

AGREEMENT FOR DEVELOPMENT AND CONSTRUCTION OF A NEW RECREATION FACILITY FOR PUBLIC USE FUNDED IN PART WITH BOND FUNDS

This agreement for development and construction of a new recreational facility for public use funded in part with bond funds (**Agreement**) has an effective date that is the last date this Agreement is executed by a party. This Agreement is between the City of Austin (**City**), a Texas home rule city and municipal corporation and the Young Men's Christian Association d/b/a YMCA of Austin, a Texas non-profit corporation (**YMCA**).

1. RECITALS

1. In order to provide its citizens a facility for recreation, meeting space and other traditional and progressive recreational and community service programs, the City desires to participate in the construction of a joint-use facility (**Facility**) with the YMCA, a non-profit organization whose goals and objectives align with the goals and objectives of the City's Parks and Recreation Department.

2. The Facility will be located at 1000 W. Rundberg Lane, Austin, Texas, 78758 or 78753.

3. The City has recognized the long experience and expertise of the YMCA in conducting programs for families at its branches in Travis County and adjoining counties, and in providing recreational and character-building programs for adults and youth.

4. The residents of the City will derive substantial benefits from the activities and programs to be provided and conducted by the YMCA at the Facility, at other YMCA branches in Austin, and through reciprocal membership privileges at YMCAs in other cities where Austin members work or travel.

5. It is the mutual desire of the City and the YMCA that the new Facility be constructed, occupied, and managed by the YMCA for the offering and conducting of YMCA programs and other community based programming as contemplated by this Agreement and the Operations Agreement attached to this Agreement. The development of this Facility is referred to in this document as the **Project**.

6. YMCA is an organization described in Section 501(c)(3) of the Internal Revenue Code of 1986 (**IRC**) that is exempt from federal income taxes under section 501(a) of the IRC.

7. The voter-approved bond funds are referred to in this document as **Bond Funds**. The available funds for this project are the **Bond Funds** less certain costs (**City Contribution**). The YMCA will provide any funds needed beyond the City Contribution to build a 30,000 square foot facility with indoor swimming pool, of which not less than 3,000 square feet shall be available for community use at no charge, and will provide the daily maintenance and operations for the Project for the public.

8. The City and YMCA (sometimes referred to collectively as the **Parties** and singly as **Party**) wish to execute this Agreement to govern the distribution of the City's disbursement of the Bond Funds to complete the Project.

NOW THEREFORE, in consideration of the premises and other good and valuable consideration, the receipt and sufficiency of which are acknowledged, the Parties agree as follows:

2. DEFINED TERMS

Approved Team means the team of professionals assembled by YMCA prior to the Effective Date to work on the design of the Improvements. That team, for which such services are not subject to the selection process of Section 3.e of this Agreement, consists of:

Project Manager; and the
Architect/Engineer.

Bond Funds means the estimated \$8,900,000.00 of the general obligation bond funds authorized in the 2006 Bond Election. Funds currently available for capital expenditures for this project are identified in City Contribution below.

Change Order means a change in the contract executed by and between YMCA and the CONSTRUCTION MANAGER, any contractor, or subcontractors for construction related services as contemplated in this Agreement.

City Project Manager or **City PM** means the individual designated by the City's Public Works Department as a project manager to act on behalf of the City with respect to the day-to-day administration of this Agreement. The City PM will: (i) act as a single point of contact to facilitate communication between the Parties; (ii) schedule project development meetings between the Parties to discuss the Project and the Improvements only on an as-needed basis; and (iii) act as a conflict resolution facilitator in connect with the matters arising under this Agreement.

The City hereby grants the City PM the maximum authority allowed by City, State and Federal law to approve Change Orders and make other decisions with respect to the design and construction of the Project, without the necessity of approval from other City representatives.

City Contribution. The City Contribution to this project that is available for the YMCA to use in construction is the Bond Funds less the Bond Funds already spent by the City in preliminary work on this project, and less the debt service cost for bond issuance, and less Art In Public Places (as described below), and less the staff costs for Parks and Recreation Department, and Public Works staff whose time is charged to this project in accordance with City standard practice. These costs are estimated at: \$475,000. The City will make periodic (but not more than once a month) disbursements of the City Contribution which will be used by YMCA solely with respect to the development, and construction of recreational facilities for public use. Prior to the disbursement of the City Contribution, YMCA shall demonstrate to the City that it has sufficient cash and other financing acceptable to the City to complete construction of the Improvements. YMCA must also present the City with the Business Plan as described in Section 4.b. prior to the City's disbursing the City Contribution.

The City Contribution shall be memorialized annually in the form of a letter documenting the project's appropriation in the Approved Capital Budget of the City of Austin, and the next anticipated appropriation as documented in the City's Capital Improvement Program Five Year Plan.

All disbursements of the City Contribution will be disbursed at the City's option: (aa) by the City's check delivered to YMCA; (bb) by the City's wire transfer to a federally insured account directed by YMCA; or (cc) in the event a claim has been filed or a dispute has occurred with a subcontractor providing labor, services or materials to the Project, by direct or joint check to such persons or entities entitled to payment.

Construction Manager means the Construction Manager at Risk hired by YMCA to manage construction of the Improvements.

Concept Plan means the document attached as **Exhibit A**.

Design Committee means a group of six people with three members selected by the YMCA, two members selected by the City Parks and Recreation Department, and one member selected by the City Public Works Department. The Design Committee will track progress on milestone deliverables, and provide feedback to PARD and the City to assure that the requirements for operations are being appropriately included in the construction of the facility. During the design phase

of the project, City Staff and the YMCA Staff shall on a monthly basis provide information to interested community groups, including the North Austin Civic Association (NACA), concerning the proposed design and layout of the facility.

Effective Date means the last date this Agreement is signed by YMCA or the City.

