



## REQUEST FOR PROPOSAL (RFP) INVITATION

### South Campus Energy Technology Center RFP# 13-006

Tarrant County College District (“TCCD”, “District”, “the College”) outlines the following schedule:

<b>RFP Release:</b>	<b>October 19, 2012</b>
<b>Deadline for Questions:</b>	<b>November 2, 2012</b>
<b>Mandatory Pre-proposal Conference:</b>	<b>October 30, 2012</b>
<b>Proposal Submission Deadline:</b>	<b>November 12, 2012 at 2:00 P.M. Local Time</b>
<b>Other:</b>	<b>Mandatory pre-proposal conference will be held on October 30, 2012, 10:00 a.m. – 11:30 a.m. at Trinity Campus, Connect Room TRTR 4102, Trinity Building 4<sup>th</sup> Floor, 300 Trinity Campus Circle, Fort Worth, TX 76102</b>

Sealed proposals must be delivered to:

**Tarrant County College District  
Trinity River Campus  
Attn: Jorge L. Espinosa, Construction Purchasing Manager  
300 Trinity Campus Circle, Room TREF 3217  
Fort Worth, TX 76102  
Fax or email not accepted.**

#### **Preamble:**

The Tarrant County College District is a public institution of higher education that provides academic, occupational, general, and continuing education opportunities, as well as lifelong learning for all people in its District and contiguous service area. The College is committed to provide a high quality learning experience for its students at a reasonable cost and to serve as a good steward of public funds.

This request for proposals implies no obligation on the part of the Tarrant County College District. The College reserves the right to accept the proposal that it believes most nearly meets the requirements, based on “best value” and not necessarily, the lowest price offered.

Tarrant County College District  
1500 Houston Street  
Fort Worth, Texas 76102-6599

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**INFORMATION / REQUIREMENTS / PROCESS**

1. Note that “bid”, “submission” and “proposal” for purposes of this RFP have the same basic meaning. Further, references to “vendor”, “supplier”, “firm”, “contractor” and / or “bidder” have the same meaning in singular or plural.
2. The sealed proposal must include at least **one (1) original, four (4) copies and one electronic copy**. It is not necessary to duplicate the entire RFP.
3. The RFP number, bidder’s address, point of contact, phone number and email address must be referenced on the bid package.
4. TCCD encourages participation from certified Minority and Women Owned Business Enterprises (MWBEs). In scoring, more points will be awarded to a MWBE based in Tarrant County ... than a MWBE based in Ellis County ... and, more points to a firm in Ellis County than a firm based in Austin ... and, so on. Below is an example of how scoring might be applied:

<b>Participation: It is TCCD’s goal that 20% of spent be directed to a certified MWBE and the results must be auditable.</b>	<b>Tarrant County</b>	<b>Eight Adjacent Counties</b>	<b>North Texas</b>	<b>Texas</b>	<b>U.S.</b>
<b>MWBE (certified)</b>	<b>25</b>	<b>20</b>	<b>15</b>	<b>10</b>	<b>5</b>
<b>Firm with certified Subcontracting Plan</b>					
<b>0%&lt;10%</b>	<b>1-3</b>	<b>1-2</b>	<b>1-2</b>	<b>0</b>	<b>0</b>
<b>&gt;10% &lt; 20%</b>	<b>4-8</b>	<b>3-6</b>	<b>3-4</b>	<b>1</b>	<b>0</b>
<b>&gt;20% &lt; 30%</b>	<b>9-17</b>	<b>7-12</b>	<b>5-7</b>	<b>2</b>	<b>0</b>
<b>&gt;30% &lt; 40%</b>	<b>18</b>	<b>13</b>	<b>8</b>	<b>3</b>	<b>0</b>
<b>&gt;40% &lt; 50%</b>	<b>19</b>	<b>14</b>	<b>9</b>	<b>4</b>	<b>0</b>
<b>≥50% &lt; 60%</b>	<b>20</b>	<b>15</b>	<b>10</b>	<b>5</b>	<b>0</b>
<b>≥60% &lt; 70%</b>	<b>21</b>	<b>16</b>	<b>11</b>	<b>6</b>	<b>1</b>
<b>≥70% &lt; 80%</b>	<b>22</b>	<b>17</b>	<b>12</b>	<b>7</b>	<b>2</b>
<b>≥80% &lt; 90%</b>	<b>23</b>	<b>18</b>	<b>13</b>	<b>8</b>	<b>3</b>
<b>≥90% &lt; 100%</b>	<b>24</b>	<b>19</b>	<b>14</b>	<b>9</b>	<b>4</b>
<b>100% Total Contribution</b>	<b>25</b>	<b>20</b>	<b>15</b>	<b>10</b>	<b>5</b>

5. The sealed bid proposal must meet all requirements as delineated herein. Failure to follow details may result in disqualification.
  - a) Technical proposals shall be submitted in envelopes or cartons clearly marked “Technical Proposal” with the solicitation number.

- b) Price Proposals shall be submitted in separately sealed envelope clearly marked "Purchase Price" with solicitation number.

**6. Format of Submission (pages in the following order): Please provide a bound and tabbed response in the following order**

- Tab 1 Cover Letter or Transmittal Letter  
Tab 2. Supplier Information Form  
Tab 3. Construction Manager at Risk Price Proposal Form, General Conditions: Staffing and Reimbursable Costs Details, and Personnel Salary Rates Form **(SUBMITTED IN A SEPARATE SEALED ENVELOPE)**  
Tab 4. Similar Project Experience  
Tab 5. Schedule Breakdown  
Tab 6. Project Team's Profiles and Experience  
Tab 7. Safety Information  
Tab 8. MWBE Subcontractor Utilization Plan & MWBE Certification -The impact on the ability of the District to comply with laws and rules relating to minority owned businesses (20% inclusion goal)  
Tab 9. Reputation of supplier & suppliers' goods and services (References)  
Tab 10. Quality of supplier's goods and services on projects of similar magnitude  
Tab 11. Extent to which the goods or services meet the District's needs  
Tab 12. Supplier's past relationship with the District  
Tab 13. Financial and Bonding Capacity  
Tab 14. Certifications / Representations Form  
Tab 15. Felony Conviction Form  
Tab 16. Non-Resident / Resident Certification Form  
Tab 17. Proof of Insurance

Proposals should be bound by wire or plastic spiral binding. Please do not submit in 3-ring binders. One copy of the proposal must have original signatures and attests throughout the documents as required, including the raised seal of the firm where requested.

Elaborate proposals and/or lengthy presentations are not desired or required by the District.

Proposal documents should be prepared in single-spaced type, 10 or 12-point font, on 8-1/2" x 11" pages, using one side of the paper only. Pages should be numbered at the bottom to show the page number and total number of pages in the proposal, e.g., Page 1 of 15, Page 2 of 15, etc.

Please limit your submission to a maximum of sixty (60) pages (not including Tab 3 Purchase Price Forms, resumes, promotion literature or other required forms and appendixes). A maximum one (1) page introductory letter may be submitted within the sixty (60)-page limitation. There is a limitation of up to fifty nine (59) pages of information directly related to the evaluation criteria elements. CPM schedules provided an 11" x 17" pages folded to fit the proposal will count as one page for each 11" x 17" sheet provided. Only the first sixty (60) pages will be evaluated if the page limitation is exceeded.

Proposal documents shall be sectionalized as described above. A blank page should precede each section with an index tab extending beyond the far right side of the page. The index tab should have the appropriate section number typed thereon. **To be considered complete, the proposal shall be organized in accordance with the Request for Proposals (RFP) requirements contained in this section.**

7. Conditional clauses in a submitted proposal are not acceptable.
8. If selected, suppliers will need to register with TCCD on line at <http://www.tccd.edu>. Click on "Business and Community" then "Vendor Application" under the section "Doing Business with TCCD". Registration is not to be construed as a commitment by TCCD to enter into a business arrangement.
9. Specifications and scopes of work that may refer to brand names and manufacturers are not intended to restrict competition, but are meant to indicate the quality of goods or services sought. Suppliers may bid an equivalent(s) provided the deviation(s) is clearly identified in the bid response. The final determination of equivalency lies solely with TCCD. It is not the intent of any instruction, term/condition, and scope of work or specification to prohibit a supplier from submitting a proposal.
10. The proposal / bid form may be a specifically defined form incorporated herein and the supplier should use this form. If no specific proposal/bid form or format is provided for herein, the Supplier may use a form or format of choice ("free form").
11. Questions regarding this RFP must be in writing and e-mailed to Jorge Espinosa, Construction Purchasing Manager at [jorge.espinosa@tccd.edu](mailto:jorge.espinosa@tccd.edu). TCCD's Director of Purchasing or Purchasing Manager are the only authorized sources that can provide information regarding this RFP and such information will be in writing.
12. All disputes, claims, or lawsuits, if any, that may result from this RFP shall be addressed in Tarrant County, TX, **without exception**.
13. TCCD reserves the right to reject any or all submittals and to waive any formality in submittals received whenever such rejection or waiver is in the best interest of the project. It is understood and agreed by the submitting firms that submittals, interview, etc. are voluntary and that TCCD is not responsible for any compensation and / or commitment associated with submittals or interviews.
14. TCCD is not required to award to the lowest bidder or to even select a supplier. However, if a selection is made and, inherent to other selection criteria depicted in this RFP, TCCD shall consider the following in accordance Chapter 2267, Subchapter F, Sections 2267.253 and 2267.254 of the Texas Government Code:

All proposals shall be technically evaluated on the basis of the factors and weights which are

shown. At a minimum, the items described in each section should be addressed.

The Purchase Price	<b>30 %</b>
Reputation of supplier & supplier's goods and services	<b>10 %</b>
Quality of supplier's services	<b>5 %</b>
Extent to which the goods or services meet the District's needs	<b>10 %</b>
Supplier's past relationship with the District	<b>5 %</b>
The impact of the ability of the District to comply with laws and rules relating to minority owned businesses (20% inclusion goal)	<b>15 %</b>
Any other relevant factor specifically listed in this RFP (see below)	<b>25 %</b>
<b>Total:</b>	<b>100 %</b>

**Tab 1: Cover Letter or Transmittal letter**

Provide on your company's letterhead the company description, mission or goals, experience, availability and any other relevant information.

**Tab 2: Supplier Information Form**

Submit company name and address, contact information, M/WBE information per attached Supplier Information Form.

**Tab 3: The Purchase Price:**

Proposed prices shall be evaluated for completeness, reasonableness, and realism. **Please fill out and submit in a separate sealed envelope the following: 1.) Construction Manager at Risk Price Proposal Form, 2.) Reimbursable Conditions: Staffing and Costs Details Form, 3.) Personnel and Salary Rates Form, and 4.) Agreement to the Terms and Conditions Form.** The following price analysis will be looked at to determine an overall best value:

- a. Completeness – the proposal covers all requirements of the specifications and baseline schedule, including all pricing information required by the solicitation.
- b. Reasonableness – prices are reasonable in comparison to estimates, previous contract prices, and can be supported by suitable estimating techniques.
- c. Realism – cost realism analysis is the process of independently reviewing and evaluating specific elements of each firm's proposed cost estimate to determine whether the estimated proposed cost elements are realistic for the work to be performed; reflect a clear understanding of the requirements; and are consistent with the unique methods of performance and materials described in the firm's technical proposal.

**Other relevant factors Tab 4 – Tab 7:**

**Tab 4: Similar Project Experience:**

Experience from projects of similar size and nature will be considered. Special attention will be given to the team’s experience with similar projects that required innovative responses to schedule challenges, commissioning and LEED certification.

- a. Please include descriptions of three (3) similar projects, \$30 million and greater and preferably for higher education institutions, completed within the last five (5) years as a Construction Manager at Risk. Within the description of these projects, please include the names of the Pre-Construction Team, Project Manager and Superintendent that managed these projects. Please include location, square footage, and approximate value, duration, and client references, with contact information, for each project. **Firms not providing staff with related project experience will be screened from the final evaluation rankings.** “Similar project experience” will be a project with the following characteristics (see attached project and schematic design documents):
  - i. Education or training facility with attributes responsive to the needs of educators and students
  - ii. 80,000 to 100,000 square feet
  - iii. Urban site expansion
  - iv. Existing campus with classes in session
  - v. High level of Mechanical, Electrical, Plumbing (MEP) requirements and scope
  - vi. LEED experience with a minimum Silver Certification.

**Tab 5: Schedule Breakdown:**

The successful firm will demonstrate a thorough understanding of the schedule and will identify expedient opportunities and risks associated with schedule acceleration, clearly showing that it can meet the milestone dates set forth in the RFP, and how.

- a. The successful firm will demonstrate a thorough understanding of the schedule and will clearly show that it can meet the milestone dates set forth in the RFP. Based on the information contained within this RFP and the information gathered in preparation for this proposal, **please provide a detailed project schedule**, addressing design, GMP development, bidding, construction, FF&E / Owner related activities, and substantial / final completion dates.

**Tab 6: Project Team’s Profiles and Experience:**

The combination of the proposed project team experiences on projects of like scope and scale will be evaluated. The successful firm’s management will have demonstrated a solid commitment to providing

continuity of personnel throughout the duration of the project.

- a. Provide an organization chart of the proposed team for the project for both the preconstruction and the construction phase along with the amount of time these individuals will work on each phase of the project. Briefly describe the roles and responsibilities for each team member on your organization chart.
- b. For each member of the proposed team, provide professional profiles or resumes, highlighting their experience. When describing the project experience for each team member, please identify their role on similar projects (i.e., project manager, superintendant, etc.). The list of project experience should include brief descriptions of project, square footage, approximate value, duration and references. Where possible, relate these teams and members to the list of similar projects provided above.

**Tab 7: Safety Information:**

The successful firm must provide information establishing confidence that they will administer construction safety and safe practices on the project site during the course of the project.

- a. Provide an overview of the firm's construction safety program. Respondent should address the firm's safety policy and orientation and training programs for management and employees. Name the Safety Coordinator or Manager who will be responsible for job site safety on this project. Include the following metrics in the form of an OSHA 200 Project Log for the years 2008-2011:
  - i. Experience Modification rate (EMR)
  - ii. Number of lost time accidents
  - iii. Number of Recordable cases
  - iv. Fatalities
  - v. Number of direct hire fixed hours worked (in round 1,000's)

**Tab 8: MWBE Subcontractor Utilization Plan & MWBE Certification:**

Provide the following:

- a. Describe your procedures for handling issues and resolving disputes with your subcontractors so as to avoid disruption of the contract schedule. Provide specific examples of how you have resolved disputes with your subcontractors on other projects.
- b. Describe the relative success and/or failures experienced on similar projects, both privately and publicly funded, regarding MWBE participation goals. Describe what measures the firm will take on this project to ensure that the requirements are satisfied.



- c. Describe any existing mentoring, protégée, and internship programs for small businesses that have been/will be established for this project.
- d. Provide your proposed MWBE subcontracting plan to accomplish TCCD's goal for this project. **Please provide a percentage commitment that your firm would be willing to agree to for subcontractor participation.**

The goal of TCCD's M/WBE program is to obtain, at least 20% MWBE participation of the overall cost, including the subcontractor Tier 2 level, with a stretch goal of 30%. Therefore, a MWBE Construction Manager will not be given credit for having 100% MWBE alone. Credit will be given for the percentage of the overall cost that is directly related to the MWBE Construction Manager (i.e. General Conditions, Self-Performed Work, Fee, etc.) plus the percentage of the overall cost of work that is awarded to MWBE subcontractors. The College's desire is to make sure that the MWBE participation is also being distributed at the subcontractor Tier 2 level.

**Tab 9: Reputation of suppliers and supplier's goods and services (References):**

Provide the following:

- a. Submit, at a minimum, two (2) references with names, addresses, emails, telephone numbers and contacts for each of the designated key personnel proposed for the project.
- b. Provide a minimum of three (3) references for the firm with following data:
  - 1. Name of contact person (Owner or Architect), and current phone number and e-mail address.
  - 2. Location of the project, duration, and completion date.
  - 3. Brief description of the project, highlighting scope and value similarities.
  - 4. Amount of contract award and final contract closeout or projected price.
- c. Number and dollar amount of each claim greater than \$100,000 that required mediation, arbitration or litigation and their current disposition.

**Tab 10: Quality of supplier's services on projects of similar magnitude:**

Provide the following:

- a. Brief description of the performance of the firm's Quality Program and its effectiveness on projects of similar size and complexity.
- b. At a minimum, explain the quality control plan for the performance of work addressing all requirements of the project. Discuss proposed approach for surveillance and inspection of work; acceptance, rejection, documentation, and resolution of deficiencies; and corrective actions.

**Tab 11: Extent to which the goods or services meet the District's needs:**

Provide salient characteristics, performance parameters, and required additional information to evaluate the firm's performance. At a minimum,

- a. Provide a discussion on understanding of the project requirements and how the firm will accomplish them.

**Tab 12: Supplier's past relationship with the District:**

Provide the following:

- a. Describe work experience with the District and describe your coordination experience with agencies and municipalities associated with where the project is located.

**Tab 13: Financial and Bonding Capacity**

Provide the following:

- a. Provide letter from Surety indicating bonding capacity up to \$30,000,000 for this project and total bonding capacity for all work.
- b. Provide documentation of the value of your bonded work in the past 36 months.

14. Finalists may be asked to interview and present to administrators prior to a final decision being made.

15. TCC's Director of Purchasing, or a designated purchasing representative, will open all RFP submissions.

- a. Selection of a supplier(s) may or may not be made depending upon the results received and the overall requirements and needs of TCCD; the selection timeframe will vary depending upon the RFP and its complexity.
- b. No final tabulations or information regarding this RFP will be shared until TCCD has made a formal selection and only then by written request.
- c. The District will select a best value firm that conforms to the solicitation, which is most advantageous to the District, price and other factors considered. In using the best value approach, the District seeks to select a firm who gives the District the greatest confidence that it will best meet our requirements. This may result in an award to a higher rated, higher priced firm where the decision is consistent with the evaluation factors and a determination is made that the more superior performance history and technical abilities/risk assessment of the higher priced firm outweighs the cost difference.

15. Acceptance of a proposal/bid for consideration implies no obligation on the part of TCCD nor does the silence of TCCD imply approval or rejection of a bid.

16. TCCD reserves the right to reject any and all bids submitted and waive any and all formalities and

conditions. TCCD is not obligated to advise those suppliers who are not selected for an RFP.

17. TCCD reserves the right to award to a single supplier, multiple suppliers or no supplier at all.

18. TCCD reserves the right to award by unit pricing, by quantity pricing, by package pricing, or by total pricing, whichever is deemed necessary to accommodate budgetary, operational, and/or specification requirements. In doing so TCCD may separate and accept or reject an item(s) as deemed necessary. If a supplier does not wish for its bid to be split in this manner the supplier must state in the RFP response that the proposal is submitted as an **“all or nothing”** bid.

19. A proposal/bid award, if any, will be through the issuance of a TCCD purchase order (PO) or blanket purchase order (BPO) and shall be governed by the general terms and conditions of purchase outlined on the TCCD PO/BPO document unless such terms and conditions are superseded by the content of this RFP or contract (if terms are in conflict, the terms of the RFP will take precedence).

20. PAYMENT BOND – For projects in excess of \$25,000, an original payment bond will be required of the successful Supplier and shall be executed by a surety company acceptable to the District and authorized to do business in the State of Texas. The payment bond shall be in an amount equal to one hundred percent (100%) of the total GMP. Original bonds shall be delivered to the District no later than fifteen (15) days after the GMP is approved by the District.

21. PERFORMANCE BOND – For projects in excess of \$100,000, both an original performance bond and an original payment bond will be required of the successful Supplier and shall be executed by a surety company acceptable to the District and authorized to do business in the State of Texas. The performance and payment bond shall be in an amount equal to one hundred percent (100%) of the total GMP. Failure to deliver the performance and payment bond as specified shall be considered as having abandoned the contract and the bid bond will be retained by the District as liquidated damages. Original bonds shall be delivered to the District no later than fifteen (15) days after the GMP is approved by the District.

22. FORCE MAJEURE – Neither Supplier nor the District shall be responsible or deemed to be in fault of its obligations to the other to the extent any failure to perform or delay in performing its obligations under this RFP is caused by events or conditions beyond the reasonable control of that party and are not due to the negligence or willful misconduct of such party. For purposes of this RFP, Force Majeure events shall include, but not be limited to, acts of God or public enemy, war, riot or civil commotion, conditions due to governmental law, regulations, ordinances, order of a court of competent jurisdiction, executive decree or order. However, in the event of such delay(s) or nonperformance, the party so delayed shall furnish prompt written notice to the other party (including the date of inception of the Force Majeure event and the extent to which it will affect performance) and shall undertake all efforts reasonable possible to cure the delay or nonperformance and mitigate its effects or to otherwise perform. The District shall not be responsible for payment for any product or service delayed or foreclosed by any Force Majeure event unless and until such delayed or foreclosed product or service is provided. The provisions of the section shall not preclude the District from canceling or terminating any resulting award

(or any order for any goods or services included herein) or from revising the scope of work, as otherwise permitted under this RFP.

23. In the event products and/or services are delivered that do not meet specifications or do not perform as specified in this proposal, the supplier will replace the items, at no additional cost to TCCD, on or before the promised date of delivery.

24. The supplier shall be responsible for all claims against the manufacturer for manufacturing defects.

25. The supplier shall not sell, assign, transfer or convey this contract, in whole or in part, without the prior written consent of TCCD.

26. Any correspondence regarding a TCCD PO/BPO, specifically a pay application, must include the PO/BPO number to ensure correct and timely processing. Invoices must reference TCC's PO/BPO number.

27. TCCD will not be responsible for products delivered or services rendered in advance of a supplier's receipt of a TCCD PO/BPO that had been signed by TCC's Director of Purchasing.

28. TCCD may require bank account information should an electronic payment system be employed to facilitate method of payment.

29. In the event of breach or default, TCCD reserves the right to enforce performance in any manner prescribed by law or deemed to be in the best interest of TCCD.

## APPENDIX A

### PROJECT INFORMATION

#### South Campus Energy Technology Center RFP# 13-006

##### Project Description:

- Project Description:** The project is located at the TCCD's South Campus at 5301 Campus Drive, Ft. Worth, TX 76119. It will consist of a new training and classroom facility of approximately 83,000 square feet, which will house the Heating, Ventilation, Air Conditioning and Refrigeration (HART) Technology program and future training programs for jobs created by renewable energy technologies, and government energy efficiency initiatives along with general purpose classrooms. The facility is intended to be a premier training center for students, faculty and the greater community. It is planned to achieve LEED Platinum Certification.
- Project Milestones and Schedule Requirements:** **Estimated timeframes** for significant project milestones are as follows:

90% CD's issued for GMP Pricing	Late April to Early May 2013
Contract Documents Complete	Mid June 2013
Guaranteed Maximum Price Submitted	Late May 2013
GMP Approval–Const. Commencement	June to July 2013
Substantial Completion	September to October 2014
Final Project Completion – Spring Classes	January 2015
- Bidding Documents:** Copies of the project information and design documents listed below are available from the Architect's website at: <https://construction.freese.com/index.cfm>.

##### Project Information

10-03-12 Renderings – Design Development Set.pdf  
10-04-12 Architectural – Design Development Set.pdf  
10-04-12 Civil – Design Development Set.pdf  
10-04-12 Electrical – Design Development Set.pdf  
10-04-12 Fire Protection – Design Development Set.pdf  
10-04-12 Landscape Architecture – Design Development Set.pdf  
10-04-12 Mechanical – Design Development Set.pdf  
10-04-12 Plumbing – Design Development Set.pdf  
10-04-12 Structural – Design Development Set.pdf  
10-04-12 Telecom Audiovisual & Security – Design Development Set.pdf  
TCCD DD Spec Book.pdf

4. **Site Observation:** Respondents shall contact the following individual with written questions regarding examination of the site: Jorge Espinosa, Construction Purchasing Manager at [jorge.espinosa@tccd.edu](mailto:jorge.espinosa@tccd.edu).
5. **Selection Process:** TCCD is selecting a Construction Manager at Risk (CMAR) to provide preconstruction and construction services for the above project. TCCD will select a CMAR through a one-step process as outlined in Chapter 2267, Subchapter F, sections 2267.253 and 2267.254 of the Texas Government Code. Upon evaluation of the responses to this RFP, TCCD will rank the firms for best value, and select a shortlist of firms for possible interviews to complete the evaluation process. The District will then select the firm that provides the best value to the District.
6. **Contract:** TCCD intends to enter into an agreement in the form of a modified Construction Manager at Risk contract of the form of AIA A133–2009 with associated General Conditions of the form AIA A201-2007. The Liquidated Damages amount per Article 2.3.3.7 of the attached AIA A133 agreement will be \$2,500.00 per day. Attached is the boilerplate for your review and comment.

**Proposed revisions to the attached contract, if any, must be returned in writing with this proposal on the Agreement to the Terms and Conditions Form. Revisions not submitted with this proposal will not be considered during subsequent negotiations. The District wishes to promptly enter into an agreement with the selected best value firm. Having no revisions to the contract is considered a plus in best value determination.**

7. **Owners Outside Contractors:** At this particular time, the Owner is not planning on contracting with any other contractor or subcontractor for the scope of this work. However, if the Owner decides to contract outside of this agreement for work associated with this scope, such as Security, IT, Data/Voice, Signage or A/V, then the Contractor will be responsible for coordination of these systems with each of these consultants and/or contractors and the scope within their agreement.



Appendix C

**SUPPLIER INFORMATION FORM**

(MUST COMPLETE ALL SECTIONS OF THIS FORM)

**RFP#13-006**

Company Name:

Company Address:

Contact Name:

Contact Title:

Contact Phone:

Contact Fax:

Contact E-Mail:

---

**MWBE Information:**

Certified MWBE?

Certifying Agency?

Expiration of Certification?

**If you are a certified MWBE, please include a copy of your certification with this RFP.**



**CONSTRUCTION MANAGER AT RISK PRICE PROPOSAL FORM**  
**South Campus Energy Technology Center**  
**RFP#13 - 006**

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

**To: Mr. Jorge Espinosa**

Dear Mr. Espinosa:

We have received and thoroughly examined the proposed Contract: AIA A133 and A201 with Exhibits, Design Development Documents and Project Information, as well as the Preliminary Project Schedule and have visited and examined the Site. We have also received Addenda \_\_\_\_\_ and have included those provisions in our Proposal. We understand the work to be done as provided in the above documents. We further understand that the work is subject to the review and approval of Tarrant County College District and submit the following Proposal.

In submitting this Proposal, the undersigned agrees and accepts all provisions and exhibits within this RFP: **Any clarifications, exceptions or qualifications to this proposal have been noted in writing with the proposal submitted in the Agreement to the Terms and Conditions Form, provided within this RFP.**

**Pricing Proposal: Estimated Project Construction Cost is projected to be around \$30M - \$35M**

- a. **Preconstruction Services as a lump sum:** \$ \_\_\_\_\_
  
- b. **CM Reimbursable General Conditions**
  - a. **As actual costs up to a Not-to-Exceed amount:** \$ \_\_\_\_\_
  
  - b. **Weeks in proposed construction schedule:** \_\_\_\_\_
  
- c. **Fee Percentage:** \_\_\_\_\_ %
  
- d. **Bonds and Subguard Rates**
  - a. **Payment and Performance Bonds:** \_\_\_\_\_ %
  
  - b. **Subguard:** \_\_\_\_\_ %
  
- e. **MWBE Subcontractor % commitment** \_\_\_\_\_ %

(As requested under Tab 8d)

**Proposal to meet the Owner’s planned Substantial Completion date:**

**We are providing a CPM Format Schedule based on the Project program, Design Development documents and other documents and addenda provided with this RFP and agree to meet the Substantial Completion date of around the September 2014 to October 2014 timeframe;**

- OR -

**We propose a revised Substantial Completion date of \_\_\_\_\_ for the following reasons:**

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Signed:

By:

NAME: \_\_\_\_\_

TITLE: \_\_\_\_\_

\_\_\_\_\_

Date \_\_\_\_\_

Signature

Notary Attest of Signature:

\_\_\_\_\_

Date \_\_\_\_\_

(CORPORATE SEAL or STAMP)

## TCCD SCHEDULE OF SUBCONTRACTORS FORM

Bidder/Contractor: \_\_\_\_\_ ◀ M/WBE ◀ NON - M/WBE

Description: \_\_\_\_\_ Contract/Solicitation Number: \_\_\_\_\_

**Check the applicable: ◀ Subcontracting/Vendor Opportunities ◀ Sole Source ◀ Direct Purchase**

Note: If contract is a sole source and/or direct purchase, please enter the Dollar Amount of Work to be completed and proceed to the Contractor's Certification, then sign and date this form.

