

RESOLUTION R-64-04

A RESOLUTION APPROVING A DESIGN/BUILD AGREEMENT AND
ADDENDUM FOR THE GENERATOR AND CONTROLS BUILDING
REPLACEMENT AT THE BLACKSMITH LIFT STATION

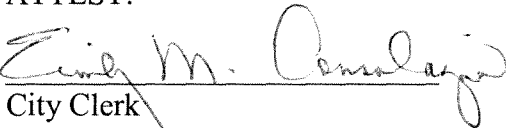
WHEREAS, the Corporate Authorities of the City of Wheaton find it necessary and in the best interest of the public health, safety and welfare to replace the Generator and Controls at the Blacksmith Lift Station; and

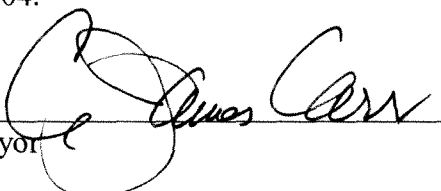
WHEREAS, the Corporate Authorities of the City of Wheaton find the most efficient way to complete said replacement is through a Design/Build Service Agreement.

NOW, THEREFORE, BE IT RESOLVED by the Mayor and City Council of the City of Wheaton, DuPage County, Illinois, that the Mayor is hereby authorized to sign, and the City Clerk is hereby directed to attest to that certain "Design/Build Service Agreement for the Generator and Controls Building Replacement at the Blacksmith Lift Station and Addendum" which are attached hereto and incorporated herein as fully set forth as Group Exhibit A.

ADOPTED this 7th day of September, 2004.

ATTEST:


Cindy M. Conzelmann
City Clerk


Mayor Carr

Ayes:

Roll Call Vote:

- Councilman Johnson
- Councilwoman Corry
- Mayor Carr
- Councilman Mork
- Councilman Mouhelis
- Councilman Bolds

Nays:

None

Absent:

Councilwoman Johnson

Motion Carried Unanimously



BURKE, LLC – Design / Build

**STANDARD FORM OF AT-RISK CONSTRUCTION MANAGEMENT
CONTRACT FOR DESIGNER-LED DESIGN-BUILD PROJECT**

OWNER:

City of Wheaton
Public Works Department
303 West Wesley Street
Wheaton, Illinois 60189

CONSTRUCTION MANAGER:

Burke, LLC
9575 West Higgins Road, Suite 600
Rosemont, Illinois 60018

PROJECT:

**Generator and Controls Building at Blacksmith
Drive Lift Station**

The Project consists of the replacement of an existing fiberglass enclosure which houses a diesel generator and pump controls. A new precast concrete controls building will be furnished and installed complete with 35 kw natural gas generator, duplex pump controls and electrical, lighting, heat and ventilation.

CONTRACT DATE:

August 1, 2004

GUARANTEED MAXIMUM
PRICE:

\$114,460.00

SUBSTANTIAL COMPLETION
DATE:

November 19, 2004



ARTICLE 1 - RELATIONSHIP OF THE PARTIES

- 1.1 Relationship. The Relationship between the Owner and the Construction Manager with regard to the Project shall be one of good faith and fair dealing. The Construction Manager agrees to provide construction, management and administration services as set forth in greater detail below.
- 1.2 Engineer. The Engineer for the Project is Christopher B. Burke Engineering, Ltd., a separate company and legal entity closely affiliated with the Construction Manager.

ARTICLE 2 - DEFINITIONS

- 2.1 Contract Documents. The Contract Documents consist of:
- .1 Change Orders and written amendments to this Contract signed by both the Owner and Construction Manager;
 - .2 This Contract;
 - .3 Surveys, geo-technical information and other information provided by the Owner pursuant to this Contract.
 - .4 The Plans and Specifications, including any Addenda thereto.
 - .5 Schedule of Prices

In case of any inconsistency, conflict or ambiguity among the Contract Documents, the Documents shall govern in the order in which they are listed above.

- 2.2 Day. A "Day" shall mean one calendar day.
- 2.3 Hazardous Material. A Hazardous material is any substance or material identified now or in the future as hazardous under any federal, state or local law or regulation, or any other substance or material which may be considered hazardous or otherwise subject to statutory or regulatory requirements governing handling, disposal and/or cleanup.
- 2.4 Subcontractor. A Subcontractor is a person or entity who has an agreement with the Construction Manager to perform any portion of the Work, and includes vendors or material suppliers but does not include any separate contractor employed by the Owner or any separate contractor's subcontractor.
- 2.5 Substantial Completion. Substantial Completion of the Work occurs on the date when construction is sufficiently complete in accordance with the Contract Documents so that the Owner can begin to occupy or utilize the Project for the use for which it is intended, or at such time that the Project is in a state that allows for the maturing and establishment of the landscape plant materials (such as seeding, sodding, of grading of areas to receive landscape materials).
- 2.6 Subsubcontractor. A Subsubcontractor is a person or entity who has an agreement with a Subcontractor to perform any portion of the Subcontractor's work.



- 2.7 The Work. The Work consists of all of the construction, procurement and administration services to be performed by the Construction Manager and the Subcontractors under this Contract, as well as any other services which are necessary to complete the Project in accordance with and reasonably inferable from the Contract Documents.

ARTICLE 3 - CONSTRUCTION MANAGER'S RESPONSIBILITIES

- 3.1 Commencement. The Construction Manager may commence the Work upon execution of this Contract. The parties contemplate that by mutual agreement, the Construction Manager may commence certain portions of the Work, such as procurement of long lead-time items and site preparation.
- 3.2 General Requirements. The Construction Manager shall perform those portions of the Work that the Construction Manager customarily performs with its own personnel. All other portions of the Work shall be performed by Subcontractors or under other appropriate agreements with the Construction Manager. The Subcontractor selection process shall be as set forth in Article 4. The Construction Manager shall exercise reasonable skill and judgment in the performance of the Work. The Construction Manager shall give all notices and comply with all laws and ordinances legally enacted at the date of execution of this Contract which govern performance of the Work, as well as providing legally effective lien waivers in conformance with the Illinois Mechanics Lien Act.
- 3.3 Schedule. The Construction Manager shall maintain in written form a schedule of the Work. The schedule shall indicate the dates for the start and completion of various stages of the construction and shall be revised as required by the conditions of the Work. The schedule may contain dates when information, decisions and approvals are required from the Owner, and both the Owner and the Construction Manager agree to use their best efforts to comply with the time requirements of the schedule.
- 3.4 Meetings. The Construction Manager shall schedule and conduct meetings at which the appropriate parties can discuss the status of the Work. The Construction Manager shall prepare and promptly distribute meeting minutes.
- 3.5 Reports. The Construction Manager shall provide monthly written reports to the Owner on the progress of the Work. The Construction Manager shall maintain a daily log containing a record of weather, Subcontractors working on the site, number of workers, Work accomplished, problems encountered and other similar relevant data as the Owner may reasonably require. The log shall be available to the Owner upon reasonable advance notice.
- 3.6 Cost Control. The Construction Manager shall develop a system of cost control for the Work, including regular monitoring of actual costs for activities and progress and estimates for uncompleted tasks and proposed changes. The Construction Manager shall identify variances between actual and estimated costs and report the variances to the Owner in the monthly written reports.
- 3.7 Permits. The Construction Manager shall assist the Owner in securing the building permits necessary for construction of the Project.



