

CITY OF EL PASO, TEXAS
AGENDA ITEM
DEPARTMENT HEAD'S SUMMARY FORM

CITY CLERK DEPT.
2018 JUL 18 PM 3:55

Item 4
Board

DEPARTMENT: Capital Improvement Department

AGENDA DATE: July 23, 2018

CONTACT PERSON/PHONE: Sam Rodriguez, P.E., City Engineer, 212-0065

DISTRICT(S) AFFECTED: ALL

STRATEGIC GOAL: No. 4: Enhance El Paso's Quality of Life through Recreational, Cultural, and Educational Environments

SUBJECT:

Resolution of the Board of Directors of the El Paso Children's Museum Development Corporation (the "Corporation") approving the management and operating agreement relating to the development and operations of the El Paso Children's Museum; and containing other related provisions.

This agreement is between the Corporation and the EPC Museum.

BACKGROUND / DISCUSSION:

On November 6, 2012, the voters of El Paso approved the Quality of Life Bond, which included funding for new and improved amenities around El Paso. One of the projects which funding was included for was a new Children's Museum to be located within the City. On March 6, 2018, El Paso City Council approved the Memorandum of Understanding (MOU) by and between the City and EPC Museum, a Texas nonprofit corporation, to continue to negotiate the El Paso Children's Museum, and to direct the production of definitive documents for City Council's consideration to allow for the public-private partnership to construct and operate the El Paso Children's Museum. The El Paso Children's Museum Development Corporation (the Local Government Corporation or LGC) was created on March 20, 2018, which named the El Paso City Council as the Directors. This resolution provides the approval for the management and operation agreement of the El Paso Children's Museum between the Corporation and EPC Museum. This item is related to the other agenda items regarding the LGC and the proposed amendment to the 2019 Capital Plan.

SELECTION SUMMARY:

N/A

PROTEST

- ☐ No protest received for this requirement.
- ☐ Protest received.

COUNCIL REPRESENTATIVE BRIEFING:

Was a briefing provided? ☒ Yes or ☐ Not Applicable (Routine)
If yes, select the applicable districts.

- ☐ District 1
- ☐ District 2
- ☐ District 3
- ☐ District 4
- ☐ District 5
- ☐ District 6
- ☐ District 7
- ☐ District 8
- ☒ All Districts

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PRIOR COUNCIL ACTION:

March 6, 2018 – El Paso City Council approved the Memorandum of Understanding

March 20, 2018 – El Paso Children's Museum Local Government Corporation was created, naming the El Paso City Council as the Directors

AMOUNT AND SOURCE OF FUNDING:

N/A

BOARD / COMMISSION ACTION:

N/A

*****REQUIRED AUTHORIZATION*****

DEPARTMENT HEAD:



RESOLUTION OF THE BOARD OF DIRECTORS OF THE EL PASO CHILDREN'S MUSEUM DEVELOPMENT CORPORATION (THE "*CORPORATION*") APPROVING THE MANAGEMENT AND OPERATING AGREEMENT RELATING TO THE DEVELOPMENT AND OPERATIONS OF THE EL PASO CHILDREN'S MUSEUM; AND CONTAINING OTHER RELATED PROVISIONS

WHEREAS, on March 20, 2018, pursuant to the authority granted by Subchapter D of Chapter 431, Texas Transportation Code, as amended, and Chapter 394, Texas Local Government Code, the City Council of the City of El Paso, Texas (the "*City*") authorized the creation of a public, nonprofit local government corporation to act as a duly constituted authority of the City to aid and assist the City in the performance of one or more of the City's governmental functions; and

WHEREAS, Chapter 791, Texas Government Code, as amended, authorizes the Corporation to contract for museum services; and

WHEREAS, the Corporation desires to approve certain contracts to undertake the development and operation of the El Paso Children's Museum, including the Management and Operating Agreement; and

WHEREAS, the EPC Museum is a Texas non-profit corporation that has received a written determination from the Internal Revenue Service that it qualifies as a 501(c)(3); and

WHEREAS, the EPC Museum desires to provide significant financial and other benefits, including expertise, for the development of the Children's Museum;

WHEREAS, this meeting is open to the public as required by law, and public notice of the time, place and purpose of this meeting was given as required by Chapter 551, Texas Government Code, as amended;

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF DIRECTORS OF THE EL PASO CHILDREN'S MUSEUM DEVELOPMENT CORPORATION:

Section 1. The findings and declarations contained in the preamble of this Resolution are incorporated herein as part of this Resolution.

Section 2. The Board hereby approves the Management and Operating Agreement entered into by and between the Corporation and the EPC Museum effective upon mutual execution.

Section 3. The Board hereby gives the Executive Director the authority to execute the Management and Operating Agreement by and between the Corporation and the EPC Museum effective upon execution.

Section 4. This Resolution shall take effect immediately from and after its adoption.

CITY CLERK DEPT.
2018 JUL 18 PM3:56

PASSED AND APPROVED this ____ day of July, 2018.

President, Board of Directors
El Paso Children's Museum
Development Corporation

ATTEST:

Secretary, Board of Directors
El Paso Children's Museum
Development Corporation

EXHIBIT A
MANAGEMENT AND OPERATING AGREEMENT

CHILDREN'S MUSEUM MANAGEMENT & OPERATING AGREEMENT

BY AND BETWEEN

THE EL PASO CHILDREN'S MUSEUM DEVELOPMENT CORPORATION

AND

THE EPC MUSEUM

June 11, 2018

Appendix A – Glossary of Defined Terms

Appendix B – Address for Notices

Appendix C – City Insurance Requirements

Exhibit A – Real Property Depiction

Exhibit B – Lease

Exhibit C – Funding Agreement

Exhibit D – Draw Request, Schedule and Process

MANAGEMENT AND OPERATING AGREEMENT

This MANAGEMENT AND OPERATING AGREEMENT (this "**Agreement**") is made and entered into as of _____, 2018 (the "**Execution Date**") by and between the EL PASO CHILDREN'S MUSEUM DEVELOPMENT CORPORATION, a local government corporation created by the City of El Paso ("**Corporation**"), and THE EPC MUSEUM, a Texas nonprofit corporation ("**EPC**" or "**Operator**"). The Corporation and EPC are sometimes collectively referred to herein as the "**Parties**" and individually as a "**Party**".

RECITALS

WHEREAS, the Corporation, a local government corporation, was created by the City of El Paso (the "**City**") pursuant to Texas Transportation Code, Chapter 431 to aid and act on behalf of the City to accomplish any governmental purpose, including developing and operating the Museum (defined below);

WHEREAS, EPC is a non-profit corporation of the State of Texas currently operating as a support organization of the El Paso Community Foundation and created to act as a private venture partner in developing and operating the Museum as "**Operator**", including providing significant financial and other benefits, including expertise, to the Museum;

WHEREAS, the Corporation and the City entered into that certain funding agreement (attached hereto as **Exhibit C**) by which the parties agreed to cooperate to provide a first class, state of the art children's museum in the downtown area of the City with land, Museum Improvements, and Museum Exhibits valued at approximately \$60 million (the "**Funding Agreement**"), including the City's Development Contribution, Capital Repair Fund, and Stipend, as well as the contributions and pledges that EPC commits to secure from donors as described in the Funding Agreement (the "**Donor Contributions**", as further defined in Section 3.3(d) below);

WHEREAS, EPC has received a written determination letter from the Internal Revenue Service that it qualifies as a Section 501(c)(3) organization under the Internal Revenue Code;

WHEREAS, the Corporation desires EPC's assistance and expertise to design, develop, and construct a new, first-class, state-of-the-art children's museum within El Paso's downtown (with the building referred to as the "**Facility**" and the project referred to as the "**Children's Museum Project**"), with the City owning the Site (described below) and the Facility and EPC developing, managing, and operating the children's museum in the Facility (the "**Museum**");

WHEREAS, the Corporation and the City have entered into that certain lease agreement for the "**Site**"(described therein) (the "**Lease**"); and

WHEREAS, concurrently with the execution of this Agreement, the Corporation shall assign to EPC and EPC shall accept the assignment of the Corporation's rights, responsibilities, and obligations under the Lease.

AGREEMENTS

NOW, THEREFORE, for and in consideration of the respective covenants and agreements of the Parties herein set forth, and other good and valuable consideration, the receipt and sufficiency of which are acknowledged, the Corporation and EPC, each intending to be legally bound, agree as follows:

Article I General Terms

Unless the context shall otherwise expressly require, capitalized terms used in this Agreement shall have the meanings assigned to them in the Glossary of Defined Terms attached hereto as Appendix A and incorporated herein by reference, which also contains rules as to usage that shall be applicable herein. Terms used but not defined herein shall have the meaning ascribed to such terms in the Lease.

Article II Representatives and Project Oversight

2.1 Corporation Representative. Corporation designates the City Manager of City, including his designee, to be the representative of Corporation (the "Corporation Representative"), and the City Manager shall have the right, from time to time, to change the Person who is the Corporation Representative. The only functions under this Agreement of the Corporation Representative shall be as expressly specified in this Agreement. Any written Approval, decision, confirmation or determination hereunder by the Corporation Representative shall be binding on the Corporation; *provided, however*, that notwithstanding anything in this Agreement to the contrary, the Corporation Representative shall not have any right to modify, amend, or terminate this Agreement.

2.2 EPC Representative. The Executive Director of EPC shall be the representative of EPC (the "EPC Representative", and together with the Corporation Representative, the "Representatives"), who shall be authorized to act on behalf of EPC under this Agreement. EPC shall have the right, from time to time, to change the Person who is the EPC Representative. Any written Approval, decision, confirmation, or determination hereunder by the EPC Representative shall be binding on EPC; *provided, however*, that notwithstanding anything in this Agreement to the contrary, the EPC Representative shall not have any right to modify, amend or terminate this Agreement.

2.3 Budget.

(a) Reports; Audit Rights.

(i) EPC shall provide the Corporation with a monthly report showing amounts funded against the Museum Budget. At Final Completion, EPC shall provide the Corporation with a final, reconciled report certified by the EPC Representative showing all amounts funded against the Museum Budget. The Corporation, at its expense (except as provided below), shall have the right, at any time during the Term of this Agreement to audit the monthly reports and the

final, reconciled report produced by EPC pursuant to this Section 2.3 to confirm EPC's compliance with the terms of this Agreement. Any such audit will be commenced and conducted with reasonable promptness, after reasonable notice to EPC and by an auditor whose fee for such audit is not calculated on a contingent basis.

(ii) EPC shall provide the Corporation a quarterly report showing the Donor Contributions against the Museum Budget.

2.4 Museum Updates.

(a) During the period before Final Completion, on behalf of the Corporation, EPC shall make periodic, but not less than quarterly, updates to the City's governing body on the status of the design, development, and construction, including budget and schedule updates for the Museum until the Museum is open to the public.

(i) EPC shall adopt and present a Museum Construction Schedule to the Corporation and the City.

(ii) The Museum Improvements budget and schedule shall identify a program of Museum Improvements, exhibit design and installation (the "Museum Exhibit Acquisition Plan", described below), and FF&E Requirements.

(iii) EPC shall develop and present to the Corporation and the City's governing bodies a five (5)-year Museum Operating Budget, including two (2) years of pre-opening operations and three (3) years of post-opening operations, including anticipated revenue generating activities (including, but not limited to, retail sales, concessions, special events, and educational opportunities). EPC shall also develop and present a fund raising plan as described in the definition of Museum Budget.

(b) Additionally, for the term of this Agreement, EPC shall submit to the Corporation and the City's governing body for approval, such approval not to be unreasonably withheld or denied, annual Museum Budgets and reconciliations as well as audits as required in the Funding Agreement, including status updates on the Donor Contributions.

Article III

Design, Construction and Operation

3.1 Museum Development. EPC shall develop the Museum in full compliance with the Corporation's obligations under the Lease and the Funding Agreement and in material conformance with the *EPC Museum 100% Strategic Master Plan* developed by Gyroscope Inc. EPC shall be permitted to make a material change or alteration in the development of the Museum; provided that (i) such change or alteration addresses specific design and space constraints, funding, or modifications as may be

proposed from time to time by Gyroscope Inc., the Museum Concept Consultant, the Exhibit Architect, and/or the Project Architect, and (ii) the City's City Engineer provides written approval for such change or alteration.

