

AGREEMENT FOR  
CONSTRUCTION MANAGEMENT SERVICES

This Agreement for Construction Management Services (this "Agreement"), made as of, \_\_\_\_\_, 2010 by and between, the City of North Royalton (the "City"), whose contact person shall be the person designated below or successor, the YMCA of Greater Cleveland (the "YMCA"), whose contact person and address are set forth below, and Panzica Construction Company, Mayfield Village, Ohio (the "Construction Manager"), whose contact person and address are set forth below .

WHEREAS, in the exercise of its powers pursuant to its Charter, it is the intention of the City to obtain construction management services for the following project (the "Project"):

**Project Name: North Royalton YMCA**

WHEREAS, the City has entered into a Construction Agency Agreement, dated as of \_\_\_\_\_, 2010, (the "Construction Agency Agreement") and a separate Operating Agreement dated as of \_\_\_\_\_, 2010 (the "Operating Agreement" )with the YMCA:

YMCA Contact: Bruce Noll, CFO  
Address:

City Contact:

Address:

Construction Manager Contact:  
Address:

WHEREAS, under the Construction Agency Agreement, the YMCA is to act as the City's agent to provide for the construction, renovation, installation and equipping of the Project and in that capacity the YMCA will be a party to this Agreement;

WHEREAS, the Construction Manager submitted a statement of qualifications in response to the notice for this Agreement;

WHEREAS, the YMCA ranked the firms which responded to the notice and has negotiated this Agreement with the Construction Manager as the most qualified firm;

WHEREAS, the compensation of the Construction Manager set forth herein is determined to be fair and reasonable to the City and the Construction Manager;

WHEREAS, the Construction Manager desires, and is capable, to provide construction management services for the Project including, without limitation, services required to plan, schedule, coordinate, manage and administer the Project; and

WHEREAS, the City has engaged or will engage the services of a design professional (the "Architect/Engineer") to design the Project and an Owner's Representative (the "Owner's Representative") for the Project;

NOW, THEREFORE, in consideration of the mutual promises herein contained, the City, the YMCA, and the Construction Manager agree as follows:

## **ARTICLE I RESPONSIBILITIES OF CONSTRUCTION MANAGER**

### **1.1 Construction Manager's Services**

- 1.1.1 **Scope of Services; Applicable Law.** The Construction Manager shall provide construction management services for the Project in accordance with the terms of this Agreement. The Construction Manager shall provide such services in accordance with the applicable Sections of the Ohio Revised Code and any applicable State rules and regulations, any applicable federal and local statutes, ordinances, rules and regulations and the Contract Documents for the Project, as in effect from time to time. The Construction Manager shall cooperate with the Architect/Engineer and shall transmit documents among the City, the YMCA and the Architect/Engineer, as necessary. The Construction Manager shall provide to the City a Declaration of Material Assistance/Non-Assistance to Terrorist Organization in accordance with Section 2909.33 of the Ohio Revised Code, when required.
- 1.1.2 **Construction Budget.** The total amount available for the construction of the Project is and all related costs is Five Million Five Hundred Thousand Dollars (\$5,500,000) without any design, construction or errors/omissions contingency (the "Construction Budget"). The Construction Budget shall not be exceeded without the written consent of the City and the YMCA. The City and the YMCA shall provide written notice to the Construction Manager of any change in the Construction Budget. It is recognized that the Construction Manager does not have control over the cost of labor, materials or equipment, over Contractors' methods of determining bid prices, or over competitive bidding, market or negotiating conditions. Accordingly, the Construction Manager cannot and does not warrant or represent that bids or negotiated prices will not vary from the Construction Budget or from any estimate of cost or evaluation prepared by or agreed to by the Construction Manager.
- 1.1.3 **Timeliness; Standard of Care.** The Construction Manager accepts the relationship of trust and confidence established by this Agreement, agrees to be truthful, honest and utilize the utmost good faith when dealing with the City and the

YMCA, and covenants with the City and the YMCA to cooperate with the Architect/Engineer and exercise the Construction Manager's best skill, care and judgment to furnish efficient construction administration, management services and supervision, and to perform the services in a timely manner in accordance with the Project Schedule so as to cause no delay, interference, disruption or hindrance in the Work, and so that the Project shall be completed as expeditiously and economically as possible within the Construction Budget and in the best interests of the City and the YMCA. The Construction Manager owes the YMCA the same performance duties it owes the City, and the YMCA shall have the same rights to enforce the Construction Manager's performance obligations as does the City, provided however, that if there is disagreement between the City and the YMCA, the Construction Manager shall comply with the position of the City.

- 1.1.4 Management Schedule. Within thirty (30) days after the execution hereof, the Construction Manager shall submit to the YMCA for approval by the City a Management Schedule for the performance of the Construction Manager's services which shall include allowances for reasonable periods of time required for the review and approval of items by the City and for approvals of governmental authorities having jurisdiction over the Project. The Construction Manager shall incorporate the Management Schedule and the Architect/Engineer's Design Schedule into the Project Schedule. The Management Schedule, when approved by the City, shall not be exceeded by the Construction Manager without notice and adjustment of the Management Schedule approved by the City. The Construction Manager shall monitor, update, coordinate and seek adherence to the Project Schedule.
- 1.1.5 Personnel. No principal individuals, other than \_\_\_\_\_, shall perform any of the Construction Manager's services without the written consent of the City and the YMCA.
- 1.1.6 Non-Discrimination. The Construction Manager represents that the Construction Manager is in compliance with all applicable equal employment opportunity requirements under law, if required by Section 153.59 of the Ohio Revised Code or any other applicable state or federal law.
- 1.1.7 Consultants. The Construction Manager may provide services through one or more consultants employed by the Construction Manager (the "Consultants") and the YMCA; provided, however, the Construction Manager shall remain responsible to the City for all duties and obligations of the Construction Manager under this Agreement. Unless waived or otherwise modified in writing by the City and the YMCA upon written request of the Construction Manager, no Consultant shall be retained upon terms inconsistent with this Agreement. The Construction Manager shall provide the Authorized Representative with the names and qualifications of any proposed Consultant, together with a description of the services to be provided by such Consultant for approval. Once approved by the Authorized Representative, the identity of any Consultant and the extent of such Consultant's participation in performing the Construction Manager's services

shall not be altered without the consent of the Authorized Representative. Upon the request of the City and the YMCA, the Construction Manager shall terminate the employment of any Consultant. The City and the YMCA may communicate with any Consultant either through the Construction Manager or directly to the Consultant with notice to the Construction Manager.

- 1.1.8 Ethics Laws. The Construction Manager represents that it is familiar with all applicable ethics law requirements, including without limitation Sections 102.04 and 3517.13 of the Ohio Revised Code, and certifies that it is in compliance with such requirements and that there are no unresolved findings against the Construction Manager under Section 9.24 of the Ohio Revised Code.
- 1.1.1 No Kickbacks. The Construction Manager shall not provide, attempt to provide, offer to provide, solicit, accept, or attempt to accept any kickback or illegal gratuity to or from any officer or employee of the City or the YMCA during the term of this Agreement; nor shall the Construction Manager knowingly include, directly or indirectly, the amount of any kickback or illegal gratuity in the estimated cost of the Project; nor shall the Construction Manager knowingly include, directly or indirectly, the amount of any kickback or illegal gratuity in any request for payment or reimbursement.
- 1.1.2 Limitation of Authority. The Construction Manager shall not have any authority to bind the City for the payment of any costs or expenses without the express written approval of the City and the YMCA. The Construction Manager shall not have any authority to authorize a Contractor to perform additional or extra Work for which the Contractor will seek payment or time extension and the Construction Manager shall notify each Contractor that the Construction Manager does not have authority to authorize additional or extra work, absent a signed document from the City and the YMCA approving the additional or extra work. The Construction Manager shall have authority to act on behalf of the City and the YMCA only to the extent provided herein or in the Standard Conditions of Contract for Construction (the “Standard Conditions”) for the Project. In the event of an emergency affecting safety or imperiling the Project or adjacent property, the Construction Manager shall act reasonably to prevent or minimize any threatened damage, injury or loss without obtaining prior instruction or authorization. The Construction Manager’s authority to act on behalf of the City and the YMCA shall be modified only by an amendment in accordance with Subparagraph 9.5.2.
- 1.1.3 Approval or Disapproval of Construction Manager’s Services. The City and the YMCA shall have the right to reasonably disapprove any portion of the Construction Manager’s services for the Project, by written notice stating the reasons for the disapproval.. If the City or the YMCA disapproves any of the Construction Manager’s services, the Construction Manager shall undertake immediate efforts to satisfy the objections. The Construction Manager acknowledges that any review, approval or lack of disapproval by the City and the YMCA or the Architect/Engineer of any services performed by the Construction

Manager does not relieve the Construction Manager of its responsibility to properly and timely perform such services.

