

**DRAFT**

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

**Between the City of Austin  
And  
The YMCA of Austin**

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**Exhibit A – Concept Plan**

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**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.
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.

**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 unreasonable 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:

	<b>Professional Services Participation Goals</b>	<b>Construction Participation Goals</b>
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.

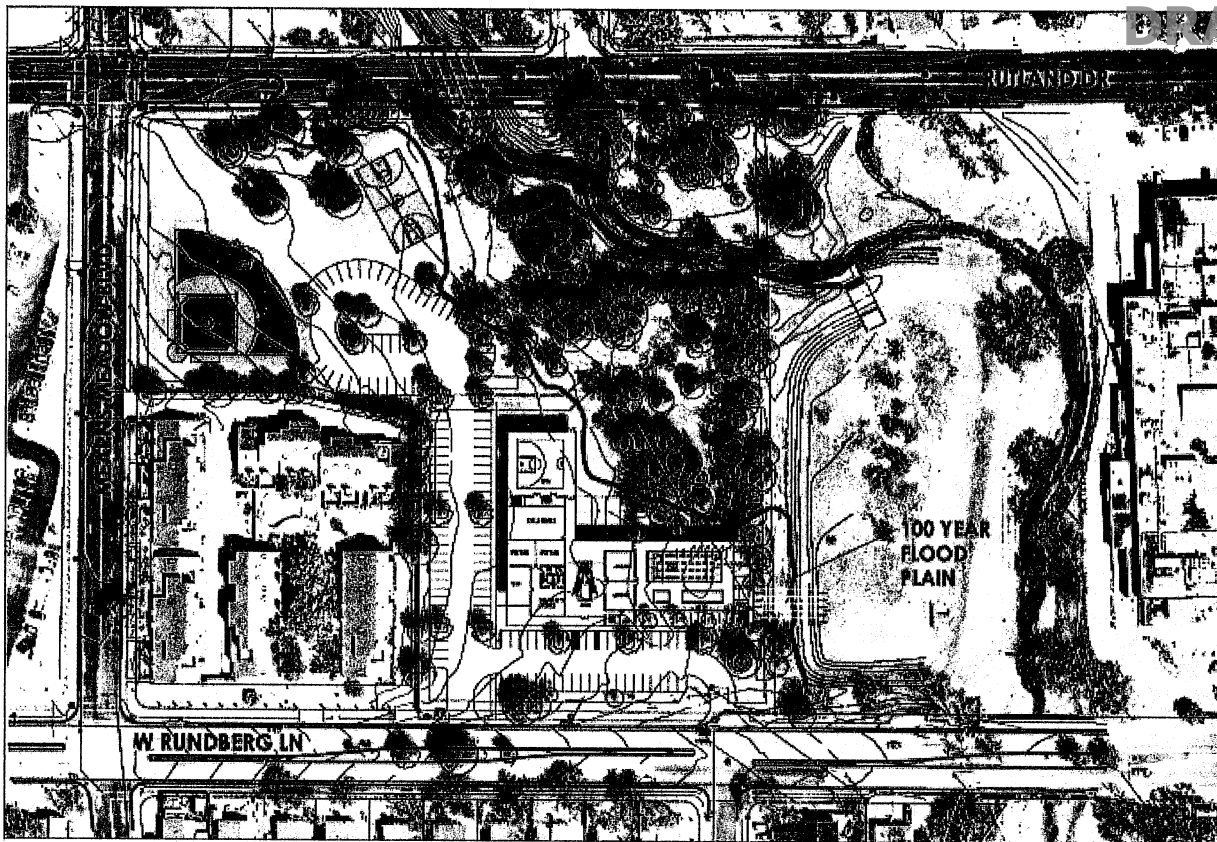
CITY OF AUSTIN, a Texas home rule  
City