- 3.8 Safety. The Construction Manager shall take necessary precautions for the safety of its employees on the Project and shall comply with all applicable provisions of federal, state and local safety laws and regulations to prevent accidents or injuries to persons on or adjacent to the Project site. The Construction Manager, directly or through its Subcontractors, shall erect and properly maintain necessary safeguards for the protection of workers and the public. However, the Construction Manager shall not be responsible for the elimination or abatement of safety hazards created or otherwise resulting from any work at the Project site being performed by someone other than the Construction Manager, a Subcontractor or Subsubcontractor. The Engineer shall have no responsibility for safety programs or precautions in connection with the Work and shall not be in charge of or have any control over any construction means, methods, techniques, sequences or procedures.
- 3.8.1 Construction Observation. The Construction Manager shall provide part-time construction observation and testing to assist the Owner in the implementation of the project. These services will be invoiced on an hourly basis as the work is executed but shall not exceed the value indicated in the Schedule of Prices as adjusted by change orders.
- 3.9 Cleanup. The Construction Manager shall keep the site of the Work free from debris and waste materials resulting from the Work. At the completion of the Work, the Construction Manager or its Subcontractors shall remove from the site of the Work all construction equipment, tools, surplus materials, waste materials and debris.
- 3.10 Hazardous Materials. The Construction Manager shall not be obligated to commence or continue Work, until any known or suspected Hazardous Material discovered at the Project site has been removed or rendered or determined to be harmless by the Owner as certified by an independent testing laboratory and approved by the appropriate government agency. The Owner shall be responsible for retaining an independent testing laboratory to determine the nature of the material encountered and whether it is a Hazardous Material. The Construction Manager shall not be required to perform any Work relating to or in the area of known or suspected Hazardous Material without written mutual agreement and shall resume Work in the area affected by any Hazardous Material only upon written agreement between the parties after the Hazardous Material has been removed or rendered harmless. If the Construction Manager incurs additional costs and/or is delayed due to the presence of known or suspected Hazardous Material, the Construction Manager shall be entitled to a Change Order equitably adjusting the Guaranteed Maximum Price and/or the date of Substantial Completion. To the fullest extent permitted by law, the Owner shall indemnify and hold harmless, regardless of fault, negligence or other liability, the Construction Manager, Engineer, all Subcontractors and Subsubcontractors, and the agents, officers, directors and employees of each of them from and against any and all claims, damages, losses, costs and expenses, whether direct, indirect or consequential, including but not limited to attorney's fees, arising out of or relating to the performance of the Work in any area affected by Hazardous Material. The terms of this indemnification shall survive completion or termination of this Contract.
- 3.11 Intellectual Property. The Construction Manager shall pay all royalties and license fees which may be due on the inclusion of any patented or copyrighted materials, methods or systems selected by the Construction Manager and incorporated in the Work. The Construction Manager shall defend, indemnify and hold the Owner



harmless from all suits or claims for infringement of any patent rights or copyrights arising out of such selection. The Owner agrees to defend, indemnify and hold the Construction Manager harmless from any suits or claims of infringement of any patent rights arising out of any patented materials, methods or systems required or specified by the Owner.

- 3.12 Completion. At or promptly after the date of Substantial Completion, the Construction Manager shall secure required certificates of inspection, testing or approval and deliver them to the Owner; collect all written warranties and equipment manuals and deliver them to the Owner; with the assistance of the Owner's maintenance personnel, direct the checkout of utilities and operations of systems and equipment for readiness, and assist in their initial start-up and testing; provide the Owner with a set of record drawings which the Construction Manager shall have maintained throughout the Project; and prepare and forward to the Owner a punch list of items of Work yet to be completed.
- 3.13 Indemnification. To the fullest extent permitted by law, the Construction Manager shall defend, indemnify and hold the Owner and the Engineer harmless from all claims for bodily injury and property damage (other than to the Work itself and other property insured under the Owner's builder's risk or other property insurance) to the extent of the negligence attributed to such acts or omissions by the Construction Manager, Subcontractors, Subsubcontractors or anyone employed directly or indirectly by any of them or by anyone for whose acts any of them may be liable.

ARTICLE 4 - SUBCONTRACTS

- 4.1 General. Work not performed by the Construction Manager with its own forces shall be performed by Subcontractors or Subsubcontractors. The Construction Manager shall be responsible for management of the Subcontractors in the performance of their Work.
- 4.2 Selection. The Construction Manager shall obtain bids from Subcontractors and/or from suppliers of materials or equipment fabricated to a special design for the Cost of Construction. The bids will be in the form of a written proposal for the items indicated as being part of the "Cost of Construction" in the Schedule of Charges. The bid will be submitted to the Construction Manager. The Construction Manager will confer with the bidders to verify the scope and intent of the submitted bid.
- .1 If the Construction Manager recommends to the Owner the acceptance of a particular bid from a specific bidder who is qualified to perform that portion of the Work and has submitted a bid which conforms to the requirements of the Contract Documents without reservations or exceptions, and the Owner requires that a different bid be accepted, then a Change Order shall be issued adjusting the Contract Time and the Guaranteed Maximum Price by the difference between the bid of the bidder recommended by the Construction Manager and the bid that the Owner has required be accepted.
- .2 The Construction Manager shall not be required to contract with anyone to whom the Construction Manager has a reasonable objection.



- 4.3 Assignment. The Construction Manager shall provide for assignment of Subcontract Agreements in the event that the Owner terminates this Contract for cause. Following such termination, the Owner shall notify in writing those Subcontractors whose assignments will be accepted, subject to the rights of sureties, if any.
- 4.4 Subcontracts. The Construction Manager shall prepare all Subcontracts and shall have full discretion to negotiate their terms, subject to the Owner's reasonable requirements or objections as to form and content.