(a) Under the terms of this Agreement, EPC shall provide professional and contracted services to develop the Museum utilizing the Facility and the Site. In executing this provision, EPC shall comply with Section 252.022(a)(7)(F), Texas Local Government Code, Section 431.110, Texas Transportation Code, and Chapter 2254, Texas Government Code, as well as all other Applicable Laws, including laws and regulations related to conflict of interest.

(b) It is anticipated that EPC has or will engage an Exhibit Concept Consultant, an Exhibit Architect, a Project Architect, and a Construction Contractor as well as the ancillary services customarily required for a project of the type, size, scope, and quality of the Museum.

(c) EPC shall provide a comprehensive parking and traffic flow plan to provide for safe parking, ingress, and egress for Museum employees and patrons, including bus parking, drop off, and pick up, as required by the City's development guidelines (the "Parking Plan"). The Corporation will provide a copy of the City's downtown parking plan and study to EPC. The Corporation shall undertake reasonable efforts to ensure the City cooperates and assists the EPC and the Project Architect in the development and implementation of a Parking Plan.

3.2 Sources of Design and Construction Funding. Funding for the design and construction of the Museum, including work related to the Site and Facility, shall be as follows:

(a) The Funding Agreement denotes City obligations for a "Development Contribution," such funds to be spent on Site acquisition, design, construction, and any necessary professional services on behalf of the City or the Corporation related to the same, as well as Museum Exhibit acquisition and installation, including the Exhibit Concept Consultant and the Exhibit Architect. The Development Contribution shall never exceed \$39.25 million. The Development Contribution includes:

(i) \$19.25 million in proceeds from the voted Quality of Life Bonds (including funds already expended on acquisition and preparation of the Site and certain professional services fees); and

(ii) \$20 million in proceeds from Certificates of Obligation.

(b) EPC acknowledges the funding cap described in Section 3.2(a) above and outlined further in the Funding Agreement. EPC acknowledges that the Funding Agreement is the only source of funding for the Corporation. EPC hereby recognizes that the City is under no obligation to, and the Corporation cannot and will not, contribute to construction overruns or additional development costs associated with the Museum. EPC

warrants and represents that EPC will solely and entirely fund any cost overruns or additional development costs beyond the Development Contribution.

(c) EPC, through its private fund raising efforts and the Stipend (described below) from the City, shall pay for the following EPC expenses:

- (i) Formation and operation of EPC;
- (ii) Exhibit Concept Consultant's fees and expenses;
- (iii) Exhibit Architect's fees and expenses;
- (iv) The architectural design competition process;
- (v) EPC fund raising activities;
- (vi) Museum Director search, hiring, and compensation;
- (vii) All or part of the Museum Exhibit design, acquisition, construction and installation; and
- (viii) Related legal and other professional services required to accomplish EPC's obligations hereunder.

3.3 Sources for Operational Funding. Funding for the management and operations of the Museum shall be as follows:

(a) Capital Repair. In addition to any capital repair funds privately raised and allocated by EPC under the Approved Museum Budget, the following applies under the Funding Agreement:

(i) Commencing on the opening of the Museum, and on each anniversary date thereafter through and including the fifth anniversary date, the City will deposit three hundred thousand dollars (\$300,000) per year into a segregated "Capital Repair Fund" account of the Corporation. Funds in the Capital Repair Fund shall be used exclusively for Facility improvements or capital repairs.

(ii) Beginning on the sixth anniversary date of the opening of the Museum, and on each anniversary date thereafter throughout the term of the Lease, the City will deposit one hundred fifty thousand dollars (\$150,000) per year into the Capital Repair Fund.

(iii) Beginning on the sixth anniversary date of the opening of the Museum, and on each anniversary date thereafter throughout the term of the

Lease, EPC (as assignee) shall also deposit the one hundred fifty thousand dollars (\$150,000) per year into the Capital Repair Fund on behalf of the Corporation.

(b) General Maintenance and Repair. In addition to any general maintenance and repair funds privately raised and allocated by EPC under the Approved Museum Budget, as required under the Lease, EPC (as assignee) shall pay the City twenty four thousand dollars (\$24,000) per year in Lease Payments on behalf of the Corporation. The City will deposit the Lease Payments into a segregated "Lease Payment Account" of the Corporation, to which EPC has full access in accordance with Section 4.3. Funds in the Lease Payment Account shall be used exclusively as provided for in the Lease.

(c) Operating Stipend. Pursuant to the Funding Agreement, as of January 19, 2017 (the "Stipend Commencement") and continuing through the term of the Lease and this Agreement, the City will provide EPC a stipend equal to thirty-three percent (33%) of the Approved Museum Budget each year (the "Stipend").

(i) The Stipend shall initially be paid beginning on Stipend Commencement in a prorated amount. Thereafter, the Stipend shall be paid in one-fourth installments on the first day of each calendar quarter.

(ii) At the end of the fourth quarter of each year of the Lease EPC shall provide the Corporation and the City with a financial statement providing budgeted versus actual variances for the year. The City shall "true up" any amounts overpaid or underpaid to EPC in its next quarterly payment.

(iii) The Stipend may be used for any Museum operational expenses, including salaries, Museum Exhibits, and repairs. No portion of the Stipend shall be required to be set aside for improvements or capital repairs.

(iv) Expenses related to the architectural design competition and or selection process shall be excluded from the operating expenses described in the Museum Budget for purposes of determining the amount of the Stipend.

(v) The Corporation and the City shall establish acceptable benchmarks that if reached may result in increases to the Stipend amount.

(vi) To the extent that the actual financial performance deviates substantially from the budgeted performance, the Corporation and the City will establish a mutually acceptable manner for adjusting the Stipend.

(vii) The Stipend shall not exceed the maximum amount two million five hundred thousand dollars (\$2,500,000) (the "Stipend Cap"). The Corporation shall use reasonable efforts to have the City review the Stipend Cap amount every third year, to assess whether this Stipend cap is achieving the thirty-three percent (33%) goal stated above and in the Funding Agreement.

(d) Donor Contributions. Over a ten (10) year period following the issuance of the Museum's certificate of occupancy, EPC agrees to secure a minimum of twenty million dollars (\$20,000,000) in contributions received and/or unconditional promises to give (as determined in accordance with generally accepted accounting principles (GAAP) and Accounting Standards presented by the Financial Accounting Standards Board as applied by nongovernmental entities) from donors, (the "Donor Contributions"); provided that in calculating the Donor Contributions at the end of this ten (10) year period, no more than ten percent (10%) of such contributions shall be in the form of pledges/unconditional promises. The Donor Contributions will be used for Museum Exhibit design, purchase, construction, repair, replacement, maintenance, restoration, installation, and Museum operational expenses, including salaries and programs. For purposes of calculating Donor Contributions, Donor Contributions shall not include (i) City contributions, (ii) El Paso County contributions, or (iii) earned revenue, such as revenue generated from ticket or entrance fees, concessions, rental fees, or other operational or programming activities. For clarity, Donor Contributions shall not include operational or programming stipends or grants that offset earned revenue (such as stipends or grants to provide free admission for school children). Operational and programming stipends or grants shall be reviewed individually by the EPC and the Corporation to determine whether such stipends or grants shall be Donor Contributions.

3.4 Museum Improvements and General Work Requirements.

(a) Museum Improvements. EPC shall design, develop, and construct the Museum Improvements in accordance with the terms and conditions of this Agreement and all Applicable Laws, and shall endeavor to diligently and continuously adhere to the Museum Construction Schedule.

(b) Quality Standard. The parties agree that the scope of design and development specifications for construction, and the construction, of the Museum Improvements will adhere to the Quality Standard.

(c) Liquidated Damages. In the event the GMP Contractor fails to cause Substantial Completion of the Museum Improvements Work to occur on or before the date required by the Museum Construction Contract (defined herein), EPC agrees to use commercially reasonable efforts to collect from the GMP Contractor the liquidated damages set forth in the Museum Construction Contract for such failure. EPC will not (i) amend or modify the provisions providing for liquidated damages in the Museum Construction Contract, (ii) waive, release, reduce or terminate the liquidated damages payable by the GMP Contractor thereunder, or (iii) waive, release, extend or terminate the GMP Contractor's obligation to achieve Substantial Completion in accordance with the Museum Construction Schedule, without the prior Approval of Corporation, such Approval not to be unreasonably withheld.

(d) Museum Exhibit Acquisition Plan. EPC agrees to exercise commercially reasonable efforts to coordinate and develop a plan (the "Museum Exhibit Acquisition Plan" for the design, acquisition, construction and installation Museum Exhibits in

substantial conformity with the exhibit design prepared by the Exhibit Concept Consultant. The Museum Exhibit Acquisition Plan shall include provisions either designating, or setting forth a procedure for designating, whether a particular Museum Exhibit is owned by the City, the County, EPC, or another entity.

3.5 Corporation Access to the Museum Improvements. Prior to opening the Museum to the general public, the Corporation Representative and its agents or contractors shall have the right of access, for itself and its authorized representatives, to the Museum and all portions thereof for conducting inspections for purposes of determining compliance with this Agreement. Such access shall be without charge, and at normal construction hours during the construction period, provided the Corporation Representative and all such agents (a) notify the EPC Representative in advance of such proposed entry by the Corporation Representative and its agent or contractors, (b) do not hinder or interfere with the construction of the Museum Improvements or the activities of EPC's contractors (including the GMP Contractor) and coordinate such work with such activities of EPC's contractors (including the GMP Contractor) to minimize the risk of creating Cost Overruns, (a) pay all costs of such work, (b) take such reasonable protective precautions or measures as the EPC Representative or its contractors (including the GMP Contractor) may reasonably request, given the stage of the construction of the Museum Improvements at the time of such entry, and (c) comply with and be subject to the provisions of the Museum Construction Contract relating to EPC's rights to access including providing the insurance required by the terms of the Museum Construction Contract (or, if the GMP Contractor does not specify the same, then by providing such insurance as EPC may reasonably request).

3.6 Work Performed.

(a) General Requirements. EPC shall perform or cause the performance of the Museum Improvements Work in accordance with and subject to the terms of this Agreement, and EPC shall promptly and faithfully cause the GMP Contractor to perform that portion of the Museum Improvements Work to be performed under the Museum Construction Contract in accordance with the terms and provisions thereof and keep and perform all of the covenants and conditions contained in the Museum Construction Contract to be kept and performed by EPC.

(b) Museum Construction Contract. The Museum Construction Contract to be executed by EPC with respect to the construction of the Museum Improvements (the "Museum Construction Contract") shall (i) contain a completion guaranty and guaranteed maximum or fixed price for the Final Completion of the Museum Improvements Work, (ii) cause the GMP Contractor to obtain, keep, and maintain performance and payment bonds from a Qualified Surety in a total amount equal to one hundred percent (100%) of the costs of the Museum Improvements Work, such performance and payment bonds to be held by and firmly bound unto EPC, and (c) comply with the terms of the Warranty provision described in Section 3.6(d) below.

(c) Record Drawings and Other Documents. Upon Substantial Completion of the Museum Improvements Work, EPC shall furnish to Corporation (i) three copies of the as-built drawings that the GMP Contractor delivers to EPC under the Museum

Construction Contract, and (ii) three copies of the operating and maintenance data binders supplied by the GMP Contractor under the Museum Construction Contract.

(d) Warranty Claims. EPC shall take commercially reasonable efforts to enforce all warranty and similar claims with respect to the Museum Improvements at EPC's cost and expense. Corporation shall make EPC aware of any defects or warranty issues which come to its attention with respect to the Museum Improvements. Corporation and EPC shall cooperate with each other in prosecuting any and all warranty and similar claims, at EPC's cost and expense, under any and all contracts or other agreements with third parties for the design or construction of the Museum.

(e) Construction Cooperation. EPC will perform the Museum Improvements Work, and require the GMP Contractor to perform the Museum Improvements Work, in accordance with the cooperative process described in Section 2.3, including instructing the GMP Contractor or the Project Architect to provide the Corporation with a duplicate copy of all preliminary drawings or specifications, written notices and other documentation delivered or received by any of them contemporaneously with their delivery to EPC, including advance notice of any weekly progress meetings and design review meetings.

(f) Punch-list Items. Upon Substantial Completion, EPC shall provide notice thereof to the Corporation. The Corporation Representative shall schedule a time to meet within ten (10) Business Days thereafter to inspect the Museum and prepare a "punch-list" of items that are reasonably required to be completed or repaired prior to Final Completion of the Museum. Contractor shall complete, or cause to be completed, all reasonable punch-list items within thirty (30) days after the inspection or as soon as is reasonably practicable in light of the work to be performed.

