

**CITY OF ROUND ROCK AGREEMENT
FOR PURCHASE OF GENERAL BUILDING CONSTRUCTION
TRADES SERVICES (MASONRY/CONCRETE FINISHING TRADE) FROM
MARIO L. CARLIN MANAGEMENT, LLC**

THE STATE OF TEXAS

§

CITY OF ROUND ROCK

§

KNOW ALL BY THESE PRESENTS:

§

COUNTY OF WILLIAMSON

§

COUNTY OF TRAVIS

§

This Agreement for on-site services in the nature of general building construction trades services (masonry/concrete finishing) to be performed on and in various commercial and residential City-owned or City-occupied buildings on a directed as-needed basis, and for related goods and services, referred to herein as the "Agreement," is made and entered into on this the _____ day of the month of _____, 2013, by and between the CITY OF ROUND ROCK, TEXAS, a home-rule municipality whose offices are located at 221 East Main Street, Round Rock, Texas 78664, referred to herein as the "City," and MARIO L. CARLIN MANAGEMENT, LLC, whose address is Post Office Box 6087, Round Rock, Texas 78683, referred to herein as "Carlin." This Agreement supersedes and replaces any previous agreements between the named parties, whether oral or written, and whether or not established by custom and practice.

RECITALS:

WHEREAS, City desires to purchase certain on-site services in the nature of general building construction trades services (masonry/concrete finishing) to be performed on and in various commercial and residential City-owned or City-occupied buildings on a directed as-needed basis, and associated goods and services, and City desires to purchase same from Carlin; and

WHEREAS, City has issued its "Invitation for Bid" for the provision of said goods, and City has selected the bid submitted by Carlin; and

WHEREAS, the parties desire to enter into this Agreement to set forth in writing their respective rights, duties, and obligations;

NOW, THEREFORE, WITNESSETH:

That for and in consideration of the mutual promises contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties mutually agree as follows:

1.01 DEFINITIONS

A. **Agreement** means the binding legal contract between City and Carlin whereby City is obligated to buy specified services and Carlin is obligated to sell same. The Agreement

includes the following: (a) City's Invitation for Bid designated Solicitation Number 13-012, Specification Number 13-910-51; (b) Carlin's Response to IFB; (c) contract award; and (d) any exhibits, addenda, and/or amendments thereto. Any inconsistencies or conflicts in the contract documents shall be resolved by giving preference in the following order:

- (1) This Agreement;
- (2) Carlin's Response to IFB;
- (3) City's Invitation for Bids, exhibits, and attachments.

B. **City** means the City of Round Rock, Williamson and Travis Counties, Texas.

C. **Effective Date** means the date upon which the binding signatures of both parties to this Agreement are affixed.

D. **Force Majeure** means acts of God, strikes, lockouts, or other industrial disturbances, acts of the public enemy, orders of any kind from the government of the United States or the State of Texas or any civil or military authority, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, hurricanes, storms, floods, restraint of the government and the people, civil disturbances, explosions, or other causes not reasonably within the control of the party claiming such inability.

E. **Goods and services** mean the specified services, supplies, materials, commodities, or equipment.

F. **Carlin** means Mario L. Carlin Management, LLC, or any of its successors or assigns.

2.01 EFFECTIVE DATE, INITIAL TERM, AND ALLOWABLE RENEWALS

A. This Agreement shall be effective on the date it has been signed by both parties hereto, and shall remain in full force and effect unless and until it expires by operation of the term stated herein, or until terminated or extended as provided herein.

B. The term of this Agreement shall be for three (3) consecutive twelve-month periods from the effective date hereof. After that term, this Agreement may be renewed for successive terms of twelve (12) months each, not to exceed in the aggregate two (2) such renewals, with such renewals to occur on or before the expiration date of the preceding term, and with such renewals being absolutely predicated upon the express written agreement of both parties. Such renewals are permitted only provided Carlin has performed each and every contractual obligation specified in this original Agreement.

C. Prices shall be firm for the duration of this Agreement and for any renewal periods. No separate line item charges shall be permitted for invoicing purposes, including but not limited to equipment rental, demurrage, costs associated with obtaining permits, or any other extraneous charges. City may permit "unit price" adjustments upwards only in accordance with

Part 1, Item 9 of City's Invitation for Bid included as a part of Exhibit "A," attached hereto and incorporated herein by reference for all purposes. Any price increase shall be requested by Carlin in writing and accompanied by the appropriate documentation to justify the requested increase. Carlin may offer price decreases at any time and in excess of any allowable percentage changes.