Exhibits means the documents attached to this Agreement:

Exhibit A Concept Plan

Exhibit B Project Budget

Exhibit C Joint Operations Agreement Between the City of Austin and the YMCA (Operations Agreement)

Exhibit D Insurance and Bond Requirements

Exhibit E Milestone Deliverables

Improvements means all the work for the Project to be completed pursuant to this Agreement.

Milestone Deliverables means those contract deliverables from the Project Team delivered at critical times during the design and construction phases of the Project and more particularly described in **Exhibit E**.

Operating Reserves means at the time of the commencement of construction, sufficient cash reserves as described in Article 7 of this Agreement.

PARD means the City of Austin Parks and Recreation Department.

Procurement Documents means the standard procurement documents available on the City of Austin Public Works web site at <http://www.ci.austin.tx.us/clmd/biddocs.htm>. Amendments to these documents may be found at <http://www.ci.austin.tx.us/clmd/cpdivision.htm>

Project Team means the Approved Team plus the Design Committee and Construction Manager hired by YMCA for design and construction of the Improvements.

Property means the property located at 1000 West Rundberg Lane Austin Texas and described more specifically in the survey attached to **Exhibit C – Operations Agreement**.

Recreational Entity: Young Men's Christian Association d/b/a YMCA of Austin.

YMCA Project Manager or YMCA PM means the qualified project manager employed by the YMCA and approved by the City of Austin, whose approval will not be unreasonably withheld, to manage the design and construction of the Improvements.

3. DESIGN AND CONSTRUCTION OF THE PROJECT

a. **Approved Team Services** will consist of services provided in accordance with the proposals accepted by YMCA in accordance with the procedures set out in this Agreement. Each member of the Approved Team will be fully funded by YMCA out of funds that are not Bond Funds or other City funds.

Contract Procurement and Management. The City's PM shall have the right to review the qualifications of each member of the Approved Team and approve the selection. The City PM's approval shall not be unreasonably withheld.

b. **Construction Manager (CONSTRUCTION MANAGER)**

Contract Procurement and Management. YMCA shall procure the CONSTRUCTION MANAGER services in accordance with all applicable laws. Procurement for these services shall be made using the City Procurement Documents. The City (City PM) shall have the right to review and participate in: the approval of the procurement process, the committee formed for the selection of the CONSTRUCTION MANAGER short list and the final selection made by YMCA. YMCA shall be responsible for the negotiation of the CONSTRUCTION MANAGER contract. The CONSTRUCTION MANAGER contract will contain a provision for establishing a guaranteed maximum price, or prices. Upon completion of the CONSTRUCTION MANAGER contract, YMCA shall provide a copy of the final contract to the City for its approval, which shall not be unreasonably withheld. No amendment changing the scope of work in the Construction Management Contract shall be made to the contract by YMCA without the prior written approval of the City, which approval shall not be unreasonably withheld.

c. **Assignment:** The Approved Team and CONSTRUCTION MANAGER agreements (**Professional Agreements**) between YMCA and these identified professionals are each subject to the following default and assignment provision: In the event of a material default of YMCA of its obligations under each of the

Professional Agreements, the City of Austin may, but is not required to, assume the rights and responsibilities of YMCA.

This Agreement shall be binding upon and inure to the benefit of the Parties and their respective heirs, successors, legal representatives and assigns; provided however, YMCA may not transfer its rights or obligations under this Agreement without the prior written consent of the City, which consent may be withheld in the City's sole and absolute discretion. Notwithstanding anything to the contrary in this Agreement, YMCA may with the prior approval of the City, which shall not be unreasonably withheld, collaterally pledge the Professional Agreements to any lender who provides YMCA its working line of credit as contemplated in this Agreement, provided, to the extent the lender exercises its rights under its collateral security and pledge agreements, the lender or its affiliates or approved assignee agree to perform or assume the obligations of YMCA under the Operations Agreement and this Agreement, and in such case the City will hold a second and inferior collateral assignment. The lender's prior security interest shall contain provisions that the lender shall comply with all laws applicable to the Project and parkland ordinances.

d. Wage Rates/Prevailing Wage: YMCA, in its administration of procurements, must comply with, and will require its CONSTRUCTION MANAGER, its contractors, and subcontractors supplying construction labor or materials to the Project to comply with the City's prevailing wage requirements, set forth in Resolution No. 20080605-047, throughout solicitation of any construction contract or procurement of services relating to the construction of Improvements pursuant to this Agreement. The City has adopted the general prevailing rate of per diem wages established by the U.S. Department of Labor for work of similar character in the locality in which the work is performed as the minimum per diem wages to be paid in connection with a City of Austin public improvement project for the construction of public buildings. The rates to be paid by the City in these projects are the rates in effect for Travis County at the time the City advertises these projects for bid. The Resolution adopts the same wages for public-private projects such as this one in which the City is a participant.

e. M/WBE: Commencing on the Effective Date, with respect to the design and construction of the Improvements, YMCA, its Project Manager, its A/E, and its CONSTRUCTION MANAGER will meet the following annual ethnic and gender specific participation goals or demonstrate their good faith efforts to meet these goals:

	Professional Services Participation Goals	Construction Participation Goals
African-American –owned Business Enterprises	1.7%	1.7%
Hispanic-owned Business Enterprises	9.5%	9.7%
Asian-American and Native American-owned Business Enterprises	5.3%	1.5%
Women-owned Business Enterprises	14.2%	12.6%

The City will provide a list of certified firms to YMCA from which YMCA shall solicit participation in the design and construction of the Improvements; YMCA may solicit participation from firms not on the list, but only City certified firms can be used towards meeting participation goals or demonstrating good faith efforts. The City will assist YMCA to identify potential scopes of work, establish the bid packages available, schedule and host outreach meetings, and assist YMCA in soliciting M/WBE firms to provide bids. The foregoing shall not require YMCA to solicit participation during a period in which YMCA is not designing or constructing the Improvements, but rather, requires YMCA to incorporate the standards and principles of the M/WBE Ordinance into its development process as and when such process exists. Additionally, YMCA's agreement to meet the M/WBE goals or demonstrate a good faith effort to meet the M/WBE goals does not require YMCA to modify or amend any contract or agreement that YMCA has entered into prior to the Effective Date. Any contract or agreement that YMCA has entered into relating to the construction of the Improvements contemplated by this Agreement, prior to the Effective Date, may, at YMCA's election, be applied in the calculation of the participation goals provided above. The foregoing agreement does not require YMCA to change or modify the composition of the Approved Team, which is the team of professionals assembled by YMCA prior to the Effective Date to work on the design of the Improvements. If YMCA solicits and selects its contractors in accordance with applicable laws, including applicable City ordinances and resolutions, then the City's approval of the hiring of these contractors will not be unreasonably withheld.

