

VIRGINIA BEACH SPORTS CENTER CIP 9-041 PPEA RFQ for the City of Virginia Beach

INTERIM AGREEMENT

THIS INTERIM AGREEMENT (this “**Agreement**”), dated as of March __, 2018 (the “**Effective Date**”), between the **CITY OF VIRGINIA BEACH**, a municipal corporation of the Commonwealth of Virginia (the “**City**”) and **ESM VBSC, LLC**, a Virginia limited liability company, (“**Manager**”), recites and provides as follows:

RECITALS:

A. On September 26, 2017, the City received conceptual proposals, under the Virginia Public-Private Education Facilities and Infrastructure Act of 2002 (“**PPEA**”) and the City’s PPEA Guidelines (“**Guidelines**”), pursuant to a solicitation by the City for a sports center facility (the “**Project**”).

B. After a request for detailed proposals, the City received detailed proposals on November 15, 2017 for the Project pursuant to a request by the City for such proposals.

C. The Manager has submitted a conceptual and a detailed proposal (collectively, the “**Proposal**”) in response to the City’s requests for conceptual and detailed proposals.

D. As permitted by the PPEA, the City and Manager now desire to enter into this Agreement to facilitate and support the efficient and comprehensive evaluation of the Project, as hereinafter more particularly set forth.

E. As permitted under the PPEA, the City elected not to accept the general contractor and architect included in the Proposal. Contemporaneously with this Agreement, the City shall execute a separate Interim Agreement with Mid-Eastern Builders Inc, a Virginia corporation and contracting company (“**Developer**”), that will provide the construction services for the Project (“**MEB Interim Agreement**”).

AGREEMENT

In consideration of the premises set forth in the Recitals, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the City and the Manager (each, a “**Party**” and together, the “**Parties**”) hereby agree as follows:

1. **Interim Agreement: Purpose.**

a. **Interim Agreement.** This Agreement is an “interim agreement” (as that term is used under the PPEA and the Guidelines) between the City and Manager in respect of the Project. Major components of the Project are outlined on the attached **Exhibit A** (unless otherwise indicated, or the context requires, each reference in this Agreement to an “**Exhibit**” or to a “**Section**” refers to an exhibit or a section of this Agreement, as applicable).

b. **Purpose.** This Purpose of this Agreement is to engage Manager to produce for the City certain services, reports, plans, and recommendations (collectively, the “**Deliverables**”)

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regarding various aspects of the Project. The Deliverables are more specifically described in **Exhibit B**. The Parties anticipate that the City will use all, or a portion of, the Deliverables and those Deliverables under the MEB Interim Agreement to determine whether to approve the Project and whether to pursue Comprehensive Agreements with the Manager and Developer pursuant to the PPEA and the Guidelines.

2. **Term.** The term of this Agreement (the “**Term**”) becomes effective as of the Effective Date and continues in effect until 5:00 PM local time in the City of Virginia Beach, Virginia (the “**City**”), on November 1, 2018, unless this Agreement expires or is terminated at an earlier date under a provision of this Agreement. The Term may be extended by amendment of this Amendment, but neither Party is obligated to agree to any such amendment.

3. **Deliverables; Schedule; Reports; Meetings; Monitoring; Finder Activities.**

a. **Deliverables and Schedule.** Manager will provide to the City the Deliverables in substantial compliance with the schedule set forth in **Exhibit B** (the “**Schedule**”).

b. **Reports and Meetings.** Manager will deliver monthly written progress reports to the City’s designated project manager (the “**City’s Project Manager**”) beginning on the 30th day of the Term and on each 30-day anniversary of that initial reporting date occurring during the Term and a final such report on the last business day of the Term. In addition to any meetings or similar conferences specified in **Exhibit B**, Manager’s designees as its project managers for the Project (the “**Manager’s Project Principals**”), along with its other principal development team members, consultants and subcontractors (collectively, the “**Manager’s Project Team**”), as appropriate, will participate in monthly meetings with all or portions of the group the City designates as its management team for the Project (the “**City’s Management Team**”) and its selected consultants. The City’s Project Manager (or that manager’s designee), in consultation with the designee of Manager’s Project Principals, will specify the reasonable dates and times for these meetings. The City’s Project Manager is authorized to cancel, or waive, any of these monthly meetings, or opt to conduct any of these meetings via telephone, video conference, or other similar means. Among any other reasonable purpose that the City’s Project Manager may specify reasonably in advance, the participants in the monthly meetings will review (i) the then-current status of the Deliverables; (ii) new information related to the Deliverables or the Project; and (iii) Manager’s performance under this Agreement.

