

TFC Contract No. 17-064-000
Flynn Construction, Inc.
RFQ No. 303-6-01965
Amendment No. 1
Project No. 16-008-5400

**AMENDMENT NO. 1
TO
CONSTRUCTION MANAGER-AT-RISK CONTRACT
BETWEEN
THE TEXAS FACILITIES COMMISSION
AND
FLYNN CONSTRUCTION, INC.**

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 Flynn Construction, Inc., a Texas corporation (hereinafter referred to as “CMR”), located at 4638 South Lamar Boulevard, Austin, Texas 78745 (hereinafter referred to as “CMR”) (hereinafter referred to collectively as the “Parties”), enter into the following *Amendment No. 1 to the Construction Manager-at-Risk Contract between the Texas Facilities Commission and Flynn Construction, Inc.* (hereinafter referred to as the “Amendment No. 1”), to be effective as of March 31, 2020.

Recitals:

WHEREAS, on March 30, 2017, the Parties entered into that one certain *Construction Manager-at-Risk Contract Between the Texas Facilities Commission and Flynn Construction, Inc.* (hereinafter referred to as the “Contract”); and

WHEREAS, the Parties now desire to enter into this Amendment No. 1 for the purpose of extending the Contract, and to include certain provisions adopted by TFC subsequent to the execution of the Contract in order to reflect the will of the Texas Legislature, and to comply with requirements promulgated by the State Auditor’s Office and the Comptroller of Public Accounts;

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

1. Unless clearly provided otherwise herein, all terms and phrases in initial caps herein shall have the same meaning as the terms and phrases with initial caps in the Contract.
2. The Parties agree to amend ARTICLE I – DEFINITIONS, by adding the following definition:

“*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 (“PARs”). See Section 12.2, below.”

3. The Parties hereby agree to amend ARTICLE III – TERM, SUSPENSION, AND TERMINATION, SECTION 3.1 – CONTRACT TERM, by deleting the section in its entirety and replacing it as follows:

“3.1. Contract Term. This Contract shall be effective as of the Effective Date and shall terminate on August 31, 2021, unless extended by the parties by amendment to this Contract or terminated earlier, as provided below.”

4. The Parties agree to modify ARTICLE III – TERM, SUSPENSION, AND TERMINATION, Section 3.3, Termination Prior to Establishment of the GMP, by adding Subsections 3.3.1 and 3.3.2., as follows:

“3.3.1. Rights Upon Termination or Expiration of Contract. In the event that the Contract is terminated for any reason, or upon its expiration, TFC shall retain ownership of all associated work products and documentation obtained from the CMR under this Contract.

3.3.2. No Liability Upon Termination. If this Contract is terminated for any reason, TFC and the State of Texas shall not be liable to CMR for any damages, claims, losses, or any other amounts arising from or related to any such termination absent an award of damages pursuant to Texas Government Code, Chapter 2260.”

5. Pursuant to Contract Section 7.1.1, Compliance with All Laws, the Parties agree to modify ARTICLE VI – ACKNOWLEDGEMENTS, COVENANTS, AND AGREEMENTS, Section 6.2, Acknowledgements, Covenants, and Agreements of CMR, by adding the following Sections 6.2.18 through and including 6.2.26, as follows:

“6.2.18. 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 Agreement. CMR shall state any facts that make it exempt from the boycott certification.

6.2.19. Prohibition Against Contracting with Companies Engaged in Business with Iran, Sudan, or Foreign Terrorist Organizations. In accordance with Section 2251.152 of the Texas Government Code, TFC is prohibited from entering into a governmental contract (as defined in Texas Government Code Section 2252.151(3)) with a company that is identified on a list prepared and maintained under Texas Government Code Section 806.051, 807.051, or 2252.153. If CMR is on the above-referenced list the Contract will be considered void or voidable and TFC will not be responsible to pay CMR for any work performed.

