

**AMENDMENT NO. 3
TO
CONSTRUCTION MANAGER-AT-RISK CONTRACT
BETWEEN
THE TEXAS FACILITIES COMMISSION
AND
J. E. DUNN CONSTRUCTION COMPANY**

This Amendment No. 3 to the Construction Manager-at-Risk Contract (hereinafter referred to as “Amendment No. 3”) is entered into by and between the Texas Facilities Commission (hereinafter referred to as “TFC”), a state agency located at 1711 San Jacinto Boulevard, Austin, Texas 78701, as Owner (as defined in UGC Section 1.28) and J. E. Dunn Construction Company (hereinafter referred to as “CMR”), a Missouri corporation, located at 1601 South MoPac Expressway, Barton Skyway 2, Suite 450, Austin, Texas 78746 (hereinafter referred to collectively as the “Parties”), to amend the Construction Manager-at-Risk Contract known as TFC Contract No. 18-152-000, as amended, and to be effective as of the date of the last Party to sign.

Recitals:

WHEREAS, on May 30, 2018, the Parties entered into that one certain *Construction Manager-at-Risk Contract Between the Texas Facilities Commission and J. E. Dunn Construction Company* (hereinafter referred to as the “Contract”); and

WHEREAS, on June 9, 2019, the Parties executed Amendment No. 1 changing the CMR’s address; and

WHEREAS, on June 6, 2020, the Parties executed Amendment No. 2 changing CMR’s address; and

WHEREAS, subject to Contract Sections 2.2.8, TFC Approvals, 12.8, Notices, and 12.30, Entire Agreement and Modification (as re-numbered in this Amendment No. 3, below), the Parties now desire to amend the Contract to reduce it by Six Million Six Hundred Thousand and No/100 Dollars (\$6,600,000.00), to a new total amount not to exceed Forty-Eight Million Two Hundred Thousand Eight Hundred and No/100 Dollars (\$48,200,600.00) thereby contractually formalizing Deductive Change Order #1; and

WHEREAS, the Parties also desire to extend the Contract Term, to modify certain provisions of ARTICLE X, Insurance, and to include provisions adopted by TFC subsequent to the execution of the Contract in order to comply with actions or requirements of the Texas Legislature, the State Auditor’s Office, the Office of the Attorney General, the Comptroller of Public Accounts, and for such other purposes as are addressed herein.

NOW, THEREFORE, the Parties agree to amend the Contract as follows:

1. Unless clearly provided otherwise herein, all terms and phrases in initial capital letters herein shall have the same meaning as the terms and phrases with initial capital letters in the Contract.

2. The Parties agree to modify ARTICLE I – DEFINITIONS, by adding the following.

“*HUB Compliance Reporting System* means the Texas Facilities Commission Historically Underutilized Business ("HUB") online reporting system located at <https://tfc.gob2g.com>. The *HUB Compliance Reporting System* is used to maintain business records documenting compliance with the HUB Subcontracting Plan ("HSP") by submission of monthly Progress Assessment Reports. See Section 12.2, Historically Underutilized Businesses ("HUBs").”

3. The Parties agree to modify ARTICLE III – TERM, SUSPENSION, AND TERMINATION, by deleting Section 3.1, Contract Term in its entirety and replacing it with Section 3.1, as follows.

“3.1. Contract Term. This Contract shall be effective as of the Effective Date and shall terminate on June 30, 2022, unless extended by the parties by amendment to this Contract or terminated earlier, as provided below.”

4. The Parties agree to modify ARTICLE IV – CONSIDERATION, by deleting Section 4.3, Components of the GMP, in its entirety and replacing it with Section 4.3, as follows.

“4.3. Components of the GMP. Upon execution of a GMP Amendment, the Contract Sum shall not exceed Forty-Eight Million Two Hundred Thousand Six Hundred and No/100 Dollars (\$48,200,600.00). The total amount of payments to CMR in connection with the Project shall not exceed the GMP thereby established, which shall be calculated as the sum of the following components:

4.3.1. Pre-Construction Services Fee. The Pre-Construction Services Fee, which is a fixed, lump sum fee of Nine Hundred Ninety-Eight Thousand and No/100 Dollars (\$998,000.00), to be shown in the GMP Amendment.

4.3.2. Construction Management Fee. The Construction Management Fee, which is a percentage fee, calculated by multiplying a percentage factor of 6.34% times the Cost of Work, which amount is Two Million Four Hundred Five Thousand Two Hundred Sixteen and No/100 Dollars (\$2,405,216.00), to be shown in the GMP Amendment.

4.3.3. General Conditions Fee. The General Conditions Fee, which is a fixed fee amount payable monthly, not to exceed a total fee amount of Four Million Eight Hundred Sixty Thousand Two Hundred Seventeen and No/100 Dollars (\$4,860,217.00), to be shown in the GMP Amendment.