ARTICLE 5 - CONSTRUCTION MANAGER'S WARRANTIES

- 5.1 One-Year Warranty. The Construction Manager warrants that all materials and equipment furnished under this Contract will be new unless otherwise specified, of good quality, in conformance with the Contract Documents, and free from defective workmanship and materials, and the Construction Manager agrees to correct all construction performed under this Contract which proves to be defective in workmanship or materials. These warranties shall commence on the date of Substantial Completion of the Work or of a designated portion thereof and shall continue for a period of one year therefrom or for such longer periods of time as may be set forth with respect to specific warranties required by the Contract Documents.
- 5.2 Materials Specified By Owner. The products, equipment, systems or materials incorporated in the Work at the direction or upon the specific request of the Owner shall be covered exclusively by the warranty of the manufacturer and are not otherwise warranted under this Contract.
- 5.3 Other Warranties. Deleted.

ARTICLE 6 - OWNER'S RESPONSIBILITIES

- 6.1 Information and Services. The Owner shall provide:
- .1 All necessary information describing the physical characteristics of the site, including surveys, site evaluations, legal descriptions, existing conditions, subsurface and environmental studies, reports and investigations developed during the design phase of the project;
 - .2 Inspection and testing services during construction as required by the law or as mutually agreed that are not included in the Guaranteed Maximum Price;
 - .3 Any necessary approvals, rezoning, easements and assessments, permits, fees and charges required for the construction, use, occupancy or renovation of permanent structures, including any legal and other required services; and
 - .4 any other information or services stated in the Contract Documents as being provided by the Owner.
- 6.2 Reliance. The Construction Manager shall be entitled to rely on the completeness and accuracy of the information and services required by paragraph 6.1 above, and



the Owner agrees to provide such information and services in a timely manner so as not to delay the Work.

- 6.3 Not Used
- 6.4 Notice of Defect. If the Owner becomes aware of any error, omission or other inadequacy in the Contract Documents or of the Construction Manager's failure to meet any of the requirements of the Contract Documents, or of any other fault or defect in the Work, the Owner shall give prompt written notice to the Construction Manager.
- 6.5 Communications. The Owner shall communicate with the Subcontractors and Subsubcontractors only through the Construction Manager. The Owner shall have no contractual obligations to any Subcontractors or Subsubcontractors.
- 6.6 Owner's Representative. The Owner's Representative for this Project is **Mr. Joe Knippen**, who shall be fully acquainted with the Project; shall be the conduit by which the Owner furnishes the information and services required of the Owner; and shall have authority to bind the Owner in all matters requiring the Owner's approval, authorization or written notice. If the Owner changes its representative, the Owner shall notify the Construction Manager in advance in writing.

ARTICLE 7 - CONTRACT TIME

- 7.1 Execution Date. The parties contemplate that this Contract will be fully executed on or before **August 1, 2004**. A delay in the Owner's execution of this Contract which postpones the commencement of the Work may require a Change Order equitably adjusting the date of Substantial Completion.
- 7.2 Substantial Completion. The date of Substantial Completion of the Work shall be the completion date identified on the first page of this Contract, as adjusted in accordance with the provisions of this Contract. Time shall be of the essence of this Contract.
- 7.3 Delays. If causes beyond the Construction Manager's control delay the progress of the Work, then the Contract Price and/or the date of Substantial Completion shall be modified by Change Order as appropriate. Such causes shall include but not be limited to: changes ordered in the Work, acts or omissions of the Owner or separate contractors employed by the Owner, the Owner preventing the Construction Manager from performing the Work pending dispute resolution, Hazardous Materials, differing site conditions, adverse weather conditions not reasonably anticipated, fire, unusual transportation delays, labor disputes, or unavoidable accidents or circumstances. In the event that delays to the Project are encountered for any reason, the Owner and the Construction Manager both agree to undertake reasonable steps to mitigate the effect of such delays.



ARTICLE 8 - PAYMENT

- 8.1 Guaranteed Maximum Price. The Guaranteed Maximum Price is the sum identified on the first page of this Contract, subject to adjustment in accordance with the provisions of this Contract.
- 8.2 Compensation. For the Construction Manager's performance of the Work, the Owner shall pay the Construction Manager in current funds the sum of the Cost of the Work as defined in this Article plus the Construction Manager's Fee. The Construction Manager's fee will be **\$15,910.00**. The total cost of the Project will be the Guaranteed Maximum Price. In the event the Cost of Construction plus the Construction Manager's Fee and Professional Services shall total less than the Guaranteed Maximum Price as adjusted by Change Orders, the resulting savings shall be shared equally between the Owner and the Construction Manager, and the Owner shall make payment of the Construction Manager's portion upon Final Completion of the Work. In the event that the Cost of Construction plus the Construction Manager's Fee and Professional Services exceeds the Guaranteed Maximum Price as adjusted by Change Orders, then the Owner shall pay no more than the Guaranteed Maximum Price as adjusted by Change Orders.
- 8.3 Progress Payments. Prior to submitting the first Application for Payment, the Construction Manager shall provide a Schedule of Values reasonably satisfactory to the Owner consisting of a breakdown of the Contract Price by trade or appropriate category. On or before the 10th day of each month after the Work has been commenced, the Construction Manager shall submit to the Owner an Application for Payment in accordance with the Schedule of Values and the Illinois Mechanic's Lien Act based upon the Work completed and materials stored on the site or at other locations approved by the Owner. Within twenty-one (21) days after receipt of each monthly Application for Payment, the Owner shall pay directly to the Construction Manager the appropriate amount for which Application for Payment was made, less amounts previously paid by the Owner. The Owner's progress payment, occupancy or use of the Project, whether in whole or in part, shall not be deemed to be an acceptance of any Work not conforming to the requirements of the Contract Documents.
- .1 With each Application for Payment the Construction Manager shall submit payrolls, petty cash accounts, receipted invoices or invoices with check vouchers attached, and any other evidence reasonably required by the Owner to demonstrate that cash disbursements or obligations already made or incurred by the Construction Manager on account of the Work equal or exceed (1) progress payments already received by the Construction Manager less (2) that portion of those payments attributable to the Construction Manager's Fee plus (3) payrolls and other costs for the period covered by the present Application for Payment.
 - .2 Each Application for Payment shall be based upon the most recent Schedule of Values submitted by the Construction Manager in accordance with the Contract Documents. The Schedule of Values shall allocate the entire Guaranteed Maximum Price among the various portions of the Work, except that the Construction Manager's Fee shall be shown as a single separate item. The Schedule of Values shall be prepared in such form and supported



by such data to substantiate its accuracy as the Owner may reasonably require and shall be used as a basis for reviewing the Construction Manager's Applications for Payment.

