

## CONSTRUCTION AGREEMENT

This Construction Agreement (the "Agreement") is effective October 14, 2020 between the project owner, City of Waukesha Parks, Recreation, and Forestry, located at 1900 Aviation Drive, Waukesha, WI 53186 (the "Owner"), and Clearwing Systems Integration, LLC, located at 11101 W. Mitchell Street, Milwaukee, WI 53214 ("Clearwing") (together, the "Parties").

As set forth in greater detail below, the purpose of this Construction Agreement is to memorialize the terms by which Clearwing will provide Owner with certain enumerated equipment and services as an independent contractor, at the following location, 1900 Aviation Drive, Waukesha, WI 53186 (the "Facility"), within the time and for the price set forth below, and subject to all the terms and conditions appearing in this Construction Agreement.

### **1.0 SCOPE OF WORK.**

1.1 Scope of Work. The Scope of Work of this Agreement generally includes the improvement of the Facility as more specifically described in the "Scope of Work" attached as Exhibit A. The Scope of Work shall include, but not exceed, the items set forth in Exhibit A. Clearwing shall perform no additional work nor provide additional equipment for the Facility unless Owner provides Clearwing with a Change Order.

1.2 Change Orders. A Change Order is defined as modification of the Scope of Work which is issued by either party for agreement by both parties. It is a directive to perform which may yield a resulting adjustment of the anticipated time to achieve Substantial Completion (defined in Section 2.2, below) and the Contract Sum (defined in Section 3.1, below).

### **2.0 TERM AND TERMINATION OF AGREEMENT.**

2.1 Commencement. Clearwing shall begin the Scope of Work upon execution of this Agreement and receipt of the Deposit (defined in Section 3.6(A), below).

2.2 Substantial Completion. Substantial Completion is defined as the stage in the Scope of Work when construction is sufficiently complete so Owner has full and unrestricted use and benefit of the Facility for its intended purpose. By the date of Substantial Completion, all items in the Scope of Work, other than incidental corrective and incidental punch list work, shall be completed. Upon achievement of Substantial Completion of the Scope of Work, Clearwing shall provide Owner with a letter that identifies the date of Substantial Completion.

2.3 Termination. Without prejudice to any other right or remedy, either party may terminate this Agreement:

- A. If either party fails to perform any material term or condition of this Agreement and/or breaches any provision of this Agreement, and such party fails to cure the breach or failure to perform within ten (10) days after receiving written demand from the non-breaching party; or
- B. After providing the other party not less than sixty (60) days written notice.

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2.4 Payment to Clearwing Upon Owner's Termination Before Substantial Completion. If Owner gives notice of termination of the Scope of Work before Clearwing has reached Substantial Completion, then Clearwing shall have the right to (a) stop performing tasks remaining in the Scope of Work, (b) terminate any further obligations under the Agreement, and/or (c) recover from Owner all of Clearwing's expenses, profit and overhead for all work performed as of the date of Default for which Clearwing has not yet received compensation, including but not limited to amounts due to Clearwing's subcontractors, suppliers, and vendors. The choice of remedy for Owner's termination shall be Clearwing's, in the exercise of its sole discretion. Clearwing expressly reserves to itself all remedies available at law, in equity, or otherwise.

2.5 Refund to Owner Upon Clearwing's Termination Before Substantial Completion. If Clearwing gives notice of termination of the Scope of Work in writing before Clearwing has reached Substantial Completion, then Owner shall have the right to (a) terminate any further obligations under the Agreement, and/or (b) recover from Clearwing any progress payments remitted to Clearwing for which work has not been delivered and/or installed. Owner expressly reserves to itself all remedies available at law, in equity, or otherwise.

### 3.0 COMPENSATION.

3.1 Contract Sum. The Contract Sum is defined as the total price Owner shall pay Clearwing for the Parties to fulfill their respective obligations under this Agreement, subject to any Change Orders that may result in modifications to the amount of the original Contract Sum.