1.2 The Construction Manager shall perform its services in compliance with all applicable provisions of the Construction Agency and Operating Agreements.

## **ARTICLE II SCOPE OF CONSTRUCTION MANAGER'S BASIC SERVICES**

### 2.1 General

2.1.1 The Construction Manager shall provide the Basic Services set forth in Paragraphs 2.2 to 2.7, inclusive. The Construction Manager shall coordinate its Basic Services with the services of the YMCA, the Architect/Engineer and the Owner's Representative. The Construction Manager shall communicate to the City and the YMCA with notice to the other.

2.1.2 The Construction Manager shall assist the Architect/Engineer to coordinate Leadership in Energy and Environmental Design ("LEED") services and submissions and shall provide the services necessary for the City to seek LEED certification at the \_\_\_\_\_ Level for the Project, but shall not warrant or guarantee that any LEED certification will be obtained, unless the failure to obtain such LEED certification constitutes a breach of the Construction Manager's standard of care.

2.1.3 The Construction Manager acknowledges the provisions of the Operating Agreement, and the YMCA's duty to allow use by Parma Community Hospital (PCH) for specific purposes. The Construction Manager agrees to perform its services with the Operating Agreement's requirements in mind, and in the event the City disapproves any design or construction documents, or PCH imposes obligations on the Project, the Construction Manager agrees to provide a reasonable amount of revisions and re-work of those documents to obtain the City or PCH's approval without incurring Additional Services expenses.

2.1.4 The Construction Manager acknowledges the provisions of the YMCA's Maintenance Program attached to the Operating Agreement, that sets forth the YMCA's general maintenance protocols, and the obligations the YMCA has to follow those protocols with respect to its obligations to the City under the Operating Agreement. The Construction Manager agrees to perform its services within the applicable standard of care so that the Project when complete can be maintained consistent with the YMCA's Maintenance Program.

### 2.2 Predesign Phase (Program Validation)

2.2.1 Program of Requirements and Other Requirements. The Construction Manager shall review and comment upon the Architect/Engineer's preliminary evaluation of the City and the YMCA's requirements for the Project, including without limitation the Program of Requirements, schedule and budget requirements, including the Construction Budget and site alternatives, each in terms of the other. The Construction Manager shall suggest revisions to the Program of Requirements related to site use and improvements, selection of materials, building systems and equipment, constructability, logistics, availability and suitability of labor and materials, time requirements, costs of alternative designs or materials and possible economics.

2.2.1.1 Approved Program of Requirements and Revisions. The Construction Manager shall assist the Architect/Engineer to prepare, date and sign the revised Program of Requirements upon approval by the City and the YMCA (the "Approved Program of Requirements"). If any changes or adjustments to the Approved Program of Requirements are desired at any time after the Approved Program of Requirements has been approved by the City and the YMCA, the Construction Manager shall assist the Architect/Engineer to prepare a written amendment to the Approved Program of Requirements describing the changes or adjustments. The Approved Program of Requirements, as amended from time to time with the approval of the City and the YMCA, shall determine the Scope of the Project.

2.2.1.2 The Construction Manager shall assist the City and the YMCA to determine whether Building Information Modeling ("BIM") will be used for the Project and to determine any BIM software, protocols or agreements necessary.

### 2.3 Schematic Design Phase (Preliminary Drawings)

2.3.1 Review and Consultation. The Construction Manager shall review and comment upon the Architect/Engineer's further evaluation or refinement of the Approved Program of Requirements, the schedule and budget requirements and site alternatives and participate in consultations with governmental authorities having jurisdiction to approve design or construction of the Project or legal requirements applicable to the Project. The Construction Manager shall review and comment upon the Architect/Engineer's investigation of existing conditions and verification of the accuracy of information provided by the City and the YMCA about existing conditions.

2.3.2 Recommendations and Costs. The Construction Manager shall provide recommendations on value engineering, constructability, logistics, existing site conditions, site use and improvements, availability and suitability of materials, equipment, labor and systems, long-lead items, safety and security plans, quality control, energy efficiency, items necessary to achieve the stated LEED certification goals for the Project, contingencies, life cycle analysis, time requirements for construction and factors related to the cost of the Project including costs of alternative designs or materials, preliminary budgets and possible economies. The Construction Manager shall comply with reporting and accounting procedures established by the City and the YMCA for the Project.

2.3.3 Schematic Design Documents. The Construction Manager shall receive copies of all Schematic Design Documents from the Architect/Engineer, review them and transmit to the City and the YMCA and the Architect/Engineer any recommendations about the matters listed in Subparagraph 2.3.2.

2.3.4 Preliminary Cost and Schedule Estimates. Upon completion of the Schematic Design Phase for the Project or appropriate portion thereof, the Construction Manager shall, with the assistance of the Architect/Engineer, prepare and submit a Statement of Probable Construction Cost for the Project based on current area volume and other unit costs and a Preliminary Project Schedule, which shall incorporate the Management Schedule and the Design Schedule, for approval of the City and the YMCA.

#### 2.4 Design Development Phase (Basic Drawings)

2.4.1 Design Development Documents. The Construction Manager shall receive copies of all Design Development Documents from the Architect/Engineer, review them and transmit to the City and the YMCA and the Architect/Engineer any recommendations about the matters listed in Subparagraph 2.3.2.

2.4.2 Cost Estimate and Project Schedule. Upon completion of the Design Development Phase for the Project or appropriate portion thereof, the Construction Manager, with the assistance of the Architect/Engineer, shall prepare and submit a Detailed Estimate of Construction Cost for the Project and a Project Schedule using the Critical Path Method indicating milestone completion dates for approval by the City and the YMCA. In establishing the Detailed Estimate of Construction Cost, the Construction Manager shall include reasonable contingencies for design, bidding and price escalation and determine in conjunction with the Architect/Engineer and the City and the YMCA the materials, equipment, component systems and types of construction to be included in the Contract Documents. The Construction Manager and the Architect/Engineer shall review any difference between the Statement of Probable Construction Cost and the Detailed Estimate of Construction Cost, identify reasons for any difference and recommend means to eliminate the difference, if necessary. The Construction Manager, the Architect/Engineer and the City and the YMCA shall agree upon the means to eliminate any difference between the Statement of Probable Construction Cost and the Detailed Estimate of Construction Cost, and the Construction Manager shall prepare a report describing the agreed upon means. The Construction Manager and the Architect/Engineer shall review any differences between the Preliminary Project Schedule and the Project Schedule, identify reasons for the differences and recommend whether the differences should be eliminated and, if necessary, means to eliminate the differences. If the Construction Manager, the Architect/Engineer and the City and the YMCA agree to eliminate any such differences, the Construction Manager shall prepare a report describing the agreed upon means. The Construction Manager, the Architect/Engineer and the City and the YMCA

shall make any necessary amendments to the Approved Program of Requirements in accordance with Subparagraph 2.2.2.

## 2.5 Construction Documents Phase (Construction Drawings and Specifications)

- 2.5.1 Drawings and Specifications. The Construction Manager shall prepare the Scope of Work (Construction Specifications Institute Division 1) for inclusion by the Architect/Engineer in the Drawings and Specifications for the Project with the approval of the City and the YMCA to facilitate the bidding and awarding of Contracts, taking into consideration factors including, but not limited to, time of performance, availability of labor, overlapping trade jurisdictions, provision of training for start-up and maintenance, provision of operation and maintenance manuals and provisions for temporary facilities, and to eliminate areas of conflict and overlapping in the Work to be performed by the various Contractors. The Construction Manager shall receive all Drawings and Specifications from the Architect/Engineer, review them and transmit them to the City and the YMCA for approval with recommendations thereon about the matters listed in Subparagraph 2.3.2 and possible Alternates.
- 2.5.2 Revisions to Cost Estimate and Project Schedule. The Construction Manager shall inform the Architect/Engineer and the City and the YMCA of the need for any changes in Project requirements or in construction materials, systems or equipment as the Drawings and Specifications are developed and of the need for any adjustments in the Detailed Estimate of Construction Cost and the Project Schedule so as not to exceed the Construction Budget and the City's milestone and completion dates. Upon approval of the City and the YMCA of any such changes or adjustments, the Construction Manager, with the assistance of the Architect/Engineer, shall prepare a revised Detailed Estimate of Construction Cost for the Project or a revised Project Schedule, as applicable, incorporating such changes or adjustments.
- 2.5.3 Bidding Documents. The Construction Manager shall assist the City and the YMCA and the Architect/Engineer in the preparation of documents necessary for bidding of Contracts by reviewing those documents and making recommendations about the division of Work and matters to be included in the Special Conditions. The Construction Manager shall cooperate with the Architect/Engineer to divide the Work into an appropriate number of bid packages to attempt to maximize savings to the City and the YMCA.
- 2.5.4 Government Approvals. The Construction Manager shall cooperate with the Architect/Engineer in submitting to the Building Department and other necessary entities such sets of the Drawings and Specifications as the Building Department or such entities may require for approval, together with any necessary completed applications. The Construction Manager shall assist the Architect/Engineer to secure any necessary National Pollution Discharge Elimination System Storm Water General Permit for the Project. In addition, the Construction Manager shall

cooperate with the Architect/Engineer with filing of documents required for the approval of governmental authorities having jurisdiction over the Project.