- .3 Applications for Payment shall show the percentage completion of each portion of the Work as of the end of the period covered by the Application for Payment. The percentage completion shall be the lesser of (1) the percentage of that portion of the Work which has actually been completed or (2) the percentage obtained by dividing (a) the expense which has actually been incurred by the Construction Manager on account of that portion of the Work for which the Construction Manager has made or intends to make actual payment prior to the next Application for Payment by (b) the share of the Guaranteed Maximum Price allocated to that portion of the Work in the schedule of values.
- .4 Subject to other provisions of the Contract Documents, the amount of each progress payment shall be computed as follows:
 - .1 Take that portion of the Guaranteed Maximum Price properly allocable to completed Work as determined by multiplying the percentage completion of each portion of the Work by the share of the Guaranteed Maximum Price allocated to that portion of the Work in the schedule of values. Pending final determination of cost to the Owner of changes in the Work, amounts not in dispute may be included, even though the Guaranteed Maximum Price has not yet been adjusted by Change Order.
 - .2 Add that portion of the Guaranteed Maximum Price properly allocable to materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work or, if approved in advance by the Owner, suitably stored off the site at a location agreed upon in writing.
 - .3 Add the Construction Manager's Fee. The Construction Manager's Fee shall be computed upon the Cost of the Work described in the two preceding Clauses at the rate stated in paragraph 8.2 or, if the Construction Manager's Fee is stated as a fixed sum in that paragraph, shall be an amount which bears the same ratio to that fixed sum Fee as the Cost of the Work in the two preceding Clauses bears to a reasonable estimate of the probable Cost of the Work upon its completion.
 - .4 Subtract the aggregate of previous payments made by the Owner.
- .5 Except with the Owner's prior approval, payments to Subcontractors shall be subject to retention of not less than 10 percent (10%) up to half the contract value. The Owner and the Construction Manager shall agree upon a mutually acceptable procedure for review and approval of payments and retention for subcontracts.
- .6 Except with the Owner's prior approval, the Construction Manager shall not make advance payments to suppliers for materials or equipment which have not been delivered and stored at the site.



- 8.4 Late Payments. If the Owner fails to pay the Construction Manager at the time payment of any amount becomes due, then the Construction Manager may suspend the Work upon five days advance written notice until payment of the amount owing has been received, in which case the Contract Time shall be equitably adjusted by Change Order. Payments due but unpaid shall bear interest at the rate of 1% per month, and the Construction Manager shall be entitled to recover all costs, including attorney's fees, incurred in enforcing payment.
- 8.5 Title. The Construction Manager warrants and guarantees that title to all Work, materials and equipment covered by an Application for Payment, whether incorporated in the Project or not, will pass to the Owner free and clear of all liens, claims, security interests or encumbrances upon receipt of such payment by the Construction Manager.
- 8.6 Final Payment. Final Payment shall be due and payable when the Work is fully completed. Before issuance of any final payment, the Owner may request satisfactory evidence that all payrolls, materials bills and other indebtedness connected with the Work have been or will be paid or otherwise satisfied. In accepting final payment, the Construction Manager waives all claims except those previously made in writing and which remain unsettled. In making final payment, the Owner waives all claims except for outstanding liens, improper workmanship or defective materials appearing within one year after the date of Substantial Completion, and terms of any special warranties required by the Contract Documents.
- .1 The amount of the final payment shall be calculated as follows:
- .1 Take the sum of the Cost of the Work substantiated by the Construction Manager's final accounting and the Construction Manager's Fee, but not more than the Guaranteed Maximum Price.
- .2 Subtract the aggregate of previous payments made by the Owner. If the aggregate of previous payments made by the Owner exceeds the amount due the Construction Manager, the Construction Manager shall reimburse the difference to the Owner.
- .2 The Owner's engineers will review and report in writing on the Construction Manager's final accounting within 7 days after delivery of the final accounting to the Owner by the Construction Manager. Based upon such Cost of the Work as the Owner's engineers report to be substantiated by the Construction Manager's final accounting., the Owner will, within twenty-one (21) days after receipt of the written report of the Owner's engineers, either make final payment as requested to the Construction Manager, or notify the Construction Manager in writing of the Owner's reasons for withholding part or all of the requested final payment.
- .3 If, subsequent to final payment and at the Owner's request, the Construction Manager incurs costs described in Paragraph 8.7 and not excluded by Paragraph 8.8 (1) to correct nonconforming Work, or (2) arising from the resolution of disputes, the Owner shall reimburse the Construction Manager such costs and the Construction Manager's Fee, if any, related thereto on the same basis as if such costs had been incurred prior to final payment, but not



in excess of the Guaranteed Maximum Price. If the Construction Manager has participated in savings, the amount of such savings shall be recalculated and appropriate credit given to the Owner in determining the net amount to be paid by the Owner to the Construction Manager.

- 8.7 Cost of the Work. The term "Cost of the Work" shall mean costs incurred by the Construction Manager in the proper performance of the Work and shall include all labor equipment and material required to perform the tasks outlined as the "Construction Manager's Responsibilities" in Article 3 herein, and shall also include payments made to Subcontractors in accordance with the requirements of the subcontracts for such work.
- 8.8 Accounting Records. The Construction Manager shall keep full and detailed accounts and exercise such controls as may be necessary for proper financial management under this Contract. The accounting and control systems shall be reasonably satisfactory to the Owner. The Owner and the Owner's engineers shall be afforded access to the Construction Manager's records, books, correspondence, instructions, drawings, receipts, subcontracts, purchase orders, vouchers, memoranda and other data relating to this Project, and the Construction Manager shall preserve these for a period of three years after final payment, or for such longer period as may be required by law.

ARTICLE 9 - CHANGES

- 9.1 Change Orders. Changes in the Work which are within the general scope of this Contract may be accomplished by Change Order without invalidating this Contract. A Change Order is a written instrument, issued after execution of this Contract signed by the Owner and Construction Manager stating their agreement upon a change and any adjustment in the Guaranteed Maximum Price and/or the date of Substantial Completion. The Construction Manager shall not be obligated to perform changed Work until the Change Order has been executed by the Owner and Construction Manager.
- 9.2 Costs. An increase or decrease in the Guaranteed Maximum Price resulting from a change in the Work shall be determined by one or more of the following methods:
- .1 Unit prices as set forth in this Contract or as subsequently agreed (but if the original quantities are altered to a degree that application of previously agreed unit prices would be inequitable to either the Owner or the Construction Manager, the Unit Prices shall be equitably adjusted);
 - .2 A mutually accepted, itemized lump sum;
 - .3 Time and materials.

Construction Manager's fee shall be proportionately increased in all Change Orders that increase the Guaranteed Maximum Price, but shall not be proportionately decreased by a Change Order that decreases the Guaranteed Maximum Price. If the parties cannot agree on the price term of a Change Order, then the Change Order will be calculated on the basis of actual time and materials costs incurred. If at the Owner's request the Construction Manager incurs substantial costs or time



investigating a proposed change which is never ultimately made, the Guaranteed Maximum Cost and Contract Time shall be equitably adjusted.