c. **Monitoring.** Members of the City’s Project Management Team are entitled to monitor any of the work undertaken by, or for, Manager under this Agreement, so long as that monitoring does not unreasonably interfere with that work, or with Developer, or any applicable subcontractor’s business.

4. **Manager Compensation and Reimbursements; Payments; Limitations; Audit.**

a. **Compensation.** As full and complete compensation for its production and provision of the Deliverables and its performance of any other obligations under this Agreement, the City will pay to Manager an amount not to exceed the amounts set forth on **Exhibit B** (the “**Budget**”) the

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“Pre-Management Fee” and will reimburse Manager the costs and expenses designated as “Compensable Costs” in the Budget.

b. **Payments.** Payment to be made in \$30,000 increments beginning within ten (10) days of the Effective Date, and every 30 days thereafter until the full amount of the Budget has been paid. Upon City’s receipt of all the Deliverables, so long as the Manager is in substantial compliance with all the terms of this Agreement, any outstanding balance of the Budget will be paid in full within ten (10) days.

c. **Limitations.** The City’s aggregate total liability to compensate and reimburse Manager in connection with this Agreement (whether as part of the Pre-Management Fee, as Compensable Cost, or otherwise) will not exceed the amounts set forth on Exhibit B. Moreover, no travel, lodging or meal expenses associated with the Deliverables, nor any fines or similar penalties, associated with Manager’s performance under this Agreement, and no costs or expenses associated with the negotiation or execution of this Agreement, nor any costs or expenses associated with the negotiation or execution of any Comprehensive Agreement, will be reimbursable as Compensable Costs. The Compensable Costs shall be limited to costs and expenses incurred in connection with the Deliverables and not costs and expenses previously incurred by Manager in connection with the Proposal, provided the Operator engagement fee may represent some of the costs incurred by Manager prior to the execution of this Agreement.

d. **Audit.** During the Term, and for a period not less than five years after the last payment is made to Manager under this Agreement, or the last day of the Term, whichever is later, Manager will keep and maintain complete and accurate records, books of account, reports and other data (the “**Books and Records**”) pertaining to its performance, and the computation of compensation and reimbursements payable to Manager, under this Agreement. Upon reasonable notice from the City, Manager will make the Books and Records available during normal business hours for inspection and audit by the City and its designee, which may include the City and any other governmental entity providing funding in connection with the City’s possible participation in the Project. The City will be entitled to copy all or any part of the Books and Records.

5. Project Approval; Possible Comprehensive Agreement.

a. **Approval Status.** The City is still evaluating whether to approve the Project as part of its Capital Improvement Program. Accordingly, this Agreement and the MEB Interim Agreement are not, and are not intended to be, evidence of any such approval, or a promise or assurance that the City will approve the Project, or that the City will approve Manager; any Manager Principal; any Manager employee, manager, member, officer, owner, or principal; any entity in which Manager (or any Manager affiliate, manager, member, officer, owner, or principal) is a member or owner; any member of Manager’s Project Team; or any other person or party, will be approved as the Project Manager. Moreover, the City is not obligated, and will not be obligated, to provide such approval, or to enter into a Comprehensive Agreement (as that term is used under the PPEA and the Guidelines), another interim agreement, a partnership or joint venture agreement, or any other form of contract, arrangement or relationship with Manager; any Manager Principal; any Manager employee, manager, member, officer, owner, or principal; any entity in which Manager (or any Manager affiliate, manager, member, officer, owner, or principal) is a member or owner; any member of Manager’s Project Team; or any other person or party with respect to the Project (or any other project), the