D. City reserves the right to review the relationship at any time, and may elect to terminate this Agreement with or without cause or may elect to continue.

3.01 CONTRACT DOCUMENTS AND EXHIBITS

City selected Carlin to supply the services as outlined in IFB Solicitation Number 13-012, Specification Number 13-910-51; and Response to IFB submitted by Carlin, all as specified in Exhibit "A." The intent of these documents is to formulate an Agreement listing the responsibilities of both parties as outlined in the IFB and as offered by Carlin in its Response to the IFB.

The services which are the subject matter of this Agreement are described in Exhibit "A" and, together with this Agreement, comprise the total Agreement and they are fully a part of this Agreement as if repeated herein in full.

4.01 INITIAL RESORT TO PRIMARY PROVIDER, AND SUBSEQUENT RESORT TO SECONDARY PROVIDER; MANDATES FOR PROVISION OF GOODS AND SERVICES

A. Initial Resort to Primary Provider, and Subsequent Resort to Secondary Provider.

The parties specifically acknowledge and agree as follows: Carlin shall be considered as one of two providers of the specified goods and services, and shall be considered the primary provider. City may, in its sole and unfettered discretion, elect to seek goods from either one of the two providers. Should the primary provider contacted not be able to fulfill the order in strict accordance with the mandates of this Agreement, then and in that event the remaining provider may be considered "best value" and be contacted to provide the goods as a secondary provider.

Carlin specifically further acknowledges and agrees as follows: This Agreement is not an exclusive agreement. City may, in its sole and unfettered discretion, elect to use either of the two providers in whatever order it deems most advantageous to City's purposes. City may, in its sole and unfettered discretion, elect to use any other providers. City is not obligated to use or purchase any estimated annual quantity of goods, and no guarantee is made of any minimum or maximum purchase.

B. Mandates for Provision of Goods and Services – Emergency Service Calls.

Carlin specifically further acknowledges and agrees as follows:

Carlin shall maintain regular business hours from 7:00 am to 6:00 pm Monday through Friday, and shall be available for emergency service calls on a 24/7 basis with a maximum two (2) hour response time. Carlin shall provide City with a 24-hour emergency contact telephone number connected with, at minimum, a voice mail paging system outside of regular business hours.

City shall make a notification call to Carlin by telephone with emergency instructions when City has designated an emergency service call situation. In the event that Carlin does not answer the telephone and/or return City's notification voicemail within thirty (30) minutes of initial placement of call, then and in that event City may contact and place the order with the secondary provider as provided above. Non-answer of notification call may result in City declaring Carlin to be non-compliant with the order and under this Agreement; non-returned voicemail within thirty (30) minutes may result in City declaring Carlin to be non-compliant with the order and under this Agreement. The legal definition under this Agreement of "repeated non-compliance" shall mean three (3) incidents, either sequential or not, of non-compliance as delineated herein within a period of six (6) consecutive months. Repeated non-compliance may result, at City's sole discretion, in cancellation of this Agreement in whole or in part.

When City has notified Carlin of an emergency service call situation, Carlin shall have trained personnel on-site within two (2) hours of City's notification. If the ordered goods and services are not delivered on-site or in-hand to City strictly within the timeframe specified in this Agreement, then and in that event Carlin may be deemed to be non-compliant with the order and its "best value" designation suspended as to that order, and City shall be free to procure the goods and services elsewhere from the remaining provider or from a different source.

Mandates for Provision of Goods and Services – Non-Emergency Service Calls.

Carlin specifically further acknowledges and agrees as follows:

City shall make a notification call to Carlin by telephone with non-emergency instructions when City has designated a non-emergency service call situation. In the event that Carlin does not answer the telephone and/or return City's notification voicemail within twenty-four (24) hours of initial placement of call by City, and provide a written estimate within forty-eight (48) hours of initial placement of call by City, and guarantee that work will be initiated within five (5) days of City's initial request, then and in that event City may contact and place the order with the secondary provider as provided above. Non-answer of notification call may result in City declaring Carlin to be non-compliant with the order and under this Agreement; non-returned voicemail within twenty-four (24) hours may result in City declaring Carlin to be non-compliant with the order and under this Agreement. The legal definition under this Agreement of "repeated non-compliance" shall mean three (3) incidents, either sequential or not, of non-compliance as delineated in this paragraph within a period of six (6) consecutive months. Repeated non-compliance may result, at City's sole discretion, in cancellation of this Agreement in whole or in part.

