

COMPREHENSIVE AGREEMENT

This COMPREHENSIVE AGREEMENT (this “*Agreement*”) is entered into this _____ day of _____, 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-5. The City formally approved the Project as part of its 5-Year 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 an ancillary splash park approved for Fiscal Year 2022 at a cost of \$4,500,000; and further approved funding necessary for the primary portion of the Project with the approval and adoption of the Council Approved Fiscal Year 2020 Budget on May 8, 2019. Other funding also has been or is expected to be appropriated for preliminary design and engineering work, as well as the ancillary splash park.

R-4. 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 by GET Solutions, Inc. dated April 19, 2018, attached as Attachment C, and 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 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 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 and all attachments referenced therein 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, and that certain letter dated August 5, 2019)

Attachment B – The Property

Attachment C – GET Solutions Study dated April 19, 2018, and as supplemented January _____, 2020

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

Attachment E – City of Hampton Coliseum Central Design Guidelines

Attachment F - Scope of Work

Attachment G – General Conditions

Attachment H - Project Schedule

Attachment I - Insurance Requirements

Attachment J – Topographic Survey of the former Best Products Site dated September, 2004, 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

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.

Where the terms and provisions of this Agreement vary from the terms and provisions of the other Contract Documents, the order of precedence of the Contract Documents shall be (1) this Agreement, including any Attachments thereto (but specifically excluding the General Conditions at Attachment G) and any modifications and amendments thereto; then (2) the General Conditions at Attachment G, including any modifications, amendments, or change orders thereto; and then (3) the Construction Documents prepared and approved in accordance with Section A3.1 of the Scope of Work and the other Contract Documents. The Revised Proposal at Attachment A is not intended to contradict this Agreement, and in the event of any conflict or inconsistency between this Agreement and that Attachment, this Agreement shall prevail. All of the other Attachments to this Agreement shall be considered complementary documents, and what is in one Attachment shall be considered in all others; and where the terms, conditions, or requirements of this Agreement, any of the Attachments, or the other Contract Documents vary in any respect, the most stringent shall apply.

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

The performance of Contractor is subject to the review and approval of the Project Manager, who has been assigned by the City Manager or her designee. The City shall notify Contractor of the name of the initial person serving as the Project Manager, who may be replaced by the City from time to time in its sole discretion.

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 “turn-key” Project that fully complies with or exceeds the Design Criteria forth 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 Project shall proceed in two phases: the Design Confirmation Phase and the Implementation Phase, which phases are more specifically described in the Scope of Work.

During the Design Confirmation Phase, Contractor will meet with City representatives and other stakeholders designated by the City to discuss the Revised Proposal and incorporate any revisions to the Revised Proposal that may be requested by the City. At the conclusion of the Design Confirmation Phase, the City and Contractor will have agreed on a basis of design, which will form the basis for the iterative design process that will follow during the Implementation Phase.

The Implementation Phase will have two stages: the Design Implementation Stage and the Construction Implementation Stage. During the Design Implementation Stage, Contractor will: (i) advance the design and budget for the Project in iterative steps, each involving the review and input of the Project Manager, such that at the end of this stage Contractor will have produced, and the Project Manager will have approved, the *IFC Set*; and (ii) submit for and receive all necessary permits and approvals from Code Officials for the construction of the Project. During the Construction Implementation Stage, Contractor shall construct the Project in accordance with the IFC Set, the approvals provided by the Code Officials, the Contract Documents, and all applicable codes and ordinances.

The Work shall be performed according to the standards established by the Contract Documents, all of which are incorporated by reference and are to be read together as a single specification. 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 of the Code of Virginia, 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 thoroughly 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 Guaranteed Maximum Price. Contractor 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.
- C. Contractor has been provided with an opportunity to visit the Property and is familiar with local conditions under which the Work is to be performed. By entering into this Agreement, Contractor assumes the following risks: (1) the nature of the land and subsoil; (2) the form and nature of the site and surrounding areas; (3) details and levels of existing pipe lines, conduits, sewers, drains, cables or other existing services; (4) the quantities, nature and availability of the materials, tools, equipment and labor necessary for the completion of the Work; (5) the means of access to the site and any accommodation that may be required; (6) uncertainties of weather and physical conditions at the site; and (7) in general, has itself obtained all necessary information as to risk contingencies, climatic, hydrological and natural conditions and other circumstances that may influence or affect its performance of the Work.
- D. 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.
- E. 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.