(g) Final Completion. On or before the date, which is ninety (90) days after the Substantial Completion Date, EPC shall cause Final Completion of the Museum Improvements Work to occur.

3.7 Cost Overruns. The term "Cost Overruns" as used in this Agreement shall mean the amount by which Museum Costs exceed the approved construction budget, as presented to the Corporation and the City's governing bodies. EPC shall be solely responsible for any Cost Overruns; provided, however that Cost Overruns resulting from a change or request initiated in writing by the City and approved by the City Manager shall be paid by the City.

3.8 Management and Operations. For the term of this Agreement, EPC shall be the "Operator" of the Museum. As Operator, EPC shall be responsible for the day to day management and operations of the Museum, including, but not limited to:

(a) Selecting the Museum design/architecture firm through a design completion process and entering into a contract for the design of the Museum;

(b) Selecting the Contractor and entering a GMP Contract for the construction of the Museum;

(c) Selecting an Exhibit design consultant and entering into a professional services contract for the exhibit design for the Museum; provided, such consultant specializes in children's museums and is nationally recognized in this field;

(d) Assuming the Corporation's obligations under the Lease, including obligation for Lease Payments;

(e) Purchasing and installing the Museum Exhibits;

(f) Operating the Museum under the governance of a board of directors;

(g) Providing appropriate staffing for the Museum, including a qualified Executive Director;

(h) Maintaining the Site, including landscaping;

(i) Maintaining the Museum and all Museum Exhibits at all times to the Quality Standard;

(j) Performing in compliance with all Applicable Laws, including, but not limited to Chapter 171, Texas Local Government Code, pertaining to Conflicts of Interest; Chapter 252, Texas Local Government Code pertaining to purchasing and contracting; and Chapter 2254, Texas Government Code, pertaining to Professional and Consulting Services;

(k) Securing, over the first ten (10) years of the Term, a minimum of \$20 million in Donor Contributions;

(l) Maintaining its tax exempt status as an organization described in Section 501(c)(3) of the Internal Revenue code and its non-profit status under state law;

(m) Preparing and submitting all reports, budgets, and audits as required under this Agreement, the Lease, and the Funding Agreement;

(n) Providing insurance coverage as required under this Agreement, the Lease, and the Funding Agreement; and

(o) Accepting all rights and responsibilities of the Corporation, as Tenant under the Lease Agreement.

3.9 EPC Delegate. The Parties acknowledge and agree that EPCM Construction, LLC, a Texas limited liability company ("EPCM"), a wholly owned subsidiary of EPC, will be formed by EPC to handle the construction of the Museum. Notwithstanding anything in this Agreement to the contrary, upon its formation, EPC may assign and delegate all or any part of its design phase and construction phase rights,

duties and obligations under this Agreement to EPCM. City agrees to execute any documentation reasonably requested by EPC in connection with said assignment or delegation. EPC Delegate shall operate pursuant to all laws and regulations outlined in this Agreement and otherwise in effect.

Article IV

Administrative Agent and Funding

4.1 **Administrative Agent.** Under the terms of the Funding Agreement, the City is the Administrative Agent for the Corporation.

4.2 **Development Contributions.** The Development Contributions (less acquisition and professional services fees already expended, but accounted for) shall be deposited into a segregated Corporation account (the "**Development Fund**"), which shall be used exclusively for the Museum, and shall be accessed by EPC through the Corporation by draw request. Draw requests must comply with the Approved Museum Budget as presented by EPC to the Corporation and the City.

(a) Pursuant to the terms of the Funding Agreement, the City will maintain reasonably detailed books and records of receipts and disbursements of all Museum Funding amounts (the "**Museum Funding Records**"). Such books and records shall be available to EPC and Corporation for examination and copying, from time to time, upon reasonable notice. EPC's and Corporation's rights to examine such books and records shall survive termination of this Agreement for a period of seven (7) years after Final Completion.

(b) EPC and the Corporation shall establish a draw request form, process, and schedule with the City, to include authorization of draft draw request forms, which shall be attached hereto as Exhibit D.

(c) So long as there is not an uncured EPC Default, the Corporation shall pay the entire amount of all draw requests made in material compliance with this Section 4.2 no later than ten (10) Business Days after delivery of any such request to the Corporation.

4.3 **Capital Repair Contributions.** The annual Capital Repair Contributions by the City and EPC shall be deposited into a segregated Corporation account (the "**Capital Repair Fund**") and shall be accessed by EPC through the Corporation by draw requests. Money in the Capital Repair Fund, including any interest accrued, shall be used exclusively for Museum Improvements and capital repairs and improvements relating to the Museum in accordance with the Approved Museum Budget. Draw requests must comply with the Approved Museum Budget as presented by EPC to the Corporation and the City.

(a) Pursuant to the terms of the Funding Agreement, City will maintain reasonably detailed books and records of receipts and disbursements of all Museum Funding Records. Such books and records shall be available to EPC and the Corporation for examination and copying, from time to time, upon reasonable notice. EPC's and the Corporation's rights to examine such books and records shall survive termination of this Agreement for a period of seven (7) years after Final Completion.

(b) EPC and the Corporation shall establish a draw request form, process, and schedule with the City, to include authorization of draft draw request forms, which shall be attached hereto as Exhibit D.

(c) So long as there is not an uncured EPC Default, the Corporation shall pay the entire amount of all draw requests made in material compliance with this Section 4.3 no later than ten (10) Business Days after delivery of any such request to the Corporation.

4.4 Lease Payments. The annual Lease Payments by the EPC shall be deposited into a segregated Corporation account (the "Lease Payment Fund") and shall be accessed by EPC through the Corporation by draw requests. Money in the Lease Payment Fund, including any interest accrued, shall be used exclusive for maintenance and repairs of the Museum in accordance with the Lease and the Approved Museum Budget. Draw requests must be in compliance with the Approved Museum Budget as presented by EPC to the Corporation and the City.

(a) Pursuant to the terms of the Funding Agreement, City will maintain reasonably detailed books and records of receipts and disbursements of all Museum Funding Records. Such books and records shall be available to EPC and the Corporation for examination and copying, from time to time, upon reasonable notice. EPC's and the Corporation's rights to examine such books and records shall survive termination of this Agreement for a period of seven (7) years after Final Completion.

(b) EPC and the Corporation shall establish a draw request form, process, and schedule with the City, which shall be attached hereto as Exhibit D.

4.5 Condition to Funding. Unless waived by the City, the City shall not be obligated to continue to provide Museum Funding under this Agreement if EPC has not secured Donor Contributions on an annual basis in accordance with the minimal targets of the Museum Budget.

Article V

Term and Termination

5.1 Term. The term under this Agreement (the "Term") shall be coterminous with the Lease, unless otherwise terminated earlier by either Party under the terms hereunder.

5.2 Termination for Failure to Commence.

(a) Automatic Termination. If for any reason construction commencement does not occur by December 31, 2020, as the same may be extended in writing by the Parties, this Agreement automatically terminates.

(b) Effect of Termination. Upon termination of this Agreement, the Lease, if previously executed, shall also terminate and the Parties shall have no further rights, obligations, or liabilities under such agreements (except pursuant to the provisions of such agreements which expressly survive termination) and the Parties automatically shall be released from any future obligations under this Agreement or the Lease that arise after

the date of termination but shall not be released from any obligations which arise or relate to occurrences prior to the date of termination.

5.3 **Termination for Default.** Either Party may terminate this Agreement under the provisions of Article XIII.

5.4 **Voluntary Termination.** The Parties may jointly consent to early termination by written agreement.

Article VI

Delays and Effect of Delays

Upon the occurrence of any EPC Delay or City Delay, the Parties shall endeavor to continue to perform their obligations under this Agreement so far as reasonably practicable. Toward that end, EPC and the City each hereby agrees that it shall make all reasonable efforts to prevent and reduce to a minimum and mitigate the effect of any EPC Delay or City Delay occasioned by an Excusable EPC Delay or Excusable City Delay, and shall diligently and continuously use its commercially reasonable efforts to ensure resumption of performance of its obligations under this Agreement after the occurrence of any Excusable EPC Delay or Excusable City Delay. The Parties shall use and continue to use all commercially reasonable efforts to prevent, avoid, overcome, and minimize any City Delay or EPC Delay.

Article VII

Approvals, Confirmations and Notices; Dispute Resolution

7.1 Approvals, Confirmations and Notices.

(a) **Museum Improvements Work – Material Changes.** EPC shall obtain the prior Approval of the Corporation Representative for any Material Change to the Plans for the Museum Improvements Work prior to the commencement of any Museum Improvements Work that deviates in a material respect from the Plans for the Museum Improvements Work, such Approval not to be unreasonably withheld.

(b) **FF&E – Material Changes.** EPC shall obtain the prior Approval of Corporation Representative of any Material Change to the FF&E Requirements prior to the commencement of any Museum Improvements Work that deviates in any material respect from that required in the FF&E Requirements, such Approval not to be unreasonably withheld.

(c) **Budget – Material Changes.** EPC shall obtain the prior Approval of Corporation Representative of any Material Change to the Approved Museum Budget prior to the EPC's approval of any Approved Museum Budget amendment that deviates in any material respect from the Approved Museum Budget, such Approval not to be unreasonably withheld.

7.2 **Dispute Resolution.** In the event any dispute, controversy, or claim between or among the Parties arises under this Agreement or is related in any way to this Agreement or the relationship of

the Parties hereunder (a "Dispute" or "Controversy"), including, but not limited to a Dispute or Controversy relating to the effectiveness, validity, interpretation, implementation, termination, cancellation, or enforcement of this Agreement, the Parties shall first attempt in good faith to settle and resolve such Dispute or Controversy by mutual agreement in accordance with this Section 7.2. In the event a Dispute or Controversy arises, either Representative shall have the right to notify the other Representative that it has elected to implement the following procedures. Within ten (10) Business Days after delivery of any such notice by one Representative to the other Representative regarding a Dispute or Controversy, the Representatives shall meet at a mutually agreed time and place to attempt, with diligence and in good faith, to resolve and settle the Dispute or Controversy. If a mutual resolution and settlement are not obtained at the meeting of the Representatives, either Representative may contact the Chair of the Corporation and the Chair of EPC directly to attempt to resolve the Dispute or Controversy. If the Dispute or Controversy is not resolved after the involvement of the Chair of the Corporation and Chair of EPC, then the Corporation and EPC shall cooperate in a commercially reasonable manner to determine if techniques such as mediation or other techniques of alternate dispute resolution might be useful. If a technique is agreed upon, a specific timetable and completion date for implementation shall also be agreed upon. If such technique, timetable or completion date is not agreed upon within thirty (30) days after the notice of the Dispute or Controversy was first delivered, or if no resolution is obtained through such alternative technique, or if no meeting between the Representatives or the Chair of the Corporation and Chair of EPC and the Representatives takes place within the forty-five (45) day period following delivery of the initial notice, then either Party may seek injunctive relief or other relief at any time thereafter from any court of competent jurisdiction in El Paso County, Texas.

Article VIII

EPC Museum Board of Directors

EPC is a supporting organization of the El Paso Community Foundation (the "Community Foundation"). EPC shall operate the Museum under the governance of its directors, which directors shall be appointed by the Community Foundation pursuant to the terms of the Supporting Organization Agreement between the Community Foundation and EPC dated effective March 23, 2018. However, as described in the Funding Agreement, during the Term, the City shall be permitted to appoint two (2) directors to the EPC board. Additionally, if the total number of EPC directors ever exceeds twenty (20) voting members during the Term, the City shall be permitted to appoint no less than twenty percent (20%) of the total number of directors. The EPC directors have adopted a conflicts of interest policy and shall review said policy on a periodic basis. For the term of this Agreement, the obligations of this Article VIII shall be captured in the EPC Bylaws or other corporate resolution.

Article IX

Insurance; Indemnity

9.1 Policies Required.

(a) *Policies Required During Construction of the Museum Improvements Work.* At all times during the Museum Improvements Work, EPC will use good faith and commercially reasonable efforts to cause the GMP Contractor to keep and maintain the

policies of insurance required by the terms and conditions of the Museum Construction Contract.

