9, 2018, the City, acting under the Virginia Public-Private Education Facilities and Infrastructure Act of 2002 (“*PPEA*”), adopted guidelines to establish procedures for development of public facilities utilizing public-private partnerships in compliance with the PPEA (the “*Guidelines*”) and made those guidelines publicly available.

R-2. On June 18, 2018, the City received an unsolicited PPEA conceptual proposal (the “*Proposal*”) from Contractor for the design and construction of a state of the art aquatics center (the “*Project*”) on a 5.203± acre tract of City owned land located along the northeast quadrant of the intersection of Coliseum Drive and Pine Chapel Road in the City of Hampton, Virginia (the “*Proposed Site*”).

R-3. The City accepted the Proposal on September 26, 2018, and subsequently gave notice on its website on or about October 11, 2018, with additional notices published at later dates in the *Daily Press*, of the Proposal and sought competing conceptual proposals, from the public for a period of more than sixty (60) days with responses due to the City’s Deputy Director of Finance and Procurement by 4:30 p.m. on December 20, 2018. A copy of the Proposal was also made available to the public at the Clerk of Council’s Office as required by the PPEA.

R-4. The City formally approved the Project as part of its 2020 - 2024 Capital Improvement Plan on April 24, 2019, with the primary portion of the Project approved for Fiscal Year 2020 at a cost of \$25,000,000, and further approved funding necessary for that primary portion of the Project with the adoption of the Council Approved Fiscal Year 2020 Budget on May 8, 2019. In addition, on April 23, 2020, the ancillary splash park was approved as part of its 2021 - 2025 Capital Improvement Plan and is included in the City Manager’s Recommended Budget for Fiscal Year 2021 at a cost of \$4,500,000. Other funding also has been or is expected to be appropriated for preliminary design and engineering work.

R-5. The City received competing conceptual designs for the Project from Eastern Sports Management and W.M. Jordan Company, and the City also received an updated version of the Proposal from Contractor that contemplated the development of a larger aquatics center (the “*Revised Proposal*”), attached hereto as Attachment A, proposed to be constructed on the Proposed Site and an adjacent unimproved .087± acre tract of City owned land (that unimproved parcel and the Proposed Site collectively referred to as the “*Property*”, which is described more particularly on Attachment B.)

R-6. In accordance with the Guidelines, the City considered each proposal received in the context of a study it obtained in 2014 exploring various sports tourism opportunities, a 2015 feasibility study by Counsilman Hunsaker specific to a 50-meter pool, and a subsurface exploration study and report by GET Solutions, Inc. dated April 19, 2018 (which was reviewed by Contractor in the preparation of the Revised Proposal), which has since be superseded by the report dated January 30, 2020, attached hereto as Attachment C, and the City determined that the Revised Proposal best aligns with the City's vision for the Project thereby making it in the City's best interest to proceed through the PPEA process with Contractor based on the Revised Proposal.

R-7. The Parties have negotiated this Agreement consistent with the PPEA, other applicable law, the Guidelines, the Revised Proposal, and discussions between representatives of the City and Contractor. And, as required by the PPEA, the City Council made a determination that there is a public need and benefit to be derived from the Project, the price of the Project is reasonable in relation to similar facilities, and the proposed Agreement will result in the timely development of the Project.

R-8. The City held a public hearing on January 22, 2020, which was advertised in the *Daily Press* on January 9, 2020 and January 16, 2020, to allow the City Council to receive input from the public on the Revised Proposal and this Agreement, and this public hearing was at least thirty (30) days prior to the date of execution of this Agreement.

R-9. This Agreement is the "comprehensive agreement" (as that term is used under the PPEA and the Guidelines) between the City and Contractor with respect to the Project and as required by the PPEA and the Guidelines, the City has posted this Agreement on the City's website for at least thirty (30) days to allow public inspection.

R-10. Having considered this Agreement and other information, the City has determined that the Project to be designed and constructed pursuant to this Agreement serves the public purpose of the PPEA under the criteria of Code of Virginia §56-575.4(C).

AGREEMENT

NOW, THEREFORE, for and in consideration of the promises and mutual covenants contained herein, and other good and valuable consideration, the receipt and sufficiency of which the Parties acknowledge, Contractor and the City hereby agree and bind themselves as follows:

1. INCORPORATION OF RECITALS. The foregoing recitals are true and correct and are incorporated herein by reference.
2. DEFINITIONS. Capitalized terms that are used in this Agreement, but not defined in this Agreement, shall have the meanings ascribed to such terms in the General Conditions attached to this Agreement as Attachment G hereto (the "**General Conditions**").
3. CONTRACT DOCUMENTS

The "**Contract Documents**" are comprised of the following:

a. This Agreement, including all exhibits and attachments hereto (including, without limitation, the Attachments listed below), and all written modifications, amendments, and Change Orders to this Agreement. The attachments to this Agreement consist of:

Attachment A – Revised Proposal (Volumes 1 and 2 dated December 20, 2018, excluding that certain AIA Contract A141 included at Tab 1 of Volume 2, that Additional Information and Clarifications dated June 21, 2019, that certain letter dated August 5, 2019, and responses to the City’s Comments and Questions dated November 26, 2019)

Attachment B – The Property

Attachment C – GET Solutions Study dated January 30, 2020

Attachment D – City of Hampton Aquatics Center Design and Functionality Requirements (“*Design Criteria*”)

Attachment E – City of Hampton Coliseum Central Design Standards dated January 12, 2018, Updated August, 2018

Attachment F – Scope of Work

Attachment G – General Conditions

Attachment H – Project Schedule

Attachment I – Insurance Requirements

Attachment J – Topographic Survey of 1908 & 1914 Coliseum Drive Hampton, VA dated September, 2004, and updated through January 17, 2020, prepared by City of Hampton Engineering Services

Attachment K – City of Hampton Public-Private Education Facilities and Infrastructure Act of 2002 Guidelines as revised May 2, 2018, and adopted May 9, 2018

Attachment L – Guaranteed Maximum Price Certification

All of the Attachments to this Agreement shall be considered complementary documents, and what is in one Attachment shall be considered in context with all others.

b. Any and all design and construction documents approved by the Project Manager in accordance with Sections 2 and 3 of the Scope of Work and the other Contract Documents.

All references to this Agreement, any Attachment, or any other Contract Document shall include any and all amendments and modifications to those documents that may be mutually agreed to in writing after the execution of this Agreement, including, but not limited to Change Orders and Change Directives. In the event of any conflict between this Agreement, the Attachments, and any other Contract Documents, the document imposing the greater requirements or higher level of performance on Contractor shall prevail; otherwise the documents shall be interpreted in the following order:

- (1) this Agreement, as it may be amended or modified from time to time;
- (2) the Guaranteed Maximum Price Certification at Attachment L, as it may be amended or modified from time to time;
- (3) the Scope of Work at Attachment F, as it may amended or modified from time to time;

- (4) the Design and Construction documents prepared and approved in accordance with Section 3.1 of the Scope of Work at Attachment F, as they may be amended or modified from time to time;
- (5) the General Conditions at Attachment G, as it may be amended or modified from time to time;
- (6) the Project Schedule at Attachment H, as it may be amended or modified from time to time;
- (7) all other Contract Documents, as they may be amended or modified from time to time.

Further, the Revised Proposal at Attachment A is not intended to contradict this Agreement, and in the event of any conflict or inconsistency between the other Contract Documents and that Attachment, the other Contract Documents shall prevail.

The Contract Documents set forth the entire agreement between the City and Contractor. The City and Contractor agree that no representative or agent of either Party has made any representation or promise with respect to the Parties' agreement that is not contained in the Contract Documents.

4. PROJECT MANAGER(S)

The performance of Contractor is subject to the review and approval of the Project Manager(s) in accordance with the Contract Documents, who has been assigned by the City Manager or her designee. The City shall notify Contractor of the name of the initial person(s) serving as the Project Manager(s), who may be replaced by the City from time to time in its sole discretion. The City Manager shall notify Contractor if any of the persons serving as a Project Manager is replaced at any time.

5. SCOPE OF WORK

It is the intent of the Parties that, unless otherwise specifically set forth in this Agreement, Contractor shall perform or provide all design, construction, and services that are necessary to provide City with a Project that complies with the Design Criteria in Attachment D and other requirements as set forth in the Contract Documents. In doing so, Contractor shall perform, provide, or cause to be provided all design and construction services, and provide or cause to be provided all material, equipment, services, and labor necessary to complete the Work described in and reasonably inferable from the Scope of Work at Attachment F and other Contract Documents.