- F. Contractor 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.
- G. There are no actions, suits, investigations or proceedings (whether or not purportedly on behalf of the Contractor) pending or, to the knowledge of Contractor, 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 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.
- H. To its best knowledge, Contractor is not a party to or otherwise bound by any agreement or instrument or subject to any other restriction or any judgment, order, writ, injunction, decree, award, rule or regulation which materially and adversely affect the business, operations, prospects, properties or other assets, or the condition, financial or otherwise, of Contractor or of the Project. Contractor has received no notice of, and to its best knowledge, is not in default (1) under any obligation for borrowed money, or (2) in the performance, observance or fulfillment or any of the obligations, covenants or conditions contained in any other agreement or instrument to which it is a party, by which it is otherwise bound or to which any of its property or the Project is subject.
- I. To Contractor's best 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. 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 addition, the Project shall be developed in accordance with City's Coliseum Central Design Guidelines attached as Attachment E, and as further outlined in the Design Criteria. 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 regulatory authority, 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 services 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.

Contractor shall be strictly liable for the performance of the Work in full compliance with this Agreement and the other Contract Documents.

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 no later than _____ calendar days after the Construction NTP is issued by the City, subject to any modifications made as provided for in the Contract Documents. Such period shall be the Time for Completion for achieving Substantial Completion. 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 be achieved by Contractor no later than 45 calendar days after the date of acceptance of Substantial Completion by the Project Manager (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 is the Contract Cost Limit ("**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 a cap on Contractor's compensation, which is the sum of the costs set forth in subsection a below. As the design is refined, a Guaranteed Maximum Price (or "**GMP**") shall be established that will be less than or equal to the CCL, and shall be the maximum amount payable to the Contractor, subject to increase and decrease by agreed to Change Orders, Construction Change Directive, 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 City estimates of the GMP at the completion of the following design phases: 35% Design Document submission, 65% Design Document (Construction Document 1) submission, and 90% Design Document (Construction Document 2) submission. The GMP estimate at the 65% Design Document and the 90% Design Document submissions 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, and should also be the basis for the final Control Budget submitted in accordance with Section 3.1.16 of the Scope of Work. In addition:

- i. The GMP shall be established at the time of the Project Manager's approval of the 65% Design Documents. For that purpose, the City shall also at that time identify for Contractor so that that information may also be considered when the 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. Once established, the GMP shall be the maximum sum that the City shall pay Contractor in total for the Work on the Project, except as otherwise provided in the Contract Documents.
 - ii. In consideration of the tasks and compensation structure outlined in the Scope of Work, the Contractor and City shall further agree on the amount of the established GMP allocable to and payable based on each of the following categories: (1) Design and Administration Fees; (2) Construction Fees; (3) Contractor Fee; and (4) Contingency Fees.
 - iii. If at any time during construction it becomes apparent to Contractor that the anticipated final cost of the Work will exceed the GMP, the Contractor shall promptly notify the Project Manager and of any proposed action to reduce costs (and without a reduction in quality) or shall advise the Project Manager of the intent to submit a claim for extra cost in accordance with Section 7.4 of the General Conditions.
- b. Contractor covenants and agrees that, except for such increases to the GMP as expressly authorized in the Contract Documents, it will deliver a fully 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 sixty (60) days of Final Completion, Contractor shall provide to the Project Manager a detailed and complete accounting of the cost of 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, 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 and Administrative Fees retained in accordance with this Section 12 shall be payable to Contractor upon completion of

the Design Implementation Stage. 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 Purchase Order in advance of the transaction, indicating that the ordering City department has sufficient funds available to pay for the purchase. If Contractor provides goods or services without a signed City Purchase Order, 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 authorized by the Project Manager.

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 City 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 12(b), above. Unless otherwise provided under the terms of this Agreement, interest will accrue at the rate of 1% per month. Contractor's obligation to pay an interest charge to a subcontractor pursuant to this section may 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 shall be deemed to have occurred, Contractor must submit to the Project Manager a signed original notarized copy of the Release and Request for Final Payment form set forth in Section 7.8 of the General Conditions.

16. AUDIT

The City shall have the right to audit all books and records (in whatever form they may be kept, whether written, electronic or other) relating or pertaining to the Contract Documents (including any and all documents and other materials, in whatever form they may be kept, which support or underlie those books and records), kept by or under the control of Contractor, including, but not limited to those kept by Contractor, its employees, agents, assigns, successors, and subcontractors. Contractor shall maintain such books and records, together with such supporting or underlying documents and materials, for the duration of the Agreement and for at least three (3) years following the completion of the Agreement. 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 Hampton Virginia. In the event that no such location is available, 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.

17. 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 \$_____ per day for each and every day after the expiration of the Time for Completion for Substantial Completion that it takes for the City to determine that Substantial Completion of the Work has been achieved. 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 \$_____ per day for each and every day beyond the Final Completion Deadline that it takes for the City to determine that Final Completion of the Work has been achieved.

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 a 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.

18. 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. The City will provide reasonable evidence of funding for the Project to Contractor upon its request.

19. LIENS

- A. It is expressly agreed that after any payment, including partial and progress payments, 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 an 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.