As part of the procedures for the submission of Proposals, all Bidders/Contractors are required to identify **ALL** participating Subcontractors/Suppliers. Please identify such areas for above project, if applicable. Use additional sheets if necessary.

Name of Company Performing Work	Certification Status <sup>1</sup> (check the applicable)		Description of Commodity, Material, or Service	Dollar/Percentage Amount
	M/WBE	Non M/WBE		
Dollar/Percentage Amount of Work to be Completed by Non M/WBE Subcontractors				
Dollar/Percentage Amount of Work to be Completed by M/WBE Subcontractors				
Total (The Total Amount shall equal the amount proposed on Summary or Proposal Page				

<sup>1</sup>All M/WBE Subcontractors/Suppliers must be certified by either the (1) **North Central Texas Regional Certification Agency**, (2) **State of TX Historically Underutilized Business**, (3) **DFW Minority Supplier Development Council** or (4) **Women's Business Council – Southwest**. It is understood and agreed that, if awarded a Contract by TCCD, the Contractor will not make additions, deletions, or substitutions to this certified list without the consent of TCCD. Request for *Approval of Change to Original Certified List of Subcontractors* may be requested through the submittal of the TCCD Approval of Change to Original Schedule of Subcontractors form. TCCD may audit any and/or all records and of the contract /vendor and conduct interviews of owners, principals, employees and applicable subcontractors participating on the contract.

The above information is true and complete to the best of my knowledge and belief. I further understand and agree that if awarded the Contract, this certification shall be attached thereto and become a part thereof. Failure to provide accurate information or exercise positive, good faith efforts (as defined by TCCD Small M/WBE Program) in support of TCCD minority women business intent and objective may result tin being considered non-responsive to TCCD requirements. TCCD reserves the right to recommend an audit on the submitted M/WBE information as deemed necessary.

Print Name and Title: \_\_\_\_\_

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

**SMALL M/WBE INTENT TO PERFORM AS A SUBCONTRACTOR FORM**

(POTENTIAL PROFESSIONAL/CONTRACTOR/VENDOR TO IDENTIFY SUBCONTRACTORS SELECTED FOR WORK ON THE CONTRACT)

Prime Contractor: \_\_\_\_\_

Vendor Identification Number: \_\_\_\_\_

Address: \_\_\_\_\_

Phone: \_\_\_\_\_ - \_\_\_\_\_ - \_\_\_\_\_ Bid Number: \_\_\_\_\_

Contract Amount: \$\_\_\_\_\_

Description of commodities/specifications: \_\_\_\_\_

\_\_\_\_\_

Time Period \_\_\_\_\_

Name of Subcontractor/Supplier: \_\_\_\_\_

Address: \_\_\_\_\_

Phone: \_\_\_\_\_ - \_\_\_\_\_ - \_\_\_\_\_ E-mail Address: \_\_\_\_\_

Is the subcontractor certified by NCTRCA?

Yes \_\_\_\_\_ No \_\_\_\_\_

Dollar amount of contract with this Subcontractor/Supplier: \$\_\_\_\_\_

Percentage amount of contract with this Subcontractor/Supplier: % \_\_\_\_\_

Description of work performed under agreement with the Subcontractor for amount indicated above:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

**PLEASE SUBMIT A SEPARATE FORM FOR EACH SUBCONTRACTOR/SUPPLIER SERVICE**

**Felony Conviction Notification. The following form must be completed and signed.**

Pursuant to the Texas Education Code (V.T.C.A. Education Code 44.034)

(a) A person or business entity that enters into a contract with a school district must give advance notice to the district if the person or an owner or operator of the business entity has been convicted of a felony. The notice must include a general description of the conduct resulting in the conviction of a felony.

(b) A school district may terminate a contract with a person or business entity if the district determines that the person or business entity failed to give notice as required by Subsection (a) or misrepresented the conduct resulting in the conviction. The district must compensate the person or business entity for services performed before the termination of the contract.

(c) The section does not apply to a publicly held corporation.

The undersigned affirms that he/she is duly authorized to provide this information by the person(s) or business entity making the quote and the information provided below concerning felony convictions has been personally and thoroughly reviewed and verified and is, therefore, current, true and accurate to the best of my knowledge.

\_\_\_ my firm is a publicly held corporation; this reporting requirement is not applicable

\_\_\_ my firm is not owned nor operated by anyone who has been convicted of a felony

\_\_\_ my firm is owned or operated by the following individual(s) who has/have been convicted of a felony:

Name(s) of Felon(s):


Detail(s) of Conviction:


Authorized Signature:

--

Printed Name & Title:

--

## NON-RESIDENT / RESIDENT CERTIFICATION

The 1985 Texas Legislature passed HB 620 relating to bids by nonresident firms. The pertinent portion of the Act has been extracted and is as follows:

- Non Resident Bidder – means a bidder whose principal place of business is not in this state, but excludes a contractor whose ultimate parent company or majority owner has its principal place of business in this state.
- Texas Resident Bidder – means a bidder whose principal place of business is in this state, and includes a contractor whose ultimate parent company or majority owner has its principal place of business in this state.

The state or a governmental agency of the state may not award a contract for general construction, improvements, services or public works projects or purchases of supplies, materials or equipment to a nonresident bidder unless the nonresident’s bid is lower than the lowest bid submitted by a responsible Texas resident bidder by the same amount that a Texas resident bidder would be required to underbid a nonresident bidder to obtain a comparable contract in the state in which the nonresident’s principal place of business is located.

I certify that \_\_\_\_\_ is a

**Resident Bidder of Texas** as defined in HB 620.

City & County: \_\_\_\_\_

Signature: \_\_\_\_\_

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

I certify that \_\_\_\_\_ is a

**Nonresident Bidder of Texas** as defined in HB 620 and our principal place of business is:

City & State: \_\_\_\_\_

Signature: \_\_\_\_\_

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

Certifications / Representations: The below document must be filled out and signed with no omissions, alterations in wording, conditional clauses or irregularities of any kind.

**CERTIFICATIONS / REPRESENTATIONS FORM**

**DISTRIBUTOR, CONTINGENT FEE, TYPE OF BUSINESS and FRANCHISE TAX**

The Supplier certifies that he (will \_\_\_\_, will not \_\_\_\_) be the actual distributor/provider of the goods or services for which this bid is submitted.

The Supplier certifies that he (has \_\_\_\_, has not \_\_\_\_) employed or retained any company or person (other than a full-time employee working solely for the Supplier) to solicit or secure this contract, and that he (has \_\_\_\_, has not \_\_\_\_) paid or agreed to pay any company or person (other than a full-time employee working solely for the Supplier) any fee, commission, percentage, or brokerage fee contingent upon award of this contract. Furthermore, the Supplier agrees to furnish information relating to the above requested by the Director of Purchasing, Tarrant County College District, including such amount of fee, percentage, commission, or other compensatory amount.

The Supplier certifies that he operates as; an individual \_\_\_\_; a partnership \_\_\_\_; an unincorporated firm \_\_\_\_; or corporation \_\_\_\_, incorporated under the laws of the State of \_\_\_\_\_.

The Supplier certifies that he is (subject to \_\_\_\_, exempt from \_\_\_\_) payment of Texas franchise taxes. If subject to franchise taxes he certifies that the Supplier's franchise taxes are current. By completing this portion of the form the Supplier acknowledges that making a false statement as to corporate franchise tax status shall be considered a material breach of the contract and shall be grounds for cancellation of the contract.

Date \_\_\_\_\_  
Title \_\_\_\_\_

Signature \_\_\_\_\_  
Printed \_\_\_\_\_

**AUTHORITY TO SIGN**

When the Supplier is an individual, a partnership, or unincorporated firm, and this Bid is signed by other than the owner or a partner, the following **MUST** be completed and signed by the owner, a partner, or if a limited partnership, the general partner.

I, \_\_\_\_\_, certify that I am \_\_\_\_\_ of \_\_\_\_\_, the firm identified as Supplier herein, and that \_\_\_\_\_, who signed this on my behalf, was duly authorized and empowered to sign and submit bids on behalf of me/my firm.

Date \_\_\_\_\_  
Title \_\_\_\_\_

Signature \_\_\_\_\_  
Printed \_\_\_\_\_

When the Supplier is a corporation and if this Bid is signed by other than a duly authorized officer of the corporation, the following must be completed and signed by a duly authorized officer of such corporation. Or a copy of the corporate authority of the individual signing the Bid to bind the corporation can be furnished with the Bid.

I, \_\_\_\_\_, certify that I am \_\_\_\_\_ of \_\_\_\_\_, the corporation identified as Supplier herein, and that \_\_\_\_\_, who signed this Bid was duly empowered by its Board to sign and submit bids binding upon the Corporation.

Date \_\_\_\_\_  
Title \_\_\_\_\_

Signature \_\_\_\_\_  
Printed \_\_\_\_\_

--

## REFERENCES

1) Company Name: \_\_\_\_\_

Address: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Business Phone: \_\_\_\_\_

Contact Person: \_\_\_\_\_

2) Company Name: \_\_\_\_\_

Address: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Business Phone: \_\_\_\_\_

Contact Person: \_\_\_\_\_

3) Company Name: \_\_\_\_\_

Address: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Business Phone: \_\_\_\_\_

Contact Person: \_\_\_\_\_



**INSERT CONTRACTOR NAME HERE**

**DATE**

**Reimbursable Conditions: Staffing and Costs Details**

**1. Field staff administration and supervision:**

	Raw Cost \$/Wk	Burden %	% of Time On Project	No. of Weeks	Total Cost
Sr. Project Manager	\$0.00	0.00%	0.00%	0.0	\$0
Project Manager	\$0.00	0.00%	0.00%	0.0	\$0
Safety Coordinator	\$0.00	0.00%	0.00%	0.0	\$0
Superintendent	\$0.00	0.00%	0.00%	0.0	\$0
Field Engineer	\$0.00	0.00%	0.00%	0.0	\$0
LEED Coordinator	\$0.00	0.00%	0.00%	0.0	\$0
MEP-CxA Superintendent	\$0.00	0.00%	0.00%	0.0	\$0
Office Manager	\$0.00	0.00%	0.00%	0.0	\$0
Administrative Assistant	\$0.00	0.00%	0.00%	0.0	\$0
Other	\$0.00	0.00%	0.00%	0.0	\$0
Other	\$0.00	0.00%	0.00%	0.0	\$0
Other	\$0.00	0.00%	0.00%	0.0	\$0
Other	\$0.00	0.00%	0.00%	0.0	\$0
<b>Subtotal Item 1: Total</b>					<b>\$0</b>

\* Indicate the percentage of time your personnel will be dedicated solely to this project

\*\* Provide description of all onsite management personnel required for this project.

**2. Cost Detail**

Item Description	Total Cost Per Item Description
2) Field Engineering Labor with burden	\$0.00
3) Field Engineering Equipment and Supplies	\$0.00
4) Field Project Office - Trailer Rental	\$0.00
5) Temporary Parking facilities	\$0.00
6) Temporary Fire Extinguishers and Safety Equipment (PPE)	\$0.00
7) Office Furniture	\$0.00
8) Office Supplies	\$0.00
9) Postage	\$0.00
10) Federal Express/Courier Services	\$0.00
11) Miscellaneous Printing incl. Bid Documents	\$0.00
12) Copy Machine - printer and Paper	\$0.00
13) Office Equipment	\$0.00
14) Telephone and Fax Service	\$0.00
15) Personal Computers On Site	\$0.00
16) Janitorial Services	\$0.00
17) Small Tools and Consumables, including storage	\$0.00
18) Vehicle Rental	\$0.00

**(NOTE - DO NOT MODIFY THE FORMAT OF THIS SPREAD SHEET. SHOULD ADDITIONAL LINES IN THE "OTHER" CATEGORY BE NECESSARY, INSERT ROW BENEATH THE LAST USED "OTHER" LINE AND THEN ADJUST FORMULAS ACCORDINGLY. INSERT DATA IN THE BLUE HIGHLIGHTED BOXES ONLY.)**

19)	Vehicle Fuel, Maintenance, Insurance, and Repair	\$0.00
20)	Builder's Risk Insurance	\$0.00
21)	Commercial Liability Insurance	\$0.00
22)	Project Scheduling and Estimating Services or any Software costs	Inc. In Fee
23)	Project Accounting Services/Data Processing Fees (off site)	Inc. In Fee
24)	Construction Clean-Up with burden	Cost of Work
25)	Final Clean-Up	Cost of Work
26)	Dumpster Fees	Cost of Work
27)	Hoisting	Cost of Work
28)	Personal Cell Phones	\$0.00
29)	Business Automobile Insurance	\$0.00
30)	Workers Comp/Employers Liability	\$0.00
31)	Temporary Utilities to construction site, incl. trailers	\$0.00
32)	Job site porta-johns, lease and service	\$0.00
33)	Site fence, traffic controls, barricades and sidewalk protection	\$0.00
34)	2-way radios	\$0.00
35)	First Aid Kits, Supplies and AED	\$0.00
36)	Other	
37)	Other	\$0.00
38)	Other	\$0.00
* Please provide detail listing of these categories		
<b>Subtotal: (Items 2-38)</b>		<b>\$0.00</b>

<b>Total Maximum General Conditions (Items 1-38)</b>	<b>\$0.00</b>
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Estimate the following items which will be reimbursed as Cost of the Work (based on Estimated Cost of Work):	Percentage
General Contractor's P & P Bond Cost (will be calculated on GMP Amount)	%
Subcontract Bond Costs	%
<b>OR</b>	
Sub Guard Costs (in lieu of Bond) per Article 6.6.1 of A133	%

Note 1: Any conflict between this form and the language in AIA form of Agreement A133 as proposed to be used in this project will be resolved in favor of the language of the agreement.

**Form shall be completed using the Excel Spreadsheet and a hard copy as well as electronic copy will be supplied per the RFP.**

**PERSONNEL AND SALARY RATES**

Project No. & Name: \_\_\_\_\_ - \_\_\_\_\_  
 [CM - Insert Project No.] [CM - Insert Project Name]

*The following Weekly Salary Rate (WSR) shall identify the estimated billable rate prior to execution of the Agreement, and shall be confirmed during the Guaranteed Maximum Price Proposal phase for use throughout Construction Phase Services on the Standard Schedule of Values Format for all salaried General Conditions type personnel pursuant to the Agreement. The WSR shall include the employee’s estimated monthly direct salary expense (including possible future salary increases), plus any employer payroll taxes and/or fringe benefit contributions as identified below and in accordance with the provisions of the attached Contract. Any additional employer contributions not identified below or as not reimbursable per the attached Contract shall be included in the Construction Managers Fee, such as Training, Bonuses, ESOP, etc.*

Employee		Estimated Employer’s Monthly Contributions						Weekly Salary Rate
Name and Title	Estimated Weekly Direct Salary Expense	Federal & State Unemployment (Less than 1%)	Social Security & Medicare (Less than 7.65%)	Worker’s Compensation	Health & Insurance	Pension / 401(k)	Vacation / Holiday	
1.	\$	\$	\$	\$	\$	\$	\$	\$
2.	\$	\$	\$	\$	\$	\$	\$	\$
3.	\$	\$	\$	\$	\$	\$	\$	\$
4.	\$	\$	\$	\$	\$	\$	\$	\$
5.	\$	\$	\$	\$	\$	\$	\$	\$
6.	\$	\$	\$	\$	\$	\$	\$	\$
7.	\$	\$	\$	\$	\$	\$	\$	\$
8.	\$	\$	\$	\$	\$	\$	\$	\$
9.	\$	\$	\$	\$	\$	\$	\$	\$
10.	\$	\$	\$	\$	\$	\$	\$	\$
11.	\$	\$	\$	\$	\$	\$	\$	\$
12.	\$	\$	\$	\$	\$	\$	\$	\$

**Construction Manager shall certify, to the best of his knowledge, that the above referenced salary information is accurate.**

**CM signature:** \_\_\_\_\_ (same individual who signs agreement)

**Form shall be completed using the Excel Spreadsheet and a hard copy supplied per the RFP.**

**EXHIBIT H**  
**INSURANCE AND SURETY REQUIREMENTS**

[See Attached]

# DRAFT AIA<sup>®</sup> Document A133<sup>™</sup> - 2009

## **Standard Form of Agreement Between Owner and Construction Manager as Constructor where the basis of payment is the Cost of the Work Plus a Fee with a Guaranteed Maximum Price**

AGREEMENT made as of the « » day of « » in the year « »  
(In words, indicate day, month and year.)

BETWEEN the Owner:  
(Name, legal status and address)

**TARRANT COUNTY COLLEGE DISTRICT**  
1500 Houston Street  
Fort Worth, Texas 76102

and the Construction Manager:  
(Name, legal status and address)

« »  
« »

for the following Project:  
(Name and address or location)

«FORMS»  
« »

The Architect:  
(Name, legal status and address)

« »  
« »

The Owner and Construction Manager agree as follows.

### ADDITIONS AND DELETIONS:

The author of this document has added information needed for its completion. The author may also have revised the text of the original AIA standard form. An *Additions and Deletions Report* that notes added information as well as revisions to the standard form text is available from the author and should be reviewed.

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

AIA Document A201<sup>™</sup>-2007, General Conditions of the Contract for Construction, is adopted in this document by reference. Do not use with other general conditions unless this document is modified.

**ELECTRONIC COPYING** of any portion of this AIA<sup>®</sup> Document to another electronic file is prohibited and constitutes a violation of copyright laws as set forth in the footer of this document.

## TABLE OF ARTICLES

1	GENERAL PROVISIONS
2	CONSTRUCTION MANAGER'S RESPONSIBILITIES
3	OWNER'S RESPONSIBILITIES
4	COMPENSATION AND PAYMENTS FOR PRECONSTRUCTION PHASE SERVICES
5	COMPENSATION FOR CONSTRUCTION PHASE SERVICES
6	COST OF THE WORK FOR CONSTRUCTION PHASE
7	PAYMENTS FOR CONSTRUCTION PHASE SERVICES
8	INSURANCE AND BONDS
9	DISPUTE RESOLUTION
10	TERMINATION OR SUSPENSION
11	MISCELLANEOUS PROVISIONS
12	SCOPE OF THE AGREEMENT

### ARTICLE 1 GENERAL PROVISIONS

#### § 1.1 The Contract Documents

The Contract Documents consist of this Agreement, the General Conditions of the Contract (as further defined below), the Owner's Supplementary Conditions attached hereto, Drawings, Specifications, Addenda issued prior to the execution of this Agreement, other documents listed in this Agreement, and Modifications issued after execution of this Agreement, all of which form the Contract and are as fully a part of the Contract as if attached to this Agreement or repeated herein. Upon the Owner's acceptance of the Construction Manager's GMP Proposal (as further defined below), the Contract Documents will also include the documents described in Section 2.2.3 and identified in the GMP Amendment (as further defined below) and revisions prepared by the Architect and furnished by the Owner as described in Section 2.2.8. The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. If anything in the other Contract Documents, other than a Modification, is inconsistent with this Agreement, this Agreement shall govern.

§ 1.1.1 Where reference is made in this Agreement or the Contract Documents to the AIA Document A201-2007, General Conditions of the Contract for Construction, the "A201-2007", or the "General Conditions", the reference refers the version of the AIA Document 201-2007, as modified by the Owner and the Construction Manager for this Project.

§ 1.1.2 If, and to the extent of, any inconsistency, ambiguity, or discrepancy in the Contract Documents, precedence shall be given to the Contract Documents in the following order of priority: (1) written Modifications issued after execution of this Agreement; (2) this Agreement, including the exhibits attached hereto and incorporated fully herein; (3) Addenda issued prior to the execution of this Agreement, with the Addenda bearing the latest date taking precedence; (4) the General Conditions; (5) the Final Drawings and Specifications; and (6) the Preliminary Drawings and Specifications, with those bearing the latest date taking precedence. Without limiting the foregoing, the terms of the Agreement and the General Conditions shall control over any terms in the Drawings or Specifications inconsistent therewith.

§ 1.1.3 A Modification is (1) a written amendment to the Contract signed by both parties, (2) a Change Order, or (3) a Construction Change Directive.

§ 1.1.4 Where reference is made in this Agreement or the Contract Documents to a Section number in this Agreement or the General Conditions, except as otherwise expressly stated in connection therewith, the reference includes all subsections to the respective Section. In other words, reference to Section 1.1 of this Article 1 also refers to Sections 1.1.1 through 1.1.4.

## § 1.2 Relationship of the Parties

The Construction Manager accepts the relationship of trust and confidence established by this Agreement and covenants with the Owner to cooperate with the Owner's project representatives and the Architect and exercise the Construction Manager's skill and judgment in furthering the interests of the Owner; to furnish efficient construction administration, management services and supervision; to furnish at all times an adequate supply of workers and materials; and use its best efforts to perform the Work in an expeditious and economical manner consistent with the Owner's interests. The Owner agrees to furnish or approve, in a timely manner, information required by the Construction Manager and to make payments to the Construction Manager in accordance with the requirements of the Contract Documents.

## § 1.3 General Conditions

For the Preconstruction Phase, AIA Document A201™-2007, General Conditions of the Contract for Construction, as modified by the parties hereto (the "General Conditions") shall apply only as specifically provided in this Agreement. For the Construction Phase, the general conditions of the contract shall be AIA A201-2007, as modified by the parties hereto (the "General Conditions"). The term "Contractor" as used in the General Conditions shall mean the Construction Manager.

## § 1.4 DEFINITIONS

§ 1.4. The following terms as used in the Contract Documents shall have the meanings set forth below:

- .1 "Agreement" – this AIA® Document A133 – 2009, Standard Form of Agreement between Owner and Construction Manager (where the Construction Manager is also the Constructor), as modified by the parties and executed below, together with the Exhibits listed in Section 11.5.1 and attached hereto.
- .2 "Applicable Laws" -- all laws, statutes, ordinances, regulations, guidelines or requirements now in force or hereafter enacted by any applicable Governmental Authority relating to or affecting the Project or arising from the Construction Contract, including, if and as applicable (1) the United States Occupational Safety and Health Administration requirements, (2) the Americans with Disabilities Act requirements, (3) requirements under Title VII of the Civil Rights Act of 1964, as amended, (4) the Age Discrimination in Employment Act requirements, (5) applicable building codes and zoning requirements of the City, (6) storm water, street, utility and other related infrastructure requirements, and (7) requirements related to the use, removal, storage, transportation, disposal and remediation of Hazardous Materials.
- .3 "Architect Agreement" – that certain **contractual agreement made as of \_\_\_\_\_, between Owner and the Architect** for the design of the improvements to be constructed pursuant to the Construction Contract and such other architectural services as set forth therein.
- .4 "Contract Documents" -- those documents as described in Section 1.1 of this Agreement.
- .5 "Contract" – the contractual agreement between the Owner and the Construction Manager for the construction of improvements and such other required services for the Project, created by this Agreement, including the Exhibits attached hereto and incorporated herein, the General Conditions, and the other Contract Documents.
- .6 "Governmental Authority" or "Governmental Authorities" -- any federal, state and/or local agency, department, commission, board, bureau, administrative or regulatory body or other instrumentality having jurisdiction over the Project, including any public sector board, agency, or body which has been authorized by a Governmental Authority to exercise some portion of its jurisdiction over the Project.
- .7 "Project Site" -- that portion of the real property on which the Work is to be performed by Construction Manager or under which Construction Manager has control and Construction Manager's operations under the Construction Contract are being performed, as more particularly

described or identified in **Exhibit A** attached hereto.

- .8 "Self-Perform Work" -- Work, other than supervision of the Work and minor Work in connection with Construction Manager's administrative and supervisory activities during the Construction Phase, that Construction Manager intends to perform by the Construction Manager's own forces, if authorized by the Owner and the requirements hereof.
- .9 "Separate Contractor" -- when referring to a Separate Contractor of the Owner, shall be a contractor or supplier with whom Owner has contracted directly, other than the Construction Manager, to furnish materials or perform work at the Project Site.
- .10 "Subcontractor" and "Sub-subcontractor" -- see Section 5.1 of the General Conditions.
- .11 "Weekly Salary Rate" means the amount agreed to by the Owner, as set forth on **Exhibit G – Personnel Salary Rates** attached hereto and made a part hereof, that can be used on Applications for Payment for Progress Payments throughout the Construction Phase for the purpose of billing for the services of Construction Manager's salaried personnel assigned to the Project. A Weekly Salary Rate must be established for each salaried person as set forth in **Exhibit G** or as otherwise approved in writing by the Owner in advance of any Application for Payment for that person. The Weekly Salary Rate is for convenience only and any payments made for Construction Manager's personnel are subject to audit to determine the actual cost of the wages and allowable employer contributions incurred by the Construction Manager for services performed for the Project. However, it is acknowledged that the Construction Manager will not bill nor will be reimbursed more than the stated amounts identified on **Exhibit G – Personnel Salary Rates**.

## ARTICLE 2 CONSTRUCTION MANAGER'S RESPONSIBILITIES

The Construction Manager's Preconstruction Phase responsibilities are set forth in Sections 2.1 and 2.2. The Construction Manager's Construction Phase responsibilities are set forth in Section 2.3. The Owner and Construction Manager may agree, in consultation with the Architect, for the Construction Phase to commence prior to completion of the Preconstruction Phase, in which case, both phases will proceed concurrently. The Construction Manager shall identify a representative authorized to act on behalf of the Construction Manager with respect to the Project (see **Exhibit F** and **Owner's Supplementary Conditions** attached hereto as **Exhibit I**).

### § 2.1 Preconstruction Phase

The Preconstruction Phase shall commence upon the date specified in a Notice to Proceed for Pre-Construction Phase Services issued by the Owner and shall continue through completion of the Construction Documents and procurement of all major Subcontractor agreements. Construction Manager is not entitled to reimbursement for any costs incurred for Pre Construction Phase Services performed before issuance of the first Notice to Proceed. Pre-Construction Phase Services may overlap with Construction Phase Services.

§ 2.1.1 The Construction Manager shall provide a preliminary evaluation of the Owner's program, schedule and construction budget requirements, each in terms of the other.

### § 2.1.2 Consultation

The Construction Manager shall schedule and conduct meetings with the Architect and Owner to discuss such matters as procedures, progress, coordination, and scheduling of the Work. The Construction Manager shall consult with the Owner and the Architect on proposed site use and improvements, selection of materials, and building systems and equipment. The Construction Manager shall also provide recommendations consistent with the Project requirements to the Owner and Architect on constructability; availability of materials and labor; actions designed to minimize adverse effects of labor or material shortages; time requirements for procurement, installation and construction; and factors related to construction cost including, but not limited to, costs of alternative designs or materials, preliminary budgets, life-cycle data, and possible cost reductions.

§ 2.1.3 When Project requirements in Section 3.1.1 have been sufficiently identified, the Construction Manager shall prepare and periodically (as reasonably requested by Owner or Architect) update a **Project Schedule** for the Architect's review and the Owner's approval. The Construction Manager shall obtain the Architect's approval for the portion of the Project Schedule relating to the performance of the Architect's services, including the issuance of design packages. The Project Schedule shall coordinate and integrate the Construction Manager's services, the Architect's services, other Owner consultants' services, and the Owner's responsibilities and identify items that



could affect the Project's timely completion. The updated Project Schedule shall include proposed activity sequences and durations, milestone dates for receipt and approval of pertinent information, submittal of a GMP Proposal (as defined below) for the Work, preparation and processing of shop drawings and samples, delivery of materials or equipment requiring long-lead-time procurement, Owner's occupancy requirements showing portions of the Project having occupancy priority, and proposed Critical Milestones (if any) and required date(s) of Substantial Completion. If preliminary Project Schedule updates indicate that previously approved Schedules may not be met, the Construction Manager shall make appropriate recommendations to the Owner and Architect.