By: \_\_\_\_\_  
Title: City Manager  
Date: \_\_\_\_\_

YMCA a Texas non-profit corporation

By: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

DRAFT



NORTH AUSTIN RECREATION CENTER

AUSTIN, TX

PACRETH

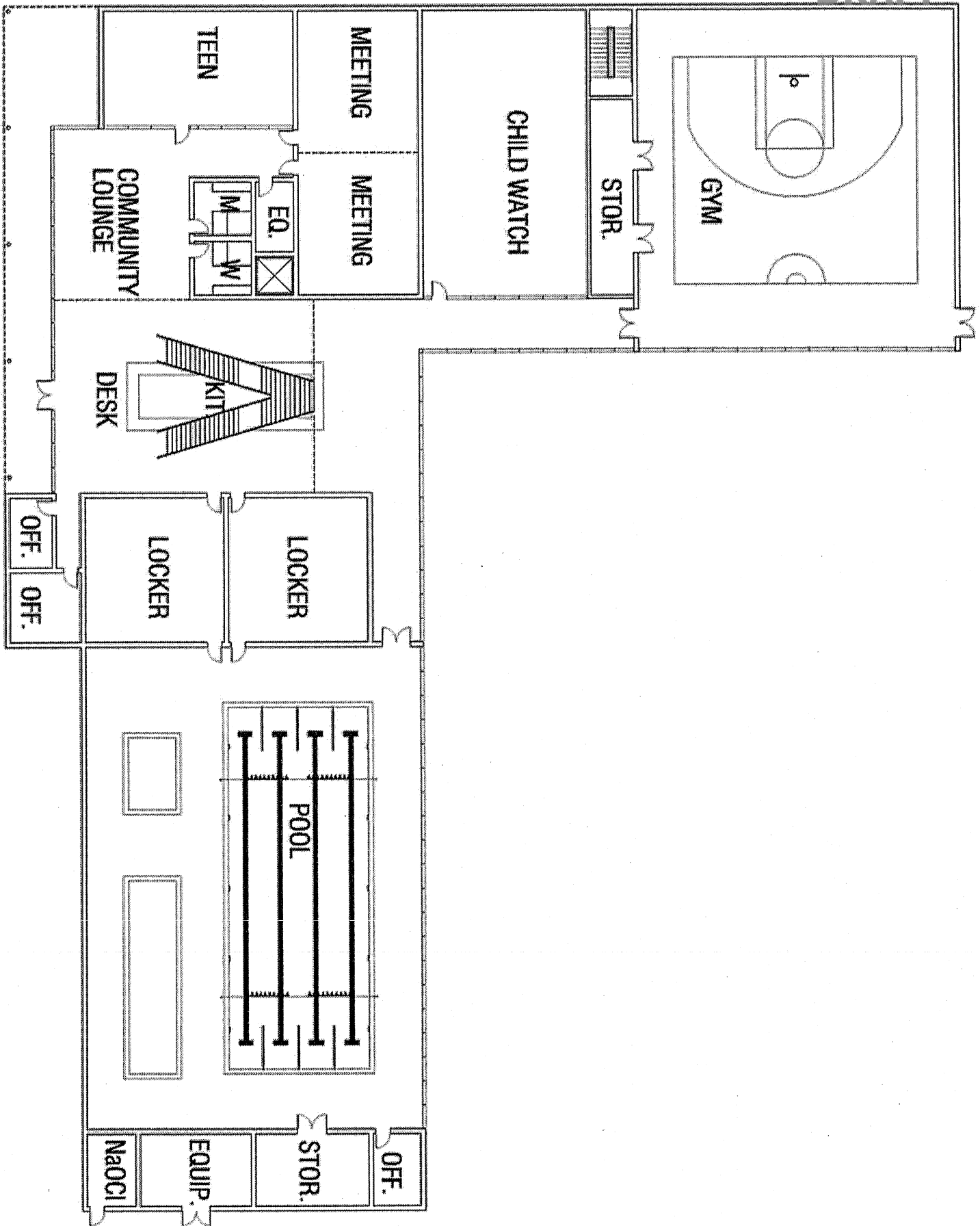
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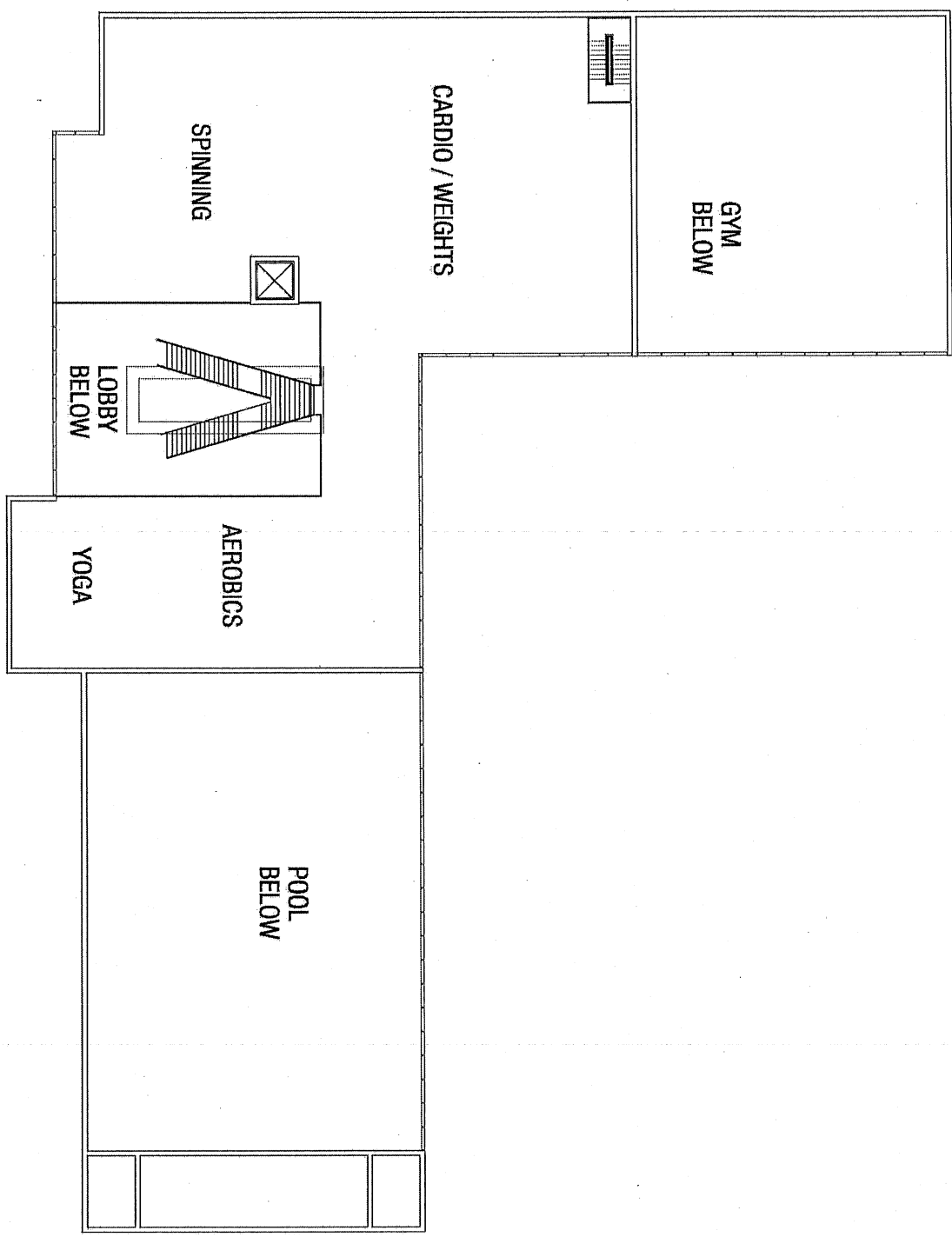
EXHIBIT

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A

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# EXHIBIT B

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North Austin Recreation Center: Total Project Budget	
<b>Construction Costs: Bond Funds</b>	
Bricks & Mortar	\$ 6,235,000
CM Fee (3.5%)	\$ 218,225
Payment & Performance Bond	\$ 85,000
Builder's Risk Insurance	\$ 25,000
Pricing Contingency	\$ 967,999
Escalation @ 6%	\$ 445,273
Sub Total GMP	\$ 7,976,497
<b>Services/Systems/Misc Costs: Bond Funds</b>	
Construction Contingency (3%)	\$ 240,000
Soft Cost Contingency	\$ 27,003
Public Works Department Fees	\$ 125,000
PARD Review Fees	\$ 25,000
Art In Public Places	\$ 155,000
Debt Issuance Costs for Bond	\$ 44,500
Building Commissioning	\$ 60,000
Security Consulting & Systems	\$ 25,000
Materials Testing	\$ 20,000
Geotech Study	\$ 10,000
City of Austin Permits/Fees	\$ 65,000
Funds Expended To Date	\$ 127,000
Sub Total	\$ 923,503
<b>Sub Total Bond Funds</b>	<b>\$ 8,900,000</b>
<b>Fitness Equipment - Direct to YMCA</b>	
Pool Equipment	
GYM Equipment	
Aerobics / Yoga	
Spinning	
Cardio/Weights	
Sub Total	\$ 200,000
<b>Furniture - Direct to YMCA</b>	
Locker Rooms	\$ 500
Meeting Rooms (2)	\$ 20,000
Teen Room	\$ 10,000
Community Lounge	\$ 25,000
Child Watch	\$ 7,500
Offices (2)	\$ 7,500
Reception Desk	\$ 1,500
Sub Total	\$ 72,000
<b>Operating Equipment - Direct by YMCA</b>	
Telecommunications/Data Cabling	\$ 45,000
Office Electronics	\$ 3,000
Sub Total	\$ 48,000
<b>Costs Paid Direct by YMCA</b>	
Architectural Team @ 8.2%	\$ 673,895
Project Management (2.75%)	\$ 261,026
Permits & Fees	\$ 25,000
Reimbursables	\$ 50,000
Sub Total	\$ 1,009,921
<b>YMCA Project Contingency</b>	<b>\$ 200,000</b>
<b>Sub Total YMCA Funds</b>	<b>\$ 1,529,921</b>
<b>Total Project Budget</b>	<b>\$ 10,429,921</b>



**JOINT OPERATIONS AGREEMENT  
BETWEEN THE CITY OF AUSTIN  
AND THE YMCA OF AUSTIN**

**THIS OPERATIONS AGREEMENT** (Operations Agreement) is made between the **CITY OF AUSTIN**, a home rule municipal corporation of the State of Texas located within Travis, Hayes, and Williamson Counties, Texas (City), acting through Marc A. Ott, its duly authorized City Manager, and the Young Men's Christian Association d/b/a **YMCA of Austin**, a Texas nonprofit corporation (YMCA), acting through its officers as duly authorized by its Board of Directors.