20. 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.

21. 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.

22. 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.

23. REPLACEMENT OF PERSONNEL AND SUBCONTRACTORS

In addition to the terms and conditions set forth in Section 5 of the Scope of Work, the City has the right to reasonably reject staff or subcontractors whom Contractor assigns to the Project. Contractor must then provide replacement staff or subcontractors satisfactory to the City in a timely manner and at no additional cost to the City. The day-to-day supervision and control of Contractor's and its subcontractors' employees is the sole responsibility of Contractor.

24. FAILURE TO DELIVER

If Contractor fails to deliver the Work in accordance with the terms and conditions of this Agreement, the City, in its sole and absolute discretion and after notice to Contractor and an opportunity to cure as specified in the City's cure notice, 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.

25. UNSATISFACTORY WORK

If any of the Work done, or material, goods, or equipment provided by Contractor does not fully comply with the requirements of the IFC Set or the Design Criteria, Contractor must, upon notice from the City, immediately remove, at Contractor's expense, such unsatisfactory Work, material,

goods, or equipment and replace the same with Work, material, goods, or equipment satisfactory to the City. 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, 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 during the term of this Agreement and during any warranty or guarantee period. 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.

26. 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 or has failed to perform the Work satisfactorily; 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.

Any purchases that Contractor makes after the notice of termination will be the sole responsibility of Contractor, unless the City 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, INCLUDING BREACH AND DEFAULT; CURE

1. Termination for Unsatisfactory Performance. If the City determines that Contractor has failed to perform satisfactorily, then the City will give Contractor written notice of such failure(s) and the opportunity to cure all such failures within fifteen (15) days or any other longer period specified by the City ("**Cure Period**"). If Contractor fails to cure any failure within the Cure Period, the City may terminate this Agreement for failure to provide satisfactory performance by providing written notice with a termination date. Contractor must submit any request for termination costs, with all supporting documentation, to the Project Manager within thirty (30) days after the expiration of the Cure Period. The City may accept or reject the request for termination costs, in whole or in part, and may notify Contractor of its decision within a reasonable time. Unsatisfactory performance shall include, but not be limited to, failure of the Contractor to substantially comply with the Construction Schedule and the Control Budget at any point in time during the Construction Implementation Stage.

In the event of termination by the City for failure to perform satisfactorily, Contractor must continue to provide its services as previously scheduled through the termination date, and the City must continue to pay all legitimate fees and charges incurred through the termination date.

2. Termination for Breach or Default. If the City terminates this Agreement for default or breach of any provision or condition of this Agreement, then the termination shall be effective immediately after notice of termination to Contractor (unless the City expressly provides for an opportunity to cure in such notice), and Contractor will not be permitted to seek termination costs.

Upon any termination pursuant to this subsection 2, the City may enter upon the Property and take possession, for the purpose of completing the Work, of all materials, equipment, scaffolds, tools, appliances, and other items thereon that have been purchased or provided for the performance of the Work, all of which Contractor hereby transfers, assignments, and sets over to the City for such purpose, and to employ any person or persons to complete the Work and provide for all of the required labor, services, materials, equipment, and other items. In the event of such termination, Contractor 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 of completing 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 attorneys' fees and expenses, incurred by the City in connection with the re-procurement and defense of claims arising from Contractor's 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 within fifteen (15) days of a demand by the City. The terms of this subsection 2 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 date Contractor receives notice of termination from the City.

3. Termination for Insolvency. The filing by the Contractor of a voluntary proceeding or the consent by the Contractor to an involuntary proceeding under present or future 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 unslayed for any period of 90 consecutive days.

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 fifteen (15) 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.

27. 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, costs (including court costs and attorneys' fees), charges, liability, demands or exposure resulting from, arising out of or in any way connected with Contractor's negligent acts or omissions, including the acts or omissions of its employees, vendors, delivery drivers and/or subcontractors, in performance or nonperformance of this Agreement. 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. Contractor must pay such expenses upon demand by the City, and failure to do so may result in the City withholding such amounts from any payments to Contractor under this Agreement.

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 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.

28. INTELLECTUAL PROPERTY INDEMNIFICATION

Contractor warrants and guarantees that in providing services under this Agreement 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 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. Contractor must pay such expenses upon demand by the City, and failure to do so may result in the City withholding such amounts from any payments to Contractor under this Agreement.

29. COPYRIGHT

By this Agreement and subject to the provisions of Section 30, 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 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.

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.

30. 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.

As progressively paid by the City to Contractor, 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 must be provided to or returned to the City upon completion, termination, or cancellation of this Agreement, if not so provided sooner. 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 or other rights set forth herein. Contractor will not use or allow others to use the Work Product for any purpose other than performance of this Agreement without the written consent of the City. 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 Contractor pursuant to this Agreement without written verification, adaptation, 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.