#### § 2.1.4 Phased Construction

§ 2.1.4.1 The Construction Manager shall provide recommendations with regard to accelerated or fast-track scheduling, procurement, or phased issuance of Drawings and Specifications to facilitate phased construction of the Work, if such phased construction is appropriate for the Project. The Construction Manager shall take into consideration cost reductions, cost information, constructability, provisions for temporary facilities and procurement and construction scheduling issues.

§ 2.1.4.2 The Work may be divided into one or more phases or packages which will be ready for commencement of construction before it is appropriate to arrive at an overall Guaranteed Maximum Price for the entire Work. If the Owner elects to proceed before the parties arrive at an overall Guaranteed Maximum Price, the Construction Manager shall develop GMP Proposals for any such phases or packages of the Work identified by the Owner. No Work, however, will be authorized to commence hereunder until the parties have entered into a written "Work Authorization Amendment" to this Agreement (see Section 2.2.10 below) which describes the Work to be performed thereunder, establishes a Guaranteed Maximum Price for such Work, and establishes such Interim or Substantial Completion Dates for such Work as the parties may agree. Execution by Owner and delivery to Construction Manager of such a Work Authorization Amendment shall constitute Notice to Proceed for the Work specified therein.

#### § 2.1.5 Preliminary Cost Estimates

This is a fast paced project, with completion deadlines that cannot reasonably be extended. When the design drawings are complete and all of the design packages have been bid by trade contractors, it will be too late in the process to substantially redesign the Project to meet the project budget. For that reason, it is the desire of the Owner to recognize any likely budget overruns as soon as possible, and by this Contract it is employing the Construction Manager to do the design monitoring, estimating, value engineering ("value analysis") and other functions to help the Owner meet the project budget. At any time that Construction Manager develops misgivings about the integrity of the project budget, Construction Manager is to promptly advise the Owner and Architect of the misgivings, and make any suggestions Construction Manager may have as to how to address the problem.

§ 2.1.5.1 Based on the preliminary design and other design criteria prepared by the Architect, the Construction Manager shall prepare preliminary estimates of the Cost of the Work or the cost of program requirements using area, volume or similar conceptual estimating techniques for the Architect's review and Owner's approval. If the Architect or Construction Manager suggest alternative materials and systems, the Construction Manager shall provide cost evaluations of those alternative materials and systems.

§ 2.1.5.2 Throughout the Preconstruction Phase, the Construction Manager will review and monitor the various phases of the development of the design documents to determine whether or not the project budget remains realistic at each phase of the development of the design documents by the Architect. As the Architect progresses with the preparation of the Schematic Design, Design Development and Construction Documents (for any phase of the Project if the Work has been broken down into Phases in accordance with the Contract Documents), the Construction Manager shall prepare and update, at appropriate intervals required by the Contract Documents or as otherwise agreed to by the Owner, Construction Manager and Architect, estimates of the Cost of the Work of increasing detail and refinement and allowing for the further development of the design until such time as the Owner and Construction Manager agree on a Guaranteed Maximum Price for the Work. Such estimates shall be provided for the Architect's review and the Owner's approval. The Construction Manager shall inform the Owner and Architect when estimates of the Cost of the Work exceed the latest approved Project budget and make recommendations for corrective action.

### § 2.1.6 Subcontractors and Suppliers

The Construction Manager shall develop bidders' interest in the Project.

§ 2.1.7 The Construction Manager shall prepare, for the Architect's review and the Owner's acceptance, a procurement schedule for items that must be ordered well in advance of construction (the "**Procurement Schedule**") which shall include a description of the items to be ordered and the required order dates in order to avoid delay to the schedule of the Work. The Architect and Owner may supplement the Procurement Schedule by written notice to the Construction Manager and the Construction Manager shall amend the Procurement Schedule to reflect such items and set out the required order dates. If the Owner agrees to procure any items prior to the establishment of the Guaranteed Maximum Price, the Owner shall procure the items on terms and conditions reasonably acceptable to the Construction Manager, and the cost of such items shall be included in the GMP Proposal. Upon the establishment of the Guaranteed Maximum Price, the Owner shall assign all contracts for these items to the Construction Manager and the cost of such items shall be included in the GMP Proposal, and the Construction Manager shall thereafter accept responsibility for them.

### § 2.1.8 Extent of Responsibility

The Construction Manager shall exercise reasonable care in preparing schedules and estimates. The Construction Manager, however, does not warrant or guarantee estimates and schedules except as may be included as part of the Guaranteed Maximum Price. The Construction Manager is not required to ascertain that the Drawings and Specifications are in accordance with Applicable Laws as defined herein, but the Construction Manager shall promptly report in writing to the Architect and Owner any nonconformity discovered by or made known to the Construction Manager as a request for information in such form as the Architect may require.

### § 2.1.9 Notices and Compliance with Laws

The Construction Manager shall comply with all Applicable Laws, including all lawful orders of public authorities applicable to its performance under this Contract, and with equal employment opportunity programs, and other programs as may be required by governmental and quasi governmental authorities for inclusion in the Contract Documents. Construction Manager's obligation for compliance shall also apply to changes in or additions to Applicable Laws effective as of the time of the Construction Manager's respective performance, subject to Construction Manager's right to make a claim for a change in the Contract Time pursuant to Section 8.3 of the General Conditions or an increase in the Contract Sum to the extent Construction Manager can establish that it incurred additional Cost of the Work arising from the change in or addition to Applicable Laws.

### § 2.1.10 Value Analysis

Construction Manager will provide value analysis studies on construction systems and major construction components, including but not limited to the mechanical system, exterior envelope, structural system, roofing system, lighting and power service. The value analysis will be summarized in report forms and distributed to the Owner and Architect.

### § 2.1.11 Personnel

Construction Manager shall identify to the Owner the employees and other personnel that it will assign to the Project and provide the Weekly Salary Rate for each of them. Construction Manager shall also identify any consultants that will be performing services for the Project. After execution of this Agreement by the Owner, Construction Manager shall not remove or replace the persons or entities assigned to the Project except with the Owner's written consent, which consent shall not be unreasonably withheld. Construction Manager shall not assign to the Project or contract with any person or entity to which Owner has a reasonable objection. Construction Manager shall promptly update Owner in writing with the list of persons and consultants if they change during the course of the Project.

## § 2.2 GUARANTEED MAXIMUM PRICE PROPOSAL [GMP Proposal]

§ 2.2.1 Within the time period as required by the Contract Documents or as otherwise agreed by the parties, the Construction Manager shall prepare a Guaranteed Maximum Price proposal (the "GMP Proposal") in the form attached hereto as **Exhibit B – Construction Manager's Form of GMP Proposal** for the Owner's review and acceptance. The Guaranteed Maximum Price in the GMP Proposal shall be computed as the sum of the following:

- a. the Construction Manager's Estimated Cost of the Work (as approved by the Owner) which consists of the sum of the guaranteed or fixed prices of the Work, including those items procured by the Owner pursuant to Section 2.1.7 above, and the reasonable, good faith estimate of the cost of the balance of the Work;

- b. the not to exceed the Guaranteed Maximum Construction Manager's Reimbursable Conditions Costs (as identified in **Exhibit C – Reimbursable Conditions Cost Breakdown**);
- c. a deductive amount for any savings incurred for bought-out, completed or partially completed Work included in duly executed Work Authorization Amendments approved prior to establishing the Guaranteed Maximum Price;
- d. the Construction Manager's Contingency pursuant to (and as limited by) Section 2.2.4 below;
- e. the Construction Manager's Fee in accordance with Section 5.1.1 below; and
- f. Allowances as approved by the Owner.

The Owner shall be entitled to full access to the details of the process of developing the GMP Proposal. It is the intent of this Agreement that allowances, assumptions, clarifications, and any other loose elements that could lead to change orders after the Guaranteed Maximum Price is determined be held to a minimum. It is also the intent of this Agreement that as many as possible of the elements of the Project be the subject of vigorous competition

§ 2.2.2 To the extent that the Drawings and Specifications are anticipated to require further development by the Architect, the Construction Manager shall provide in the Guaranteed Maximum Price for such further development consistent with the Contract Documents and reasonably inferable therefrom. Such further development does not include such things as changes in scope, systems, kinds and quality of materials, finishes or equipment, all of which, if required, shall be incorporated by Change Order.

§ 2.2.3 The Construction Manager shall include with the GMP Proposal a written statement of its basis, which shall include the following:

- .1 A list of the Drawings and Specifications, including all Addenda thereto, and the Conditions of the Contract;
- .2 A detailed list of the clarifications and assumptions made by the Construction Manager in the preparation of the GMP Proposal, including assumptions under Section 2.2.2, to supplement the information provided by the Owner and contained in the Drawings and Specifications;
- .3 A list of allowances and a statement of their basis;
- .4 A statement of the proposed Guaranteed Maximum Price, broken down into a Schedule of Values (in compliance with the requirements of Section 7.1.5 below), including a statement of the estimated Cost of the Work organized by trade categories or systems, allowances, contingency, and the Construction Manager's Fee; and
- .5 The anticipated date by which the Owner must accept the Guaranteed Maximum Price (such date being no less than ninety days after submission of the GMP Proposal to Owner).

In the GMP Proposal, the Construction Manager shall also identify which Drawings and Specifications the Construction Manager contends will require revision in order to reflect the Construction Manager's proposed assumptions and clarifications and describe in detail the revisions to Drawings and Specifications which Construction Manager contends will be necessary if such assumptions and clarifications are agreed upon per Section 2.2.8. The GMP Proposal shall also comply with such requirements as provided in Sections 2.2.12 through 2.2.18 below. Except as otherwise agreed in writing by the parties, Construction Manager shall prepare and submit its GMP Proposal to the Owner within thirty (30) days following the issuance of Construction Documents for the Work sufficiently complete to allow the Construction Manager to "buy-out" the Work (subject to allowances, assumptions, and qualifications reasonably proposed by Construction Manager and agreed by Owner).

§ 2.2.4 It is understood and agreed that the Guaranteed Maximum Price for the Work shall include a Construction Manager's Contingency in the amount not to exceed        percent (  %) of the Estimated Cost of the Work on which the Guaranteed Maximum Price is based for the purpose of protecting the Construction Manager from Cost of the Work over-runs in line items in its Schedule of Values and other Costs of the Work that were not included in the Guaranteed Maximum Price for the respective Phase. Such costs reimbursable from Construction Manager's Contingency must be costs that would be reimbursable as Cost of the Work under Section 6.1 through 6.7 below, other than Reimbursable Conditions Costs that exceed the Maximum Reimbursable Conditions Costs as established in the GMP Amendment. Costs that exceed the Maximum Reimbursable Conditions Costs and costs that are not reimbursable under Section 6.8 below shall not be reimbursable from Construction Manager's Contingency.

§ 2.2.4.1 It is expressly understood and agreed that, to the extent that a Change Order is warranted under the terms of this Agreement, the Construction Manager's Contingency fund is not to be utilized for unforeseen conditions for

which the Owner is responsible hereunder, events of force majeure (see Section 8.3 of the General Conditions), or design changes which constitute a change in the scope of the Work and for which the Owner is responsible hereunder. Sums may be charged to the Construction Manager's Contingency only to the extent that the same have been paid or are to be paid by Construction Manager. Notwithstanding anything in the Contract Documents to the contrary, no charge shall be made against the Construction Manager's Contingency without Owner's written consent, such consent not to be unreasonably withheld.

§ 2.2.5 The Construction Manager shall meet with the Owner and Architect to review the GMP Proposal. In the event that the Owner and/or the Architect discover any inconsistencies or inaccuracies in the information presented, they shall promptly notify the Construction Manager, who shall make appropriate adjustments to the GMP Proposal, its basis, or both.

§ 2.2.6 If the Owner notifies the Construction Manager that the Owner has accepted the GMP Proposal in writing within the time required for the acceptance of the GMP Proposal, the GMP Proposal shall be deemed effective without further acceptance from the Construction Manager. Following acceptance of a Guaranteed Maximum Price, the Owner and Construction Manager shall execute the Guaranteed Maximum Price Amendment ("GMP Amendment") amending this Contract, a copy of which the Owner shall provide to the Architect. The GMP Amendment shall set forth the agreed upon Guaranteed Maximum Price with the information and assumptions upon which it is based.

§ 2.2.7 The Construction Manager shall not incur any cost to be reimbursed as part of the Cost of the Work prior to the commencement of the Construction Phase, unless the Owner provides prior written authorization for such costs.

§ 2.2.8 The Owner shall authorize the Architect to provide the revisions to the Drawings and Specifications to incorporate the agreed-upon assumptions and clarifications contained in the GMP Amendment. The Owner shall promptly furnish those revised Drawings and Specifications to the Construction Manager as they are revised. The Construction Manager shall notify the Owner and Architect of any inconsistencies between the GMP Amendment and the revised Drawings and Specifications, and such notice shall describe in detail each inconsistency.

§ 2.2.9 To the extent any sales, rental or use of labor, equipment or materials for the Project are subject to sales or use tax under Applicable Law, the Construction Manager shall include in the Guaranteed Maximum Price all such sales, consumer, use and similar taxes for the Work provided by the Construction Manager that are legally enacted, whether or not yet effective, at the time the GMP Amendment is executed.

§ 2.2.10 As noted in Section 2.1.4, some phases of the Work may be ready for construction before it is appropriate to arrive at an overall Guaranteed Maximum Price for the entire Project. If the Owner elects to proceed with any packages of the Work before the parties arrive at an overall Guaranteed Maximum Price, the Construction Manager shall develop GMP Proposals for any phases of the Work identified by the Owner.

§ 2.2.10.1 Until a Guaranteed Maximum Price for the entire Project has been established and accepted by the Owner, the Construction Manager and Owner agree to use the Work Authorization Amendment in a mutually acceptable format to authorize work to begin based on a specified scope and a specified "not to exceed" price. The price and the scope of Work identified with each previously approved Work Authorization Amendment will be included in the Guaranteed Maximum Price at the time the Contract Documents are sufficiently complete to establish the Guaranteed Maximum Price ("GMP"), subject to any limitation on the Construction Manager's Contingency as provided in Section 2.2.4 above. Prior to the Owner's acceptance of the Guaranteed Maximum Price for the entire Work, Construction Manager shall not incur any cost to be reimbursed as part of the Cost of the Work for Construction Phase services, except as the Owner may specifically authorize in an executed Work Authorization Amendment as required herein.

§ 2.2.10.2 Except as otherwise agreed by Owner and Construction Manager, when a GMP Proposal for any portion of the Work is agreed upon by the parties pursuant to a Work Authorization Amendment, the Guaranteed Maximum Price amounts, including any the Construction Manager's Reimbursable Conditions Costs, for those portions which have been previously approved by the Owner shall be combined and shall be used in pricing those portions of the Work covered by such Guaranteed Maximum Price proposals, subject to any limitation on the Construction Manager's Contingency as provided in Section 2.2.4 above, and all separate Guaranteed Maximum Price proposals previously agreed to by the parties shall be of no further force and effect.



**§ 2.2.11 Subcontract Buy-Out.** Except as otherwise expressly authorized in writing by Owner, Construction Manager shall enter into written Subcontracts (which for purposes hereof includes a subcontract agreement covering any Self-Perform Work (as defined herein) expressly authorized by Owner, supply agreements and purchase orders) for the respective scope of the Work with fixed pricing terms and in accordance with the requirements of the Contract Documents no later than sixty (60) days after the GMP Proposal has been accepted. Construction Manager shall provide Owner with copies of the respective executed Subcontracts with the pricing terms no later than three (3) business days after such Subcontracts have been entered into. In no event shall Construction Manager commence Self-Perform Work, order materials, or permit a Subcontractor to commence its portion of the Work prior to furnishing Owner with a copy of such executed Subcontract.

The parties acknowledge that, as those Subcontracts are entered into and at Owner's request, the Cost of the Work in the individual line items on which the Guaranteed Maximum Price for the respective Phase of the Work is based shall be subject to adjustment as provided herein to reflect the fixed Cost of the Work pursuant to the Subcontracts (referred to herein as "buy-out"). When buy-out of the entire Work is at least 85% complete, Construction Manager shall provide a proposed adjustment of the Guaranteed Maximum Price and the respective line items in the Schedule of Values to reflect the Cost of the Work fixed by the respective Subcontracts. To the extent that the fixed Cost of the Work is less than the Estimated Cost of the Work for a respective line item, such line item and the Guaranteed Maximum Price of the respective Phase of the Work shall be reduced accordingly. To the extent that the fixed Cost of the Work is greater than the Estimated Cost of the Work for a respective line item, the Guaranteed Maximum Price for the respective Phase of the Work shall not be increased but such line item shall be increased by such amount, if available, from Construction Contingency or from an established "savings" from another line item (with that line item being reduced accordingly). The adjustments as provided herein shall be incorporated by Change Order, with any net savings reducing the Contract Sum accordingly.

**§ 2.2.11.1** The Construction Manager shall document the actual Cost of the Work at buyout as compared to the Guaranteed Maximum Price Proposal and shall report this information to the Owner monthly and with Construction Manager's recommendation for selection of a bid/proposal for each subcontracting package.

**§ 2.2.12** The GMP Proposal must include a written description of how it was derived that specifically identifies the clarifications and assumptions made by the Construction Manager in the GMP and the monetary amounts attributable to them. The GMP Proposal shall include, without limitation, a breakdown of Construction Manager's estimated Reimbursable Conditions Costs (in an amount not to exceed the Guaranteed Maximum Reimbursable Conditions Costs as established herein) and estimated Costs of the Work organized by trade; contingency amounts; the Construction Phase Fee; and the proposed Time of Completion, including dates for each Notice to Proceed, Substantial Completion and Final Completion (see definition in Section 8.1.3 of the General Conditions). Construction Manager shall be authorized to commence the Work covered by such GMP Proposal upon acceptance of such GMP Proposal by Owner and issuance of a Notice to Proceed for such Work by Owner.

**§ 2.2.13** The GMP Proposal shall allow for reasonably expected changes and refinements in the Drawings and Specifications through completion of the Construction Documents, except for material changes in scope. The GMP Proposal shall also expressly include all Reimbursable Conditions Costs and such other costs and expenses directly incurred by the Construction Manager in connection with its administration and supervision of the Work through Final Completion of the Work, regardless of whether Construction Manager achieves Final Completion within any deadlines set forth in Section 2.3.3.2 below.

**§ 2.2.14** The GMP Proposal and all supporting documents shall identify and describe all items, assumptions, costs, contingencies, schedules and other matters necessary and relevant for proper execution and completion of the Work covered thereby and for establishment of the Guaranteed Maximum Price. The GMP Proposal and the supporting documents are complementary and, in the event of an irreconcilable conflict between or among them, the interpretation that provides for the higher quality of material and/or workmanship shall prevail over all other interpretations.

**§ 2.2.15** The GMP Proposal shall adopt and incorporate all of the terms and conditions of this Agreement and all attachments to this Agreement. Any proposed deviation from the terms and conditions of this Agreement must be clearly and conspicuously identified to the Owner in writing and specifically accepted by the Owner. In the event of a conflict between any term of the GMP Proposal that was not clearly and conspicuously identified and approved by the Owner and the terms of this Agreement and its attachments, the terms of the Agreement and its attachments shall control.

§ 2.2.16 Owner may accept or reject a Guaranteed Maximum Price Proposal or attempt to negotiate its terms with Construction Manager. Upon acceptance by the Owner of a GMP Proposal in writing, both parties shall execute the GMP Proposal and the terms of the GMP Proposal, including the Guaranteed Maximum Price and the supporting documents, shall become part of the Contract between the Owner and the Construction Manager. If the Owner rejects the GMP Proposal or the parties are unable or unwilling to agree on a GMP, the Owner may terminate this Agreement as provided in Article 10 below.

§ 2.2.17 In submitting the GMP Proposal, the Construction Manager represents that it will provide every item, system or element of Work that is identified, shown or specified in the GMP Proposal or the supporting documents, along with all necessary or ancillary materials and equipment for their complete operating installation, unless specifically excepted by the Owner. Upon Owner's acceptance of the GMP Proposal, the Construction Manager shall not be entitled to any increase in the Guaranteed Maximum Price due to the continued refinement of the Construction Documents or the absence or addition of any detail or specification that may be required in order to complete the construction of the Project or applicable Work Package as described in and reasonably inferable from the GMP Proposal or the supporting documents used to establish the GMP.

§ 2.2.18 Following the Owner's acceptance of the GMP Proposal, Construction Manager shall continue to monitor the development of the Construction Documents so that, when complete, the Construction Documents adequately incorporate and resolve all qualifications, assumptions, clarifications, exclusions and value engineering issues identified in the GMP Proposal. During the Construction Documents stage, the Construction Manager shall deliver a monthly status report to the Owner describing the progress on the incorporation of all qualifications, assumptions, clarifications, exclusions, value engineering issues and all other matters relevant to the establishment of the GMP into the Construction Documents.

## § 2.3 Construction Phase

### § 2.3.1 General

§ 2.3.1.1 For purposes of Section 8.1.2 of the General Conditions, the date of commencement of the Work shall mean the date of commencement of the Construction Phase.

§ 2.3.1.2 The Construction Phase shall commence upon the Owner's issuance of a Notice to Proceed.

### § 2.3.2 Administration

§ 2.3.2.1 Except as may be otherwise directed or approved by Owner, all Subcontracts (including purchase orders) shall be awarded pursuant to competitive bids and according to the following procedure. The procedure for obtaining such bids shall be approved by the Owner and shall comply with and be governed by the requirements for competitive bidding as set forth in Sections 2267.255 through 2267.257 of the Texas Government Code. All bids shall be opened in the presence of the Owner or its designated representative. The Owner shall determine, with the advice of the Construction Manager and the Architect, which bids will be accepted. The Construction Manager shall not be required to contract with anyone to whom the Construction Manager has reasonable objection.

§ 2.3.2.1.1 If the Construction Manager intends to perform Work by its own forces (Self-Perform Work), other than supervision of the Work, or through a Related Party (as defined in Section 6.10 below), Construction Manager shall notify Owner, in writing, of such intent and how the bid pricing will be obtained (whether on the basis of a stipulated sum, unit price, or cost of the work plus a stipulated mark-up subject to a guaranteed maximum price). Construction Manager must obtain Owner's written approval prior to solicitation of bids. If Owner approves Construction Manager's request to submit pricing for Self-Perform Work or from a Related Party, Construction Manager must competitively bid against no less than three trade contractors. All bids, including Construction Manager's bid (which must fully comply with all applicable requirements for bids from Subcontractors) and the Related Party's bid shall, at Owner's request, be submitted directly to Owner and shall be opened by Owner or its designated representative.

§ 2.3.2.2 If the Guaranteed Maximum Price has been established and when the Owner requires that a higher bidder be accepted, then the Construction Manager may require that a Change Order be issued to adjust the Contract Time and the Guaranteed Maximum Price as provided in Section 2267.256 (b) of the Texas Government Code.

§ 2.3.2.3 Subcontracts or other agreements shall conform to the applicable payment provisions of this Contract. Without limiting the foregoing, Construction Manager's subcontract and purchase order forms shall be subject to

approval of Owner and shall provide that subcontractor shall perform its portion of the Work in accordance with all applicable provisions of this Agreement and the other Contract Documents. Subcontracts shall not be awarded on the basis of cost plus a fee.

§ 2.3.2.4 If the Construction Manager recommends a specific bidder that may be considered a "Related Party" according to Section 6.10, then the Construction Manager shall promptly notify the Owner in writing of such relationship and notify the Owner of the specific nature of the contemplated transaction, according to Section 2.3.2.1.

§ 2.3.2.5 The Construction Manager shall schedule and conduct regular, weekly meetings at which the Owner, Architect, Construction Manager and appropriate Subcontractors can discuss such matters as procedures, progress, coordination, scheduling, and status of the Work. The Construction Manager shall prepare and promptly distribute minutes to the Owner and Architect.

§ 2.3.2.6 Upon the execution of the GMP Amendment, the Construction Manager shall prepare and submit to the Owner and Architect a construction schedule for the Work ("**Contractor's Progress Schedule**") and submittal schedule in accordance with Section 3.10 of the General Conditions.

§ 2.3.2.7 The Construction Manager shall record the progress of the Project in accordance with Section 3.10 of the General Conditions. On a monthly basis, or otherwise as required by Section 3.10 of the General Conditions or as agreed to by the Owner, the Construction Manager shall submit written progress reports to the Owner and Architect, showing percentages of completion and other information required by the Owner. The Construction Manager shall also keep, and make available to the Owner and Architect, a daily log containing a record for each day of weather, portions of the Work in progress, identification of the Subcontractors working on the site and the number of workers on site, identification of equipment on site, problems that might affect progress of the work, accidents, injuries, and other information required by the Owner.

§ 2.3.2.8 The Construction Manager shall develop a system of cost control for the Work, including regular monitoring of actual costs for activities in progress and estimates for uncompleted tasks and proposed changes. The Construction Manager shall identify variances between actual and estimated costs and report the variances to the Owner and Architect and shall provide this information in its monthly reports to the Owner and Architect, in accordance with Section 2.3.2.7 above.

### § 2.3.3 CONTRACT TIME

§ 2.3.3.1 The Contract Time with regard to the Construction Phase Services shall be measured from the Date of Commencement as provided pursuant to Section 2.3.1.1. It is currently intended by the parties that the Date of Commencement of the Construction Phase shall be on or about \_\_\_\_\_, 20\_\_ (subject to earlier commencement of a portion of that Work by Work Authorization Amendment).

§ 2.3.3.2 Time is of the essence of this Contract. The Construction Manager shall diligently prosecute the Work and achieve Substantial Completion of the Work within the Contract Time requirements as set forth in the applicable Work Authorization Amendment or the GMP Amendment, subject to adjustments as provided in the Contract Documents. After Substantial Completion, the Construction Manager shall diligently continue to prosecute the Work to Final Completion and, except as otherwise expressly agreed in the GMP Amendment, shall achieve Final Completion not later than forty-five (45) calendar days from the later of the Date of Substantial Completion or receipt of Owner's final "punch list."

§ 2.3.3.3 Owner retains the right to identify specific areas for early Substantial Completion sufficient to allow for installation of Owner's equipment, phased use or partial occupancy of the facility, or providing access to Owner's Separate Contractors or vendors for finish-out of concession areas and service amenities. The parties acknowledge that a Work Authorization Amendment, the GMP Amendment, or such other Modification of the Agreement may create such milestones requiring certain phases or scopes of work to be substantially performed or completed at certain specified times. Collectively, the times required for early Substantial Completion and the milestones described above are referred to in the Contract Documents as "**Critical Milestones**". The Critical Milestones made a part of the Contract are critical elements of the Contract Time requirements under the Contract and are "of the essence" of the Contract.

§ 2.3.3.4 The Owner reserves the right to modify or revise the Critical Milestones and the Project Schedule by written notice to Construction Manager. In the event that Construction Manager intends to request an increase in the Contract Sum or Contract Time as a result of such modification or revision of the Critical Milestones or the Project Schedule, the Construction Manager shall strictly comply with the notice requirements set forth in Article 15 of the General Conditions. If Construction Manager fails to provide notice as required by Sections 15.1.2 and 15.1.4 of the General Conditions within ten (10) days after receipt of Owner's notice with regard to the modification or revision of the Critical Milestones or the Project Schedule, the Construction Manager shall be deemed to have waived any right to seek or recover an increase in the Contract Sum or Contract Time as a result thereof. Such change in the Contract Time requirements shall be incorporated into the Contract Documents by Change Order or Construction Change Directive if the Construction Manager wrongfully fails or refuses to execute the Change Order.

