

**RFQ 38-23, Construction Manager at Risk – Fire Station 47
CMAR Services Contract**

This CONTRACT made and entered into on this _____ day of _____, 20___, by and between the City of Clearwater, Florida, a municipal corporation, hereinafter designated as the “City” or “Owner”, and Biltmore Construction Company, Inc., authorized to do business in Pinellas County and State of Florida, hereinafter designated as the “Construction Manager”. The contracting entities shall collectively be known as the “Parties.”

WITNESSETH:

WHEREAS, the Clearwater City Council has approved using the Construction Manager at Risk approach on appropriate projects as determined by the City’s Engineering Department; and

WHEREAS, the City desires to engage the services of the Construction Manager to provide management of the necessary construction, design, and preconstruction services (collectively referred to as the “Services”) subject to the terms and conditions set forth in this Contract and any agreement incorporated into this Contract by reference; and

WHEREAS, the City selected the Construction Manager in accordance with the competitive selection process based on information and representations given by the Construction Manager in a response to Request for Qualifications 38-23.

NOW, THEREFORE, IT IS AGREED BY AND BETWEEN THE PARTIES THAT THE ABOVE RECITALS AND REPRESENTATIONS ARE TRUE AND ACCURATE AND ARE INCORPORATED HEREIN BY REFERENCE AND THE PARTIES FURTHER AGREE AS FOLLOW:

ARTICLE 1: SCOPE OF WORK, CONTRACT DOCUMENTS, AND TERM

- 1.1 The Construction Manager and its successors, assigns, executors or administrators, in consideration of the sums of money, as herein after set forth to be paid by the City to the Construction Manager, shall and will at its own cost and expense perform all labor, furnish all materials, tools and equipment for all individual projects assigned as a result of this Contract.
- 1.2 For each individual project assigned, in accordance with such proposal and technical supplemental specifications and such other special provisions and drawings, if any, which will be submitted by the City, together with any advertisement, instructions to bidders, general conditions, proposal and bond, which may be hereto attached, and any drawings, if any, which may be herein referred to, are hereby made a part of this Contract, and all of said work to be performed and completed by the contractor and its successors and assigns shall be fully completed in a good and workmanlike manner to the satisfaction of the City.
- 1.3 Unless otherwise specified in this Contract, all work shall be completed in accordance with **Section III** and **Section IV** of the **City of Clearwater Contract Specifications** (the “Specifications”). For the purposes of this Contract, the term Contractor in Section III shall include the Construction Manager. The Specifications, as may be supplemented and changed, along with this Contract constitute the “Contract Documents.” All terms and

conditions set forth in RFQ 38-23, Standard Terms and Conditions are incorporated by reference and attached hereto. Any inconsistency in documents relating to this Contract shall be resolved by giving precedence in the following order: (i) Proposals(s); (ii) this Contract and any amendments; (iii) Specifications; (iv) RFQ 38-23, Standard Terms and Conditions.

- 1.4 The term of this Contract shall commence upon execution of this Contract by the Parties and shall terminate after completion and acceptance of the Projects as provided herein and upon final payment in accordance with the Contract Documents.

ARTICLE 2: CONSTRUCTION MANAGER'S DUTIES AND STATUS

- 2.1 The Construction Manager recognizes the relationship of trust and confidence established between it and the City by this Contract, and agrees with the City to furnish its best skill and judgment and the overall supervision of its executives; to furnish efficient business administration and superintendence; and to use every effort to keep upon the project site at all times an adequate supply of workforce and materials to secure its execution and completion in the most expeditious and economical manner.
- 2.2 The Construction Manager represents that it has made a thorough examination of the premises and is thoroughly familiar with the conditions under which it is to work.
- 2.3 The Construction Manager agrees to perform and complete the Services in accordance with laws, rules, and regulations of all governmental authorities and departments thereof.
- 2.4 The Construction Manager agrees to cooperate with the City, Architect-Engineer, or any other Design Professional in all respects, including, but not limited to, providing necessary preconstruction services, such as evaluation of methods, availability and costs of the various components of the Services while under design consideration; supervising the Services and the progress thereof; the coordination of the Services and suggesting changes in the Services; and supplying information as to costs and availability of materials and methods of construction in order, amongst other things, to reduce costs wherever the same may be practicably consistent with the quality of the Services presented in the Contract Documents.
- 2.5 The Construction Manager agrees to the following:
- a) In connection with the performance of work under this Contract, the Construction Manager agrees not to discriminate against any employee or applicant for employment because of race, sex, religion, color, national origin, or any other protected class under federal or state law. The aforesaid provision shall include, but not be limited to, the following employment:
- upgrading
 - demotion or transfer
 - recruitment or recruitment advertising
 - lay-off or termination
 - rates of pay or other forms of compensation; and