(b) *Builders Risk Insurance.* Additionally, EPC shall cause its GMP Contractor to maintain adequate additional property insurance written on the so-called "Builder's Risk Completed Value Non-Reporting Form" during any period in which any Museum Improvements Work is being performed, with no coinsurance requirement, and containing a provision granting the insured permission to complete and adding EPC as the loss payee for such insurance.

(c) *Payment and Performance Bond.* EPC shall require its GMP Contractor to carry a payment and performance bond on the project for one hundred percent (100%) of the construction budget.

9.2 City Property Insurance. Pursuant to the Lease, the City has agreed, at its sole expense, to obtain and maintain property insurance at all times during the Term of the Lease, insuring all buildings and structures comprising the Museum against all risk of direct physical loss or damage to the same extent and with the same coverage as other City owned buildings such as the Civic Center, Plaza Theatre, and Convention Center. City may elect to self-insure for any deductibles in said insurance policies. Such insurance coverage may be maintained by any combination of single policies and umbrella policies and shall name Corporation and EPC as an additional insured. Such insurance shall include full replacement value cost coverage if it can be obtained at commercially reasonable terms acceptable to City.

9.3 EPC Insurance.

(a) EPC agrees, at its sole expense, to obtain and maintain all insurance standard and appropriate for a non-profit organization with employees and a management contract, including, but not limited to, directors' and officers' coverage, general liability coverage, and workers' compensation. EPC shall also carry electronic commerce/cyber security coverage.

(b) During the term of this Agreement, EPC agrees to provide all insurance, at the limits established in Appendix C and as required by the Corporation under the Lease. The City, the Corporation, and each of their officials, employees, agents and contractors shall be named as additional insureds

(c) The EPC, EPC Delegate, GMP Contractor and any other contractors or vendors under this Agreement and their subcontractors' insurance coverage shall be primary insurance as respects the City, its officials, employees, agents and contractors. Any insurance or self-insurance maintained by the City, its officials, employees, agents and contractors shall be in excess of the EPC, EPC Delegate, GMP Contractor, and any other contractor/vendor's or their subcontractor's insurance and shall not contribute to the EPC, EPC Delegate, GMP Contractor, other contractor/vendor's or their subcontractor's insurance.

(d) Prior to undertaking any work under this Agreement, the EPC, EPC Delegate, GMP Contractor and/or any other contractor/vendor working under this Agreement, at no expense to the City, shall furnish to the City a certificate of insurance with original endorsements affecting coverage for each of the insurance policies provided in Appendix C. Any deductibles or self-insured retentions must be declared to, and approved by the City.

9.4 Indemnity of EPC. To the extent allowed by Applicable Law, EPC shall indemnify, hold harmless, and defend the Corporation and the City and each of its officers, officials, employees, agents, and volunteers from any and all loss, liability, fines, penalties, forfeitures, costs and damages (whether in contract, tort or strict liability, including but not limited to personal injury, death at any time and property damage, including damage by fire or other casualty) incurred by the Corporation, the City, EPC or any other person, and from any and all Claims, demands and Actions in law or equity (including reasonable attorneys' fees and litigation expenses), arising directly or indirectly out of: (a) EPC's occupancy, use, operation, maintenance, inspection, and/or repair of the Museum, and/or (b) EPC's performance under this Agreement.

9.5 Indemnity of Corporation. To the extent allowed by Applicable Law, Corporation shall indemnify, hold harmless, and defend EPC and the City and each of its officers, officials, employees, agents and volunteers from any and all loss, liability, fines, penalties, forfeitures, costs and damages (whether in contract, tort or strict liability, including but not limited to personal injury, death at any time and property damage, including damage by fire or other casualty) incurred by EPC, the City or any other person, and from any and all Claims, demands and Actions in law or equity (including reasonable attorneys' fees and litigation expenses), arising directly or indirectly out of: (a) the Corporation's construction, occupancy, use, operation, maintenance, inspection, and/or repair of the Museum, and/or (b) Corporation's performance under this Agreement.

Article X Casualty

If, during the term of this Agreement, the Museum or any portion thereof is damaged or destroyed by Casualty, then neither Party shall have the right to terminate this Agreement and the Corporation shall promptly use commercially reasonable efforts to restore, repair, and continue construction of the Museum Improvements and the Substantial Completion Date shall be extended by the period of restoration and repair. To that end, the Corporation shall use all insurance proceeds available for such purposes. The restoration and repair details shall be undertaken in the same manner involved in the original construction of the Museum.

Article XI Assignment, Transfer and Subleasing

11.1 Assignment, Subletting or Transfers by EPC. Except as otherwise provided in Section 11.2, EPC shall not assign, transfer, sublease, license, mortgage, pledge, encumber, or otherwise hypothecate

(each a "Transfer") any right, title, interest or obligation of EPC under this Agreement, whether voluntarily, involuntarily, by operation of law or otherwise (including by way of merger or consolidation) without the prior written Approval of the Corporation's governing body and the City's governing body. If EPC wishes to assign this Agreement to a Person who is not an Affiliate of EPC, then EPC shall request the Corporation's Approval of such assignment which shall not be unreasonably withheld as long as (a) the duties and responsibilities of the assignee of EPC under this Agreement do not change, (b) the Museum, when completed, will be managed and operated by EPC or a "Qualified Operator" as defined in the Lease, (c) any such assignee must expressly assume any and all obligations of EPC under this Agreement and the Lease, and (d) there is no continuing EPC Default and such assignment would not cause a EPC Default. Without limiting the foregoing, no assignment hereunder shall affect the enforceability of this Agreement and any assignee shall continue to be bound by the terms hereof. Notwithstanding anything to the contrary contained in this Agreement, EPC shall not enter into any such Transfer (other than a Use Agreement as described in Section 11.2) without also entering into the same Transfer under the Lease to the same entity.

11.2 Use Agreement. Notwithstanding Section 11.1, EPC may enter into a Use Agreement without prior written Approval provided that such Use Agreement (a) is subject and subordinate to this Agreement, and to the rights of the Corporation hereunder, and shall expressly so state; (b) any Improvements made pursuant to such Use Agreement are made in accordance with the Quality Standard; and (c) for a use that is a Permitted Use (as defined in the Lease). EPC agrees to exercise commercially reasonable efforts in screening the counter-parties to Use Agreements that are concessioners or service providers in order to verify their financial and reputational credibility.

11.3 Transfers by Corporation. Except in connection with the Financing, the Corporation may not effect a Transfer of any right, title, interest, or obligation of the Corporation in and to the Museum or under this Agreement to any Person, without the City and EPC's prior Approval.

11.4 Requirement of Bond Counsel Opinion. Notwithstanding any other provision of this Article XI, EPC shall not make a Transfer under Section 11.1 or enter into a Use Agreement under Section 11.2, and the Corporation shall not effect a Transfer under Section 11.3, without first receiving a written opinion from Bond Counsel for the City that such action, Transfer or Use Agreement will not adversely affect the tax-exempt status of the Bonds.

Article XII

Representations, Warranties and Covenants

12.1 EPC's Representations and Warranties. As an inducement to the Corporation to enter into this Agreement, EPC represents and warrants to the Corporation that notwithstanding anything herein to the contrary and as of the Execution Date:

(a) **Organization.** EPC is a Texas nonprofit corporation duly organized, validly existing and in good standing under the laws of the State of Texas. EPC has received a written determination letter from the Internal Revenue Service that EPC qualifies as an organization described in Section 501(c)(3) of the Internal Revenue Code. The business that EPC carries on and which it proposes to carry on may be conducted by EPC. EPC is

duly authorized to conduct business as a nonprofit corporation in the State of Texas and each other jurisdiction in which the nature of its properties or its activities requires such authorization. EPC agrees that for the term of this Agreement, it will remain a nonprofit corporation under state law and a Section 501(c)(3) organization under federal law. EPC will operate the Museum in accordance with the Tax Agreement executed by EPC in connection with the issuance of the Bonds.

(b) Authority. The execution, delivery and performance of this Agreement by EPC are within its powers, and have been duly authorized by all necessary action of EPC.

(c) No Conflicts. Neither the execution and delivery of this Agreement nor the consummation of any of the transactions herein or therein contemplated nor compliance with the terms and provisions hereof or thereof will contravene the organizational documents of EPC nor any Applicable Laws to which EPC is subject or any judgment, decree, license, order or permit applicable to EPC, or will conflict or be inconsistent with, or will result in any breach of any of the terms of the covenants, conditions or provisions of, or constitute a default under, or result in the creation or imposition of a Lien upon any of the property or assets of EPC pursuant to the terms of, any indenture, mortgage, deed of trust, agreement or other instrument to which EPC is a party or by which EPC is bound, or to which EPC is subject, or create a real or perceived conflict of interest with regard to the use of public funds.

(d) No Consent. No consent, authorization, approval, order or other action by, and no notice to or filing with, any court or Governmental Authority or regulatory body or third party is required for the execution, delivery, and performance by EPC of this Agreement.

(e) Valid and Binding Obligation. This Agreement is the legal, valid, and binding obligation of EPC, enforceable against EPC in accordance with its terms, except as limited by applicable relief, liquidation, conservatorship, bankruptcy, moratorium, rearrangement, insolvency, reorganization, or similar laws affecting the rights or remedies of creditors generally, as in effect from time to time.

(f) No Pending Litigation, Investigation or Inquiry. There is no Action, Proceeding, inquiry or investigation, at law or in equity, before any court, arbitrator, governmental or other board or official, pending or, to the knowledge of EPC, threatened against or affecting EPC, which the management of EPC in good faith believes that the outcome of which would (i) materially and adversely affect the validity or enforceability of, or the authority or ability of EPC under, this Agreement to perform its obligations under this Agreement, or (ii) have a material and adverse effect on the consolidated financial condition or results of operations of EPC or on the ability of EPC to conduct its business as presently conducted or as proposed or contemplated to be conducted (including the operation of the Museum).

(g) Conflict of Interest. None of EPC or any Affiliate of EPC nor any of their officers, employees, or agents are officials or employees of the Corporation or the City. EPC has adopted a conflicts of interest policy for its board of directors and staff that includes disclosure of any contracts between EPC and any entity or person affiliated with a member of EPC's board of directors or staff. EPC acknowledges that City funds provided for the Museum have restrictions related to direct and indirect third party benefits.

12.2 Corporation's Representations and Warranties. As an inducement to EPC to enter into this Agreement, the Corporation represents and warrants to EPC that notwithstanding anything herein to the contrary and as of the Execution Date:

(a) Organization. The Corporation is a local government corporation duly formed and validly existing under the laws of the State of Texas, with all necessary power and authority to enter into this Agreement and to consummate the transactions herein contemplated.

(b) Authority. The execution, delivery and performance of this Agreement by the Corporation is within the Corporation's powers, respectively, and have been duly authorized by all necessary action of the Corporation.

(c) No Conflicts. Neither the execution and delivery of this Agreement nor the consummation of any of the transactions herein or therein contemplated nor compliance with the terms and provisions hereof or thereof will contravene any Applicable Laws to which the Corporation is subject or any judgment, decree, license, order, or permit applicable to the Corporation.

(d) No Consent. Upon the execution of this Agreement by the Corporation, the Corporation will have caused all governmental proceedings required to be taken by or on behalf of the Corporation to authorize the Corporation to make and deliver this Agreement and to perform the covenants, obligations, and agreements of the Corporation hereunder, subject to annual Appropriation.

(e) Valid and Binding Obligation. This Agreement is the legal, valid, and binding obligation of the Corporation, enforceable against the Corporation in accordance with its terms, except as limited by applicable relief, sovereign immunity, liquidation, conservatorship, bankruptcy, moratorium, rearrangement, insolvency, reorganization, or similar laws affecting the rights or remedies of creditors generally, as in effect from time to time.

(f) No Pending Litigation, Investigation or Inquiry. Except as previously disclosed to EPC in writing, there is no Action, Proceeding, inquiry or investigation, at law or in equity, before any court, arbitrator, governmental or other board or official, pending or, to the knowledge of the Corporation, threatened against or affecting the Corporation, which the Corporation in good faith believes that the outcome of which would (i) materially and adversely affect the validity or enforceability of, or the authority or ability

of the Corporation under, this Agreement to perform its obligations under this Agreement, or (ii) have a material and adverse effect on the consolidated financial condition or results of operations of the Corporation or on the ability of the Corporation to conduct its business as presently conducted or as proposed or contemplated to be conducted.