Beginning at the end of the first quarter expiring after the Effective Date, YMCA shall provide quarterly reports to allow the City's Small and Minority Business

Resources Department to track (A) the utilization on a percentage basis of minority-owned and women-owned business enterprise firms in the design and construction of the improvements; and (B) YMCA's efforts to implement Resolution No. 20071109-127 relating to M/WBE compliance. The City shall provide the forms to be used by YMCA in submitting these reports.

f. LEED Certification Objective: YMCA shall take steps to insure that its design and construction comply with City requirements relating to Leadership in Energy and Environmental Design (LEED) green building rating system. YMCA will, at a minimum, achieve the LEED Silver certification for the Improvements.

g. Compliance with Resolution No. 20071129-046. YMCA shall comply with all applicable City codes and ordinances, including: (i) all future city buildings and site developments shall meet all provisions of Subchapter E of Chapter 25-2 of the Land Development Code; (ii) the development process for any City buildings and associated site development shall include consultation with Watershed Protection and Development Review to look for commercially reasonable opportunities within the project budget to include green infrastructure and innovative stormwater facilities such as biofiltration ponds, rainwater harvesting, porous pavement, vegetative filter strips for disconnected impervious cover, non-required vegetation, native landscapes to achieve carbon sequestration, and others as developed by the department, and that these facilities be designed and implemented in such a way that enables ongoing monitoring; and (iii) YMCA shall present Plans for the Improvements, which are feasible under the circumstances within and the Project Budget and given the nature of the Project, to the Design Commission to ensure they demonstrate compliance with City design and sustainability standards, and that this presentation take place early enough in the development process to enable incorporation of improvements that result from this consultation.

h. Design

- i. Design Review, Approval and Authorized Changes:** At completion of each Milestone Deliverable, YMCA shall submit to the City's PM one half-size set of drawings, specifications and project manual (**Plans**) and an updated statement of probable construction costs for the City's review and confirmation that the Plans conform to any previously approved Plans. The City's PM shall advise YMCA within ten (10) business days after receipt of the Plans if any portion or component of the Plans materially differs with the Concept Plan and any previously approved Plans, the Project Budget or violates a provision of this Agreement and shall provide a detail of the reasons why the Plans do not conform to the Concept Plan and any previously approved Plans, or

do not conform to the Project Budget or violate this Agreement. If YMCA is so advised, YMCA shall immediately revise the Plans to comply with the Concept Plan and any previously approved Plans, the Project Budget and/or this Agreement. Any disagreement between City and YMCA regarding the existence of a material variance shall be resolved by the Architect. The revised approved Plans at the end of the construction document phase shall be the **Final Plans**. The City PM is not responsible for obtaining any building permit or certificate of occupancy for the Premises. YMCA shall not commence construction until YMCA has obtained the confirmation required above for Plans and all required governmental permits for the identified scope of work, which shall not be unreasonably withheld. No material Change Order to the Final Plans or any Change Order to the Final Plans affecting the Project may be made without the prior written consent of the City's PM, which consent shall not be unreasonably withheld or delayed. All other Change Orders to the Final Plans shall be approved by the City as long as they materially conform to the Concept Plan or any previously approved Plan, the Project Budget and this Agreement. Approval by the City PM does not constitute approval by any City department exercising regulatory authority over the construction of buildings.

- ii. **Ownership of Plans and Specifications:** Subject to the legal interests of the A/E and any production professionals, ownership of all of the Plans, as well as any and all subsequent Change Orders and all other engineering studies, reports, plans or other materials in any way relating to the construction at the Premises (**Identified Documents**), shall be in YMCA during the term of the Operations Agreement. YMCA will have the absolute right to use of these Identified Documents in connection with the Premises during the term of the Operations Agreement without consent of the City. Subject to the legal interests of the A/E and any production professionals, ownership of the Identified Documents vests in the City at the termination of the Operations Agreement, no matter how such termination occurs. YMCA, whether from Bond Funds or other sources, is solely responsible for the payment of all fees and expenses in connection with the preparation and use of the Identified Documents. YMCA will obtain any written consents and confirmations as the City may request from the appropriate parties allowing the City use and ownership of the Identified Documents for the Premises only after the term of the Operations Agreement. At Final Completion, YMCA shall provide the City with its own copy of the Identified Documents. During the term of this Agreement, the City shall be entitled to additional copies of the Identified Documents at any time and from time to time, from YMCA, if the City pays reproduction costs.

i. **Art In Public Places (AIPP):** YMCA shall comply with the City of Austin Art in Public Places requirement in connection with the Improvements. The AIPP budget is estimated at \$155,000.

j. **Permits and Fees:** Responsibility for obtaining permits and for paying fees associated with the permits is the responsibility and duty of YMCA. Fees for permits are not reimbursable.

k. **Zoning, Site Plan, and Building Permits:** YMCA is responsible for insuring that appropriate zoning, site plan, and building permit approvals have been obtained during appropriate times in the design and construction process. YMCA is also responsible for compliance with the zoning, site plan, and building permits during the design, construction, and operation of the Improvements.

