



**MANAGEMENT AND OPERATION AGREEMENT
BETWEEN THE CITY OF AUSTIN AND THE AUSTIN ROWING CLUB RELATING
TO THE WALLER CREEK BOATHOUSE**

This Agreement (“**Agreement**”) relating to the management and operation of the Waller Creek Boathouse, approved by the Austin City Council on March 1, 2012, is made between the **CITY OF AUSTIN**, a home rule municipal corporation of the State of Texas located within Travis, Hays, and Williamson Counties, Texas (“**City**”), and the **AUSTIN ROWING CLUB**, a Texas nonprofit corporation established under the Texas Nonprofit Corporation Act (“**ARC**”) (collectively, “**Parties**”).

RECITALS

1. The Austin City Council adopted the Waller Creek Master Plan in March, 2010 to create a vision for the revitalization and redevelopment of the Waller Creek District. At the southernmost end of the Waller Creek District is Lady Bird Lake Park where the newly constructed Waller Creek Boathouse (“**Boathouse**”) will be instrumental in reinstating the environmental value of the Waller Creek District as a natural feature within Austin’s urban landscape.
2. The Boathouse is designed and intended to be a premier water recreational facility that will showcase the water-related recreational activities available to citizens and visitors to Austin in and around Lady Bird Lake Park.
3. The City issued Request for Proposal #CB30017 on March 15, 2010 seeking responses from private entities experienced in the management and operation of facilities offering water-related activities willing to enter into a public-private partnership with the City to manage and operate the Boathouse for the benefit of the public.
4. The successful proposer, ARC, is a 501(c)(3) nonprofit organization founded in 1986 that has established itself as a premier rowing community in the State of Texas by hosting numerous regattas and university-level rowing teams. The City and ARC have a thirty year history of working together to advance water-related activities on Lady Bird Lake.
5. Residents of the City as well as visitors will derive substantial benefits from the partnership between the City’s Parks and Recreation Department and ARC; the combination of this experience will provide enhanced quality of life for all Austin citizens and visitors by providing organized, consistent opportunities for water-related activities and will set the way for a successful beginning project related to the revitalization of the Waller Creek District.

NOW THEREFORE, the Parties agree as follows:

ARTICLE 1. DEFINITIONS

1.01 City. City means the City of Austin, a home rule municipality.

1.02 Boathouse Facility. The building commonly known as the Waller Creek Boathouse is a resource for the public to assemble and meet during normal operating hours. The ARC, as manager of the Facility is entrusted by the City to provide access and equal opportunity to services and programs administered by the ARC that are comparable to other water-related facilities, that meet the needs of the community, and for which the ARC may charge fees that are reasonable, consistent with other water-related facilities in the Austin-area.

1.03 Director. Director means the Director of the City's Parks and Recreation Department or her designee (**PARD**).

1.04 Emergency Repair. Emergency Repair means any repair or replacement of any portion of the Facility (as defined below), necessary to protect the public and the integrity of the building or its systems in a timely and reasonable manner. See also, Section 3.14 below.

1.05 Evaluation Team. The City will establish an evaluation team consisting of the Director, Chief Financial Officer, City Purchasing Officer and the Project Manager for the Waller Creek Tunnel Project. This team will report to the Assistant City Manager charged with management of the Parks and Recreation Department (PARD).

ARTICLE 2. TERM

2.01 Term. The initial term of this Agreement ("**Term**") shall begin on March 1, 2012 and shall expire on February 28, 2017; this Agreement may be extended for one 24-month period through February 28, 2019, subject to the approval of the City. The City will issue an initial Notice to Proceed to ARC once a Certificate of Occupancy is authorized on the Facility allowing ARC access to commence the management and operations of the Boathouse.

2.02 Start-Up Period. ARC will be provided a period of time to initiate the management and operation of the Facility. The start-up period will begin with the issuance of the initial Notice to Proceed and will result in a right of access to the Facility by ARC. ARC will be provided a period of time, no later than through the end of the calendar year, December 31, 2012, to finish build-out, finalize location of staff and visitor parking locations, prepare risk management, safety and other plans, secure approval for the sale and consumption of alcohol and complete any other deliverable to the City required by this Agreement. This schedule will be compatible with the timeframe contained in Exhibit 2 which provides the revenues to the City are delayed until the second year of the Agreement. The City will issue a second Notice to Proceed no later than January 1, 2013 which will commence the revenue sharing described in Exhibit 2.

Within the first 18 months of the Term, periodic evaluations of the Waller Creek Tunnel Project construction will take place to determine the impact, if any, on ARC's revenues.

During the Start-Up Period, the Director may prepare criteria for programs directed at underserved youth. At the Director's request, ARC will be available to meet with the Director or her designee to discuss the programs and project dates and locations for programs. These meetings and development of criteria for the Underserved Youth Program are at the Director's discretion. The Parties agree that programming for the Underserved Youth Program will begin no later than January, 2013.

2.03 Holdover. Unless terminated earlier by either party pursuant to a right stated in this Agreement, this Agreement will expire without further notice when the Initial Term and approved options expire. Upon expiration of the initial term or period of extension, the Contractor agrees to holdover under the terms and conditions of this agreement for such a period of time as is reasonably necessary to re-solicit and /or complete the project (not to exceed 120 days unless mutually agreed on in writing.)

ARTICLE 3. USE OF PREMISES, OWNERSHIP OF PROPERTY AND SCOPE OF WORK

3.01 Premises. In consideration of the mutual terms and covenants of this Management and Operations Agreement, ARC has the right to occupy and jointly use with the City the Premises described in Exhibit 1. The Land and Facility are collectively referred to as the "Premises". This Agreement is subject to all existing easements for public roads, channels, highways, public utilities, railroads, pipelines and electrical transmission lines. The area identified on Exhibit 1 as "Waller Creek Tunnel Equipment Area" which houses certain Waller Creek Tunnel equipment are expressly excluded from the Premises.