3.2 Amount of Contract Sum. The Contract Sum shall be Six Thousand Three Hundred Fifty One Dollars and Seventy Four Cents (\$6,351.74), subject to additions and deductions as provided in any Change Orders.

3.3 Changes to Contract Sum. Although Clearwing shall abide by any reasonably practicable Change Orders that Owner may issue, Clearwing may file a claim for additional costs or time incurred to fulfill any new obligations. If the Change Order expressly provides for an adjustment to the Contract Sum, then the adjustment shall be based on one of the following methods:

- A. Mutually acceptable lump sum which is itemized and supported by sufficient substantiating data to permit evaluation;
- B. Unit prices stated in the Agreement or as the Parties may subsequently agree; or
- C. Other mutually acceptable fixed or percentage fee.

3.4 Credits from Change Orders. If a Change Order's deletion or change in the Scope of Work yields a net decrease in the Contract Sum, the amount of the credit Clearwing gives Owner shall be the actual net cost to Clearwing. When both additions and credits covering related aspects of the Scope of Work are involved in a Change Order, the allowance for overhead and profits shall be figured on the basis of net increase, if any, with respect to that change.

3.5 Charges from Change Orders. If a Change Order's addition or change in the Scope of Work yields a net increase in the Contract Sum of greater than Five Hundred Dollars (\$500.00), an additional deposit of fifty percent (50%) of the amount of the Change Order shall be paid to Clearwing by the Owner at the time the Change Order is approved. Clearwing shall not begin undertaking the additional work contained in the Change Order until it has received from Owner both fully authorized copy of the Change Order and the required deposit. Remaining charges from the Change Order, as well as additional charges from any other Change Orders, may be billed in the next scheduled progress payment.

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3.6 ~~Progress Payments. Owner shall make Progress Payments to Clearwing as defined in this section:~~

~~A. *Deposit.* As a deposit and to cover Clearwing's preliminary expenses arising from the Scope of Work, Owner shall pay Clearwing fifty percent (50%) of the Contract Sum, in the amount of Three Thousand One Hundred Seventy Five Dollars and Eighty Seven Cents (\$3,175.87) at the time this Agreement is executed. Clearwing shall not begin undertaking the Scope of Work until it has received from Owner both a fully executed copy of this Agreement and its Deposit.~~

B. *Final Payment.* Within thirty (30) days following Clearwing's completion of all incidental corrective and incidental punch list work and Owner's final acceptance of all items in the Scope of Work, as amended by any Change Orders, Owner shall pay Clearwing all remaining amounts due pursuant to his Agreement.

3.7 Late Payment Penalty. Late payments will incur a penalty assessed at 2.5% weekly, effective from the due date and compounding per week. Payment penalties will continue to be assessed until payment and penalty is received.

#### 4.0 REPRESENTATIONS, WARRANTIES AND COVENANTS.

4.1 Owner's Responsibility for Scope of Work and Related Documents. Owner shall bear full legal responsibility for any defects and/or deficiencies in (a) any Scope of Work documents generated by Owner, (b) all plans or drawings provided to Clearwing, (c) any discrepancies between the Scope of Work and Owner's plans or drawings versus the actual condition of the Facility, (d) any damages to the Facility, (e) delays in Clearwing's completion of the Scope of Work which are caused by Owner or Owner's agents or representatives, (f) and all incidental and/or consequential damages resulting from or related to such defects, deficiencies, or discrepancies.

4.2 Damage to the Facility. Clearwing shall exercise reasonable care to avoid causing undue damage to the Facility during the course of completing the Scope of Work. Clearwing shall not be responsible for any damage to the Facility which is not reasonably avoidable due to the Scope of Work required by Owner, or due to the existence of latent defects or hidden conditions in the Facility.