l. **Construction Commencement and Completion:**

i. **Time of Performance.** No later than 45 days after the City issues the last of any required construction permits for this Project and in no event later than December 31, 2013, YMCA shall begin bona fide excavation of the premises in preparation for the construction of this Project. YMCA shall diligently pursue completion of this Project and shall Substantially Complete this Project no later than two (2) years after the date construction begins. "**Substantially Complete**" means finally completed, but for minor items of punch list work that can be completed in not more than 30 days, that do not interfere with YMCA's use of the Premises, and that do not interfere with YMCA's ability to obtain a certificate of occupancy for the Premises. YMCA shall complete work on the punch list items no later than 30 days after it identifies the items for the punch list (**Final Completion**). The City shall extend the dates set out in this section for good cause and for events of Force Majeure.

ii. **Construction Standards and Liens.** All items to be reimbursed by the City must be constructed in accordance with the following construction standards:

- (a) Construction must be performed in a good and workmanlike manner in accordance with the Final Plans.
- (b) Construction must be completed using good industry practice for the type of work in question.
- (c) The materials and workmanship must be of a quality greater than or at least equal to the standards set out in the Final Plans.

- (d) All construction must be designed and constructed in compliance with all applicable building codes, ordinances, and other laws or regulations of governmental authority having jurisdiction over the construction.
- (e) The work must also comply with the City of Austin's MBE/WBE program requirements for construction projects.
- (f) The work must comply with the Americans with Disabilities Act requirements applicable to municipally owned and operated facilities.
- (g) No construction or work may be commenced until all licenses, permits, and authorizations required of all governmental authorities having jurisdiction necessary to commence construction have been obtained.
- (h) YMCA shall have obtained and shall maintain in effect the insurance coverage required by this Agreement and the Operations Agreement with respect to the Project.
- (i) After commencement, the construction or work being performed must be prosecuted within the time schedules and deadlines under this Agreement.
- (j) YMCA shall have no right, authority, or power to bind the City or any interest of the City in the Premises for labor, materials, or any other charge or expense incurred in construction of any improvements or other work done on the Premises.
- (k) YMCA shall take no action to render the City liable for any lien or right of lien for any labor, materials, or other charge or expense incurred in connection with any work performed on the Premises and YMCA shall in no way be considered as the agent of the City in the construction, erection, or operation of any improvements made on the Premises.
- (l) If any liens or claims for labor or materials supplied or claim to have been supplied to the Premises are filed, YMCA shall promptly pay or bond such liens to the City's reasonable satisfaction or otherwise obtain the release or discharge of the lien or claim, provided the City is not in default of its payment obligations herein.
- (m) Repairs: if, during construction, YMCA damages any property of the City, YMCA shall be responsible for such damage and shall repair it at YMCA's sole cost and expense. This provision is not intended to limit YMCA's right to seek repair of damage, or payment to repair damage, from a person or entity hired by it to complete construction, if the damage was caused by that person or an agent of the entity. However, YMCA is ultimately responsible for taking the necessary steps to insure that the repair is completed in accordance with

applicable codes and standards and paid for from funds that are not the City's funds.

- (n) The YMCA shall only use the Procurement Documents for any procurements for the Project for which Bond Funds are used.

m. Ownership of Improvements: Title to all the Improvements located on the Premises is and shall remain vested in the City immediately upon the attachment of the Improvement to the Premises or to another Improvement located on the Premises, subject to the rights of YMCA under the Operations Agreement.

n. Assignment of Warranties and Guaranties: To the extent assignable, upon termination of the Operations Agreement all warranties and guaranties obtained by YMCA shall be automatically assigned to the City.

4. PROJECT DEVELOPMENT COSTS

a. Project Budget: The Project Budget for the Project is attached as **Exhibit B** and is approved by the City. The Project Budget shall include all costs incurred in connection with the design and construction of the Improvements, including but not limited to the following: demolition costs, excavation costs, building costs, fixed equipment costs, site development costs, moveable equipment costs, professional fees, Project contingencies, and cost of debt issuance; provided that the Project Budget shall not include any cost over-runs within the individual cost categories shown on the Project Budget caused by Change Orders, where requested by either the City or YMCA. In such case and subject to Section 9.b.(2) of this Agreement, the Party requesting the Change Order, if not approved by the other Party, shall pay for all changes which it requires. It is the intent of the Parties that these provisions shall not apply to those Changes Orders necessary to comply with the building codes and ordinances or where resulting from the unavailability of materials or errors or omissions in the Final Plans. It is the intent of the Parties that neither Party shall make a financial commitment, which would result in a cost over-run within an individual cost category shown on the Project Budget, without the concurrence of the other Party. The Parties agree that any savings that may occur, no matter how they occur, within the individual cost categories shown on the Project Budget shall be applied to other cost categories within the scope of the Project as YMCA may elect.

b. Fiscal Planning: Before commencement of construction, YMCA shall submit to the City supporting evidence that it has sufficient funds together with the Bond Funds to enable YMCA to complete the Improvements and to pay all associated costs. Upon receipt of the submittal by YMCA, the City shall confirm the sufficiency of the supporting evidence and promptly notify YMCA if the submittals are not sufficient and the reason for their insufficiency. YMCA shall

also submit its **Business Plan** prepared by a consultant of YMCA's choosing or internally by YMCA's staff that shall demonstrate that YMCA has sufficient budgeted funds to maintain and operate the Improvements during the first three years after construction is complete. The City shall reasonably confirm the sufficiency of the Business Plan and promptly notify YMCA if it is insufficient and the reason for its insufficiency.

c. **Budget Changes:** YMCA may not increase the Project Budget without the City's prior written consent. YMCA may decrease the Project Budget or shift allocations to budget line items without changing the total Project Budget without the City's approval or consent, provided however, YMCA will provide the City with a copy of the amended Project Budget in such case. YMCA may not decrease the Project Budget in a way that results in a material diminution in value of the Improvements without approval of the City. Review by the City shall be completed within two weeks of any submittal under this paragraph and approval of the change will not be unreasonably withheld.