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Project Manager, or for any other purpose. Manager has submitted the Proposal, has entered into the engagement evidenced by this Agreement, and will contribute to the evaluation process of the Project at its own risk and cost, except for its rights to compensation expressly set out in this Agreement. Moreover, should further negotiations in respect of the Project, or the Project Manager (including any as to an amendment of this Agreement, or as to any possible Comprehensive Agreement for the Proposed Project) occur involving the City, or any representative of the City, or the government of the City and Manager; any Manager Principal; any Manager employee, manager, member, officer, owner, or principal; any entity in which Manager (or any Manager affiliate, manager, member, officer, owner, or principal) is a member or owner; any member of Manager's Project Team; or any other person or party, the City is not, and will not be, obligated to complete or continue those negotiations, and the City may terminate any of those negotiations, as well as its evaluation of the Project, for any reason, or for no reason, in its sole discretion without liability, except for compensation expressly provided under this Agreement that may have been earned, and therefore due and payable, on or before such termination. The approval of the Project, any Project Manager, and any further contract, arrangement or relationship as to the Project, requires passage of a binding resolution by the City Council of the City.

b. **Possible Comprehensive Agreement.** That approval status described in **Section 5(a)** notwithstanding, during the Term, the City (in its sole discretion) may determine that it is appropriate to attempt to negotiate the form of a Comprehensive Agreement with Manager (or a Manager-designated affiliate or other Manager-designated party) and Comprehensive Agreement with Developer that are acceptable to the City and the applicable party. If the City so determines, the City and that applicable party (to the extent not anticipated by the then-existing Schedule) will formulate a negotiating and drafting schedule for this task and will endeavor to produce such a Comprehensive Agreements in accordance with the applicable timetable.

6. **Expiration/Termination of Term.** This Agreement will automatically end upon the earliest of: (i) execution of a Comprehensive Agreement, or another interim agreement, in respect of the Project; (ii) the 5th business day after the date that either Party receives notice from the other that the Party giving notice does not intend to approve, or proceed with development of, the Project, or that it does not intend to otherwise pursue the Project with the other Party and elects to end this Agreement; or (iii) the expiration of the Term. If a Party ends this Agreement under clause (ii), immediately above, or the Term expires, all Deliverables then made or in production, including any work product, plans, projections, design concepts and other items delivered or due to be delivered to the City on or before the date of termination, or expiration, will become the property of the City upon delivery, the date of the termination, or the date of expiration of the Term, whichever is earlier; provided that the City has paid to Manager all sums which are due and payable to Manager as required by the terms of this Agreement.

7. **Designated Project Personnel.**

a. **Manager.** Manager's Project Principals, and the members of Manager's Project Team are all listed on **Exhibit C**. While this Agreement is in effect, Manager will cause each of Manager's Project Principals to devote sufficient time and attention to directing and overseeing Manager's performance under this Agreement, participate in all meetings and conferences specified in the Schedule or required under this Agreement, and to interact with members of the City's Project

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Management Team and the City's consultants and representatives for purposes of this Agreement. Manager may change the composition of Manager's Project Principals only upon receiving the prior consent of the City, which will not be unreasonably withheld. City acknowledges and agrees that Developer shall have its own Developer Project Principals in accordance with the MEB Interim Agreement. Manager shall in consultation with the City's Project Management Team manage and oversee the Developer and the design, construction, operation, and maintenance of the Project in accordance with the terms of this Agreement and the Comprehensive Agreement.

b. **City.** The City's Project Manager and the members of the City's Project Management Team are all listed on **Exhibit C-1**. While this Agreement is in effect, the City will cause all the City's Project Management Team to devote sufficient time and attention to directing and overseeing the City's performance under this Agreement, and to interact with members of Manager's Project Principals for purposes of this Agreement.

8. **Accuracy of Proposal; Representation & Warranties.** Manager represents and warrants to the City that (i) to the best of Manager's knowledge and belief as of the date of this Agreement all factual statements made in Manager's submissions to the City evidencing the Project (including those pertaining to prior experience and expertise) are true, accurate, and not misleading in any material respects, (ii) Manager has the expertise and capacities to produce and provide the Deliverables and to perform its other obligations under this Agreement, (iii) the data and other information contained within the Deliverables will be accurate and complete and its use for the purposes of this Agreement will not violate any law, or infringe or violate any property right, and (iv) Manager has full power and authority to enter into this Agreement, and the person[s] signing this Agreement on behalf of Manager has full power and authority to bind Manager under this Agreement.