Article XIII **Defaults and Remedies**

13.1 Events of Default.

(a) **EPC Default.** The occurrence of any of the following shall be an “Event of Default” by EPC or an “EPC Default”:

(i) the failure of EPC to keep, observe or perform any of the terms, covenants, or agreements contained in this Agreement on EPC’s part to be kept, performed or observed if: (1) such failure is not remedied by EPC, within thirty (30) days after notice from the Corporation of such default; or (2) in the case of any such default which cannot with due diligence and good faith be cured within thirty (30) days, EPC fails to commence to cure such default within thirty (30) days after such default, or EPC fails to prosecute diligently the cure of such default to completion within such additional period as may be reasonably required to cure such default with diligence and in good faith; it being intended that, in connection with any such default which is not susceptible of being cured with due diligence and in good faith within thirty (30) days but is otherwise reasonably susceptible of cure, the time within which EPC is required to cure such default shall be extended for such additional period as may be necessary for the curing thereof with due diligence and in good faith; *provided, however*, that if such default is not cured within one hundred eighty (180) days after notice from the Corporation of such default, (notwithstanding EPC’s diligent prosecution of curative efforts), then such failure shall constitute an Event of Default under this Agreement;

(ii) the occurrence of an Insolvency Event with respect to EPC; or

(iii) during the term of this Agreement, a “Corporation Default” as defined in the Lease shall have occurred and remain uncured provided that such default was directly and proximately caused by EPC and is not a Corporation Default under Section.

(b) **Corporation Default.** The occurrence of the following shall be an “Event of Default” by the Corporation or a “Corporation Default”:

(i) the failure of the Corporation to perform or observe any of the obligations, covenants, or agreements to be performed or observed by the Corporation under this Agreement within thirty (30) days (or such longer period

as may be permitted in this Agreement) after notice from EPC of such failure, but if such performance or observance cannot reasonably be accomplished within such thirty (30) day period (or such longer period as may be permitted in this Agreement), then no Event of Default shall occur unless the Corporation fails to commence such performance or observance within such thirty (30) day period (or such longer period as may be permitted in this Agreement) and fails to diligently prosecute such performance or observance to conclusion thereafter; *provided*, however, that if such performance or observance has not been accomplished within one hundred eighty (180) days after notice from EPC to the Corporation of such failure (notwithstanding the Corporation's diligent prosecution of its curative efforts), then such failure shall constitute an Event of Default hereunder;

(ii) the occurrence of an Insolvency Event with respect to Corporation; or

(iii) during the term of this Agreement, a "Corporation Default" as defined in the Lease shall have occurred and remain uncured provided that such default was not directly and proximately caused by EPC.

13.2 Remedies.

(a) Corporation's Remedies. Subject to this Article XIII, upon the occurrence of any EPC Default, the Corporation may, in its sole discretion, pursue any one or more of the following remedies, without any notice or demand whatsoever, other than any notice (including Final Notice, as defined in Section 13.2(c) below) expressly provided in this Agreement:

(i) The Corporation may (but under no circumstance shall be obligated to) terminate this Agreement pursuant to Section 13.2(c).

(ii) The Corporation may exercise any and all other remedies available to the Corporation at law or in equity or otherwise provided in this Agreement; *provided* that notwithstanding the foregoing or anything else herein to the contrary, the Corporation's rights under this Section 13.2 shall be subject to the terms and provisions of Section 13.3.

(b) EPC's Remedies. Subject to this Article XIII, upon the occurrence of any Corporation Default, EPC may, at its sole discretion, pursue any one or more of the following remedies without any notice or demand whatsoever, other than any notice (including Final Notice) expressly provided in this Agreement:

(i) EPC may (but under no circumstance shall be obligated to) terminate this Agreement pursuant to Section 13.2(c).

(ii) If the Agreement is terminated pursuant to Section 13.2(c), the Corporation shall assume all obligations of EPC under all contracts, including

consulting, and employment contracts, to the extent such contracts cannot be terminated without penalty on less than thirty (30) days' notice. For any agreement the Corporation assumes, EPC shall provide to the Corporation all contract deliverables in the possession of EPC. For Donor Contributions received by EPC after such termination, EPC agrees to pay-over such contributions to the Corporation, either directly or through the El Paso Community Foundation. Nothing in this section relieves EPC of its obligation to provide required Donor Contributions as reflected in the Approved Museum Budget for existing obligations and fund cost overruns related to Museum development, construction, or operations.

(iii) EPC may exercise any and all other remedies available to EPC at law or in equity or otherwise provided in this Agreement; *provided* that notwithstanding the foregoing or anything else herein to the contrary, EPC's rights under this Section 13.2 shall be subject to the terms and provisions of Section 13.3.

(c) Right to Terminate. Upon the occurrence of an EPC Default or a Corporation Default, the non-defaulting Party, in addition to its other remedies at law or in equity, shall have the right to give the defaulting Party notice (a "Final Notice") of the non-defaulting Party's intention to terminate this Agreement after the expiration of a period of thirty (30) days from the date such Final Notice is delivered unless the Event of Default is cured, and upon expiration of such thirty (30) day period, if the Event of Default is not cured, this Agreement shall terminate without liability to the non-defaulting Party. If, however, within such thirty (30) day period the defaulting Party cures such Event of Default, then this Agreement shall not terminate by reason of such Final Notice. Notwithstanding the foregoing, in the event there is an Action or Proceeding pending or commenced between the Parties with respect to the particular Event of Default covered by such Final Notice, the foregoing thirty (30) day period shall be tolled until a final non-appealable judgment or award, as the case may be, is entered with respect to such Action or Proceeding.

(d) Cumulative Remedies. Subject to the provisions of this Article XIII, each right or remedy of the Corporation and EPC provided for in this Agreement shall be cumulative of and shall be in addition to every other right or remedy of the Corporation or EPC provided for in this Agreement, and the exercise or the beginning of the exercise by the Corporation or EPC of any one or more of the rights or remedies provided for in this Agreement shall not preclude the simultaneous or later exercise by the Corporation or EPC of any or all other rights or remedies provided for in this Agreement or hereafter existing at law or in equity, by statute or otherwise.

13.3 No Indirect Damages. IN NO EVENT SHALL EITHER PARTY BE LIABLE TO THE OTHER PARTY UNDER ANY PROVISION OF THIS AGREEMENT OR OTHERWISE FOR LOST PROFITS, INCLUDING LOST OR PROSPECTIVE PROFITS, OR FOR ANY OTHER SPECIAL, INDIRECT, INCIDENTAL, CONSEQUENTIAL, EXEMPLARY OR PUNITIVE DAMAGES, IN CONTRACT, TORT OR OTHERWISE, OR CONCURRENT

NEGLIGENCE OR THE NEGLIGENCE OF ANY OF ITS AFFILIATES OR RELATED PARTIES; PROVIDED THAT WITHOUT LIMITING THE FOREGOING, THIS LIMITATION OF LIABILITY SHALL NOT APPLY TO CLAIMS OF EACH PARTY ARISING OUT OF THIRD PARTY CLAIMS FOR ANY OF THE FOREGOING.

13.4 No Waivers.

(a) General. No failure or delay of any Party, in any one or more instances (i) in exercising any power, right, or remedy under this Agreement or (ii) in insisting upon the strict performance by the other Party of such other Party's covenants, obligations or agreements under this Agreement, shall operate as a waiver, discharge or invalidation thereof, nor shall any single or partial exercise of any such right, power or remedy or insistence on strict performance, or any abandonment or discontinuance of steps to enforce such a right, power or remedy or to enforce strict performance, preclude any other or future exercise thereof or insistence thereupon or the exercise of any other right, power or remedy. The covenants, obligations, and agreements of a defaulting Party and the rights and remedies of the other Party upon a default shall continue and remain in full force and effect with respect to any subsequent breach, act or omission.

(b) No Waiver of Termination Notice. Without limiting the effect of Section 13.4(a) above, the receipt by the Corporation of any amount due under this Agreement paid by EPC after the termination in any manner of the Term, or after the giving by the Corporation of any notice hereunder to effect such termination, shall not, except as otherwise expressly set forth in this Agreement, reinstate, continue, or extend the Term, or destroy, or in any manner impair the efficacy of, any such notice of termination as may have been given hereunder by Corporation to EPC prior to the receipt of any such amount due under this Agreement or other consideration, unless so agreed to in writing and executed by the Corporation. Neither acceptance of the keys nor any other act or thing done by the Corporation or by its agents or employees during the Term shall be deemed to be an acceptance of a surrender of the Museum, excepting only an agreement in writing executed by the Corporation by accepting or agreeing to accept such a surrender.

13.5 Effect of Termination. If the Corporation or EPC elects to terminate this Agreement, as provided herein (whether such termination occurs pursuant to this Article XIII or any other provision hereof), this Agreement shall, on the effective date of such termination, terminate with respect to all future rights and obligations of performance hereunder by the Parties (except for the rights and obligations herein that expressly are to survive termination hereof). Termination of this Agreement shall not alter the then existing Claims, if any, of either Party for breaches of this Agreement occurring prior to such termination and the obligations of the Parties hereto with respect thereto shall survive termination.

Article XIV General Provisions

14.1 No Broker's Fees or Commissions. Each Party hereto hereby represents to the other Party hereto that such Party has not created any liability for any broker's fee, broker's or agent's commission, finder's fee or other fee or commission in connection with this Agreement.

14.2 Corporation Approval. Notwithstanding anything to the contrary set forth in this Agreement, EPC recognizes and agrees that any contracts or agreements, the funding thereof, or amendments thereto, contemplated to be entered into by the Corporation under the terms of this Agreement which are entered into after the date of this Agreement will be subject to the prior Approval of the Governing Body of the Corporation, but not Approvals and confirmations expressly permitted in this Agreement to be given by the Corporation Representative.

14.3 Non-Appropriation. Notwithstanding any other provision of this Agreement or the Funding Agreement, the City's obligation to pay any money to Corporation or EPC, or any third party under this Agreement is contingent upon an Appropriation of the money by the Governing Body of City. City's failure to make an Appropriation does not create a Corporation Default under this Agreement; however, EPC, as its sole and exclusive remedy, may terminate this Agreement as a result thereof. Upon termination, the Corporation shall assume all obligations of EPC under all contracts, including consulting and employment contracts, to the extent such contracts cannot be terminated without penalty on less than thirty (30) days' notice. For any agreement the Corporation assumes, EPC shall provide to the Corporation all contract deliverables in the possession of EPC. The Corporation retains all of its rights as a body politic under State law.

14.4 Employment of Consultants. The Corporation shall have the right, at its sole cost and expense unless otherwise expressly provided herein, to employ such consultants as the Corporation may deem necessary to assist in the review of any and all plans, specifications, reports, agreements, applications, bonds, statements, and other documents and information to be supplied to the Corporation by EPC under this Agreement and to perform any inspection rights on behalf of the Corporation. EPC covenants and agrees to reasonably cooperate with such consultants in the same manner as EPC is required to cooperate with the Corporation pursuant to the terms of this Agreement. EPC shall have the right, at its sole cost and expense unless otherwise expressly provided herein, to employ such consultants as EPC may deem necessary to assist in the review of any and all plans, specifications, reports, agreements, applications, bonds, statements and other documents and information to be supplied to EPC by the Corporation or the City under this Agreement. The Corporation covenants and agrees to reasonably cooperate with such consultants in the same manner as the Corporation is required to cooperate with EPC pursuant to the terms of this Agreement.

14.5 Confidential Information and Open Records. Disclosure of the terms of this Agreement will be governed by the Texas Public Information Act, Chapter 552, Texas Government Code (as amended, the "Open Records Act"). The Corporation shall maintain the confidentiality of any proprietary information, trade secrets, or other confidential materials delivered to it pursuant to this Agreement and designated as confidential by the delivering Party (the "Confidential Information") in accordance with the Open Records Act; *provided, however*, that EPC will need to assert the basis for any such exclusion from

disclosure under the Open Records Act before the Texas Attorney General if the Corporation or the City receives an open records request. EPC acknowledges that information in its possession, paid for with City dollars, may be subject to disclosure under the Open Records Act and shall present requests for such disclosure to the Texas Attorney General for determination.