- 9.3 Unknown Conditions. If in the performance of the Work, the Construction Manager finds latent, concealed or subsurface physical conditions which differ from the conditions the Construction Manager reasonably anticipated, or if physical conditions are materially different from those normally encountered and generally recognized as inherent in the kind of work provided for in this Contract, then the Guaranteed Maximum Price and/or the Date of Substantial Completion shall be equitably adjusted by Change Order within a reasonable time after the conditions are first observed.
- 9.4 Claims. For any claim for an increase in the Guaranteed Maximum Price and/or an extension in the date of Substantial Completion, the Construction Manager shall give the Owner written notice of the claim within 21 days after the Construction Manager first recognizes the condition giving rise to the claim. Except in an emergency, notice shall be given before proceeding with the Work. In any emergency affecting the safety of persons and/or property, the Construction Manager shall act, at its discretion, to prevent threatened damage, injury or loss. Any change in Guaranteed Maximum Price and/or Date of Substantial Completion resulting from such claim shall be effectuated by Change Order.

ARTICLE 10 - INSURANCE AND BONDING

- 10.1 The Construction Manager's Insurance. The Construction Manager shall obtain and maintain insurance coverage for the following claims which may arise out of the performance of this Contract, whether resulting from the Construction Manager's operations or by the operations of any Subcontractor, anyone in the employ of any of them, or by an individual or entity for whose acts they may be liable:
- .1 workers' compensation, disability benefit and other employee benefit claims under acts applicable to the Work;
 - .2 under applicable employers liability law, bodily injury, occupational sickness, disease or death claims of the Construction Manager's employees;
 - .3 bodily injury, sickness, disease or death claims for damages to persons not employed by the Construction Manager;
 - .4 usual personal injury liability claims for damages directly or indirectly related to the person's employment by the Construction Manager or for damages to any other person;
 - .5 damage to or destruction of tangible property, including resulting loss of use, claims for property other than the work itself and other property insured by the Owner;
 - .6 bodily injury, death or property damage claims resulting from motor vehicle liability in the use, maintenance or ownership of any motor vehicle; and
 - .7 contractual liability claims involving the Construction Manager's indemnity obligations.



The Construction Manager's Commercial General and Automobile Liability Insurance shall be written for not less than the following limits of liability:

Commercial General Liability Insurance

Each Occurrence Limit	\$1,000,000
General Aggregate Limit	\$2,000,000
Products/Completed Operations Agg.	\$2,000,000
Personal & Advertising Injury Limit	\$1,000,000
Fire Damage (any one fire)	\$ 100,000
Medical Expenses, each person	\$ 10,000

Comprehensive Automobile Liability Insurance

Combined Single Limit, each accident	\$1,000,000
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or

Bodily Injury (per person)	\$1,000,000
Bodily Injury (per accident)	\$1,000,000
Property Damage (per accident)	\$1,000,000

Worker's Compensation & Employer's Liability

Worker's Compensation	Statutory Limits
Employer's Liability	
Bodily Injury by Accident	\$ 500,000 each accident
Bodily Injury by Disease	\$ 500,000 policy limit
Bodily Injury by Disease	\$ 500,000 each employee

Commercial Umbrella/Excess Liability

Each Occurrence	\$2,000,000
Aggregate	\$2,000,000

Professional Liability

Each Occurrence	\$2,000,000
Aggregate	\$2,000,000



Commercial General Liability Insurance may be arranged under a single policy for the full limits required or by a combination of underlying policies and an Excess or Umbrella Liability policy. The policies shall contain a provision that coverage will not be canceled or not renewed until at least thirty (30) days' prior written notice has been given to the Owner. Certificates of insurance showing required coverage to be in force shall be provided to the Owner prior to commencement of the Work. The Owner shall be named as an additional insured on all policies except the Workman's Compensation and Employer's Policies. The Construction Manager's Policy shall be primary to the Owner's insurance coverages which shall be considered excess only.

Products and Completed Operations insurance shall be maintained for a minimum period of at least 1 year(s) after the date of Substantial Completion.

- 10.2 The Owner's Insurance. The Owner shall obtain and maintain property insurance in a form reasonably acceptable to the Construction Manager upon the entire Project for the full cost of replacement at the time of any loss. This insurance shall include as named insureds the Owner, Construction Manager, Engineer, Subcontractors and Subsubcontractors. This insurance shall insure against loss from the perils of fire and extended coverage, and shall include "all risk" insurance for physical loss or damage including without duplication of coverage, at least: theft, vandalism, malicious mischief, transit, collapse, falsework, temporary buildings, debris removal, flood, earthquake, testing, and damage resulting from defective design, workmanship or material. The Owner shall increase limits of coverage, if necessary, to reflect estimated replacement cost. The Owner shall be responsible for any co-insurance penalties or deductibles. If the Owner occupies or uses a portion of the Project prior to its Substantial Completion, such occupancy or use shall not commence prior to a time mutually agreed to by the Owner and the Construction Manager and to which the insurance company or companies providing the property insurance have consented by endorsing the policy or policies. This insurance shall not be canceled or lapsed on account of partial occupancy. Consent of the Construction Manager to such early occupancy or use shall not be unreasonably withheld. Upon the Construction Manager's request, the Owner shall provide the Construction Manager with a copy of all policies before an exposure to loss may occur. Copies of any subsequent endorsements shall be furnished to the Construction Manager. The Construction Manager shall be given thirty (30) days' notice of cancellation, non-renewal, or any endorsements restricting or reducing coverage. The Owner shall give written notice to the Construction Manager before commencement of the Work if the Owner will not be obtaining property insurance. In that case, the Construction Manager may obtain insurance in order to protect its interest in the Work as well as the interest of the Engineer, Subcontractors and Subsubcontractors in the Work. The Guaranteed Maximum Price shall be increased by the cost of this insurance through Change Order. If the Construction Manager is damaged by failure of the Owner to purchase or maintain property insurance or to so notify the Construction Manager, the Owner shall bear all reasonable costs incurred by the Construction Manager arising from the damage. All or part of the coverage may be provided by the Owner through an intergovernmental risk insurance pool.

- 10.3 Property Insurance Loss Adjustment. Any insured loss shall be adjusted with the Owner and the Construction Manager and made payable to the Owner and Construction Manager as trustees for the insureds, as their interests may appear, subject to any applicable mortgagee clause. Upon the occurrence of an insured loss,



monies received will be deposited in a separate account and the trustees shall make distribution in accordance with the agreement of the parties in interest, or in the absence of such agreement, in accordance with the dispute resolution provisions of this Contract. If the trustees are unable to agree between themselves on the settlement of the loss, such dispute shall also be submitted for resolution pursuant to the dispute resolution provisions of this Contract.