d. **City Contribution Items:**

i. **Conditions Precedent to Disbursement:** The City's obligation to contribute the City Contribution will be subject to the satisfaction of the following conditions:

(a) At least 15 days prior to the date of the requested disbursement of the City Contribution, YMCA shall deliver to the City PM the following:

- A. A pay request approved by YMCA or other form of invoice from YMCA evidencing the draw amount due;
- B. For construction services performed or materials delivered: the supporting application for payment in the form reasonably approved by the City, showing the schedule of values, by trade, of percentage of completion of the City Contribution item detailing the portion of work completed and the portion not completed as of the date of the application for payment, updated progress schedule and monthly subcontractor report in a form reasonably approved by the City, and if requested by the City, copies of invoices from contractors and subcontractors (**YMCA Contractors**) for services and labor rendered and materials delivered to the Premises with respect to the City Contribution Reimbursement Item.

- C. For all construction services regardless of how performed:
 - (i) No later than final payment for the construction services, executed conditional mechanic's lien releases from all YMCA Contractors (along with unconditional mechanics lien releases with respect to payments made pursuant to YMCA's prior submission under this Agreement) in recordable form.
 - (ii) Records satisfactorily documenting to the City that YMCA has complied with Chapter 271 Subchapter H of the Texas Local Government Code relating to alternative project delivery methods - specifically the employment of a construction manager at risk.
- D. For all requested disbursements of the City Contribution, any and all other information reasonably requested by the City, which has not been previously provided.

e. **YMCA Covenants:**

- i. **Budget Requirements:** The Project Budget attached to this Agreement is on a form reasonably approved by the City. Any changes shall be subject to the terms of Section 4.c.
- ii. **Contribution Requirements:** YMCA and the City understand and agree that the Premises and the uses of the Premises are subject to the Operations Agreement by and between the City and YMCA and the Parties agree this Agreement shall not remove any rights and privileges YMCA may have under the Operations Agreement.
- iii. **Milestone Deliverables:** YMCA shall during the course of the design phase and the construction phase deliver either by mail or hand delivery to the City PM the Milestone Deliverables.
- iv. **Financing:** In satisfying Section 4.b. above, if a contractual commitment includes financing, that financing will be on terms and conditions acceptable to YMCA and reasonably acceptable to the City. The City agrees that YMCA may assign or pledge its interest under the Operations Agreement whereby such lender or such lender's affiliate or approved assignee shall have as a remedy, but not the obligation, to assume the obligations of YMCA under the Operations Agreement and this Agreement and such right shall be approved by the City so long as the City has an assignment of such interest inferior to such lender. The contractual commitments may include a combination of YMCA

financing, cash, and pledges, reasonably acceptable to and confirmed by City, all of which are available and restricted for the purpose of payment of construction costs. YMCA shall identify any additional sources of revenue to repay any financing for the Project.

- v. **Construction Accounts:** Prior to the commencement of construction, YMCA shall establish a separate segregated series of construction accounts (Construction Accounts) at one or more federally insured financial institutions of YMCA's choosing. The Construction Accounts may be maintained by YMCA at the financial institution, if any, that serves as trustee for any other financing maintained by YMCA. The Construction Accounts may be used only for the purpose of the deposit and withdrawal of construction funds including Bond Funds and the deposit and withdrawal of funds for debt service on YMCA's financing of the City Contribution Reimbursement Items. No other funds may be commingled in the Construction Accounts. YMCA shall furnish to the City satisfactory information on the Construction Accounts including the amounts on deposit prior to commencement of planning and design of the City Contribution Reimbursement Items. YMCA shall furnish, at the City's request, at any reasonable time, any additional information as the City may request regarding the Construction Accounts until completion of the City Contribution Reimbursement Items.

f. **Bond Covenant:** The City and YMCA understand and acknowledge that the City may finance the City Contribution with the proceeds of obligations, the interest on which is excludable from gross income for federal income tax purposes (**Tax Exempt Bonds**) and, in connection with the Tax Exempt Bonds, the City will make certain covenants, representations and provisions to assure compliance with the IRC and any regulations or rulings promulgated by the U.S. Department of the Treasury pursuant thereto relating to Tax Exempt Bonds. YMCA agrees to take, or refrain from, actions to ensure the Tax Exempt Bonds satisfy such covenants, representations and provisions. In particular, but not by way of limitation, YMCA will not use or permit the City Contribution, or the property financed with Tax Exempt Bond Funds to be used (i) in any activity which constitutes an unrelated trade or business within the meaning of Section 513 of the IRC or (ii) by any person other than a governmental person or an exempt organization described in Section 501(c)(3) of the IRC. Moreover, if the IRC is amended, or regulations or rulings are hereafter promulgated which impose additional requirements applicable to the Tax Exempt Bonds or if it is determined by a court of applicable jurisdiction that this Agreement fails to comply with the terms of the IRC, then the City and YMCA agree to renegotiate, in good faith, to amend or replace this Agreement in order to comply with the additional

requirements only to the extent necessary to preserve the exemption from federal income taxation of interest on the Tax Exempt Bonds.

5. PAYMENT OF PROJECT DEVELOPMENT COSTS

a. City Contribution Items: The requirements for payment shall be as set forth in Article 2 Defined Terms under City Contribution and as follows:

i. Payment Timeline and Disbursement Method: Each City payment shall be made as provided in Article 2 under the defined term, "City Contribution."