2.5.5 Additional Filings. Upon approval of the Building Department of the Drawings and Specifications, the Construction Manager shall receive from the Architect/Engineer one (1) set of corrected copies of the Drawings and Specifications bearing approval stamps of the Building Department for the Project.

2.5.6 Items for Common Use. The Construction Manager shall schedule any necessary meetings with the Architect/Engineer and the City and provide recommendations and information to the Architect/Engineer and the City for discussion at such meetings regarding the assignment of responsibilities for refuse removal and for safety precautions and programs, temporary Project facilities and utilities, weather protection, fire protection and scaffolding, and equipment, materials and services for common use of Contractors, if any. The Construction Manager shall also review the Contract Documents to verify that the requirements for and assignment of responsibilities are included in the Contract Documents.

2.5.7 Labor Recommendations. The Construction Manager shall provide to the Architect/Engineer and the City and the YMCA an analysis of the types and quantities of labor required of the Project, review the availability of appropriate categories of labor required for all Contracts and make recommendations for actions designed to minimize adverse effects of labor shortages. This Project will be subject to State prevailing wage requirements and the Construction Manager will provide its services to ensure and enforce compliance with the prevailing wage laws and to assist the prevailing wage coordinator for the Project.

## 2.6 Bidding or Negotiation Phase (Bidding Assistance and Recommendation)

2.6.1 Obtaining Bids. The Construction Manager shall develop and make recommendations for bidding criteria, bidding schedules and bidding information and shall develop Bidders' interest in the Project.

2.6.2 Prebid Meetings. The Construction Manager, with the assistance of the Architect/Engineer, shall conduct prebid meetings with prospective Bidders to familiarize Bidders with the Contract Documents, any special requirements of the Contract Documents and prevailing wage requirements. The Construction Manager shall obtain responses from the Architect/Engineer to questions at prebid meetings and review Addenda prepared by the Architect/Engineer incorporating those responses. The Construction Manager, with the assistance of the Architect/Engineer, shall prepare minutes of the prebid meetings which shall be used by the Architect/Engineer to prepare Addenda. The Construction Manager shall provide the minutes to Bidders upon request.

2.6.3 Bid Packages. The Construction Manager, with the assistance of the Architect/Engineer, shall assemble the Contract Documents into appropriate

multiple prime contract packages for bidding to meet the requirements of the City's Charter regarding competitive bidding of construction contracts, and shall distribute the bid packages to prospective Bidders, including any local or regional associations that maintain plan rooms.

- 2.6.4 Bid Review. The Construction Manager, with the assistance of the Architect/Engineer, shall review all bids received for lowest bid and responsiveness, participate in investigating the responsibility of Bidders to determine whether a Bidder is best and deliver a written recommendation of the Construction Manager and the Architect/Engineer to the City and the YMCA about the award of, or rejection of, any bid or bids for each Contract for the Project in accordance with applicable law. In making the recommendation, the Construction Manager and the Architect/Engineer shall evaluate all applicable Alternates referenced in the Contract Documents.
- 2.6.5 Bid Substitutions. Substitutions contained in the bid of any Bidder shall not be considered by the Construction Manager in recommending the award of any Contract.
- 2.6.6 Conferences. The Construction Manager, with the assistance of the Architect/Engineer, shall conduct pre-award and post-award conferences with apparently successful Bidders and shall gather documentation for Contract execution from such Bidders. Upon the failure of a Bidder to provide such documentation in a timely manner, the Construction Manager shall assist the City and the YMCA in considering whether an extension of time for submitting such documentation is appropriate.
- 2.6.7 Subcontractor and Material Supplier Review. The Construction Manager shall participate in investigating any Subcontractor or Material Supplier proposed by any Contractor and recommend approval or disapproval in accordance with the Standard Conditions based upon review of the Contract Documents, any past experience and reasonable inquiry.
- 2.6.8 Over Budget Options. If the Construction Budget is exceeded by the total of the lowest and best bids and any legally negotiated prices for the Project, the City and the YMCA shall, at the City and the YMCA's option (1) approve in writing an increase in the Construction Budget; (2) authorize rebidding or renegotiation for some or all portions of the Project within a reasonable time not to exceed thirty (30) days without an increase in the Construction Budget; (3) suspend or abandon the Project, in whole or in part, and terminate this Agreement, in whole or in part, in accordance with Subparagraph 8.1.1 and Subparagraph 8.1.2 or Subparagraph 8.1.4, as applicable; or (4) cooperate in the revision of the Scope of the Project as defined in Subparagraph 2.2.2 to reduce the actual cost of construction to the Construction Budget. If the City and the YMCA adopts option (1), the Construction Manager may request, in writing, an adjustment to the Basic Fee, in accordance with Subparagraph 5.4.5. If the City and the YMCA adopts options

(2), (3) or (4), the Construction Manager shall cooperate in any necessary bidding or negotiation and modification of documents without additional charge.

- 2.6.9 Further Revisions to Cost Estimate and Project Schedule. If necessary, the Construction Manager shall inform the Architect/Engineer and the City and the YMCA of the need for any adjustments in the Detailed Estimate of Construction Cost and the Project Schedule. Upon approval of the City and the YMCA of any such adjustments, the Construction Manager, with the assistance of the Architect/Engineer, shall prepare a revised Detailed Estimate of Construction Cost or a revised Project Schedule, as applicable, incorporating such adjustments and obtain the City and the YMCA's written approval thereof.
- 2.6.10 Contract Execution and Notices. The Construction Manager, with the assistance of the Architect/Engineer, shall assist the City and the YMCA in the preparation of Notices of Intent to Award and Notices to Proceed, preparation and execution of Contracts, and preparation of notices to sureties and of the Notice of Commencement.
- 2.6.11 Guaranteed Maximum Price Concept. Construction Manager acknowledges that the YMCA is obligated by the Construction Agency Agreement to guarantee to the City that the Project can be completed for a guaranteed maximum price (GMP) subject to contractually permitted increases in the contract values. Construction Manager will assist the YMCA in preparing its GMP proposal to the City for review and acceptance, and will advise the YMCA and the City *in writing* of any material contingencies, allowances or discrepancies in the bid tabulations, award, or final contract values used to calculate the GMP, or of any needed revisions to the Detailed Estimate of Construction Cost or Project Schedule that could result in the GMP being exceeded. Further, the Construction Manager will assist the YMCA in calculating an appropriate GMP contingency to include within the YMCA's proposal to the City, particularly for any allowance or unit priced work that could increase contract values. At the conclusion of the bidding process, the City and the YMCA will enter into negotiations to set a GMP that will be determined and fixed prior to the commencement of construction of the Project. The Construction Manager along with the Architect/Engineer will provide a final recommendation to the City and the YMCA as to an appropriate GMP for the Project based upon the Construction Manager's experience, professional judgment and skill as a construction manager experienced in public facility construction like that called for on this Project, and the City and YMCA will have the right to rely on the Construction Manager's recommendation in setting the GMP under the Construction Agency Agreement. If the Construction Manager and the Architect/Engineer can not agree on a GMP recommendation for the Project, each will state its separate recommendation in writing to the City and the YMCA.

## 2.7 Construction Phase (Administration of Construction)

2.7.1 Duration, Extent, Access. The Construction Phase will commence with the award of the first prime contract and will terminate upon Final Acceptance of the Project by the City following close-out, provided that if there are warranty claims against any Contractor, the Construction Manager will provide reasonable assistance to the City and the YMCA so that they may obtain the Contractor's performance of warranty work at any time during the Contractor's warranty period. The Construction Manager shall at all times have access to the Project whenever any Work is in preparation or in progress.