The Work shall be furnished and performed by the Contractor in accordance with the Contract Documents and generally accepted industry practices and professional standards and with the accuracy, care, and skill customarily employed by and expected from comparable firms in the commercial building and construction industry in the region where the Project is located. It shall be Contractor's responsibility, at solely Contractor's cost, to provide sufficient services to fulfill the purposes of the Work. Nothing in the Contract Documents shall be construed to limit Contractor's responsibility to manage the details and execution of its Work.

6. REPRESENTATIONS AND WARRANTIES OF CONTRACTOR

Contractor hereby represents and warrants to the City that:

- A. Contractor is fully qualified to act as a design-builder for the Project (in such capacity, the “**Design-Builder**”) and perform the Work for the Project and has, and shall maintain, any and all licenses, permits, or other authorizations necessary to act as the Design-Builder for construction of the Work (including, without limitation, the necessary state construction and design licenses and obligations required by Code of Virginia §56-575.8, as it may be amended from time to time, and that the execution of this Agreement by Contractor has been duly and properly authorized.
- B. Contractor has examined the terms of the Contract Documents and has found them in all respects to be complete, accurate, and sufficient for design and construction of the Project for an amount that does not exceed the Contract Cost Limit. Contractor understands it will not be compensated for the performance of any additional or change order Work or for any delays arising from any errors, omissions or conflicts or other issues in the Contract Documents that Contractor should reasonably have discovered as a result of such review, except to the extent any such possible errors, omissions, or conflicts have been expressly contemplated and provided for in the Contract Documents.
- C. Contractor is a duly organized and validly existing legal entity under the laws of the North Carolina, and is duly registered and authorized to transact business in the Commonwealth of Virginia and has the power and authority to own its properties and other assets and to transact the business in which it is now engaged or proposed to engage. Contractor is also duly licensed as a “Class A” Contractor with the Virginia Department of Professional and Occupational Regulation.
- D. Contractor has the power and authority to execute, deliver and carry out the terms and provisions of this Agreement and all other instruments to be executed and delivered by the Contractor in connection with its obligations hereunder. The execution, delivery and performance by the Contractor of this Agreement have been duly authorized by all requisite action by the Contractor, and this Agreement is a valid and binding obligation of the Contractor enforceable in accordance with its respective terms, except as may be affected by applicable bankruptcy or insolvency laws affecting creditors' rights generally.
- E. Contractor, to the best of Contractor’s knowledge, is not in default in the performance, observance, or fulfillment of any of the obligations, covenants or conditions contained in any evidence of indebtedness of Contractor or contained in any instrument under or pursuant to which any such evidence of indebtedness has been issued or made and delivered. Neither the execution and delivery of this Agreement, nor the consummation of the transactions herein contemplated, will conflict with or result in a breach of any of the terms, conditions or provisions of the Contractor’s Articles of Incorporation or of any agreement or instrument to which the Contractor is now a party or otherwise bound or to which any of its properties or other assets is subject, or of any order or decree of any court or governmental instrumentality, or of any arbitration award, franchise or permit, or constitute a default thereunder, or, except as contemplated hereby, result in the

creation or imposition of any lien or other encumbrance upon any of the properties or other assets of the Contractor.

- F. There are no actions, suits, investigations or proceedings (whether or not purportedly on behalf of the Contractor) pending or, to the best of Contractor's knowledge, threatened against or affecting the Contractor or the Project or any other of the assets or properties of Contractor at law or in equity or before or by a governmental department, commission, board, bureau, agency, or instrumentality, domestic or foreign, or before an arbitrator of any kind, which involve the possibility of liability in excess of \$100,000.00 or of any material adverse effect on the business operations, prospects, properties or other assets or in the condition, financial or otherwise, of Contractor, or of the Project, and the Contractor, to the best of Contractor's knowledge, is not in default with respect to any judgment, order, writ, injunction, decree, award, rule or regulation of any court, arbitrator or governmental department, commission, board, bureau, agency or instrumentality, domestic or foreign.
- G. To the best of Contractor's knowledge, neither this Agreement nor any document, certificate or financial statement furnished to the City by or on behalf of the Contractor in connection herewith, contains any untrue statement of a material fact or omits to state any material fact necessary in order to make the statements contained herein and therein not misleading. Other than the yet to be determined economic and financial impact of the COVID-19 pandemic, there is no fact known to Contractor which materially adversely affects or in the future may (so far as it is now known to Contractor) have a material adverse effect upon the business, operations, prospects, property, other assets or financial condition of Contractor or of the Project which has not been set forth in this Agreement or in other documents, certificates and financial statements furnished to the City or on behalf of Contractor in connection with the transactions contemplated hereby.

7. REPRESENTATIONS OF CITY TO CONTRACTOR

- A. The City is a municipal corporation of the Commonwealth of Virginia, possessing the full legal right, power, and authority to enter into and perform its obligations under this Agreement.
- B. The City has the power and authority to execute, deliver, and carry out the terms and provisions of this Agreement and all other instruments to be executed and delivered by the City in connection with its obligations hereunder.
- C. The execution, delivery, and performance by the City of this Agreement has been duly authorized by all requisite action by City Council, as applicable and this Agreement is a valid and binding obligation of the City enforceable in accordance with its respective terms, except as may be affected by applicable bankruptcy or insolvency laws affecting creditors' rights generally.

8. CODE, REGULATORY, and OTHER COMPLIANCE

Contractor is responsible for completing the Project in accordance with all applicable federal, state, and/or local regulatory requirements in effect at the time building permits are issued for the Project.

To the extent any applicable federal, state, and/or local regulatory requirements or orders (including applicable taxes or tariffs) are enacted or changed after the approval of the building permits for the Project necessitating a change to the Work necessary to complete the Project, the Contractor shall submit a Change Order to the City pursuant to Section 7.3 of the General Conditions at Attachment G, the City's approval of which shall not be unreasonably withheld. In addition, the Project shall be developed in accordance with City's Coliseum Central Design Guidelines that are in effect on the date of the execution of this Agreement, a copy of which is attached hereto as Attachment E, and as further outlined in the Design Criteria attached hereto as Attachment D. Notwithstanding anything to the contrary in this Agreement, the City's participation in this Agreement as a Party does not constitute governmental approval by the City or any other Code Officials, which approvals must be separately obtained by Contractor from the appropriate governmental agencies as needed to perform its obligations under this Agreement.

9. STANDARD OF CARE

The City is entering into this Agreement in reliance on Contractor's experience and abilities with respect to performing the Work hereunder. In performing the Work hereunder, Contractor will ensure that it and all its agents and employees exercise the degree of skill and care that is normally accepted by members of the same profession currently practicing under similar conditions in the same locality ("*Customary Standard of Care*"). Contractor will re-perform, without additional compensation, any services or Work not meeting this Customary Standard of Care.

Contractor will be responsible for the professional quality, completeness, technical accuracy and coordination of all designs, drawings, specifications, costs estimates and other services or materials provided, regardless of whether such drawings and documents are prepared by Contractor or Contractor's subcontractors or sub-consultants. The plans, drawings, specifications and other documents that Contractor prepares or has prepared must be free from material errors, and upon the construction thereof will produce a facility that will be structurally sound, complete, and a properly functioning facility that is suitable for the purposes for which it is intended.

The City's review, approval or acceptance of or payment for any services required under this Agreement does not release Contractor from any liability or operate as a waiver by the City of any rights or of any cause of action arising out of this Agreement.

10. TIME FOR COMPLETION

The City and Contractor shall use their best efforts to maintain the Project Schedule, which can be modified by mutual written agreement of the Parties as circumstances warrant and consistent with this Agreement, keeping in mind the importance of achieving Substantial Completion of the Work in accordance with the Milestone Dates and the Time for Completion set forth in the Project Schedule, the Construction Schedule, and this Agreement.

All Work required during the Construction Implementation Stage shall achieve Substantial Completion in accordance with the Project Schedule, subject to any modifications made as provided for in the Contract Documents. No Work shall be deemed substantially complete until it meets the requirements of Substantial Completion set forth in the General Conditions. Final Completion of the Work shall also be achieved by Contractor in accordance with the Project Schedule, subject to any modification as provided for in the Contract Documents (the "*Final*

Completion Deadline”). The Work will not achieve Final Completion until it meets the requirements for Final Completion set forth in the Contract Documents.

Unless otherwise expressly provided in this Agreement, no claims for early completion of the Work are allowed.