§ 2.3.3.5 In the event Construction Manager shall fall behind schedule for any reason which does not justify an extension under Section 8.3 of the General Conditions of the Substantial Completion Date or any other Contract Time requirements, Construction Manager shall, within ten (10) days after written request of Owner, develop and deliver a recovery plan to the Owner with a recovery schedule and a program describing the additional manpower, overtime, material expediting, re-sequencing of the Work and other steps Construction Manager shall take to meet the requirements of the Contract with regard to the Contract Time. Construction Manager shall not be entitled to compensation from the Owner or any increase in the Contract Sum for the scheduled recovery efforts, except as to causes of delay to the critical path not the fault of the Construction Manager under Section 8.3 of the General Conditions. No approval or consent by the Owner or any plan for re-sequencing or acceleration of the Work submitted by Construction Manager pursuant to this Section shall constitute a waiver by Owner of any damages or losses which Owner may suffer by reason of such re-sequencing or the failure of the Construction Manager to meet the Substantial Completion Date or other requirements of the Contract with regard to the Contract Time.

§ 2.3.3.5.1 Owner shall additionally be entitled to direct the acceleration or re-sequencing of the Work in order to achieve completion prior to the required date for Substantial Completion or to meet any other Contract Time requirements of the Contract, and Construction Manager shall be reimbursed for the amount of the premium portion of overtime actually incurred in respect thereto and shall be entitled to an increase adjustment to the Contract Sum to the extent of the premium portion of overtime so incurred. Before proceeding with any such Owner-directed acceleration plan under this subsection, the Construction Manager shall have received the Owner's prior written approval of the plan and its anticipated not-to-exceed cost.

§ 2.3.3.6 Except as provided in the Project Schedule approved by the Owner or in Section 8.3 and Article 15 of the General Conditions, adverse weather conditions are not anticipated to impact the progress of Construction Manager's work. However, Construction Manager will record on a daily basis whether its job progress has been materially affected by such conditions. Any such day lost due to adverse weather conditions (except such delay for which Construction Manager is entitled to an extension of the Contract Time under Section 8.3 and Article 15 of the General Conditions) shall be made up by Construction Manager performing work on the ensuing Saturday or by extended hours during that week, and treating such as a work day for the purpose of complying with and meeting the Contractor's Progress Schedule (prior to such delay) and the Contract Time requirements, including the Critical Milestones and the Project Schedule. Notwithstanding the foregoing, it is expressly understood that no application for extension of time will be made unless the critical path of the project is materially affected. The Construction Manager will provide written explanation and CPM schedule evidencing such impact has occurred. Construction Manager will notify Owner of any such delay in writing, and on a monthly basis submit a report to the Owner substantiating any days claimed to have been lost, over and above those allotted for in the Contractor's Progress Schedule, due to adverse weather conditions.

**§ 2.3.3.7 LIQUIDATED DAMAGES.** The Construction Manager acknowledges and agrees that, if the Construction Manager fails to achieve Substantial Completion of the entire Work and to meet the completion requirements of the Critical Milestones, if any, within the Contract Time as established by the appropriate Work Authorization Amendment, the GMP Amendment, or other Modification of the Agreement, the Owner will sustain extensive damages and serious loss as a result of such failure. The exact amount of such damages will be difficult to ascertain. Therefore, the Owner and Construction Manager agree that, if the Construction Manager shall neglect, fail, or refuse to achieve Substantial Completion of the entire Work by the date required by the Contract Documents for Substantial Completion of the entire Work or to meet the completion requirements of the Critical Milestones, if any, subject to adjustments in the Contract Time as provided in the Contract Documents, then the Construction Manager



(and the Construction Manager's Surety, if any, in the case of default) agrees to pay to the Owner as Liquidated Damages, and not as a penalty or forfeiture, the sum or sums for each day of such delay as set forth below:

Such Liquidated Damages are hereby agreed to be a reasonable pre-estimate of damages the Owner will incur as a result of delayed completion of the Work or relevant portion thereof. The Owner may deduct Liquidated Damages described in this Subsection from any unpaid amounts then or thereafter due the Construction Manager under this Agreement. Any Liquidated Damages not so deducted from any unpaid amounts due the Construction Manager shall be payable to the Owner at the demand of the Owner, together with interest from the date of the demand at a rate equal to the highest lawful rate of interest payable by the Construction Manager.

§ 2.3.3.7.1 To the extent that the parties enter into a Work Authorization Amendment for a portion of the Work, the parties may agree therein to a required Substantial Completion Date for such portion of the Work and separate Liquidated Damages for the Construction Manager's failure to achieve Substantial Completion of such portion of the Work within the Contract Time requirements provided therein.

## § 2.3.4 THE WORK OF THE CONTRACT

§ 2.3.4.1 The Construction Manager shall fully execute the Work described in the Contract Documents or reasonably inferable by the Construction Manager as necessary to produce the results indicated by the Contract Documents, except to the extent specifically indicated in the Contract Documents to be the responsibility of others.

§ 2.3.4.2 The Construction Manager shall perform the Work at the location or locations described in **Exhibit A** (the "Project Site Description"). The Construction Manager shall confine its operations and restrict its staging and storage of machinery, equipment, and materials to those areas within the Project Site or to such other areas authorized in writing by the Owner (the "Project Boundaries/Staging Areas Plan"). Construction Manager shall not encumber the Project Site and adjacent areas with any materials or equipment and shall arrange and maintain its materials and equipment in an orderly manner so that Owner's Separate Contractors shall have reasonable access to and within the Project Site and any construction occurring there and in adjacent areas.

§ 2.3.4.2.1 The Owner reserves the right to make reasonable modifications or revisions to the Construction Manager's Project Boundaries/Staging Areas Plan by written notice to Construction Manager or by a Modification of the Agreement and **Exhibit A** attached hereto. In the event that Construction Manager intends to request an increase in the Contract Sum or Contract Time as a result of such modification or revision of the Construction Manager's Project Boundaries/Staging Areas Plan, the Construction Manager shall strictly comply with the notice requirements set forth in Section 15.1.2 of the General Conditions.

§ 2.3.4.3 The Construction Manager shall furnish only skilled and properly trained staff for performance of the Work. The key members of the Construction Manager's staff shall be persons agreed upon with the Owner, any such agreement not to be unreasonably withheld. Such key members of the Construction Manager's staff shall not be changed without the written consent of the Owner, unless such person becomes unable to perform any required duties due to death, disability, transfer, or termination of employment with the Construction Manager. Without limiting the foregoing, during the performance of the Work, the Construction Manager shall keep a competent superintendent at the Project site at all times, fully authorized to act on behalf of the Construction Manager. Notice from the Owner to one of Construction Manager's designated representatives (see **Exhibit F**) in connection with defective Work or instructions for performance of the Work shall be considered notice of such issues to the Construction Manager.

## § 2.4 Professional Services

Section 3.12.10 of the General Conditions shall apply to both the Preconstruction and Construction Phases.

## § 2.5 Hazardous Materials

Section 10.3 of the General Conditions shall apply to both the Preconstruction and Construction Phases.

## ARTICLE 3 OWNER'S RESPONSIBILITIES

### § 3.1 Information and Services Required of the Owner

§ 3.1.1 The Owner shall provide information with reasonable promptness, regarding requirements for and limitations on the Project, including a written program which shall set forth the Owner's objectives, constraints, and criteria, including schedule, space requirements and relationships, flexibility and expandability, special equipment, systems sustainability and site requirements. Construction Manager shall immediately give written notice to Owner upon each determination by Construction Manager that any of the 'full information' referenced in the immediately preceding sentence is not being timely provided by Owner, with such notice detailing what information is not being timely provided.

§ 3.1.2 Prior to the execution of the GMP Amendment, the Construction Manager may request in writing that the Owner provide reasonable evidence that the Owner has made financial arrangements to fulfill the Owner's obligations under the Contract. Thereafter, the Construction Manager may only request such evidence if a change in the Work materially changes the Contract Sum or as otherwise permitted by Applicable Law. The Owner shall furnish such evidence as a condition precedent to commencement or continuation of the portion of the Work affected by a material change. After the Owner furnishes the evidence, the Owner shall not materially vary such financial arrangements without prior notice to the Construction Manager.

§ 3.1.4 Structural and Environmental Tests, Surveys and Reports. During the Preconstruction Phase, the Owner shall furnish the following information or services with reasonable promptness. The Owner shall also furnish any other information or services under the Owner's control and relevant to the Construction Manager's performance of the Work with reasonable promptness after receiving the Construction Manager's written request for such information or services. Except to the extent that the Construction Manager knows of any inaccuracy, the Construction Manager shall be entitled to rely on the accuracy of information and services furnished by the Owner but shall exercise proper precautions relating to the safe performance of the Work.

§ 3.1.4.1 The Owner shall furnish tests, inspections and reports required by Applicable Law and as otherwise agreed to by the parties, such as structural, mechanical, and chemical tests, tests for air and water pollution, and tests for hazardous materials.

§ 3.1.4.2 The Owner shall furnish surveys describing physical characteristics, legal limitations and utility locations for the site of the Project, and a legal description of the site. The surveys and legal information shall include, as applicable, grades and lines of streets, alleys, pavements and adjoining property and structures; designated wetlands; adjacent drainage; rights-of-way, restrictions, easements, encroachments, zoning, deed restrictions, boundaries and contours of the site; locations, dimensions and necessary data with respect to existing buildings, other improvements and trees; and information concerning available utility services and lines, both public and private, above and below grade, including inverts and depths. All the information on the survey shall be referenced to a Project benchmark.

§ 3.1.4.3 The Owner, when such services are requested, shall furnish services of geotechnical engineers, which may include but are not limited to test borings, test pits, determinations of soil bearing values, percolation tests, evaluations of hazardous materials, seismic evaluation, ground corrosion tests and resistivity tests, including necessary operations for anticipating subsoil conditions, with written reports and appropriate recommendations.

§ 3.1.4.4 During the Construction Phase, the Owner shall furnish information or services required of the Owner by the Contract Documents with reasonable promptness. The Owner shall also furnish any other information or services under the Owner's control and relevant to the Construction Manager's performance of the Work with reasonable promptness after receiving the Construction Manager's written request for such information or services. Owner shall be obligated to furnish only those items described in Paragraph 3.1.4 and its subparagraphs as are reasonably necessary.

### § 3.2 Owner's Authorized Representative

The Owner's Authorized Representative(s) for the Project is (are) as set forth in **Exhibit F** and the **Owner's Supplementary Conditions (Exhibit I)** attached hereto. Owner reserves the right to change or add to its Authorized Representative(s) upon written notice to Construction Manager. Such Authorized Representative(s) shall have such authority to act on behalf of the Owner with respect to the Project, subject to such limitations and/or conditions as provided in **Exhibit F** and the **Owner's Supplementary Conditions (Exhibit I)** attached hereto. Except as otherwise provided in Section 4.2.1 of the General Conditions, the Architect does not have authority to act

on behalf of or to bind the Owner or relieve the Construction Manager from any obligation arising under the Contract Documents. The term "Owner" means the Owner or the Owner's respective representatives.

§ 3.2.1 Legal Requirements. The Owner shall furnish such legal, insurance and accounting services, including auditing services, that it may determine to be reasonably necessary at any time for the Project to meet the Owner's needs and interests.

### § 3.3 Architect

The Owner has retained an Architect to provide those professional services described in the Agreement between the Owner and the Architect, Construction Manager will be furnished a copy of the Architect's Agreement upon request. Owner reserves the right to change the Architect at any time or to modify the terms of its contractual agreement with the Architect. Owner shall give Construction Manager reasonably timely notice of any termination or replacement of the Architect and of any material changes in its contractual agreement with the Architect that bears on the Work hereunder or the responsibilities or liabilities of the Construction Manager arising under this Contract.

## ARTICLE 4 COMPENSATION AND PAYMENTS FOR PRECONSTRUCTION PHASE SERVICES

### § 4.1 Compensation

§ 4.1.1 For the Construction Manager's Pre-Construction Phase services, the Owner shall compensate the Construction Manager as provided in this Section 4.1.

§ 4.1.2 For the Construction Manager's Pre-Construction Phase services described in the Contract Documents, including Sections 2.1 and 2.2 above, and performed prior to the commencement of the Construction Phase of the Work, Construction Manager's total compensation (including reimbursement of costs and expenses) shall be as follows:

Construction Manager will be paid a Pre-Construction Phase Fee in the stipulated sum of \_\_\_\_\_ Dollars (\$ \_\_\_\_\_) for each calendar month (with partial months apportioned in proportion to services performed) that Construction Manager performs Pre-Construction Services in accordance with the requirements hereof, provided the total amount of such Fee shall not exceed the sum of \_\_\_\_\_ Dollars (\$ \_\_\_\_\_).

§ 4.1.3 Such Pre-Construction Phase Fee shall be Construction Manager's total compensation for the performance of Pre-Construction Phase services. Construction Manager shall not be entitled to reimbursement of costs and expenses incurred in the performance of such services in addition to the Pre-Construction Phase Fee. Without limiting the foregoing, the following costs and expenses, if incurred by Construction Manager in the performance of its Pre-Construction Phase services prior to the commencement of the Construction Phase, shall be included in the Pre-Construction Phase Fee (i.e., not separately reimbursable): profit and profit sharing; general overhead; salaries and labor; housing and relocation; estimating, scheduling and information management systems and software; contract administration; office expenses; printing and copying; consulting fees; legal or accounting fees; cost of money; taxes; insurance premiums and deductibles; bond costs; purchase or rental of equipment; and utilities.

### § 4.2 Payments

§ 4.2.1 [Intentionally omitted.]

§ 4.2.2 Payment of the Pre-Construction Phase Fee upon termination pursuant to Section 4.1.2 above shall be due and payable upon presentation of the Construction Manager's invoice, with such supporting documentation as reasonably required by Owner. Amounts not in good faith dispute and properly billed and due to Construction Manager which are unpaid « thirty » ( « 30 » ) days after the invoice date shall bear interest as provided in Subchapter B, Chapter 2251, Texas Government Code.

## ARTICLE 5 COMPENSATION FOR CONSTRUCTION PHASE SERVICES

§ 5.1 For the Construction Manager's performance of the Work as described in Section 2.3, the Owner shall pay the Construction Manager the Contract Sum in current funds for the Construction Manager's performance of the Contract. The Contract Sum is the Cost of the Work as defined in Section 6.1.1 plus the Construction Manager's Fee.

§ 5.1.1 The Construction Manager's Fee, except as limited by the Guaranteed Maximum Price, shall be \_\_\_\_% of the Cost of the Work (as defined hereinbelow).  
(State a lump sum, percentage of Cost of the Work or other provision for determining the Construction Manager's Fee.)

The Construction Manager's Fee shall be the Construction Manager's complete fee compensation (which includes Construction Manager's profit and indirect overhead) and, together with the payment for the Cost of the Work for those costs which are expressly set forth in Sections 6.1 through 6.7 of this Agreement, shall constitute Construction Manager's sole reimbursement for indirect and direct costs and expenses, general conditions, and profit arising from or attributable to the performance of the Work as described herein.

§ 5.1.2 The method of adjustment of the Construction Manager's Fee for changes in the Work:

« see Section 5.1.1 above. »

§ 5.1.3 Limitations, if any, on a Subcontractor's overhead and profit for increases in the cost of its portion of the Work:

See **Exhibit J – Change Order Pricing**.

« »

§ 5.1.4 [Intentionally omitted.]

§ 5.1.5 [Intentionally omitted.]

(Identify and state the unit price; state the quantity limitations, if any, to which the unit price will be applicable.)

## § 5.2 Guaranteed Maximum Price

§ 5.2.1 The Construction Manager guarantees that the Contract Sum shall not exceed the Guaranteed Maximum Price set forth in the GMP Amendment, as it is amended from time to time to reflect additions and deductions by changes in the Work as provided in the Contract Documents. To the extent the Cost of the Work exceeds the Guaranteed Maximum Price, the Construction Manager shall bear such costs in excess of the Guaranteed Maximum Price without reimbursement or additional compensation from the Owner.

§ 5.2.1.1 Notwithstanding any provision herein to the contrary, no Work is authorized to commence hereunder until a Guaranteed Maximum Price for that Work has been made the subject of the GMP Amendment or a Work Authorization Amendment to this Contract and a Notice to Proceed has been issued by the Owner with regard to such Work (which such Notice to Proceed may be included in the respective GMP Amendment or Work Authorization Amendment).

« »

§ 5.2.2 The Guaranteed Maximum Price is subject to additions and deductions by Change Order as provided in the Contract Documents and the Date of Substantial Completion shall be subject to adjustment as provided in the Contract Documents.

§ 5.2.3 **SAVINGS** If the allowable, final, verified, audited amount of the Cost of the Work and the Reimbursable Conditions Costs (in an amount not in excess of the Guaranteed Maximum Reimbursable Conditions Costs), incurred by the Construction Manager, together with the Construction Manager's Fee is less than the Guaranteed Maximum Price, as adjusted in accordance with the Contract Documents, the entire difference (the "Savings") shall be credited to the Owner and the final Contract Sum shall be adjusted accordingly. Any savings achieved during the buyout of the subcontracting work pursuant to Section 2.2.11 above shall be credited to the Owner.

§ 5.2.3.1 Owner shall be entitled to recognize and recover 100% of any savings identified by cost review or audit at

any time, before or after final payment.

§ 5.2.3.2 If the total of the Cost of the Work, including the Reimbursable Conditions Costs actually incurred but not in excess of the Guaranteed Maximum Reimbursable Conditions Costs as established herein, and the Construction Manager's Fee is greater than the Guaranteed Maximum Price as modified pursuant to the requirements of the Contract, then the Guaranteed Maximum Price shall be the total amount payable by the Owner to the Construction Manager, and all costs of completing the Work in excess of the Guaranteed Maximum Price shall be paid by the Construction Manager.

### § 5.3 Changes in the Work

§ 5.3.1 The Owner may, without invalidating the Contract, order changes in the Work within the general scope of the Contract consisting of additions, deletions or other revisions. The Owner shall issue such changes in writing. The Construction Manager shall be entitled to an adjustment in the Contract Time as a result of changes in the Work as provided in the General Conditions and subject to the requirements thereof.

§ 5.3.2 Adjustments to the Guaranteed Maximum Price on account of changes in the Work subsequent to the execution of the GMP Amendment may be determined by any of the methods listed in Section 7.3.3 of the General Conditions of the Contract for Construction.

§ 5.3.3 In calculating adjustments to subcontracts (except those awarded with the Owner's prior consent on the basis of cost plus a fee), the terms "cost" and "markup" as used in Section 7.3.3.3 of the General Conditions and the term "costs" as used in Section 7.3.7 of the General Conditions shall have the meanings assigned to them in the General Conditions and shall not be modified by Sections 5.1 and 5.2, Sections 6.1 through 6.7, and Section 6.8 of this Agreement. Adjustments to subcontracts awarded with the Owner's prior consent on the basis of cost plus a fee shall be calculated in accordance with the terms of this Agreement, unless the Owner has furnished the Construction Manager with prior written approval of the form and substance of a subcontract, in which case such adjustments shall be calculated in accordance with the terms and conditions of that subcontract.

§ 5.3.4 In calculating adjustments to the Guaranteed Maximum Price, the terms "cost" and "costs" as used in the above-referenced provisions of the General Conditions shall mean the Cost of the Work as defined in Sections 6.1 to 6.7 of this Agreement and the term "fee" shall mean the Construction Manager's Fee as defined in Section 5.1 of this Agreement.

§ 5.3.5 Except as otherwise expressly provided herein or in the GMP Amendment, in calculating an adjustment to the Guaranteed Maximum Price for a change in the Work, such adjustment shall be based upon the actual estimated increase or reduction of such costs rather than a percentage or otherwise pre-determined mark-up or mark-down.

## ARTICLE 6 COST OF THE WORK FOR CONSTRUCTION PHASE

### § 6.1 Costs to Be Reimbursed

§ 6.1.1 The term Cost of the Work shall mean costs necessarily incurred by the Construction Manager in the proper performance of the Work. Such costs shall be at rates not higher than the standard paid at the place of the Project except with prior consent of the Owner. The Cost of the Work shall include only the items set forth in Sections 6.1 through 6.7 which are directly related to the Project.

§ 6.1.2 Where any cost is subject to the Owner's prior approval, the Construction Manager shall obtain this approval prior to incurring the cost. The parties shall endeavor to identify any such costs prior to executing the GMP Amendment.

### § 6.2 Labor Costs

§ 6.2.1 Wages of construction workers directly employed by the Construction Manager to perform the construction of the Work at the site and only to the extent that such workers are actually performing work directly related to the Project. Cost to be reimbursed will be the actual wages paid to the individuals performing the work.

§ 6.2.2 Wages or salaries of the Construction Manager's supervisory and administrative personnel when stationed at the site, or when stationed off-site with the Owner's prior written approval, but only for that portion of their time required for and actually performing such supervisory and administrative services at the Project site and directly



related to the Project. Such rates shall not exceed those set forth on **Exhibit G (Personnel Rates Schedule)** unless approved in writing by Owner.

### § 6.2.3 [Intentionally omitted.]

§ 6.2.4 Costs paid or incurred by the Construction Manager for taxes, insurance, contributions, assessments and benefits required by law or collective bargaining agreements and, for personnel not covered by such agreements, customary benefits such as sick leave, medical and health benefits, holidays, vacations and pensions, provided such costs are based on wages and salaries included in the Cost of the Work under Sections 6.2.1 through 6.2.3. Such costs shall be reimbursed on the basis of actual, verifiable costs not exceeding those set forth in **Exhibit G (Personnel Rates Schedule)** or as otherwise provided in **Exhibit G**, unless approved in writing by Owner.

§ 6.2.4.1 Employee bonuses and/or costs associated with Employee Stock Ownership Plans (ESOP) will not be considered reimbursable labor or labor burden costs and will not be reimbursable as Cost of the Work (*i.e.*, must be covered by the Construction Manager's Fee).

§ 6.2.5 All personnel costs are subject to audit to determine the actual cost of the wages, salaries and allowable employer contributions incurred by the Construction Manager for services performed for the Project.

§ 6.2.6 All reimbursable labor costs and mark-ups shall be subject to the requirements in **Exhibit E – Labor Cost Requirements** attached hereto and incorporated herein.

### § 6.3 Subcontract Costs

§ 6.3.1 Payments made by the Construction Manager to Subcontractors in accordance with the requirements of the subcontracts properly entered into under the Contract Documents.

### § 6.4 Costs of Materials and Equipment Incorporated in the Completed Construction

§ 6.4.1 Costs, including transportation and storage, of materials and equipment incorporated or to be incorporated in the completed construction.

§ 6.4.2 Costs of materials described in the preceding Section 6.4.1 in excess of those actually installed to allow for reasonable waste and spoilage. Unused excess materials, if any, shall become the Owner's property at the completion of the Work or, at the Owner's option, shall be sold by the Construction Manager. Any amounts realized from such sales shall be credited to the Owner as a deduction from the Cost of the Work.

### § 6.5 Costs of Other Materials and Equipment, Temporary Facilities and Related Items

§ 6.5.1 Costs of transportation, storage, installation, maintenance, dismantling and removal of materials, supplies, temporary facilities, machinery, equipment and hand tools not customarily owned by construction workers that are provided by the Construction Manager at the site and fully consumed in the performance of the Work. Costs of materials, supplies, temporary facilities, machinery, equipment and tools that are not fully consumed shall be based on the cost or value of the item at the time it is first used on the Project site less the value of the item when it is no longer used at the Project site. Costs for items not fully consumed by the Construction Manager shall mean fair market value.

§ 6.5.2 Rental charges for Construction Manager-owned or leased vehicles assigned to those personnel defined in Section 6.2.1 and 6.2.2 above, temporary facilities, machinery, equipment and hand tools not customarily owned by construction workers that are provided by the Construction Manager at the site, whether rented from the Construction Manager or others, and costs of transportation, installation, minor repairs and replacement (subject to Section 6.5.2.7 below), dismantling and removal. The total rental cost of any Construction Manager-owned item may not exceed the fair market value of such item at the time such item was placed into use for the Project, subject to the terms and conditions of this Section 6.5.2 and at such rates as provided and limited herein.

§ 6.5.2.1 The projected usage for each piece of equipment to be rented for use on the Project and the estimated total rentals shall be considered by the Construction Manager before the piece of equipment is rented so that an appropriate rent versus buy decision can be made. Purchased equipment shall be considered "job owned". At the completion of the Project, the Construction Manager shall transfer title and possession of all remaining job-owned equipment to the Owner, or Construction Manager may keep any such equipment

for an appropriate fair market value credit to job cost, which will be mutually agreed to by Owner and Construction Manager.

§ 6.5.2.2 Each piece of equipment to be rented shall have hourly, daily, weekly and monthly rates) and the most economical rate available shall be reimbursed based on the circumstances of actual need and usage of the piece of equipment while it is stationed at the jobsite. When the piece of equipment is no longer needed for the work, no rental charges will be reimbursed if the piece of equipment remains at the jobsite for the convenience of the Construction Manager.

§ 6.5.2.3 The reimbursable equipment rental rates for equipment owned by Construction Manager or a Related Party shall be at rates subject to Owner's prior approval and shall not exceed 75% of the published rates based on the latest edition of "Rental Rates and Specifications" published by the Associated Equipment Distributors (AED). If the AED publication does not contain information related to the type of equipment rented, the maximum equipment rental rate shall not exceed 75% of the current competitive rental rates from local third party equipment rental companies.

§ 6.5.2.3.1 The aggregate rentals chargeable for each piece of tools or equipment owned by Construction Manager or a Related Party shall not exceed 50% of the fair market value of such equipment at the time of its commitment to the Work. The original purchase price and date of purchase of the equipment will be documented with a copy of the purchase invoice for the piece of equipment. Such aggregate limitations will apply and no further rentals shall be charged even if a piece of equipment is taken off the job and is later replaced by a similar piece of equipment. For purposes of computing the aggregate rentals applicable to aggregate rental limitations, rental charges for similar pieces of equipment will be combined if the pieces of equipment were not used at the same time.

§ 6.5.2.3.2 Fair market value for used material and equipment as referred to in this Contract shall mean the estimated price a reasonable purchaser would pay to purchase the used material or equipment at the time it was initially needed for the Work of the Project.

§ 6.5.2.4 Rental charges for equipment which is not owned by Construction Manager or any of its affiliates, subsidiaries, or other Related Parties and is rented from third parties for use in proper completion of the Work shall be considered reimbursable and will be reimbursed at actual costs, as long as rental rates are consistent with those prevailing in the locality. For any lease/purchase arrangement where any of the lease/purchase rental charges were charged to Owner as reimbursable Cost of the Work, appropriate credit adjustments to the Cost of the Work will be made for an appropriate pro rata share of the fair market value of the equipment at the time it was last used on the Project.

§ 6.5.2.5 All losses resulting from lost, damaged or stolen tools and equipment shall be the sole responsibility of the Construction Manager, and not the Owner, and the cost of such losses shall not be reimbursable under this Contract.

§ 6.5.2.6 The Construction Manager shall be required to maintain a detailed equipment inventory of all job-owned equipment (either purchased and charged to Cost of the Work or job-owned through aggregate rentals) and such inventory shall be submitted to Owner each month. For each piece of equipment, such inventory should contain at a minimum (1) original purchase price or acquisition cost, (2) acquisition date, (3) approved FMV at the time the piece of equipment was first used on the job, and (4) final disposition.

§ 6.5.2.7 All costs incurred for minor maintenance and repairs are considered to be covered by the rental rates. Such costs include routine and preventative maintenance, minor repairs and other incidental costs. In addition, repairs and/or replacement of a capital nature are considered to be covered by the rental rates. Major repairs and overhauls are not considered routine and ordinary, consequently such costs are not reimbursable and are intended to be covered by the rental rates. All mileage associated with equipment is covered in the rental rate.

§ 6.5.3 Costs of removal of debris from the site of the Work and its proper and legal disposal.