When City has designated a non-emergency service call situation, Carlin shall fulfill in full the non-emergency order within the dates and times specified by City. Driving distance

from City's location to Carlin shall not exceed 35 miles. If the ordered goods and services are not delivered on-site or in-hand to City strictly within the timeframes specified in this Agreement, then and in that event Carlin may be deemed to be non-compliant with the order and its "best value" designation suspended as to that order, and City shall be free to procure the goods elsewhere from the remaining provider or from a different source.

5.01 ITEMS AWARDED

Only if, as, and when needed by City, masonry/concrete finishing services are awarded to Carlin in accordance with bid items #1 through and including #4 shown on Exhibit "A," as follows:

Mason/Concrete Finisher	
Regular Hourly Labor Rate	\$35.00 (4 minimum hours)
Overtime Hourly Labor Rate	\$52.50 (no minimum hours)
Materials (if on Cost-Plus basis)	
Percentage Markup	15%

6.01 COSTS

Carlin specifically acknowledges and agrees that City is not obligated to use any estimated annual quantity of services, and City may not expend in excess of \$15,000.00 in payment of such services per single job performed during the initial term of this Agreement. Only if, as, and when needed by City, the bid costs listed on Exhibit "A," which are specifically relevant to the referenced bid items, shall be the basis of any charges collected by Carlin.

7.01 INVOICES

All invoices shall include, at a minimum, the following information:

- A. Name and address of Carlin;
- B. Purchase Order Number;
- C. Description and quantity of items received; and
- D. Delivery dates.

8.01 INTERLOCAL COOPERATIVE CONTRACTING / PURCHASING

Authority for local governments to contract with one another to perform certain governmental functions and services, including but not limited to purchasing functions, is granted under Government Code, Title 7, Chapter 791, Interlocal Cooperation Contracts, Subchapter B and Subchapter C, and Local Government Code, Title 8, Chapter 271, Subchapter F, Section 271.101 and Section 271.102.

Other governmental entities within the State of Texas may be extended the opportunity to purchase off of the City of Round Rock's bid, with the consent and agreement of the successful vendor(s) and Round Rock. Such agreement shall be conclusively inferred for the vendor from lack of exception to this clause in the vendor's response. However, all parties hereby expressly agree that the City of Round Rock is not an agent of, partner to, or representative of those outside agencies or entities and that the City of Round Rock is not obligated or liable for any action or debts that may arise out of such independently-negotiated "piggyback" procurements.

9.01 NON-APPROPRIATION AND FISCAL FUNDING

This Agreement is a commitment of City's current revenues only. It is understood and agreed that City shall have the right to terminate this Agreement at the end of any City fiscal year if the governing body of City does not appropriate funds sufficient to purchase the services as determined by City's budget for the fiscal year in question. City may effect such termination by giving Carlin a written notice of termination at the end of its then-current fiscal year.

10.01 PROMPT PAYMENT POLICY

In accordance with Chapter 2251, V.T.C.A., Texas Government Code, any payment to be made by City to Carlin will be made within thirty (30) days of the date City receives goods under this Agreement, the date the performance of the services under this Agreement are completed, or the date City receives a correct invoice for the goods or services, whichever is later. Carlin may charge interest on an overdue payment at the "rate in effect" on September 1 of the fiscal year in which the payment becomes overdue, in accordance with V.T.C.A., Texas Government Code, Section 2251.025(b). This Prompt Payment Policy does not apply to payments made by City in the event:

A. There is a bona fide dispute between City and Carlin, a contractor, subcontractor, or supplier about the goods delivered or the service performed that causes the payment to be late; or

B. There is a bona fide dispute between Carlin and a subcontractor or between a subcontractor and its supplier about the goods delivered or the service performed that causes the payment to be late; or

C. The terms of a federal contract, grant, regulation, or statute prevent City from making a timely payment with federal funds; or

D. The invoice is not mailed to City in strict accordance with any instruction on the purchase order relating to the payment.

