

## **FIRST AMENDMENT TO DESIGN-BUILD SERVICES CONTRACT**

**THIS FIRST AMENDMENT TO THE DESIGN-BUILD SERVICES CONTRACT** (the “Amendment”) is made, entered into and effective as of January \_\_, 2025 (the “Amendment Date”), between the City of Yuma, an Arizona municipal corporation (“Yuma”) and Willmeng Construction, Inc., an Arizona corporation (“Design-Builder”), together with American Ramp Company, a Missouri corporation (“ARC”). Yuma, Design-Builder and ARC may hereinafter be referred to individually as a “Party” or collectively as the “Parties.”

### **RECITALS**

**WHEREAS**, Yuma and Design-Builder entered into that certain Design-Build Services Contract for Design-Build (DB) Project for the Kennedy Skate Park Improvements, CIP Project No. 0096-PARKS, dated as of March 9, 2023 (the “Construction Contract”), in connection with the design and construction of the Kennedy Skate Park, which included the removal of the existing skate park, the re-construction of a new skate park plaza, skate bowl, and a bicycle pump track, shade canopies, site grading, irrigation systems, and electrical and lighting systems, as more fully described in the Construction Contract and Contract Documents, hereinafter referred to as the “Project.”

**WHEREAS**, Design-Builder contracted with ARC for the design, engineering and construction of the skate park component of the Project, including, but not limited to preparing the technical specifications as well as the installation of the concrete components of the Project as more fully described in the Contract Documents and the ARC Subcontract Agreement, hereinafter referred to as the “Concrete Work.”

**WHEREAS**, ARC is an additional signatory to this Amendment in connection with such Concrete Work and the provisions of this Amendment related to such Concrete Work.

**WHEREAS**, while inspecting the concrete flatwork for the Project, the Parties have determined that the concrete mix design used for the flatwork did not meet the Project specifications and has resulted in premature cracking and other deficiencies, hereinafter referred to as the “Deficient Work.”

**WHEREAS**, pursuant to the terms of the Construction Contract, among other requirements, Design-Builder is required to promptly correct the Deficient Work for failing to conform to the requirements of the Contract Documents, which correction, at the discretion of Yuma, require the removal and replacement of such Deficient Work.

**WHEREAS**, ARC’s licensed engineer has inspected the Deficient Work and has determined and expressly certified that the deficiencies will not adversely impact the intended use or safety of the Project.

**WHEREAS**, Designer-Builder’s licensed engineer has inspected the Deficient Work and has determined and expressly certified that the deficiencies will not adversely impact the intended use or safety of the Project.

**WHEREAS**, the Parties have agreed that in lieu of removal and replacement of the Deficient Work at this time, that Design-Builder and ARC will provide an extended warranty and additional assurances for the Concrete Work as provided for herein, agreeing that further degradation of the Deficient Work may still require the removal and replacement of the Deficient Work.

**WHEREAS**, the Parties have agreed to the terms of this Amendment for purposes of adjusting the terms of the Construction Contract to provide for an extension of the warranty on the concrete flatwork, annual inspections of the concrete flatwork and other assurances for the concrete flatwork and for making such other amendments as provided for herein.

**NOW, THEREFORE**, in consideration of their mutual undertakings and agreements hereunder, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties undertake and agree as follows:

### **AGREEMENT**

1. **Incorporation of Recitals.** The Parties acknowledge that the foregoing Recitals are a material part of this Amendment and are incorporated herein.
2. **Definitions and Interpretation.** The terms used but not defined herein shall have the respective meanings ascribed to such terms in the Construction Contract.
3. **Amendments.** The Construction Contract is hereby amended as provided for in this Section 3.