3.02 Permitted Use of Premises. ARC may use the Premises only for the purpose of operating and maintaining the Boathouse for use by the public. ARC will offer, conduct, and operate non faith-based recreation rowing and on-the-water recreation opportunities including such activities as kayak and stand up paddle rental, recreation-related and other related uses during normal operating hours and as set forth in the Uses Exhibit submitted to the City for approval annually, and for no other purpose without the prior written consent of City. The Uses Exhibit must establish the programs, program rates, Facility fees for both members and non-members, and any access restrictions that might impact the public's use of the Facility.

3.03 Illegal Use Not Permitted. ARC may not use any part of the Premises or any building situated on them for any use or purpose that violates any applicable law, regulation, or ordinance of the United States, the State of Texas, the County of Travis, or the City of Austin, or other lawful authority with jurisdiction over the Premises.

3.04 Condition of Premises. ARC accepts the Premises described in Exhibit 1 in its present condition, finds it suitable for the purposes intended, and further acknowledges that it is thoroughly familiar with such condition by reason of a personal inspection and does not rely on any representations by City as to the condition of the Premises or its suitability for the purposes intended. ARC further accepts the Premises described in Exhibit 1 subject to all previous recorded easements, if any, that may have been granted on, along, over, under or across said property, and releases City from any and all damages, claims for damages, loss or liabilities that

may be caused to all invitees, licensees, or trespassers by reason of the exercise of such rights or privileges granted in these easements.

3.05 Zoning Restrictions and Other Laws. The Premises are subject to any statement of facts which an accurate survey or physical inspection might show, all zoning, restrictions, regulations, rulings and ordinances, building restrictions, and other laws and restrictions now in effect or later adopted by any governmental authority having jurisdiction.

3.06 Fees. Fees for memberships and programs shall be reviewed annually by the Director or her designee, who may request that the ARC modify such fees. Fees shall be posted on the Premises so as to be visible to the public.

3.07 Janitorial Services and Housekeeping. The ARC, at its sole cost and expense, shall provide daily janitorial and custodial service for the Boathouse. For the Term of this Agreement, the ARC will employ or subcontract for housekeeping staff whose function shall be daily in-house tasks related to routine and emergency cleanups, room or facilities preparation, minor repairs and other routine function associated with programs and building operations.

3.08 Inspections. The City shall conduct periodic and regular inspections as may be required of the Boathouse to insure that fire, safety and sanitation regulations and other provisions contained in this Agreement or in the City Code are being adhered to by the ARC. The City shall notify the ARC of its findings, specifying any items needing attention. The ARC agrees to grant the City the right to access the Facility for inspections during normal business hours, and after hours, with prior notice as may be necessary. Failure to conduct any inspections as may be required shall not operate as a waiver of the City's right to conduct these inspections and shall not be considered a default of the terms of this Agreement.

3.09 Fire Code Inspections. ARC will permit the City's Fire Marshal or his or her authorized agents to inspect the Premises, and ARC and City will comply with all requirements of the Fire Marshal or his or her authorized agents that are necessary to bring the Premises into compliance with the City Fire Code and Building Code provisions regarding fire safety, as such provisions exist or may later be amended subject to the maintenance and repair obligations under Paragraph 3.12 (a) below. ARC shall maintain in proper condition accessible fire extinguishers of a number and type approved by the Fire Marshal or his or her authorized agents for the particular hazard involved.

3.10 Ownership of Equipment. No City funds shall be used to acquire equipment to be used for private purposes by the ARC. The ARC shall own all equipment and furniture purchased by it. The ARC, at its sole cost and expense shall be responsible for repair and/or replacement of any equipment during the term of the Agreement.

3.11 Ownership of Building and Fixtures. City shall own the Boathouse and all attached fixtures. The Boathouse and any other buildings, improvements, additions, alterations, and fixtures (except furniture, movable equipment, and trade fixtures) constructed, placed, or maintained on any part of the Premises during the Term are considered part of the real property

of the Premises and must remain on the Premises and title to all permanent improvements on the Premises shall vest in the City.

3.12 Right to Remove Personal Property; Trade Fixtures. ARC may, at any time while it occupies the Premises, or within a reasonable time thereafter, not to exceed ninety (90) days, remove personal property, furniture, machinery, equipment, or other trade fixtures owned solely by ARC, in, under, or on the Premises, or acquired by ARC, whether before or during the Term and any extension, this property is referred to as “ARC Property.” On or before the date of expiration of this Agreement, ARC shall vacate the Premises, remove all ARC Property and repair any damage to any buildings or improvements on the Premises resulting from the removal, restoring the Premises to a condition reasonably satisfactory to the City. If the City or ARC terminates this Agreement, ARC shall vacate the Premises, remove the ARC Property and restore the Premises within such time as the City shall reasonably designate, but in no event less than ninety (90) days. In either event, if ARC shall fail or neglect to remove the ARC Property within a reasonable time after the Agreement termination date, not to exceed ninety (90) days and so restore the Premises, then the ARC Property shall become the property of the City.

3.13 Maintenance and Repair.

a. City Obligations. Except for repairs required by ARC under b below, the City will at all times during the Term, keep and maintain, or cause to be kept and maintained, the Premises, including the Boathouse and all other buildings and improvements erected on the Premises in compliance with city codes in good state of appearance and repair at the City’s sole expense including, the structure, roof, foundation, HVAC, and parking area.