- selection for training, including apprenticeship
- b) The Construction Manager agrees to post hereafter in conspicuous places, available for employees or applicants for employment, notices to be provided by the contracting officer setting forth the provisions of the non-discrimination clause.
- c) The Construction Manager further agrees to insert the foregoing provisions in all contracts hereunder, including contracts or agreements with labor unions and/or worker's representatives, except sub-contractors for standard commercial supplies or raw materials.

ARTICLE 3: SCOPE OF THE SERVICES

3.1 The services that the Construction Manager shall provide include but are not limited to those described in the following sections.

3.2 **Reporting.** Written reports shall be provided with the monthly pay requests as follows:

- a) Monthly Executive Summary which provides an overview of current issues and pending decisions, future developments and expected achievements, and any problems or delays, including code violations found by any permitting agency.
- b) A Monthly Construction Progress Report that includes a cost narrative, a scheduling narrative and that summarizes the work of the various subcontractors. This report shall include information from the weekly job site meetings as applicable such as:
 - general conditions
 - long lead supplies
 - current deliveries
 - safety and labor relations programs permits
 - construction problems and recommendations; and
 - plans for the succeeding month

3.3 Scheduling

- a) Upon award of this Contract, the Construction Manager shall submit a master project schedule covering the planning and design approvals, construction, and Owner occupancy of the project. This schedule will serve as the framework for the subsequent development of all detailed schedules. The master project schedule shall be produced and updated monthly throughout the project.
- b) Within thirty (30) days after the date of the Owner's issuance of a Notice to Proceed, the Construction Manager shall prepare and submit to the Owner two copies of a Critical Path Method (CPM) construction schedule graphically depicting the activities contemplated to occur as a necessary incident to performance of the work required to complete the project, showing the sequence in which the Construction Manager proposes for each such activity to occur and duration (dates of commencement and completion, respectively) of each activity.

- c) Following development and submittal of the construction schedule, the Construction Manager shall, at the end of each calendar month during the project, or at such earlier intervals as circumstances may require, update and/or revise the construction schedule to show the actual progress of the work performed and the occurrences of all events which have affected the progress of performance of work already performed or will affect the progress of the performance of the work yet to be performed in contrast with the planned progress of performance of such work, as depicted on the original construction schedule and all updates and/or revisions thereto as reflected in the updated and/or revised construction schedule last submitted prior to submittal of each such monthly update and revision. Each such update and/or revision to the construction schedule shall be submitted to the Owner in duplicate.
- d) The Construction Manager shall provide current scheduling information and provide direction and coordination regarding milestones, beginning and finishing dates, responsibilities for performance and the relationships of the Construction Manager's work to the work of his subcontractors and suppliers to enable them to perform their respective tasks so that the development of construction progresses in a smooth and efficient manner in conformance with the overall project schedule. The schedule shall include all phases of the construction work, material supplies, long lease procurement, approval of shop drawings, change orders in progress, schedules for change orders, and performance testing requirements. The Construction Manager shall advise the Owner, its representatives and the Architect-Engineer of their required participation in any meeting or inspection giving each at least one-week notice unless such notice is made impossible by conditions beyond his control. The Construction Manager shall hold job-site meetings at least once each month with the Construction Team and at least once each week with the subcontractors and the Architect-Engineer's Field Representative, or more frequently as required by work progress, to review progress, discuss problems and their solutions and coordinate future work with all subcontractors.
- e) Twice per month corresponding as closely as possible with progress review meetings, a "two week" look ahead report shall be prepared and submitted to Owner and Architect / Engineer.