**RECITALS**

**WHEREAS**, 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; and

**WHEREAS**, the Facility is planned to be constructed on City property located at 1000 Rundberg Lane, near the intersection of Mearns Meadow Boulevard and Rundberg Lane.

**WHEREAS**, the City has recognized the 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; and

**WHEREAS**, the residents of the City will derive substantial benefits from the activities and programs to be provided and conducted by the YMCA for YMCA members and program participants at the joint use facility and, through reciprocal membership privileges, at other YMCA's in the Austin area and nationally where Austin members work or travel; and

**WHEREAS**, 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 in accordance with its terms and conditions, based on programs of the YMCA and the City's Parks and Recreation Department offered at each of its facilities;

**NOW THEREFORE**, in consideration of the covenants and agreements contained in this Agreement, the City and the YMCA hereby agree as follows:

.

## ARTICLE 1. AND DEFINITIONS

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

1.02 **Community Center.** The building commonly known as the City of Austin/YMCA North Austin Community Recreation Center that provides health and fitness programs for the surrounding community and that is a resource for the public to assemble and meet during normal operating hours. The YMCA, as manager of the facility (defined below) is entrusted by the City to provide access and equal opportunity to services and programs administered by the YMCA that are comparable to other YMCA facilities, that meet the needs of the community, and for which the YMCA may charge fees that are reasonable, consistent with other YMCA facilities in the Austin-area, and that are approved by the City which shall not unreasonably withhold this approval.

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

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

1.05 **Facility.** Facility means the building to be constructed and operated as the City of Austin/YMCA North Austin Community Recreation Center. Facility includes all the footprint of the Facility, any exterior patios and sidewalks directly adjacent to the Facility, any improvements, amenities, and areas that were installed, constructed, or landscaped as part of the original construction completed in accordance with the Agreement for Development and Construction of New Recreation Facility for Public Use Funded in Part with Bond Funds.

1.06 **Uses Exhibit means Exhibit 2** attached to this Agreement and incorporated for all purposes. Revisions to the Uses Exhibit will not alter the terms of this Agreement (unless this Agreement is also revised by the parties) and to the extent that the Uses Exhibit is inconsistent with this Agreement, this Agreement controls.

1.07 **YMCA.** YMCA means the Young Men's Christian Association d/b/a YMCA of Austin, a Texas non-profit corporation.

## ARTICLE 2. TERM OF JOINT USE AND DEVELOPMENT

2.01 **Term.** The term of this Agreement (Term) shall commence upon issuance of a Certificate of Occupancy regarding the Facility, and shall expire 240 months from that date.

2.02 Holdover. Unless terminated earlier by either party pursuant to a right stated in this Agreement, this Agreement will expire without further notice when the Term expires. Any holding over by YMCA after the Term expires will not constitute a renewal of the Agreement or give YMCA any rights under the Agreement in or to the Premises.

### **ARTICLE 3. USE OF PREMISES/OWNERSHIP OF PROPERTY**

3.01 Premises. In consideration of the mutual terms and covenants of this Operations Agreement, YMCA has the right to occupy and jointly use with the City, (a) a 6.997 acre tract of land, more or less, as legally described in the survey, Exhibit “1,” attached to this Operations Agreement (Land), and (b) any buildings and improvements on the Land or to be constructed on the Land. The Land and Facility are collectively referred to as the “Premises”. This Agreement is subject to all existing easements for public roads, channels, highways, public utilities, railroads, pipelines and electrical transmission lines.

3.02 Permitted Use of Premises. YMCA may use the Premises only for the purpose of constructing and operating the Facility for use by the public. YMCA will offer, conduct, and operate non faith-based recreation, wellness, and youth and family programs and related activities, consistent with other YMCA facilities and the Uses Exhibit attached as Exhibit 2 to this Agreement and Exhibit D of the Agreement For Development and Construction of New Recreation Facility for Public Use Funded in Part with Bond Funds , and for no other purpose without the prior written consent of City. Not less than 3,000 net usable square feet of the Premises shall be dedicated to purposes commonly associated with a City recreation center.

Scheduling will be coordinated through the YMCA to prevent conflict with regularly scheduled programs of the YMCA.

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

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

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

3.06 Membership Fees. Fees for memberships and programs shall be priced in accordance with fees established by the YMCA for branches of similar size and amenities located in the City of Austin and consistent with the YMCA's goal to permit participation by all socio-economic groups. As set forth in the Uses Exhibit, such fees will be approved annually by the Director or her designee, who may request that the YMCA modify such fees.

3.07 Janitorial Services and Housekeeping. The YMCA, at its sole cost and expense, shall provide daily janitorial and custodial service for the Facility. For the Term of this Agreement, the YMCA will employ or subcontract for housekeeping staff whose function shall be daily in-house tasks related to routine and emergency cleanups, room or facilities preparation, minor repairs and other routine function associated with programs and building operations. The YMCA shall pay the full cost of the total salary and fringe benefits of said employee(s) or contractors.

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

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

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

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

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

3.13 Maintenance and Repair.

(a) City Obligations. Except for repairs required by YMCA under (b) below, the City will at all times during the Term, keep and maintain, or cause to be kept and maintained, the Premises, including the Facility and all other buildings and improvements erected on the Premises, in good state of appearance and repair (except for reasonable wear and tear)-at the City’s sole expense including, without limitation, the structure, roof, foundation, HVAC, electrical, plumbing and the parking area. Such maintenance and repairs will be made expeditiously and in the same manner as a person generally proficient in that industry or trade performing under similar circumstances.

After City receives notice of needed repairs pursuant to (b) below, the City shall within five (5) working days of notification inspect the Facility to determine the extent of repair required. The City shall complete the repairs within ninety (90) days from the date of such notice. If the City is unable to initiate the repairs as required, the City shall notify the YMCA in writing and YMCA may make and pay for repairs as approved in writing by the Director or her designee. YMCA shall submit a request for reimbursement for the cost of an approved repair. The City shall reimburse the YMCA for the approved repair within 30 days. Needed repairs as used in this subsection exclude obligations of the YMCA in (b) below. For repair and/or replacement expenses less than or equal to \$5,000, YMCA may make repairs internally or hire outside contractors, but agrees to solicit at least one bid and provide a copy of the bid if requested by the City. For repair and/or replacement expenses greater than \$5,000 and less than or equal to \$50,000, YMCA may

make repairs internally and submit a written request for reimbursement or hire outside contractors based on the YMCA's determination of the best of three (3) bids. The City may request a copy of the bids solicited prior to reimbursement. For repair and/or replacement expenses greater than \$50,000, the YMCA shall use existing standard purchasing procedures currently in place by the City of Austin for expenses more than \$50,000, and upon approval by the Director, the City shall reimburse the YMCA for approved repairs or replacement.