11. **CONTRACT PRICE.** The amount to be paid to Contractor for performance of all Work under this Agreement shall initially be called the “*Contract Cost Limit*” or “*CCL*”. The CCL is Twenty Nine Million Five Hundred Thousand and 00/100 dollars (\$29,500,000.00). The CCL has been agreed to by the Parties and is the cap on Contractor’s possible compensation. As the design of the Project is refined, a “*Guaranteed Maximum Price*” or “*GMP*” shall be mutually agreed upon by the Parties that must be less than or equal to the CCL, and, once agreed upon shall replace the CCL as the maximum amount payable to the Contractor for the Project and which shall be reasonably allocated in the Control Budget and Schedule of Values into the following categories: (i) Design Fees, (ii) Construction Fees, (iii) the Contractor Fee, and (iv) Contingency Fees, as each are defined in the Scope of Work at Attachment F, and as component parts of the Cost of Work as that term is defined in the General Conditions at Attachment G. In all instances, the Parties shall negotiate the GMP in good faith with the common objective to secure the highest quality, lowest priced Project that most reasonably conforms to the Design Criteria at Attachment D. The GMP may be subject to increase and decrease by agreed to Change Orders, Construction Change Directives, or other modifications, and amendments as otherwise provided in the Contract Documents. Additionally:

- a. The Contractor shall develop the Project design in accordance with Sections 2 and 3.1 of the Scope of Work in order to arrive at the GMP. The Contractor shall submit to the Project Manager estimates of the GMP at the completion of the following design phases: 65% Design Documents Submission and 90% Design Documents Submission. The GMP proposals provided by Contractor at the 65% Design Documents Submission and 90% Design Documents Submission must be supported by detailed subcontractor quotes for all major trades, and detailed labor and materials for self-performed Work, general conditions, and for Work to be subcontracted or purchased at a later date. Each GMP proposal submitted to the City by Contractor shall include a proposed Control Budget that is associated with such proposal. In addition:
 - i. An initial GMP estimate shall be established at the time of the Project Manager’s approval of the 65% Design Documents Submission. For that purpose, the Project Manager shall also at that time identify for Contractor, so that that information may also be considered when the final GMP is established, (1) any Project components that will be acquired and/or installed directly by the City; and (2) any separate contracts the City intends to enter into in accordance with Section 3.13 of the General Conditions. The final mutually agreed upon GMP shall be established after the Project Manager’s approval of the 90% Design Documents Submission.
 - ii. Promptly after the final GMP has been mutually agreed upon, the Parties shall jointly execute the Guaranteed Maximum Price Certification that is attached

hereto as Attachment L, which Certification shall include the final Control Budget that corresponds to the final GMP, and the final agreed upon Project Schedule, including the Time for Completion and Milestone Dates applicable thereto.

- b. Contractor covenants and agrees that, except for such increases to the GMP as expressly authorized in the Contract Documents, it will deliver a complete Project that is a logical development of the Basis of Design and constructed in strict accordance with the IFC Set for an amount that does not exceed, in the aggregate, the GMP.
- c. Within ninety (90) days of Final Completion, Contractor shall provide to the Project Manager a detailed and complete accounting of the Cost of the Work for the Project. Should the actual final Cost of the Work be less than the GMP, as it may have been adjusted pursuant to the terms of the Contract Documents, the savings shall accrue seventy-five percent (75%) to the City and twenty-five percent (25%) to Contractor. Should the actual final Cost of the Work exceed the GMP, as adjusted pursuant to the terms of the Contract Documents, then the excess amount shall be borne solely by Contractor.

12. PROGRESS PAYMENTS AND RETAINAGE

The City will make progress or partial payments to Contractor in accordance with Section 13 of this Agreement, Article 7 of the General Conditions, and the other Contract Documents. Five percent (5%) of each progress payment made will be retained by the City. The amount of the Design Fees retained in accordance with this Section 12 that have accrued through the Design Implementation Stage shall be payable to Contractor upon completion of the Design Implementation Stage, which completion shall be deemed to have occurred once the IFC Set has been approved by the Project Manager. All other amounts retained pursuant to this Section 12 shall not be payable to Contractor until Final Acceptance.

13. PAYMENT TERMS and CITY PURCHASE ORDER REQUIREMENT

In order to receive payment, Contractor must submit Applications for Payment to the Project Manager in accordance with the terms of Article 7 of the General Conditions for approval by the Project Manager. In addition, City purchases are authorized only if the City issues a formal purchase order (each, a "Purchase Order") in advance of the transaction, indicating that the ordering City department has sufficient funds available to pay for the purchase. Upon the full execution of this Agreement, the City shall obtain an initial Purchase Order that will include all then appropriated funds for the Work to be completed, and a copy of the issued Purchase Order shall be provided to Contractor. The City shall obtain one or more additional Purchase Orders for the remaining Work not covered by the initial Purchase Order as additional funding is appropriated, and copies of the same shall be promptly provided to Contractor. If Contractor performs Work without a signed Purchase Order covering such Work, it does so at its own risk and expense. The City will not be liable for payment for any purchases made by Contractor that are not covered by a validly issued Purchase Order and otherwise authorized by the Project Manager pursuant to the Application for Payment process set forth in Section 12 above and Article 7 of the General Conditions at Attachment G.

14. PAYMENT OF SUBCONTRACTORS

Consistent with Code of Virginia §2.2-4354, as it may be amended from time to time, Contractor is obligated to take one of the two following actions within seven (7) days after receipt of payment by the City for Work performed by any subcontractor under this Agreement:

- a. Pay the subcontractor for the proportionate share of the total payment received from the City attributable to the Work performed by the subcontractor under this Agreement; or
- b. Notify the Project Manager and the subcontractor, in writing, of Contractor's intention to withhold all or a part of the subcontractor's payment together with the reason for non-payment.

Contractor is obligated to pay interest to the subcontractor on all amounts owed by Contractor to the subcontractor that remain unpaid after seven (7) days following receipt by Contractor of payment from the City for Work performed by the subcontractor under this Agreement, except for amounts withheld as allowed in subsection 14(b), above. Unless otherwise provided under the terms of this Agreement, interest on such amounts will accrue at the rate of 1% per month. Contractor's obligation to pay an interest charge to a subcontractor pursuant to this section shall not be construed to be an obligation of the City. A modification of this Agreement shall not be permitted for the purpose of providing reimbursement for any such interest charges. A cost reimbursement claim may not include any amount for reimbursement for any such interest charges.

Contractor must include in each of its subcontracts a provision requiring each subcontractor to include or otherwise be subject to the same payment and interest requirements with respect to each lower-tier subcontractor.

15. RELEASE AND REQUEST FOR FINAL PAYMENT

In order to receive Final Payment, and before Final Acceptance by the City, Contractor must comply with and submit to the Project Manager all documents required by Section 7.8 of the General Conditions.

16. LIQUIDATED DAMAGES

Time is of the essence under this Agreement. Contractor acknowledges that the City is engaging Contractor to serve as a design-builder so as to minimize the potential for cost overruns, schedule delays, or the need for extensive value engineering/re-design late in the Project. The Project must achieve Substantial Completion within the Time for Completion for Substantial Completion. The City and Contractor agree that damages for failure to achieve Substantial Completion of the Work by the expiration of the Time for Completion for Substantial Completion are not susceptible to exact determination, but that Contractor will pay the City as liquidated damages \$3,000.00 per day for each and every day after the expiration of the Time for Completion for Substantial Completion that it takes for Substantial Completion of the Work to be achieved in accordance with Section 6.2(a) of the General Conditions. The City and Contractor also agree that damages for failure to achieve Final Completion of the Work by the Final Completion Deadline is not susceptible to exact determination, but that Contractor will pay to the City as liquidated damages \$1,500.00 per day for each and every day beyond the Final Completion Deadline that it takes for Final Completion of the Work to be achieved in accordance with Section 6.2(b) of the General Conditions.

The City will be entitled to deduct liquidated damages against any sums owed by the City to Contractor under this Agreement, or if the City does not owe Contractor any sums, Contractor must promptly pay such liquidated damages within fifteen (15) days of its receipt of a written demand by the City. Contractor hereby waives any defense as to the validity of any liquidated damages on grounds that such liquidated damages are void as penalties or are not reasonably related to actual damages.

17. PLAN OF FINANCE

The City will arrange to finance the costs of the Project in a manner that results in the availability of funds in the amounts and at the times required to meet the projected needs for the Project, subject to annual appropriation. In addition to the Purchase Orders to be provided to Contractor pursuant to Section 13, the City will provide other reasonable evidence of funding for the Project to Contractor upon its request, including, but not limited to the funding and appropriations set forth in Recital R-4.