§ 6.5.4 Costs of document reproductions, facsimile transmissions and long-distance telephone calls, postage and parcel delivery charges, telephone service at the site and reasonable petty cash expenses of the site office.

§ 6.5.5 That portion of the reasonable expenses of the Construction Manager's supervisory or administrative personnel incurred while traveling in discharge of duties connected with the Work, but only to the extent such personnel's wages for such duties are reimbursable as Cost of the Work under this Article 6 and not expressly excluded in Section 6.8.1.11 below. Such expenses incurred by employees of the Construction Manager not permanently stationed at the field office must be approved in advance by the Owner. Commuting expenses are specifically not reimbursable.

§ 6.5.6 Costs of materials and equipment suitably stored off the site at a mutually acceptable location, subject to the Owner's prior approval.

#### § 6.6 Miscellaneous Costs

§ 6.6.1 The actual cost of premiums for that portion of insurance and bonds required by the Contract Documents and that can be directly attributed to this Contract, based upon such minimum limits for coverage as required by **Exhibit H (Insurance and Bonding Requirements)** attached hereto, which rates shall be final for the duration of the Project (and only subject to adjustment for changes in the scope or duration of the Project).

§ 6.6.1.1 If Construction Manager elects to purchase subcontractor default insurance (such as SubGuard insurance) to cover the default of its Subcontractors, such subcontractor default insurance cost shall be reimbursable as Cost of the Work at the rate of      percent (    %) of the value of the subcontracts, including the purchase orders, actually enrolled in and covered by such subcontractor default insurance. Any Construction Manager costs incurred in connection with the subcontractor default insurance program that exceeds the amount reimbursed by the Owner under the formula in this paragraph will not be reimbursable as Cost of the Work (*i.e.*, must be covered by the Construction Manager's Fee). If Construction Manager obtains subcontractor default insurance but elects to bond a Subcontractor not covered by such insurance, the amount reimbursable as Cost of the Work for the premium cost of the bond shall not exceed the amount that would have been reimbursable had the Subcontractor been enrolled in the subcontractor default insurance as provided above.

§ 6.6.1.2 Construction Manager shall not be entitled to reimbursement of premium charges for self-insurance coverage furnished by Construction Manager, including self-insured retentions, except as otherwise expressly authorized in writing by the Owner. To the extent that Construction Manager is entitled to reimbursement for self-insurance coverage or "Contractor-Controlled" liability insurance coverage, premium costs shall be reimbursable on a pro-rata basis as a percentage of the completion of the applicable Work

§ 6.6.2 Sales, use or similar taxes imposed by a governmental authority that are related to the Work and for which the Construction Manager is liable under the Contract Documents, excluding, however, such taxes for which Owner is exempt under Texas law.

§ 6.6.3 Fees and assessments for the building permit and for other permits, licenses and inspections for which the Construction Manager is required by the Contract Documents to pay.

§ 6.6.4 Fees of laboratories for tests required by the Contract Documents, except those related to defective or nonconforming Work for which reimbursement is excluded by Section 13.5.3 of the General Conditions or by other provisions of the Contract Documents, and which do not fall within the scope of Section 6.7.3.

§ 6.6.5 Royalties and license fees paid for the use of a particular design, process or product required by the Contract Documents; the cost of defending suits or claims for infringement of patent rights arising from such requirement of the Contract Documents; and payments made in accordance with legal judgments against the Construction Manager resulting from such suits or claims and payments of settlements made with the Owner's consent. However, such costs of legal defenses, judgments and settlements shall not be included in the calculation of the Construction Manager's Fee or subject to the Guaranteed Maximum Price. If such royalties, fees and costs are excluded by the last sentence of Section 3.17 of the General Conditions or other provisions of the Contract Documents, then they shall not be included in the Cost of the Work.

§ 6.6.6 Costs for electronic equipment, directly related to the Work with the Owner's prior approval.

§ 6.6.6.1 However, any such electronic equipment identified in Section 6.6.6 will be limited to the cost of personal computer hardware, printers, fax machines, and network equipment used at the field office in the normal day to day administration, management and control of the Project. The aggregate charges for any such hardware shall not



exceed the fair market value of the hardware at the time it was brought to the field office. If the total charges for any particular piece of hardware reach an amount equal to the fair market value, that particular piece of hardware shall be turned over to the Owner whenever it is no longer needed for the Project. If the Construction Manager elects to keep the particular piece of hardware, the Contract Sum shall be credited with a mutually agreeable amount which shall represent the fair market value of the particular piece of hardware at the time it was no longer needed for the job. **Software or other costs associated with the use of computer programs shall not be considered to be a reimbursable Cost of the Work (i.e., must be covered by the Construction Manager's Fee).**

§ 6.6.7 Deposits lost for causes other than the Construction Manager's negligence or failure to fulfill a specific responsibility in the Contract Documents.

§ 6.6.8 Legal, mediation and arbitration costs, including attorneys' fees, other than those arising from disputes between the Owner and Construction Manager, reasonably incurred by the Construction Manager after the execution of this Agreement in the performance of the Work and with the Owner's prior approval, which shall not be unreasonably withheld.

### § 6.7 Other Costs and Emergencies

§ 6.7.1 Other costs incurred in the performance of the Work if, and to the extent, approved in advance in writing by the Owner.

§ 6.7.2 Costs incurred in taking action to prevent threatened damage, injury or loss in case of an emergency affecting the safety of persons and property, as provided in Section 10.4 of the General Conditions, provided that the emergency is not caused by the negligence or failure to fulfill a specific responsibility of the Construction Manager to the Owner as set forth in the Contract Documents or the failure of the Construction Manager's personnel to supervise adequately the Work of the Subcontractors.

§ 6.7.3 Costs of repairing or correcting nonconforming Work executed by the Construction Manager or its Subcontractors, Sub-subcontractors (of any tier), or suppliers (of any tier) and costs of repairing or correcting damage to the Work caused by the Construction Manager, or its Subcontractors, Sub-subcontractors (of any tier), or suppliers (of any tier), provided that such damaged or nonconforming Work was not caused or contributed to by the negligence or failure to fulfill a specific responsibility of the Construction Manager or the Construction Manager's foremen, engineers or superintendents, or other supervisory, administrative or managerial personnel of the Construction Manager (which specific responsibilities include the obligation to coordinate the work of the various Subcontractors and to develop and maintain protocols and onsite procedures with Subcontractors that will facilitate early discovery and mitigate the impact of coordination problems and potential Subcontractor defaults that could adversely impact the cost and progress of the Work), and only to the extent that the cost of repair or correction is not recoverable (exercising reasonable commercial efforts) by the Construction Manager from insurance, sureties, Subcontractors, suppliers, or others.

§ 6.7.4 The costs described in Sections 6.1 through 6.7 shall be included in the Cost of the Work, notwithstanding any provision of the General Conditions or other Conditions of the Contract which may require the Construction Manager to pay such costs, unless such costs are excluded by the provisions of this Agreement, including Section 6.8.

### § 6.8 Costs Not To Be Reimbursed

§ 6.8.1 The Cost of the Work shall not include the items listed below:

- .1 Salaries and other compensation of the Construction Manager's personnel stationed at the Construction Manager's principal office or offices other than the site office, except as specifically provided in Section 6.2, or as may be provided in Article 11;
  - 1.1 Costs for relocation and temporary living allowances of the Construction Manager's personnel required for the Work;
  - 1.2 Costs for job training and professional development for Construction Manager's personnel;
- .2 Expenses of the Construction Manager's principal office and offices other than the site office;
- .3 Overhead and general expenses, except as may be expressly included in Sections 6.1 to 6.7;

- .3.1 Costs of data processing services, whether performed onsite or offsite;
- .4 The Construction Manager's capital expenses, including interest on the Construction Manager's capital employed for the Work;
  - .5 Except as provided in Section 6.7.3 of this Agreement, costs due to the negligence or failure of the Construction Manager, Subcontractors, Sub-subcontractors (of any tier), and suppliers or anyone directly or indirectly employed by any of them or for whose acts any of them may be liable to fulfill a specific responsibility of the Contract, including but not limited to costs related to the correction or completion of defective, rejected or nonconforming work, materials or equipment, and damages to persons or property;
  - .6 Any cost not specifically and expressly described in Sections 6.1 to 6.7;
  - .7 Costs, other than costs included in Change Orders approved by the Owner, that would cause the Guaranteed Maximum Price to be exceeded;
  - .8 Costs for services incurred during the Preconstruction Phase, except as provided in Article 4 above;
  - .9 Sales, use or similar taxes imposed by a governmental authority related to the Work for which the Owner is exempt under Texas law;
  - .10 Legal and administrative costs to review and negotiate these Contract Documents;
  - .11 Travel and subsistence expense of Construction Manager, its officers or employees incurred while traveling between the Project and Construction Manager's principal or branch offices, and travel in the metropolitan area of the Project;
  - .12 Fines, penalties, sanctions or impositions assessed or imposed by any governmental body, instrumentality or tribunal arising from the fault of Construction Manager or its Subcontractors or any tier;
  - .13 Costs incurred by Construction Manager resulting from the failure of Construction Manager or its Subcontractors to coordinate their work with that of Owner and its contractors, if any, after agreeing to the schedules therefor, or failure of Construction Manager to comply with directives of Owner not in conflict with said schedules;
  - .14 Any and all overhead expense, or office expense at any location, except site office expense to the extent specifically included herein;
  - .15 Costs related to Construction Manager's indemnification obligations under the Contract Documents;
  - .16 Any profit sharing plans, such as Employee bonuses, incentives, rewards and/or costs associated with Employee Stock Ownership Plans (ESOP); and
  - .17 The cost of any and all insurance deductibles and co-payments payable by the Construction Manager and costs due to the failure of Construction Manager or any Subcontractor to procure and maintain insurance as and to the extent required by the Contract Documents.

§ 6.8.2 Subject to and as limited by Section 9.3.3 of the General Conditions, costs and expenses arising from Construction Manager's indemnity obligations, including but not limited to Construction Manager's costs and expenses in removing or defending against a payment bond claim or a mechanic's lien claim asserted against the Owner and/or its property.

§ 6.8.3 Costs to repair defective Work and other costs to comply with Construction Manager's warranty obligations under the Contract, except as may be expressly included in Section 6.7.3 above.

### § 6.9 Discounts, Rebates and Refunds

§ 6.9.1 All proceeds from sale of surplus materials and equipment shall accrue to the Owner and be credited to the Cost of Work, and the Construction Manager shall make provisions so that they can be secured.

§ 6.9.2 Cash discounts or other early payment discounts obtained on payments made by the Construction Manager shall accrue to the Owner if (1) before making the payment, the Construction Manager included them in an Application for Payment and received payment from the Owner, or (2) the Owner has deposited funds with the Construction Manager with which to make payments; otherwise, cash discounts shall accrue to the Construction Manager. Trade discounts, rebates, refunds and amounts received from sales of surplus materials and equipment shall accrue to the Owner, and the Construction Manager shall make provisions so that they can be obtained.

§ 6.9.2.1 Construction Manager shall make reasonable efforts to provide Owner with timely notice of all available discounts, rebates, refunds and returns (hereinafter referred to collectively as “discounts”), including discounts for volume purchases. The Construction Manager shall not obtain for its own benefit any discounts in connection with the Work prior to providing the Owner with reasonable, prior notice of the potential discount and an opportunity to furnish funds or other authorization necessary to obtain such discount on behalf of the Owner in accordance with the requirements of this Paragraph. In the event that Construction Manager fails to provide Owner with timely notice of the availability of any discount, such discount shall be credited against the Cost of the Work.

§ 6.9.3 Costs of the Work will be credited with all insurance policy discounts, performance and payment bond rebates or refunds, refunds or return premiums from any subcontractors default insurance (including a refund for any “reserve” to the extent such payments to the reserve were reimbursable and paid as Cost of the Work), refunds or rebates from any Construction Manager controlled insurance program applicable to the Project, merchandise rebates of any nature, refunds of any nature, insurance dividends; and a portion of any volume rebates or free material credits earned with purchase of material or other goods and services charged to the job.

§ 6.9.4 Amounts that accrue to the Owner in accordance with the provisions of Section 6.9 shall be credited to the Owner as a deduction from the Cost of the Work.

#### § 6.10 Related Party Transactions

§ 6.10.1 For purposes of Section 6.10, the term “Related Party” shall mean a parent, subsidiary, affiliate or other entity having common ownership or management with the Construction Manager; any entity in which any stockholder in, or management employee of, the Construction Manager owns any interest in excess of ten percent in the aggregate; or any person or entity which has the right to control the business or affairs of the Construction Manager. The term “Related Party” includes any member of the immediate family of any person identified above.

§ 6.10.2 Construction Manager shall not subcontract with or purchase labor or materials in connection with the Work of the Contract from a Related Party without the written consent of the Owner and compliance with Section 2.3.2.1 above.

#### § 6.11 Accounting Records and Audit Rights

In addition to the requirements set forth in Article 14 of the General Conditions and **Exhibit K – Right of Audit**, which is incorporated fully herein, the Construction Manager shall keep full and detailed records and accounts related to any cost or expenditure charged to the Owner as Cost of the Work and exercise such controls as may be necessary for proper financial management under this Contract and to substantiate all such costs and expenditures incurred. In the event that this Agreement expressly provides for specified rates for reimbursable cost items, the documentation supporting the computation of the agreed rates shall not be subject to audit; however, the amounts charged, based upon those rates, will be subject to audit and review hereunder. The accounting and control systems shall be satisfactory to the Owner. The Owner and the Owner’s auditors shall, during regular business hours and upon reasonable notice, be afforded access to, and shall be permitted to audit and copy, the Construction Manager’s records and accounts, including complete documentation supporting accounting entries, books, correspondence, instructions, drawings, receipts, subcontracts, Subcontractor’s proposals, purchase orders, vouchers, memoranda and other data relating to this Contract and the Work hereunder, including but not limited to all records and back-up documentation relating to reimbursable expenses and Cost of Work items. The Construction Manager shall preserve these records for a period of four years after final payment, or for such longer period as may be required by law.

### ARTICLE 7 PAYMENTS FOR CONSTRUCTION PHASE SERVICES

#### § 7.1 Progress Payments

§ 7.1.1 Based upon Applications for Payment submitted to the Owner and the Architect by the Construction Manager, with all supporting documentation as herein provided, and Certificates for Payment issued by the Architect, the Owner shall make progress payments on account of the Contract Sum to the Construction Manager as provided below and elsewhere in the Contract Documents. On or before the 25th day of the month immediately preceding a month in which the Construction Manager will submit an Application for Payment, the Owner, the Architect (if required by the Owner) and the Construction Manager shall meet to review a preliminary draft of such Application for Payment (hereinafter referred to as a “Pencil Draw”) prepared by the Construction Manager. The Construction Manager shall revise the Pencil Draw in accordance with any objection or recommendation of either the Owner or the Architect that is consistent with the requirements of the Contract Documents. Such revised Pencil

Draw shall be re-submitted by the Construction Manager to the Owner as the Application for Payment due on or before the 5th day of the month immediately following the month in which the Pencil Draw was first submitted.

§ 7.1.2 The period covered by each Application for Payment shall be one calendar month ending on the last day of the month.

« »

§ 7.1.3 Provided that all conditions precedent to payment set forth in the Contract Documents have been satisfied, including but not limited to such documentation as required by the General Conditions, and an Application for Payment in conformance with the requirements of the Contract Documents is received by the Owner and the Architect not later than the «5th » day of a month, the Owner shall make payment of the certified amount to the Construction Manager not later than the thirty-first (31<sup>st</sup>) day after receipt thereof. If an Application for Payment is received by the Owner and the Architect after the application date fixed above, payment shall be made by the Owner not later than «thirty-one» ( «31 » ) days after the Owner and Architect receives the Application for Payment and approves it for conformance with the requirements of the Contract Documents.  
*(Federal, state or local laws may require payment within a certain period of time.)*

§ 7.1.4 With each Application for Payment, the Construction Manager shall submit payrolls, petty cash accounts, receipted invoices or invoices with check vouchers attached, and any other evidence required by the Owner or Architect to demonstrate that cash disbursements already made by the Construction Manager on account of the Cost of the Work equal or exceed progress payments already received by the Construction Manager, less that portion of those payments attributable to the Construction Manager's Fee, plus payrolls for the period covered by the present Application for Payment.

§ 7.1.5 Each Application for Payment shall be based on the most recent Schedule of Values submitted by the Construction Manager in accordance with the Contract Documents. The Schedule of Values shall allocate the entire Guaranteed Maximum Price among the various portions of the Work, except that the Construction Manager's Fee and any Allowances and agreed-upon Construction Manager's Contingency shall be shown as single separate items. The Schedule of Values shall be prepared in such form and supported by such data to substantiate its accuracy as the Architect or the Owner may require. This Schedule, unless objected to by the Owner or the Architect, shall be used as a basis for reviewing the Construction Manager's Applications for Payment and determining the amount due for each such Progress Payment but shall not be considered as a basis for increasing or decreasing the GMP. The Schedule of Values shall not be modified or revised without the prior written consent of the Owner and the Construction Manager in each instance.

§ 7.1.6 Applications for Payment shall show the percentage of completion of each portion of the Work as of the end of the period covered by the Application for Payment. The percentage of completion shall be the lesser of (1) the percentage of that portion of the Work which has actually been completed, or (2) the percentage obtained by dividing (a) the expense that has actually been incurred by the Construction Manager on account of that portion of the Work for which the Construction Manager has made or intends to make actual payment prior to the next Application for Payment by (b) the share of the Guaranteed Maximum Price allocated to that portion of the Work in the Schedule of Values.

§ 7.1.6.1 In addition to other required items, each Application for Payment shall be accompanied by the following documentation, statements and information, all in form and substance reasonably satisfactory to the Owner and in compliance with applicable state statutes:

- (A) a duly executed statement from Construction Manager detailing all moneys paid out or costs incurred by it on account of the Cost of the Work and for which payment is sought;
- (B) with regard to payments sought for work (labor and materials) furnished by Subcontractors (including vendors or material suppliers), Construction Manager must identify all Subcontractors for whose work payment is being sought in the Application and, in addition to providing such supporting documentation as may be reasonably required or requested by the Owner, provide, for each such Subcontractor the following information: (1) a brief description of the Work performed for which payment is being sought, (2) the agreed upon price or value of the Work, (3) the amount to

be retained or withheld from the Subcontractor, and (4) the amount requested for payment to the subcontractor:

- (C) with regard to work performed by Construction Manager or its own forces, Construction Manager must provide an accurate description of the work performed and for which payment is sought, including such supporting documentation required by this Agreement;
- (D) a statement, under oath, by Construction Manager that all bills or obligations incurred by Construction Manager, for which previous Applications for Payment have been submitted and paid by Owner, have been paid by Construction Manager, or, if some bill or obligation remains outstanding, the statement shall fully disclose the outstanding bill or obligation by stating the name of the person or entity to whom the bill or obligation remains outstanding, the amount of the outstanding bill or obligation, and the basis or reason why such bill or obligation has not been paid;
- (E) a statement, under oath, by Construction Manager that, to the best of its information and belief, no person or entity has a claim for payment or has asserted a claim for payment arising from or in connection with the Work performed under this Contract, other than any claim which has been fully paid and duly released or is included in the Application for Payment and fully described in subparagraph (A) immediately above, or, if Construction Manager knows or believes such a claim exists or has been asserted or made, the statement shall fully disclose the claim by stating the name of the claimant or potential claimant, a description of the work for which payment is claimed, the amount of such claim, and the basis or reason why such claim has not been paid;
- (F) to the extent requested by the Owner at least five (5) days prior to the required date for the submission by the Construction Manager of the respective Application for Payment, a duly executed statement, under oath, from the Construction Manager's Subcontractors for whom payment is sought which provides the same information with regard to each such Subcontractor as is required for the Construction Manager in subparagraphs (D and E) immediately above; and
- (G) a duly executed Waiver and Release from the Construction Manager waiving all claims for payment for the Work covered by previously paid Applications for Payment and waiving all claims for payment for the Work covered by the Application for Payment being submitted, conditioned only upon receipt of the payment being requested, and all such other claims for payment or increase in the Contract Sum, other than outstanding claims for retainage, pending Change Order requests, pending Claims for which notice has been provided in accordance with Article 15 of the General Conditions, or such other claims as otherwise expressly identified in the Waiver and Release.

§ 7.1.7 Subject to other provisions of the Contract Documents, the amount of each progress payment shall be computed as follows:

- .1 Take that portion of the Guaranteed Maximum Price properly allocable to completed Work as determined by multiplying the percentage of completion of each portion of the Work by the share of the Guaranteed Maximum Price allocated to that portion of the Work in the Schedule of Values, not to exceed the actual cost of such Work incurred by the Construction Manager for such period, less the retainage to be withheld as provided hereinbelow. Pending final determination of cost to the Owner of changes in the Work, amounts not in dispute shall be included as provided in Section 7.3.9 of the General Conditions;
- .2 If approved in advance in writing by the Owner, add that portion of the Guaranteed Maximum Price properly allocable to materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work, or if approved in advance by the Owner, suitably stored off the site at a location agreed upon in writing;
- .3 Add the Construction Manager's Fee, less retainage of «five» percent («5» %). The Construction Manager's Fee shall be computed upon the Cost of the Work at the rate stated in Section 5.1.1 or, if the Construction Manager's Fee is stated as a fixed sum in that Section, shall be an amount that bears the same ratio to that fixed-sum fee as the Cost of the Work bears to a reasonable estimate of the probable Cost of the Work upon its completion;



- 4 Subtract retainage of «five » percent ( «5 » %) from that portion of the Construction Manager's Self-Perform Work authorized hereunder;
- 5 Subtract the aggregate of previous payments made by the Owner;
- 6 Subtract the shortfall, if any, indicated by the Construction Manager in the documentation required by Section 7.1.4 to substantiate prior Applications for Payment, or resulting from errors subsequently discovered by the Owner's auditors in such documentation; and
- 7 Subtract amounts, if any, for which the Architect has withheld or nullified a Certificate for Payment as provided in Section 9.5 of the General Conditions and such other amounts, if any, for which the Owner is authorized to withhold from payment under the terms of the Contract Documents.

§ 7.1.8 Except with the Owner's prior approval, payments to Subcontractors shall be subject to retention of not less than five percent (5%). The Owner and the Construction Manager shall agree upon a mutually acceptable procedure for review and approval of payments and retention for subcontracts. Construction Manager shall make such payments included in Construction Manager's Application for Payment to its Subcontractors within the earlier of seven (7) days after receipt of payment from Owner or such time period as required by Applicable Law. Construction Manager shall not retain funds from its Subcontractors to the extent such funds have been requested from Owner and payment has been made to Construction Manager.

§ 7.1.9 Except with the Owner's prior approval, the Construction Manager shall not make advance payments to suppliers for materials or equipment which have not been delivered and stored at the site.

§ 7.1.10 In taking action on the Construction Manager's Applications for Payment, the Architect shall be entitled to rely on the accuracy and completeness of the information furnished by the Construction Manager and shall not be deemed to represent that the Architect has made a detailed examination, audit or arithmetic verification of the documentation submitted in accordance with Section 7.1.4 or other supporting data; that the Architect has made exhaustive or continuous on-site inspections; or that the Architect has made examinations to ascertain how or for what purposes the Construction Manager has used amounts previously paid on account of the Contract. Such examinations, audits and verifications, if required by the Owner, will be performed by the Owner's auditors acting in the sole interest of the Owner.

§ 7.1.11 Any reduction or release of retainage, or portion thereof, shall not be a waiver of (1) any of the Owner's rights to retainage in connection with other payments to the Construction Manager or (2) any other right or remedy that the Owner has under the Contract Documents, at law or in equity.

## § 7.2 Final Payment

§ 7.2.1 Final payment, constituting the entire unpaid balance of the Contract Sum and as further described below, shall be made by the Owner to the Construction Manager only after the following **conditions precedent to final payment** have occurred or been fully satisfied:

- 1 the Construction Manager has fully performed the Contract except for the Construction Manager's responsibility to correct Work as provided in Section 12.2.2 of the General Conditions, and to satisfy other requirements, if any, which extend beyond final payment;
- 2 the Construction Manager has submitted a Final Accounting for the Cost of the Work and a final Application for Payment in conformity with the requirements of the Contract Documents at least 45 days prior to the required date for final payment;
- 3 a final Certificate for Payment has been issued by the Architect;
- 4 the Construction Manager has provided its notice of disputed amount to the auditor's report, provided written acceptance of the auditor's report, or has waived any objection to the auditor's report as provided by Section 7.2.3;
- 5 the Construction Manager has fully complied with the requirements set forth in Section 7.2.5 below and Section 9.10 of the General Conditions; and
- 6 any other conditions precedent to final payment expressly set forth in the Contract Documents have been satisfied.

§ 7.2.2 At least 45 days prior to the date required for the final payment, the Construction Manager shall deliver its final accounting of the Work (the “Final Accounting”) to the Owner which sets out the amount of the final payment sought by Construction Manager and the documentation backing up that final payment request.

§ 7.2.2.1 Construction Manager shall deliver, with its Final Accounting, to the Owner the following documentation and reports, in both “.pdf” and “Excel” formats:

- a. Monthly Job Cost Detail;
- b. Detailed Job Cost History To Date;
- c. Monthly Labor Distribution detail (if not already separately detailed in the Job Cost Detail);
- d. Total Job to date Labor Distribution detail (if not already included in the detailed Job Cost History to date); and
- e. Detailed Subcontract Status Reports (showing original subcontract value, approved subcontract change orders, subcontractor invoices, payment to subcontractors, etc.).

§ 7.2.2.2 To the extent not previously furnished by Construction Manager to Owner, Construction Manager shall also deliver, with its Final Accounting, to the Owner the following documentation and reports, in “.pdf” format:

- a. Employee Timesheets documenting time worked by all individuals employed by Construction Manager who charged reimbursable time to the Project;
- b. Copies of executed subcontracts with all Subcontractors;
- c. Copies of executed Change Orders and Change Directives issued to Subcontractors; and
- d. Copies of all documentation supporting all reimbursable job costs (subcontractor payment applications, vendor invoices, internal cost charges, etc.).

§ 7.2.2.3 The Owner’s auditors will review and report in writing on the Construction Manager’s Final Accounting of the Work within thirty (30) days after delivery of the Final Accounting (with the documentation required in Section 7.2.2.1 and 7.2.2.2 above) to the Owner by the Construction Manager. Based upon such Cost of the Work as the Owner’s auditors report to be substantiated by the Construction Manager’s Final Accounting, and provided the other conditions of Section 7.2.1 have been met, the Architect will, within seven days after receipt of the written report of the Owner’s auditors, either issue to the Owner a final Certificate for Payment for the Work with a copy to the Construction Manager, or notify the Construction Manager and Owner in writing of the Architect’s reasons for withholding a certificate as provided in Section 9.5.1 of the General Conditions. The time periods stated in this Section supersede those stated in Section 9.4.1 of the General Conditions. The Architect is not responsible for verifying the accuracy of the Construction Manager’s Final Accounting.

§ 7.2.3 If the Owner’s auditors report the Cost of the Work as substantiated by the Construction Manager’s Final Accounting to be less than claimed by the Construction Manager, the Construction Manager shall be entitled to proceed in accordance with Article 9 without seeking an initial decision pursuant to Section 15.2 of the General Conditions; provided, however, a notice of the disputed amount (detailing the Construction Manager’s objections to the specific findings in the Owner’s auditors report) shall be made by the Construction Manager to the Owner within twenty-one (21) days after the Construction Manager’s receipt of a copy of the Architect’s final Certificate for Payment and the Owner’s auditor’s report. Failure to submit such notice within this 21-day period shall result in the substantiated amount reported by the Owner’s auditors becoming binding on the Construction Manager. Pending a final resolution of the disputed amount, the Owner shall pay the Construction Manager the amount determined to be due pursuant to the Owner’s auditor’s report, less any other amounts to be withheld pursuant to the Architect’s final Certificate for Payment.