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

YMCA shall neither commit nor allow to be committed any waste on the Premises, nor shall YMCA maintain, commit or permit the maintenance or commission of any nuisance on the Premises or use the Premises for any unlawful purpose.

Upon discovery of any condition that requires the City to make needed repairs under (a) above, the YMCA shall notify the City of the defect or condition.

(i) If the City receives the required notice and does not perform as required in (a) , the YMCA may undertake the necessary repair and the City shall be responsible to reimburse the YMCA within thirty (30) days the reasonable costs of the repairs; or

(ii) If the YMCA is unable to reach the City's contact person or the City does not respond within five working days of notification by the YMCA, the YMCA may undertake the necessary repair and the City shall be responsible to reimburse the YMCA within thirty (30) days the reasonable costs of the repairs.

(iii) YMCA agrees to maintain at it own expense during the term of this agreement, a preventative maintenance program for all systems, including but not limited to, HVAC systems, elevators, plumbing, pool pumps and apparatus, fire suppression and sprinkler systems, and other systems that require periodic maintenance to continue operating efficiency and warranty compliance. When notified by maintenance contractors of potential capital replacement issues or,

remedial action, YMCA shall promptly notify City in writing of any items that are the responsibility of the City,

**3.14 Emergency Repairs.**

(i) If the YMCA and City mutually agree that emergency repairs need to be undertaken immediately, the YMCA may undertake the necessary repair waiving the bidding requirements of Section 3.12(b)(iii) and the City shall be responsible to reimburse the YMCA within thirty (30) days. The City will approve the emergency repair in writing to the YMCA as soon as is reasonably possible, but not more than five (5) business days.

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

**3.15 Dedicated Community Area.** Not less than 10% of the square footage of the Facility shall be dedicated for use as a City recreation center, available to all members of the public without charge. Children under the age of 8 years shall be accompanied by an adult, including a staff member operating an afterschool or camp program. After school and other children's programming, as well as programming for seniors, shall be as described in Exhibit 2 – Uses.

**3.16 Naming.** The Facility shall be named the City of Austin/YMCA North Austin Community Recreation Facility. Any change in the name of the Facility must be done in accordance with City Code Sections 14-1-31 through 14-1-34.

**ARTICLE 4. BOND FUND REQUIREMENTS**

**4.01 Use.** During the Term of this Agreement, the YMCA must use the Facility for the operation of a recreation center, and for recreation center-related educational purposes. The operations may also include incidental office space, and food service related to the recreation center operations.

It is the understanding of the YMCA and the City that the City financed the grant for the improvement of the Facility (the Tax-Exempt Facility) with the proceeds of certain obligations the interest on which is tax-exempt under the Federal income tax laws (the Tax-Exempt Bonds). In connection with the issuance of the Tax-Exempt Bonds, the City has covenanted (the Bond Covenants) with the holders of the Tax-Exempt Bonds that the proceeds of such bonds and the Tax-Exempt Facilities will be used in a manner which assures that the Tax-Exempt Bonds will qualify as obligations within the meaning of section 103 of the Internal Revenue Code (the Code). The YMCA agrees not to use

nor permit the use of the proceeds of the grant or the Tax-Exempt Facility in a manner which it knows or should know would result in their use either in an unrelated trade or business or in a manner which would otherwise violate the Bond Covenants. Moreover, if the YMCA is notified by City that the Tax-Exempt Bonds have been selected for audit by the Internal Revenue Service, then the YMCA agrees to provide to the City any information which is in its possession regarding the use of the proceeds or the Tax-Exempt Facility as may be needed by the City to timely respond to questions posed by the Internal Revenue Service. In the event of a failure to comply with this covenant the City will have the right to specific performance, injunctive relief, or the recovery of economic damages suffered by the City.

## **ARTICLE 5. CONSTRUCTION OF THE FACILITY**

5.01 General Conditions. City and YMCA agree that YMCA will award the contract for construction of the Facility, subject to the Agreement for Development and Use of Bond Funds to Construction of New Recreation Facility for Public Use Funded in Part with Bond Funds between the City and the YMCA.

## **ARTICLE 6. AUDITING**

6.01 Audits. YMCA 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 YMCA related to the performance under this Contract. YMCA shall retain all such records for a period of three (3) years after final payment on this Contract or until all audit and litigation matters that the City has brought to the attention of YMCA are resolved, whichever is longer. YMCA agrees to refund to the City any overpayments disclosed by any such audit.

## **ARTICLE 7. INSURANCE REQUIREMENTS DURING TERM OF JOINT OCCUPANCY**

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

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



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

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

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

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

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

7.02 Additional Insurance Requirements.

- (a) The City and its Officers, Employees and Volunteers shall be named as an Additional Insured on the Automobile and Commercial General Liability policies.
- (b) Thirty days (30) prior written notice of cancellation or non-renewal is required.
- (c) Waiver of rights of recovery (subrogation) in favor of the City.
- (d) The insurers for all policies must be licensed and/or approved to do business in the State of Texas. Except for workers' compensation, all insurers must have a minimum rating of A: VII in the current A. M. Best Key Rating Guide or have reasonably equivalent financial strength and solvency to the satisfaction of Risk Management. If the rating is below that required, prior written approval of the City's Risk Management Division is required.
- (e) If insurance policies are not written for specified coverage limits, an Umbrella or Excess Liability insurance for any differences is required. Excess Liability shall follow form of the primary coverage.
- (f) Unless otherwise stated, all required insurance shall be written on the "occurrence basis". Prior written approval from the City's Risk Management Division is required for any claims-made policies. If coverage is underwritten on a claims-made basis, the retroactive date shall

be coincident with or prior to the date of the contractual agreement and the certificate of insurance shall state that the coverage is claims-made and the retroactive date. The insurance coverage shall be maintained for the duration of the contractual agreement and for five (5) years following completion of the contractual agreement. An annual certificate of insurance submitted to the City shall evidence such insurance coverage.

- (g) Any deductible in excess of \$5,000.00, for any policy that does not provide coverage on a first-dollar basis, must be approved in writing by the City's Risk Management division.
- (h) The City, at its sole discretion, reserves the right to review the insurance requirements and to make reasonable adjustments to insurance coverages and their limits when deemed necessary and prudent by the City based upon changes in statutory law, court decision or the claims history of the industry as well as of the contracting party to the City. The City shall be required to provide prior written notice of ninety (days).
- (i) The City shall be entitled, upon request and without expense, to receive copies of policies and endorsements thereto and may make any reasonable requests for deletion or revision or modifications of particular policy terms, conditions, limitations, or exclusions except where policy provisions are established by law or regulations binding upon either of party or the underwriter on any such policies.