18. LIENS

- A. Contractor warrants that title to all Work covered by an Application for Payment will pass to the City no later than the time of payment by the City to the Contractor, including partial and progress payments and regardless of any sum retained in accordance with the Agreement, has been made by the City to Contractor for Work done, or labor or material supplied under the Contract Documents, and to the extent ownership is not already indisputably vested in the City, the City will have a lien upon all Work, materials, machinery, systems, supplies, or equipment provided either by Contractor or any subcontractor or vendor, or for Contractor, which is to be used in the performance of this Agreement and under the Contract Documents. Upon the City's request, Contractor shall provide a bill of sale stating that the City is the owner of the Work, materials, machinery, systems, supplies, or equipment and equipment purchased by or for Contractor under this Agreement and the Contract Documents.
- B. Contractor further warrants and guarantees that title to the Work, materials, machinery, systems, supplies, or equipment transferred as set forth in subsection A of this Section 18 shall pass to the City free and clear of all liens, claims, security interests, and other encumbrances; and that none of such Work, materials, machinery, systems, supplies, or equipment shall be acquired by Contractor or any of Contractor's subcontractors subject to any agreement under which a security interest or other lien or encumbrance is retained by any person.
- C. Contractor shall not create, suffer, or permit another to create, and shall promptly remove or discharge, any liens or encumbrances against the Property. If a claim of lien is recorded against the Property, Contractor shall promptly remove the lien by discharging or removing the lien in accordance with applicable laws. If Contractor fails to comply with the foregoing, the City may, without limiting its remedies, retain sufficient funds to pay the same and all costs incurred by reason

thereof or directly discharge or remove the lien, at Contractor's expense, in accordance with applicable laws.

19. EMPLOYMENT DISCRIMINATION BY CONTRACTOR PROHIBITED

Consistent with Code of Virginia §2.2-4311, as it may be amended from time to time, during the performance of its Work pursuant to this Agreement:

- A. Contractor will not discriminate against any employee or applicant for employment because of race, religion, color, sex, national origin, age or disability or on any other basis prohibited by state law. Contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth the provisions of this nondiscrimination clause.
- B. Notices, advertisements and solicitations placed in accordance with federal law, rule or regulation will be deemed sufficient for meeting the requirements of this section.
- C. Contractor will state in all solicitations or advertisements for employees that it places or causes to be placed that Contractor is an Equal Opportunity Employer.
- D. Contractor will comply with the provisions of the ADA, which prohibits discrimination against individuals with disabilities in employment and mandates that disabled individuals be provided access to publicly and privately provided services and activities.
- E. Contractor must include the provisions of the foregoing paragraphs in every subcontract or purchase order of more than \$10,000.00 relating to this Agreement so that the provisions will be binding upon each subcontractor or vendor.

20. EMPLOYMENT OF UNAUTHORIZED ALIENS PROHIBITED

Consistent with Code of Virginia §2.2-4311.1, as it may be amended from time to time, Contractor must not during the performance of this Agreement knowingly employ an unauthorized alien, as that term is defined in the federal Immigration Reform and Control Act of 1986.

21. DRUG-FREE WORKPLACE TO BE MAINTAINED BY CONTRACTOR

Consistent with Code of Virginia §2.2-4312, as it may be amended from time to time, during the performance of this Agreement, Contractor must: (i) provide a drug-free workplace for its employees; (ii) post in conspicuous places, available to employees and applicants for employment, a statement notifying employees that the unlawful manufacture, sale, distribution, dispensation, possession, or use of a controlled substance or marijuana is prohibited in Contractor's workplace and specifying the actions that will be taken against employees for violating such prohibition; (iii) state in all solicitations or advertisements for employees placed by or on behalf of Contractor that Contractor maintains a drug-free workplace; and (iv) include the provisions of the foregoing clauses in every subcontract or purchase order of more than \$10,000.00 relating to this Agreement so that the provisions will be binding upon each subcontractor or vendor. For the

purposes of this section, “workplace” means the site(s) for the performance of the Work required by this Agreement.

22. REPLACEMENT OF PERSONNEL AND SUBCONTRACTORS

Pursuant to the terms and conditions set forth in Section 6 of the Scope of Work at Attachment F and Section 3.14(f) of Attachment G, the Project Manager has the right to reasonably reject staff or subcontractors whom Contractor assigns to the Project. Contractor must then provide replacement staff or subcontractors acceptable to the Project Manager, which acceptance may not be unreasonably withheld, in a timely manner. The day-to-day supervision and control of Contractor’s and its subcontractors’ employees is the sole responsibility of Contractor.

23. FAILURE TO DELIVER

If Contractor fails to deliver the Work in accordance with the terms and conditions of the Contract Documents, the City, in its sole and absolute discretion and after notice to Contractor and an opportunity for Contractor to cure such failure within the Cure Period (as hereinafter defined), may procure the Work from other sources and hold Contractor responsible for any resulting additional costs. The City shall be entitled to offset all such costs against any sums owed by the City to Contractor, and to recover any such costs in excess of the GMP from the Contractor. However, if public necessity requires the use of non-conforming materials or supplies, those materials or supplies may be accepted at a reduction in price to be determined solely by the City and based upon a comparable reduction of the GMP.

24. UNSATISFACTORY WORK

If any of the Work done, or material, goods, or equipment provided by Contractor does not comply with the requirements of the IFC Set, Contractor must, upon notice from the Project Manager and within a reasonable amount of time thereafter remove, at Contractor’s expense, such unsatisfactory Work, material, goods, or equipment and replace the same with Work, material, goods, or equipment in conformance with the IFC Set, and as confirmed to be so by the Project Manager. If Contractor fails to commence and work diligently to cure such non-compliant Work, material, goods, or equipment within fifteen (15) days after the date of such notice or any other longer period specified by the City in such written notice, the City shall have the right to remove or replace the rejected Work, material, goods, or equipment at the expense of Contractor and offset the expense and administrative costs against any sums owed to Contractor. This provision applies both during the term of this Agreement and during any warranty or guarantee period. If the Contractor does not correct unsatisfactory work within the time limits established by this section, at the Project Manager’s discretion, rather than correction or replacement of the Work, an appropriate adjustment to the Cost of the Work may be made in accordance with the Contract Documents.

25. TERMINATION

The City may terminate this Agreement at any time as follows: (1) for cause, if, as determined by the City, Contractor is in breach or default of any term of this Agreement, or has failed to perform the Work satisfactorily in accordance with the Contract Documents, and any such breach, default, or failure is not cured to the City’s satisfaction within any applicable Cure Period; or (2) for the convenience of the City.

Upon receipt of a notice of termination, Contractor must not place any further orders or subcontracts for materials, services or facilities; must terminate all vendors and subcontracts, except as are necessary for the completion of any portion of the Work that the City did not terminate; and must immediately deliver all documents related to the terminated Work to the City within seven (7) Business Days of the receipt of the notice of termination.

Any purchases that Contractor makes after Contractor's receipt of the notice of termination will be the sole responsibility of Contractor, unless the Project Manager has approved the purchases in writing as necessary for completion of any portion of the Work that the City did not terminate.

If any court of competent jurisdiction finds a termination for cause by the City to be improper, then the termination will be deemed a termination for convenience.

A. TERMINATION FOR CAUSE; CURE

1. Termination for Unsatisfactory Performance of the Work or any other Breach or Default Under the Agreement. If the City determines that Contractor has failed to satisfactorily perform the Work as required by the Contract Documents or has otherwise breached or defaulted under this Agreement, then the City will give Contractor written notice of such failure(s), breach, or default and the opportunity to cure all such failure(s), breach, or default within fifteen (15) days after Contractor's receipt of such written notice or any other longer period specified by the City in such written notice (in any such case, the "***Cure Period***"). If Contractor fails to cure any failure(s), breach, or default within the Cure Period, the City may terminate this Agreement by providing written notice to Contractor with a specified termination date, which may be immediate. In the event of termination by the City under this Subsection 1 Contractor must continue to provide its services as previously scheduled through the specified termination date and shall be compensated through that specified termination date as set forth below.