6. OPERATIONS AND MAINTENANCE

a. YMCA Responsibilities: YMCA has the obligation to operate and maintain the Premises in accordance with the terms and conditions of the Operations Agreement.

b. City Responsibilities: City's obligation, if any, to operate and maintain the Premises is also only in accordance with the terms and conditions of the Operations Agreement.

c. YMCA Programming: YMCA Programming shall be in accordance with the Operations Agreement and the Uses Exhibit attached to the Operations Agreement.

d. Naming and Sponsorship: The Facility shall be named the City of Austin/YMCA North Austin Community Recreation Center. The name may be changed if approved by City Council and the YMCA. No rights or privileges shall be granted by YMCA in exchange for naming and sponsorship of any part of the Facility or related property that would impair the tax-exempt status of the Bond Funds.

7. OPERATING RESERVES

At the time of commencement of construction, the YMCA shall be required to demonstrate an Operating Reserve. The Operating Reserve may be maintained either in the capital reserves account, the operating account of YMCA, or in YMCA's available lines of credit to fund operational expenses relating to the Project in an amount not less than \$65,000.

The Operating Reserves shall not be pledged or used, directly or indirectly, for the payment of principal or interest on the City's bonds.

8. INSURANCE AND INDEMNITY

a. YMCA and its Consultants and Contractors' Insurance and Bonding: YMCA shall require that any professionals or other persons under the Professional Agreements maintain the insurance and bonds required by the City and listed in the **Exhibit D** attached to this Agreement and the Operations Agreement. If any additional insurance or bonds are required by Federal or State law or by local ordinance, YMCA shall also require the persons and firms hired by it for design and construction of the City Contribution items under the Professional Agreements to have that insurance and bonding in place throughout their work on the Project. In the event of any material defects in design, materials or workmanship resulting from the work of the A/E, YMCA PM, CONSTRUCTION MANAGER, or any other production professionals occurs, YMCA agrees, if advised by its legal counsel, to pursue any causes of action it may have against the appropriate party, or at the option and request of the City, assign to the City such cause of action, subject to any superior rights YMCA's lender may have therein.

b. Indemnity – Patent or Copyright: The CONSTRUCTION MANAGER shall protect, hold harmless and indemnify YMCA and the City of Austin from and against all claims, damages, judgments, and losses arising from infringement or alleged infringement of any United States patent or copyright that arise out of any of the work performed by the CONSTRUCTION MANAGER or used by the CONSTRUCTION MANAGER, or by the City, or YMCA at the direction of the CONSTRUCTION MANAGER of any article or material to be constructed pursuant to this Agreement. Upon becoming aware of a suit or threat of suit for patent or copyright infringement, YMCA shall promptly notify the CONSTRUCTION MANAGER and the CONSTRUCTION MANAGER shall be given full opportunity to negotiate a settlement. The CONSTRUCTION MANAGER does not warrant against infringement by reason of YMCA's or the Project A/E's design of articles or their use in combination with other materials or in the operation of any process relating to the Improvements to be constructed pursuant to this Agreement. In the event of litigation, YMCA agrees to cooperate reasonably with the CONSTRUCTION MANAGER and all parties shall be entitled, in connection with any such litigation, to be represented by counsel at their own expense.

c. Indemnification of Certain Entities: YMCA shall include in its Professional Agreement negotiated with the CONSTRUCTION MANAGER for the Project, a provision that the CONSTRUCTION MANAGER covenants and

agrees to fully indemnify and hold harmless YMCA, the City, the Architect/Engineer, and their respective current and former employees, officers, directors, volunteers, agents and representatives (**Indemnified Entities**), individually and collectively, from and against any and all costs, claims, liens, damages, losses, expenses, fees, fines, penalties, proceedings, actions, demands, causes of action, liability and suits of any kind and nature, including but not limited to, personal or bodily injury, death and property damage, (**Claims**) made upon any Indemnified Entity directly or indirectly arising out of, resulting from, or related to: (i) a violation or alleged violation of any ordinance, regulation, statute, or other legal requirement by the CONSTRUCTION MANAGER or any of its agents or employees; or (ii) the CONSTRUCTION MANAGER'S activities under its Professional Agreement, including any negligent acts or omissions of the CONSTRUCTION MANAGER, any agent, officer, director, representative, employee, consultant occurring in the performance of the rights and duties under its Professional Agreement. This indemnification paragraph shall not apply to any Claims resulting from the negligence of any of the Indemnified Entities, but shall include Claims attributable to the extent of the CONSTRUCTION MANAGER'S sole, contributory, partial, joint, comparative, or concurrent acts, omissions, or negligence of CONSTRUCTION MANAGER or any subcontractor under the CONSTRUCTION MANAGER.

d. Payment and Performance Bonds: YMCA agrees to and shall require the CONSTRUCTION MANAGER (as identified in the Professional Agreement) to name the City of Austin as co-obligee on the payment and performance bonds. Under no circumstances shall YMCA be required to post a payment or performance bond to any party. The payment and performance bonds required of the CONSTRUCTION MANAGER under this Agreement shall be in accordance with the specifications provided in **Exhibit D** attached to this Agreement.

e. Assumption: In contracting with the A/E, the production professionals, and the CONSTRUCTION MANAGER, YMCA will require that each contract, including the Identified Documents, provide that it can be assumed by the City in the event of a termination of the Operations Agreement due to an uncured default by YMCA, subject to the rights of YMCA's lender.

f. YMCA Indemnity of City. YMCA 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) YMCA'S BREACH OF ANY OF THE TERMS OR PROVISIONS OF THIS AGREEMENT OR (ii) ANY NEGLIGENT

ACT OR OMISSION OR INTENTIONAL MISCONDUCT OF YMCA, 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 YMCA AND CITY, RESPONSIBILITY, IF ANY, SHALL BE APPORTIONED COMPARATIVELY IN ACCORDANCE WITH THE LAWS OF THE STATE OF TEXAS.