After City receives notice of needed repairs pursuant to b below, the City shall within five (5) working days of notification inspect the Boathouse to determine the extent of repair required. The City shall complete the repairs within ninety (90) days from the date of such notice. If the City is unable to initiate the repairs as required, the City shall notify the ARC in writing and ARC may make and pay for repairs as approved in writing by the Director or her designee. ARC shall submit a request for reimbursement for the cost of an approved repair. The City shall reimburse the ARC for the approved repair within 30 days. Needed repairs as used in this subsection exclude obligations of the ARC in b below. For repair and/or replacement expenses less than or equal to \$5,000, ARC may make repairs internally or hire outside contractors, but agrees to solicit at least one bid and provide a copy of the bid if requested by the City. For repair and/or replacement expenses greater than \$5,000 and less than or equal to \$50,000, ARC may make repairs internally and submit a written request for reimbursement or hire outside contractors based on the ARC's determination of the best of three (3) bids. The City may request a copy of the bids solicited prior to reimbursement. For repair and/or replacement expenses greater than \$50,000, the ARC shall use existing standard purchasing procedures currently in place by the City for expenses more than \$50,000, and upon approval by the Director, the City shall reimburse the ARC for approved repairs or replacement.

b. ARC Obligations. At all times during the Term of this Agreement, the ARC shall, at its sole cost and expense, make all regular and ordinary nonstructural building maintenance and repairs, including but not limited to, painting, wallpaper, tile, flooring, electrical, plumbing and window glass replacement. Such repairs will be made in an expeditious and proper manner. Further, the ARC shall be responsible for keeping any landscaping, including any irrigation system, within the Site Plan approved for construction upon the Premises in a neat, tidy and working condition, with adequate watering and maintenance, and replacing landscaping, including all growth of weeds and other objectionable vegetation on the property from reaching such conditions as to violate governmental requirements, if any, or to be hazardous and/or objectionable to the City or the ARC. Collection and proper disposal of trash, garbage, litter and debris will be the responsibility of ARC, at its sole cost and expense.

- i. For repair and/or replacement expenses less than or equal to \$5,000, ARC may make repairs internally or hire outside contractors, but agrees to solicit at least one bid and provide a copy of the bid if requested by the City. For repair and/or replacement expenses greater than \$5,000 and less than or equal to \$50,000, ARC may make repairs internally and submit a written request for reimbursement or hire outside contractors based on the ARC's determination of the best of three (3) bids. The City may request a copy of the bids solicited. prior to reimbursement. For repair and/or replacement expenses greater than \$50,000, the ARC shall use existing standard purchasing procedures currently in place by the City for expenses more than \$50,000, and upon approval by the Director, the City shall reimburse the ARC for approved repairs or replacement.
- ii. ARC shall neither commit nor allow to be committed any waste on the Premises, nor shall ARC maintain, commit or permit the maintenance or commission of any nuisance on the Premises or use the Premises for any unlawful purpose.
- iii. ARC agrees to maintain at it own expense during the term of this agreement, a preventative maintenance program for all systems, including but not limited to, HVAC systems, elevators, plumbing, pumps and apparatus, fire suppression and sprinkler systems, and other systems that require periodic maintenance to continue operating efficiency and warranty compliance. When notified by maintenance contractors of potential capital replacement issues or, remedial action, ARC shall promptly notify the City in writing of any items that are the responsibility of the City.

3.14 Emergency Repairs

a. If the ARC and City mutually agree that emergency repairs need to be undertaken immediately, the ARC may undertake the necessary repair waiving the bidding requirements of Section 3.12(b)(iii) and the City shall be responsible to reimburse the ARC within thirty (30)

days. The City will approve the emergency repair in writing to the ARC as soon as is reasonably possible, but not more than five (5) business days.

- b. If the ARC is unable to reach the City's contact person and action is necessary to prevent further damage to the Boathouse or to prevent imminent danger or injury to persons, the ARC may undertake the necessary repairs to cure the condition and the City shall be responsible to reimburse the ARC within 30 days the reasonable cost of the repairs.

3.15 Scope of Work

- a. Maximize Public Use of Facility. ARC shall exercise due diligence and good faith efforts in managing and operating the Facility so as to minimize operating expenses and maximize operating revenues consistent with the Intended Uses. ARC in establishing and implementing its operating policies, may schedule not only those events that generate substantial direct revenue to the Facility but also those events that produce less direct revenue but in ARC's good faith judgment, generate either a significant cultural, or other benefit public or other wise serve the public interest; provided that ARC shall ensure the Facility is used for a public purpose that furthers the Facility's mission.
- b. Annual Programming. ARC shall exercise diligence in using, managing and operating the Facility in a manner that maximizes public access, utilization of the Facility and is responsive to community feedback. ARC shall have an annual Public and stakeholder input process that results in community input regarding service delivery. ARC shall establish annual utilization goals for each program area each year. ARC shall also periodically review and adapt programming to meet current community priorities and needs. Such goals for the coming year shall be submitted to the City 90 days before the beginning of the City's Fiscal Year.
- c. Grand Opening. ARC shall conduct the Grand Opening of the Boathouse in accordance with the mutually agreed upon requirements and preferences of the City and ARC. The City will coordinate with ARC to assure appropriate City officials are invited to and attend the Grand Opening. The City and ARC will mutually agree on a budget for the Grand Opening and will cooperate in securing the approvals necessary in order to serve beer and wine at the Grand Opening.
- d. Subcontracting. ARC shall negotiate, execute and perform all subcontracts, use agreements, licenses and other agreements (1) with persons who desire to schedule events at the Facility or who desire otherwise to use the Facility or any part thereof or (2) that otherwise pertain to the use, operation, and occupancy of the Facility or any part thereof.
- e. Risk Management and Energy Policy. ARC shall implement and monitor a comprehensive risk management and energy efficiency program(s) for the Facility.
- f. Incident Reports. ARC shall maintain for review by the City upon reasonable notice, information as reasonably required by the City to satisfy the City's

responsibilities, including information regarding injuries and unusual incidents at the Facility, and regarding security measures and safety programs (including recommendations for changes for such measures/programs) at the Facility.