4.3 Readiness of the Facility. Owner represents that the Facility, in its "as-is" condition, is ready for Clearwing to undertake the Scope of Work. Owner shall bear the cost of any additional expenses Clearwing may incur in order to make the Facility reasonably safe and ready for Clearwing to undertake the Scope of Work, and/or to correct or repair damage to the Facility resulting from the existence of latent defects or hidden conditions. All such additional costs shall be added to the Contract Sum by a Change Order.

4.4 Warranty. Clearwing shall provide warranty documentation upon completion of the project. Document shall include the warranty start date and the specific details on warranty service. Clearwing provides a two year warranty on workmanship. Manufacturer warranty period based on individual manufacturer.

#### 5.0 EVENT OF DEFAULT.

5.1 Default by Owner. An Event of Default by Owner is defined as either (a) Owner's failure to make any payment to Clearwing when due, or (b) Owner's failure to perform any other material obligation(s) set forth in this Agreement,

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and where Owner then fails to make such payment or perform such obligation(s) within five (5) days after Clearwing provides Owner with written notice of the Default, or if performance is impossible in five (5) days then within such reasonable time as is necessary for Owner to perform.

5.2 Default by Clearwing. An Event of Default by Clearwing is defined as Clearwing's failure to perform any material obligation(s) set forth in this Agreement, and where Clearwing then fails to perform such obligation(s) within five (5) days after Owner provides Clearwing with written notice of the Default, or if performance is impossible in five (5) days then within such reasonable time as is necessary for Clearwing to perform.

5.3 Clearwing's Remedy. Upon Owner's Default, Clearwing shall have the right to (a) stop performing tasks remaining in the Scope of Work, (b) terminate any further obligations under the Agreement, and/or (c) recover from Owner all of Clearwing's expenses, profit and overhead for all work performed as of the date of Default for which Clearwing has not yet received compensation, including but not limited to amounts due to Clearwing's subcontractors, suppliers, and vendors. The choice of remedy for Owner's Default shall be Clearwing's, in the exercise of its sole discretion. Clearwing expressly reserves to itself all remedies available at law, in equity, or otherwise.

5.4 Owner's Remedy. Upon Clearwing's Default, Owner shall have the right to (a) terminate any further obligations under the Agreement, and/or (b) recover from Clearwing any progress payments remitted to Clearwing for which work has not been delivered and/or installed. The choice of remedy for Clearwing's termination shall be the Owner's, in the exercise of its sole discretion. Owner expressly reserves to itself all remedies available at law, in equity, or otherwise.

5.5 Legal Fees and Costs. If either party brings legal action toward the other party to recover any amount due under this Agreement, the prevailing party shall be entitled to an award of its attorneys' fees and costs incurred in bringing such action.

## 6.0 INDEMNITY.

~~6.1 Mutual Indemnity. Clearwing shall defend (if requested by Owner, with counsel selected by Owner), indemnify and hold Owner harmless, including its parent companies/entities, subsidiary companies/entities, affiliate companies/entities, directors, trustees, officers, employees, servants, volunteers and agents, from all liabilities, claims, actions, demands, suits, causes of action, losses, damages, judgments, fines, costs and expenses (including reasonable attorneys' fees, legal expenses and fees incurred on appeal, and interest) accruing and resulting to any persons, firms or other legal entity as a result of any intentional or negligent actions or failure to act by Clearwing and/or its parent companies/entities, subsidiary companies/entities, affiliate companies/entities, directors, trustees, officers, employees, servants, volunteers and agents which Owner may incur, be exposed to, become responsible for, or pay. Owner shall notify Clearwing of the existence of any such claim or cause of action within a reasonable time after Owner becomes aware of the same.~~