- 10.4 Waiver of Subrogation. The Owner and Construction Manager waive all rights against each other, the Engineer, and any of their respective employees, agents, consultants, Subcontractors and Subsubcontractors, for damages caused by risks covered by insurance provided in Paragraph 10.2 to the extent they are covered by that insurance, except such rights as they may have to the proceeds of such insurance held by the Owner and Construction Manager as trustees. The Construction Manager shall require similar waivers from all Subcontractors, and shall require each of them to include similar waivers in their subsubcontracts and consulting agreements. The Owner waives subrogation against the Construction Manager, Engineer, Subcontractors and Subsubcontractors on all property and consequential loss policies carried by the Owner on adjacent properties and under property and consequential loss policies purchased for the Project after its completion. If the policies of insurance referred to in this Paragraph require an endorsement to provide for continued coverage where there is a waiver of subrogation, the owners of such policies will cause them to be so endorsed.
- 10.5 Bonds. The Construction Manager shall furnish bonds through their subcontractors covering faithful performance of the Cost of Construction portion of the Contract and payment of the obligations arising thereunder. Bonds may be obtained through the Construction Manager's usual source or their subcontractor's and the cost thereof shall be included in the Cost of Construction. The amount of each bond shall be equal to 100% of the Cost of Construction for each subcontract. The Construction Manager's Fee and other professional services will not be included in the bonded amount. The Construction Manager shall deliver the required bonds to the Owner at least three days before commencement of any Work at the Project site.

ARTICLE 11 - TERMINATION

- 11.1 By the Construction Manager. Upon seven (7) days' written notice to the Owner, the Construction Manager may terminate this Contract for any of the following reasons:
- .1 if the Work has been stopped for a thirty (30) day period;
 - a. under court order or order of other governmental authorities having jurisdiction;
 - b. as a result of the declaration of a national emergency or other governmental act during which, through no act or fault of the Construction Manager, materials are not available; or
 - c. because of the Owner's failure to pay the Construction Manager in accordance with this Agreement;
 - .2 if the Work is suspended by the Owner for sixty (60) days;



- .3 if the Owner materially delays the Construction Manager in the performance of the Work without agreeing to an appropriate Change Order;
- .4 if the Owner otherwise materially breaches this Contract; or
- .5 if the Owner fails to furnish reasonable evidence that sufficient funds are available and committed for the entire cost of the Project in accordance with Section 6.3 of this Contract.

Upon termination by the Construction Manager in accordance with this paragraph, the Construction Manager shall be entitled to recover from the Owner payment for all Work executed and for any proven loss, cost or expense in connection with the Work, plus all demobilization costs and reasonable damages. In addition, the Construction Manager shall be paid an amount calculated as set forth in paragraph 11.3.

11.2 By the Owner for Cause. If the Construction Manager persistently fails to perform any of its obligations under this Contract, the Owner may, after seven (7) days' written notice, during which period the Construction Manager fails to perform or to begin to perform such obligation, undertake to perform such obligations itself. The Contract Price shall be reduced by the cost to the Owner of performing such obligations. Upon seven (7) days' written notice to the Construction Manager and the Construction Manager's surety, if any, the Owner may terminate this Contract for any of the following reasons:

- .1 if the Construction Manager persistently utilizes improper materials and/or inadequately skilled workers;
- .2 if the Construction Manager does not make proper payment to laborers, material suppliers or subcontractors and refuses or fails to rectify same;
- .3 if the Construction Manager persistently fails to abide by the orders, regulations, rules, ordinances or laws of governmental authorities having jurisdiction; or
- .4 if the Construction Manager otherwise materially breaches this Contract.

If the Construction Manager fails to cure within the seven (7) days, the Owner, without prejudice to any other right or remedy, may take possession of the site and complete the Work utilizing any reasonable means. In this event, the Construction Manager shall not have a right to further payment until the Work is completed. If the Construction Manager files a petition under the Bankruptcy Code, this Contract shall terminate if the Construction Manager or the Construction Manager's trustee rejects the Agreement or, if there has been a default, the Construction Manager is unable to give adequate assurance that the Construction Manager will perform as required by this Contract or otherwise is unable to comply with the requirements for assuming this Agreement under the applicable provisions of the Bankruptcy Code. In the event the Owner exercises its rights under this paragraph, upon the request of the Construction Manager, the Owner shall provide a detailed accounting of the costs incurred by the Owner.

11.3 Termination by the Owner Without Cause. If the Owner terminates this Contract other than as set forth in Paragraph 11.2, the Owner shall pay the Construction



Manager for the Cost of all Work executed and for any proven loss, cost or expense in connection with the Work, plus all demobilization costs. In addition, the Construction Manager shall be paid an amount calculated as set forth below:

- .1 If the Owner terminates this Contract prior to commencement of the construction, the Construction Manager shall be paid 5% of the Guaranteed Maximum Price.
 - .2 If the Owner terminates this Contract after commencement of the construction, the Construction Manager shall be paid 5% of the remaining balance of the Guaranteed Maximum Price.
 - .3 The Owner shall also pay to the Construction Manager fair compensation, either by purchase or rental at the election of the Owner, for any equipment retained. The Owner shall assume and become liable for obligations, commitments and unsettled claims that the Construction Manager has previously undertaken or incurred in good faith in connection with the Work or as a result of the termination of this Contract. As a condition of receiving the payments provided under this Article 11, the Construction Manager shall cooperate with the Owner by taking all steps necessary to accomplish the legal assignment of the Construction Manager's rights and benefits to the Owner, including the execution and delivery of required papers.
- 11.4 Suspension By The Owner For Convenience. The Owner for its convenience may order the Construction Manager in writing to suspend, delay or interrupt all or any part of the Work without cause for such period of time as the Owner may determine to be appropriate. Adjustments shall be made for increases in the Guaranteed Maximum Price and/or the date of Substantial Completion caused by suspension, delay or interruption. No adjustment shall be made if the Construction Manager is or otherwise would have been responsible for the suspension, delay or interruption of the Work, or if another provision of this Contract is applied to render an equipment adjustment.