14.6 Anti-Discrimination and Diversity. In accordance with Applicable Laws, the Parties, in performing their respective obligations hereunder will not discriminate based on race, sex, religion, national or ethnic origin, age or disability. It is the intent of the Parties to encourage local participation, community involvement, and diversity in the design, construction, development, and/or operation of the Museum.

14.7 Accounting Terms and Determinations. Unless otherwise specified, all accounting terms used in this Agreement shall be interpreted, all determinations with respect to accounting matters thereunder shall be made, and all financial statements and certificates and reports as to financial matters required to be furnished hereunder shall be prepared, in accordance with GAAP.

14.8 Survival. The following terms and provisions of this Agreement shall survive any expiration or termination of this Agreement: Sections 5.2(b), Article XIII, and Sections 9.4, 9.5, 15.5, 15.6, 14.8, 14.12, 14.15, 14.16, 15.20, 15.24, and 15.25.

14.9 Severability. If any term or provision of this Agreement and the Lease or the application thereof to any Person or circumstances, shall to any extent be invalid or unenforceable in any jurisdiction, as to such jurisdiction, the remainder of this Agreement, or the application of such term or provision to the Persons or circumstances other than those as to which such term or provision is held invalid or unenforceable in such jurisdiction, shall not be affected thereby, and each term and provision of this Agreement shall be valid and enforceable to the fullest extent permitted by Applicable Law and any such invalidity or unenforceability in any jurisdiction shall not invalidate or render unenforceable such provision in any other jurisdiction. To the extent permitted by Applicable Law, the Parties hereby waive any provision of law that renders any provision thereof prohibited or unenforceable in any respect.

14.10 Entire Agreement; Amendment. This Agreement (including all exhibits attached hereto), together with the Lease, constitute the entire and exclusive agreement between the Corporation and EPC with respect to the subject matter contained herein and therein. There are no restrictions, promises, obligations, or undertakings between the Parties, other than those set forth or referred to in this Agreement with respect to the subject matter hereof. Neither this Agreement nor any of the terms thereof may be terminated, amended, supplemented, waived or modified orally, but only by an instrument in writing signed by the Party against which the enforcement of the termination, amendment, supplement, waiver or modification shall be sought.

14.11 Headings; Exhibits. The headings, if any, of the various articles, sections, and other subdivisions of this Agreement are for convenience of reference only and shall not modify, define, or limit any of the terms or provisions of this Agreement. All appendices and exhibits attached to this Agreement are incorporated herein by reference in their entirety and made a part hereof for all purposes; *provided, however*, that in the event of a conflict between the terms of the text of this Agreement and any appendices or exhibits, the text of this Agreement shall control.

14.12 Parties in Interest; Limitation on Rights of Others. The terms of this Agreement shall be binding upon, and inure to the benefit of, the Parties and their permitted successors and assigns. Nothing in this Agreement, whether express or implied, shall be construed to give any Person (other than the Parties and their permitted successors and assigns and as expressly provided herein, and the City) any legal or equitable right, remedy or claim under or in respect of this Agreement or any covenants, conditions or provisions contained therein or any standing or authority to enforce the terms and provisions of this Agreement.

14.13 Counterparts. This Agreement may be executed in multiple counterparts (including by means of facsimile, digital or electronic signature), any one of which need not contain the signatures of more than one Party, but all such counterparts taken together shall constitute one and the same instrument. All signatures need not be on the same counterpart.

14.14 Delivery by Facsimile or Email. This Agreement, to the extent signed and delivered by means of facsimile or email with scan or facsimile attachment, shall be treated in all manner and respects as an original agreement or instrument and shall be considered to have the same binding legal effect as if it were the original signed version thereof delivered in person. At the request of any Party hereto, each other Party hereto shall re-execute original forms thereof and deliver them to all other Parties. No Party hereto shall raise the use of a facsimile machine or email to deliver a signature or the fact that any signature was transmitted or communicated through the use of a facsimile machine or email as a defense to the formation or enforceability of a contract, and each such Party forever waives any such defense.

14.15 Governing Law. THIS AGREEMENT AND THE ACTIONS OF THE PARTIES SHALL IN ALL RESPECTS BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF TEXAS NOTWITHSTANDING ANY CHOICE-OF-LAW OR CONFLICT-OF-LAW PRINCIPLE THAT MIGHT DICTATE A DIFFERENT GOVERNING LAW.

14.16 Court Proceedings. Any suit, Action or Proceeding against any Party arising out of or relating to this Agreement, any transaction contemplated hereby or any judgment entered by any court in respect of any thereof may be brought in any Federal court whose jurisdiction includes El Paso County or any state court located in the City of El Paso, Texas, and the Parties hereby submit to the nonexclusive jurisdiction of such courts for the purpose of any such suit, Action or Proceeding. To the extent that service of process by mail is permitted by Applicable Law, the Parties irrevocably consent to the service of process in any such suit, Action, or Proceeding in such courts by the mailing of such process by registered or certified mail, postage prepaid, at its address for notice provided for in this Agreement. The Parties irrevocably agree not to assert any objection that they may ever have to the laying of venue of any such suit, Action or Proceeding in any Federal or state court located in the City of El Paso, Texas, and any claim that any such suit, Action or Proceeding brought in any such court has been brought in an inconvenient forum. Each Party agrees not to bring any Action, suit, or Proceeding against the other Party arising out of or relating to this Agreement or any transaction contemplated hereby except in a Federal court whose jurisdiction includes El Paso County or a state court located in the City of El Paso, Texas.

14.17 Non-liability of the Corporation's Officials or Employees and EPC Officials or Employees. No member of any legislative, executive, or administrative body of, or affiliated with, the Corporation or its Affiliates, including the City, and no official, agent, employee or representative of the Corporation or

such body or any of its Affiliates, including the City (whether acting in the performance of the Corporation's Governmental Functions or otherwise), shall be personally liable to EPC, or any Person holding by, through, or under EPC, for any actions taken in his or her capacity as an official, agent, employee or representative of such Person in the event of any default or breach by the Corporation, or for any amount which may become due to EPC or any Person holding by, through or under EPC, or for any other obligation, under or by reason of this Agreement. No officer, director, shareholder, member, agent, employee, or representative of EPC, or its Affiliates, shall be personally liable to the Corporation or any Person holding by, through, or under the Corporation, for any actions taken in his or her capacity as an officer, director, shareholder, agent, employee or representative of such Person in the event of any default or breach by EPC, or for any amount which may become due to the Corporation or any Person holding by, through, or under the Corporation, or for any other obligation, under or by reason of this Agreement.

14.18 Payment on Business Days. If any payment under this Agreement is required to be made on a day other than a Business Day, the date of payment shall be extended to the next Business Day.

14.19 Time. Times set forth in this Agreement for the performance of obligations shall be strictly construed, time being of the essence of this Agreement. All provisions in this Agreement which specify or provide a method to compute a number of days for the performance, delivery, completion or observance by a Party of any action, covenant, agreement, obligation or notice hereunder shall mean and refer to calendar days, unless otherwise expressly provided. However, in the event the date specified or computed under such instrument for the performance, delivery, completion or observance of a covenant, agreement, obligation or notice by either Party, or for the occurrence of any event provided for herein, shall be a day other than a Business Day, then the date for such performance, delivery, completion, observance, or occurrence shall automatically be extended to the next calendar day that is Business Day. All references in this Agreement to times or hours of the day shall refer to Mountain Standard Time or Mountain Daylight Savings Time, as applicable, on the date in question in El Paso, Texas.

14.20 Interpretation and Reliance. No presumption will apply in favor of any Party in the interpretation of this Agreement or in the resolution of any ambiguity of any provision hereof.

14.21 Attorneys' Fees. If any Party to this Agreement defaults in the performance of any covenants, obligations or agreements of such Party contained in this Agreement and the other Party hereto places the enforcement of this Agreement, or any part thereof, or the exercise of any other remedy therein provided for such default, in the hands of an attorney who files suit upon the same (either by direct Action or counterclaim), the non-prevailing Party shall pay to the prevailing Party its reasonable attorneys' fees and costs of court. In addition to the foregoing award of attorneys' fees to the prevailing Party, the prevailing Party shall be entitled to its attorneys' fees incurred in any post-judgment proceedings to collect or enforce the judgment. This provision is separate and several and shall survive the merger of this Agreement into any judgment on this Agreement.

14.22 Joint and Several Liability. If EPC at any time comprises more than one Person, all such Persons shall be jointly and severally liable for payment of amounts due under this Agreement and for performance of every obligation of EPC under this Agreement.

14.23 Relationship of the Parties; No Partnership. The relationship of EPC and the Corporation under this Agreement is that of independent parties, each acting in its own best interests, and notwithstanding anything in this Agreement to the contrary, neither the obligation to pay the Corporation any amounts hereunder or under the Lease nor any other aspect of this Agreement shall create or evidence, nor is it intended to create or evidence, a partnership, joint venture or other business relationship or enterprise between EPC and the Corporation. As such, the Corporation shall have no direct supervision of or obligation to the employees of EPC and any communication of employee matters shall be through the EPC Representative.

14.24 Non-Merger of Estates. The interests of the Corporation and EPC in the Museum shall at all times be separate and apart, and shall in no event be merged, notwithstanding the fact that this Agreement, or any interest therein, may be held directly or indirectly by or for the account of the Person who shall own the fee title to the Museum or any portion thereof; and no such merger of estates shall occur by operation of law, or otherwise, unless and until all Persons at the time having any interest in the Museum shall join in the execution of a written instrument effecting such merger of estates.

14.25 Payments by Either Party. All payments required to be made by either Party to the other Party pursuant to the terms of this Agreement shall be paid in such freely transferable coin or currency of the United States as at the time of payment shall be legal tender for the payment of public and private debts at the receiving Party's address as set forth in Appendix B, or at such other address as such Party may specify from time to time in accordance with the terms and conditions of Section 14.26 below. Notwithstanding the provisions of Section 14.26 below and for the purposes of this Agreement, all payments shall be deemed paid and received only when actually received by the other Party and, in the event of payment by check, other than a cashier's check or certified check, shall not be considered to have been actually received in the event of the failure of such check to clear the receiving Party's account.

14.26 Notice. All notices permitted or required to be made hereunder shall be in writing and delivered by hand, overnight courier, certified mail, facsimile, or e-mail. Notices shall be deemed given (a) when actually given and received if delivered by hand; (b) one (1) Business Day after delivery to an overnight courier if delivered by an overnight courier; (c) three (3) Business Days after deposit with the United States Postal Service if delivered by certified mail; or (d) when sent if delivered by facsimile or e-mail (as evidenced by facsimile or e-mail confirmation). All such notices shall be addressed to the appropriate Party at the addresses set forth in Appendix B.

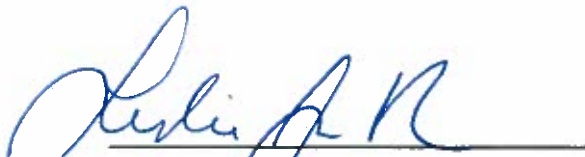
[Signature Page Follows]

IN WITNESS WHEREOF, the Parties have executed this Agreement to be effective as of the Execution Date.

EL PASO CHILDREN'S MUSEUM DEVELOPMENT CORPORATION

Tomás González
Executive Director

APPROVED AS TO FORM:



Leslie B. Jean-Pierre
Assistant City Attorney

APPROVED AS TO CONTENT:



Sam Rodriguez, P.E.
City Engineer, Capital Improvement Department

THE EPC MUSEUM


By: _____
Name: Paul Kortenaar
Title: Director

El Paso Community Foundation joins in this Agreement to evidence its consent to Article VIII only.

EL PASO COMMUNITY FOUNDATION


By: _____
Richard Eric Pearson, President

[Management and Operating Agreement - Signature Page]

**APPENDIX A
TO
MANAGEMENT AND OPERATING AGREEMENT**

Glossary of Defined Terms

“Action” or “Proceedings” means any legal action, lawsuit, proceeding, arbitration, and investigation by a Governmental Authority, hearing, audit, appeal, administrative proceeding or judicial proceeding.

“Administrative Agent” has the meaning set forth in Section 4.1.

“Affiliate” means, with respect to any specified Person, any other Person who, directly or indirectly, Controls, is under common Control with, or is Controlled by such specified Person.

“Agreement” has the meaning given to that term in the introductory paragraph of this Agreement.

“Antiquities Code” means the Antiquities Code of Texas as codified in Title 9, Chapter 191 of the Texas Natural Resource Code, as may be amended from time to time.