4.3.4. Cost of Work. The Cost of Work will be adjusted and finalized as part of the GMP. The budget for the Cost of Work shall not exceed Thirty-Seven Million Nine Hundred Thirty-Seven Thousand One Hundred Sixty-Seven and No/100 Dollars (\$37,937,167.00). The CMR Contingency shall be reflected in the GMP Amendment as a separate line item of the Cost of the Work used to establish the GMP.

4.3.5. TFC Controlled Contingency. The TFC Controlled Contingency of Two Million and No/100 Dollars (\$2,000,000.00), which sum shall be maintained through construction, and included in the Contract Sum and finalized in the GMP Acceptance.

4.3.6. Unused Contingencies. Any unused portion of the CMR Contingency shall be returned to TFC at the completion of the Project through a credit Change Order to the Contract Sum. No part of the TFC Controlled Contingency shall be included in the GMP unless TFC elects to do so by Change Order, and then only with respect to that portion of the TFC Controlled Contingency funds that are actually used for a TFC directed change to the Work.”

5. The Parties agree to amend ARTICLE VII – WARRANTIES AND REPRESENTATIONS BY CMR, as follows.

5.1. Section 7.1.22, Prohibition Against Boycotting Israel, is deleted in its entirety and replaced with the following.

“7.1.22. Entities that Boycott Israel. Pursuant to Section 2270.002 of the Texas Government Code, CMR certifies that either (i) it meets an exemption criteria under Section 2270.002; or (ii) it does not boycott Israel and will not boycott Israel during the term of this Contract. CMR shall state any facts that make it exempts from the boycott certification.”

5.2. The following are added as numbered.

“7.1.24. Disaster Relief Contract Violation. Under Sections 2155.006 and 2261.053 of the Texas Government Code, CMR certifies that the individual or business entity named in the response or Contract is not ineligible to receive the specified Contract and acknowledges that this Contract may be terminated and payment withheld if this certification is inaccurate.

7.1.25. Human Trafficking Prohibition. Pursuant to Section 2155.0061 of the Texas Government Code, CMR certifies that it is not ineligible to receive this Contract and acknowledges that this Contract may be terminated and payment withheld if CMR’s certification in this matter is inaccurate. TFC may not award a contract, including a contract for which purchasing authority is delegated to a state agency, that includes proposed financial participation by a person who, during the five-year (5) period preceding the date of the award, has been convicted of any offense related to the direct support or promotion of human trafficking.

7.1.26. Use of State Property. CMR is prohibited from using State Property for any purpose other than performing services authorized under the Contract. State Property includes, but is not limited to: TFC's office space, identification badges, TFC information technology equipment and networks (e.g., laptops, portable printers, cell phones, iPads, external hard drives, data storage devices, any TFC issued software, and the TFC Virtual Private Network (VPN client)), and any other resources of TFC. CMR shall not remove State Property from the continental United States. In addition, CMR may not use any computing device to access TFC's network or e-mail while outside of the continental United States. CMR shall not perform any maintenance services on State Property unless the Contract expressly authorizes such services. During the time that State Property is in the possession of CMR, CMR shall be responsible for (i) all repair and replacement charges incurred by TFC that are associated with loss of State Property or damage beyond normal wear and tear; and (ii) all charges attributable to CMR's use of State Property that exceeds the scope of the Contract. CMR shall fully reimburse such charges to TFC within ten (10) calendar days of CMR's receipt of TFC's notice of amount due. Use of State Property for a purpose not authorized by agreement shall constitute breach of contract and may result in termination of the Contract and the pursuit of other remedies available to TFC under contract, at law, or in equity."

6. The Parties agree to amend ARTICLE X – ACCOUNTING RECORDS, AUDIT, PROPRIETARY INFORMATION, AND PUBLIC DISCLOSURE, Section 10.7, Electronic and Information Resources Accessibility Standards, by adding Subsection 10.7.1, as follows.

"10.7.1. Cybersecurity Training Required. If CMR has "access," as that term is defined in 1 Tex. Admin. Code § 202.1, to any state computer system or database, then, pursuant to Tex. Gov't Code § 2054.5192, CMR and its subcontractors, officers, and employees shall complete a cybersecurity training program certified under Tex. Gov't Code §2054.519. The cybersecurity training program must be completed by the CMR and its subcontractors, officers and employees during the term and any renewal period of the Contract. CMR shall verify completion of the training program to TFC pursuant to, and in accordance with, Tex. Gov't Code § 2054.5192."