3.4 Design Review and Recommendations

- a) The Construction Manager shall familiarize himself thoroughly with the evolving architectural, civil, mechanical, plumbing, electrical and structural plans and specifications and shall follow the development of design through Contract Documents. The Construction Manager shall make recommendations with respect to the selection of systems and materials, and cost reducing alternatives including assistance to the Architect-Engineer and Owner in evaluating alternative comparisons versus long term cost effect. The evaluation shall speak to the benefits of the speed of erection and early completion of the project. The Construction Manager shall furnish pertinent information as to the availability of materials and labor that will be required. The Construction Manager shall submit to the Owner and Architect-Engineer such comments as may be appropriate concerning construction, feasibility, and practicality. The Construction Manager shall bring to the Owner and the Architect-Engineer's attention any apparent

defects in the design, drawing and specifications, or other documents. The Construction Manager shall prepare an estimate of the construction cost at appropriate milestones during the design and shall evaluate such estimate with the project budget. The Construction Manager shall recommend cost saving alternatives, as appropriate, at each design milestone. At each design milestone the Owner, Architect Engineer and Construction Manager shall conduct a value engineering review.

- b) After receiving the Construction Documents for each phase of the project, the Construction Manager shall perform a specific review thereof. Promptly after completion of the review, the Construction Manager shall submit to the Owner, with a duplicate to the Architect-Engineer, a written report covering suggestions or recommendations previously submitted, additional suggestions or recommendations as the Construction Manager may deem appropriate, and all actions taken by the Architect-Engineer with respect to same, any comments he may deem to be appropriate with respect to separating the work into separate contracts and/or alternative materials.
- c) At completion of the Construction Manager's review of the plans and specifications, except only as to specific matters as may be identified by appropriate comments pursuant to this section, the Construction Manager shall warrant, without assuming any architectural or engineering responsibility, that the plans and specifications are consistent, practical, feasible and constructible. The Construction Manager shall warrant that the work described in the plans and specifications for the various bidding packages is constructible within the scheduled construction time.
- d) The Construction Manager shall review the design for the purpose of identifying long lead procurement items (i.e. machinery, equipment, materials, and supplies). When each item is identified, the Construction Manager shall notify the subcontractors, the Owner, and the Architect-Engineer of the required procurement and schedule. Such information shall be included in the bid documents and made a part of all affected sub-contracts. As soon as the Architect-Engineer has completed drawings and technical specifications and the Construction Manager has obtained permitting approval, the Construction Manager shall prepare invitations for bids. The Construction Manager shall keep informed of the progress of the respective subcontractors or suppliers, manufacturing or fabricating such items and advise Project Director, Owner and Architect-Engineer of any problems or prospective delay in delivery.

3.5 **Staffing.** Key personnel assigned to City projects by the Construction Manager shall not be removed from the project until alternate personnel acceptable to the City are approved in writing by the City.

3.6 **Soliciting Bids**

- a) Without assuming responsibilities of the Architect-Engineer, and unless waived in writing by the Owner, the Construction Manager shall prepare invitations for bids, or requests for proposal when applicable, for all procurements of long lead items, materials and services, and for Subcontractor contracts. Such invitations for bids shall be prepared in accordance with the following guidelines:

- i) Contracts totaling \$1,000 but not exceeding \$10,000 may be entered into by the Construction Manager with the firm which is qualified and submits the lowest verbal quotation. The Construction Manager shall obtain a minimum of two (2) verbal quotations. These quotations shall be entered on a bid tabulation sheet and a copy of such tabulation sent to the Owner, Architect-Engineer and to each firm. The successful quotation shall be confirmed by written contract or purchase order to the low bid firm defining the scope and quality of work to be provided.
 - ii) Contracts totaling \$10,000 but not exceeding \$200,000 may be entered into by the Construction Manager with the firm who is qualified and submits the lowest responsive proposal. The Construction Manager shall request at least three (3) firms to submit sealed written proposals based on written drawings and/or specifications. The written proposals shall all be opened publicly at the location, date and time named by the Construction Manager in his request for proposal. A tabulation of the results shall be furnished to the Owner, Architect-Engineer and to each firm.
 - iii) Contracts totaling \$200,000 but not exceeding \$500,000 may be entered into by the Construction Manager with the firm who is pre-qualified and submits the lowest responsive proposal. The Construction Manager shall advertise these projects at least once with the last advertisement appearing at least 21 calendar days prior to the established bid opening date. These proposals shall be based on approved plans and specifications. Bids shall be received and opened publicly at the location, date and time established in the bid advertisement.
 - iv) Contracts totaling \$500,000 or greater shall be treated the same as described under iii above except that the advertisement shall be run for at least 30 days prior to the established bid opening and at least 5 days prior to any scheduled pre-bid conference.
 - v) Individual purchases of materials or rentals or leases of equipment of up to \$999.99 each may be made without bids or quotes when reasonably necessary to expedite work on the project; however, the Construction Manager shall not divide or separate a procurement in order to avoid the requirements set forth above.
 - vi) Site utilities may be acquired at market rates from the entity(ies) providing such in the franchise area.
- b) For each separate construction contract exceeding \$35,000, the Construction Manager shall, unless waived by Owner, conduct a pre-bid conference with prospective bidders, the Architect-Engineer, and the Owner. In the event questions are raised which require an interpretation of the bidding documents or otherwise indicate a need for clarification or correction of the invitation, the Construction Manager shall transmit these to the Architect-Engineer and upon receiving clarification or correction in writing shall prepare an addendum to the bidding document, and issue same to all of the prospective bidders.