§ 7.2.4 Provided all other conditions to final payment have occurred or been fully satisfied, the Owner’s final payment to the Construction Manager shall be made no later than (a) thirty (30) days after the issuance of the Architect’s final Certificate for Payment or (b) ten (10) days after the date Owner has received Construction Manager’s notice of disputed amount to the auditor’s report or the deadline for such notice has passed under Section 7.2.3, whichever is the later to occur. The amount of the final payment shall be calculated as follows:

- .1 Take the sum of the Cost of the Work substantiated by the Construction Manager’s Final

Accounting and the Construction Manager's Fee, but not more than the Guaranteed Maximum Price as finally adjusted.

- .2 Subtract amounts, if any, for which the Architect withholds, in whole or in part, in connection with a final Certificate for Payment as provided in Section 9.5.1 of the General Conditions or other provisions of the Contract Documents and such amounts to which the Owner is entitled to withhold from final payment.
- .3 Subtract the aggregate of previous payments made by the Owner for the Work.

§ 7.2.5 The conditions to final payment also include the following:

- .1 Construction Manager shall deliver any special guarantees or warranties required by the Contract Documents and assignments of all guarantees or warranties from subcontractors, vendors, suppliers, or manufacturers (with the addresses and telephone numbers of those subcontractors or other persons providing guarantees and warranties).
- .2 With its final Application for Payment, Construction Manager shall furnish to Owner a Bills Paid Affidavit which conforms to the provisions of the Contract and Applicable Law and which truthfully states that all bills have been paid or are expressly set forth in the Affidavit. Amounts unpaid or claimed to be owed by Construction Manager (including claims asserted by Subcontractors, whether or not disputed by Construction Manager) shall be fully identified in the Affidavit (by name of person to whom payment is owed or who is claiming payment and the amount owed or claimed to be due). Such Affidavit shall include an express representation and warranty by Construction Manager that all such unpaid bills will be paid by Construction Manager from the final payment being requested.
- .3 With its final Application for Payment, Construction Manager shall furnish to Owner a duly executed Waiver and Release from the Construction Manager waiving and releasing all claims for payment for the Work covered by previously paid Applications for Payment and waiving all claims for payment for the Work covered by the final Application for Payment being submitted, conditioned only upon receipt of the final payment being requested, and all such other claims for payment or increase in the Contract Sum, including but not limited to outstanding claims for retainage, pending Change Order requests, and pending Claims asserted or which could have been asserted pursuant to Article 15 of the General Conditions, except for such claims that have been expressly reserved by Construction Manager and that are expressly identified in the Waiver and Release.
- .4 Construction Manager shall have delivered to Owner three (3) complete sets of Record Documents and electronic CADD files of same, reflecting the "As-Built" conditions of the Project at Final Completion, including, without limitation, all warranties, manuals, instructions, reports, and other such documentation as Owner may have previously requested and such other documentation required by the Contract Documents prior to final payment. Additionally, such other conditions to final payment as required by Article 9 of the General Conditions have been met or have occurred.

#### ARTICLE 8 INSURANCE AND BONDS

For all phases of the Project, the Construction Manager and the Owner shall purchase and maintain insurance, and the Construction Manager shall provide bonds as set forth in Article 11 of the General Conditions and as set forth in the **Insurance and Surety Requirements** attached hereto as **Exhibit H** and fully incorporated herein.

*(State bonding requirements, if any, and limits of liability for insurance required in Article 11 of AIA Document A201-2007.)*

Type of Insurance or Bond	Limit of Liability or Bond Amount (\$0.00)
n/a	

#### ARTICLE 9 DISPUTE RESOLUTION

§ 9.1 Any claim or dispute between the Owner and Construction Manager shall be subject to mediation as provided in Section 15.3 of the General Conditions.



§ 9.1.1 The Owner and Construction Manager shall endeavor to resolve claims, disputes and other matters in question between them by mediation which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Mediation Procedures in effect on the date of the Agreement or as otherwise agreed by the parties. A request for mediation shall be made in writing, delivered to the other party to the Agreement, and filed with the person or entity administering the mediation. The request may be made concurrently with the filing of a complaint or other appropriate demand for binding dispute resolution but, in such event, mediation shall proceed in advance of binding dispute resolution proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order.

§ 9.1.2 The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in the place where the Project is located, unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

§ 9.1.3 If the parties do not resolve a dispute through mediation pursuant to this Section 9.1, the method of binding dispute resolution shall be the following: Litigation in state or federal district court located in Fort Worth, Tarrant County, Texas.

§ 9.2 The provisions regarding dispute resolution shall survive completion and termination of the Contract.

§ 9.3 Initial Decision Maker [Intentionally deleted.]

*(If the parties mutually agree, insert the name, address and other contact information of the Initial Decision Maker, if other than the Architect.)*

«There is no "Initial Decision Maker.»»

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## ARTICLE 10 TERMINATION OR SUSPENSION

### § 10.1 Termination Prior to Establishment of the Guaranteed Maximum Price

§ 10.1.1 Prior to the execution of the GMP Amendment, the Owner may terminate this Contract upon not less than seven days' written notice to the Construction Manager for the Owner's convenience and without cause, and the Construction Manager may terminate this Contract, upon not less than seven days' written notice to the Owner, for the reasons set forth in Section 14.1.1 of the General Conditions.

§ 10.1.2 In the event of termination of this Contract pursuant to Section 10.1.1, the Construction Manager shall, as its sole and exclusive remedy, be compensated for Preconstruction Phase services performed prior to receipt of a notice of termination consistent with any compensation terms pursuant to Section 4.1 above. Notwithstanding the foregoing, the compensation under this Section shall not exceed the compensation set forth in Section 4.1.

§ 10.1.3 If the Owner terminates the Contract pursuant to Section 10.1.1 after the commencement of the Construction Phase but prior to the execution of the GMP Amendment, the Owner shall pay to the Construction Manager an amount calculated as follows, which amount shall be in addition to any compensation paid to the Construction Manager under Section 10.1.2:

- .1 Take the Cost of the Work incurred by the Construction Manager for the Work to the date of termination;
- .2 Add the Construction Manager's Fee computed upon the Cost of the Work to the date of termination at the rate stated in Section 5.1 or, if the Construction Manager's Fee is stated as a fixed sum in that Section, an amount that bears the same ratio to that fixed-sum Fee as the Cost of the Work at the time of termination bears to a reasonable estimate of the probable Cost of the Work for the Work upon its completion; and
- .3 Subtract the aggregate of previous payments made by the Owner for Construction Phase services for the Work.

The Owner shall also pay the Construction Manager fair compensation, either by purchase or rental at the election of the Owner, for any equipment owned by the Construction Manager which the Owner elects to retain and which is not otherwise included in the Cost of the Work under Section 10.1.3.1. Construction Manager's recovery as expressly authorized under this Section 10.1.3 shall be Construction Manager's sole and exclusive remedy in the event of the Owner's termination of the Contract pursuant to Section 10.1.1 above.

§ 10.1.3 .1 To the extent that the Owner elects to take legal assignment of subcontracts and purchase orders (including rental agreements), the Construction Manager shall, as a condition of receiving the payments referred to in this Article 10, execute and deliver all such papers and take all such steps, including the legal assignment of such subcontracts and other contractual rights of the Construction Manager, as the Owner may require for the purpose of fully vesting in the Owner the rights and benefits of the Construction Manager under such subcontracts or purchase orders. All Subcontracts, purchase orders and rental agreements entered into by the Construction Manager will contain provisions allowing for assignment to the Owner as described above.

§ 10.1.3 .2 If the Owner accepts assignment of subcontracts, purchase orders or rental agreements as described above, the Owner will reimburse or indemnify the Construction Manager for all costs arising under the subcontract, purchase order or rental agreement, if those costs would have been reimbursable as Cost of the Work if the contract had not been terminated. If the Owner chooses not to accept assignment of any subcontract, purchase order or rental agreement that would have constituted a Cost of the Work had this agreement not been terminated, the Construction Manager will terminate the subcontract, purchase order or rental agreement and the Owner will pay the Construction Manager the costs necessarily incurred by the Construction Manager because of such termination.

#### § 10.2 Termination Subsequent to Establishing Guaranteed Maximum Price

Following execution of the GMP Amendment and subject to the provisions of Section 10.2.1 and 10.2.2 below, the Contract may be terminated as provided in Article 14 of the General Conditions.

§ 10.2.1 If the Owner terminates the Contract after execution of the Guaranteed Price Amendment, the amount payable to the Construction Manager pursuant to Sections 14.2 and 14.4 of the General Conditions shall not exceed the amount the Construction Manager would otherwise have received pursuant to Sections 10.1.2 and 10.1.3 of this Agreement.

§ 10.2.2 If the Construction Manager terminates the Contract after execution of the GMP Amendment, the amount payable to the Construction Manager under Section 14.1.3 of the General Conditions shall not exceed the amount the Construction Manager would otherwise have received under Sections 10.1.2 and 10.1.3 above.

#### § 10.3 Suspension

The Work may be suspended by the Owner as provided in Article 14 of the General Conditions. In such case, the Guaranteed Maximum Price and Contract Time shall be increased as provided in Section 14.3.2 of the General Conditions, except that the term "profit" shall be understood to mean the Construction Manager's Fee as described in Sections 5.1 and 5.3.5 of this Agreement.

### ARTICLE 11 MISCELLANEOUS PROVISIONS

§ 11.1 Terms in this Agreement shall have the same meaning as those in the General Conditions.

#### § 11.2 Ownership and Use of Documents

Section 1.5 of the General Conditions shall apply to both the Preconstruction and Construction Phases.

#### § 11.3 Governing Law

Section 13.1 of the General Conditions shall apply to both the Preconstruction and Construction Phases.

#### § 11.4 Assignment

The Owner and Construction Manager, respectively, bind themselves, their agents, successors, assigns and legal representatives to this Contract. The Construction Manager shall not assign this Contract without the written consent of the Owner. Owner may, upon written notice to the Construction Manager and without the consent of the Construction Manager, assign this Contract and Owner's rights hereunder as provided in Section 13.2 of the General Conditions. In addition to and without limiting its rights under Section 13.2 of the General Conditions, Owner may, upon written notice to the Construction Manager and without the consent of the Construction Manager, also assign this Contract to any parent, subsidiary, or affiliated entity of the Owner, provided such affiliated entity, subsidiary or

other entity is or becomes the owner of the property on which the improvements are constructed pursuant to the Construction Contract and Owner has retained an ownership entity in such assignee.

§ 11.5 Other provisions:

§ 11.5.1 Those other documents forming part of this Agreement, and incorporated herein by reference, are as follows:

- Exhibit A -- Project Site Description
- Exhibit B -- Construction Manager's Form of GMP Proposal
- Exhibit C -- Reimbursable Conditions Cost Breakdown
- Exhibit D -- Felony Conviction Notice
- Exhibit E -- Labor Cost Requirements
- Exhibit F -- List of Parties' Representatives
- Exhibit G -- Construction Manager's Personnel Rates Schedule
- Exhibit H -- Insurance and Surety Requirements
- Exhibit I -- Owner's Supplementary Conditions
- Exhibit J -- Change Order Pricing
- Exhibit K -- Right of Audit – Examination of Records
- Exhibit L -- M/WBE Requirements

§ 11.5.2 CONSTRUCTION MANAGER'S AUTHORIZED REPRESENTATIVE.

The Construction Manager's Authorized Representative(s) for the Project is (are) set forth in the **List of Parties' Representatives** attached hereto as **Exhibit F** and in the **Owner's Supplementary Conditions (Exhibit I)** attached hereto.

§ 11.5.3 CHANGES IN WORK. As a condition precedent to an increase in the Guaranteed Maximum Price, an extension of the Contract Time, or a recovery of the Cost of Work for performing work outside the scope of this Contract, the Construction Manager must, prior to the performance of any such work, obtain the approval of the Owner. Such prior approval must be obtained by a Change Order agreed to and executed by the parties pursuant to Section 7.2 of the General Conditions or by a Change Directive issued by the Owner pursuant to Section 7.3 of the General Conditions.

§ 11.5.4 LIMITATION OF REMEDIES FOR DELAY. Except as otherwise provided herein, extensions of time shall be the Construction Manager's sole remedy for any delay, unless the delay shall have been caused by acts constituting interference by Owner with the Construction Manager's performance of the Work, and then, only to the extent that such acts continue after the Construction Manager has provided written notice to Owner of such interference. The Owner's reasonable exercise of any of its rights or remedies under the Contract Documents, regardless of the extent or frequency, shall not under any circumstances be construed as intentional interference with the Construction Manager's performance of the Work.

§ 11.5.5 ATTORNEY'S FEES. If any action at law or in equity, including an arbitration proceeding (if the parties hereinafter agree in writing to an arbitration proceeding), is necessary to enforce or interpret the terms of the Contract, the Court or the arbitrator(s), as applicable, shall determine the prevailing party and award to such prevailing party, in addition to any other relief to which such party is entitled to recover, its reasonable attorneys' fees, expert witness fees, costs, and other reasonable expenses incurred in such proceeding.

§ 11.5.6 AUTHORITY OF ARCHITECT. Notwithstanding any contrary provision hereof or of any Contract Document, no consent, decision, determination, approval or certification to be made by Architect hereunder shall be binding upon Owner unless and to the extent agreed to in writing by Owner.

§ 11.5.7 AUTHORITY OF EACH SIGNATORY. Each signatory hereto represents that it has the authority to execute this Contract on behalf of the respective named party.

§ 11.5.8 MULTIPLE ORIGINAL COUNTERPARTS. This Contract may be executed in multiple original counterparts, each of which shall be of equal dignity.

§ 11.5.9 PARTIAL INVALIDITY DOES NOT INVALIDATE CONTRACT. The invalidity of any part or portion of the Contract Documents shall not impair or affect in any manner whatsoever the validity, enforceability or effect of the remainder of the Contract Documents.

§ 11.5.10 PREVAILING WAGES. See Supplementary Conditions attached hereto.

§ 11.5.11 FELONY CONVICTION NOTICE. Construction Manager shall fully comply with the requirements of Section 44.034 of the Texas Education Code, including the requirement for giving notice of any felony conviction. Construction Manager shall complete and furnish to Owner, prior to the commencement of the Construction Phase Services, the Felony Notification affirmation in the form attached hereto as **Exhibit D – Felony Conviction Notification**.

§ 11.5.12 M/WBE REQUIREMENTS. Construction Manager shall comply with all M/WBE Requirements as set forth in **Exhibit L – M/WBE Requirements** and as provided in the Owner’s solicitation documents in connection with the selection of the Construction Manager for the Project or as otherwise adopted by the Owner for the Project prior to the execution of the GMP Amendment and shall meet such M/WBE participation goals as established by the Owner for the Project or exercise good faith efforts to do so.

§ 11.5.13 LEED CERTIFICATION. Construction Manager acknowledges that Owner currently intends for the Project to achieve certification (                    level) from the Green Building Certification Institute (“GBCI”) under the Leadership in Energy & Environmental Design (“LEED Certification”) system. The specific level of LEED Certification will be finalized by the Owner during the design process and will be referred to herein as the “LEED Goal”. Construction Manager acknowledges and understands that the LEED Goal may not be established by Owner until after the execution of this Agreement. Construction Manager represents and warrants that its personnel have the experience, training, and certifications required to understand the LEED Certification process, install any specialized equipment or materials that may be incorporated as part of the LEED Goal design, and assist the Owner in achieving the LEED Goal.

**11.5.13.1 Master Checklist.** In the event that the Owner decides to seek LEED Certification, Owner shall retain a LEED Consultant who will prepare, revise, and maintain a Master Checklist of points that the Project needs to achieve in order to achieve the LEED Goal. The Master Checklist will assign responsibility for achieving the points among the Owner, Architect, Construction Manager, and LEED Consultant. Construction Manager acknowledges and agrees that it will be responsible for all LEED points assigned to Construction Manager by the Master Checklist as amended by the LEED Consultant throughout the Project. If Construction Manager disagrees with accepting responsibility for any of the points assigned to Construction Manager in the Master Checklist, Construction Manager shall notify Owner and the LEED Consultant of such disagreement within five (5) days of Construction Manager receiving the Master Checklist with which it disagrees.

**11.5.13.2 Cooperation.** Construction Manager agrees that it will maintain and provide Owner and the LEED Consultant with all documentation or other information that may be required by GBCI in connection with the Owner’s application for LEED Certification related to the Project.

**11.5.13.3 Survival of LEED Obligations.** Construction Manager specifically agrees that the obligations set forth in this Section 11.5.13 shall survive the termination or completion of the Agreement.

<< >>

## ARTICLE 12 SCOPE OF THE CONTRACT

§ 12.1 This Contract represents the entire and integrated agreement between the Owner and the Construction Manager and supersedes all prior negotiations, representations or agreements, either written or oral. This Contract may be amended only by written instrument signed by both Owner and Construction Manager.

§ 12.2 The following documents comprise the Contract: see Article 1 above.

This Agreement is entered into as of the day and year first written above.

OWNER (Signature)

« »« »

(Printed name and title)

CONSTRUCTION MANAGER (Signature)

« »« »

(Printed name and title)

LEBR

# DRAFT AIA® Document A201™ - 2007

## General Conditions of the Contract for Construction

for the following PROJECT:  
(Name and location or address)

### OWNER'S GENERAL CONDITIONS FOR CMR [A-133] AGREEMENT

THE OWNER:  
(Name and address)

Tarrant County College District  
1500 Houston Street  
Fort Worth, Texas

THE ARCHITECT:  
(Name and address)

\_\_\_\_\_

THE CONTRACTOR:

\_\_\_\_\_

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- 10 PROTECTION OF PERSONS AND PROPERTY
- 11 INSURANCE AND BONDS
- 12 UNCOVERING AND CORRECTION OF WORK

#### ADDITIONS AND DELETIONS:

The author of this document has added information needed for its completion. The author may also have revised the text of the original AIA standard form. An *Additions and Deletions Report* that notes added information as well as revisions to the standard form text is available from the author and should be reviewed.

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

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## ARTICLE 1 GENERAL PROVISIONS

### § 1.1 BASIC DEFINITIONS

#### § 1.1.1 THE CONTRACT DOCUMENTS

The Contract Documents are enumerated in the Agreement between the Owner and Contractor (hereinafter referred to as the “Agreement”). See Section 1.1 of the Agreement.

#### § 1.1.2 THE CONTRACT

The Contract Documents form the Contract for Construction. The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. The Contract may be amended or modified only by a Modification. The Contract Documents shall not be construed to create a contractual relationship of any kind (1) between the Contractor and the Architect or the Architect’s consultants, (2) between the Owner and a Subcontractor or a Sub-subcontractor, (3) between the Owner and the Architect or the Architect’s consultants or (4) between any persons or entities other than the Owner and the Contractor.

#### § 1.1.3 THE WORK

The term “Work” means the construction and services required by the Contract Documents, whether completed or partially completed, and includes all other labor, materials, equipment and services provided or to be provided by the Contractor to fulfill the Contractor’s obligations. The Work may constitute the whole or a part of the Project. The Work includes all labor, parts, supplies, skill, supervision, transportation, services and other facilities and things necessary, proper or incidental to the carrying out and completion of the terms of the Contract Documents and all other items needed to produce, construct and fully complete the Work items shown by the Contract Documents.

#### § 1.1.4 THE PROJECT

The Project is the total construction of which the Work performed under the Contract Documents may be the whole or a part and which may include construction by the Owner and by separate contractors.

#### § 1.1.5 THE DRAWINGS

The Drawings are the graphic and pictorial portions of the Contract Documents showing the design, location and dimensions of the Work, generally including plans, elevations, sections, details, schedules and diagrams.

#### § 1.1.6 THE SPECIFICATIONS

The Specifications are that portion of the Contract Documents consisting of the written requirements for materials, equipment, systems, standards and workmanship for the Work, and performance of related services. Consistent with Section 1.1 of the Agreement, in the event of any inconsistency or conflict between any provision in the Agreement (or Exhibits attached thereto and incorporated therein ) and the General Conditions, on the one hand, and any provisions in the Specifications, on the other hand, the terms of the Agreement and the General Conditions shall control.

#### § 1.1.7 INSTRUMENTS OF SERVICE

Instruments of Service are representations, in any medium of expression now known or later developed, of the tangible and intangible creative work performed by the Architect and the Architect’s consultants under their respective professional services agreements and to which the Owner has been granted certain rights as set out in the Agreement between the Owner and the Architect for the design services for the Project. Instruments of Service may include, without limitation, studies, surveys, models, sketches, drawings, specifications, and other similar materials.

#### § 1.1.7 APPLICABLE LAW

Except as otherwise expressly provided in the Agreement, the term “Applicable Law” or “Applicable Laws” as used in the Contract Documents shall have the meaning set forth in Section 1.4.2 of the Agreement.

### § 1.2 CORRELATION AND INTENT OF THE CONTRACT DOCUMENTS

§ 1.2.1 The intent of the Contract Documents is to include all items necessary for the proper execution and completion of the Work by the Contractor. The Contract Documents are complementary (except as otherwise expressly provided in Section 1.1 of the Agreement), and what is required by one shall be as binding as if required by all; performance by the Contractor shall be required only to the extent consistent with the Contract Documents and reasonably inferable from them as being necessary to produce the indicated results. Notwithstanding the foregoing, but except as otherwise provided in the Agreement with regard to the precedence given to Contract

Documents, in the event of inconsistencies within or between parts of the Contract Documents, or between the Contract Documents and applicable standards, codes and ordinances, the Contractor shall (1) provide the better quality or greater quantity of Work and (2) comply with the more stringent requirement. With regard to inconsistencies in the Drawings, given dimensions shall take precedence over scaled measurements, and large scale drawings over small scale drawings. The terms and conditions of this Section shall not relieve the Contractor of any of the obligations set forth in Sections 3.2 and 3.7. Should the Contractor find discrepancies, omissions or conflicts within the Contract Documents, or be in doubt as to their meaning, the Contractor shall at once notify the Architect, who will issue a written addendum to all parties.

§ 1.2.2 Organization of the Specifications into divisions, sections and articles, and arrangement of Drawings shall not control the Contractor in dividing the Work among Subcontractors or in establishing the extent of Work to be performed by any trade.

§ 1.2.3 Unless otherwise stated in the Contract Documents, words that have well-known technical or construction industry meanings are used in the Contract Documents in accordance with such recognized meanings.

### § 1.3 CAPITALIZATION

Terms capitalized in these General Conditions include those that are (1) specifically defined, (2) the titles of numbered articles or (3) the titles of other documents published by the American Institute of Architects.

### § 1.4 INTERPRETATION

In the interest of brevity the Contract Documents frequently omit modifying words such as “all” and “any” and articles such as “the” and “an,” but the fact that a modifier or an article is absent from one statement and appears in another is not intended to affect the interpretation of either statement.

### § 1.5 OWNERSHIP AND USE OF DRAWINGS, SPECIFICATIONS AND OTHER INSTRUMENTS OF SERVICE

The Drawings, Specifications and other documents, including those in electronic form, prepared by the Architect and the Architect's consultants are Instruments of Service through which the Work to be executed by the Contractor is described. The Contractor may retain one record set. Neither the Contractor nor any Subcontractor, Sub-subcontractor or material or equipment supplier shall own or claim a copyright in the Drawings, Specifications and other documents prepared by the Architect or the Architect's consultants. All copies of Instruments of Service, except the Contractor's record set, shall be returned or suitably accounted for to the Owner, on request, upon completion of the Work. The Drawings, Specifications and other documents prepared by the Architect and the Architect's consultants, and copies thereof furnished to the Contractor, are for use solely with respect to this Project. They are not to be used by the Contractor or any Subcontractor, Sub-subcontractor or material or equipment supplier on other projects or for additions to this Project outside the scope of the Work without the specific written consent of the Owner. The Contractor, Subcontractors, Sub-subcontractors and material or equipment suppliers are authorized to use and reproduce applicable portions of the Drawings, Specifications and other documents prepared by the Architect and the Architect's consultants appropriate to and for use in the execution of their Work under the Contract Documents. All copies made under this authorization shall bear the statutory copyright notice, if any, shown on the Drawings, Specifications and other documents prepared by the Architect and the Architect's consultants. Submittal or distribution to meet official regulatory requirements or for other purposes in connection with this Project is not to be construed as publication in derogation of the copyrights or other reserved rights of the Owner or its design professionals with regard to such Instruments of Service.

### § 1.6 EXECUTION OF CONTRACT DOCUMENTS

Execution of the Contract by the Contractor is a representation that the Contractor has visited the site, become generally familiar with local conditions under which the Work is to be performed and correlated personal observations with requirements of the Contract Documents.

## ARTICLE 2 OWNER

### § 2.1 GENERAL

§ 2.1.1 The Owner is the person or entity identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number.

§ 2.1.2 The presence of the Owner (or its representatives) or Architect at the Site does not imply acceptance or approval of the Work.



§ 2.1.3 It is understood and agreed that the relationship of Contractor to Owner shall be that of an independent contractor. Nothing contained herein or inferable herefrom shall be deemed or construed to (1) make Contractor the agent, servant, or employee of the Owner or (2) create any partnership, joint venture, or other association between Owner and Contractor. Any direction or instruction by Owner or any of its authorized representatives in respect of the Work shall relate to the results the Owner desires to obtain from the Work, and shall in no way affect Contractor's independent contractor status as described herein.

## § 2.2 INFORMATION AND SERVICES REQUIRED OF THE OWNER

§ 2.2.1 Contractor acknowledges and agrees that, prior to commencement of the Work, the Contractor has received all information requested by the Contractor or otherwise required by Applicable Law with regard to the financial arrangements Owner has made to fulfill the Owner's obligations under the Contract and is satisfied as to the adequacy of such arrangements. Thereafter, the Contractor may only request such evidence if (1) the Owner fails to make payments to the Contractor as the Contract Documents require; (2) a change in the Work materially changes the Contract Sum; or (3) financial arrangements made by the Owner have materially changed. The Owner shall furnish such evidence as a condition precedent to continuation of the Work or the portion of the Work affected by a material change. After the Owner furnishes the evidence, the Owner shall not materially vary such financial arrangements without prior notice to the Contractor.

§ 2.2.2 Except for permits and fees that are the responsibility of the Contractor under the Contract Documents, including those required under Section 3.7.1, the Owner shall secure and pay for necessary approvals, easements, assessments and charges required for construction, use or occupancy of permanent structures or for permanent changes in existing facilities as provided by the Contract Documents.

§ 2.2.3 If requested to do so by the Contractor, the Owner shall furnish a survey describing, to the extent reasonable and customary, physical characteristics, legal limitations and utility locations (other than visible utilities). The Contractor shall be entitled to rely on the accuracy of information furnished by the Owner in connection with such survey but shall exercise proper precautions relating to the safe performance of the Work. Notwithstanding the delivery of such information and documents by Owner, Contractor shall perform all work in a non-negligent manner so as to avoid damaging any utility lines, cables, pipes or pipelines on the Property. As between Owner and Contractor, Contractor shall be responsible for any damage(s) done to such lines, cables, pipes and pipelines during its construction work resulting from the negligent conduct of Contractor or any of its Subcontractors.

§ 2.2.4 The Owner shall furnish information or services required of the Owner by the Contract Documents with reasonable promptness.

§ 2.2.5 Unless otherwise provided in the Contract Documents, the Owner shall furnish to the Contractor one copy of the Contract Documents for purposes of making reproductions pursuant to Section 1.5.2.

## § 2.3 OWNER'S RIGHT TO STOP THE WORK

If the Contractor fails to correct Work that is not in accordance with the requirements of the Contract Documents as required by Section 12.2 or repeatedly fails to carry out Work in accordance with the Contract Documents, the Owner may issue a written order to the Contractor to stop the Work, or any portion thereof, until the cause for such order has been eliminated; however, the right of the Owner to stop the Work shall not give rise to a duty on the part of the Owner to exercise this right for the benefit of the Contractor or any other person or entity. This right shall be in addition to, and not in restriction of, the Owner's rights under Subsection 12.2.