9. EVENTS OF DEFAULT AND REMEDIES

a. YMCA's Default and the City's Remedies: YMCA shall be deemed to be in default under this Agreement if YMCA fails or refuses to perform YMCA's obligations under this Agreement, or any representation or warranty made by YMCA pursuant to this Agreement becomes untrue, and after thirty (30) days' notice of an event of default from the City and such default was for any reason other than a default by the City. If YMCA is deemed to be in default under this Agreement after the expiration of the cure period, the City shall be entitled to require specific performance, withhold the City's Contribution, or terminate this Agreement subject to the rights of YMCA's lender, if any, or assume YMCA's obligations and complete the Project. In the event a default by YMCA is not reasonably curable within such thirty day period, then YMCA shall, only with specific written approval by the City, have additional time to complete the cure of its default so long as it prosecutes its cure diligently and in good faith. Fraudulent statements made in the inducement of the City by board members or officers of YMCA who are materially involved with the Project shall be grounds for termination for cause. Upon the occurrence of any event deemed to be a default by YMCA under this Agreement, subject to YMCA's lender's rights, all Professional Agreements, Identified Documents, Plans, contracts and other records relating to the Project shall be returned to the City.

b. The City's Defaults and YMCA's Remedies: The City shall be deemed to be in default under this Agreement if the City fails to meet, comply with, or perform any covenant, agreement, or obligation within the time limits and in the manner required in this Agreement, or any representation or warranty made by the City pursuant to this Agreement becomes untrue. If the City is deemed to be in default under this Agreement, the City shall also have a thirty (30) day time period, after being notified by YMCA of the default, in which to cure the default. After the expiration of the cure period, YMCA may, at YMCA's sole option, do any one or more of the following: (a) terminate this Agreement by written notice delivered to the City; (b) enforce specific performance of this Agreement against

the City; (c) exercise any other right or remedy YMCA may have at law or in equity by reason of such default. YMCA may not seek any remedy for non-payment by the City if such non-payment is due to:

(1) Article VIII, Section 1 of the Austin City Charter which prohibits the payment of any money to any person, firm or corporation who is in arrears to the City for taxes, and of §2-8-3 of the Austin City Code concerning the right of the City to offset indebtedness owed the City; and

(2) Non-Appropriation. The funding of this Agreement is dependent upon the availability of appropriations. The City's payment obligations are payable only and solely from funds appropriated and available for this Agreement. The absence of appropriated or other lawfully available funds shall render the Agreement null and void to the extent funds are not appropriated or available. The City shall provide YMCA written notice of the failure of the City to make an adequate appropriation for any fiscal year to pay the amounts due under the Agreement, or the reduction of any appropriation to an amount insufficient to permit the City to pay its obligations under the Agreement. In the event of non or inadequate appropriation of funds, there will be no penalty nor removal fees charged to the City.

YMCA is authorized to include in each of the Professional Agreements, construction contracts, and all other related documents to which YMCA is a party, language exculpating YMCA from liability in the event of non-appropriation of all or part of the City Contribution, and otherwise specifying such agreements and contacts as "paid when paid" obligations of the YMCA.

10. MISCELLANEOUS PROVISIONS

a. Representation: YMCA represents and warrants to the City that YMCA did not incur any cost or expense associated with any City Contribution item prior to the Effective Date, for which YMCA would seek reimbursement under this Agreement.

b. Termination: The Agreement will automatically terminate upon the first to occur of (a) the termination or expiration of the Operations Agreement (as may be reinstated, renewed or continued), and (b) the expiration or satisfaction of all the terms and obligations under this Agreement by the Parties.

c. Miscellaneous: If any term or provision of this Agreement is declared by a court of competent jurisdiction to be illegal or invalid, such illegal or invalid term or provision shall not affect the balance of the terms and provisions of this Agreement. In the event any action or suit is brought by reason of any breach of

this Agreement or any other dispute between the parties concerning this Agreement, then the prevailing Party shall be entitled to have and recover from the other Party all costs and expenses of suit, including reasonable attorneys' fees. This Agreement shall be governed by and construed and enforced in accordance with the laws of the State of Texas. Venue for any action regarding this Agreement shall be in the District Courts of Travis County Texas. This Agreement is to be deemed to have been prepared jointly by the Parties. If any inconsistencies or ambiguities exist, they shall not be interpreted or construed against either Party as the drafter. The Parties shall take such actions and execute such documents as each may reasonably request, to carry out the purposes of this Agreement. All paragraph headings are inserted for convenience only and shall not be used in any way to modify, limit, construe or otherwise effect this Agreement. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which, together, shall constitute one and the same instrument. Each Party represents and warrants to the other Party that it is duly authorized to execute this Agreement. In performing the obligations hereunder, YMCA shall be an independent contractor, and nothing herein shall be deemed to constitute the City and YMCA as partners or joint venturers. Nothing in this Agreement shall alter in any manner the status of personnel employed by YMCA or by the City, who shall in no event be deemed to be employees of the other. When the approval or consent of the City is required under this Agreement, and its not otherwise stated, such approval or consent shall not be unreasonably withheld or delayed and in the event the City has not responded to a request for such approval or consent by YMCA within ten (10) business days of its request, then such approval or consent shall be deemed given.

d. Book and Records: YMCA shall keep proper books of record and account in which full and correct entries shall be made of all of its construction transactions related to this project and its assets and businesses so as to permit the presentation of financial statements prepared in accordance with sound accounting principles consistently applied on a cash basis; and permit the City, or its representatives, at reasonable times and intervals upon prior notice, to visit YMCA's office, or at the City's Offices as may be mutually agreed to.

e. Notices: If notice, payment, report or other matter is required or permitted to be given under this Agreement, it may be effected by personal delivery to the address set forth below, or by certified mail, postage prepaid, return receipt requested, properly addressed to the appropriate address set forth below:

If to the City:

The City of Austin
City Attorney

City of Austin Law Department
P.O. Box 1088
Austin, Texas 78767-1088

If to the City PM:

The City of Austin
Public Works Department
505 Barton Springs Road, Suite 850,
Austin, TX 78704
Attn: City PM for YMCA Project