“Applicable Laws” means any and all laws, ordinances, statutes, regulations, judicial decisions, orders, injunctions, writs, rulings, interpretations, rules, permits or certificates of any court, arbitrator or other Governmental Authority and applicable to the Person or Property in question (including any activities or operations occurring on, under, over, upon, at or from such Property in question). Applicable Laws shall include the Antiquities Code, all City Codes, Environmental Laws and any applicable Federal wage requirements. EPC acknowledges that there may be certain “Applicable Laws” that apply to the Museum as a result of same being owned by City or a local government corporation organized under the laws of the State of Texas.

“Appropriation” means with respect to any payment obligation or other monetary obligation of City that may from time to time exist or arise under this Agreement during a fiscal year, the approval and setting aside by City of an adequate amount of funds to satisfy the payment obligation or other monetary obligation of City.

“Approval,” “Approve” or “Approved” means (a) with respect to any item or matter for which the approval of Corporation or Corporation Representative, as the case may be, is required under the terms of this Agreement, the specific approval of such item or matter by Corporation pursuant to a written instrument executed by Corporation or Corporation Representative, as applicable, delivered to EPC, and shall not include any implied or imputed approval, and no approval by Corporation or Corporation Representative pursuant to this Agreement shall be deemed to constitute or include any approval required in connection with any Governmental Functions of Corporation, unless such written approval shall so specifically state; and (b) with respect to any item or matter for which the approval of EPC is required under the terms of the Agreement, the specific approval of such item or matter by EPC or the EPC Representative, as the case may be, pursuant to a written instrument executed by a duly authorized officer of EPC or the

EPC Representative, as permitted pursuant to the terms of this Agreement, and delivered to Corporation, and shall not include any implied or imputed approval.

"Bonds" means the Quality of Life Bonds and Certificates of Obligation described in Section 3.2.

"Bond Counsel" means Norton Rose Fulbright US LLP, or another law firm retained by the City to advise on municipal securities.

"Business Day" shall mean a day of the year that is not a Saturday, Sunday, Legal Holiday or a day on which commercial banks are not required or authorized to close in El Paso, Texas.

"Capital Repair Contributions" has the meaning set forth in Section 4.3.

"Casualty" shall have the meaning set forth in Article X.

"Children's Museum Project" has the meaning given to that term in the Recitals.

"City" means the City of El Paso, a home rule City and political subdivision located in El Paso County and operating hereunder as governmental entity performing a governmental function.

"City Codes" means all ordinances, codes and policies from time to time adopted by the City of El Paso, Texas, including, the El Paso Code of Ordinances and any building codes, fire or life safety codes, development codes, subdivision code, and zoning ordinances, as same may be amended from time to time.

"City Delay" has the meaning set forth in Section 6.1.

"Corporation Default" has the meaning set forth in Section 13.1(b).

"Museum Exhibits" has the meaning set forth in Section 3.4(d).

"Corporation Representative" has the meaning set forth in Section 2.1.

"Claims" shall mean and include any and all actions, causes of action, suits, disputes, controversies, claims, debts, sums of money, offset rights, defenses to payment, agreements, promises, notes, losses, damages and demands of whatsoever nature, known or unknown, whether in contract or in tort, at law or in equity, for money damages or dues, recovery of property, or specific performance, or any other redress or recompense which have accrued or may ever accrue, may have been had, may be now possessed, or may or shall be possessed in the future by or in behalf of any Person against any other Person for, upon, by reason of, on account of, or arising from or out of, or by virtue of, any transaction, event or occurrence, duty or obligation, indemnification, agreement, promise, warranty, covenant or representation, breach of fiduciary duty, breach of any duty of fair dealing, breach of confidence, breach of funding commitment, undue influence, duress, economic coercion, conflict of interest, negligence, bad

faith, malpractice, violations of any Applicable Law, intentional or negligent infliction of mental distress, tortious interference with contractual relations, tortious interference with corporate governance or prospective business advantage, breach of contract, deceptive trade practices, libel, slander, usury, conspiracy, wrongful acceleration of any indebtedness, wrongful foreclosure or attempt to foreclose on any collateral relating to any indebtedness, action or inaction, relationship or activity, service rendered, matter, cause or thing, whatsoever, express or implied.

"Community Foundation" shall have the meaning set forth in Article VIII.

"Comparable Properties" means one or more first-class, state-of-the-art children's museums (as mutually agreed upon by the Representatives) that (a) have been constructed within five years of the Execution Date, (b) are generally comparable in size, design and quality of construction and (c) are located in the United States. For the purposes of this Agreement, the term "Comparable Properties" shall also include the The Doseum, San Antonio, Texas; The Phillip and Patricia Frost Museum of Science, Miami, Florida; and MOXI (The Wolf Museum of Exploration and Innovation), Santa Barbara, California.

"Construction Contractor" has the meaning set forth in Section 3.1.

"Control" means the possession, directly or indirectly, of the power to direct or cause the direction of management, policies or activities of a Person, whether through ownership of voting securities, by contract or otherwise.

"Cost Overruns" has the meaning set forth in Section 3.7.

"Design Completion Date" has the meaning set forth in Section 4.4.

"Design Fees" means the fees paid by City to the Preliminary Architect, the Project Architect or other design professional for the preparation of plans and specifications for the Museum Improvements.

"Development Contributions" has the meaning set forth in Section 4.2.

"Dispute or Controversy" has the meaning set forth in Section 7.2.

"Donor Contributions" has the meaning set forth in the recitals hereto and further described in Section 3.3. Donor Contributions shall be provided for in the Museum Budget as described herein.

"EPC" has the meaning set forth in the preamble to this Agreement.

"EPC Default" has the meaning set forth in Section 13.1(a).

"EPC Delay" means any delay by EPC in achieving performance of its obligations under this Agreement.

"EPC Representative" has the meaning set forth in Section 2.2.

"Event of Default" has the meaning set forth in Section 13.1(a) and Section 13.1(b).

"Excusable City Delay" means any Corporate Delay which is caused by or attributable to (but only to the extent of) Force Majeure.

"Excusable EPC Delay" means any EPC Delay which is caused by or attributable to (but only to the extent of) Force Majeure.

"Execution Date" has the meaning set forth in the preamble to the Agreement.

"Exhibit Architect" means a Qualified Design Professional or team of Qualified Design Professionals who will be employed by EPC in connection with the Museum Exhibits, as provided for in Section 3.1. Nothing in this Agreement prevents, restricts or limits the Exhibit Concept Consultant from being engaged as the Exhibit Architect.

"Exhibit Concept Consultant" has the meaning set forth in Section 3.1.

"Facility" has the meaning set forth in the Recitals.

"FF&E Requirements" means the specifications and requirements for the City personal property to be part of the Museum Improvements at Substantial Completion thereof.

"Final Completion" means, with respect to the Museum Improvements Work or any component of the Museum Improvements Work, (a) the final completion of the design, development, construction, furnishing and all other aspects of such work and Improvements substantially in accordance with the Project Plans or other plans therefor (all of which have been Approved pursuant to the terms of this Agreement, as and if required), all Applicable Laws and all other requirements of this Agreement, including the completion of the punch list type items referred in Section 6.3(f) and (b) the issuance of all Governmental Authorizations necessary to use, occupy and operate all aspects and areas of the Museum Improvements, in accordance with the terms of this Agreement.

"Final Notice" has the meaning set forth in Section 13.2(c).

"Financing" shall have the meaning set forth in Section 11.3.

"Force Majeure" means any act that (a) materially and adversely affects the affected Party's ability to perform the relevant obligations under this Agreement or delays such affected Party's ability to do so, (b) is beyond the reasonable control of the affected Party, and (c) is not due to the affected Party's fault or negligence. Subject to the satisfaction of the conditions set forth in (a) through (c) above, Force Majeure shall include: (i) natural phenomena, such as storms, floods, lightning, and earthquakes; (ii) wars, civil disturbances, revolts, insurrections, terrorism, sabotage, and threats of sabotage or terrorism; (iii) transportation disasters, whether by ocean, rail, land or air; (iv) strikes or other labor disputes; (v) fires; and (vi) actions or omissions of a

Governmental Authority (not including the actions of City) that were not voluntarily induced or promoted by the affected Party, or brought about by the breach of its obligations under this Agreement or any Applicable Law; *provided, however*, that under no circumstances shall Force Majeure include economic hardship.

"GAAP" means generally accepted accounting principles as in effect from time to time in the United States as set forth in the opinions and pronouncements of the Accounting Principles Board of the American Institute of Certified Public Accountants and statements and pronouncements of the Financial Accounting Standards Board.

"GMP Contractor" means the guaranteed maximum price contractor selected by EPC in accordance with the terms of this Agreement to construct the Museum and certain of the Improvements.

"Governing Body of City" means the City Council of the City of El Paso, Texas.

"Governmental Authority" means any Federal, state, local, or foreign governmental entity, authority or agency, court, tribunal, regulatory commission or other body, whether legislative, judicial or executive (or a combination or permutation thereof), including a local government corporation.

"Governmental Authorizations" means all approvals, consents, decisions, authorizations, certificates, confirmations, exemptions, applications, notifications, concessions, acknowledgments, agreements, licenses, permits, import permits, employee visas, environmental permits, decisions, right of ways, and similar items from any Governmental Authority, including a liquor license from the Texas Alcohol and Beverage Commission.

"Governmental Function" means any regulatory, legislative, permitting, zoning, enforcement (including police power), licensing or other functions which City is authorized or required to perform in its capacity as a Governmental Authority in accordance with Applicable Laws. The entering into this Agreement and the performance by City of its obligations under this Agreement shall not be considered a "Governmental Function."

"Improvements" means all improvements, structures, buildings and fixtures of any kind whatsoever, whether above or below grade, including buildings, the foundations and footings thereof, utility installations, storage, loading facilities, walkways, driveways, landscaping, signs, site lighting, site grading and earth movement, and all fixtures, plants, apparatus, appliances, furnaces, boilers, machinery, engines, motors, compressors, dynamos, elevators, fittings, piping, connections, conduits, ducts and equipment of every kind and description now or hereafter affixed or attached to any of such buildings, structures or improvements and used or procured for use in connection with the heating, cooling, lighting, plumbing, ventilating, air conditioning, refrigeration, or general operation of any of such buildings, structures or improvements, and any exterior additions, changes or alterations thereto or replacements or substitutions therefor. The term "Improvements" does not include any Museum Exhibit.

"Insolvency Event" means, with respect to any Person, (a) such Person's or any of its Subsidiaries' (i) failure to generally pay its debts as such debts become due, (ii) admitting in writing its inability to pay its debts generally or (iii) making a general assignment for the benefit of creditors; (b) any proceeding being instituted by or against such Person or any of its Subsidiaries (i) seeking to adjudicate it a bankrupt or insolvent, (ii) seeking liquidation, winding up, reorganization, arrangement, adjustment, protection, relief, or composition of it or its debts under any law relating to bankruptcy, insolvency or reorganization or relief of debtors or (iii) seeking the entry of an order for relief or the appointment of a receiver, trustee or other similar official for it or for any substantial part of its property and, in the case of any such proceeding instituted against such Person or any such Subsidiary, any such proceeding shall remain undismissed for a period of ninety (90) days or any of the actions sought in such proceeding shall occur; or (c) such Person's or any of its Subsidiaries' taking any corporate action to authorize any of the actions set forth above in this definition.

"Lease" has the meaning set forth in the Recitals.

"Lease Payments" has the meaning set forth in Section 3.3.

"Legal Holiday" means any day, other than a Saturday or Sunday, on which City's administrative offices are closed for business.

"Lien" means any mortgage, charge, pledge, lien, privilege, security interest, hypothecation or other encumbrance upon or with respect to any Property or assets or any kind, whether real or personal tangible or intangible, now owned or hereafter acquired; provided however that the Real Property and the Facility, as owned by the City shall not be subject to any lien.

"Material Change" means (a) as to the Museum Improvements, any modification to the Museum Improvements so that the Museum Improvements will not conform in a material respect to the Plans for Museum Improvements previously Approved by Museum Operating Committee, and (b) as to City Personal Property to be a part of the Museum Improvements at Substantial Completion thereof, any modification to such City Personal Property so that such City Personal Property does not conform to the FF&E Requirements previously Approved by Museum Oversight Committee, and (c) as to the Parking Plan to be a part of the Museum Improvements at Substantial Completion thereof, any modification to such Parking Plan so that it does not conform to the Parking Plan previously Approved by the Museum Oversight Committee.