§ 2.3.2 If suspension of the Work is warranted by reason of unforeseen conditions which are likely to adversely affect the quality of the Work if such Work were continued, Owner may suspend the Work by written notice to the Contractor. In such event, the Contract Time and the Contract Sum shall be adjusted accordingly, subject to the terms of Sections 3.2, 3.7.4, and 8.3.3 hereof. If Contractor, in its reasonable judgment, believes that a suspension is warranted by reason of unforeseen circumstances which may adversely affect the quality of the Work if the Work were continued, Contractor shall immediately notify Owner of such belief.

## § 2.4 OWNER'S RIGHT TO CARRY OUT THE WORK

§ 2.4.1 If the Contractor defaults or neglects to carry out the Work in accordance with the Contract Documents and fails within a ten-day period after receipt of written notice from the Owner to commence and continue correction of

such default or neglect with diligence and promptness, the Owner may, without prejudice to other remedies the Owner may have, correct such deficiencies. In such case an appropriate Change Order shall be issued deducting from payments then or thereafter due the Contractor the reasonable cost of correcting such deficiencies, including without limitation Owner's expenses and compensation for the Architect's additional services made necessary by such default, neglect or failure. Such action by the Owner and amounts charged to the Contractor shall be reasonable and necessary. If payments then or thereafter due the Contractor are not sufficient to cover such amounts, the Contractor shall pay the difference to the Owner. The rights of the Owner hereunder shall not give rise to any duty on the part of the Owner to exercise same for the benefit of the Contractor or any other person or entity. If providing the above-referenced prior notice to the Contractor is not reasonable because of an emergency or exigent circumstances, the Owner shall provide only such prior notice which is reasonable under the circumstances.

§ 2.4.2 After the Work is complete, the Owner may make emergency repairs to the Work if necessary to prevent further damage, or if the Contractor does not promptly respond to a notice of a condition requiring repairs. Contractor shall be responsible to Owner for this cost if the reason for the repairs is defects in Contractor's Work. If payments then or thereafter due the Contractor are not sufficient to cover such costs, the Contractor shall pay the difference to the Owner.

## § 2.5 EXTENT OF OWNER'S RIGHTS.

§ 2.5.1 The rights stated in this Article 2 and elsewhere in the Contract Documents are cumulative and not in limitation of any rights of the Owner (1) granted in the Contract Documents, (2) at law or (3) in equity.

§ 2.5.2 In no event shall the Owner have control over, charge of, or any responsibility for construction means, methods, techniques, sequences or procedures or for safety precautions and programs in connection with the Work, notwithstanding any of the rights and authority granted the Owner in the Contract Documents.

## ARTICLE 3 CONTRACTOR

### § 3.1 GENERAL

§ 3.1.1 The Contractor is the person or entity identified as the Construction Manager in the Agreement and is referred to throughout the Contract Documents as if singular in number. The Contractor shall be lawfully licensed, if required in the jurisdiction where the Project is located. The Contractor shall designate in writing a representative who shall have express authority to bind the Contractor with respect to all matters under this Contract. The term "Contractor" means the Construction Manager or the Construction Manager's Authorized Representative.

§ 3.1.2 The Contractor shall perform the Work in accordance with the Contract Documents and all Applicable Laws that bear upon the performance of the Work. The Contractor shall prosecute the Work in a good and workmanlike manner, continuously and diligently in accordance with generally accepted standards for construction of projects similar to the Project, using qualified, careful, and efficient workers and in conformity with the provisions of this Contract and the other Contract Documents. Contractor shall at all times use reasonable measures to protect the Work from damage caused by weather and casualties.

§ 3.1.3 The Contractor shall furnish construction administration and management services as required by the Contract Documents and use the Contractor's best efforts to perform the Work of the Project in an expeditious and economical manner consistent with the interests of the Owner. The Owner shall endeavor to promote harmony and cooperation among the Owner, Architect, Contractor and other persons or entities employed by the Owner for the Project.

§ 3.1.4 The Contractor shall not be relieved of obligations to perform the Work in accordance with the Contract Documents either by activities or duties of the Architect in the Architect's administration of the Contract, or by tests, inspections or approvals required or performed by persons or entities other than the Contractor.

### § 3.2 REVIEW OF CONTRACT DOCUMENTS AND FIELD CONDITIONS BY CONTRACTOR

§ 3.2.1 Without limiting its obligations under the Contract Documents, execution of the GMP Amendment (see Section 2.2.6 of the Agreement) by the Contractor is a representation that the Contractor has visited the site, become generally familiar with local conditions under which the Work is to be performed and correlated personal observations with requirements of the Contract Documents. The Contractor and each Subcontractor shall evaluate

and satisfy themselves as to the conditions and limitations under which the Work is to be performed, including, without limitation (1) the location, condition, layout and nature of the Project site and surrounding areas, (2) generally prevailing climatic conditions, (3) anticipated labor supply and costs, (4) availability and cost of materials, tools and equipment and (5) other similar issues. The Owner assumes no responsibility or liability for the physical condition or safety of the Project site or for any improvements located on the Project site or for price escalations in the marketplace. Price escalations in the marketplace shall not be reimbursed by the Owner in excess of the GMP and shall not cause the GMP to be increased. The Contractor (as between the Owner and the Contractor) shall be solely responsible for providing a safe place for the performance of the Work. The Owner shall not be required to make any adjustment in either the Contract Sum or Contract Time in connection with any failure by the Contractor or any Subcontractor to comply with the requirements of this Section.

§ 3.2.2 Without limiting its obligations under the Contract Documents, because the Contract Documents are complementary, the Contractor shall, before starting each portion of the Work, carefully study and compare the various Contract Documents relative to that portion of the Work, as well as the information furnished by the Owner pursuant to Section 2.2.3, shall take field measurements of any existing conditions related to that portion of the Work, and shall observe any conditions at the site affecting it. These obligations are for the purpose of facilitating coordination and construction by the Contractor and are not for the purpose of discovering errors, omissions, or inconsistencies in the Contract Documents; however, the Contractor shall promptly report to the Owner and the Architect in writing any errors, inconsistencies or omissions discovered by or made known to the Contractor as a request for information in such form as the Architect may require. Notwithstanding the foregoing, the exactness of grades, elevations, dimensions, or locations given on any Drawings issued by the Architect, or the work installed by other contractors, is not guaranteed by the Architect or the Owner. The Contractor shall, therefore, satisfy itself as to the accuracy of all grades, elevations, dimensions and locations. In all cases of interconnection of its Work with existing or other work, it shall verify at the site all dimensions relating to such existing or other work. Any errors due to the Contractor's failure to so verify all such grades, elevations, locations or dimensions shall be promptly rectified by the Contractor without any additional cost to the Owner. It is recognized that the Contractor's review is made in the Contractor's capacity as an experienced contractor and not as a licensed design professional, unless otherwise specifically provided in the Contract Documents.

§ 3.2.3 The Contractor is not required to ascertain that the Contract Documents are in accordance with Applicable Laws, but the Contractor shall promptly report to the Owner and the Architect in writing any nonconformity discovered by or made known to the Contractor or any suspected nonconformity which has been raised or discussed by Contractor's supervisory personnel as a request for information in such form as the Architect may require.

§ 3.2.4 If the Contractor believes that additional cost or time is involved because of clarifications or instructions issued by the Owner or the Architect in response to the Contractor's notices or requests for information pursuant to Sections 3.2.2 or 3.2.3, the Contractor shall make Claims as provided in Article 15. If the Contractor fails to perform the obligations of Sections 3.2.2 or 3.2.3, the Contractor shall pay such costs and damages to the Owner as would have been avoided if the Contractor had performed such obligations. If the Contractor performs those obligations, the Contractor shall not be liable to the Owner or Architect for damages resulting from errors, inconsistencies or omissions in the Contract Documents or for nonconformities of the Contract Documents to Applicable Law, unless the Contractor recognized, or in the exercise of reasonable caution and care should have recognized, such error, inconsistency, omission or difference and failed to report it to the Architect.

§ 3.2.5 Prior to performing any Work, Contractor shall locate all utility lines, including telephone company lines and cables, sewer lines, water pipes, gas lines, electrical lines, including, but not limited to, all buried pipelines and buried telephone cables, as shown and located on the plans and specifications and the survey (if any) furnished pursuant to Section 2.2.3 above and shall perform any Work in such a manner so as to avoid damaging any such lines, cables, pipes and pipelines. Contractor shall be responsible for any negligent damage done to said lines, cables, pipes and pipelines during its construction work. In addition, Contractor shall review any applicable hazardous materials surveys for the particular buildings, if any, involved in the Project(s), and shall notify all Subcontractors and Sub-subcontractors of the necessity to review said surveys. Contractor shall perform any Work in such a manner as to avoid damaging, exposing or dislodging any asbestos-containing materials that are clearly identified and located in any such hazardous material surveys.

§ 3.2.6 Neither any oral representation by or oral agreement with the Owner, Architect, or any representative, consultant, officer, agent, or employee of Owner or Architect before execution of this Contract shall affect or modify any of Contractor's rights or obligations hereunder, all such prior oral representations, understandings, and

agreements being superseded by this Contract. Contractor is not aware of any facts that make misleading or inaccurate in any material respect any information Owner or Architect or any of their representatives, consultants, officers, agents, or employees have furnished to Contractor which would have a material, adverse affect on the Contract Time or Contract Sum, and if, during the course of the performance of the Work, Contractor learns of any such facts, it will so advise each of said parties.

### § 3.3 SUPERVISION AND CONSTRUCTION PROCEDURES

§ 3.3.1 The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for, and have control over, construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract, unless the Contract Documents give other specific instructions concerning these matters. If the Contract Documents give specific instructions concerning construction means, methods, techniques, sequences or procedures, the Contractor shall evaluate the jobsite safety thereof and, except as stated below, shall be fully and solely responsible for the jobsite safety of such means, methods, techniques, sequences or procedures. If the Contractor determines that such means, methods, techniques, sequences or procedures may not be safe, the Contractor shall give timely written notice to the Owner and Architect and shall not proceed with that portion of the Work without further written instructions from the Architect. If the Contractor is then instructed to proceed with the required means, methods, techniques, sequences or procedures without acceptance of changes proposed by the Contractor, the Owner shall be solely responsible for any resulting loss or damage arising solely from those Owner-required means, methods, techniques, sequences or procedures except to the extent such loss or damage results from or is caused by the Contractor's failure to follow instructions or the Contractor's failure to exercise reasonable care and skill in carrying out such instructions. Contractor shall bear responsibility for design and execution of acceptable trenching and shoring procedures, in accordance with Texas Government Code, Section 2166.303 and Texas Health and Safety Code, Subchapter C, Sections 756.021, *et. seq.*

§ 3.3.2 The Contractor shall be responsible to the Owner for acts and omissions of the Contractor's employees, Subcontractors, Sub-subcontractors, and their agents and employees, and other persons or entities performing portions of the Work for, or on behalf of, the Contractor or any of its Subcontractors and Sub-subcontractors. The Contractor shall be responsible for the actions of Contractor's forces, Subcontractors' forces and Sub-subcontractors' forces to enforce the Owner's Drug-Free, Alcohol-Free, Weapon-Free and Tobacco-Free Zones and shall require adequate dress and identification of Contractor's forces, consistent with the nature of the Work being performed and as provided in the Standard Form of Agreement Between Owner and Contractor, as modified.

§ 3.3.3 The Contractor shall be responsible for inspection of portions of Work already performed to determine that such portions are in proper condition to receive subsequent Work.

§ 3.3.4 Contractor, its subcontractors and vendors shall bear responsibility for compliance with Applicable Law, including but not limited to all federal, state and local laws, regulations, guidelines and ordinances pertaining to worker safety and applicable to the Work. Contractor further recognizes that the Owner and Architect do not owe the Contractor any duty to supervise or direct his work so as to protect the Contractor from the consequences of his own conduct. In case of entry by the Contractor or any of the Contractor's agents or employees, upon the property or premises of the Owner, for the purposes of construction, erection, inspection, or delivery under this contract, the Contractor agrees to provide (or cause to be provided through its Subcontractors) all necessary sufficient safeguards and to take all proper precautions against the occurrence of accidents, injuries, or damages to any person or property.

### § 3.4 LABOR AND MATERIALS

§ 3.4.1 Unless otherwise provided in the Contract Documents, the Contractor shall provide and pay for labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, and other facilities and services necessary for proper execution and completion of the Work, whether temporary or permanent and whether or not incorporated or to be incorporated in the Work. The Contractor shall check all materials and labor entering into the Work and shall keep full detailed accounts thereof.

§ 3.4.2 Contractor may make substitutions only with the consent of the Owner as provided herein and in accordance with a Change Order or Construction Change Directive.

§ 3.4.2.1 Contractor may submit for consideration proposed substitutions of materials, equipment or processes from those set out in the Contract Documents. Submittals of proposed substitutions must be made in writing at such time



as not to delay the Work and should contain sufficient information to allow the Architect and Owner to determine if the proposed substitution is in fact equal to or better than the requirements of the Contract Documents. The Architect shall review proposed substitutions within a reasonable time. Contractor shall bear the risk of any delay in performance caused by submitting substitutions and shall be responsible for payment of any design-related costs in reviewing and making such changes incurred by Owner (in addition to the costs for Basic Services charged by Owner's Architect). Any and all substitutions must be approved in writing by the Owner. The Owner may approve or deny substitutions in its sole discretion. No approved substitution shall change the requirements of the Contract Documents until it has been incorporated into the Contract as a Modification in accordance with the requirements of the Contract Documents.

§ 3.4.2.2 When specific products, systems or items of equipment are referred to in the Contract Documents, any ancillary devices necessary for proper functioning shall also be provided, but not including any manufacturers' options on any particular device, which device is specified in the Contract Documents. When standards, codes, manufacturer's instructions and guarantees are required by the Contract Documents with no edition specified, the current edition at the time of contract execution shall apply. References to standards, codes, manufacturer's instructions and guarantees shall apply in full, except (1) they do not supersede more stringent standards set out in the Contract Documents, and (2) any exclusions or waivers that are inconsistent with the Contract Documents do not apply.

§ 3.4.3 The Contractor shall enforce strict discipline and good order among the Contractor's employees and other persons carrying out the Work. The Contractor shall not permit employment of unfit persons or persons not properly skilled in tasks assigned to them.

### § 3.5 WARRANTY

The Contractor warrants to the Owner that materials and equipment furnished under the Contract will be of good quality and new unless the Contract Documents require or permit otherwise. The Contractor further warrants that the Work will conform to the requirements of the Contract Documents and will be free from defects, except for those inherent in the quality of the Work the Contract Documents require or permit. Work, materials, or equipment not conforming to these requirements shall be considered defective. The Contractor's warranty excludes remedy for damage or defect caused by abuse, alterations to the Work not executed by the Contractor, improper or insufficient maintenance, improper operation, or normal wear and tear and normal usage. If required by the Owner or the Architect, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment. The warranties set out in this subsection are in addition to and not exclusive of any other warranties or guarantees set out in other places in the Contract Documents or implied under Applicable Law or the Contractor's obligations under the corrective period set out in Article 12 below.

§ 3.5.2 The Contractor agrees to assign to the Owner at the time of Final Completion of the Work, any and all manufacturer's warranties relating to materials and labor used in the Work and further agrees to perform the Work in such manner so as to preserve any and all such manufacturer's warranties.

§ 3.5.3 All required warranties on equipment, machinery, materials, or components shall be submitted to the Architect on the manufacturer's or supplier's approved forms at the time of Substantial Completion.

### § 3.6 TAXES

This Project is eligible for exemption from the State Sales Tax on materials incorporated in the Project, provided that Contractor fulfills the requirements of State Tax Laws. For purposes of establishing exemption, it is understood and agreed that Contractor will be required to segregate materials and labor costs at the time a contract is awarded, and will accept an exemption certificate from Owner. The Contractor shall pay any taxes otherwise assessed because of Contractor's failure to comply with the requirements of State Law to qualify for that tax exemption.

### § 3.7 PERMITS, FEES, NOTICES, AND COMPLIANCE WITH LAWS

§ 3.7.1 The Contractor shall be responsible for making and submitting application for the building permit. The Contractor shall be responsible for payment of permits, governmental fees, licenses, and inspections necessary for proper execution of the contract and which are legally required when bids are received. The Contractor shall also obtain all permits and approvals, and pay all fees and expenses, if any, associated with National Pollutant Discharge Elimination System (NPDES) regulations administered by the Environmental Protection Agency (EPA) and local authorities, if applicable, that require completion of documentation and/or acquisition of a "Land Disturbing Activities Permit" for the project. Contractor's obligations under this paragraph do not require it to perform engineering services during the pre-construction phase to prepare proper drainage for the construction sites. However, any drainage alterations made by Contractor during the construction process which modifies the original site drainage plan and requires the issuance of a permit shall be at Contractor's sole cost.

§ 3.7.2 The Contractor shall comply with and give notices required by Applicable Law and all other requirements of public authorities applicable to performance of the Work.

§ 3.7.3 If the Contractor performs Work knowing, or in the exercise of reasonable caution and care should have known, it to be contrary to Applicable Law or lawful orders of public authorities, the Contractor shall assume appropriate responsibility for such Work and shall bear the costs attributable to correction. Without limiting the foregoing, in the event that Contractor deviates from the plans and specifications, except to the extent such deviation is expressly authorized by the Contract Documents and approved by the Owner and the Architect in writing, Contractor shall assume responsibility for such deviations and shall bear the costs of bringing such Work into compliance with Applicable Laws and the Contract Documents.

§ 3.7.4 **Concealed or Unknown Conditions.** If the Contractor encounters conditions at the site that are (1) subsurface or otherwise concealed physical conditions that differ materially from those indicated in the Contract Documents or which were not reasonably inferable by the Contractor from the Contract Documents and field conditions at the site of the Project, or (2) unknown physical conditions of an unusual nature, that differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents, or (3) unknown or concealed physical conditions that Contractor should not reasonably have known or anticipated based on the area in which the site of the project is located, the type of improvements involved, or the practices prevalent in the construction industry, the Contractor shall promptly provide notice to the Owner and the Architect before conditions are disturbed and in no event later than ten (10) days after first observance of the conditions. The Architect will promptly investigate such conditions and, if the Architect finds that they differ materially and cause an increase or decrease in the Contractor's cost of, or time required for, performance of any part of the Work, will recommend an equitable adjustment in the Contract Sum or Contract Time, or both. If the Owner and Contractor agree with the Architect's recommendations, the parties will execute a Change Order to reflect such agreed adjustment. If the Architect finds that the conditions at the site are not materially different from those indicated in the Contract Documents and that no change is justified, the Architect shall promptly notify the Owner and Contractor in writing, stating the reasons. If either party disputes the Architect's findings or recommendation, that party may proceed as provided in Article 15.

§ 3.7.5 If, in the course of the Work, the Contractor encounters human remains or recognizes the existence of burial markers, archaeological sites or wetlands not indicated in the Contract Documents, the Contractor shall immediately suspend any operations that would affect them and shall notify the Owner and Architect. Upon receipt of such notice, the Owner shall promptly take any action necessary to obtain governmental authorization required to resume the operations. The Contractor shall continue to suspend such operations until otherwise instructed by the Owner but shall continue with all other operations that do not affect those remains or features. Requests for adjustments in the Contract Sum and Contract Time arising from the existence of such remains or features may be made as provided in Article 15.

### § 3.8 ALLOWANCES

§ 3.8.1 The Contractor shall include in the Contract Sum all allowances stated in the Contract Documents. Items covered by allowances shall be supplied for such amounts and by such persons or entities as the Owner may direct, but the Contractor shall not be required to employ persons or entities to whom the Contractor has reasonable objection.

§ 3.8.2 Unless otherwise provided in the Contract Documents,

- .1 allowances shall cover the cost to the Contractor of materials and equipment delivered at the site and all required taxes, less applicable trade discounts;
- .2 Contractor's costs for unloading and handling at the site, labor, installation costs, and other expenses contemplated for stated allowance amounts shall be included in the allowances; and
- .3 whenever costs are more than or less than allowances, the Contract Sum shall be adjusted accordingly by Change Order. The amount of the Change Order shall reflect (1) the difference between actual costs and the allowances under Section 3.8.2.1 and (2) changes in the Contractor's costs under Section 3.8.2.2.

§ 3.8.3 Materials and equipment under an allowance shall be selected by the Owner in sufficient time to avoid delay.

§ 3.8.4 Contractor shall keep separate and adequate records of all allowances and shall submit such records to Owner from time to time upon request. Owner shall be responsible for costs incurred in excess of allowance amounts only to the extent approved by Owner in writing.

§ 3.8.4 Allowances shall be reflected in the Schedule of Values and Contractor shall not have the right to shift allowances to other line items in the Schedule of Values except in accordance with the requirements of Section 7.1.5 of the Agreement and with the Owner's written approval, in its sole discretion.

### § 3.9 SUPERINTENDENT / SAFETY PROFESSIONAL

§ 3.9.1 The Contractor shall employ a competent superintendent and necessary assistants who shall be in attendance at the Project site during performance of the Work. The superintendent shall represent the Contractor, and communications given to the superintendent shall be as binding as if given to the Contractor. Additionally, the Contractor shall employ a competent safety professional (who may or may not be the superintendent) and necessary assistants who shall be in attendance at the project site during performance of the work. The safety professional shall enforce all applicable construction safety standards, develop a progressive discipline program, monitor employee safety compliance, and document safety violations. Important communications shall be confirmed in writing

§ 3.9.2 If not approved by the Owner before the execution of the Agreement, the Contractor, as soon as practicable after award of the Contract but no less than 14 days before the commencement of the Work, shall furnish in writing to the Owner the name and qualifications of a proposed superintendent. The Owner may reply within 14 days to the Contractor in writing stating (1) whether the Owner has reasonable objection to the proposed superintendent or (2) that the Owner requires additional time to review. Failure of the Owner to reply within the 14 day period shall constitute notice of no reasonable objection.

§ 3.9.3 The Contractor shall not employ a proposed superintendent to whom the Owner has made reasonable and timely objection. The Contractor shall not change the superintendent without the Owner's consent, which shall not unreasonably be withheld or delayed.

### § 3.10 CONTRACTOR'S CONSTRUCTION SCHEDULES / REPORTS

§ 3.10.1 The Contractor, promptly after being awarded the Contract, shall prepare and submit for the Owner's and Architect's information a Contractor's construction schedule for the Work ("Contractor's Progress Schedule"). The Contractor's Progress Schedule shall not exceed time limits current under the Contract Documents (including the Critical Milestones, if any, established in the Contract Documents), shall be revised at appropriate intervals as required by the conditions of the Work and Project, shall be related to the entire Project to the extent required by the Contract Documents, and shall provide for expeditious and practicable execution of the Work. A detailed, critical path schedule format shall be used for the Contractor's Progress Schedule with thorough updates to such Schedule prepared at least monthly. All Schedule updates shall address the subject of how the Contractor intends to address any critical path delays previously encountered. The Contractor's Progress Schedule and all updates should address submittal activities as well as actual field construction activities.

§ 3.10.2 The Contractor shall, within ten (10) days after execution of the Agreement, prepare and keep current, for the Owner's approval, a schedule of submittals which is coordinated with the Contractor's Progress Schedule, and allows the Owner and the Architect reasonable time to review submittals. If the Contractor fails to submit and



maintain a submittal schedule as required herein, the Contractor shall not be entitled to any increase in Contract Sum or extension of Contract Time based on the time required for review of submittals.

§ 3.10.3 The Contractor shall perform the Work in general accordance with the most recent Contractor's Progress Schedule submitted to the Owner, provided such Schedule is consistent with and does not exceed the time limits under the Contract Documents, including but not limited to the Schedule of the Work and its Critical Milestones, if any.

§ 3.10.4 Failure of the Work to proceed in the sequence scheduled by Contractor shall not alone serve as the basis for a Claim for additional compensation or time. In the event there is interference with the Work which is beyond its control, Contractor shall attempt to reschedule the Work in a manner that will hold resulting additional time and costs to a minimum.

§ 3.10.5 The Contractor shall maintain a daily log containing a record of weather, Subcontractors working on the site, number of workers, Work accomplished, problems encountered and other similar relevant data as the Owner may reasonably require. The log shall be available to the Owner and Architect. The Contractor shall also develop a system of cost control for the Work, including regular monitoring of actual costs for activities in progress and estimates for uncompleted tasks and proposed changes. The Contractor shall identify variances between actual and estimated costs and report the variances to the Owner and Architect at regular intervals. The Contractor shall additionally prepare a monthly schedule summary report in a form and of sufficient detail and character as approved by the Owner. The report at a minimum shall specify whether the Project is on schedule, and if not, the reasons therefor and the terms of the new schedule, all in comparative form. The Contractor shall hold weekly progress meetings at the Site (with Owner and its authorized representatives entitled to attend) or at such other time, place, and frequency as are reasonably acceptable to Owner. Progress of the Work shall be reported in detail with reference to construction schedules. When it appears to Owner or Contractor that a contract milestone or completion date cannot be met for reasons not the fault of the Contractor, Contractor will develop with Owner a plan and a budget under the Change Order provision of the Contract Documents to meet such a situation either (at Owner's option) by accelerating the Work to overcome the delays, or suspending or otherwise slowing the Work to efficiently take advantage of any relaxation in Owner's need for the completed Work.

§ 3.10.6 Unless otherwise directed by Owner, the Contractor shall prepare and promptly distribute meeting minutes of all monthly and weekly meetings held hereunder.

### § 3.11 DOCUMENTS AND SAMPLES AT THE SITE

§ 3.11.1 The Contractor shall maintain at the site for the Owner one record copy of the Drawings, Specifications, Addenda, Change Orders and other Modifications, in good order and marked currently to record changes (including changes in the field) and selections made during construction. . At the end of construction, these documents shall be turned over to the Owner with the Contractor's certification that they show complete and exact "as-built" conditions. The Contractor shall further maintain at the site and available for Owner's inspection one record copy of approved Shop Drawings, Product Data, Samples and similar required submittals. These shall be available to the Owner and the Architect and shall be delivered to the Owner upon completion of the Work.

§ 3.11.2 Contractor shall at all times maintain job records, including, but not limited to, invoices, payment records, payroll records, daily reports, logs, diaries, and job meeting minutes, applicable to the project. Contractor shall make such reports and records available to inspection by the Owner, Architect, or their representative agents, within five (5) working days of request by Owner, Architect, or their agents. Such records shall be maintained by Contractor for at least 12 years following Final Completion of the Project.

### § 3.12 SHOP DRAWINGS, PRODUCT DATA AND SAMPLES

§ 3.12.1 Shop Drawings are drawings, diagrams, schedules and other data specially prepared for the Work by the Contractor or a Subcontractor, Sub-subcontractor, manufacturer, supplier or distributor to illustrate some portion of the Work.

§ 3.12.2 Product Data are illustrations, standard schedules, performance charts, instructions, brochures, diagrams and other information furnished by the Contractor to illustrate materials or equipment for some portion of the Work.

§ 3.12.3 Samples are physical examples that illustrate materials, equipment or workmanship and establish standards by which the Work will be judged.

§ 3.12.4 Shop Drawings, Product Data, Samples and similar submittals are not Contract Documents. Their purpose is to demonstrate the way by which the Contractor proposes to conform to the information given and the design concept expressed in the Contract Documents for those portions of the Work for which the Contract Documents require submittals. Review by the Architect (or such other design professional designated by the Owner for submittal review) is subject to the limitations of Section 4.2.7. Owner may designate one or more design professionals other than the Architect identified in the Agreement to review submittals. References herein to the "Architect" with regard to submittals shall include such other designated design professionals. Informational submittals upon which the Architect is not expected to take responsive action may be so identified in the Contract Documents.

§ 3.12.5 The Contractor shall review for compliance with the Contract Documents, approve and submit to the Architect and, if requested by the Owner, to the Owner all Shop Drawings, Product Data, Samples and similar submittals required by the Contract Documents in accordance with the submittal schedule approved by the Architect or, in the absence of an approved submittal schedule, with reasonable promptness and in such sequence as to cause no delay in the Work or in the activities of the Owner or of separate contractors.