9. **Indemnification.** Manager will indemnify the City (and the members of its board and its officers, employees and authorized representatives) from and against any loss, damage, expense, liability and expense (including reasonable attorneys' fees) arising from (i) bodily injury or property damage to the extent caused by the negligent or wrongful act, error, or omission of Manager, any member of Manager's Project Team, or any of Manager's or any of Manager's Project Team's employees, officers, contractors, agents or others for which Manager is legally responsible or who were otherwise acting on Manager's behalf, or (ii) the claims of third parties to the extent caused by the Manager's failure to perform its obligations, or its breach of any representation or warranty made, under this Agreement, provided in each case that the applicable claim is presented within two (2) years after the expiration or earlier termination of the Term. This indemnification provision (y) will survive the expiration of the Term or its earlier termination, and (z) is not, and is not to be construed as, a limitation of liability. Notwithstanding the foregoing, Manager's indemnification obligations as set forth herein shall exclude any loss, damage, expense, liability and expense arising from (i) bodily injury or property damage to the extent caused by the negligent or wrongful act, error, or omission of Developer, any member of Developer's Project Team, or any of Developer's or any of Developer's Project Team's employees, officers, contractors, or agents.

10. **Independent Contractors.** Manager and each of Manager's Project Team is an independent contractor for all purposes of this Agreement. Neither Manager, each of Manager's Project Team, nor any of their employees, agents, subsidiaries or subcontractors is an employee, servant, agent, partner, or joint venturer of, or with, the City by reason of this Agreement, or any other reason. Neither the

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City, nor any of its employees, agents, or subcontractors is an employee, servant, agent, partner or joint venturer of, or with, Manager by reason of this Agreement.

11. **No Liability of Officials, Employees or Agents.** No director, officer, official, employee, agent or representative of the City is, or will be, personally liable to Manager any of Manager's Project Team, or any successor in interest of any of them, as a consequence of any default or breach by the City for any sum that may become due to Manager, any of the Manager Project Team, or any successor in interest of any of them, or on any obligation incurred under this Agreement. No officer, official, employee, agent or representative of Manager or Manager's Project Team will be personally liable to the City, or any successor in interest, as a consequence of any default or breach by Manager or Manager's Project Team for any amount which may become due to the City or any successor in interest, or on any obligation incurred under this Agreement.

12. **Insurance.**

a. **Coverages.** Manager, at its expense and not as a Compensable Cost, must carry the following insurance coverages: Workers' compensation insurance, commercial general liability insurance (on an occurrence basis), automobile liability insurance for any automobile owned or hired, and umbrella/excess liability insurance. The commercial general liability policy must be for a combined single limit for personal injury and property damage of not less than \$1,000,000, and must provide coverage, at a minimum, for (i) broad form contractual liability specifically covering this Agreement, (ii) products liability and completed operations, and (iii) broad form property damage coverage. The automobile liability policy must a combined single limit policy for bodily injury and property damage of not less than \$1,000,000). The umbrella/excess liability policy must be for a maximum single limit of \$25,000,000) for supplementing the commercial general liability policy, workers' compensation and automobile liability policy. Workers' compensation coverage must conform to statutory requirements.

b. **Insurers; Insureds; Certificates.** Manager's insurance policies required under this Agreement must be issued by companies authorized to do insurance business in the Commonwealth of Virginia and reasonably acceptable to the City. Those policies must be primary and non-contributory with any other insurance coverage or self insurance carried by the City with respect to any claims arising out of or in connection with this Agreement. The commercial general liability, automobile liability, and umbrella/excess liability insurance policies must name the City, its officers, employees and agents as additional insureds. Upon the Effective Date, and as may be reasonably required by the City during the Term, Manager must furnish certificates of insurance evidencing the required coverages. All insurance policies shall be in form, amounts and with such companies as are reasonably acceptable to the City, provided, however, each applicable insurer must have a Best's Insurance Rating of less than "A-".