"Museum" has the meaning given to that term in the Recitals.

"Museum Budget" means the total budget for all Museum Costs allocated to the Children's Museum Project), broken down in reasonable detail by "hard" and "soft" cost categories, including separate line items for the amount payable under each of the Museum Construction Documents and allowances and contingencies, together with any amendments thereto up to the Substantial Completion Date. The Museum Budget shall include a mutually agreed upon contingency in order to protect the interests of the Parties. The Museum Budget

shall provide a schedule for Donor Contributions and pledges on an annual basis, with three (3) and five (year) plans.

"Museum Construction Contract" has the meaning set forth in Section 3.6(b).

"Museum Construction Documents" means any and all contracts, documents or other instruments entered into by or on behalf of EPC or any Affiliates thereof for the development, design, construction or furnishing of the Museum Improvements, including the Museum Construction Contract.

"Museum Construction Schedule" means a schedule of critical dates relating to the Museum Improvements Work (which dates may be described or set forth as intervals of time from or after the completion or occurrence of the preceding task or event), which schedule shall include the estimated dates for (a) completion of the Project Plans in detail sufficient for satisfaction of all Applicable Laws (including issuance of necessary building permits), (b) issuance of all Governmental Authorizations and satisfaction of all Applicable Laws prerequisite to commencement of the Museum Improvements Work and (c) Substantial Completion of the Museum Improvements Work.

"Museum Costs" means all documented, direct costs incurred or to be incurred by EPC in order for EPC to fulfill its obligations under this Agreement with respect to the Museum Improvements Work and to cause Final Completion of the Museum Improvements Work, including all infrastructure, demolition, site preparation, any necessary land acquisitions, Predevelopment Expenses, Design Fees, and any amounts payable to a third party under any of the Museum Construction Documents.

"Museum Director" means the person hired by EPC to be the director of the Museum. EPC hired Dr. Paul Kortenaar as the Founding Museum Director on September 1, 2017.

"Museum Exhibit Acquisition Plan" has the meaning set forth in Section 3.4(d).

"Museum Exhibits" means any and all works, exhibits, collections, installations, artifacts and other objects of artistic, cultural, historical, educational, or scientific importance that may be made available for public viewing through exhibits that may be special, permanent or temporary.

"Museum Funding" has the meaning given to that term in the Recitals.

"Museum Funding Records" has the meaning set forth in Section 4.2(a).

"Museum Improvements" means the Museum, the Museum Parking and the Parking Plan, including the Improvements and the City personal property located on the Real Property and described in the Plans for Museum Improvements and the FF&E Requirements.

"Museum Improvements Work" means the design, development and construction of the Museum Improvements (including any associated infrastructure, demolition or site preparation) in accordance with the terms of this Agreement.

"Museum Operating Budget" means that budget developed and supported by the EPC for pre-opening and operating costs required to support the obligations of the EPC under this Agreement.

"Open Records Act" has the meaning set forth in Section 14.5.

"Parking Plan" has the meaning set forth in Section 3.1(c).

"Parties" or "Party" has the meaning set forth in the preamble to this Agreement.

"Person" means any individual, corporation, limited or general partnership, limited liability company, joint venture, association, joint-stock company, trust, unincorporated organization or government or any agency or political subdivision thereof or any other form of entity.

"Plans for Museum Improvements" means the plans and specifications for the construction of the Museum Improvements prepared by the Project Architect and which shall include the development and implementation of the Parking Plan.

"Project Architect" means a Qualified Design Professional or team of Qualified Design Professionals who will be employed by EPC in connection with the Museum Improvements, as provided for in Section 3.1.

"Project Plans" means collectively, the Plans for Museum Improvements and the FF&E Requirements.

"Qualified Design Professional" means an architect that satisfies all of the following criteria: (a) licensed and otherwise in compliance with all applicable Governmental Rules to do business and act as an architect in the State of Texas for the type of work proposed to be performed by such architect and (b) well experienced as an architect in comparable work.

"Qualified Surety" means any surety which has been approved by City and which has an Alfred M. Best Company, Inc. rating of "A" or better and a financial size category of not less than "VIII" (or, if Alfred M. Best Company, Inc. no longer uses such rating system, then the equivalent or most similar ratings under the rating system then in effect, or if Alfred M. Best Company, Inc. is no longer the most widely accepted rater of the financial stability of sureties providing coverage such as that required by this Agreement, then the equivalent or most similar rating under the rating system then in effect of the most widely accepted rater of the financial stability of such insurance companies at the time).

"Quality Standard" means a first-class, state-of-the-art children's museum, comparable, when taken as a whole, to the Comparable Properties.

"Real Property" means the tract of land depicted in Exhibit A.

“Related Party” or “Related Parties” means with respect to any Person, such Person’s partners, directors, officers, shareholders, members, agents, employees, auditors, advisors, consultants, servants, counsel, contractors, subcontractors (of any tier), tenants, subtenants (of any tier), licensees, sublicensees (of any tier), lenders, successors, assigns, legal representatives, elected and appointed officials, volunteers and Affiliates, and for each of the foregoing their respective partners, directors, officers, shareholders, members, agents, employees, auditors, advisors, counsel, consultants, contractors, subcontractors, licensees, sublicensees, tenants, and subtenants.

“Representative” has the meaning set forth in Section 2.2.

“Stipend” has the meaning set forth in Section 3.3. **“Subsidiary”** means, for any Person, any corporation, partnership or other entity of which at least a majority of the securities or other ownership interests having by the terms thereof ordinary voting power to elect a majority of the board of directors or other Persons performing similar functions of such corporation, partnership or other entity (irrespective of whether or not at the time securities or other ownership interests of any other class or classes of such corporation, partnership or other entity shall have or might have voting power by reason of the happening of any contingency) is at the time directly or indirectly owned or Controlled by such Person, one or more Subsidiaries of such person, or by such Person and one or more Subsidiaries of such Person.

“Substantial Completion” means, when used with respect to the Museum Improvements Work or any component of the Museum Improvements Work, the receipt of (a) a certificate of the Project Architect certifying that such Improvements have been completed in accordance with the Project Plans, and (b) a certificate of occupancy from the City acting in accordance with its Governmental Function that such Improvements are ready for use and occupancy for their intended purposes in accordance with Applicable Law.

“Substantial Completion Date” means the date upon which Substantial Completion of the Museum Improvements Work occurs.

“Term” has the meaning set forth in Article V.

“Transfer” has the meaning set forth in Section 11.1.

“Use Agreement” means a use, sublease, license, concession, occupancy or other agreement for the use or occupancy of any designated space or designated facilities within the Museum for any Permitted Use (as defined in the Lease), other than a Museum Event (as defined in the Lease), but shall not include any of the foregoing for all or substantially all of the Museum or for a period greater than the remaining Term (as defined in the Lease).

Rules as to Usage

The terms defined below have the meanings set forth below for all purposes, and such meanings are equally applicable to both the singular and plural forms of the terms defined.

1. "Include", "includes" and "including" shall be deemed to be followed by ", but not limited to," whether or not they are in fact followed by such words or words of like import.
2. "Writing", "written" and comparable terms refer to printing, typing, and other means of reproducing in a visible form.
3. Any agreement, instrument or Applicable Laws defined or referred to above means such agreement or instrument or Applicable Laws as from time to time amended, modified or supplemented, including (in the case of agreements or instruments) by waiver or consent and (in the case of Applicable Laws) by succession of comparable successor Applicable Laws and includes (in the case of agreements or instruments) references to all attachments thereto and instruments incorporated therein.
4. References to a Person are also to its permitted successors and assigns.
5. Any term defined above by reference to any agreement, instrument or Applicable Laws has such meaning whether or not such agreement, instrument or Applicable Laws are in effect.
6. "Hereof", "herein", "hereunder" and comparable terms refer, unless otherwise expressly indicated, to the entire agreement or instrument in which such terms are used and not to any particular article, section or other subdivision thereof or attachment thereto. References to "Article", "Section", "Subsection" or another subdivision or to an attachment are, unless the context otherwise requires, refer to an article, section, subsection or subdivision of or an attachment within or to this Agreement as a whole. All references to exhibits or appendices in any agreement or instrument that is governed by this Appendix are to exhibits or appendices attached to such instrument or agreement.
7. Pronouns, whenever used in this Agreement and of whatever gender, shall include natural Persons, corporations, limited liability companies, partnerships and associations of every kind and character.
8. References to any gender include, unless the context otherwise requires, references to all genders.
9. The word "or" will have the inclusive meaning represented by the phrase "and/or".
10. "Shall" and "will" have equal force and effect.
11. Unless otherwise specified, all references to a specific time of day shall be based upon Mountain Standard Time or Mountain Daylight Savings Time, as applicable, on the date in question in El Paso, Texas.

12. References to "\$" or to "dollars" shall mean the lawful currency of the United States of America.

13. "Not to be unreasonably withheld" (or any comparable phrase) when used herein with respect to any Approval shall be deemed to be followed by ", conditioned, delayed or denied" whether or not it is in fact followed by such words or words of like import.

**APPENDIX B
TO
MANAGEMENT AND OPERATING AGREEMENT**

Address for Notices

A. CORPORATION: EL PASO CHILDREN'S MUSEUM DEVELOPMENT CORPORATION

All notices to City shall be sent to:

El Paso Children's Museum Development Corporation
c/o City of El Paso
P.O. Box 1890
El Paso, Texas 79950-1890
Attention: City Manager

with copies of all notices to Corporation relating to defaults, remedies or indemnification being sent to:

City of El Paso
P.O. Box 1890
El Paso, Texas 79950-1890
Attention: City Attorney

B. EPC: THE EPC MUSEUM

All notices to EPC shall be sent to:

The EPC Museum
333 N. Oregon St., 2nd Floor
El Paso, Texas 79901
Attention: Eric Pearson

with copies of all notices to EPC relating to defaults, remedies or indemnification being sent to:

Kemp Smith LLP
221 N. Kansas St., Suite 1700
El Paso, Texas 79901
Attention: Gene Wolf

APPENDIX C
City of El Paso Insurance Requirements

Commercial General Liability:

Written on an occurrence form. (There may be situations where a "claims-made" form may be our only option but it is best we require an occurrence form including all the usual coverage known as:

- Premises/operations liability
- Products/completed operations
- Personal/advertising injury
- Contractual liability
- Broad-form property damage
- Independent contractor liability
- Cyber Liability/Data/Breach/Ransom

Minimum Limits of Liability

\$1,000,000 Bodily Injury/\$1,000,000 Property Damage per occurrence

Commercial General Liability Exclusion Removed/Railroad Protective Liability

\$1,000,000 Bodily Injury/\$1,000,000 Property Damage Liability per occurrence

Required when a contractor is going to work within 50 feet of any "railroad property"

Automobile Liability

\$1,000,000 Bodily Injury/\$500,000 Property Damage Liability per occurrence

Workers' Compensation

Statutory Coverage

\$500,000 Employers Liability

Professional (Errors & Omissions) Liability (if required)

\$1,000,000 per occurrence

Excess Liability Insurance (if required)

\$5,000,000 per occurrence

The City, its officials, employees, agents and contractors shall be named as additional insureds. The contractor/vendor and their subcontractors' insurance coverage shall be primary insurance as respects the City, its officials, employees, agents and contractors. Any insurance or self-insurance maintained by the City, its officials, employees, agents and contractors shall be in excess of the contractor/vendor's or contractor/vendor's subcontractor's insurance and shall not contribute to the contractor/vendor's or contractor/vendor's subcontractor's insurance.

Prior to undertaking any work under this Agreement, the contractor/vendor, at no expense to the City, shall furnish to the City a certificate of insurance with original endorsements affecting coverage for each of the insurance policies provided in this exhibit. Any deductibles or self-insured retentions must be declared to, and approved by the City.

**EXHIBIT A
TO
MANAGEMENT AND OPERATING AGREEMENT**

Real Property

**EXHIBIT B
TO
MANAGEMENT AND OPERATING AGREEMENT**

Lease

**EXHIBIT C
TO
MANAGEMENT AND OPERATING AGREEMENT**

Funding Agreement

**EXHIBIT D
TO
DRAW REQUEST FORM, PROCESS AND SCHEDULE**