3.7 **Quality Control.** The Construction Manager shall develop and maintain a program,

acceptable to the Owner and Architect-Engineer that assures quality control of the construction. The Construction Manager shall supervise the work of all subcontractors providing instruction to each when their work does not conform to the requirements of the plans and specifications and shall continue to assert influence and control over each subcontractor to ensure that corrections are made in a timely manner so as to not affect the efficient progress of the work. Should disagreement occur between the Construction Manager, the Owner or the Architect-Engineer over acceptability of work and conformance with the requirements of the specifications and plans, the Owner shall be the final judge of performance and acceptability.

- 3.8 **Subcontractor Interfacing.** The Construction Manager shall be the single point of interface with all subcontractors for any work done under this Contract. The Construction Manager shall negotiate all change orders, field orders and request for proposals, with all affected subcontractors and shall review the costs of those proposals and advise the Owner and Architect-Engineer of their validity and reasonableness, acting in the Owner's best interest prior to requesting approval of each change order from the Owner. Before any work is begun on any change order, a written authorization from the Owner must be issued. When health and safety are threatened, however, the Construction Manager shall act immediately to remove such threat to health and safety. The Construction Manager shall also carefully review all shop drawings and then forward the same to the Architect-Engineer for review and actions. The Architect-Engineer will transmit them back to the Construction Manager who will then issue the shop drawings to the affected subcontractor for fabrication or revision. The Construction Manager shall maintain a record to promote expeditious handling. The Construction Manager shall request the Architect-Engineer to make interpretations of the drawings or specifications requested of him by the subcontractors and shall maintain a record to promote timely response. The Construction Manager shall advise the Owner and Architect-Engineer when timely response is not occurring on any of the above. The Construction Manager shall collect, review, and submit to the Owner, all project closeout documentation including operation, maintenance, and training manuals.

ARTICLE 4: MAXIMUM PROJECT COST AND FEES FOR SERVICES

4.1 Guaranteed Maximum Price for Construction

- a) When the Construction Documents are sufficiently complete to establish the scope of work for the project or any portion thereof, the Construction Manager will establish and submit in writing to the Owner for his approval a Guaranteed Maximum Price (GMP) guaranteeing the maximum price to the Owner, for the construction cost of the project or designated part thereof. Such Guaranteed Maximum Price will be subject to modification for changes in the project as provided in article 4.1(e) below. Actual price paid for the work by the Owner, however, shall be the actual cost of all work subcontracts, supply contracts, direct labor costs, direct supervision costs and direct job costs, plus the Construction Manager's fees or the GMP, whichever is less when the work is complete. Invoicing shall occur monthly for completed work with 5% retainage withheld until final completion and acceptance of all work covered in the contract documents in accordance with the City's General Conditions. GMP Proposals will be incorporated by reference

and attached hereto as exhibits.