g. Safety Standards. ARC shall follow safety standards set by the State of Texas and consistent with industry standards, including (1) ensuring that relevant staff maintain certifications for CPR, First Aid and AED training, (2) ensuring that AED and First Aid equipment must be present on site and in good working order, (3) providing Personal Flotation Devices (PRDs) approved by the U.S. Coast Guard, in serviceable condition, readily accessible and of the appropriate size for intended user, and ensuring that all vessels other than rowing shells and rowing barges are equipped with one Type I, II, III or V wearable PFD for each person on board.

h. Emergency Operations Plan. ARC shall develop and maintain a general safety, infection control and security plan to address public safety issues and also have an Emergency Operations Plan and procedures to protect lives and property. Plan elements may include but are not limited to transportation and utility services, communications, health, medical, fire, police, search and rescue, hazardous materials, shelter, resource management, volunteers, civil disturbances/incidents and evacuation.

i. Public Relations. ARC shall summarize and notify the City of all media inquiries concerning the Facility or its operation within twenty-four (24) hours of the interview or other media inquiry in question. ARC will provide the Director with draft copies of any public relations material or campaigns and gain her approval before the release of any such material or campaign.

j. Licenses and Permits. ARC shall obtain all permits and licenses necessary to operate, manage, maintain a Boathouse and to sell on the Premises (1) food and beverages, (2) merchandise related to or consistent with the Intended Use, (3) goods and services in furtherance of the Intended Use, and (4) upon approval of the City, alcoholic beverages. All permits shall be mounted in a conspicuous location.

k. Special Events. ARC shall have a Special Event Coordination Plan and Procedures ensuring compliance with park, facility, federal, state and local requirements.

l. Balcony. ARC shall maintain balcony views of the lake without obstruction. None of the following uses of balcony space shall be deemed to be a violation: Conducting classes, temporary placement of exercise equipment, provision of outdoor seating in connection with café services or use in connection with special events.

m. Rules and Regulations. ARC shall enforce applicable current and future policies and regulations established by the City governing activities of uses of the Boathouse.

n. Underserved Youth Programming. PARD will coordinate with ARC on programs/camps for the Underserved Youth. As long as there is no conflict with

another scheduled event, ARC shall accommodate the program(s) identified by PARD. PARD will have the sole authority to determine the Financial Need criteria for use of the Financial Assistance and Underserved Youth Funds.

o. Office for Parks and Recreation Department. The City may utilize office space at the Facility; ARC will maintain the office space.

p. Temporary Parking. The City will provide ten temporary parking spaces at the Austin Convention Center until permanent parking is completed.

ARTICLE 4. BOND FUND REQUIREMENTS

4.01 Intended Use. During the Term of this Agreement, the ARC shall use the Facility for the operation of a water-recreation facility. Other uses shall include operation of a café offering food and beverages and event space rental.

It is the understanding of the ARC and the City that the City financed the grant for the improvement of the Facility (the Tax-Exempt Facility) with the proceeds of certain obligations the interest on which is tax-exempt under the Federal income tax laws (the Tax-Exempt Bonds). In connection with the issuance of the Tax-Exempt Bonds, the City has covenanted (the Bond Covenants) with the holders of the Tax-Exempt Bonds that the proceeds of such bonds and the Tax-Exempt Facilities will be used in a manner which assures that the Tax-Exempt Bonds will qualify as obligations within the meaning of section 103 of the Internal Revenue Code (the Code). The ARC agrees not to use nor permit the use of the proceeds of the grant or the Tax-Exempt Facility in a manner which it knows or should know would result in their use either in an unrelated trade or business or in a manner which would otherwise violate the Bond Covenants. Moreover, if the ARC is notified by City that the Tax-Exempt Bonds have been selected for audit by the Internal Revenue Service, then the ARC agrees to provide to the City any information which is in its possession regarding the use of the proceeds or the Tax-Exempt Facility as may be needed by the City to timely respond to questions posed by the Internal Revenue Service. In the event of a failure to comply with this covenant the City will have the right to specific performance, injunctive relief, or the recovery of economic damages suffered by the City.

ARTICLE 5. REVENUE SHARING, CAPITAL INVESTMENT, AND REPORTS

5.01 Revenue Sharing. ARC shall share revenues with the City from Boathouse operations in amounts and on the schedule set forth on Exhibit 2 to this Agreement. Revenue to the City shall be submitted monthly along with the Monthly Sales and Rental Report on or before fifteen (15) days after the reporting month.

5.02 Capital and Maintenance Fund. ARC will establish a Capital Account for deposits of 1% of the annual Commercial Gross Revenues.

5.03 Reports.

- a. Quarterly Financial Reports. ARC shall within thirty (30) calendar days of the end of the fiscal quarter furnish to City a report regarding the Boathouse's financial performance during the prior quarter. The City shall reasonably determine report format and content after consultation with ARC. Format and contents will include, but are not limited, to cumulative revenues, expenditures and budget comparison to date with variance.
- b. Quarterly Management Reports. ARC shall prepare and submit quarterly and year-to-date management reports regarding Boathouse operations to include: advertising, safety environmental, maintenance and repair and tenant/concession by program segment. Reports shall be used to assist ARC in planning, budgeting, cost control performance evaluation, and revenue enhancement. The tenant/concession report shall include but not be limited to the following:
- i. Patron attendance by use
 - ii. Analyses of food and beverage concession and catering performance and income for the current period, year-to-date, and prior periods
 - iii. Analyses of other concession/ARC performance and income
 - iv. Analyses of event attendance and revenues
 - v. Other statistical reports reasonably requested by City of Austin
- c. Quarterly Sales Tax Report. ARC shall submit to City a copy of quarterly sales tax report within thirty (30) calendar days of filing the report
- d. Annual IRS Report. ARC shall provide to City annually, within thirty (30) calendar days of filing with the Internal Revenue Service, a copy of the IRS Form 990 pertaining specifically to Boathouse income.
- e. Performance Review. Eighteen (18) months after the issuance of the first Notice to Proceed, the Evaluation Team will conduct a performance review to ensure ARC is adequately meeting all service expectations and Financial expectations. The Evaluation Team will provide to ARC a report on all findings, which may include a notice that ARC is in jeopardy of not meeting expectations which could result in termination of the contract.