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

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

reconstructed after a casualty, the YMCA and City shall proportionally share in the insurance settlement proceeds.

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

## **ARTICLE 8. TAXES**

8.01 Payment by YMCA. YMCA will pay and discharge all taxes, general and special assessments, and other charges of any kind levied on or assessed against the Premises and all interests in the Premises and all improvements and other property on them during the Term and any extension, whether belonging to City or to YMCA. YMCA will pay all the taxes, charges, and assessments directly to the public officer charged with their collection before they become delinquent, and, to the extent permitted by law, YMCA will indemnify City and hold it harmless from all such taxes, charges, and assessments. YMCA may, in good faith at its own expense (and in its own name) contest any such taxes, charges, and assessments and must pay the contested amount, plus any penalties and interest imposed, if and when finally determined to be due. YMCA's failure to discharge any such tax, charge or assessment when finally due within ten (10) days after the date City's written notice is received by YMCA shall constitute an event of default under Section 12.01 (d) below. However, YMCA's financial obligation to City to liquidate and discharge such lien shall survive following termination of this Agreement and until such a time as the lien is discharged.

## **ARTICLE 9. UTILITIES**

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

## **ARTICLE 10. RESTORATION**

10.01 Damage or Destruction. City shall not be responsible, under any circumstances, for any damage to property belonging to YMCA, its members, employees, agents, contractors, subcontractors, invitees, licensees, or trespassers, which may be damaged, stolen, or destroyed, and YMCA hereby releases City from any responsibility therefore. If the Facility or any other building or improvement constructed on the Premises is damaged or destroyed by fire or any other casualty, YMCA shall within ninety (90) days from the date of the damage or destruction, begin to repair, reconstruct, or replace the damaged or destroyed Facility and pursue the repair, reconstruction, or replacement with reasonable diligence so as to restore the Facility to substantially the condition it was in before the casualty. But if beginning or completing this work is

prevented or delayed by war, civil commotion, acts of God, strikes, governmental restrictions or regulations, or interferences, fire or other casualty, or any other reason beyond the YMCA's control, whether similar to any of those enumerated or not, the time for beginning or completing the restoration (or both) will automatically be extended for the period of each such delay. In lieu of reconstructing the Facility, the parties can mutually agree to declare this Agreement terminated.

## **ARTICLE 11. INDEMNIFICATION**

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

**11.02 INDEMNIFICATION. 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.**

**11.03 Notification. YMCA agrees to notify City promptly upon the receipt of any claim or lawsuit brought in connection with any injury, death or damages on the Premises. YMCA agrees to make its officers, agents, and employees available to the City, at all reasonable times for any statements and case preparation necessary for the**

defense of any claims or litigation for which the City may be responsible hereunder. YMCA shall place language in its contract with contractors that contractors shall notify the City as required by YMCA in this subsection.

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

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

## **ARTICLE 12. DEFAULT AND REMEDIES**

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

- a. YMCA fails to use the Premises for conducting and operating the Facility for the purpose of offering, conducting and operating non faith-based recreation, wellness, and youth and family programs and related activities, consistent with other YMCA facilities;
- b. YMCA makes a transfer in fraud of creditors, or makes an assignment for the benefit of creditors;
- c. YMCA vacates any substantial portion of the Premises for a period of longer than thirty (30) days, unless YMCA can demonstrate to the reasonable satisfaction of the City that all reasonable efforts are being made by YMCA to occupy said Premises or
- d. YMCA fails to comply with any other term, provision or covenant of this Agreement that is material.
- e. YMCA fails to provide services in accordance with the requirements of the Services Plan.

12.02 Curing a Default.

- (i) If an event of default occurs, the City shall give written notice that describes the default in reasonable detail to the YMCA. The YMCA must commence curing such default within fourteen (14) calendar days after the time it receives the notice from the City, and then complete the cure within ninety (90) days thereafter.
- (ii) If the YMCA does not substantially complete the cure within the stated time in (i) of this section, the City may terminate this Agreement by giving

written notice of the termination; provided, however, if the default is not reasonably susceptible to cure within the stated time, the City will not exercise its right to terminate this Agreement so long as the YMCA has commenced to cure the default within the required time and diligently completes the cure within a reasonable time without unreasonable cessation of the work to complete the cure.

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

### **ARTICLE 13. RECORDS**

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

13.02 Open Records. YMCA acknowledges that City is required to comply with Chapter 552 of the Texas Government Code (Public Information Act or Act). Under the Public Information Act, this agreement, and documents related to this agreement, which are in City's possession, or to which City has access, are presumed to be public and the City may release these records to the public unless an exception described in the Act applies to a document.

13.03 Notice of complaints or violation reports. The YMCA shall promptly notify the City of any complaints or reports of violations of the law that have occurred at the Facility and that are significant in nature and that have a material effect on the operations of the Facility.

**ARTICLE 14. NOTICES**

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

- a.           If to City:           City Manager  
  City of Austin  
  City Hall  
  301 W. 2nd, 3rd Floor  
  Austin, Texas 78701  
  \  
  
b.           If to YMCA:       1402 E. Cesar Chavez  
  Austin, Texas 78702  
  Attn: President/CEO

**ARTICLE 15. GENERAL PROVISIONS**

15.01 Right of Entry and Inspection. YMCA must permit City or its agents, representatives, or employees to enter the Premises for the purposes of inspection; determining whether YMCA is complying with this Agreement; maintaining, repairing, or altering the Premises; or any other reasonable purpose During any inspection, City may perform any obligations that City is authorized or required to perform under the terms of this Agreement or pursuant to its governmental duties under federal state or local laws, rules or regulations.

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

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

15.04 No Partnership or Joint Venture. YMCA shall operate as an independent contractor and not as an officer, agent, servant, or employee of the City. YMCA shall have the exclusive control of, and the exclusive right to, control the work designated to the YMCA to be performed under this Agreement, and all persons performing the same, and shall be solely responsible for the acts and omissions of its officers, agents, servants,

contractors, subcontractors and employees. Neither City nor YMCA shall be responsible under the Doctrine of Respondeat Superior for the acts and omissions of its officers, agents, servants, contractors, subcontractors, or employees. It is understood and agreed that the City is not involved as a party to any activities that may be carried on by YMCA pursuant to this Agreement. YMCA acknowledges itself solely responsible for such activities and for all persons and property involved or used in connection with YMCA's use of the Premises. Provided, however, that no provision of this Agreement shall operate or be construed as a waiver by either party of any immunity from liability which it has or could be asserted under the doctrine of governmental immunity or any other immunity which it has under law.

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

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

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

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



or provisions of this agreement.

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

15.10 Reciprocal Waiver of Immunity. The parties each waive their rights of charitable or governmental immunity in any action between them.