2.7.2 Duties Generally. The Construction Manager shall provide administration of the Project, scheduling and coordination of the Work, Contractors and any other Persons on the site of the Project. The Construction Manager shall assist the prevailing wage coordinator for the Project, shall collect certified payrolls from the various contractors and sub-contractors, and shall review and monitor the contractor's compliance with the prevailing wage laws to ensure compliance with the prevailing wage requirements for the Project. If Construction Manager becomes aware of prevailing wage violations, the Construction Manager shall give immediate written notice to the appropriate contractor and notify the City and the YMCA in writing, and then follow up to make sure the violations are corrected or other appropriate action is taken. The Construction Manager shall not certify or approve any contractor's pay application if that contractor has not provided accurate payroll certifications. The Construction Manager shall at all times maintain a competent, full-time staff at the Project to perform all necessary services for the Project so that the Work may be accomplished timely and efficiently. The Construction Manager shall refer all questions for interpretation or clarification of the Contract Documents to the Architect/Engineer, shall transmit the Architect/Engineer's responses to such requests back to the Contractors in a timely manner, and shall notify the Architect/Engineer if the presence of the Architect/Engineer on the site of the Project is necessary. The Construction Manager shall determine in general that the Work of each Contractor and its respective subcontractors is being performed in accordance with the Contract Documents and applicable building codes, and notify the City and the YMCA, and the Architect/Engineer of defects and deficiencies in the Work, discovered or made known to the Construction Manager. The Construction Manager shall have authority to reject Work that does not conform to the Contract Documents and shall notify the Architect/Engineer and the City and the YMCA about such rejection within 24 hours. The Construction Manager must record any rejection of Work in its daily logs and include sufficient information regarding the rejected Work in its written notice to the City and the YMCA, and the Architect/Engineer to allow them to make informed decisions regarding how to proceed, including any recommendations for additional inspections, testing or analysis of the subject Work by the City and the YMCA. The Construction Manager's failure to reject Work that does not conform to the Contract Documents shall not be considered acceptance of non-conforming Work. The Construction Manager shall identify the need for notices to any Contractors

with regard to delays, disruptions, non-conforming work, performance problems, claims, warranties, repairs, corrective work, personnel problems, project management, staffing, resourcing, coordination, other Project issues and shall draft such notices and make sure they are issued to the appropriate contractors in a timely manner so as to ensure the YMCA and the City meet any notice requirements set forth in the Contract Documents. The Construction Manager will maintain a log of all project notices issued, the contractor's responses (if any), and ensure appropriate follow up. The Construction Manager's duties shall not require the Construction Manager to undertake any of the Contractor's Responsibilities as set forth in Subparagraph 2.7.17.

- 2.7.3 Investigation of Conditions. With the assistance of the Architect/Engineer, the Construction Manager shall as necessary investigate existing conditions to determine the accuracy of information the City provided about existing conditions.
- 2.7.4 Inspections. The Construction Manager shall inspect the Work of each Contractor for Defective Work on an on-going basis. If through inspection or otherwise, the Construction Manager becomes aware of Defective Work., The Construction Manager shall report all Defective Work to the City and the YMCA and the Architect/Engineer, with recommendations for correction or other appropriate action, and shall timely notify the responsible Contractor(s) to correct any Defective Work. The Construction Manager shall then monitor and report on performance of any corrective work.
- 2.7.5 Progress and Records. The Construction Manager shall record the progress of the Project and provide written reports to the City and the YMCA on a monthly basis. Such reports shall include, without limitation, updated schedules, cash flow diagrams, progress photographs, bid analyses, rolling completion lists, information about variations between actual and budgeted or estimated costs and information on each Contractor's Work showing the percentage of work completed, and a statement of the Construction Manager's opinion whether the GMP can realistically be met, along with any other information the City and the YMCA may reasonably request. If the Construction Manager believes the GMP can not realistically be met, then the report shall also include a statement as to the reasons why, and the Construction Manager's recommendations for further action to meet the GMP or if necessary, consider an increase to the GMP. The Construction Manager shall coordinate compliance by the Contractors with the Contractors' safety programs. The Construction Manager's responsibilities to coordinate the safety programs shall not require the Construction Manager to control nor be responsible for the acts or omissions of Contractors, Subcontractors or any other Persons not employees of the Construction Manager. The Construction Manager shall keep a daily log containing a daily record of weather, number of workers on site of the Project for each Contractor, identification of equipment, work accomplished, problems encountered and other similar relevant data. If the Project experiences a delay or disruption to the schedule, the Construction Manager shall immediately note that on the daily log and identify

the Contractor or conditions responsible for the delay or disruption. The Construction Manager shall maintain on site current records of all Contracts, Drawings, Specifications, Shop Drawings, Samples, purchase orders, materials, equipment, maintenance and operating manuals and instructions, and other construction-related documents, including all revisions. The Construction Manager shall maintain records of principal building layout lines, elevations of the bottom of footings, floor levels and key site elevations to the extent certified by a qualified surveyor or professional engineer and any test results, make all such records available to the Architect/Engineer, the Contractors and the City and the YMCA at all times and at the completion of the Project deliver all such records to the City and the YMCA.

2.7.6 Construction Schedule. The Construction Manager shall prepare a Project Schedule incorporating the Construction Schedules received from the Contractors in accordance with the Standard Conditions. The Construction Manager shall provide copies of the Construction Schedules and schedules of submittals to the Architect/Engineer and the City and the YMCA and incorporate the Construction Schedules and schedules of submittals into the Project Schedule so that the Project Schedule includes a Critical Path for the Project and provides for each scope of Work, including without limitation, phasing of construction, if applicable, times for commencement and completion required of each Contractor and ordering and delivery of materials requiring long lead-time. The Construction Manager shall require each Contractor to provide records for any materials that require long lead-time and to certify to the Construction Manager that such materials have been ordered for timely delivery to the Project. The Construction Manager shall, if requested by the City and the YMCA, provide a priority of occupancy in accordance with the Standard Conditions. The Construction Manager shall review the sufficiency of the Contractors' workforce and the number and types of equipment assigned and provided by each Contractor to the Project and shall make recommendations to the City and the YMCA and the Architect/Engineer about the adequacy of such workforce and equipment. The Construction Manager shall periodically inform the Architect/Engineer and the City and the YMCA of the need to update the Project Schedule as required to show current conditions, including without limitation, to conform to the Construction Schedules, as updated from time to time. If such conditions indicate that milestone completion dates shown on the Project Schedule may not be met, the Construction Manager shall recommend corrective action to the Architect/Engineer and the City and comply with the requirements of the City and the YMCA so that the milestone completion dates may be met, unless the City and the YMCA agrees in writing to revise the milestone completion dates. Whenever the Project Schedule is revised or updated as provided in this Subparagraph, the Construction Manager, with the assistance of the Architect/Engineer, shall prepare a revised Project Schedule and obtain the City and the YMCA's written acceptance thereof.

2.7.7 Meetings. The Construction Manager shall schedule, conduct and participate in preconstruction, progress, coordination, quality control and special meetings with

the Architect/Engineer, the City, the YMCA, appropriate Consultants, the Contractors and any other Persons involved in the Project to discuss such matters as procedures, progress, problems and scheduling. The Construction Manager shall prepare and distribute minutes of all such meetings to the Architect/Engineer, the City, the YMCA, the Contractors and any other Persons involved. The Construction Manager shall initiate and coordinate partnering meetings with the Architect/Engineer, the City, the YMCA, appropriate Consultants, the Contractors and other Persons involved in the Project.

- 2.7.8 Tests, Inspections. The Construction Manager shall advise and consult with the City and the YMCA during the Construction Phase as to the need for any special testing, inspections or approval of Work on the Project. The Construction Manager shall notify the Authorized Representative of the times scheduled for any special testing, inspections or approvals.
- 2.7.9 Submittal Review. The Construction Manager shall receive, review for completeness and responsiveness the Contractors' submittals such as Shop Drawings and Samples and shall deliver them to the Architect/Engineer for review as provided in the Standard Conditions.
- 2.7.10 Bulletins; Change Orders; Requests for Information. The Construction Manager shall recommend necessary or desirable changes in the Project to the City and the YMCA and the Architect/Engineer, review any Bulletins prepared by the Architect/Engineer prior to their issuance, review Contractor Proposals and submit recommendations thereon to the City and the YMCA and the Architect/Engineer, assist in negotiating Change Orders in accordance with the Standard Conditions for authorization and execution by the City and the YMCA and the Architect/Engineer. The Construction Manager shall keep a log of Requests for Information, Bulletins, Proposals and Change Orders and shall transmit all interpretations or clarifications of the Contract Documents to the applicable Contractors.
- 2.7.11 Project Costs. The Construction Manager shall maintain Project cost accounting records on Work performed by Contractors under unit costs, actual costs for labor and materials, or other appropriate basis and afford the City and the YMCA and the Architect/Engineer access to these records at all times.
- 2.7.12 Contractor Payments. Based upon the Construction Manager's review of the applicable Work and evaluations of the applicable Contractor's Applications for Payment, the Construction Manager shall review and recommend for approval, modification or rejection the amounts shown on such Applications as being due to the applicable Contractor in accordance with the Contract Documents. Each Application for Payment shall be signed by the Construction Manager and delivered to the Architect/Engineer or the City, as applicable. The Construction Manager's recommendation for payment shall constitute a representation to the City and the YMCA based on the Construction Manager's evaluations of the Work, and on the data comprising the Contractors' Applications for Payment, that

to the best of the Construction Manager's knowledge, information and belief to the standard of care, that, (1) the Work has progressed to the point indicated and the quality of the Work is in accordance with the Contract Documents; (2) the Contractor and its sub-contractors are not in violation of any prevailing wage requirements for the Project; (3) all sub-contractors, suppliers and others providing labor or material to the Project have submitted signed lien waivers through the date of the pay application (4) that there are no liens or attested account claims filed or of record as of the date payment will be released; and (5) that the Work and all contractors are in reasonable compliance with all applicable federal statutes and regulations, state laws, charter provisions, ordinances, building codes and policies of the City. The foregoing representations are subject to an evaluation of the Work following results of any subsequent tests or inspections, and to correction of any minor deviations from the Contract Documents before completion and to specific qualifications expressed by the Construction Manager, in writing, at the time of the recommendation. If the Construction Manager is aware or becomes aware that any contractor has failed to pay its laborers, subcontractors or suppliers and/or may be in violation of the Ohio Prompt Payment Act, or that any contractor, subcontractor, laborer or material supplier has filed an attested account claim or lien, the Construction Manager shall provide the City and the YMCA with prompt written notice, and shall not certify any applications for payment until such concerns have been addressed to the satisfaction of the City and the YMCA.