6.2.20. Certification Concerning Restricted Employment for Former State Officers or Employees Under Government Code § 572.069. CMR certifies that it has not employed and will not employ a former TFC or state officer who participated in a procurement or contract negotiation for TFC involving CMR within two (2) years after the state officer or

employee left state agency employment or service. This certification only applies to former state officers or employees whose service or employment ceased on or after September 1, 2015.

6.2.21. Disaster Relief Contract Violation. Under Sections 2155.006 and 2261.053, Texas Government Code, CMR certifies that the individual or business entity named in this 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.

6.2.22. No Conflicts. CMR represents and warrants that CMR has no actual or potential conflicts of interest in providing services to the State of Texas under this Contract and that CMR's provision of services under this Contract would not reasonably create an appearance of impropriety.

6.2.23. Excluded Parties. CMR certifies that it is not listed on the federal government's terrorism watch list as described in Executive Order 13224.

6.2.24. Suspension and Debarment. CMR certifies that it and its principals are not suspended or debarred from doing business with the state or federal government as listed on the State of Texas Debarred Vendor List maintained by the Texas Comptroller of Public Accounts and the System for Award Management (SAM) maintained by the General Services Administration.

6.2.25. 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 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.

6.2.26. 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.”

6. The Parties agree to modify ARTICLE X – RECORDS, AUDIT, PROPRIETARY INFORMATION AND PUBLIC DISCLOSURE, by adding Section 10.8, Cybersecurity Training Required, as follows:

“10.8. 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.”

8. The Parties agree to modify ARTICLE XI – BONDS AND INSURANCE, Section 11.2.1, Workers’ Compensation and Employers’ Liability Coverage, by deleting Subsection 11.2.1.2, in its entirety and replacing it with Subsection 11.2.1.2, as follows:

“11.2.1.2. 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. Owner is entitled, upon request and without expense, to receive copies of Subcontractor’s written certifications.”

9. The Parties agree to modify ARTICLE XII – MISCELLANEOUS PROVISIONS, Section 12.2, Historically Underutilized Businesses (“HUBs”), by adding 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 HUB Subcontracting Plan (“HSP”) to include the Progressive Assessment Report (“PAR”) compliance monitoring through a HUB Compliance Reporting System known as B2G. CMR and CMR’s Subcontractors must submit required PAR information into the B2G system as a condition of payment. Any delay in the timely submission of PAR information into the B2G system will be treated as a deficiency and the payment request will be subject to suspension until such deficiency has been resolved.”

10. The Parties agree to modify ARTICLE XII – MISCELLANEOUS PROVISIONS, Section 12.8, Name and Organizational Changes, by adding Subsection 12.8.1, Termination Due to Material Change, as follows:

“12.8.1. Termination Due to Material Change. TFC may terminate this Contract due to any change to CMR that materially alters CMR’s ability to perform under the Contract.”

11. The Parties agree to modify ARTICLE XII – MISCELLANEOUS PROVISIONS, by inserting Sections 12.26 through and including 12.28, and re-numbering existing Section 12.26, Entire Agreement and Modification, as Section 12.29, so that the inserted and existing sections read in their entirety, as follows:

“12.26. False Statements; Breach of Representations. By signature to this CMR, 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.

12.27. 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.

12.28. 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.

12.29. 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.”

12. Except as expressly amended herein, the Contract remains in full force and effect.

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Flynn Construction, Inc.
RFQ No. 303-6-01965
Amendment No. 1
Project No. 16-008-5400

IN WITNESS WHEREOF, the parties hereto have made and executed this Amendment No. 1 to be effective as of March 31, 2020.

TEXAS FACILITIES COMMISSION

FLYNN CONSTRUCTION, INC.

DocuSigned by:
By: Mike Novak, Executive Director
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DocuSigned by:
By: L. Patrick Flynn, President & CEO
A23D99C858C1417...

Mike Novak

L. Patrick Flynn

Executive Director

President & CEO

Date of execution: 03/28/2020 | 6:36 AM CDT

Date of execution: 03/27/2020 | 3:27 PM PDT

GC CR

Dir MW

DED JR