~~Owner shall defend and hold harmless Clearwing and its parent companies/entities, subsidiary companies/entities, affiliate companies/entities, directors, trustees, officers, employees, servants, volunteers and agents from and against any and all liabilities, claims, actions, demands, suits, causes of action, losses, damages, judgments, fines, costs and expenses (including reasonable attorneys' fees, all legal expenses and fees incurred on appeal, and interest) accruing and resulting to any persons, firms or other legal entity as a result of any intentional or negligent actions or failure to act by Owner and/or its parent companies/entities, subsidiary companies/entities, affiliate companies/entities, directors, trustees, officers, employees, servants, volunteers and agents which Clearwing may incur, be exposed to, become responsible for, or pay. Clearwing shall notify Owner of the existence of any such claims or causes of action within a reasonable time after Clearwing becomes aware of the same. Owner and Clearwing acknowledge that their respective obligations under this section survive the end of this Agreement.~~

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## 7.0 FORCE MAJEURE.

7.1 Force Majeure Event. Force Majeure events shall include, but not be limited to strikes, lockout, severe weather, civil violence, inability to procure material, failure of electricity or other necessary utilities, restrictive governmental laws or regulations promulgated subsequent to the date of this Agreement, riots, insurrection, or wars. Circumstances which are *not* Force Majeure events are those which are within the control of one party, such as delays in commencement of Clearwing's work due to defects or deficiencies in the Scope of Work or related plans or drawings, or discrepancies between the Scope of Work or related plans or drawings versus the actual condition of the Facility.

7.2 Remedies. Neither party shall be responsible to the other for any expenses or claims arising from the delay, cancellation, or non-performance of any provision of this Agreement due to a Force Majeure event beyond their respective control. If a Force Majeure event materially delays either party's performance under this Agreement, then the time for performance shall be extended, based on the Parties' mutual agreement and professional judgment, with such extension of time memorialized in a Change Order.

## 8.0 LIEN ON THE FACILITY.

8.1 Lien. Clearwing gives notice that where permitted by law, it reserves the right to have a lien placed on the Facility for the purpose of assuring Owner's payment of the Contract Sum upon Clearwing's completion of the Scope of Work. As soon as practicable, Clearwing shall provide Owner with a letter confirming the lien and its terms.

## 9.0 GENERAL PROVISIONS.

9.1 Contract Documents. The Contract Documents shall consist of (a) this Agreement, plus (b) all exhibits, drawings, and specifications, (c) addenda issued prior to execution of this Agreement, (d) other documents listed in this Agreement, and (e) Change Orders and any other modifications issued after execution of this Agreement. Collectively, these materials memorialize the contract between Owner and Clearwing, representing the entire agreement between Owner and Clearwing and superseding all prior negotiations, representations or agreements, either written or oral.

9.2 Clearwing's Licenses. At all times relevant to this Agreement, Clearwing shall maintain all applicable licenses and certifications required by law.

9.3 Insurance. At all times relevant to this Agreement, Clearwing shall maintain General Liability insurance to cover claims for property damage or worker's compensation arising from the Scope of Work. Clearwing's policies will name only Owner as an additional insured prior to performing work. Clearwing will charge an additional fee to any other parties that require insurance coverage from Clearwing.

9.4 Governing Law and Venue. This Agreement shall be deemed to be executed in the State of Wisconsin. The validity and construction of this Agreement shall be determined pursuant to Wisconsin law, regardless of any principles of conflicts of laws or choice of laws of any jurisdiction. The Parties agree to the exclusive jurisdiction and venue of the state or federal courts located in Milwaukee, Milwaukee County, Wisconsin, as applicable, for the purpose of any lawsuit or legal proceeding arising from this Agreement.

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9.5 Alternative Dispute Resolution. As an alternative to the provisions of Section 9.4, above, upon mutual agreement by Owner and Clearwing, the Parties may refer any conflict, controversy, claim or dispute arising from this Agreement to a private mediator to help them resolve such dispute themselves, or to a mutually acceptable private arbitrator to reach a legally binding decision as to the dispute. In any arbitration held pursuant to this section, the prevailing party shall be entitled to recover its dispute resolution expenses, including reasonable attorneys' fees, taxable costs, and expert witness expenses, from the non-prevailing party. The arbitration award shall be final and binding, and judgment on the arbitrator's award may be entered in any Court having jurisdiction.