If to YMCA:

YMCA
1402 East Cesar Chavez Street
Austin, Texas 78702
Attn: President/CEO

With a copy to:

Hamilton Rial
Johnson, Rial & Parker, P.C.
811 Barton Springs Road, Suite 730
Austin, Texas 78704

These addresses may be changed by notice to the other parties given in the same manner as provided above.

f. Force Majeure: Both YMCA and the City agree they shall grant the other Party a reasonable extension of time as appropriate, if conditions beyond the parties' control or Acts of God, flood, riot, civil insurrection, labor strikes, or orders of local or federal government render timely performance of the Parties' services impossible or unexpectedly burdensome. The Party suffering the impossibility or burdensome conditions must provide written notice to the other Party within ten (10) days of the onset of such performance delay, specifying the reasons. Consent to an extension of time for performance under such circumstances will not be unreasonably withheld, conditioned, or delayed. Failure to fulfill obligations due to conditions beyond either Party's control shall not be considered a breach of this Agreement; provided, however, that the obligations shall be suspended only for the reasonable duration of the condition(s).

g. Right to Audit: YMCA agrees that the representatives of the Office of the City Auditor, or other authorized representatives of the City, shall, upon reasonable notice to YMCA, have access to, and the right to audit, examine, or reproduce at the expense of the City, any and all records of YMCA related to the performance under this Agreement. Any audit or examination shall take place at the offices of YMCA during reasonable business hours. YMCA shall retain all such records for a period of three (3) years after final payment of the City Contribution under this Agreement, or until any audit and litigation matters relating to the Project, or this Agreement, that the City has brought to the attention of YMCA are resolved, whichever is longer. YMCA agrees to refund to the City any overpayments disclosed by any such audit and the City agrees to pay any underpayments of the Bond Funds disclosed by any such audit, subject to the City's right to decline payment as set out in Article 9.b.(1) and (2) of this Agreement. At the request of YMCA, the City shall provide YMCA a copy of such audit. In addition, YMCA shall include in its Professional Agreement with the CONSTRUCTION MANAGER the following:

- i.** The CONSTRUCTION MANAGER 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 the CONSTRUCTION MANAGER related to YMCA's performance under this Agreement. The CONSTRUCTION MANAGER shall retain all such records for a period of three (3) years after final payment under the Professional Agreement, or until all audit and litigation matters that the City has brought to the attention of the CONSTRUCTION MANAGER are resolved, whichever is longer. The CONSTRUCTION MANAGER agrees to refund to YMCA any overpayments disclosed by any such audit.
- ii.** The CONSTRUCTION MANAGER agrees to include the terms of Section i. above in all subcontractor agreements entered into by the CONSTRUCTION MANAGER in connection with the Professional Agreement.

h. Dispute Resolution:

In the event of a dispute, either Party may make a written request for a meeting between representatives of each Party within fourteen (14) calendar days after receipt of the request or such later period as agreed by the Parties. Each Party shall include, at a minimum, one (1) senior level individual with decision-making authority regarding the dispute. The purpose of this and any subsequent meeting is to attempt in good faith to negotiate a resolution of the dispute. If, within thirty

(30) calendar days after such meeting, the Parties have not succeeded in negotiating a resolution of the dispute, they will proceed directly to mediation as described below. Negotiation may be waived by a written agreement signed by both Parties, in which event the Parties may proceed directly to mediation as described below.

If the efforts to resolve the dispute through negotiation fail, or the Parties waive the negotiation process, the Parties may select, within thirty (30) calendar days, a mediator trained in mediation skills to assist with resolution of the dispute. Should they choose this option, the City and YMCA agree to act in good faith in the selection of the mediator and to give consideration to qualified individuals nominated to act as mediator. Nothing in this Agreement prevents the Parties from relying on the skills of a person who is trained in the subject matter of the dispute or a contract interpretation expert. If the Parties fail to agree on a mediator within thirty (30) calendar days of initiation of the mediation process, the mediator shall be selected by the Travis County Dispute Resolution Center (DRC). The Parties agree to participate in mediation in good faith for up to thirty (30) calendar days from the date of the first mediation session. The City and YMCA will share the costs of mediation equally.

i. CONFIRMATION AND WAIVER: YMCA CONFIRMS TO THE CITY THAT IT IS NOT RELYING ON, AND WAIVES ANY CLAIM REGARDING, ANY EXPRESS OR IMPLIED REPRESENTATION OR WARRANTY CONCERNING OR RELATING TO THE PREMISES, OTHER THAN OWNERSHIP THEREOF BY THE CITY, THE CONDITION OF THE PREMISES, COMPLIANCE OF THE PREMISES WITH THE LAWS, , INCOME TO BE DERIVED THEREFROM OR EXPENSES TO BE INCURRED WITH RESPECT THERETO, THE OBLIGATIONS, RESPONSIBILITES OR LIABILITIES OF THE OWNER THEREOF, OR ANY OTHER MATTER OR THING RELATING TO OR AFFECTING THE PREMISES. YMCA ACKNOWLEDGES AND AGREES WITH THE CITY THAT YMCA IS ENTERING INTO THIS AGREEMENT AND THE TRANSACTION CONTEMPLATED HEREIN RELYING SOLELY UPON ITS OWN CONSULTANTS, LEGAL COUNSEL, EVALUATIONS AND EXAMINATIONS. YMCA SPECIFICALLY ACKNOWLEDGES THAT THE CITY CANNOT CONTRACT IN ANY MANNER REGARDING THE EXERCISE OF ITS SOVEREIGN POWER.

[END OF TEXT]

IN WITNESS WHEREOF, the parties have duly executed this Agreement
as of the last date below.

CITY OF AUSTIN, a Texas home rule
City

By: _____
Title: City Manager
Date: _____

YMCA a Texas non-profit corporation

By: _____
Title: _____
Date: _____