- 2.7.13 Partial Occupancy. The Construction Manager shall assist the City and the YMCA in determining dates of Partial Occupancy of the Work or portions thereof designated by the City and the YMCA and shall assist in obtaining any necessary temporary occupancy certificate or other certificate from any applicable government authority. The Construction Manager shall review any lists prepared by the Architect/Engineer of incomplete or unsatisfactory Work and prepare schedules for the completion or correction of such Work.
- 2.7.14 Contract Closeout. Upon receipt of a Contractor's Punch List, the Construction Manager and the Architect/Engineer shall provide written notice to the City and the YMCA and the Contractor of rejection of the Contractor's request for Final Inspection or that the Work is ready for Final Inspection in accordance with the Standard Conditions, conduct the Final Inspection with the assistance of the Architect/Engineer, review an Architect/Engineer's Punch List, if applicable, and prepare and process a certificate of Contract Completion in accordance with the Standard Conditions. Upon Contract Completion, the Construction Manager shall receive, review for conformity with the requirements of the Contract Documents and transmit to the City and the YMCA any affidavits and turn over to the City and the YMCA any keys, manuals and the originals of any guarantees, warranties, releases, bonds and waivers. The Construction Manager shall assist the City and the YMCA with the check out of utilities and of operations systems and equipment for readiness and shall assist the City and the YMCA in the initial start-up and testing of such equipment and systems including coordinating the training of personnel in the operation and maintenance of systems.

- 2.7.15 Contractor Claims. The Construction Manager shall review claims from Contractors for additional compensation and equitable adjustment and shall deliver a written recommendation to the City and the YMCA about each claim and attend dispute resolution meetings related to each claim.
- 2.7.16 Record Drawings. The Construction Manager shall review the As-Built Drawings provided by the Contractors and verify that the As-Built Drawings, to the best of the Construction Manager's knowledge based upon the Construction Manager's observations during the progress of the Project, detail the actual construction of the Project. The Construction Manager shall transmit the verified As-Built Drawings to the Architect/Engineer for the preparation of Record Drawings.
- 2.7.17 Contractor Responsibilities. The Construction Manager shall not be responsible for and shall not have control or charge of construction means, methods, manners, techniques, sequences, procedures or scheduling used by a Contractor to comply with the Contractor's obligations under its Contract for the Project. The Construction Manager shall not be responsible for or have control or charge over the acts or omissions of Contractors or Subcontractors or any of their agents or employees, or any other Persons performing any Work on the Project.
- 2.7.18 Delays. If the Construction Manager anticipates that the Project Schedule will not be met, the Construction Manager will immediately notify the City and the YMCA, in writing. Construction Manager will then assist the City and the YMCA to determine the cause of the delay, including whether there are concurrent causes, and then documenting them. Construction Manager will then be responsible for preparing a suitable recovery schedule as soon as possible, and then implementing the recovery schedule to minimize Project delays or disruptions. When appropriate, Construction Manager will assist the City and the YMCA in making any claim against the responsible Contractor, subcontractor, Architect/Engineer, or other person to recover for all compensable, non-excusable delays.
- 2.7.19 GMP. If the Construction Manager anticipates that the GMP will not be met due to something other than increases agreed upon by the City and the YMCA, the Construction Manager will immediately notify the City and the YMCA in writing. The Construction Manager will then assist the City and the YMCA in investigating the Project circumstances to mitigate or avoid increases in the GMP and assign responsibility for causation. If causation is determined to be the responsibility of a Contractor, sub-contractor, the Architect/Engineer, or person other than the City or the YMCA, then Construction Manager will assist the City and the YMCA in documenting that cause or causes so that the City and the YMCA can pursue recovery of any damages.
- 2.7.20 The Construction Manager specifically acknowledges the YMCA's duties under Article IV and V of the Construction Agency Agreement regarding the Project, and agrees to assist the YMCA in the fulfillment of these duties to the City. The Construction Manager will perform all duties and functions for the YMCA set

forth in Article IV and V of the Construction Agency Agreement that the YMCA must perform to the City. The Construction Manager will provide all warranties and performance guarantees to the YMCA that the YMCA must provide to the City under Article IV and V of the Construction Agency Agreement. To the extent of any conflict between the Construction Manager's performance obligations under this Agreement and the Construction Agency Agreement, this Agreement will control, provided that the Construction Manager has given the YMCA prior written notice of the conflict. It shall not be considered a conflict if this Agreement and the Construction Agency Agreement address the same topic, as long as the Construction Manager can comply with the requirements of both Agreements.

2.7.21

### **ARTICLE III            ADDITIONAL SERVICES**

#### **3.1    General.**

- 3.1.1 The following services are not included in Basic Services and shall be provided only if requested by the City and the YMCA in writing. The following services shall be paid for as provided in this Agreement in addition to the compensation for Basic Services; provided, however, the Construction Manager shall not be compensated for any of the following services made necessary by the act or omission of the Construction Manager or any Consultant. Unless waived by the City and the YMCA in writing, authorization to provide Additional Services must be obtained prior to providing the Additional Services. Any Additional Services of the Construction Manager shall be coordinated with and provided in cooperation with the Architect/Engineer.
- 3.1.2 Specialized Services. Providing any service not included in this Agreement or not ordinarily furnished in accordance with customary practice.
- 3.1.3 Replacement Work. Providing consultation concerning replacement of any Work on the Project damaged by fire, casualty or other cause not due to negligence of the Construction Manager or any Consultant and furnishing services as may be required in connection with the replacement of such Work.
- 3.1.4 Special Studies. Providing planning site evaluations, wetlands or other environmental studies or comparative studies of alternative sites and preparing special surveys, studies and submissions required for approval of governmental authorities or others having jurisdiction over the Project.
- 3.1.5 Surveys. Providing Survey services including land surveys and right of way studies.
- 3.1.6 Contractor Default. Providing services made necessary by the default of a Contractor.

## **ARTICLE IV                      RESPONSIBILITIES OF THE CITY**

- 4.1     Required Actions. The City and the YMCA shall review, approve or take such actions as are required of the City by this Agreement, the Contract Documents and applicable law in a reasonable and timely manner.
- 4.2     Instructions to Contractors. All instructions of the City and the YMCA to Contractors shall be through, or in consultation with, the Construction Manager, with notice to the Architect/Engineer.
- 4.3     City's Requirements. The City and the YMCA shall provide full information regarding its requirements for the Project any agreements related to the Project, design and construction standards and work rules which shall set forth the City and the YMCA's use, design, time and financial objectives, constraints and criteria, including space requirements and relationships, flexibility and expandability, time constraints imposed by fiscal and budgetary considerations, special equipment and systems and site requirements.
- 4.4     Authorized Representative. The City and the YMCA shall designate an Authorized Representative, i.e. a Person authorized to act on the City's behalf with respect to the Project to the extent provided in the Contract Documents.
- 4.5     Site Description. If reasonably requested by the Construction Manager as necessary for the Project, the City and the YMCA shall furnish an existing legal description of the site.
- 4.6     Notice to Construction Manager. If the City and the YMCA observes or otherwise becomes aware of any Defective Work or other fault or defect in the Project, prompt notice thereof shall be given to the Construction Manager.
- 4.7     Legal Representation. The City and the YMCA shall not be responsible to provide, or pay for, any legal representation of the Construction Manager.
- 4.8     Architect/Engineer. The City and the YMCA shall retain an Architect/Engineer to design the Project, prepare Drawings and Specifications for the Project and observe the construction of the Project. The Architect/Engineer's services, duties and responsibilities are described in the Contract Documents and the agreement between the City and the YMCA and the Architect/Engineer for the Project. Upon request, the City and the YMCA shall provide a copy of the executed Architect/Engineer's agreement for the Project to the Construction Manager.
- 4.9     Construction Agent. The City has contracted with the YMCA to serve as the City's Construction Agent for the Project. The City may communicate to the Construction Manager or perform the City's responsibilities under this Agreement by or through the YMCA; provided, however, the YMCA shall not have any authority to make or provide any agreements, approvals, consents, waivers or similar decisions to be made by the City under this Agreement.