9.6 Entire Agreement. This Agreement contains all of the Parties' agreements. No amendment or modification of this Agreement shall be effective unless in writing and executed by these Parties. The Parties shall execute such other documents as may be necessary to effectuate the purposes of this Agreement. The headings and titles in this Agreement are for convenience only and have no bearing on its content or substance.

9.7 Assignment. Owner may assign this Agreement in whole or part to any entity which obtains exclusive rights over the Facility. Clearwing may not assign this Agreement or any of its rights or obligations without Owner's prior written consent, which shall not be unreasonably withheld.

9.8 Independent Contractor. For all purposes relating to this Agreement, Clearwing shall act as an independent contractor, not as Owner's employee or agent, for the purpose of performing the tasks set forth in the Scope of Work, as amended.

9.9 Confidential Information. In the course of providing services and equipment under this Agreement, either party may acquire information relating to the operation, financial affairs, intellectual property, or other confidential information concerning the other party or its affiliates which may not be accessible to the general public (the "Confidential Information"). The Parties agree that Confidential Information shall not be used or published except as required in the performance of this Agreement or as required by law.

9.10 Severability. If any term of this Agreement is determined to be invalid or unenforceable, the remaining terms shall remain valid and enforceable as permitted by law. Any indemnity provided for in this Agreement, including but not limited to the indemnity provided in Section 6.0, shall survive the expiration of this Agreement.

9.11 Construction. The Parties have participated jointly in the negotiation of this Agreement. If any ambiguity or question of intent or interpretation arises, then this Agreement shall be construed as if drafted jointly by the Parties, and no presumption or burden of proof shall arise favoring or disfavoring any Party by virtue of the authorship of any of the provisions of this Agreement.

9.12 Notices. Any notice or other communication relating to enforcement of this Agreement shall be in writing, and shall be deemed given if: (i) delivered personally to an officer of the party to be notified; and/or (ii) sent by email to the email address set forth below; and/or (iii) sent by overnight courier or United States registered or certified mail, postage prepaid, return receipt requested, to the addresses set forth here:

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**OWNER:** City of Waukesha Parks, Recreation, and Forestry  
1900 Aviation Drive  
Waukesha, WI 53186

**ATTENTION:** Mona Bauer  
**Telephone:** (262) 524-3737  
**Email:** MBauer@waukesha-wi.gov

**CLEARWING:** Clearwing Systems Integration, LLC  
11101 W. Mitchell Street  
Milwaukee, WI 53214

**ATTENTION:** Mitch Van Dyke  
**Telephone:** 414-258-6333  
**Email:** mvandyke@clearwing.com

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IN WITNESS WHEREOF, authorized representatives of each party have signed this Agreement, making it effective as of the date shown below.

**City of Waukesha Parks, Recreation, and Forestry**

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

Please provide Accounting Contact Information for Invoicing and Payment:

Printed Name: \_\_\_\_\_

Email: \_\_\_\_\_

Phone Number: \_\_\_\_\_

**CLEARWING SYSTEMS INTEGRATION, LLC**

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

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**EXHIBIT A -- SCOPE OF WORK**

Clearwing Systems Integration will procure and install an LG 55" digital signage display on a swivel mount so that it can be oriented angled in the corner or flat on the office wall. A Brightsign standard I/O media player is included for playback of content which can be edited and uploaded remotely.

This installation will require one power circuit and one data circuit to be installed at the display location. This is not included in this proposal and will be the responsibility of the owner to provide. This proposal includes labor, parts, and accessories needed for the display installation.

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## Bill of Materials

Qty	Vendor	Reference	Description
1	LG	55UH5E-B	55" 3840x2160 (UHD), HDMI, 500 nit LED Backlit LCD Large Format Monitor
1	BrightSign	XT244	Standard I/O Player
1	Chief	PNRUB	LFP four arm dual universal

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