ARTICLE 12 - DISPUTE RESOLUTION

- 12.1 Step Negotiations. The parties shall attempt in good faith to resolve all disputes promptly by negotiation, as follows. Either party may give the other party written notice of any dispute not resolved in the normal course of business. Management representatives of both parties one level above the Project personnel who have previously been involved in the dispute shall meet at a mutually acceptable time and place within ten (10) days after delivery of such notice, and thereafter as often as they reasonably deem necessary, to exchange relevant information and to attempt to resolve the dispute. If the matter has not been resolved within thirty (30) days from the referral of the dispute to such management representatives, or if no meeting has taken place within fifteen (15) days after such referral, the dispute shall be referred to senior managers under the aforesaid procedure. If the matter has not been resolved by such senior managers, either party may initiate mediation as provided hereinafter. If a negotiator intends to be accompanied at a meeting by an attorney, the other negotiator shall be given at least three (3) working days' notice of such intention and may also be accompanied by an attorney. All negotiations pursuant to this clause are



confidential and shall be treated as compromise and settlement negotiations for purposes of the Federal Rules of Evidence and applicable state Rules of Evidence.

- 12.2 Mediation. In the event that any dispute arising out of or relating to this Contract is not resolved in accordance with the procedures provided in Section 12.1, such dispute may be submitted to mediation with American Arbitration Association ("AAA") or JAMS/Endispute, Inc. If the mediation process has not resolved the dispute within thirty (30) days of the submission of the matter to mediation, or such longer period as the parties may agree to, the dispute shall be decided by arbitration as set forth below.
- 12.3 Arbitration. Deleted.
- 12.4 Continued Performance of the Work. In the event of any dispute, the Construction Manager shall continue to perform the Work and maintain its progress pending final determination of the dispute, provided the Owner places a sum equal to 150% of the amount in dispute in an escrow account, reasonably satisfactory to both parties, which specifies that the escrow agent shall distribute the escrow sum between the parties in accordance with any agreement, arbitration award or court judgment entered resolving the dispute.

ARTICLE 13 - LIQUIDATION AND LIMITATION OF LIABILITY

- 13.1 Late Completion. In the event that the Work is not Substantially Complete by the date set forth in this Contract, then promptly after receiving Final Payment, the Construction Manager shall pay to the Owner as liquidated damages a sum equal to **\$0.00** for each day (up to 30 days) that the Work is late in reaching Substantial Completion. Monies for Late Completion will be taken from any shared savings appreciated during the course of work and will only be due upon completion of the entire project.
- 13.2 Early Completion. If the Work is Substantially Complete earlier than the date of Substantial Completion set forth in this Contract, then at the time of making Final Payment, the Owner will pay an additional sum to the Construction Manager as a bonus for early completion equal to **\$0.00** for each day (up to 30 days) that the Work is early in reaching Substantial Completion. Monies for Early Completion are not included in the Guaranteed Maximum Price.
- 13.3 Limitation of Liability. The Owner acknowledges that the Construction Manager is a limited liability company and agrees that any claim made by the Owner arising out of or pertaining to this Contract shall be made against only the Construction Manager and not against any director, officer, or employee of the Construction Manager or any other company affiliated with the Construction Manager. The Owner and persons claiming through the Owner agree to limit the liability of the Construction Manager for all claims arising out of or resulting from the performance of services under this Contract to an amount equal to the Construction Manager's Fee.
- 13.4 Consequential Damages. Notwithstanding anything to the contrary in this Contract, in no event shall the Construction Manager or any of its Subcontractors be liable for consequential loss or damage, including but not limited to loss of use or profits, and



the Owner hereby releases the Construction Manager and its Subcontractors and the Owner from any such liability.

- 13.5 Exclusive Remedies. Deleted.

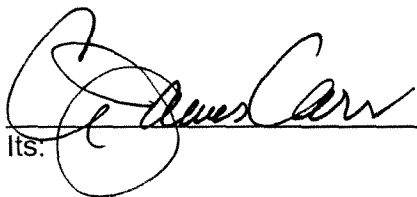
ARTICLE 14 - MISCELLANEOUS

- 14.1 Project Sign. The Owner agrees that the Construction Manager and Engineer will be properly identified and will be given appropriate credit on all signs, press releases and other forms of publicity for the Project. Owner will permit the Construction Manager and Engineer to photograph and make other reasonable use of the Project for promotional purposes.
- 14.2 Notices. Notices to the parties shall be given at the addresses shown on the cover page of this Contract by mail, fax or any other reasonable means.
- 14.3 Integration. This Contract is solely for the benefit of the parties, and no one is intended to be a third party beneficiary hereto. This Contract represents the entire and integrated agreement between the parties, and supersedes all prior negotiations, representations or agreements, either written or oral.
- 14.4 Governing Law. This Contract shall be governed by the laws of the State of Illinois.
- 14.5 Severability. The partial or complete invalidity of any one or more provisions of this Contract shall not affect the validity or continuing force and effect of any other provision.
- 14.6 Assignment. Neither party to this Contract shall assign the Contract as a whole without written consent of the other, except that the Owner may collaterally assign this Contract to a lender if required to secure financing for this Project.
- 14.7 Existing Contract Documents. A list of the Plans, Specifications and Addenda in existence at the time of execution of this Contract is attached as an exhibit to this Contract.



OWNER:

City of Wheaton
Public Works Department
303 W. Wesley Street
Wheaton, Illinois 60189

By: 
Its: _____

Dated: 9/8/04

CONSTRUCTION MANAGER:

Burke, LLC
9575 West Higgins Road, Suite 600
Rosemont, Illinois 60018

By: 
Its: Principal

Dated: July 16, 2004

By: Michael J. Stuck / me
Its: Principal

Dated: July 16, 2004

City of Wheaton

Generator and Controls Building Replacement at Blacksmith Drive Lift Station

Schedule of Prices

ITEM NO.	DESCRIPTION OF WORK	UNIT	QUANTITY	UNIT PRICE	COST
13122/01	PRECAST CONCRETE BUILDING	LSUM	1	\$28,000.00	\$28,000.00
16490/01	AUTOMATIC TRANSFER SWITCH	LSUM	1	\$5,000.00	\$5,000.00
16620/01	STANDBY GENERATOR	LSUM	1	\$18,000.00	\$18,000.00
16400/01	SEWAGE PUMP CONTROL PANEL AND ACCESSORIES	LSUM	1	\$16,000.00	\$16,000.00
16100/01	SERVICE AND DISTRIBUTION	LSUM	1	\$4,000.00	\$4,000.00
16100/02	TEMPORARY POWER	LSUM	1	\$15,000.00	\$15,000.00
16110/01	CONDUIT	LSUM	1	\$5,000.00	\$5,000.00
16120/01	WIRING	LSUM	1	\$5,000.00	\$5,000.00
16450/01	GROUNDING SYSTEM	LSUM	1	\$1,000.00	\$1,000.00
SUBTOTAL CONSTRUCTION COST=					\$97,000.00

B. BONDS

ITEM NO.	DESCRIPTION OF WORK	UNIT	QUANTITY	UNIT PRICE	COST
1	PERFORMANCE BOND	LSUM	1	\$1,550.00	\$1,550.00
SUBTOTAL BONDS =					\$1,550.00