## ARTICLE V COMPENSATION

5.1.1. Compensation to the Construction Manager will be on a lump sum basis. Construction Manager understands and agrees that the City is exclusively responsible for payment of the Construction Manager's compensation under this Agreement, and that the YMCA is not a guarantor or payor of Construction Manager's compensation.

### 5.2 Reimbursable Expenses.

5.2.1. Definition and Aggregate Limit. Reimbursable Expenses means actual expenditures incurred by the Construction Manager or its Consultants in the interest of the Project approved by the City for: (1) transportation and living when traveling in connection with the Project, if approved in advance by the City and the YMCA; (2) record storage, if approved in advance by the City and the YMCA; (3) the Project field office and the equipping and furnishing thereof, including without limitation utilities if not provided by the Contractors; and (4) postage, telephone, overnight courier service, photographs, copying expenses and expenses incurred in the event of an emergency. Reimbursable Expenses shall not include expenditures or expenses for commuting to or from the Project or for purchasing or renting of residences for personnel of the Construction Manager or any Consultants or for moving such personnel to residences. The Construction Manager shall use all reasonable means to minimize Reimbursable Expenses. In no event shall Reimbursable Expenses exceed \_\_\_\_\_ Dollars (\$\_\_\_\_\_) in the aggregate, and no other expenditures shall be Reimbursable Expenses unless so provided in an amendment in accordance with Subparagraph 9.5.2. Reimbursable Expenses shall be billed at the Construction Manager's Cost, without markup.

5.2.2. Limits on Transportation and Living Expenses. The cost for transportation and living expenses in connection with the Project shall be in accordance with the City and the YMCA's policies, as amended from time to time.

5.2.3. Limits on Tangible Property. The determination of whether to purchase or rent tangible property as Reimbursable Expenses must be approved in advance by the City and the YMCA. The Construction Manager shall maintain a current inventory of all such property and any such property which has been purchased and has a useful life after Project Closeout shall be delivered to the City and the YMCA.

### 5.3 Basis of Compensation.

5.3.1. Basic Fee. For Basic Services provided by the Construction Manager and all Consultants, the City shall pay the Construction Manager a Basic Fee in accordance with Paragraph 5.4 hereof in the amount of ONE HUNDRED EIGHTEEN THOUSAND DOLLARS (\$118,000). A change in the Basic Fee may be made only by an amendment in accordance with Subparagraph 9.5.2.

5.3.2. Additional Fees. For Additional Services provided by the Construction Manager and any Consultants in accordance with Article III, the City shall pay the Construction

Manager Additional Fees in an amount negotiated to the mutual reasonable satisfaction of the City and the YMCA and the Construction Manager. Except for Additional Services and Additional Fees listed above, Additional Services and any Additional Fees may be approved only by an amendment in accordance with Subparagraph 9.5.2.

- 5.3.3. Extent of Basic Fee. The Construction Manager's Basic Fee includes all compensation for Basic Services, including without limitation, compensation for all personnel of the Construction Manager and any Consultants other than those listed in Paragraph 5.1, operating expenses of the Construction Manager's principal office and branch offices, any part of the Construction Manager's capital expenses, including interest on the Construction Manager's capital employed for the Project, overhead or expenses of any kind, except Reimbursable Expenses, any costs incurred due to the negligence of the Construction Manager, the Construction Manager's general advertising, federal, state or local income, sales or other taxes, state franchise taxes and qualification fees, and membership in trade, business or professional organizations.
- 5.3.4. Total Compensation. The total compensation of the Construction Manager and all Consultants shall consist of the Basic Fee, any Additional Fees and Reimbursable Expenses.

5.4 Method and Terms of Payment.

Basic Fee. Except as otherwise provided in Subparagraph 5.3.1, payment of the Basic Fee shall be paid as follows: Preconstruction Phase: \$8,000, payable at the commencement of construction; and Construction Phase: \$110,000, payable \_\_\_\_\_.

The Basic Fee shall be subject to all setoffs in favor of the City and the YMCA for claims against the Construction Manager. Payments for Basic Services shall be based upon a properly completed and supported invoices of the Construction Manager.

- 5.4.1. Additional Fees, Reimbursable Expense. Payments of Additional Fees for Additional Services in accordance with Article III and Subparagraph 5.3.2, and for Reimbursable Expenses as set forth in Paragraph 5.2 shall be made monthly based upon services performed or expenses incurred, as applicable, and as shown by a properly completed and supported invoice of the Construction Manager.
- 5.4.2. Payments by Construction Manager. Within ten (10) business days of receipt of payment made pursuant to this Agreement, the Construction Manager shall pay all portions thereof due to Consultants and to Persons who provided items the expenses of which are Reimbursable Expenses.
- 5.4.3. Compensation for Extension of Project Time. If the Construction Manager notifies the City and the YMCA not less than thirty (30) days prior to the time for completion of the Project set by the original Project Schedule approved pursuant to Subparagraph 2.4.2, that such time for completion is reasonably expected to be exceeded by more than thirty (30) days to the extent it is not the fault of the Construction Manager, the compensation,

if any, for Basic Services to be rendered and Reimbursable Expenses to be incurred during such extended period shall be negotiated to the mutual reasonable satisfaction of the City and the YMCA and the Construction Manager. If, as a result of such negotiation, the City and the YMCA agree that the Construction Manager shall be paid additional compensation, an amendment to that effect shall be executed in accordance with Subparagraph 9.5.2 before the Construction Manager renders any services made necessary by such extension of the time of completion, unless otherwise agreed in writing by the City and the YMCA.

- 5.4.4. Construction Budget. The Scope of the Project is defined by the Approved Program of Requirements as provided in Subparagraph 2.2.2. The Construction Budget is defined in Subparagraph 1.1.2. Except as provided in Subparagraph 2.6.8, if the City and the YMCA materially changes the Scope of the Project or the Construction Budget to the extent it is not the fault of the Construction Manager, any adjustment in the compensation of the Construction Manager shall be negotiated to the mutual reasonable satisfaction of the City and the YMCA and the Construction Manager. If, as the result of such negotiation, the City and the YMCA agree that the Construction Manager shall be paid additional compensation, an amendment to that effect shall be executed in accordance with Subparagraph 9.5.2 before the Construction Manager renders any services made necessary by such change in the Scope of the Project or the Construction Budget, unless otherwise agreed in writing by the City and the YMCA. If, as the result of such negotiation, the Construction Manager agrees to a reduction in compensation, an amendment to that effect shall be executed in accordance with Subparagraph 9.5.2 as soon as practicable.

## **ARTICLE VI INSURANCE, INDEMNIFICATION AND FINANCIAL RESPONSIBILITY**

### **6.1 Insurance**

6.1.1 Casualty Insurance. Except when a modification is requested in writing by the Construction Manager and approved in writing by the City and the YMCA, the Construction Manager shall carry and maintain at the Construction Manager's cost, with companies authorized to do business in Ohio, all necessary liability insurance (which shall include as a minimum the requirements set forth below) during the term of this Agreement:

- a. Workers' Compensation coverage and employer's liability insurance as required by law; and
- b. Commercial general liability coverage for bodily injury and property damage, including limited contractual liability coverage, naming the City and the YMCA as an additional insured, in not less than \$10,000,000 aggregate; and
- c. Automobile liability protection with limits not less than \$10,000,000

d. Construction Management Professional Liability Insurance with coverage for negligence, errors and omissions regarding the professional services provided under this Agreement with limits not less than \$1 million per occurrence.

6.1.2 Certificates. The Construction Manager shall provide the City and the YMCA with certificates of insurance evidencing the required coverages and amounts, including without limitation any certificates of renewal of insurance. The certificates of insurance shall contain a provision that the policy or policies will not be canceled without thirty (30) days prior written notice to the City and the YMCA

## 6.2 Indemnification

6.2.1 Indemnification by Construction Manager Generally. To the fullest extent permitted by law, the Construction Manager shall and does agree to defend, indemnify and hold the City, the YMCA and their respective members, officers, officials, employees and representatives harmless from and against all claims, damages, losses, liens, causes of action, suits, judgments and expenses (including reasonable attorney's fees and other costs of defense), of any nature, kind or description, which (a) arise out of, are caused by or result from performance of the Construction Manager's services hereunder, (b) are attributable to bodily injury, personal injury, sickness, disease or death of any person, or to damage to or destruction of property, including the loss of use and consequential damages resulting therefrom, but (c) only if they are caused by any negligent acts, errors or omissions of the Construction Manager, anyone directly or indirectly employed by the Construction Manager or anyone for whose acts the Construction Manager may be legally liable. This Subparagraph is intended to be, and shall be construed as consistent with, and not in conflict with, Section 2305.31 of the Ohio Revised Code, to the fullest extent permitted.