11.01 GRATUITIES AND BRIBES

City may, by written notice to Carlin, cancel this Agreement without incurring any liability to Carlin if it is determined by City that gratuities or bribes in the form of entertainment, gifts, or otherwise were offered or given by Carlin or its agents or representatives to any City

officer, employee or elected representative with respect to the performance of this Agreement. In addition, Carlin may be subject to penalties stated in Title 8 of the Texas Penal Code.

12.01 TAXES

City is exempt from Federal Excise and State Sales Tax; therefore, tax shall not be included in Carlin's charges.

13.01 ORDERS PLACED WITH ALTERNATE VENDORS

If Carlin cannot provide the services as specified, City reserves the right and option to obtain same from another source or supplier(s).

14.01 INSURANCE

Carlin shall meet all requirements as stated in the attached IFB Solicitation Number 13-013 (including all attachments and exhibits), and its bid response.

15.01 CITY'S REPRESENTATIVE

City hereby designates the following representative(s) authorized to act in its behalf with regard to this Agreement:

Pete Dominguez, Facilities Manager
City of Round Rock
212 Commerce Cove
Round Rock, TX 78664
512-341-3144
pdominguez@roundrocktexas.gov

16.01 RIGHT TO ASSURANCE

Whenever either party to this Agreement, in good faith, has reason to question the other party's intent to perform hereunder, then demand may be made to the other party for written assurance of the intent to perform. In the event that no written assurance is given within the reasonable time specified when demand is made, then and in that event the demanding party may treat such failure as an anticipatory repudiation of this Agreement.

17.01 DEFAULT

If Carlin abandons or defaults hereunder and is a cause of City purchasing the specified services elsewhere, Carlin agrees that it may be charged the difference in cost, if any, and that it will not be considered in the re-advertisement of the service and that it may not be considered in future bids for the same type of work unless the scope of work is significantly changed.

Carlin shall be declared in default of this Agreement if it does any of the following:

- A. Fails to make any payment in full when due;
- B. Fails to fully, timely and faithfully perform any of its material obligations hereunder;
- C. Fails to provide adequate assurance of performance under the "Right to Assurance" section herein; or
- D. Becomes insolvent or seeks relief under the bankruptcy laws of the United States.

18.01 TERMINATION AND SUSPENSION

- A. City has the right to terminate this Agreement, in whole or in part, for convenience and without cause, at any time upon thirty (30) days' written notice to Carlin.
- B. In the event of any default by Carlin, City has the right to terminate this Agreement for cause, upon ten (10) days' written notice to Carlin.
- C. Carlin has the right to terminate this Agreement only for cause, in the event of material and substantial breach by City, or by written mutual agreement to terminate.
- D. In the event City terminates under subsections (A) or (B) of this section, the following shall apply: Upon City's delivery of the referenced notice to Carlin, Carlin shall discontinue all services in connection with the performance of this Agreement and shall proceed to cancel promptly all existing orders and contracts insofar as such orders and contracts are chargeable to this Agreement. Within thirty (30) days after such notice of termination, Carlin shall submit a statement showing in detail the goods and/or services satisfactorily performed under this Agreement to the date of termination. City shall then pay Carlin that portion of the charges, if undisputed. The parties agree that Carlin is not entitled to compensation for services it would have performed under the remaining term of the Agreement except as provided herein.

19.01 INDEMNIFICATION

Carlin shall defend (at the option of City), indemnify, and hold City, its successors, assigns, officers, employees and elected officials harmless from and against all suits, actions, legal proceedings, claims, demands, damages, costs, expenses, attorney's fees, and any and all other costs or fees arising out of, or incident to, concerning or resulting from the fault of Carlin, or Carlin's agents, employees or subcontractors, in the performance of Carlin's obligations under this Agreement, no matter how, or to whom, such loss may occur. Nothing herein shall be deemed to limit the rights of City or Carlin (including, but not limited to the right to seek contribution) against any third party who may be liable for an indemnified claim.

20.01 COMPLIANCE WITH LAWS, CHARTER AND ORDINANCES

Carlin, its agents, employees and subcontractors shall use best efforts to comply with all federal and state laws, City's Charter and Ordinances, as amended, and with all applicable rules and regulations promulgated by local, state and national boards, bureaus and agencies.