ARTICLE 6. AUDITING

6.01 Audits. ARC agrees that the representatives of the Office of the City Auditor, or other authorized representatives of the City, shall have access to, and the right to audit, examine, or reproduce, any and all records of ARC related to the performance under this Contract. ARC shall retain all such records for a period of three (3) years after final payment on this Contract or until all audit and litigation matters that the City has brought to the attention of ARC are resolved, whichever is longer. ARC agrees to refund to the City any overpayments disclosed by any such audit. ARC shall include these audit requirements in all subcontractor agreements entered into in connection with this Agreement.

6.02 Independent Audit. Independent certified audits of ARC's operations shall be submitted to the Director by April 30 of each contract year. The first audit shall be due April 30, 2013 and the final audit due on April 30, 2018. ARC shall pay for the Annual Certified Audit out of its independent funds. ARC may define the scope of the audit and recommend a firm to conduct the audit to be approved by the City. Audits will be approved by a Certified Public Accountant. The audit report/statements will be submitted to the City directly by the Auditor. A copy of the audit report/statements will be provided to ARC directly by the Auditor. The annual audit must be reviewed and approved by the ARC Board.

6.03. Performance Evaluation. At the 28th month after the initial Notice to Proceed is issued, the Evaluation Team will conduct a complete Performance Evaluation of the first 24 months of operation. The financial review will be from the Independent Audit provided to the City from ARC. If ARC is meeting or exceeding all financial expectations as proposed on the original contract, ARC will be allowed to continue operations. However, if financial projections are not being met, the City will have the right to terminate the agreement and provide a 90 day notice unless the City determines that all reasonable efforts are being made by ARC and that the market or other uncontrollable issues are the factors for not reaching the financial projections.

ARTICLE 7. INSURANCE REQUIREMENTS

7.01 Insurance Required. Prior to the time ARC is entitled to any right of access to or use of the Boathouse, ARC shall obtain and maintain the following types of insurance and minimum limits of coverage during the Term of the Agreement:

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|----------------------------------|-----------------------------|
| (a) Workers' Compensation | Statutory limits |
| Employer's liability | |
| \$100,000 | Each accident/occurrence |
| \$100,000 | Disease - each employee |
| \$500,000 | Disease - policy limit |
| (b) Commercial General Liability | \$1,000,000 each occurrence |
| \$2,000,000 | aggregate limit |

Coverage shall include but not be limited to the following: premises/operations, independent contractors, products/completed operations, personal injury, and contractual liability.

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|--------------------------|--------------------|-----------------------------|
| (c) Automobile Liability | \$1,000,000 | Each accident on a combined |
| | single limit basis | |

A commercial business policy shall provide coverage on "Any Auto", defined as autos owned, hired and non-owned.

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|----------------------------------|-----------------------------|
| (d) Umbrella or Excess Liability | \$5,000,000 Each occurrence |
| | \$5,000,000 Aggregate |

(e) Sexual Abuse and Molestation coverage is required if care of a child is provided outside the presence of a legal guardian or parent, this coverage shall be written for a minimum limit of \$500,000 per occurrence. If this coverage is written on a stand alone basis the City shall be listed as an additional named insured.

7.02 Additional Insurance Requirements.

- (a) The City and its Officers, Employees and Volunteers shall be named as an Additional Insured on the Automobile and Commercial General Liability policies.
- (b) Thirty days (30) prior written notice of cancellation or non-renewal is required.
- (c) Waiver of rights of recovery (subrogation) in favor of the City.
- (d) The insurers for all policies must be licensed and/or approved to do business in the State of Texas. Except for workers' compensation, all insurers must have a minimum rating of A: VII in the current A. M. Best Key Rating Guide or have reasonably equivalent financial strength and solvency to the satisfaction of Risk Management. If the rating is below that required, prior written approval of the City's Risk Management Division is required.
- (e) If insurance policies are not written for specified coverage limits, an Umbrella or Excess Liability insurance for any differences is required. Excess Liability shall follow form of the primary coverage.
- (f) Unless otherwise stated, all required insurance shall be written on the "occurrence basis". Prior written approval from the City's Risk Management Division is required for any claims-made policies. If coverage is underwritten on a claims-made basis, the retroactive date shall be coincident with or prior to the date of the contractual agreement and the certificate of insurance shall state that the coverage is claims-made and the retroactive date. The insurance coverage shall be maintained for the duration of the contractual agreement and for five (5) years following completion of the contractual agreement. An annual certificate of insurance submitted to the City shall evidence such insurance coverage.
- (g) Any deductible in excess of \$5,000.00, for any policy that does not provide coverage on a first-dollar basis, must be approved in writing by the City's Risk Management division.
- (h) The City, at its sole discretion, reserves the right to review the insurance requirements and to make reasonable adjustments to insurance coverages and their limits when deemed necessary and prudent by the City based upon changes in statutory law, court decision or the claims history of the industry as well as of

the contracting party to the City. The City shall be required to provide prior written notice of ninety (days).

(i) The City shall be entitled, upon request and without expense, to receive copies of policies and endorsements thereto and may make any reasonable requests for deletion or revision or modifications of particular policy terms, conditions, limitations, or exclusions except where policy provisions are established by law or regulations binding upon either of party or the underwriter on any such policies.

(j) Subcontractors are required to carry the same coverage and must submit to the City Certificates of Insurance prior to commencing work on the project.