Upon termination pursuant to this Subsection 1, the City may enter upon the Property and take possession of, for the purpose of completing the Work, all materials, supplies, equipment, and other items purchased by or otherwise in possession of Contractor that have been paid for by the City or would be charged to the City pursuant to the Agreement for the performance of the Work. In such event, the City shall have the right to employ any person or persons to complete the Work and provide for all of the required labor, services, materials, equipment, and other items necessary to complete the Project. For that purpose, Contractor hereby transfers, assigns, and sets over to the City for such purpose all right title and interest in those materials, supplies, equipment and other items for which title has not previously transferred to the City pursuant to the terms of this Agreement. In the event of such termination, Contractor shall submit to the City an Application for Payment for any and all Work performed through the specified termination date not then billed, but, shall not be entitled to receive any further payments under the Contract Documents until the Work shall be finally

completed by others as contemplated by the Contract Documents. At such time, if the City's aggregate cost and expense incurred to complete the Work exceeds the unpaid balance of the GMP, then Contractor shall be obligated to pay the difference to the City. Such costs and expenses shall include not only the cost of completing the Work (or curing unsatisfactory or non-compliant Work), but also losses, damages, costs and expenses, including reasonable attorneys' fees and expenses, incurred by the City in connection with the re-procurement and defense of claims arising from Contractor's breach or default. The City may deduct such costs from any amount due to Contractor, or if the City does not owe Contractor, Contractor must promptly pay the costs actually incurred by the City within fifteen (15) days after Contractor's receipt of a written demand by the City. The terms of this Subsection 1 do not limit the City's recovery of any other damages from Contractor to which the City is entitled to recover by law.

Except as otherwise expressly directed by the City in writing, Contractor must stop all Work on the termination date specified in the City notice, other than any Work that is absolutely necessary to leave the Project in a safe and secure condition.

2. Termination for Insolvency. The filing by the Contractor of a voluntary proceeding or the consent by the Contractor to an involuntary proceeding under bankruptcy, insolvency, or other laws respecting debtor's rights, including, but not limited to the entering of an order for relief against the Contractor or the appointment of a receiver, trustee, or custodian for all or a substantial part of the assets of the Contractor in any involuntary proceeding, and the continuation of such order, judgment or decree unstayed for any period of ninety (90) consecutive days, the City may terminate this Agreement by written notice to the Contractor. In the event of termination by the City for Contractor's insolvency, the City may enter upon the Property and take possession of, for the purpose of completing the Work, all materials, supplies, equipment, and other items purchased by or otherwise in possession of Contractor that have been paid for by the City or are yet to be billed to the City pursuant to the Agreement for the performance of the Work. The City shall further have the right to employ any person or persons to complete the Work and provide for all of the required labor, services, materials, equipment, and other items necessary to complete the Project. For that purpose, Contractor hereby transfers, assigns, and sets over to the City for such purpose all right title and interest in those materials, supplies, equipment and other items for which title has not previously transferred to the City pursuant to the terms of this Agreement. In the event of such termination, Contractor shall submit to the City an Application for Payment for any Work not then billed.

Except as otherwise expressly directed by the City in writing, Contractor must stop all Work on the termination date specified in the City notice, other than

any Work that is absolutely necessary to leave the Project in a safe and secure condition.

B. TERMINATION FOR THE CONVENIENCE OF THE CITY

The City may, without cause and for its convenience, terminate this Agreement in whole or in part whenever it determines that termination is in the City's best interest. The City will give Contractor at least thirty (30) days' notice in writing of any termination of this Agreement for convenience. The notice must specify the extent to which this Agreement is terminated and the effective termination date. In such event, the City shall pay Contractor for the following:

- i. All Work properly performed by Contractor in accordance with the Contract Documents;
- ii. The reasonable costs and expenses directly attributable to such termination, including demobilization costs and amounts due in settlement of terminated contracts with subcontractors;
- iii. Overhead and profit of up to the amount of fifteen percent (15%) for all portions of the Work properly performed in accordance with the Contract Documents through the date of termination, and not previously billed to the City; and
- iv. No amount will be allowed for anticipatory or lost profits.

Except as otherwise expressly directed by the City in writing, Contractor must stop all Work on the date Contractor receives notice of termination from the City, other than any Work that is absolutely necessary to leave the Project in a safe and secure condition.

26. INDEMNIFICATION

To the fullest extent permitted by law, Contractor covenants for itself, its employees and its subcontractors to save, defend, hold harmless and indemnify the City and all of its elected and appointed officials, officers, current and former employees, agents, departments, agencies, boards and commissions (collectively the "*City Indemnitees*") from and against any and all claims made by third parties for any and all losses, damages, injuries, fines, penalties, charges, liabilities, or other costs (including, but not limited to, court costs and reasonable attorneys' fees) resulting from, arising out of or in any way connected with performance or nonperformance of the Work as set forth in the Contract Documents provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, and/or to damage, injury or destruction of any property, whether real, personal or mixed, (other than the Work itself) and only to the extent caused by the Contractor's willful and/or negligent acts or omissions, including the willful and/or negligent acts or omissions of its agents, employees, vendors, delivery drivers, subcontractors, and/or invitees. This duty to save, defend, hold harmless, and indemnify will survive the termination of this Agreement. If Contractor fails or refuses to fulfill its obligations contained in this section, Contractor must reimburse the City for any and all resulting payments and expenses, including reasonable attorneys' fees that are actually incurred by the City, including time and costs expended

by the City Attorney's Office, from the Contractor's failure to fulfill its obligation in this section. Contractor must pay actual expenses within thirty (30) days of receipt of such demand by the City, which demand shall include supporting documentation evidencing payment of such expenses by the City, and failure to make such payment within thirty (30) days may result in the City withholding such amounts from any payments to Contractor under this Agreement.

Except as otherwise provided in the Contract Documents, Contractor agrees to defend, indemnify, and hold harmless the City from any and all damages, costs, claims, expenses, suits, losses, liabilities, or obligations of any kind including, without limitation, environmental assessments, evaluations, remediations, fines, penalties, and clean-up costs which may be asserted against or imposed upon, or incurred by the City arising from Contractor's willful and/or negligent discharge or disposal of any hazardous or toxic materials, trash, debris, refuse, waste or other materials related in any way to Contractor's operations herein.

27. INTELLECTUAL PROPERTY INDEMNIFICATION

Contractor warrants and guarantees, to the best of Contractor's knowledge, that in providing services under the Contract Documents neither Contractor nor any subcontractor is infringing on the intellectual property rights (including, but not limited to, copyright, patent, mask, and trademark) of third parties.

If Contractor or any of its employees or subcontractors uses any design, device, work or material that is covered by patent or copyright, it is understood that the GMP includes all royalties, licensing fees, and any other costs arising from such use in connection with the Work under this Agreement.

Contractor covenants for itself, its employees and its subcontractors to save, defend, hold harmless, and indemnify the City Indemnitees from and against any and all claims, losses, damages, injuries, fines, penalties, costs (including court costs and attorneys' fees), charges, liability or exposure for infringement of or on account of any trademark, copyright, patented or unpatented invention, process or article manufactured or used in the performance of this Agreement. This duty to save, defend, hold harmless and indemnify will survive the termination or cancellation of this Agreement. If Contractor fails or refuses to fulfill its obligations contained in this section, Contractor must reimburse the City for any and all resulting payments and expenses actually incurred, including reasonable attorneys' fees. Contractor must pay such expenses within fifteen (15) days of Contractor's receipt of written demand from the City, and failure to do so may result in the City withholding such amounts from any payments to Contractor under this Agreement.

28. COPYRIGHT

Subject to the provisions of Section 29 of this Agreement, Contractor irrevocably transfers, assigns, sets over and conveys to the City all rights, title and interest, including the sole exclusive and complete copyright interest, in any and all copyrightable works created pursuant to this Agreement. Contractor will execute any documents that the City reasonably requests to formalize such transfer or assignment.

The rights granted to the City by this section are irrevocable and may not be rescinded or modified, including in connection with or as a result of the termination of or a dispute concerning this Agreement unless otherwise determined in writing by the City.

Contractor may not use subcontractors or third parties to develop or provide input into any copyrightable materials produced pursuant to this Agreement without the City's advance written approval and unless Contractor includes this copyright provision in any contract or agreement with such subcontractors or third parties related to this Agreement. Contractor shall also cause all contracts and agreements between Contractor and subcontractors, sub-consultants, and/or any other third parties arising out of this Agreement to include the City as an express third party beneficiary of all of Contractor's rights under such contracts and agreements, such that the City shall have the right, but not the obligation, to enforce any and all rights under such contracts and agreements to complete the Project in the event Contractor defaults under this Agreement.

Notwithstanding the above, the City acknowledges that Contractor and/or the members of the Design Team may desire to use photographs, renderings, or other imagery of the Project for marketing purposes. For this purpose, Contractor, members of the Design Team, or any other subcontractor of Contractor must first receive written approval of the City prior to any such use, which approval shall not be unreasonably withheld, but may be conditioned upon Contractor, the member of the Design Team, or other of Contractor's subcontractors making such request (1) providing the City representative samples of the photographs, renderings, or other imagery, and the context for the publication or use; and/or (2) entering into a license agreement for said use.