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

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

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

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

15.15 Sole Agreement. This Agreement constitutes the sole and only agreement of the parties respecting the operations of the Premises.

**DRAFT**

EXECUTED this the \_\_\_\_\_ day of \_\_\_\_\_, 2010.

**CITY OF AUSTIN**

**YMCA OF AUSTIN**

By: \_\_\_\_\_  
Marc A. Ott  
City Manager

By: \_\_\_\_\_  
James Finck  
President/CEO

**APPROVED AS TO FORM AND LEGALITY**

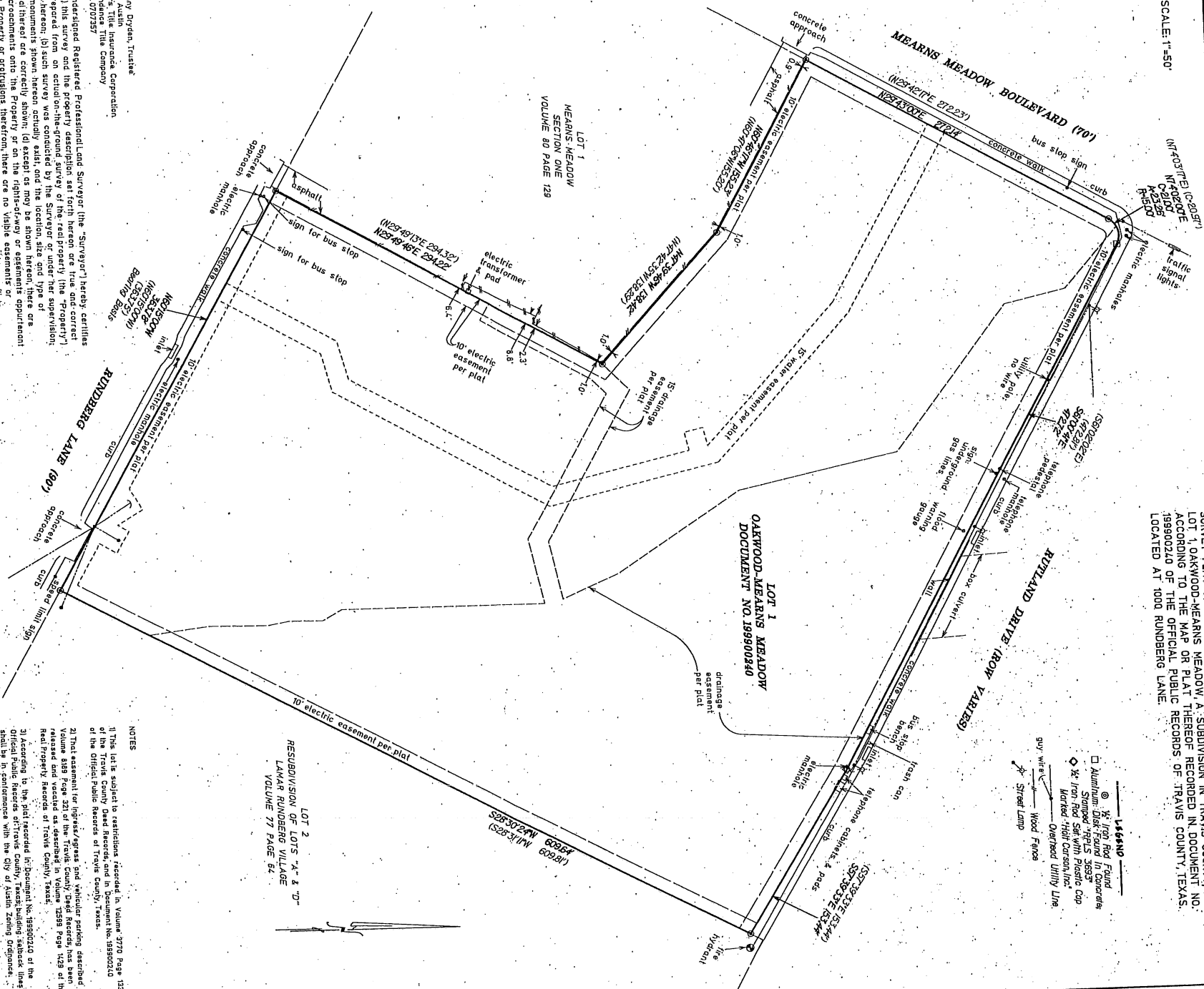
By: \_\_\_\_\_  
Leela Fireside  
Assistant City Attorney

(N740317E) (C-2057)  
N740200E  
C-2100  
A-2325

156610

③ 1/2" Iron Rod Found  
Aluminum Disk Found in Concrete  
Stamped "RPLS 3693"  
1/2" Iron Rod Set with Plastic Cap  
Marked "Holt Carson, Inc."  
Overhead Utility Line

guy wire  
Wood Fence  
Street Lamp

[illegible]

A797016 : copyright 2007 ©

HOLT CARSON, INC.  
1904 FORTVIEW ROAD  
AUSTIN, TX 78704  
(512) 442-0990

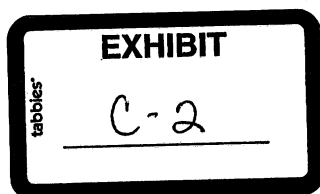
# EXHIBIT

15

**Exhibit 2****Uses Exhibit**

The YMCA shall submit to the Director on an annual basis a program and fees exhibit, in a format similar to the attached schedule, which establishes the program rates, facility fees and comprehensive programming that the YMCA shall manage or provide to the community at the Premises. The purpose of this exhibit is to develop a programming and fee schedule that the YMCA shall use in the management of the premises as mutually agreed and approved by the Director in writing for the term of the agreement. The YMCA, at a minimum, shall include in this exhibit the following community access, services or programs:

1. Cultural programming similar to that which exists at the Gus Garcia Community Center and at competitive, low or no cost to participants. These programs shall include but are not limited to:
  - a. After-School Youth Programs in association with Austin Independent School District (AISD) and other adjacent schools during the academic school year
  - b. Child Drop-off programs for youth eight (8) years old and above without parental supervision in designated areas, Reference the City of Austin "Kids Klub" program
  - c. Youth and Teen Summer Camp Programs
  - d. Teen Youth Programs, such as: "Teen Fitness Club", "Teen Club" and Art Programs
  - e. Senior citizens programs, such as: Senior Fitness, Dancing and other social events
  - f. No fee use of the community lounge, meeting rooms and teen lounge
  - g. Other cultural and community services that may be requested by the City and mutually agreed upon by the City and YMCA
  - h. Program participation by the general public in paid programs without requiring YMCA membership
2. Within the first (1<sup>st</sup>) year of operation, the creation of a COA/YMCA North Austin Community Recreation Center Community Committee of Managers (NACOM). The purpose of the NACOM will be to provide community input to the PARKS Board and YMCA Board regarding the facility operations, programming and issues resolution affecting the operation of the facility and service to the community
  - a. Membership by citizens to the NACOM shall be made up of a majority of residents from the 78753 Zip code area and its operating profile and responsibilities shall be mutually developed and approved by the City and YMCA.