7.03 Minimum Coverage. Insurance coverage specified herein constitutes the minimum requirements and said requirement shall in no way lessen or limit the liability of the ARC under the terms of this Agreement. ARC shall procure and maintain, at its own cost and expense, any additional kinds and amounts of insurance that, in its own judgment, it deems to be necessary

7.04 ARC Coverage. During the Term of this Agreement and at its sole cost and expense, ARC shall at all times maintain in effect property and casualty insurance coverages insuring the Premises in an amount equal to at least 100% of the actual replacement cost thereof and providing protection against any peril generally included in the classification "Fire and Extended Coverage" or so called "special form" coverage. The ARC shall be the named insured under the policy and the City shall be named as Loss Payee. Such insurance must be payable to the ARC and the City, as their interests may appear, and shall include a waiver of subrogation in favor of the City. ARC shall deliver to City, upon City's request, certificates of such insurance. In no event shall the City be responsible for damage to the Facility by reason of fire or other casualty, or by reason of any other cause that could have been insured against under the terms of a standard fire and extended coverage insurance policy or policies. In the event of a casualty, if the ARC reconstructs the Boathouse under Section 10.01, ARC and City shall use all insurance proceeds to reconstruct the Boathouse. If the Boathouse is not reconstructed after a casualty, the ARC and City shall proportionally share in the insurance settlement proceeds.

Following the completion of construction, ARC shall cooperate with the City's Risk Management Division for scheduling of property insurance inspections and responding to the property carriers recommendations as set forth in the inspection reports.

ARTICLE 8. TAXES

8.01 Payment by ARC. ARC will pay and discharge all taxes, general and special assessments, and other charges of any kind levied on or assessed against the Premises and all interests in the Premises and all improvements and other property on them during the Term and any extension, whether belonging to City or to ARC. ARC will pay all the taxes, charges, and assessments directly to the public officer charged with their collection before they become delinquent, and, to the extent permitted by law, ARC will indemnify City and hold it harmless

from all such taxes, charges, and assessments. ARC may, in good faith at its own expense (and in its own name) contest any such taxes, charges, and assessments and must pay the contested amount, plus any penalties and interest imposed, if and when finally determined to be due. ARC's failure to discharge any such tax, charge or assessment when finally due within ten (10) days after the date City's written notice is received by ARC shall constitute an event of default under Section 12.01 (d) below. However, ARC's financial obligation to City to liquidate and discharge such lien shall survive following termination of this Agreement and until such a time as the lien is discharged.

ARTICLE 9. UTILITIES

9.01 Payment by ARC. The ARC, at its sole cost and expense, will incur the cost to provide all gas, water, sewer, electric utilities, network and communication services for use by the ARC at the Facility.

ARTICLE 10. RESTORATION

10.01 Damage or Destruction. City shall not be responsible, under any circumstances, for any damage to property belonging to ARC, its members, employees, agents, contractors, subcontractors, invitees, licensees, or trespassers, which may be damaged, stolen, or destroyed, and ARC hereby releases City from any responsibility therefore. If the Facility or any other building or improvement constructed on the Premises is damaged or destroyed by fire or any other casualty, ARC shall within ninety (90) days from the date of the damage or destruction, begin to repair, reconstruct, or replace the damaged or destroyed Facility and pursue the repair, reconstruction, or replacement with reasonable diligence so as to restore the Facility to substantially the condition it was in before the casualty. But if beginning or completing this work is prevented or delayed by war, civil commotion, acts of God, strikes, governmental restrictions or regulations, or interferences, fire or other casualty, or any other reason beyond the ARC's control, whether similar to any of those enumerated or not, the time for beginning or completing the restoration (or both) will automatically be extended for the period of each such delay. In lieu of reconstructing the Facility, the parties can mutually agree to declare this Agreement terminated.

ARTICLE 11. INDEMNIFICATION

11.01 Liability of City. **CITY IS NOT LIABLE FOR ANY LOSS, DAMAGE, OR INJURY OF ANY KIND TO ANY PERSON OR PROPERTY ARISING FROM ANY USE OF THE PREMISES (OR ANY PART OF THEM), OR CAUSED BY ANY DEFECT IN ANY BUILDING, STRUCTURE, IMPROVEMENT, EQUIPMENT, OR FACILITY ON THE PREMISES (EXCEPT AS RELATED TO THE CITY'S REPAIR AND MAINTENANCE OBLIGATIONS DESCRIBED IN SECTION 10.01 ABOVE) OR CAUSED BY OR ARISING FROM ANY ACT OR OMISSION OF ARC, OR OF ANY OF ITS AGENTS, EMPLOYEES, LICENSEES, OR INVITEES, OR BY OR FROM ANY ACCIDENT, FIRE, OR OTHER CASUALTY ON THE PREMISES, OR BROUGHT ABOUT BY ARC'S FAILURE TO MAINTAIN THE PREMISES IN SAFE CONDITION.**

11.02 **INDEMNIFICATION.** ARC AGREES TO DEFEND, INDEMNIFY AND HOLD THE CITY, ITS OFFICERS, AGENTS SERVANTS AND EMPLOYEES, HARMLESS AGAINST ANY AND ALL CLAIMS, LAWSUITS, ACTIONS, COSTS AND EXPENSES OF ANY KIND, INCLUDING, BUT NOT LIMITED TO, THOSE FOR PROPERTY DAMAGE OR LOSS AND/OR PERSONAL INJURY, INCLUDING DEATH, THAT MAY RELATE TO, ARISE OUT OF OR BE OCCASIONED BY (i) ARC'S BREACH OF ANY OF THE TERMS OR PROVISIONS OF THIS AGREEMENT OR (ii) ANY NEGLIGENT ACT OR OMISSION OR INTENTIONAL MISCONDUCT OF ARC, ITS OFFICERS, AGENTS, ASSOCIATES, EMPLOYEES, CONTRACTORS (OTHER THAN THE CITY) OR SUBCONTRACTORS, RELATED TO CONSTRUCTION OF A FACILITY OR THE PERFORMANCE OF THIS AGREEMENT; EXCEPT THAT THE INDEMNITY PROVIDED FOR IN THIS PARAGRAPH SHALL NOT APPLY TO ANY LIABILITY RESULTING FROM THE NEGLIGENCE OF THE CITY OR ITS OFFICERS, AGENTS, EMPLOYEES OR SEPARATE CONTRACTORS, AND IN THE EVENT OF JOINT AND CONCURRENT NEGLIGENCE OF BOTH ARC AND CITY, RESPONSIBILITY, IF ANY, SHALL BE APPORTIONED COMPARATIVELY IN ACCORDANCE WITH THE LAWS OF THE STATE OF TEXAS.