The provisions of this section will survive the termination or cancellation of this Agreement.

29. OWNERSHIP OF WORK PRODUCT

This Agreement does not confer on Contractor any ownership rights or rights to use or disclose the City's data or inputs.

Upon receipt of progress or partial payments by Contractor in accordance with the Contract Documents, all work product, in any form, including, without limitation, designs, drawings, plans, specifications, and any other documents and electronic data, which results from or arises out of or was created in anticipation of this Agreement (collectively, the "**Work Product**") shall become the property of the City and, if not provided sooner, Contractor must provide to or return to the City the latest or final version of each Work Product upon completion, termination, or cancellation of this Agreement, together with any other versions or materials consisting of the Work Product that may be reasonably requested by the City. Contractor shall be responsible for obtaining, in advance, any and all agreements and consents from third party producers of Work Product to allow for the City to exercise the rights contained in this Section 29 with respect to the Work Product and reasonable evidence thereof shall be provided by Contractor to the City upon the written request of the City. If this Agreement is terminated or cancelled prior to Final Completion, the City shall have the right to pay Contractor any costs necessary to reimburse Contractor for the costs of any then existing Work Product not previously paid to Contractor by the City, including, but not limited to, design, drawing, and specification documents.

To the extent necessary, Contractor shall execute any and all documents, in addition to this Agreement, that may be necessary to assign, convey, and vest in the City the ownership of the Work Product or other rights set forth herein, provided that payment has been made by the City for such Work Product as outlined above. Contractor will not use or knowingly allow others to

use the Work Product for any purpose other than performance of this Agreement without the written consent of the City. Provided the City has paid for the Work Product as outlined above, the City shall have the unrestricted right to utilize the Work Product for any purpose including, without limitation, to cause the Project to be constructed by a party other than the Contractor, at the City's sole and absolute discretion, if this Agreement is terminated for any reason. Any use of Work Product by the City other than with Contractor pursuant to this Agreement without written verification, adaptation, and consent of Contractor (which shall not be unreasonably withheld by Contractor and shall be at no cost to the City) shall be at the City's sole risk, and the Contractor shall not have any liability therefore.

Except as necessary for the performance of Work under the Contract Documents, Contractor may neither release the Work Product nor share its contents with any party, unless agreed to by the City. Contractor will refer all inquiries regarding the status of any Work Product to the Project Manager. Once the City has paid Contractor for the Work Product, at the City's request, Contractor will deliver all Work Product then paid for by the City, regardless of any sum retained in accordance with the Contract Documents, including hard copies of electronic files, to the Project Manager. To the extent Contractor or any subcontractor or third party working under Contractor for the purposes of this Agreement must retain an electronic or other copy of the Work Product for licensing or other lawful purpose, the Contractor, subcontractor, or third party shall notify the City of any disclosure and the purpose therefore prior to any release.

Contractor must include the provisions of this section as part of any contract or agreement related to this Agreement into which it enters with subcontractors or other third parties including, without limitation, any design services applicable to the Project. Contractor shall also cause all such other contracts or agreements with any subcontractors or other third parties to include the City as an express third party beneficiary of all of Contractor's rights under such contracts and agreements.

The provisions of this section will survive any termination or cancellation of this Agreement.

30. APPLICABILITY OF THE VIRGINIA FREEDOM OF INFORMATION ACT

Contractor is advised that the Virginia Freedom of Information Act ("**VFOIA**"; Code of Virginia §2.2-3700 *et. seq.*, as it may be amended from time to time) shall govern public inspection of all records related to this Agreement. If Contractor seeks to protect any proprietary data or materials pursuant to VFOIA or any other applicable law, including but not limited to Code of Virginia §56-575.17, as it may be amended from time to time, Company shall (i) provide a statement that invokes protection from the VFOIA or such other applicable law, prior to, or upon the submission of the proprietary data or other materials; (ii) provide a statement that identifies the data or other materials to be protected and states the reasons why protection is necessary; and (iii) under separate cover in a sealed envelope clearly marked as "Proprietary" and/or "Confidential submit trade secrets and other proprietary information. Information submitted that does not meet the above requirements will be considered public information in accordance with the statutes of the Commonwealth of Virginia. The City's obligations of confidentiality hereunder shall not apply to any information which (i) is now or hereafter becomes available to the public without breach of the obligations under this Agreement by the City; (ii) becomes available to the City from a third party having the legal right to disclose such information; or (iii) such disclosure is compelled by a court of competent jurisdiction or otherwise compelled by law.

31. ETHICS IN PUBLIC CONTRACTING

This Agreement incorporates by reference all state and federal laws related to ethics, conflicts of interest or bribery, including the State and local Government Conflict of Interests Act (Code of Virginia § 2.2-3100 et seq.), the Virginia Governmental Frauds Act (Code of Virginia § 18.2-498.1 et seq.) and Articles 2 and 3 of Chapter 10 of Title 18.2 of the Code of Virginia, as amended (§ 18.2-438 et seq.). Contractor certifies that its bid was made without collusion or fraud; that it has not offered or received any kickbacks or inducements from any other offeror, supplier, manufacturer or subcontractor; and that it has not conferred on any public employee having official responsibility for this procurement any payment, loan, subscription, advance, deposit of money, services, or anything of more than nominal value, present or promised, unless consideration of substantially equal or greater value was exchanged.

32. CITY EMPLOYEES

No City employee may personally share in any part of this Agreement or receive any benefit from this Agreement that is not available to the general public.

33. FORCE MAJEURE

Neither party will be held responsible for failure to perform the duties and responsibilities imposed by this Agreement if such failure is due to a Force Majeure Event, unless otherwise specified in this Agreement. If a Party desires to cite a Force Majeure Event as a defense for failure to perform any duties or responsibilities hereunder, such Party must provide written notice to the other Party within five (5) days after the Party is aware of the commencement of the Force Majeure Event, which notice shall include a reasonable description of the facts pertaining to the Force Majeure Event and a reasonable estimate of the anticipated delay caused by the Force Majeure Event based on the facts then known to such Party. Upon the occurrence of any Force Majeure Event, the time or times for the performance of the covenants, provisions, and agreements of this Agreement shall be extended for the period of the Force Majeure Event (including any time reasonably required to recommence performance due to such Force Majeure Event). The affected Party shall use reasonable efforts to remedy with all reasonable dispatch the cause or causes preventing it from carrying out its obligations under this Agreement. Notwithstanding anything to the contrary in this Agreement, the Contractor may not rely on either its own acts or omissions or the absence of immediately available funds as grounds for any Force Majeure Event or for any delay in its performance.

34. AUTHORITY TO TRANSACT BUSINESS

Contractor must, consistent with Code of Virginia § 2.2-4311.2, be and remain registered with and authorized to transact business in the Commonwealth of Virginia during the entire term of this Agreement. Otherwise, this Agreement is voidable at the sole option of, and with no expense to, the City. In addition, Contractor shall keep and maintain in good standing its Class A Contractor's License issued by the Virginia Department of Professional and Occupational Regulation.

35. RELATION TO THE CITY

Contractor is an independent contractor, and neither Contractor nor its employees or subcontractors will be considered employees, servants or agents of the City. The City will not be responsible for any negligence or other wrongdoing by Contractor or its employees, servants or agents. The City will not withhold payments to Contractor for any federal or state unemployment

taxes, federal or state income taxes or Social Security tax or for any other benefits. The City will not provide to Contractor any insurance coverage or other benefits, including workers' compensation.

36. [INTENTIONALLY OMITTED]

37. REPORT STANDARDS

Contractor must submit all written reports required by this Agreement for advance review in a Contractor-selected format approved by the Project Manager, unless otherwise specified in the Contract Documents. Reports must be timely and must accurately reflect the status of the Project as of the date of the report. Contractor will bear the cost of correcting any inaccuracies contained in the report data and any other revisions that are required to bring the report(s) into compliance with this section.