21.01 ASSIGNMENT AND DELEGATION

The parties hereby bind themselves, their successors, assigns and legal representatives to each other with respect to the terms of this Agreement. Neither party shall assign, sublet or transfer any interest in this Agreement without prior written authorization of the other party.

22.01 NOTICES

All notices and other communications in connection with this Agreement shall be in writing and shall be considered given as follows:

- A. When delivered personally to recipient's address as stated in this Agreement; or
- B. Three (3) days after being deposited in the United States mail, with postage prepaid to the recipient's address as stated in this Agreement.

Notice to Carlin:

Mr. Mario L. Carlin
Mario L. Carlin Management, LLC
Post Office Box 6087
Round Rock, TX 78683

Notice to City:

Steve Norwood, City Manager		Stephen L. Sheets, City Attorney
221 East Main Street	AND TO:	309 East Main Street
Round Rock, TX 78664		Round Rock, TX 78664

Nothing contained herein shall be construed to restrict the transmission of routine communications between representatives of City and Carlin.

23.01 APPLICABLE LAW; ENFORCEMENT AND VENUE

This Agreement shall be enforceable in Round Rock, Texas, and if legal action is necessary by either party with respect to the enforcement of any or all of the terms or conditions herein, exclusive venue for same shall lie in Williamson County, Texas. This Agreement shall be governed by and construed in accordance with the laws and court decisions of the State of Texas.

24.01 EXCLUSIVE AGREEMENT

This document, and all appended documents, constitutes the entire Agreement between Carlin and City. This Agreement may only be amended or supplemented by mutual agreement of the parties hereto in writing, duly authorized by action of the City Manager or City Council.

25.01 DISPUTE RESOLUTION

City and Carlin hereby expressly agree that no claims or disputes between the parties arising out of or relating to this Agreement or a breach thereof shall be decided by any arbitration proceeding, including without limitation, any proceeding under the Federal Arbitration Act (9 USC Section 1-14) or any applicable state arbitration statute.

26.01 SEVERABILITY

The invalidity, illegality, or unenforceability of any provision of this Agreement or the occurrence of any event rendering any portion or provision of this Agreement void shall in no way affect the validity or enforceability of any other portion or provision of this Agreement. Any such void provision shall be deemed severed from this Agreement, and the balance of this Agreement shall be construed and enforced as if this Agreement did not contain the particular portion or provision held to be void. The parties further agree to amend this Agreement to replace any stricken provision with a valid provision that comes as close as possible to the intent of the stricken provision. The provisions of this section shall not prevent this entire Agreement from being void should a provision which is of the essence of this Agreement be determined to be void.

27.01 MISCELLANEOUS PROVISIONS

Standard of Care. Carlin represents that it employs trained, experienced and competent persons to perform all of the services, responsibilities and duties specified herein and that such services, responsibilities and duties shall be performed in a manner according to generally accepted industry practices.

Time is of the Essence. Carlin understands and agrees that time is of the essence and that any failure of Carlin to fulfill obligations for each portion of this Agreement within the agreed timeframes will constitute a material breach of this Agreement. Carlin shall be fully responsible for its delays or for failures to use best efforts in accordance with the terms of this Agreement. Where damage is caused to City due to Carlin's failure to perform in these circumstances, City may pursue any remedy available without waiver of any of City's additional legal rights or remedies.

Force Majeure. Neither City nor Carlin shall be deemed in violation of this Agreement if it is prevented from performing any of its obligations hereunder by reasons for which it is not responsible as defined herein. However, notice of such impediment or delay in performance must be timely given, and all reasonable efforts undertaken to mitigate its effects.

Multiple Counterparts. This Agreement may be executed in multiple counterparts, any one of which shall be considered an original of this document; and all of which, when taken together, shall constitute one and the same instrument.

IN WITNESS WHEREOF, City and Carlin have executed this Agreement on the dates indicated.

City of Round Rock, Texas

By: _____
Printed Name: _____
Title: _____
Date Signed: _____

Mario L. Carlin Management, LLC

By: Mario L. Carlin
Printed Name: Mario L. Carlin
Title: Owner
Date Signed: 3/25/2013

For City, Attest:

By: _____
Sara L. White, City Clerk

For City, Approved as to Form:

By: _____
Stephan L. Sheets, City Attorney