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. At the City's request, Contractor will deliver all Work Product, including hard copies of electronic files, to the Project Manager, and Contractor will destroy all electronic files.

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.

31. 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, Company shall (i) provide a statement that invokes protection from the VFOIA, 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) submit trade secrets and other proprietary information under separate cover in a sealed envelope clearly marked “PROPRIETARY”. 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.

32. 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.

33. 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.

34. 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.

35. 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.

36. 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.

37. ANTITRUST

Contractor conveys, sells, assigns and transfers to the City all rights, title and interest in and to all causes of action under state or federal antitrust laws that Contractor may have relating to this Agreement.

38. REPORT STANDARDS

Contractor must submit all written reports required by this Agreement for advance review in a format approved by the Project Manager. 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.

39. AUDIT

Contractor shall make available to the City, upon City's written request, all contracts, purchase orders, and other agreements between any and all subcontractors and vendors engaged by Contractor in performance of its obligations under this Agreement. 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 the 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, including, but not limited to, the services of external audit firm and attorney's fees; or the City may deduct the overcharges and examination costs 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, or such period of time required by the City's funding partner(s), if any, whichever is greater, Contractor must give the City at least thirty (30) days' notice and must not dispose of the documents if the City objects.

40. 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.

41. AMENDMENTS

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

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

43. APPLICABLE LAW, FORUM, VENUE, AND JURISDICTION

This Agreement is governed in all respects by the laws of the Commonwealth of Virginia; and the 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.

44. NO ARBITRATION

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

45. 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.

46. 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.

47. 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.

48. ATTORNEYS' FEES

Contractor agrees that in the event of litigation arising from this Agreement any judgment awarded to City against Contractor shall include all litigation expenses, including actual attorney's fees, appellate attorney's fees, and court costs. Contractor further agrees that City shall not be responsible for Contractor's litigation expenses, regardless of the outcome.

49. 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 shall also survive: INDEMNIFICATION;

INTELLECTUAL PROPERTY INDEMNIFICATION; RELATION TO CITY; OWNERSHIP AND RETURN OF RECORDS; AUDIT; COPYRIGHT; DISPUTE RESOLUTION; APPLICABLE LAW, FORUM, VENUE, AND JURISDICTION; ATTORNEY’S FEES; AND CONFIDENTIAL INFORMATION.

50. 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.

51. 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.

52. NOTICES and DAILY COMMUNICATIONS

All legal notices and other formal communications required by this Agreement are deemed to have been given 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

TO CITY’S CONSULTANTS:

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.
11830 Fishing Point Drive, Suite 201
Newport News, Virginia 23606

Routine, day-to-day communications between the Project Manager and Contractor may be by e-mail. 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:

Contractor shall copy the Project Manager addressees 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. 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. 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 itemized in Attachment I through Final Completion and, as applicable, through all warranty and guarantee periods 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. It shall not be necessary in making proof of this Agreement or any counterpart to produce or account for the other counterpart.

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 §56-575.9(F) of the Code of Virginia (as amended).

58. FINANCIAL STATEMENTS

Contractor agrees to provide the City with copies of complete and current financial statements for Contractor on an annual basis. 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. Contractor hereby designates such financial statements as confidential proprietary information exempt from release under the Virginia Freedom of Information Act.

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 page follows.]

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:

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

Senior Deputy City Attorney

By: _____
Mary Bunting, City Manager

Approved as to Content:

Terry O'Neill, Director of Community Development

Ron Sterling, Project Manager, Public Works

Karl Daughtrey, Director of Finance

Brian DeProfio, Aquatics Executive Committee Chair and Assistant City Manager

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

By: _____
Name: _____
Title: _____

DRAFT 12.31.19

ATTACHMENT A
REVISED PROPOSAL

DRAFT 12.31.19

ATTACHMENT B

THE PROPERTY

Proposed Site (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.

Adjacent Site (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

DRAFT 12.31.19

ATTACHMENT D

**CITY OF HAMPTON AQUATICS CENTER DESIGN AND FUNCTIONALITY
REQUIREMENTS**

DRAFT 12.31.19

ATTACHMENT E

CITY OF HAMPTON COLISEUM CENTRAL DESIGN GUIDELINES

DRAFT 12.31.19

ATTACHMENT F
SCOPE OF WORK

DRAFT 12.31.19

ATTACHMENT G
GENERAL CONDITIONS

DRAFT 12.31.19

ATTACHMENT H
PROJECT SCHEDULE

DRAFT 12.31.19

ATTACHMENT I
INSURANCE REQUIREMENTS

DRAFT 12.31.19

ATTACHMENT J
TOPOGRAPHIC SURVEY

DRAFT 12.31.19

ATTACHMENT K

CITY OF HAMPTON PPEA GUIDELINES

DRAFT 12.31.19