7. The Parties agree to modify ARTICLE XI – BONDS AND INSURANCE, as follows.

7.1. Section 11.2.5, Subcontractor's Certification, is deleted in its entirety and replaced with the following.

"11.2.5. Subcontractor's Certification. In accordance with Tex. Lab. Code §406.096(b), CMR shall require each Subcontractor to certify in writing to the CMR that said Subcontractor provides workers' compensation and employers' liability insurance for all of Subcontractor's employees employed on this public project. In keeping with Sections 5.2.8 and 5.2.9 of "Exhibit A," Owner is entitled, upon request and without expense, to receive copies of Subcontractor's written certifications."

7.2. Section 11.2.25, Notification, is deleted in its entirety and replaced with the following.

“11.2.25. Notification. All policies shall obligate the insurer to notify the Texas Facilities Commission (Attn: TFC Insurance, Facilities Design and Construction Division). P.O. Box 13047, Austin, Texas 78711, of any cancellation (except notification of any cancellation in the event of nonpayment) in writing. at least 30 days prior to any such cancellation. CMR shall provide TFC with at least thirty (30) days’ notice of any material change or nonrenewal of its insurance policies and at least ten (10) days’ notice of cancellation to Owner in the event of non-payment of premiums By CMR.”

7.3. Section 11.2.43, Distribution of Completed Certificates, is deleted in its entirety and replaced with the following.

“11.2.43. Distribution of Completed Certificates. Completed Certificates shall be distributed by CMR and shall be provided to TFC upon execution of this Contract and upon each renewal, replenishment, or supplementation of the coverage thereunder, and certificates, as follows.

Original shall be sent:

By Mail to: Texas Facilities Commission
Attention: Insurance
Facilities Design and Construction Division
P O Box 13047
Austin, Texas 78711-3047

By E-Mail to: Insurance@TFC.state.tx.us”

8. The Parties agree to amend ARTICLE XII – MISCELLANEOUS PROVISIONS, as follows.

8.1. Section 12.2, Historically Underutilized Businesses (“HUBs”), is amended to include Subsection 12.2.1, as follows.

“12.2.1. Requirement to Utilize HUB Compliance Reporting System. Pursuant to Texas Administrative Code, Title 34 §§ 20.85(f)(1)(2) and 20.287(b), TFC administers monthly administration HSP-PAR compliance monitoring through its HUB Compliance Reporting System commonly known as B2G. CMR and CMR’s subcontractors/subconsultants shall submit required PAR information into the B2G system. Any delay in the timely submission of PAR information into the B2G system will be treated as an invoicing error subject to dispute under Tx. Gov’t Code Section 2251.042.”

8.2. Section 12.27, Entire Agreement and Modification, is re-numbered 12.30. The following are added, and unaltered Section 12.30 re-inserted, as numbered.

“12.27. False Statements; Breach of Representations. By signature to this Contract, CMR makes all the representations, warranties, guarantees, certifications and affirmations included in this Contract. If CMR signs this Contract with a false statement or it is subsequently determined that CMR has violated any of the representations, warranties, guarantees, certifications or affirmations included in this Contract, CMR shall be in default under this Contract, and TFC may terminate or void this Contract for cause and pursue other remedies available to TFC under this Contract and applicable law.

12.28. Abandonment and Default. If CMR defaults on this Contract, TFC reserves the right to cancel the Contract without notice and either re-solicit or re-award the Contract to the next best responsive and responsible respondent. The defaulting CMR will not be considered in the re-solicitation and may not be considered in future solicitations for the same type of work.

12.29. Antitrust and Assignment of Claims. CMR represents and warrants that neither CMR nor any firm, corporation, partnership, or institution represented by CMR, or anyone acting for such firm, corporation or institution has (i) violated the antitrust laws of the State of Texas under Tex. Bus. & Com. Code, Chapter 15, or the federal antitrust laws; or (ii) communicated directly or indirectly the proposal to any competitor or any other person engaged in such line of business during the procurement process for this Contract. CMR assigns to the State of Texas all of CMR’s rights, title, and interest in and to all claims and causes of action CMR may have under the antitrust laws of Texas or the United States for overcharges associated with the Contract.

12.30. Entire Agreement and Modification. This Contract and its integrated attachment(s) constitute the entire agreement of the parties and such are intended as a complete and exclusive statement of the promises, representations, negotiations, discussions, and other agreements that may have been made in connection with the subject matter hereof. Unless an integrated attachment to this Contract specifically displays a mutual intent to amend a particular part of this Contract, general conflicts in language between any such attachment and this Contract shall be construed consistently with the terms of this Contract. Unless otherwise expressly authorized by the terms of this Contract, no modification, renewal, extension, or amendment to this Contract shall be binding upon the parties unless the same is in writing and signed by the respective parties hereto.”

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