c. **Insurance Related Covenants.** Manager must (i) notify the City promptly after Manager learns of any loss, damage or injury related to or in connection with the Project or the performance or non-performance of under this Agreement; (ii) notify any applicable insurance carrier in compliance with the policy terms, (iii) take no action (such as admission of liability) that might bar the City from obtaining any protection afforded by any policy the City may hold, or that might prejudice the City in its defense to any claim, demand or suit within limits prescribed by the policy or

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policies of insurance; and (iv) aid and cooperate with the City in every reasonable respect with respect to such insurance and any covered loss.

d. **Minimum Requirements.** The required insurance coverages specified in this provision are minimum insurance coverages and coverage amounts, and those specifications are only for the purposes of this Agreement. The City has not assessed the risk to which Manager may be exposed, or the liability Manager may incur, in connection with this Agreement, nor has the City represented in any fashion that such coverages or coverage amounts are prudent or otherwise sufficient to protect Manager's interests.

13. **Default; Remedies; Limitations.**

a. **Default.** If a Party fails to perform any of its obligations under this Agreement (a "Default"), the other Party is entitled to give notice to the defaulting Party, which must specify the Default and demand of performance. The defaulting Party must cure the specified Default within ten (10) days after it receives the notice of Default or, if such default cannot be remedied in such period, does not within such ten (10) days commence such act or acts as shall be necessary to remedy the default and shall not thereafter diligently proceed to cure such default.

b. **Remedies.** If the defaulting Party does not cure the Default within that 10-day period or, if such default cannot be remedied in such period, does not within such ten (10) days commence such act or acts as shall be necessary to remedy the default and shall not thereafter diligently proceed to cure such default, the non-defaulting Party will be entitled to (i) terminate this Agreement immediately by giving notice of termination to the defaulting Party and (ii) pursue all other available remedies at law, or in equity, subject to the pre-conditions and limitations specified in this Agreement.

c. **Limitations.** Anything to the contrary in this Agreement understanding, neither the City nor Manager will be liable to the other Party for any punitive, indirect, or consequential damages arising in connection with this Agreement (including lost profits, opportunity costs, or any other damages).

14. **Notices.** To be effective, each notice, consent, approval, waiver, or similar communication or action required or permitted to be given under this Agreement (a "Notice") must be in writing and must be delivered either by private messenger service (including a nationally recognized overnight courier), or by USPS mail, addressed as provided in this provision. Each Notice will be considered given on the date it is provided to the applicable messenger, or to the USPS, as the case may be, and will be considered received on the date actually received, unless delivery is evaded, in which case, the date delivery is attempted will be considered the date the Notice is received. Each address set forth in this provision will continue in effect for all purposes under this Agreement unless a Party replaces its address information by appropriate new information by a Notice to the other Parties in compliance with this provision:

To the **City**: Deputy City Manager Ronald Williams, Jr.
2401 Courthouse Drive, Room 234
Virginia Beach, Virginia 23456

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To the **Manager**: ESM VBTEC, LLC
 2020 Landstown Centre Way
 Virginia Beach, VA 23456
 Attn. John M. Wack, Jr.

15. **Various Contract Matters.**

a. **Governing Law; Binding Contract; Waiver.** This Agreement is governed by the laws of the Commonwealth of Virginia without giving effect to its choice of law principles. This Agreement is binding upon, and inures to, the benefit of each of the Parties and their respective permitted legal successors and permitted assigns. The failure of a Party to demand strict performance of any provision, or to exercise any right conferred, under this Agreement is not, and is not to be construed as, a waiver or relinquishment of that Party's right to assert or rely on that provision or right in the future. Either Party, however, may elect to waive any right or benefit to which it is entitled under this Agreement.

b. **No Third Party Beneficiary or Other Similar Rights.** There are no third-party beneficiaries to this Agreement. Accordingly, no third-party is entitled to make any claim under this Agreement for failure to perform or other breach under this Agreement. Only the Parties (and their respective permitted successors and permitted assigns) are entitled to rely upon the provisions of this Agreement.