38. AUDIT

Contractor shall make available to the City, upon City's written request, all books and records relating or pertaining to the Contract Documents (in whatever form they may be kept whether written or electronic), including, but not limited to, contracts, purchase orders, and other agreements between any and all subcontractors and vendors engaged by Contractor in performance of its obligations under the Contract Documents. In addition, Contractor must retain all books, records and other documents related to this Agreement for at least five (5) years after Final Payment and must allow the City or its authorized agents to examine the documents during this period and during the term of this Agreement. Contractor must provide any requested documents to the City for examination within fifteen (15) days of Contractor's receipt of such request, at Contractor's expense. Should the City's examination reveal any overcharging by Contractor, Contractor must, within thirty (30) days of the City's request, reimburse the City for the overcharges and for the reasonable costs of the City's examination commensurate with the amount of the overcharge, including, but not limited to, the services of external audit firm and reasonable attorney's fees; or after the expiration of that thirty (30) day period, the City may deduct the overcharges and examination costs actually incurred from any amount that the City owes to Contractor. If Contractor wishes to destroy or dispose of any records related to this Agreement (including confidential records to which the City does not have ready access) within five (5) years after Final Payment, Contractor must give the City at least thirty (30) days' notice and must not dispose of the documents if the City objects. The books and records, together with the supporting or underlying documents and materials shall be made available, upon request, to the City's employees, agents, representatives, contractor's or other designees, during normal business hours at Contractor's office or place of business in Newport News, Virginia. In the event Contractor no longer maintains an office in that City, then the books and records, together with the supporting or underlying documents and records, shall be made available for audit at a time and location chosen by the City. Documents and information pertaining to proprietary means and methods, and not specifically relating to costs paid by the City to Contractor, that are provided by Contractor for the City's review under this paragraph shall be identified to and managed by the City in the manner prescribed in Section 30.

39. SUCCESSORS AND ASSIGNS; ASSIGNMENT

Except as expressly otherwise provided, all of the terms, covenants and conditions hereof shall be binding upon and inure to the benefit of the Parties and their respective successors and permitted assigns. Contractor may not assign, transfer, convey, or otherwise dispose of any award or any of its rights, obligations or interests under this Agreement without the prior written consent of the City, which consent may be granted or withheld by the City in its sole discretion.

40. AMENDMENTS

This Agreement may not be modified, altered, or changed except by written amendment executed by both Parties by persons duly authorized to bind both Contractor and the City.

41. DISPUTE RESOLUTION. The required procedure for the City's consideration of claims by Contractor is set forth in Section 3.3 of the General Conditions.

42. APPLICABLE LAW, FORUM, VENUE, AND JURISDICTION

This Agreement is governed in all respects by the laws of the Commonwealth of Virginia; and the exclusive jurisdiction, forum and venue for any litigation concerning or arising out of this Agreement or the Work shall be the Circuit Court or the General District Court for the City of Hampton, Virginia, and in no other court.

43. NO ARBITRATION

No claim arising under or related to this Agreement may be subject to arbitration.

44. NON-EXCLUSIVITY OF REMEDIES

All remedies available to the City or Contractor under this Agreement are cumulative, and no remedy will be exclusive of any other at law or in equity.

45. NO WAIVER

The failure of the City or Contractor to insist upon the strict performance of any provisions of this Agreement, the failure of the City or Contractor to exercise any right, option or remedy hereby reserved, or the existence of any course of performance hereunder shall not be construed as a waiver of any provision hereof or of any such right, option or remedy or as a waiver for the future of any such provision, right, option or remedy or as a waiver of a subsequent breach thereof. The consent or approval by the City of any act by Contractor requiring the City's consent or approval shall not be construed to waive or render unnecessary the requirement for the City's consent or approval of any subsequent similar act by Contractor. No provision of this Agreement shall be deemed to have been waived unless such waiver shall be in writing signed by the Party to be charged.

46. SEVERABILITY

The sections, paragraphs, clauses, sentences, and phrases of this Agreement are severable and if any section, paragraph, clause, sentence or phrase of this Agreement is declared invalid by a court of competent jurisdiction, the rest of this Agreement will remain in effect.

47. ATTORNEYS' FEES AND OTHER LITIGATION EXPENSES

Contractor and City agree that in the event of litigation arising from this Agreement, each Party will bear the responsibility for the payment of all of its own litigation expenses, including actual attorney's fees, appellate attorney's fees, and court costs, regardless of which Party initiates the litigation and regardless of the outcome.

48. SURVIVAL OF TERMS

In addition to any statement that a specific term or paragraph survives the expiration or termination of this Agreement, the following sections in this Agreement (and any corresponding provisions in the other Contract Documents applicable to such subject matter) shall also survive to the maximum extent permitted by applicable law: INDEMNIFICATION; INTELLECTUAL PROPERTY INDEMNIFICATION; RELATION TO CITY; OWNERSHIP AND RETURN OF RECORDS; AUDIT; COPYRIGHT; DISPUTE RESOLUTION; APPLICABLE LAW, FORUM, VENUE, AND JURISDICTION; ATTORNEYS' FEES; AND APPLICABILITY OF THE VIRGINIA FREEDOM OF INFORMATION ACT.

49. HEADINGS

The section headings in this Agreement are inserted only for convenience and do not affect the substance of this Agreement or limit the section's scope.

50. AMBIGUITIES

The Parties and their counsel have each participated fully in the drafting of this Agreement, and any rule that ambiguities are to be resolved against the drafting Party does not apply. The language in this Agreement is to be interpreted as to its plain meaning and not strictly for or against any Party.

51. WAIVER OF CLAIMS FOR CONSEQUENTIAL DAMAGES

Contractor and the City waive claims against each other for consequential damages arising out of or relating to this Contract. This mutual waiver includes: (i) damages incurred by the City for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or the services of such persons; and (ii) damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit except anticipated profit arising directly from the Work. Nothing in this Section 51 shall be deemed to preclude or waive the assessment or award of liquidated damages, when applicable, in accordance with the requirements of the Contract Documents.

52. NOTICES and DAILY COMMUNICATIONS

All legal notices and other formal communications required by this Agreement are deemed to have been given and received when either (a) delivered in person; (b) one (1) Business Day after being deposited with a nationally recognized overnight courier for overnight delivery; or (c) three (3) Business Days after being deposited with the United States Postal Service, certified mail, with return receipt requested, postage prepaid, and in each case addressed as follows:

TO CITY: City Manager
 22 Lincoln Street
 Hampton, Virginia 23669

With a copy to: Lavinia Whitley
Deputy Director Finance/Procurement
City of Hampton
1 Franklin Street, Suite 345
Hampton, Virginia 23669

City Attorney
22 Lincoln Street, 8th Floor
Hampton, Virginia 23669

TO CONTRACTOR:

Clancy & Theys Construction Co.
Attention: William J. Goggins, Sr.
11830 Fishing Point Drive, Suite 201
Newport News, Virginia 23606

With a copy to: Kelley C. Holland, Esq.
Williams Mullen
999 Waterside Drive, Suite 1700
Norfolk, Virginia 23510

Routine, day-to-day communications between the Project Manager and Contractor may be by e-mail. Change Orders, Construction Change Directives, Notice(s) of Claims, and order to suspend work, and notices of default or breach of the Contract Documents by either Party must be given and received only by formal written notice outlined above; however, with respect to Change Orders and Construction Change Directives, once signed by both Parties, the fully executed Change Orders and Construction Change Directives may be exchanged by delivery of a scanned .pdf copy of the executed document by email.

The following email addresses shall be used for day-to-day communication, and may be changed at any time by either Party upon written notice to the other:

Project Manager:
toneill@hampton.gov (Terry O'Neill) and rsterlin@hampton.gov (Ron Sterling)

City Consultants:
jyatzeck@mbpce.com (Jim Yatzeck) and kevinpost@chh2o.com (Kevin Post)

Contractor:
nicoleanderson@clancytheys.com (Nicole Anderson) and
billgoggins@clancytheys.com (Bill Goggins)

Contractor shall copy both Project Manager addressees set forth above on any and all emails transmitted to City Consultants.

53. NON-DISCRIMINATION NOTICE

Consistent with Code of Virginia §2.2-4343.1, as it may be amended from time to time, the City does not discriminate against faith based organizations.

54. INSURANCE, PAYMENT, AND PERFORMANCE BONDS

As a condition to the City's execution of this Agreement, Contractor will be required to furnish payment and performance bonds in the amount of the Guaranteed Maximum Price ("Performance and Payment Bonds"). All bonds shall be executed by a corporate surety or corporate sureties that are reasonably acceptable to the City, and duly authorized to do business in the Commonwealth of Virginia, which meet the requirements of Code of Virginia §2.2-4337, as it may be amended from time to time, and are executed in a form acceptable to the City, which acceptance shall not be unreasonably withheld by the City. Contractor shall also furnish any cash escrow, funds, cashier's checks, certified checks, or letters of credit required for the City's issuance of any earth-disturbing or other permit and any bonds or security required by VDOT or any other governmental authority. In addition to the payment and performance bond required above, Contractor shall obtain and maintain, and/or shall cause its subcontractors to obtain and maintain insurance coverage required by the Insurance Requirements, attached hereto as Attachment I, through Final Completion and, as applicable, through all warranty and guarantee periods as provided by the Contract Documents.