- b) At the time of submission of a Guaranteed Maximum Price, the Construction Manager will verify the time schedule for activities and work which were adopted and used to determine the Construction Manager's cost of work. In addition to the cost of work, a GMP will include an agreed upon sum as the construction contingency which is included for the purpose of defraying the expenses due to unforeseen circumstances relating to construction. The Construction Manager will be required to furnish documentation evidencing expenditures charged to the contingency prior to the release of funds by the Owner. If bids are received below the applicable line items in the GMP, the surplus will be added to the contingency.
- c) If bids are received above the applicable line item in the GMP, the deficiency will be taken from the contingency; however, such occurrence shall not be cause to increase the GMP.
- d) If bids are not received for a portion of the work at or below the applicable line item amount in the GMP, the Construction Manager reserves the right to perform that portion of the work as acknowledged by the Owner or negotiate for its performance for the specified line item lump sum amount or less.
- e) The increase or decrease in the Guaranteed Maximum Price resulting from a change in the project shall be determined in one or more of the following ways:
 - i. By mutual acceptance of a lump sum properly itemized and supported by sufficient substantiating data to permit evaluation by the Architect-Engineer and Owner;
 - ii. By unit prices stated in the agreement or subsequently agreed upon;
 - iii. If none of the methods is agreed upon, the Construction Manager, provided it has received a signed written order by the Owner, shall promptly proceed with the work involved. The cost of such work shall then be determined on the basis of the reasonable expenditures and savings of those performing the work attributed to the change. In the event a change order is issued under these conditions, however, the Architect-Engineer will establish an estimated cost of the work and the Construction Manager shall not perform any work whose cost exceeds that estimate without prior written approval by the Owner. In such case, the Construction Manager shall keep and present, in such form as the Owner may prescribe, an itemized accounting together with appropriate supporting data of the increase in the cost of the project. The amount of decrease in the Guaranteed Maximum Price to be allowed by the Construction Manager to the Owner for any deletion or change which results in a net decrease in cost will be the amount of the actual net decrease;
 - iv. The Architect-Engineer will have authority to order minor changes in the project not involving an adjustment in the Guaranteed Maximum Price or an extension of the Construction Completion Date and not inconsistent with the intent of the

Drawings and Specifications. Such changes shall be affected by written order. Documentation of changes shall be determined by the Architect-Engineer. Changes shall be approved by the Architect-Engineer.

- 4.2 Construction Manager's Fee.** In consideration of the performance of the contract, the Owner agrees to pay the Construction Manager as compensation for his services, fees as set forth below:

Preconstruction Phase Fee. This fee shall be based on design costs if applicable, constructability review, value engineering and fee determination of Guaranteed Maximum Price. The fee for this phase in the amount of **\$38,972** shall be paid at the negotiated price upon receipt of the Guaranteed Maximum Price. Preconstruction Service Proposals will be incorporated by reference and attached hereto as exhibits.

Construction Phase Fee. Prior to commencement of the Construction Phase, the Owner will direct the Construction Manager in writing to proceed into the Construction Phase. The Construction Manager's compensation for work or service performed during the Construction Phase shall be a fee of **\$8,500,702**. The Construction Phase Fee shall be invoiced and paid in **18** months. Payments will be remitted monthly at the cost of **\$~478,164** each and one final monthly payment of **\$~850,070**. The first monthly payment shall become due thirty days following the issuance of the first Construction Authorization and the final monthly payment shall be paid only when construction of the project is completed and occupancy of the project accepted by the Owner. If construction is authorized only for a part of the project, the fee paid shall be proportionate to the amount of work authorized by the Owner.

ARTICLE 5: TERMINATION AND TIME OF THE ESSENCE

- 5.1** If the Construction Manager is adjudged bankrupt or makes a general assignment for the benefit of creditors, or if a receiver is appointed on account of its insolvency, or if refuses or fails, except in cases for which an extension of time is provided, to supply enough properly skilled workmen or proper materials for the Services, or otherwise be guilty of a substantial violation of any provision of this Contract as determined by the certificate of the Architect, the Owner may, without prejudice and reserving any other right or remedy the Owner may have, after giving the Construction Manager seven (7) days' written notice, terminate this Contract with the Construction Manager and take possession of the premises and all materials, tools, and appliances thereon and finish the project in whatever manner the Owner may deem expedient. The City may also terminate this Contract pursuant to Article 15, Section III of the Contract Specifications.
- 5.2** It is mutually agreed between the Parties hereby that time is of the essence of this Contract, and in the event that the Substantial Completion Date is not achieved within the time stipulated herein, it is then further agreed that the City may deduct from such sums or compensation as may be due to the Construction Manager, the sum of **\$1,000.00 per day** for each day that the work to be performed by the Construction Manager remains incomplete beyond the time limit specified herein, which sum of **\$1,000.00 per day** shall only and solely represent damages which the City has sustained by reason of the failure of

the Construction Manager to complete the work within the time stipulated, it being further agreed that the sum is not to be construed as a penalty but is only to be construed as liquidated damages for failure of the Construction Manager to complete and perform all work within the time period as specified in this Contract.