11.03 Notification. ARC agrees to notify City promptly upon the receipt of any claim or lawsuit brought in connection with any injury, death or damages on the Premises. ARC agrees to make its officers, agents, and employees available to the City, at all reasonable times for any statements and case preparation necessary for the defense of any claims or litigation for which the City may be responsible hereunder. ARC shall place language in its contract with contractors that contractors shall notify the City as required by ARC in this subsection.

11.04 Waiver of Immunity. Nothing in this Agreement shall be deemed to constitute a waiver of any immunity or affirmative defense, which may be asserted by City or ARC as to any claim of any third party.

11.05 Cause of Action. Nothing in this Agreement shall be construed in any manner, to create a cause of action for the benefit of any person not a party to this Agreement, or to create any rights for the benefit of any person not a party to this Agreement not otherwise existing at law.

ARTICLE 12. DEFAULT AND REMEDIES

12.01 Event of Default. The following shall be deemed events of default by ARC under this Agreement:

- a. ARC fails to use the Premises for conducting and operating the Facility for the purpose of on-the-water recreation programming as set forth in the Uses Exhibit in accordance with Item 3.02, Permitted Use of Premises.
- b. ARC makes a transfer in fraud of creditors, or makes an assignment for the benefit of creditors;

- c. ARC vacates any substantial portion of the Premises for a period of longer than thirty (30) days, unless ARC can demonstrate to the reasonable satisfaction of the City that all reasonable efforts are being made by ARC to occupy said Premises or
- d. ARC fails to comply with any other term, provision or covenant of this Agreement that is material.
- e. ARC fails to provide services in accordance with the requirements of this Agreement.

12.02 Curing a Default.

- (i) If an event of default occurs, the City shall give written notice that describes the default in reasonable detail to the ARC. The ARC must commence curing such default within fourteen (14) calendar days after the time it receives the notice from the City, and then complete the cure within ninety (90) days thereafter.
- (ii) If the ARC does not substantially complete the cure within the stated time in (i) of this section, the City may terminate this Agreement by giving written notice of the termination; provided, however, if the default is not reasonably susceptible to cure within the stated time, the City will not exercise its right to terminate this Agreement so long as the ARC has commenced to cure the default within the required time and diligently completes the cure within a reasonable time without unreasonable cessation of the work to complete the cure.

12.03 Other Remedies. Any termination of this Agreement as provided in this article will not relieve ARC from paying any sum or sums due and payable to City under this Agreement at the time of termination, or any claim for damages then or previously accruing against ARC under this Agreement. Any such termination will not prevent City from enforcing the payment of any such sum or sums or claim for damages by any remedy provided for by law, or from recovering damages from ARC for any default under the Agreement. All City's rights, options, and remedies under this Agreement will be construed to be cumulative, and not one of them is exclusive of the other. City may pursue any or all such remedies or any other remedy or relief provided by law, whether or not stated in this Agreement.

12.04 Relocation of ARC. In the event this Agreement is terminated, the City agrees to act expeditiously to assist ARC in the relocation of its private operations to an appropriate location in Lady Bird Park.

ARTICLE 13. RECORDS

13.01 Provision of Records. On a monthly basis, or at such intervals as may be requested, the ARC shall provide the City digital copies of current Facility membership in the form of electronic statistics, e.g. itemized by zip code, family unit or as reasonably specified by the City, as well as financial, operational, safety, environmental and maintenance information related to the Facility and all other information reasonably deemed necessary by the City and the ARC.

13.02 Open Records. ARC acknowledges that the City is required to comply with Chapter 552 of the Texas Government Code (“**Public Information Act**”). Under the Public Information Act, this Agreement, and documents related to this Agreement, which are in the City’s possession, or to which the City has access, are presumed to be public and the City may release these records to the public unless an exception to disclosure applies.

13.03 Notice of complaints, or violation reports. The ARC shall notify, within 10 days of occurrence/notice, the City of any complaints or reports of violations of the law that have occurred at the Facility and that are significant in nature and that have a material effect on the operations of the Facility.

ARTICLE 14. NOTICES

14.01 Notices. Any notice, demand, request or other communication hereunder given or made by either party to the other shall be in writing and shall be deemed to be delivered whether actually received or not, when deposited in the United States mail, postage prepaid, certified or registered mail, return receipt requested, addressed to the parties hereto at the respective addresses set out below, or at such other address as they may hereafter specify by written notice so given.

- | | | |
|----|-------------|--|
| a. | If to City: | Parks and Recreation Department
Director, Parks Department
City of Austin
City Hall
200 South Lamar
Austin, Texas 78701 |
| b. | If to ARC | Austin Rowing Club
President
P. O. Box 1741
Austin, Texas 78767-1741
(mailing address)

74 ½ B Trinity St.
Austin, TX 78701
(physical address) |

ARTICLE 15. GENERAL PROVISIONS

15.01 Right of Entry and Inspection. ARC must permit City or its agents, representatives, or employees to enter the Premises for the purposes of inspection; determining whether ARC is complying with this Agreement; maintaining, repairing, or altering the

Premises; or any other reasonable purpose During any inspection, City may perform any obligations that City is authorized or required to perform under the terms of this Agreement or pursuant to its governmental duties under federal state or local laws, rules or regulations.