The Uses Exhibit shall include general programming categories, fees for both YMCA members and the general public, program schedules and any access restrictions that might impact the public's use of the facility. The exhibit, fees and programming, may be revised as necessary to reflect seasonal adjustments or changes in community preferences and exercise or sports trends. However, any additions, deletions or revisions to the approved exhibit from the prior year that constitutes at least a fifty percent (50%) change in the total approved programming, in other words, if more than half of the programming or fees change, the revision(s) shall require the written approval of the Director. Additionally, the YMCA may provide a range of fees for programs that are available to various age or use groups and that require such a fee range. Any change to the daily access fees in excess of five percent (5%) for non-YMCA members must be approved by the Director regardless of other exhibit revisions.

YMCA shall clearly identify fees for the general public in the common area of the premises in a form acceptable to the City as approved by the Director.

Uses Exhibit, Proposed Format

Proposed Typical Monthly Program Fees <sup>1</sup>			
Program Description	YMCA Members	General Public	Notes
Daily Access Fee with Pool Access: Children	Included	2.00	<sup>2</sup>
Daily Access Fee with Pool Access: Adults	Included	6.00	<sup>2</sup>
Child Watch	Included	Included	<sup>3</sup> , with paid program enrollment
Special events, may be fee based	Included	Included	
Monthly Health Screenings	Included	Included	
Aqua Fitness	Included	40.00	
FitStart session	Included	N/A	
Group Aerobics			
Fit Camp	Included	\$ 40.00	
Women on Weights	Included	40.00	
Pilates	Included	40.00	
Yoga	Included	40.00	
Hip Hop Aerobics	Included	40.00	
Tone and Tighten	Included	40.00	
Abs Blast	Included	40.00	
Middle School Muscle	Included	40.00	
F.A.S.T. (Fit Adolescents Safely Training)	\$ 5.00	20.00	
Salsa Aerobics	15.00	40.00	
Tai Chi	Free	20.00	
Women's Self Defense	10.00	40.00	
Latin Kick Boxing	10.00	40.00	
Tae Kwon Do	15.00	40.00	
Personal Training (Per Hour)	40.00	40.00	
English for Latinos	5.00	20.00	
Techno Savvy	10.00	20.00	
Anyone Can Play Guitar	20.00	50.00	
Swim Classes, Baby – Adult	40.00	72.00	
Full Day VIP Summer Camp	150.00	180.00	
Youth Sports Classes			
Kinder Basketball	10.00	20.00	
Youth 3-on-3 Soccer	10.00	20.00	
Dancing Queens	10.00	20.00	
Kinder Soccer	10.00	20.00	
Sportzone	Included	20.00	
Dodgeball	Included	20.00	
Poquito Picassos	15.00	30.00	
Collage and Clay	15.00	30.00	
Notes:	<sup>1</sup> Source: YMCA of Austin		
	<sup>2</sup> Access to room/area controlled by scheduled use (programs) and age		
	<sup>3</sup> Requires YMCA Membership or paid program enrollment		

Proposed Monthly Membership Fees <sup>1</sup>							
Annual Household Income		Monthly Fee				One-time Enrollment	
		Single Adult	Couple	One Adult Family	Family		
\$ 55,000	- and above	\$ 55.00	\$ 70.00	\$ 65.00	\$ 75.00	\$ 48.00	
50,000	- 54,999	39.00	49.00	42.00	53.00	39.00	
45,000	- 49,999	39.00	49.00	42.00	53.00	30.00	
40,000	- 44,999	39.00	46.00	35.00	45.00	24.00	
35,000	- 39,999	39.00	40.00	32.00	40.00	21.00	
30,000	- 34,999	34.00	38.00	28.00	35.00	18.00	
25,000	- 29,999	30.00	33.00	26.00	30.00	18.00	
20,000	- 24,999	26.00	30.00	24.00	25.00	15.00	
15,000	- 19,999	22.00	26.00	24.00	21.00	15.00	
10,000	- 14,999	18.00	22.00	20.00	18.00	12.00	
-	- 9,999	14.00	16.00	16.00	12.00	6.00	

EXHIBIT D

Insurance and Bond Requirements

A. General Requirements

YMCA shall forward certificates of insurance with the endorsements required below to the City as verification of coverage within 5 calendar days after the date this Agreement is executed (unless provided otherwise below), EXCEPT that YMCA shall have in place a policy of commercial general liability insurance meeting the requirements of the Joint Operations Agreement during the entire term set forth in the Joint Operations Agreement.

YMCA's facilities are insured on the City's property insurance policy. YMCA shall contact the City's Risk Management Division for scheduling and other information related to the required use of Factory Mutual Insurance Company's plan review services for the construction of any Improvements to be made pursuant to the Agreement. Contact must be made no later than when the design drawings are 50% complete.

YMCA shall not commence work on the Project until the required insurance is obtained by the CM-R and has been reviewed by the City. Approval of insurance by the City does not relieve or decrease the liability of YMCA hereunder and is not a limitation of liability on the part of YMCA.

YMCA must submit certificates of insurance for all contractors and/or subcontractors to the City prior to the commencement of work on the Improvements to be made pursuant to the Agreement and for all A/E and other professionals prior to the commencement of work under their respective agreements.

YMCA's, and all engineers/architects and Project Management consultants (professionals), contractor's, and subcontractor's insurance coverage must be written by companies licensed to do business in the State of Texas at the time the policies are issued and must be written by companies with A.M. Best ratings of B+VII or better or otherwise be approved by the City. All endorsements naming the City as additional insured, waivers, and notices of cancellation endorsements as well as the Certificate of Insurance must contain the following information:

Attn: City Project Manager Public Works  
City of Austin  
P. O. Box 1088  
Austin, Texas 78767-1088

The "other" insurance clause must not apply to the City where the City is an additional insured shown on any policy. It is intended that policies required in this Exhibit, covering both the City and YMCA, be considered primary coverage as applicable.

If insurance policies are not written for amounts specified in this Exhibit, YMCA, the CM-R, or other professionals, contractors, and subcontractors of YMCA must carry umbrella or excess liability insurance for any differences in amounts specified. If excess liability insurance is provided, it must follow the form of the primary coverage.

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

YMCA shall not cause any insurance to be canceled nor permit any insurance to lapse during the term of the Agreement (Term) without providing a substantially equivalent policy of insurance or coverage in replacement thereof.

The Professionals, and any contractor, or subcontractor responsible for maintaining insurance pursuant to this Agreement shall be responsible for premiums, deductibles and self-insured retentions, if any, stated in policies. All deductibles or self-insured retentions must be disclosed on the certificate of insurance.

The City may review the insurance requirements set forth in this Exhibit to the Agreement during the period of construction and until Final Completion plus the period for all construction warranty work and may make reasonable adjustments to insurance coverages, limits, and exclusions when reasonably deemed necessary and prudent by the City based upon applicable changes in statutory law, court decisions, the claims history of the industry or financial condition of the insurance company(ies), YMCA, professionals, contractors, or subcontractors.