ARTICLE 6: INDEMNIFICATION

- 6.1 To the fullest extent permitted by law, Construction Manager agrees to defend, indemnify, and hold the City, its officers, agents, and employees, harmless from and against any and all liabilities, demands, claims, suits, losses, damages, causes of action, fines or judgments, including costs, attorneys', witnesses', and expert witnesses' fees, and expenses incident thereto, relating to, arising out of, or resulting from: (i) the services provided by the Construction Manager, its contractors, subcontractors, agents, employees, or personnel under this Contract; (ii) any negligent acts, errors, mistakes or omissions by Construction Manager, its contractors, subcontractors, agents, employees, or personnel; and (iii) Construction Manager, its contractors, subcontractors, agents, employees, or personnel failure to comply with or fulfill the obligations established by this Contract.
- 6.2 The Construction Manager will update the City during the course of the litigation to timely notify the City of any issues that may involve the independent negligence of the City that is not covered by this indemnification.
- 6.3 The City assumes no liability for actions of Construction Manager and will not indemnify or hold Construction Manager or any third party harmless for claims based on this Contract or use of Construction Manager provided supplies or services.
- 6.4 Nothing contained herein shall be construed as a waiver of any immunity from or limitation of liability the City (Owner) may be entitled to under the doctrine of sovereign immunity or section 768.28, Florida Statutes.
- 6.5 This article shall survive the termination of this Contract.

ARTICLE 7: TITLE TO THE PROJECT

- 7.1 The title of all work, completed portions of the project and in the course of construction, and of all materials on account of which payment has been made shall be in the Owner.

ARTICLE 8: ASSIGNMENT

- 8.1 This Contract shall be binding upon and inure to the benefit of the Parties hereto and their respective successors and assigns, except that this Contract may not be assigned by either party without the prior written consent of the other party. Any assignment made without such prior written consent shall not vest rights in the assignee.

ARTICLE 9: ADDITIONAL PROVISIONS

- 9.1 This Contract shall be governed by and construed in accordance with the laws of the State of Florida, and the venue for any dispute under this Contract shall be an appropriate court of competent jurisdiction in Pinellas County, Florida.
- 9.2 Any notice required to be given by the terms and provisions of this Contract or by any law or governmental regulation, either by the Owner or Construction Manager, shall be in writing unless otherwise required by such law or regulation and shall be deemed to have been served and given when deposited in either Registered or Certified Mail in United States Branch Post Office, addressed to the party hereto to whom directed, at the address specified in the Specifications.
- 9.3 The language in this Contract shall be construed according to its customary meaning within the Florida building industry. Whenever used, the singular shall include the plural, the plural the singular, and the use of any gender shall be applicable to all genders.
- 9.4 If any provision of the Contract Documents is invalid or unenforceable as against any person or party, the remainder of the Contract Documents and the applicability of such provision to other persons or parties shall not be affected thereby.
- 9.5 The Parties are acting herein solely as independent contractors. Nothing herein contained will create or be construed as creating a partnership, joint venture, or agency relationship between the Parties. Each Party acknowledges and agrees that it neither has nor will give the appearance or impression of having any legal authority to bind or commit the other Party in any way. Each Party will be solely responsible for all wages, income taxes, worker's compensation, and any other requirements for all personnel it supplies in connection with this Contract.
- 9.6 The City's performance and obligation to pay under this Contract is contingent upon an annual appropriation by the Clearwater City Council.

IN WITNESS WHEREOF, the parties hereto have made and executed this Contract on the date and year first above written.

(Corporate Seal)

FIRM NAME

By: _____

Print Name: _____

Title: _____

WITNESS:

By: _____

Print Name: _____

Countersigned:

CITY OF CLEARWATER

Brian Aungst
Mayor

Jennifer Poirrier
City Manager

Approved as to form:

Attest:

Jerrod Simpson
Senior Assistant City Attorney

Rosemarie Call
City Clerk