55. TIME OF THE ESSENCE

The time to complete construction of the Work is of the essence of this Agreement. Contractor shall proceed expeditiously with adequate forces and make diligent efforts to perform all portions of the Work in accordance with the Project Schedule, the Construction Schedule, and the Milestone Dates applicable to the respective portions of the Work, and Contractor shall achieve Substantial Completion of the Work and Final Completion of the Work within the Time for Completion and Milestone Dates specified in the Contract Documents. The City will cooperate reasonably with Contractor's efforts to keep the Project on schedule.

56. COUNTERPARTS

This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of such counterparts together shall be deemed to be one and the same instrument.

57. ANNUAL APPROPRIATIONS; FILING WITH AUDITOR OF PUBLIC ACCOUNTS

The financial obligations of the City contained in this Agreement are subject to annual appropriation. Within thirty (30) days after the date of this Agreement, the City shall submit a copy of this Agreement to the Auditor of Public Accounts to the extent required by Code of Virginia §56-575.9(F) (as amended).

58. FINANCIAL STATEMENTS

Contractor agrees to provide the City with copies of its most recently completed and current annual financial statements no later than fifteen (15) days after the execution of this Agreement, and thereafter by April 1st of each calendar year during the term of this Agreement. The financial statements provided need not be audited, but if Contractor does have the financial statements audited, they shall supplement their initial submission of unaudited financial statements for the year concerned with copies of audited statements within thirty (30) days after they become

available. If Contractor seeks to protect those financial statements provided pursuant to this Section from release under the VFOIA, Contractor shall identify those documents to the City and the City shall manage those documents in the manner prescribed in Section 30.

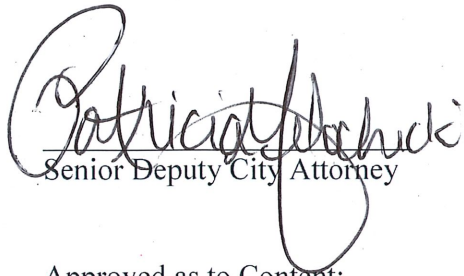
59. CONDITION PRECEDENT TO AGREEMENT'S EFFECTIVENESS

It shall be a condition precedent to this Agreement's effectiveness that it first be approved by the City Council of the City as evidenced by the signature of the City Manager on behalf of the City on the signature page hereof.

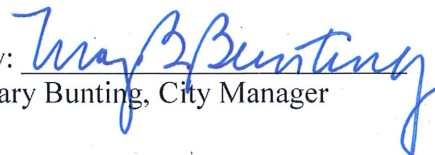
[Remainder of page intentionally left blank. Signature pages follow.]

IN WITNESS WHEREOF, the Parties have executed this Comprehensive Agreement effective as of the day and year first above written.

Approved as to form and legal sufficiency:

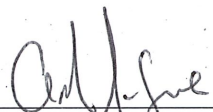

Senior Deputy City Attorney

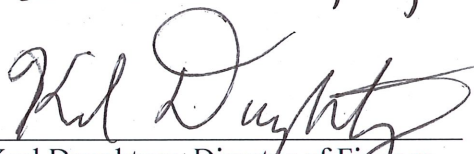
CITY OF HAMPTON, a municipal corporation of the Commonwealth of Virginia

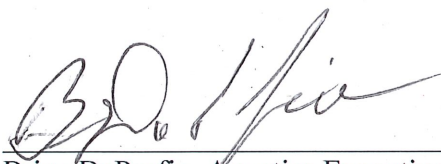
By: 
Mary Bunting, City Manager

Approved as to Content:


Terry O'Neill, Director of Community Development


~~Ron Sterling, Project Manager, Public Works~~
McLORD Newsome, Engineer

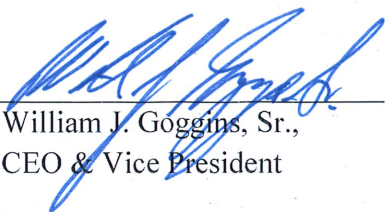

Karl Daughtrey, Director of Finance


Brian DeProfio, Aquatics Executive Committee Chair and Assistant City Manager

[Signature page of Contractor follows.]

**CLANCY & THEYS CONSTRUCTION
CO., a North Carolina corporation**

By: _____


William J. Goggins, Sr.,
CEO & Vice President

[Contractor's signature page to Comprehensive Agreement]

ATTACHMENT A
REVISED PROPOSAL

[Attached hereto]

ATTACHMENT B

THE PROPERTY

1908 Coliseum Drive:

ALL that certain piece or parcel of land, with all the improvements thereon, lying and being in the City of Hampton, Virginia, containing 5.203 acres, situated at the northeast corner of the intersection of Coliseum Drive and Pine Chapel Road, and being further designated and described as follows:

BEGINNING at a rod marking the intersection of the east line of Coliseum Drive with the north line of Pine Chapel Road; thence north $21^{\circ} 15'$ west 420 feet to a rod; thence north $68^{\circ} 45'$ east 460.82 feet to a rod; thence south $18^{\circ} 22' 15''$ east 593.11 feet to a rod and the north line of Pine Chapel Road; thence along and fronting on the north line of Pine Chapel Road N. $89^{\circ} 30' 25''$ west 230.40 feet to a rod; thence north $87^{\circ} 35' 50''$ west 105.18 feet to a rod; thence south $89^{\circ} 07' 30''$ west 128.73 feet to a rod marking the place of beginning; all as shown on plat of survey made by William M. Sours-Surveyor, dated March 9, 1971, a copy of which is recorded in the Clerk's Office of the Circuit Court for the City of Hampton, Virginia, in Deed Book 461, page 229.

and

1914 Coliseum Drive:

All that certain tract or parcel of land, together with all improvements thereon and appurtenances thereto belonging, located in the City of Hampton, Commonwealth of Virginia, beginning at the southeast corner of lot known as "Y-1", property of JAY-SAN, Inc., said corner being also in the northerly boundary of land of Florenz Orisman and lying N 68 degrees 45 minutes 00 seconds E a distance of 250 feet from the easterly side of Coliseum Drive along the division line between said properties of JAY-SAN, Inc. and Florenz Orisman; thence from the point of beginning thus established N 21 degrees 15 minutes 00 seconds W along the easterly line of property of JAY-SAN, Inc., a distance of 160 feet to a point in the southerly boundary of lands of Coliseum Gardens L.P.; thence along southerly boundary of said Coliseum Gardens L.P., N 68 degrees 45 minutes 00 seconds E a distance of 218.87 feet to a point; thence following the westerly boundary of Coliseum Gardens L.P. S 18 degrees 22 minutes 15 seconds E a distance of 160.20 feet to a point; thence S 68 degrees 45 minutes 00 seconds W along the northerly boundary line of the land of the said Florenz Orisman a distance of 210.82 feet to the point or place of beginning and containing 34,375.2 square feet or 0.7891 of an acre.

Being also the northeasterly corner of properties conveyed to Best Products Co., Inc., from Bulkeley Corporation in Deed Book 431, Page 188 and from Benjamin HJ. And Florence M. Fiscella in Deed Book 431, Page 645, and being further the easterly portion of lot designated as Lot "Y" on plat by W. M. Sours, Surveyor, recorded in Deed Book 473, Page 145.

ATTACHMENT C
GET GEOTECHNICAL REPORT

[Attached hereto]

ATTACHMENT D
CITY OF HAMPTON AQUATICS CENTER DESIGN AND FUNCTIONALITY
REQUIREMENTS

[Attached hereto]

ATTACHMENT E
CITY OF HAMPTON COLISEUM CENTRAL DESIGN GUIDELINES

[Attached hereto]

ATTACHMENT F
SCOPE OF WORK

[Attached hereto]

ATTACHMENT G
GENERAL CONDITIONS

[Attached hereto]

ATTACHMENT H
PROJECT SCHEDULE

[Attached hereto]

ATTACHMENT I
INSURANCE REQUIREMENTS

[Attached hereto]

ATTACHMENT J
TOPOGRAPHIC SURVEY

[Attached hereto]

ATTACHMENT K
CITY OF HAMPTON PPEA GUIDELINES

[Attached hereto]

ATTACHMENT L
GUARANTEED MAXIMUM PRICE CERTIFICATION

[Attached hereto]