6.2.2 Intellectual Property Indemnification. To the fullest extent permitted by law, the Construction Manager shall and does agree to indemnify and hold the City, the YMCA and their respective members, officers, officials, employees and representatives harmless from and against all claims, damages, losses, liens, causes of action, suits, judgments and expenses (including reasonable attorney's fees and other costs of defense), of any nature, kind or description, which result from any claimed infringement of any copyright, patent or other intangible property right caused by the Construction Manager, anyone directly or indirectly employed by the Construction Manager or anyone for whose acts the Construction Manager may be legally liable. The Construction Manager shall not be required to indemnify and hold harmless such Persons for such matters when the claimed infringement occurs in materials provided by the City and the YMCA or the Contractors.

- 6.2.3 To the fullest extent permitted by law, the Construction Manager shall and does agree to defend, indemnify and hold the YMCA and its respective members, officers, officials, employees and representatives harmless from and against all claims, damages, losses, liens, causes of action, suits, judgments and expenses (including reasonable attorney's fees and other costs of defense), of any nature, kind or description to the extent of any liability the YMCA has to the City pursuant to the Operating Agreement or Construction Agency Agreement, which arises out of, is caused by or results from performance of the Construction Manager's services hereunder. The Construction Manager shall assume the defense of the YMCA for any claims asserted against the YMCA to which this paragraph applies, even if such claims are frivolous, and the Construction Manager shall be entitled to any defense that the YMCA would be entitled to claim against the City.
- 6.2.4 The YMCA shall have the benefit of all rights, remedies and redress against the Construction Manager that the City, under the Contract Documents, has against the YMCA for Work covered by this Agreement. If the YMCA asserts or defends a claim against the City that relates to the Work of the Construction Manager, the Construction Manager shall promptly make available to the YMCA all information relating to the portion of the claim that relates to the Construction Manager, and the Construction Manager shall not be entitled to any compensation or reimbursement for time or expenses incurred in responding to claims made by the City against the YMCA for services the Construction Manager has provided or failed to provide. If the YMCA obtains a recovery or agreement from the City for compensation, damages, time extensions, or similar remedies (including agreed change orders) that relate to any claim the Construction Manager has, may have, or has asserted against the YMCA, the Construction Manager agrees to be bound by that recovery or agreement, and shall take nothing further from the YMCA in any claim or dispute resolution.

## **ARTICLE VII DISPUTE RESOLUTION PROVISIONS**

- 7.1 Mediation. Instead of, or in addition to, the procedures set forth below, the City and the YMCA and the Construction Manager may, by written agreement, submit any claims, requests, disputes or matters in question between them to mediation upon such terms as shall be mutually reasonably agreeable.
- 7.2 Notice and Filing of Requests. Any request by the Construction Manager for additional fees or expenses shall be made in writing to the City and the YMCA and filed prior to payment of the final 10% of the Basic Fee. Failure of the Construction Manager to timely make such a request shall constitute a waiver by the Construction Manager of any request for such fees and expenses.

- 7.3 Request Information. In every written request filed pursuant to Paragraph 7.2, the Construction Manager shall provide the nature and amount of the request; identification of Persons, entities and events responsible for the request; activities on the Project Schedule affected by the request or new activities created by any delay and the relationship with existing activities; anticipated duration of any delay; and recommended action to avoid or minimize any future delay.
- 7.4 Meeting with Authorized Representative. If the Construction Manager files a written request with the City and the YMCA pursuant to Paragraph 7.2, the Authorized Representative shall, within thirty (30) days of receipt of the request, schedule a meeting in an effort to resolve the request and render a decision on the request promptly thereafter or render a decision on the request without a meeting, unless a mutual agreement is made to extend such time limit. The meeting scheduled by the Authorized Representative shall be attended by Persons expressly and fully authorized to resolve the request on behalf of the Construction Manager. The decision of the Authorized Representative shall be final and conclusive, subject to appeal under Section 7.5.
- 7.4 Appeal to Council. If the efforts of the Authorized Representative do not lead to resolution of the request, the Construction Manager may appeal to the City Council by notice in writing to the Authorized Representative. The Construction Manager shall be permitted to appear at the next meeting of Council at which the Construction Manager's appeal can be reasonably scheduled. The decision of the Council shall be the final and conclusive determination of the City, subject to litigation in a court of competent jurisdiction.
- 7.5 Delegation. No provision of this Article shall prevent the Authorized Representative from delegating the duties or authorities of the Authorized Representative to any other Person selected at the discretion of the Authorized Representative.
- 7.6 Performance. The Construction Manager shall proceed with the Construction Manager's performance of this Agreement during any dispute resolution process, unless otherwise agreed by the Construction Manager and the City and the YMCA in writing. The City shall continue to make payment, in accordance with this Agreement, of any amounts not in dispute pending final resolution of any dispute in accordance with this Article.

## **ARTICLE VIII      TERMINATION AND REMEDIES**

### **8.1      Termination of Agreement.**

- 8.1.1 Means of Termination. This Agreement may be terminated by either party should the other party commit a material breach of this Agreement and fail to cure within seven (7) days of receiving written notice of the material breach and intent to terminate; provided, however, the Construction Manager shall not terminate this Agreement for non-payment if the City initiates the payment process by preparing, executing and submitting a voucher for all reasonably undisputed amounts due to the Construction Manager within ten (10) days of receipt of the Construction Manager's written notice to terminate. This Agreement may be

terminated for convenience in whole or in part by the City and the YMCA upon fifteen (15) days written notice to the Construction Manager. This Agreement may be terminated, in whole or in part, at any time upon the mutual consent of the City and the YMCA and the Construction Manager.

- 8.1.2 Construction Manager's Remedies Upon Termination by City For Convenience or Termination by Construction Manager. In the event of a termination for convenience or a termination by the Construction Manager for cause, the Construction Manager shall be compensated for all Basic Services and applicable Additional Services performed up to the termination date pro rated based on the percentage of the Basic Services or Additional Services completed, together with Reimbursable Expenses incurred prior to the termination date. Construction Manager shall not be entitled to any other compensation, and shall not be entitled to payment of any profit or overhead on unperformed services.
- 8.1.3 Construction Manager's Remedies Upon Termination by City and the YMCA for Cause. In the event of a termination which is due to the Construction Manager's material breach of this Agreement, the Construction Manager shall be compensated for all Basic Services and applicable Additional Services performed up to the termination date pro rated based on the percentage of the Basic Services or Additional Services completed, together with Reimbursable Expenses incurred prior to the termination date, minus the cost to the City and the YMCA to cure or correct deficiencies in the Construction Manager's performance, which costs will include both direct expenses, as well as attorney's fees, consultant's fees, and other professional services fees incurred to cure the Construction Manager's breach. If the cost to complete the Construction Manager's performance under this Agreement, including performance of any Additional Services added to the Construction Manager's scope prior to termination exceeds the value remaining on the Construction Manager's contract prior to termination, then the Construction Manager shall also be liable to the City and the YMCA for the difference in cost to complete the Construction Manager's performance, and the City and the YMCA shall be entitled to withhold or deduct amounts due the City and the YMCA pending resolution of any disputes under this paragraph.
- 8.1.4 Construction Manager's Remedies Upon Termination by Mutual Consent. In the event of a termination upon the mutual consent of the City and the YMCA and the Construction Manager, any compensation for Basic Services or for Additional Services and Reimbursable Expenses shall be negotiated and set forth in an amendment to this Agreement in accordance with Subparagraph 9.5.2 prior to such termination.
- 8.1.5 Post-Termination Matters. If the City and the YMCA and the Construction Manager agree that any services are to be performed for the Project by the Construction Manager after any termination date, the amount of any compensation and the method and terms of payment of such compensation and Reimbursable Expenses related to such services shall be negotiated and set forth in an amendment to this Agreement in accordance with Subparagraph 9.5.2 prior

to the commencement of such services. Such amendment and any relevant portions of this Agreement shall survive termination of this Agreement.