C. PROFESSIONAL FEES

ITEM NO.	DESCRIPTION OF WORK	UNIT	QUANTITY	UNIT PRICE	COST
1	GENERAL CONDITIONS	LSUM	1	\$2,910.00	\$2,910.00
2	CONSTRUCTION MANAGEMENT	LSUM	1	\$7,000.00	\$7,000.00
3	DESIGN ENGINEERING	LSUM	1	\$6,000.00	\$6,000.00
SUBTOTAL PROFESSIONAL FEES=					\$15,910.00

GUARANTEED MAXIMUM PRICE = \$114,460.00

21
R-104-04
935

**AN ADDENDUM TO A DESIGN/BUILD SERVICE AGREEMENT
FOR THE GENERATOR AND CONTROLS BUILDING REPLACEMENT
AT THE BLACKSMITH LIFT STATION**

WHEREAS, the City of Wheaton, (hereinafter "Wheaton") and Burke, LLC (hereinafter "Burke") have entered into a Standard Form At Risk Construction Management Contract for Designer/LED Design-Build Project for the Generator and Controls Building at the Blacksmith Lift Station (hereinafter "Contract"); and

WHEREAS, Wheaton and Burke agree to amend the Contract for the Blacksmith Lift Station in conformance with this Addendum; and

WHEREAS, this Addendum is adopted with the Contract and is supported by the same considerations.

NOW THEREFORE, Wheaton and Burke, based upon the good and valuable considerations recited in the Contract do hereby agree to the following terms, conditions and covenants of this Addendum:

1. The recital paragraphs of this Addendum are incorporated herein as constituting the intent of Wheaton and Burke as well as substantive provisions of the Contract.
2. That the terms, conditions and covenants of this Addendum are intended to amend the Contract. Any ambiguity or inconsistency between the Contract and this Addendum shall be resolved in favor of this Addendum.
3. The Contract is hereby amended as follows:
 - a. That portion of Paragraph 2.5 entitled Substantial Completion which reads "or at such time that the project is a state that allows for the maturing and establishment of landscape plant materials (such as seeding, sodding or grading of areas to receive landscape materials)" is stricken in its entirety.
 - b. Paragraph 3.8.1 entitled Construction Observation is modified by the addition of the following sentence: "the charge for construction observation services are part of the Guaranteed Maximum Price".
 - c. That (the second to the last sentence 1) Section 3.10 entitled Hazardous Materials is amended by adding the phrase "except where the hazardous

materials are brought to the site by the construction manager, its sub-contractors or sub-subcontractors".

- d. That Section 3.1.3 entitled Indemnification is modified by the addition of a sentence which shall read: "Construction manager shall secure an identical indemnification from its sub-contractors, and require its sub-contractors to secure an identical indemnification from their sub-subcontractors providing the Owner indemnification from the subcontractors and sub-subcontractors under the same terms and conditions of this Section 3.1.3.
- e. That Section 4.2.2 is modified by the addition of the sentence "The Owner shall not be required to accept any sub-contractor or sub-subcontractor to whom the owner has reasonable objection.
- f. That Section 6.2 entitled Reliance is modified by the addition of the phrase "unless the Construction Manager exercising that care and applying that knowledge of a reasonably well qualified Construction Manager would recognize that the information provided by the owner is incomplete or inaccurate".
- g. That the first sentence of Section 6.6 entitled Owner's Representatives is modified by adding the phrase "except any proposed increase in guaranteed maximum price".
- h. That Section 8.3.1 entitled Progress Payments is amended by the addition of the words "lien waivers" after the word "attached" in the third line of the first sentence.
- i. That paragraph 8.3.5 is amended by the addition of a new sentence which shall read: "Interest shall not be paid on retention".
- j. That Section 8.4 entitled Late Payments is amended by striking the language "and the Construction Manager shall be entitled to recover all costs, including attorneys fees, incurred in enforcing payment".
- k. That Section 8.6 entitled Final Payment is amended by the striking the language that reads "in making final payment, the owner waives all claims except for outstanding liens, improper workmanship or defective materials appearing within one (1) year after the date of substantial completion, and the terms of any warranties required by the contract documents".
- l. That Sub-Section 8.6.3 of Section 8.6 entitled Final Payment is modified by striking the words "Paragraph 8.8(1)" in the third line of the first sentence.

- m. That Section 10.1 entitled the Construction Manager's Insurance is modified by striking the word "usual" from Sub-Section 10.1.4.
- n. That the first sentence of Paragraph 10.2 entitled Owner's Insurance is modified by replacing the word "shall" with the word "may".
- o. That Section 10.4 entitled Waiver of Subrogation is stricken in its entirety.
- p. That Section 11.2 entitled By the Owner for Cause is modified by striking the words "persistently" from Sub-Paragraphs 11.2.1 and 11.2.3.
- q. That the last complete Paragraph of 11.2 entitled by the By the Owner for Cause is modified by inserting the phrase "in the owners discretion" after the word "terminate" and striking the phrase "if the Construction Manager or the Construction Manager's trustee rejects the agreement, or if there has been a default, the construction is unable to give adequate insurance that the construction manager will perform as required by this Contract or is otherwise unable to comply with the requirements for assuming this Agreement under the applicable provisions of the Bankruptcy Code".
- r. That Paragraph 12.2 entitled Mediation is modified by striking the phrase "or JAMS/Endispute, Inc." from its first sentence. The second sentence of Paragraph 12.2 entitled Mediation is stricken in its entirety and modified to read: "If the Mediation process does not resolve the dispute within 30 days of the submission of the matter to Mediation, or such longer period as the parties may agree, the dispute maybe decided by Arbitration if the parties mutually agree or if not in a court of law in the Eighteenth Judicial Circuit of DuPage County, Illinois. The losing party in any judicial resolution shall pay the prevailing parties costs, including reasonable attorneys fees and expert witness fees.
- s. That Paragraph 13.1 entitled Late Completion is stricken in its entirety.
- t. That Paragraph 13.2 entitled Early Completion is stricken in its entirety.
- u. That Paragraph 13.3 entitled Limitation of Liability is modified by the addition of the phrase "except to the extent covered by the insurance coverage set forth in Article X of this Agreement" to its first sentence. The second sentence of Paragraph 13.3 Limitation of Liability is stricken in its entirety.

OWNER:

"A" R-64-04
310

City of Wheaton
Public Works Department
3030 W. Wesley Street
Wheaton, Illinois 60189

By: Dated: 9/8/04

CONSTRUCTION MANAGER:

Burke, LLC
9575 West Higgins Road, Suite 600
Rosemont, Illinois 60018

By: _____

Its: Principal

Dated: _____

By: _____

Its: Principal

Dated: _____