

TFC Contract No. 19-022-000
Amendment 1
Charles N. White Construction Company
RFQ No. 303-8-01858
Project No. 17-018-8030

**AMENDMENT NO. 1
TO THE
CONSTRUCTION MANAGER-AT-RISK CONTRACT
BETWEEN
THE TEXAS FACILITIES COMMISSION
AND
CHARLES N. WHITE CONSTRUCTION COMPANY**

This Amendment No. 1 is entered into by and between the Texas Facilities Commission, a state agency located at 1711 San Jacinto Boulevard, Austin, Texas 78701 (hereinafter referred to as "TFC"), as Owner (as defined below and in *2015 Uniform General Conditions*, Section 1.28) and Charles N. White Construction Company, located at 2705 Bee Cave Road, Austin, Texas 78746 (hereinafter referred to as "Construction Manager-Agent" or "CMR"), to amend the original Construction Manager-at-Risk Contract executed by the Parties as of May 30, 2018 (hereinafter referred to as the "Contract") pursuant Tex. Gov't Code Ann. §§2166.2525 and §2267.151 (West 2018).

RECITALS

WHEREAS, on December 20, 2018, the Parties entered into that one certain *Construction Manager-at-Risk Contract Pedestrian Mall and Underground Parking Garage Capitol Complex Project Between the Texas Facilities Commission and Charles N. White Construction Company*; and

WHEREAS, pursuant to Commission award on June 18, 2020, and in keeping with Sections 2.2.9, TFC Approvals, and 12.27, Entire Agreement and Modification, the Parties now desire to amend the Contract to reflect increased funding in the amount of Six Million Five Hundred Ninety-Eight Thousand Three Hundred Twenty-One and No/100 Dollars (\$6,598,321.00), 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 hereby agree 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. See Section 12.2, Historically Underutilized Businesses ("HUBs")."

3. The Parties Agree to amend ARTICLE II – SCOPE OF SERVICES, by adding Section 2.10, as follows.

“2.10. Additional Project Scope. The Project includes additional chilled water distribution piping Work, Texas State Parking Lot 3 modifications, and additional utility relocation/upgrades.”

4. The Parties agree to amend ARTICLE IV – CONSIDERATION, as follows.

(a) Section 4.3, Components of the GMP, is deleted in its entirety and replaced with Section 4.3, as follows.

“4.3. Components of the GMP. Upon execution of a GMP Amendment, 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 for all portions of the Project and all GMPs, is a fixed fee that shall, in no event, exceed Six Hundred Forty-Seven Thousand Thirty-Six and No/100 Dollars (\$647,036.00) for the Project, an allocable portion of which shall be shown in each GMP Amendment covering each portion of the Project. The Pre-Construction Services Fee is part of the Total Project GMP. The Pre-Construction Service Fee(s) for tenant agencies to be determined will be negotiated at the appropriate times.

4.3.2. Construction Management Fee. The Construction Management Fee, which is a percentage fee, calculated by multiplying a percentage factor of three and one-half percent (3.5%) times the Cost of Work or Two Million ?Four Hundred Ninety-Seven Thousand Six Hundred Seventy-Five and No/100 Dollars (\$2,497,675.00) an allocable portion of which shall be shown in each GMP Amendment covering each portion of the Project. The Construction Management Fee is part of the Total Project GMP.

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 Five Million Four Hundred Seventy-Seven Thousand Two Hundred Ninety-Two and No/100 Dollars (\$5,477,292.00), an allocable portion of which shall be shown in each GMP Amendment covering each portion of the Project. The General Conditions Fee is part of the Total Project GMP.

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 Seven-One Million Three Hundred Sixty-Two One Hundred Thirty-Seven and No/100 Dollars (\$71,362,137.00). The CMR Contingency shall be reflected in the Cost of Work for each GMP Amendment as a

separate line item in CMR's GMP for CMR's exclusive use and benefit to cover any additional costs that may be discovered or otherwise arise during the design and construction document phases, but which costs are nevertheless the responsibility of CMR as part of the Cost of Work. The maximum amount allowed for the Cost of Work is part of the Total Project GMP.