The insurance coverages specified below are required minimums and are not intended to limit the responsibility or liability of YMCA, the professionals, contractors or subcontractors of YMCA.

**B. Specific Requirements**

Worker's Compensation and Employers' Liability Insurance. Coverage must be consistent with statutory benefits outlined in the Texas Worker's Compensation Act (Section 401). The minimum policy limits for Employer's Liability are \$1,000,000 bodily injury each accident, \$1,000,000 bodily injury by disease policy limit and \$1,000,000 bodily injury by disease each employee.

- (a) YMCA's, its professionals', contractors', and subcontractors' policy shall apply to the State of Texas and include these endorsements in favor of the City:
  - (i) Waiver of Subrogation, Form WC 420304, or equivalent coverage.
  - (ii) Thirty days Notice of Cancellation, Form WC 420601, or equivalent coverage.

Commercial General Liability Insurance. If not previously provided under the Joint Operations Agreement by YMCA for itself, YMCA, any professionals, including the A/E team, the CM-R and other contractors shall provide the minimum bodily injury and property damage per occurrence are \$1,000,000 for coverages A and B.

- (a) The policy must contain the following provisions:



- (i) Blanket contractual liability coverage for liability assumed under this Agreement and all contracts related to this Project.
  - (ii) Independent contractor's coverage.
  - (iii) Products/completed operations liability for the duration of the warranty period.
- (b) The policy must also include these endorsements in favor of the City:
- (i) Waiver of Subrogation, endorsement CG 2404, or equivalent coverage.
  - (ii) Thirty days notice of cancellation, endorsement CG 0205, or equivalent coverage.
  - (iii) The City listed as an additional insured, endorsement CG 2010, or equivalent coverage.

Business Automobile Liability Insurance. YMCA, its professionals, contractors, and subcontractors shall provide coverage for all owned, non-owned and hired vehicles with a minimum combined single limit of \$1,000,000 per occurrence for bodily injury and property damage.

- (a) The policy must include these endorsements in favor of the City:
- (i) Waiver of subrogation, endorsement TE 2046A. or equivalent coverage
  - (ii) Thirty days notice of cancellation, endorsement TE 0202A. or equivalent coverage
  - (iii) The City listed as an additional insured, endorsement TE 9901B. or equivalent coverage

If these specific endorsements are not available, evidence of equivalent coverage shall be provided to the City. If neither the endorsement or equivalent coverage is available, a written statement to that effect from the carriers underwriter shall be provided to the City for approval. Acceptance of the statement shall not be reasonably withheld by the City.

Property Insurance. Property insurance shall be maintained by YMCA as required in the Joint Operations Agreement.

Builders Risk Insurance. During the construction of the Improvements to be completed pursuant to the Agreement, or any subsequent construction or repair of the Improvements, YMCA shall require its contractor to maintain an all risk builders risk insurance policy in the amount of the construction contract or CM-R contract, as the case may be. The policy must name the City as loss payee as its interest may appear.

Hazardous Material Insurance. For work that involves asbestos or any hazardous materials or pollution defined as asbestos, any contractor or subcontractor responsible for such work must comply with the following insurance requirements in addition to those specified above:

- (a) Provide an asbestos abatement endorsement to the commercial general liability policy with minimum bodily injury and property damage limits of \$1,000,000 per occurrence for coverages A&B and products/completed operations coverage with a separate aggregate of \$1,000,000. This policy must not exclude asbestos or any hazardous materials or pollution defined as asbestos, and must provide “occurrence” coverage without a sunset clause. The policy must provide 30 day notice of cancellation and waiver of subrogation endorsements in favor of YMCA and the City.
- (b) Any contractor or subcontractor responsible for transporting asbestos or any hazardous materials defined as asbestos shall provide pollution coverage. Federal law requires interstate or intrastate transporters of asbestos to provide an MCS 90 endorsement with a \$5,000,000 limit when transporting asbestos in bulk in conveyances of gross vehicle weight rating of 10,000 pounds or more. Interstate transporters of asbestos in non-bulk in conveyances of gross vehicle weight rating of 10,000 pounds or more must provide an MCS 90 endorsement with a \$1,000,000 limit. The terms “conveyance” and “bulk” are defined by Title 49 CFR 171.8. All other transporters of asbestos shall provide either an MCS 90 endorsement with minimum limits of \$1,000,000 or an endorsement to their Commercial General Liability Insurance policy which provides coverage for bodily injury and property damage arising out of the transportation of asbestos. The endorsement must, at a minimum, provide a \$1,000,000 limit of liability and cover events caused by the hazardous properties of airborne asbestos arising from fire, wind, hail, lightening, overturn of conveyance, collision with other vehicles or objects, and loading and unloading of conveyances.
- (c) The contractor shall submit complete copies of the policy providing pollution liability coverage to YMCA and the City.

Professional Liability Insurance. In addition to the workers compensation, business auto liability and commercial general liability coverage requirements above, all contractors providing professional services shall provide Professional Liability Insurance to pay on behalf of the assured all sums which the assured becomes legally obligated to pay as damages by reason of any negligent act, error, or omission committed or alleged to have been committed with respect to plans, maps, drawings, analyses, reports, surveys, change orders, designs or specifications prepared or alleged to have been prepared by the assured. The policy must provide for 30 day notice of cancellation in favor of the YMCA and the City. The minimum limit of liability for this coverage shall be \$1,000,000.

Performance and Payment Bonds. YMCA shall require its general contractor or CM-R, within 30 days from and after notification of the award of the contract, and before commencement of construction of the Improvements, to furnish and deliver to the City, legally issued surety bonds in a form approved by the City and in compliance with the Texas Property Code, with the City

and YMCA named as co-obligees. The furnishing and delivery of such bonds within the periods mentioned is a condition precedent to the commencement of the construction of the Improvements and, upon the failure of the CM-R to so furnish and deliver all of the same in form, tenor and execution and with sureties reasonably satisfactory to the City, no rights obtain thereunder to the CM-R, no construction of the Improvements being completed pursuant to the Agreement may commence or continue and, if construction has commenced without compliance with the requirements of this paragraph, all construction activities must immediately be suspended and YMCA will be in material default under the Agreement.

Payment Bond. YMCA shall require the CM-R to provide a payment surety bond legally issued, meeting the approval of the City, in an amount not less than 100% of the total contract price of the construction costs of the Improvements, conditioned upon the prompt, full, and complete payment of all subcontractors and suppliers.

Performance Bond. YMCA shall require the CM-R to provide a performance surety bond legally issued, meeting the approval of the City, in an amount not less than 100% of the total contract price of the construction costs of the Improvements, conditioned upon the prompt, full and complete performance by the CM-R of these covenants and agreements contained in the contract documents

Nothing in this Exhibit is intended to overlap or be duplicative of the insurance currently carried by YMCA.