3.1 Paragraph 2.31.3 of the Construction Contract is amended by deleting it in its entirety and replacing it with the following:

2.31.3 If, within five (5) years after the date of final acceptance by Yuma of all concrete flatwork required by the Contract Documents or within such longer period of time as may be prescribed by law or by the terms of any applicable special warranty required by the Contract Documents, any concrete flatwork that is determined by Yuma to be defective, deficient or not in strict accordance with the Contract Documents or ASTM F2480-18, Design-Builder shall within 30 days correct such work after receipt of written notice from Yuma to do so, at Design-Builder's sole expense. If, within one (1) year after the date of final acceptance by Yuma of the remaining scope required by the Contract Documents or within such longer period of time as may be prescribed by law or by the terms of any applicable special warranty required by the Contract Documents, any work that is determined by Yuma to be defective in strict accordance with the Contract Documents, Design-Builder shall correct such work after receipt of written notice from Yuma to do so, at Design-Builder's sole expense. The 30-day corrective period may be extended by Yuma upon determination that the required

remedy will take longer than 30 days to complete. It is expressly understood that the corrective remedy shall be the removal and replacement of any defective, deficient and/or non-conforming work, unless otherwise waived by the City Engineer in writing. The obligations under this Section 2.31.3 shall survive acceptance of the Work under the Construction Contract and termination of the Construction Contract and shall in no way limit any of Yuma's other rights and remedies under the Construction Contract. Yuma shall give the notice required herein promptly after discovery of the condition or changed condition.

3.2 Paragraph 2.31 of the Construction Contract is amended by adding the following, which shall be inserted as Paragraph 2.31.9:

2.31.9 During the period of the five (5) year warranty, Design-Builder shall require that ARC's licensed engineer conduct an annual inspection and written report detailing the condition of the concrete flatwork, noting any defects or deficiencies and providing Yuma with the written report within 14 days of such annual inspection. The annual written report shall expressly certify, with the engineer's seal, that any noted deficiencies will not adversely impact the continued intended use or safety of the Project.

4. **Documents Otherwise Unchanged.** Except as provided for in this Amendment, the Construction Contract shall remain unchanged and in full force and effect in accordance with its terms. As of the Effective Date of this Amendment, each reference to the Construction Contract, and references in the Construction Contract to such agreement itself, shall reference the Construction Contract as amended hereby and as the same may be further amended, modified or supplemented from time to time.

5. **Bonds and Insurance.** Pursuant to the terms of the Construction Contract all insurance and bonds shall remain in full force and effect during and throughout the warranty period, which shall include the extended warranty period provided for in this Amendment. Design-Builder shall notify its appropriate insurers and bonding companies of the extended warranty period under this Amendment and verify that such coverages shall remain in full force and effect for the extended warranty period. Design-Builder shall provide Yuma with evidence of compliance with the extended bonding and insurance requirements in the form of endorsements and an extended maintenance bond for the extended warranty period. Any insurance or bonds cancelled or otherwise terminated prior to the expiration of the extended warranty period shall be immediately replaced. Failure to maintain required insurance and bonds shall be deemed a material breach of this Amendment and shall result in the requirement that all Deficient Work be immediately removed and replaced.

6. **Binding Effect; Successors and Assigns.** This Amendment shall be binding upon and inure to the benefit of the Parties and each of their respective permitted successors and assigns.

7. **Severability.** If any provision (or part of any provision) of this Amendment shall, for any reason, be held to be invalid, illegal, or unenforceable in any respect, such provision (or part thereof) shall not affect the validity, legality and enforceability of any other provision of (or the other part of such provision) or any other documents referred to in this Amendment, and this Amendment shall be construed as if such invalid, illegal, or unenforceable provision (or part thereof) had never been contained herein. With regard to any provision that is found to be invalid, illegal or unenforceable, the Parties shall promptly meet and negotiate a substitute for such provision or part thereof which shall, to the greatest extent legally permissible, effect the original intent of the Parties; and, if necessary or desirable, apply to the court which declared such invalidity for an interpretation of the invalidated provision (or part thereof) to guide the negotiations.

8. **Counterparts.** This Amendment may be executed in one or more counterparts, each of which will be deemed an original, and all of which together shall constitute one and the same instrument for all purposes.

**IN WITNESS WHEREOF**, the Parties hereto have entered into this Amendment on the date first written above.

**CITY OF YUMA**

**WILLMENG CONSTRUCTION, INC.**

By: \_\_\_\_\_  
John D. Simonton, City Administrator

By: \_\_\_\_\_  
Michael J. Mongelli, President

**AMERICAN RAMP COMPANY**

By: \_\_\_\_\_  
Jonathan Hunter, CEO

**ATTEST:**

By: \_\_\_\_\_  
Lynda L. Bushong, City Clerk

**APPROVED AS TO FORM:**

By: \_\_\_\_\_  
Richard W. Files, City Attorney