4.3.5. TFC Controlled Contingency. The TFC Controlled Contingency of Two Million Eight Hundred Thousand Six Hundred Seven and No/100 Dollars (\$2,800,607.00), which sum shall be maintained through construction, and, shall be included in the Contract Sum and the GMPs , but CMR shall not use such funds unless and until TFC elects to use, apply, or otherwise credit such funds to pay for a change in the Work as a Cost of Work that is not the responsibility of CMR, or due to the fault or negligence of CMR, and which change has been Approved by Owner by Change Order or directed by Owner in a Unilateral Change Order. The TFC Controlled Contingency is part of the Total Project GMP.

4.3.6. Unused Contingencies. Any amounts of the CMR Contingency and the TFC Controlled Contingency in a GMP remaining unused at the completion of the Work covered by such GMP shall be returned to TFC at the completion of such Work through a Change Order Approved by TFC to credit such unused amounts from such GMP and debit them to one or more other GMPs for which the Work is incomplete, as required in Section 4.10, below. No part of the TFC Controlled Contingency shall be included in the GMP unless TFC elects to do so by Change Order or Unilateral Change Order for a TFC directed change to the Work or a return of unused portions of the GMP.”

(b) Section 4.4, Total Project GMP, is deleted in its entirety and replaced with Section 4.4, as follows.

“4.4. Total Project GMP. The sum of all GMPs for all portions of the entire Project shall be considered the “Total Project GMP.” The Total Project GMP shall not exceed Eighty-Two Million Seven Hundred Eighty-Four Thousand Seven Hundred Forty-Seven and No/100 Dollars (\$82,784,747.00), which shall include: (i) a reasonable amount to be established as CMR Contingency; and (ii) the amount of the TFC Controlled Contingency set forth in Section 4.3.5, above. Unless an Amendment to this Contract or a Change Order is executed by TFC that expressly increases to Total Project GMP with respect to TFC's election to use TFC Controlled Contingency for TFC-directed changes, the total of all amounts to be paid to CMR in connection with all GMPs for all portions of the Project shall not exceed the Total Project GMP.”

5. The Parties agree to amend ARTICLE VI – ACKNOWLEDGEMENTS, COVENANTS, AND AGREEMENTS, Section 6.2, Acknowledgements, Covenants, and Agreements of CMR, as follows.

(a) Subsection 6.2.19, Prohibition Against Boycotting Israel, is deleted in its entirety and replaced with Subsection 6.2.19, as follows.

“6.2.19. 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.”

(b) The following three (3) clauses are added as Subsections 6.2.21, 6.2.22, and 6.2.23.

“6.2.21. 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.

6.2.22. 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.

6.2.23. 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 VII – WARRANTIES AND REPRESENTATIONS BY CMR, by adding the following two (2) clauses as Subsections 7.1.22 and 7.1.23.

“7.1.22. 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.

7.1.23. 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 amend ARTICLE XI – BONDS AND INSURANCE, Section 11.2, Insurance Requirements, as follows.

(a) Subsection 11.2.5, Subcontractor's Certification, is deleted in its entirety and replaced with Subsection 11.2.5, as follows.

"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."

(b) Subsection 11.2.24, Notification, is deleted in its entirety and replaced with Subsection 11.2.24, as follows.

"11.2.24. Notification. All policies shall obligate the insurer to notify the Texas Facilities Commission (Attn: TFC Insurance Specialist, Facilities Design and Construction Division), P.O. Box 13047, Austin, Texas 78711, of any: (i) non-renewal; (ii) cancellation; or (iii) material changes, in writing, at least 30 days prior to any such non-renewal, cancellation or change. All polices shall require at least ten (10) days' notice of cancellation to Owner in the event of non-payment of premiums by CMR."

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

(a) The Parties agree to add the following clause as Subsection 12.2.1.

"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.”

(b) The Parties agree to add the following three clauses as Sections 12.28, 12.29, and 12.30.

“12.28. 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.

12.29. 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.

12.30. 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.

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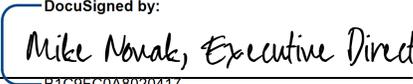
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9. All other terms and conditions of the Contract not expressly amended herein shall remain in full force and effect.

10. This Amendment No. 1 shall be effective as of the date of the last Party to sign it.

TEXAS FACILITIES COMMISSION

CHARLES N. WHITE CONSTRUCTION COMPANY

By: 
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By: 
810BFFB7EA704A0...

Mike Novak

Bob Higgins

Executive Director

Sr. Vice President

Date of Execution: 07/23/2020 | 3:20 PM CDT

Date of Execution: 07/23/2020 | 3:12 PM CDT

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