c. **Compliance with Laws.** Manager must comply, and must cause Manager Project Team, Manager's agents and subcontractors to comply, with all federal, state and local laws, rules, regulations and ordinances applicable to the performance of its obligations under this Agreement.

d. **Prior Agreements and Discussions.** Any agreements (whether in writing or oral) between the City and Manager existing before or contemporaneously with this Agreement relating to the Project (or any prior versions of the Project) are superseded by this Agreement. All prior discussions and negotiations as to the Project (or any prior versions of this project) are merged into this Agreement. The submission of any unexecuted copy of this Agreement does not constitute an offer to be legally bound by the provisions of the document submitted; and no Party will be bound by this Agreement until it is approved, executed and delivered on behalf of by both of the Parties.

e. **Assignment.** Manager is not entitled to assign its rights, nor delegate its duties, under this Agreement without the prior consent of the City, which consent the City may be withheld in its sole discretion.

f. **Entire Agreement; Amendment; Counterparts.** This Agreement constitutes the entire agreement of the Parties as to the Project. This Agreement may only be amended or modified by a writing signed on behalf of each of the Parties. This Agreement may be signed in any number of counterparts, and, so long as each Party signs at least one counterpart, each signed counterpart evidences an original Agreement, but all signed counterparts together constitute but one Agreement.

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g. **Rules of Usage and Interpretation.** The captions in this Agreement are for convenience only and are not to be used in its interpretation. This Agreement shall not be construed against one Party, or the other Party, on the basis that its counsel drafted it or participated in its drafting. The words “include,” “including,” or words to similar purport are not to be construed to be words of limitation. References to a Party means and includes that Party and its permitted successors and permitted assigns.

h. **Venue.** Any legal action, equitable cause, or other judicial proceeding with respect to this Agreement must be brought in the courts of the Commonwealth of Virginia in the City, or of the United States of America for the Eastern District of Virginia (Norfolk Division) and in no other courts. By signing this Agreement, each Party accepts for itself and in respect of its property, generally and unconditionally, the jurisdiction of those courts.

[Signatures appear on following page]

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WITNESS the following signatures and seals.

CITY OF VIRGINIA BEACH

By: _____

Name: _____

Title: City Manager

Date: _____

ATTEST:

City Clerk

MANAGER:

ESM VBSC, LLC, a Virginia limited liability company

By: Eastern Sports Management, LLC, Virginia limited liability company, Sole Member

By: _____
John M. Wack, Jr., Manager

Date: _____

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Exhibit A – Major Components of Project

Pre-opening consulting

Project plan development

Operator agreement for a maximum term of 20 years

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Exhibit B – Deliverables, Schedule, and Budget

Deliverables related to Comprehensive Agreement:

- (1) Owner’s representative consulting fee;
- (2) Detailed operations proforma;
- (3) Staffing plan;
- (4) Marketing plan (in consultation with CVB Sports Marketing);
- (5) Operator engagement fee;
- (6) Analysis of risk sharing model, including possible operator investment;
- (7) Draft operating agreement: construction period & 20-year term

Budget

\$150,000.00

Schedule

City Council adopts Resolution with Notice of Intent to proceed with project.

Project Team Meeting(s) – Manager, Developer and Consultants

Issue written progress report to City’s designated project manager.

Project Team Meeting – Manager, Developer and Consultants

Completed Schematic Design drawings due to Manager and Developer

Issue written progress report to City’s designated project manager

Construction Estimate due to Manager and Developer

Issue written progress report to City’s designated project manager

Issue Final report to City’s designated project manager

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Exhibit C – Project Principals: Project Team

Project Principals

Manager/Operator: ESM VBSC, LLC

PROJECT TEAM

Developer - Construction Contractor: Mid Eastern Builders Inc. - See MEB Interim Agreement for details of its team.

Architect:

Mechanical/Electrical/Plumbing Consultant:

Structural Consultant:

Civil Engineer:

Legal : Hirschler Fleischer
725 Jackson Street, Suite 200
Fredericksburg, Virginia 22401

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Exhibit C-1 – City’s Management Team

Deputy City Manager- Ronald Williams, Jr.

Project Manager- Brad Van Dommelen

City Attorney’s Office- Dana R. Harmeyer, Esq.

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