15.02 Interpretation. In the event of any dispute over the meaning or application of any provision of this Agreement, this Agreement shall be interpreted fairly and reasonably, and neither more strongly for or against any party, regardless of the actual drafter of this Agreement.

15.03 No Third Party Rights. The provisions and conditions of this Agreement are solely for the benefit of the City and ARC, and any lawful assign or successor of the ARC, and are not intended to create any rights, contractual or otherwise, to any other person or entity.

15.04 No Partnership or Joint Venture. ARC shall operate as an independent contractor and not as an officer, agent, servant, or employee of the City. ARC shall have the exclusive control of, and the exclusive right to, control the work designated to the ARC to be performed under this Agreement, and all persons performing the same, and shall be solely responsible for the acts and omissions of its officers, agents, servants, contractors, subcontractors and employees. Neither City nor ARC shall be responsible under the Doctrine of Respondeat Superior for the acts and omissions of its officers, agents, servants, contractors, subcontractors, or employees. It is understood and agreed that the City is not involved as a party to any activities that may be carried on by ARC pursuant to this Agreement. ARC acknowledges itself solely responsible for such activities and for all persons and property involved or used in connection with ARC's use of the Premises. Provided, however, that no provision of this Agreement shall operate or be construed as a waiver by either party of any immunity from liability which it has or could be asserted under the doctrine of governmental immunity or any other immunity which it has under law.

15.05 Declared Emergency. In the event of a declared City, state or federal emergency, the ARC will immediately make the Facility available for use as deemed necessary by the City in order to respond to the declared emergency. Should the declared emergency extend beyond 72 hours, the City will seek reimbursement from federal, state and/or local funding and compensate the ARC for any lost revenue as a result of declared emergency use, to the extent funds are received from these sources.

15.06 Force Majeure. Each party to this agreement agrees to excuse the failure of another party to perform its obligations under this Agreement to the extent that failure is caused by an event of Force Majeure. ***Force Majeure means acts and events not within the control of the party, and which the party could not use due diligence to avoid or prevent.*** Events of Force Majeure include acts of God, strikes, riots, sabotage, civil disturbances, epidemics, acts of domestic or foreign terrorism, lightning, earthquakes, fires, storms, floods, and landslides. Force Majeure does not include economic or market conditions, which affect a party's cost, but not its ability to perform. The party invoking Force Majeure shall give timely and adequate notice to the other party of the event by facsimile transmission, telephone, or e-mail and then the party must promptly provide written notice of the Force Majeure in the manner required by this Agreement. The party shall use due diligence to remedy the effects of Force Majeure as soon as reasonably possible. If a party's performance is delayed by the event of Force Majeure, the

parties will mutually agree to extend the time for the completion of obligations by a period of time reasonably necessary to overcome the effect of the Force Majeure event

15.07 Binding Covenants. Subject to the limitations contained in this Agreement, the covenants, conditions and agreements made and entered into by the parties are declared to be for the benefit of and binding upon their respective successors, representatives and assigns, if any.

15.08 Invalid Provision. It is agreed that, in the event any covenant, condition or provision of this Agreement is held to be invalid by any court of competent jurisdiction, the invalidity of such covenant, condition or provision shall in no way affect any other covenant, condition or provision; provided, however, that the invalidity of any such covenant, condition or provision does not materially prejudice either ARC or City in connection with the rights and obligations contained in the valid covenants, conditions or provisions of this agreement.

15.09 Assignment and Successors. ARC may not assign, transfer or otherwise convey any of its rights or obligations under this Agreement to any party without the prior written consent of the City, which consent shall not be unreasonably withheld or delayed, conditioned on (i) the prior approval of the assignee or successor and a finding by the City Council that the proposed assignee or successor is financially capable of completing the construction and occupancy of Facility and (ii) the proposed assignee or successor has executed a written agreement with the City under which it agrees to assume all covenants and obligations of the ARC under this Agreement, in which case such assignee or successor shall thereafter be deemed "ARC" for all purposes under this Agreement. An attempt to assign this contract without the consent of the ARC shall be considered an event of default.

15.10 Applicable Laws. The laws of the State of Texas shall govern this agreement and the relationship created hereby. Venue for any action brought to interpret or enforce, or arising out of or incident to, the terms of this agreement shall be in Travis County, Texas.

15.11 Severability of Provisions. If any of the provisions contained in this Agreement shall be held, for any reason, to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability, shall be construed as if such invalid, illegal, or unenforceable provision had never been in this Agreement.

15.12 Governmental Powers. It is understood that by execution of this Agreement, the City does not waive or surrender any of its governmental powers

15.13 Captions. Captions and headings used in this Agreement are for reference purposes only and shall not be deemed a part of this Agreement.

15.14 Agreement. This Agreement includes, without limitation, the attached Exhibits, the City's Standard Purchasing Terms and Conditions, the Supplemental Terms and Conditions included in Solicitation number CB30017, and ARC's offer in response to the solicitation. Any inconsistency or conflict in the Contract documents shall be resolved by giving precedence in the following order:

- a. This Agreement

- b. Exhibit 2, Revenue, Capital Investments and other Contributions
- b. The Supplemental Purchase Terms and Conditions;
- c. The Standard Purchase Terms and Conditions;
- d.. ARC's Proposal dated April 26, 2010 with exhibits.

EXECUTED this the _____ day of _____, 2012.

**CITY OF AUSTIN AUSTIN ROWING
CLUB**

By: _____

By: _____
Marc A. Ott Camille Jobe
City Manager President

APPROVED AS TO FORM AND LEGALITY

By: _____
Jacqueline Cullom
Assistant City Attorney

Exhibits

Exhibit 1 – Boathouse Defined
Exhibit 2 – Revenue, Capital Investments and Other Contributions