- 8.1.6 If the Construction Agency Agreement terminates due to a “Termination Event” as set forth in Article VI of that Agreement and such Termination Event was not caused by an act, omission or material breach by the Construction Manager, then this Agreement shall also terminate on the same terms as the Construction Agency Agreement. In lieu of any other remedy provided by law or this Agreement, Construction Manager shall be entitled only to recover those amounts against the YMCA that the YMCA has recovered from the City, and agrees to accept only such compensation (if any), that the YMCA has actually received from the City that would apply to the Construction Manager’s services. If the YMCA has liability to the City under Article VII due to an Event of Default that was the result of an act, omission or material breach by the Construction Manager, then Construction Manager shall defend, indemnify and hold the YMCA and its employees, members, officers, directors, representatives and agents harmless from any such liability, including the YMCA’s reasonable attorney’s fees and expenses.
- 8.1.7 If the City chooses to remedy any Event of Default and back charge the YMCA for those expenses, and the Event of Default is due to an act, omission or material breach by the Construction Manager, then the Construction Manager agrees to defend, indemnify and hold the YMCA and its employees, members, officers, directors, representatives and agents harmless from any such liability, including the YMCA’s reasonable attorney’s fees and expenses.

## 8.2 Remedies.

- 8.2.1 Cumulative Remedies. No remedy conferred upon the City and the YMCA by the terms of this Agreement is intended to be exclusive of any other remedy provided at law or in equity. Each and every remedy of the City and the YMCA shall be cumulative and shall be in addition to any other remedy given to the City and the YMCA hereunder or now or hereafter existing. Except as otherwise provided in this Agreement, no remedy conferred upon the Construction Manager by the terms of this Agreement is intended to be exclusive of any other remedy provided at law or in equity. Except as otherwise provided in this Agreement, each and every remedy of the City and the YMCA shall be cumulative and shall be in addition to any other remedy given to the hereunder or now or hereafter existing.
- 8.2.2 Remedies Not Waived. No delay, omission or forbearance to exercise any right, power or remedy accruing to the City and the YMCA or the Construction Manager hereunder shall impair any such right, power or remedy or shall be

construed to be a waiver of any breach hereof or default hereunder. Every such right, power or remedy may be exercised from time to time and as often as deemed expedient.

## **ARTICLE IX MISCELLANEOUS PROVISIONS**

### **9.1 Ownership and Use of Documents.**

9.1.1 Property of City and the YMCA. Drawings, Specifications and other documents prepared by, or with the cooperation of, the Construction Manager or any Consultant pursuant to this Agreement, including all copyrights, are the property of the City and the YMCA whether or not the Project for which they are prepared is commenced or completed. The Construction Manager or Consultant, as applicable, may retain copies, including reproducible copies of such Drawings, Specifications and other documents for information and reference. Rights to such drawings, specifications and other documents as between City and the YMCA shall be governed by the Construction Agency Agreement.

9.1.2 Construction Manager's Intellectual Property. All inventions, patents, design patents and computer programs acquired or developed by the Construction Manager in connection with or relation to the Project shall remain the property of the Construction Manager and shall be protected by the City from use by others except by agreement in writing with appropriate and agreed upon compensation to the Construction Manager.

9.2 Public Relations. Prior to completion of the Project, any public relations or publicity about the Project shall be solely within the control and with the consent of the City and the YMCA. The Construction Manager shall not use the City and the YMCA's name or seal, nor any adaptation thereof, for any advertising purposes, including without limitation press releases, without the express written consent of the City and the YMCA.

9.3 Records. The records of all of the Construction Manager's Direct Personnel Costs, Reimbursable Expenses and payments to Consultants pertaining to the Project shall be kept on a generally recognized accounting basis and shall be available to the City and the YMCA at all times and shall be maintained for seven (7) years after the date of Final Acceptance of the Project by the City and the YMCA. All other records kept by the Construction Manager related to the Project shall be available to the City and the YMCA at all times and shall be maintained for six (6) years after Final Acceptance of the Project by the City and the YMCA.

9.4 Successors and Assigns. The City and the YMCA and the Construction Manager, each bind themselves, their successors, assigns and legal representatives, to the other party to this Agreement and to the successors, assigns and legal representatives of the other party with respect to all terms of this Agreement. The Construction Manager shall not assign, or transfer any right, title or interest in this Agreement without the prior written consent of the City and the YMCA.

9.5 Extent of Agreement.

- 9.5.1 Entire Agreement. This Agreement and the Contract Documents represent the entire and integrated agreement between the City and the YMCA and the Construction Manager and supersede all prior negotiations, representations or agreements, either written or oral.
- 9.5.2 Amendments. This Agreement may be amended only by an amendment prepared by the City and the YMCA and signed by both the City and the YMCA and the Construction Manager.
- 9.5.3 Multiple Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be regarded as an original and all of which shall constitute but one and the same instrument.
- 9.5.4 Captions. The captions or headings in this Agreement are for convenience only and in no way define, limit or describe the scope or intent of any provisions or sections hereof.
- 9.5.5 Precedence. If there are any inconsistencies between the provisions of the Contract Documents and the provisions of the Notice or this Agreement, the provisions of the Contract Documents shall prevail.
- 9.5.6 Conditions to Validity. None of the rights, duties and obligations contained in this Agreement shall be binding on any party until all legal requirements have been met.

9.6 Governing Law

- 9.6.1 Law of Ohio. This Agreement shall be governed by the law of the State of Ohio to the exclusion of the law of any other jurisdiction and the Cuyahoga County, Ohio Court of Common Pleas, or if required by law the United States District Court for the Northern District of Ohio, shall have jurisdiction over any action hereunder or related to the Project to the exclusion of any other forum.
- 9.6.2 Capitalized Terms. Capitalized terms in this Agreement shall have the same meaning as those in the Standard Conditions, unless otherwise defined herein, or unless another meaning is indicated by the context.

9.7 Notices

- 9.7.1 Addresses. All notices, certificates, requests or other communications hereunder shall be in writing and shall be deemed to be given if delivered in person to the individual or to a member of the Person for whom the notice is intended, or if delivered at or mailed by registered or certified mail, postage prepaid, to the appropriate following address:

If to the City:

If to the Construction Manager:

If to the YMCA:

If to the Architect/Engineer:

- 9.7.2 Additional Notices. A copy of all notices, certificates, requests or other communications to the City shall be sent to the Authorized Representative.
- 9.7.3 Electronic Transmission. For convenience of communication only, notices, certificates, requests or other communications hereunder of fewer than ten (10) pages, except requests for payment, may be sent by facsimile transmission to the City at (\_\_\_\_) \_\_\_\_-\_\_\_\_ or by electronic mail at \_\_\_\_\_, to the YMCA at \_\_\_\_\_, or \_\_\_\_\_, to the Architect/Engineer at \_\_\_\_\_ or \_\_\_\_\_ and to the Construction Manager at \_\_\_\_\_ or \_\_\_\_\_. Notices, certificates, requests or other communications sent by facsimile transmission or electronic mail shall not be deemed to be given unless confirmed, actually received or a counterpart is received or mailed. Requests for payment may be sent to the City by facsimile transmission or electronic mail only with the specific consent of the City.
- 9.7.4 Emergencies. In the event of an emergency involving the Project, including, without limitation, a fatality, serious injury, fire, collapse, flood, utility or power loss to occupied facilities, explosion, or environmental damage, the Construction Manager shall immediately notify the City and the YMCA by telephone.
- 9.7.5 Change of Address. The City, the YMCA, the Architect/Engineer or the Construction Manager may, by notice given hereunder, designate any further or different addresses, telephone numbers or facsimile numbers or electronic mail addresses to which subsequent notices, certificates, requests or communications shall be sent.

9.8 Severability. If any provision of this Agreement, or any covenant, obligation or agreement contained herein is determined by a court of competent jurisdiction to be invalid or unenforceable, such determination shall not affect any other provision, covenant, obligation or agreement, each of which shall be construed and enforced as if such invalid or unenforceable provision were not contained herein. Such invalidity or unenforceability shall not affect any valid and enforceable application thereof, and each such provision, covenant, obligation or agreement, shall be deemed to be effective, operative, made, entered into or taken in the manner and to the full extent permitted by law.

IN WITNESS WHEREOF, the City and the Construction Manager have executed this Agreement as of the date and year first above written.

Panzica Construction Company  
(*“Construction Manager”*)

By: \_\_\_\_\_

Title: \_\_\_\_\_

City of North Royalton  
(*“City”*)

By: \_\_\_\_\_

Title: \_\_\_\_\_

and

By: \_\_\_\_\_

Title: \_\_\_\_\_

YMCA as *“Construction Agent”*

By: \_\_\_\_\_

Title: \_\_\_\_\_

The legal form and correctness of the within instrument is hereby approved.

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Thomas A. Kelly  
Law Director

**CERTIFICATE**

The undersigned, Fiscal Officer of the City of North Royalton, certifies that the moneys required to meet the obligations of the City during the year 2010 under the foregoing Construction Agency Agreement have been lawfully appropriated by the City Council of the City for such purposes and are in the treasury of the City or in the process of collection to the credit of an appropriate fund, free from any previous encumbrances. This Certificate is given in compliance with Sections 5705.41 and 5705.44, Ohio Revised Code.

Dated: \_\_\_\_\_, 2010

\_\_\_\_\_  
Fiscal Officer,

City of North Royalton