§ 3.12.6 By submitting Shop Drawings, Product Data, Samples and similar submittals, the Contractor represents to the Owner and Architect that the Contractor has (1) reviewed and approved them, (2) determined and verified materials, field measurements and field construction criteria related thereto, or will do so and (3) checked and coordinated the information contained within such submittals with the requirements of the Work and of the Contract Documents.

§ 3.12.7 The Contractor shall perform no portion of the Work for which the Owner or the Contract Documents require submittal and review of Shop Drawings, Product Data, Samples or similar submittals until the respective submittal has been approved by the Architect or such person designated in writing by the Owner to approve such submittals.

§ 3.12.8 The Work shall be in accordance with approved submittals except that the Contractor shall not be relieved of responsibility for deviations from requirements of the Contract Documents by the approval of Shop Drawings, Product Data, Samples or similar submittals by the Architect or such person designated in writing by the Owner to approve such submittals unless the Contractor has specifically informed the Owner and the Architect (or other person designated by the Owner) in writing of such deviation at the time of submittal and (1) the Owner has given written approval to the specific deviation as a minor change in the Work, such deviation having been identified in writing by Contractor, or (2) a Change Order or Construction Change Directive has been issued authorizing the deviation. The Contractor shall not be relieved of responsibility for errors or omissions in Shop Drawings, Product Data, Samples or similar submittals by the approval thereof by the Architect (or other person designated by the Owner).

§ 3.12.9 The Contractor shall direct specific attention, in writing or on resubmitted Shop Drawings, Product Data, Samples or similar submittals, to revisions other than those requested by the Architect (or other person designated by the Owner) on previous submittals. In the absence of such written notice, the approval by the Architect (or other person designated by the Owner) of a resubmission shall not apply to such revisions.

§ 3.12.10 The Contractor shall not be required to provide design or other professional services that constitute the practice of architecture or engineering unless such services are specifically required by the Contract Documents for a portion of the Work or unless the Contractor needs to provide such services in order to carry out the Contractor's responsibilities for construction means, methods, techniques, sequences and procedures. The Contractor shall not be required to provide design and/or other professional services in violation of Applicable Law. When such services are required under Applicable Law to be performed by such properly licensed design professionals, the Contractor shall cause such services or certifications to be provided by such properly licensed design professional, whose signature and seal shall appear on all drawings, calculations, specifications, certifications, Shop Drawings and other submittals prepared by such professional. Shop Drawings and other submittals related to the Work designed or certified by such professional, if prepared by others, shall bear such professional's written approval when submitted to the Architect. The Owner and the Architect shall be entitled to rely upon the adequacy, accuracy and completeness of the services, certifications and approvals performed or provided by such design professionals,

provided the Owner and Architect have specified to the Contractor all performance and design criteria that such services must satisfy. Pursuant to this Section 3.12.10, the Architect or such other person designated by the Owner will review, approve or take other appropriate action on submittals only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. The Contractor shall not be responsible for the adequacy of the performance and design criteria specified in the Contract Documents. In the event that Contractor retains a licensed design professional under the terms of this paragraph, Contractor shall require that licensed design professional to carry comprehensive general liability and errors and omissions insurance coverage in the same amounts and forms as that required of the Architect on this Project. In the event that that licensed design professional retained by the Contractor will be conducting on-site services or observations, the licensed design professional shall also carry worker's compensation insurance and comprehensive automobile liability in the same amounts and forms required of the Architect on this Project.

### § 3.13 USE OF SITE

§ 3.13.1 The Contractor shall confine operations at the site to areas permitted by Applicable Law, including all lawful orders of public authorities and the Contract Documents and shall not unreasonably encumber the site with materials or equipment.

§ 3.13.2 Protection of construction materials and equipment stored at the Project site from weather, theft, damage and all other adversity is solely the responsibility of the Contractor.

### § 3.14 CUTTING AND PATCHING

§ 3.14.1 The Contractor shall be responsible for cutting, fitting or patching required to complete the Work or to make its parts fit together properly. All areas requiring cutting, fitting and patching shall be restored to the condition existing prior to the cutting, fitting and patching, unless otherwise required by the Contract Documents.

§ 3.14.2 The Contractor shall not damage or endanger a portion of the Work or fully or partially completed construction of the Owner or separate contractors by cutting, patching or otherwise altering such construction, or by excavation. The Contractor shall not cut or otherwise alter such construction by the Owner or a separate contractor except with written consent of the Owner and of such separate contractor; such consent shall not be unreasonably withheld. The Contractor shall not unreasonably withhold from the Owner or a separate contractor the Contractor's consent to cutting or otherwise altering the Work.

### § 3.15 CLEANING UP

§ 3.15.1 The Contractor shall keep the premises and surrounding area free from accumulation of waste materials or rubbish caused by operations under the Contract. At completion of the Work, the Contractor shall remove waste materials, rubbish, the Contractor's tools, construction equipment, machinery and surplus materials from and about the Project.

§ 3.15.2 If the Contractor fails to clean up as provided in the Contract Documents, the Owner may do so and Owner shall be entitled to reimbursement from the Contractor.

### § 3.16 ACCESS TO WORK

The Contractor shall provide the Owner and Architect, and their consultants and representatives, access to the Work in preparation and progress wherever located.

### § 3.17 ROYALTIES, PATENTS AND COPYRIGHTS

The Contractor shall pay all royalties and license fees. The Contractor shall defend suits or claims for infringement of copyrights and patent rights and shall hold the Owner and Architect harmless from loss on account thereof, but shall not be responsible for such defense or loss when a particular design, process or product of a particular manufacturer or manufacturers is required by the Contract Documents, or where the copyright violations are contained in Drawings, Specifications or other documents prepared by the Owner or Architect. However, if the Contractor has reason to believe that the required design, process or product is an infringement of a copyright or a patent, the Contractor shall be responsible for such loss unless such information is promptly furnished to the Owner and the Architect.

### § 3.18 INDEMNIFICATION

§ 3.18.1 To the fullest extent permitted by law (including Chapter 151, Texas Insurance Code) the Contractor shall indemnify, defend, and hold harmless the Owner and its Trustees, officers, administrators, employees, agents, representatives, consultants (other than Owner's design professionals for the Project), and lenders (entities providing conventional or bond financing for the construction of the Project) collectively referred to herein as the "Indemnified Parties", from and against claims, actions, liabilities, damages, losses and expenses, including but not limited to attorneys' fees and costs and expenses of litigation or arbitration incurred by an Indemnified Party, arising out of or resulting from the performance or a failure in the performance of the Work of the Contract by or through the Contractor or any other negligent or wrongful act or omission of the Contractor or one of its Subcontractors or Suppliers (of any tier) or anyone else for whom the Contractor is responsible under Applicable Law or the Contract Documents, collectively referred to herein as the "Contractor's Responsible Parties," **EXCEPT TO THE EXTENT** caused by the negligent acts or omissions of the Indemnified Parties or their agents, employees, or third-parties under their control or supervision (other than the Contractor and the Contractor's Responsible Parties and their agents and employees), **REGARDLESS OF WHETHER OR NOT SUCH CLAIM, DAMAGE, LOSS OR EXPENSE IS CAUSED IN PART BY THE CONCURRENT OR PARTIAL NEGLIGENCE OF A PARTY INDEMNIFIED HEREUNDER.** Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Section 3.18.

§ 3.18.1.1 Expenses recoverable by an Indemnified Party as part of the Contractor's indemnity obligations under this Section 3.18 shall include, without limitation, all attorneys' fees and any costs incurred by Owner in enforcing the provisions of the Contractor's indemnity obligations.

§ 3.18.1.2 **THE CONTRACTOR'S DUTY TO DEFEND THE OWNER AND THE OTHER PARTIES INDEMNIFIED HEREUNDER IN A CLAIM OR ACTION AND THE OBLIGATION TO INDEMNIFY THE OWNER AND THE OTHER PARTIES INDEMNIFIED HEREUNDER FOR THEIR COSTS OF DEFENSE (INCLUDING ATTORNEY'S FEES) SHALL ARISE FOR ALL CLAIMS RESULTING FROM OR ARISING OUT OF THE PERFORMANCE OF THE WORK OF THE CONTRACTOR, EXCEPT TO THE EXTENT SUCH CLAIM OR ACTION IS CAUSED BY THE NEGLIGENCE OR FAULT OF THE OWNER OR SUCH OTHER INDEMNIFIED PARTY OR THEIR AGENTS, EMPLOYEES OR THIRD-PARTIES UNDER THEIR CONTROL OR SUPERVISION, OTHER THAN THE CONTRACTOR OR ITS AGENTS, EMPLOYEES, OR SUBCONTRACTORS OF ANY TIER.**

§ 3.18.1.3 Except as provided in Subsection 3.18.2 below **AND TO THE EXTENT SUCH CONTRACTUAL APPORTIONMENT IS ENFORCEABLE UNDER CHAPTER 151, TEXAS INSURANCE CODE,** in the event that an Indemnified Party or their design professionals, consultants, or separate contractors (other than the Contractor and the Contractor's Responsible Parties) are found, by final judgment or arbitration award, to be negligent or at fault in whole or in part, the indemnity and hold harmless obligation of the Contractor with regard to attorney's fees and litigation or arbitration costs and expenses incurred by an Indemnified Party in defense of such claim shall be reduced by the percentage of negligence or fault of the Indemnified Party and/or their design professionals, consultants, or separate contractors (other than the Contractor and the Contractor's Responsible Parties).

§ 3.18.2 **BROAD-FORM INDEMNIFICATION FOR CLAIMS BASED UPON THE ALLEGED PERSONAL INJURY OF AN EMPLOYEE OF THE CONTRACTOR OR ONE OF THE CONTRACTOR RESPONSIBLE PARTIES OR UPON THE ALLEGED INFRINGEMENT OF A COPYRIGHT:**

**IN ADDITION TO AND NOT LIMITED BY THE FOREGOING, THE OBLIGATIONS OF CONTRACTOR TO DEFEND, INDEMNIFY, AND HOLD HARMLESS THE OWNER AND THE OTHER INDEMNIFIED PARTIES AS SET FORTH ABOVE WITH REGARD TO A CLAIM BASED UPON THE PERSONAL INJURY OR ALLEGED PERSONAL INJURY OF AN EMPLOYEE OF THE CONTRACTOR OR ONE OF THE CONTRACTOR RESPONSIBLE PARTIES OR A CLAIM BASED UPON THE INFRINGEMENT OR ALLEGED INFRINGEMENT OF A COPYRIGHT SHALL APPLY TO LIABILITIES EVEN IF AND TO THE EXTENT SUCH LIABILITIES ARE CAUSED OR ALLEGED TO BE CAUSED IN PART BY THE NEGLIGENCE OR FAULT OF ANY INDEMNIFIED PARTY TO THE EXTENT (BUT NO FURTHER) THAT:**

- (I) THE INDEMNIFIED PARTY'S LIABILITY IS BASED UPON OR ARISES FROM THE SELECTION OR CONSENT TO SELECTION BY AN INDEMNIFIED PARTY OF THE CONTRACTOR OR ONE OF THE CONTRACTOR RESPONSIBLE PARTIES TO PERFORM THE WORK;**
- (II) THE INDEMNIFIED PARTY'S LIABILITY IS BASED UPON OR ARISES FROM THE FAILURE OR ALLEGED FAILURE BY AN INDEMNIFIED PARTY TO SUPERVISE, MONITOR, OR CONTROL THE ACTIVITIES OF THE CONTRACTOR OR ONE OF THE CONTRACTOR RESPONSIBLE PARTIES ON**

OR ABOUT THE PROJECT SITE OR OTHERWISE IN RESPECT TO PERFORMANCE OF THE WORK OR COMPLIANCE WITH APPLICABLE LAW;

(III) THE INDEMNIFIED PARTY'S LIABILITY IS BASED UPON OR ARISES FROM THE FAILURE OR ALLEGED FAILURE BY AN INDEMNIFIED PARTY TO ENFORCE THE OBLIGATIONS OF THE CONTRACTOR OR ONE OF THE CONTRACTOR RESPONSIBLE PARTIES UNDER THE CONTRACT DOCUMENTS; OR

(IV) THE INDEMNIFIED PARTY'S LIABILITY IS BASED UPON OR ARISES FROM A FINDING THAT THE INDEMNIFIED PARTY IS VICARIOUSLY LIABLE FOR THE ACT OR OMISSION OF THE CONTRACTOR OR THE SUBCONTRACTOR PARTY.

§ 3.18.3 Contractor shall promptly advise Owner in writing of any action, administrative or legal proceeding or investigation as to which this indemnification may apply. UPON TIMELY WRITTEN NOTICE AND TO THE FULLEST EXTENT ALLOWED BY APPLICABLE LAW, OWNER MAY, IN ITS SOLE DISCRETION, REQUIRE CONTRACTOR TO DEFEND OWNER AND THE OTHER INDEMNIFIED PARTIES IN CONNECTION WITH ANY ACTIONS (WHETHER IN LITIGATION OR ARBITRATION) OR CLAIMS SUBJECT TO CONTRACTOR'S INDEMNIFICATION OBLIGATIONS UNDER THIS SECTION 3.18.

§ 3.18.3.1 WITHOUT LIMITING THE FOREGOING, SUCH OBLIGATION OF THE CONTRACTOR TO DEFEND SHALL ARISE WITH REGARD TO CLAIMS INDEMNIFIED UNDER SECTION 3.18.2 ABOVE, REGARDLESS OF THE FAULT OR ALLEGED FAULT OF THE OWNER OR THE INDEMNIFIED PARTIES.

§ 3.18.3.2 In the event that Contractor is required to defend and does defend Owner, Owner shall have the right, at its option, to be represented therein by advisory counsel of its own selection and at its own expense. Nothing herein shall limit Contractor's obligation to indemnify the Indemnified Parties for attorneys' fees and defense costs incurred by such Indemnified Parties in connection with their defense of an action or claim under this Section 3.18.

§ 3.18.4 The obligations of the Contractor under this Section 3.18 shall not extend to the liability of the Owner's design professionals or their sub-consultants, agents and employees arising out of their preparation or approval of maps, drawings, opinions, reports, surveys, change orders, designs or specifications.

§ 3.18.5 In claims against any person or entity indemnified under this Section 3.18 by an employee of the Contractor or a Contractor Responsible Party, the indemnification obligation under this Section shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for the Contractor or a Subcontractor or Sub-subcontractor under workers' compensation acts, disability benefit acts or other employee benefit acts.

§ 3.18.6 Contractor's indemnification obligations arising under this Section 3.18 shall not be limited by any limitation on the measure of damages as set forth in the Contract Documents.

§ 3.18.7 The indemnity provisions set forth in this Section 3.18 shall survive the expiration or earlier termination of this Contract, the Final Completion of the Work, and any other services to be provided pursuant to this Agreement.

§ 3.18.8 In the event of failure by Contractor to fully perform in accordance with this Section 3.18, Owner, at its option, and without relieving Contractor of its obligations hereunder, may so perform, but all costs and expenses so incurred by Owner in that event shall be reimbursed by Contractor to Owner, together with interest on the same from the date any such expense was paid by Owner and then reimbursed by Contractor, at the rate of eighteen percent (18%) per annum.

## ARTICLE 4 ARCHITECT

### § 4.1 GENERAL

§ 4.1.1 The Architect is the person lawfully licensed to practice architecture or engineering (as applicable) or an entity lawfully practicing architecture or engineering identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number.

§ 4.1.2 *[Intentionally deleted.]*

§ 4.1.3 *[Intentionally deleted.]*



## § 4.2 ADMINISTRATION OF THE CONTRACT

§ 4.2.1 The Architect will provide such services with regard to the administration of the Contract as described in the Contract Documents or as requested by the Owner. The Architect will have no authority to act on behalf of the Owner unless otherwise expressly authorized in writing by the Owner.

§ 4.2.2 Upon the Owner's request, the Architect, as a consultant to the Owner, will visit the site at intervals appropriate to the stage of construction, or as otherwise agreed with the Owner, to become generally familiar with the progress and quality of the portion of the Work completed, and to determine in general if the Work observed is being performed in a manner indicating that the Work, when fully completed, will be in accordance with the Contract Documents. However, the Owner does not currently intend for the Architect to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work. The Architect will not have control over, charge of, or responsibility for, the construction means, methods, techniques, sequences or procedures, or for the safety precautions and programs in connection with the Work since these are solely the Contractor's rights and responsibilities under the Contract Documents, except as provided in Section 3.3.1. Any failure by the Architect to inform the Contractor or any observed non-compliance shall not constitute a waiver by Architect or Owner of the right to insist upon compliance by Contractor.

§ 4.2.3 On the basis of such site visits, the Architect will keep the Owner reasonably informed about the progress and quality of the portion of the Work completed, and report to the Owner (1) known deviations from the Contract Documents and from the most recent construction schedule submitted by the Contractor, and (2) defects and deficiencies observed in the Work. Neither the Owner nor its agents or consultants, including the Architect will be responsible for the Contractor's failure to perform the Work in accordance with the requirements of the Contract Documents. Neither the Owner nor its agents or consultants, including the Architect will have control over or charge of and will not be responsible for acts or omissions of the Contractor, Subcontractors, Sub-subcontractors, or their agents or employees, or any other persons or entities performing portions of the Work.

### § 4.2.4 COMMUNICATIONS FACILITATING CONTRACT ADMINISTRATION

Except as otherwise provided in the Contract Documents, the Architect shall be copied on all correspondence between the Owner and Contractor. The Owner and Contractor may communicate directly with each other or indirectly through the Architect about matters arising out of or relating to the Contract. Communications by and with the Architect's consultants shall be through the Architect. Communications by and with Subcontractors and material suppliers shall be through the Contractor. Communications by and with separate contractors shall be through the Owner.

§ 4.2.5 The Owner reserves the right, upon written notice to the Contractor, to require the Architect or another third-party consultant to review and certify the amounts due the Contractor and issue Certificates for Payment in such amounts based upon its evaluations of the Work and of the Contractor's Applications for Payment.

§ 4.2.6 The Owner reserves the right, upon written notice to the Contractor, to give the Architect (or such other person designated by the Owner) authority to reject Work that does not conform to the Contract Documents. In such event, whenever the Architect or such other person designated by the Owner considers it necessary or advisable, the Architect or such designated person will have authority to require inspection or testing of the Work in accordance with Sections 13.5.2 and 13.5.3, whether or not such Work is fabricated, installed or completed. However, neither this authority of the Architect (or such designated person) nor a decision made in good faith either to exercise or not to exercise such authority shall give rise to a duty or responsibility of the Architect or such designated person to the Contractor, Subcontractors, Sub-subcontractors, material and equipment suppliers, their agents or employees, or other persons or entities performing portions of the Work.

§ 4.2.7 The Architect (or such other person designated by the Owner) will review and approve, or take other appropriate action upon, the Contractor's submittals such as Shop Drawings, Product Data and Samples, but only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. The action by the Architect or such other person designated by the Owner will be taken in accordance with the submittal schedule approved by the Owner or, in the absence of an approved submittal schedule, with reasonable promptness while allowing sufficient time to permit adequate review by the Architect or such other person designated by the Owner. Review of such submittals is not conducted for the purpose of determining the accuracy and completeness of other details such as dimensions and quantities, or for substantiating instructions for installation or performance of equipment or systems, all of which remain the responsibility of the

Contractor as required by the Contract Documents. The review hereunder of the Contractor's submittals shall not relieve the Contractor of the obligations under Sections 3.3, 3.5 and 3.12. The review hereunder shall not constitute approval of safety precautions or, unless otherwise specifically stated by the Architect or other person designated hereunder by the Owner, of any construction means, methods, techniques, sequences or procedures. The approval hereunder of a specific item shall not indicate approval of an assembly of which the item is a component.

§ 4.2.8 Except as otherwise directed by the Owner or as required by the Contract Documents, the Contractor will prepare Change Orders for the Owner's approval. Construction Change Directives may be prepared by either the Owner or the Architect (with the Owner's approval).

§ 4.2.9 If requested by the Owner, the Architect will conduct inspections to assist the Owner in determining the date or dates of Substantial Completion and the date of Final Completion; issue Certificates of Substantial Completion pursuant to Section 9.8; receive and forward to the Owner, for the Owner's review and records, written warranties and related documents required by the Contract and assembled by the Contractor pursuant to Section 9.10; and issue a final Certificate for Payment pursuant to Section 9.10.

§ 4.2.10 *[Intentionally deleted.]*

§ 4.2.11 Upon the Owner's request, the Architect will initially interpret and decide matters concerning performance under, and requirements of, the Contract Documents. The Architect's response to such requests will be made in writing within any time limits agreed upon or otherwise with reasonable promptness.

§ 4.2.12 *[Intentionally deleted.]*

§ 4.2.13 *[Intentionally deleted.]*

§ 4.2.14 The Architect (or such other design professional designated by the Owner) will review and respond to requests for information about the Contract Documents. The response by the Architect (or such other design professional designated by the Owner) to such requests will be made in writing within any time limits agreed upon or otherwise with reasonable promptness. If appropriate, the Architect (or such other design professional designated by the Owner) will prepare and issue supplemental Drawings and Specifications in response to the requests for information.

§ 4.2.15 Notwithstanding any other provision of this Agreement to the contrary, the Architect (or such other design professional designated by the Owner) shall have no authority to order or approve any material deviation from the Contract Documents, whether or not such deviation affects the Contract Sum or other Substantial Completion Date (as defined herein). In the event any such deviation is sought, prior written approval from Owner must be obtained.

## ARTICLE 5 SUBCONTRACTORS

### § 5.1 DEFINITIONS

§ 5.1.1 A Subcontractor is a person or entity who has a direct contract with the Contractor to perform a portion of the Work at the site. The term "Subcontractor" is referred to throughout the Contract Documents as if singular in number and means a Subcontractor or an authorized representative of the Subcontractor. The term "Subcontractor" includes suppliers of materials, tools, consumables, equipment, or systems and entities renting equipment, tools or other items but does not include a separate contractor or subcontractors of a separate contractor. The term "Subcontract", whether capitalized or not, includes Purchase Orders and other supply contracts.

§ 5.1.2 A Sub-subcontractor is a person or entity who has a direct or indirect contract with a Subcontractor to perform a portion of the Work at the site. The term "Sub-subcontractor", whether capitalized or not, is referred to throughout the Contract Documents as if singular in number and means a Sub-subcontractor of any tier or an authorized representative of the Sub-subcontractor. The term "Sub-subcontractor" includes suppliers of materials, tools, consumables, equipment, or systems and entities renting equipment, tools or other items to a Subcontractor or another Sub-subcontractor.

§ 5.1.3 Contractor shall promptly notify Owner and Architect of any material defaults by any Subcontractor or Sub-subcontractor.



## § 5.2 AWARD OF SUBCONTRACTS AND OTHER CONTRACTS FOR PORTIONS OF THE WORK

§ 5.2.1 Unless otherwise stated in the Contract Documents or the bidding requirements, the Contractor, as soon as practicable after the GMP Amendment has been entered into by the parties, shall furnish in writing to the Owner and the Architect the names of persons or entities (including those who are to furnish materials or equipment fabricated to a special design) with whom Contractor has subcontracted or intends to subcontract for each portion of the Work.

§ 5.2.2 The Contractor shall not contract with a proposed person or entity to whom the Owner has made reasonable and timely objection and who has not been selected pursuant to the subcontractor bidding process required by the Agreement and Applicable Laws. The Contractor shall not be required to contract with anyone to whom the Contractor has made reasonable objection.

§ 5.2.3 *[Intentionally omitted.]*

§ 5.2.4 The Contractor shall not substitute a Subcontractor, person or entity previously selected if the Owner makes reasonable objection to such substitution.

## § 5.3 SUBCONTRACTUAL RELATIONS

§ 5.3.1 By appropriate written agreement, the Contractor shall require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound to the Contractor by terms of the Contract Documents, and to assume toward the Contractor all the obligations and responsibilities, including the responsibility for safety of the Subcontractor's Work, which the Contractor, by these Documents, assumes toward the Owner and Architect. Each subcontract agreement shall preserve and protect the rights of the Owner and Architect under the Contract Documents with respect to the Work to be performed by the Subcontractor so that subcontracting thereof will not prejudice such rights, and shall allow to the Subcontractor, unless specifically provided otherwise in the subcontract agreement, the benefit of all rights, remedies and redress against the Contractor that the Contractor, by the Contract Documents, has against the Owner. Where appropriate, the Contractor shall require each Subcontractor to enter into similar agreements with Sub-subcontractors. The Contractor shall make available to each proposed Subcontractor, prior to the execution of the subcontract agreement, copies of the Contract Documents to which the Subcontractor will be bound, and, upon written request of the Subcontractor, identify to the Subcontractor terms and conditions of the proposed subcontract agreement that may be at variance with the Contract Documents. Subcontractors will similarly make copies of applicable portions of such documents available to their respective proposed Sub-subcontractors.

§ 5.3.2 Without limiting the foregoing, the Contractor agrees to include language in all its agreements with its Subcontractors stating that neither the Subcontractor nor its member companies nor their affiliated companies nor company principals nor their family members shall perform any direct design services in connection with the Project. Each such Subcontract Agreement must contain, among other things, a prohibition to preclude contractors, contractor firms and/or principals and family members from having any financial interest in a firm which performs any part of the design services in connection with the Project.

§ 5.3.3 **Related Party Subcontractor.** The Contractor shall not enter into any subcontract, contract, agreement, purchase order or other arrangement for the furnishing and/or installation of any portion of materials, services, equipment or work with any party or entity if such party or entity is a Related Party (as defined in Section 6.10 of the Agreement), unless such arrangement has been approved by the Owner in writing, after full disclosure in writing by Contractor of such affiliation and Contractor has complied with the requirements of Section 2.3.2.1 and Section 6.10 of the Agreement. The term Related Party includes any entity related to or affiliated with the Contractor, its employees, agents, partners or shareholders, if any, has direct or indirect ownership or control.

## § 5.4 CONTINGENT ASSIGNMENT OF SUBCONTRACTS

§ 5.4.1 Each subcontract agreement for a portion of the Work is assigned by the Contractor to the Owner, provided that

- .1 assignment is effective only after termination of the Contract by the Owner for cause pursuant to Section 14.2 and only for those subcontract agreements that the Owner accepts by notifying the Subcontractor and Contractor in writing; and
- .2 assignment is subject to the prior rights of the surety, if any, obligated under bond relating to the Contract.

When the Owner accepts the assignment of a subcontract agreement, the Owner assumes the Contractor's rights and obligations under the subcontract with regard to the Work to be performed after the acceptance of the assignment.

§ 5.4.2 Upon such assignment, if the Work has been suspended for more than sixty (60) days, the Subcontractor's compensation shall be equitably adjusted for increases in cost resulting from the suspension.

§ 5.4.3 Upon such assignment to the Owner under this Section 5.4, the Owner may further assign the subcontract to a successor contractor or other entity. If the Owner assigns the subcontract to a successor contractor or other entity, the Owner shall nevertheless remain legally responsible for all of the successor contractor's obligations under the subcontract.

#### § 5.5 NOTICE OF MATERIAL DEFAULT / NO CLAIM BY SUBCONTRACTOR AGAINST OWNER

Contractor shall promptly notify Owner and Architect of any material defaults by any Subcontractor.

Notwithstanding any provision contained in Article 5 to the contrary, it is hereby acknowledged and agreed that Owner has in no way agreed, expressly or implicitly, nor will Owner agree, to allow any subcontractor or other materialman or workman employed by Contractor to create a lien or to obtain a personal judgment against Owner for the amount due from the Contractor.

### ARTICLE 6 CONSTRUCTION BY OWNER OR BY SEPARATE CONTRACTORS

#### § 6.1 OWNER'S RIGHT TO PERFORM CONSTRUCTION AND TO AWARD SEPARATE CONTRACTS

§ 6.1.1 The Owner reserves the right to perform construction or operations related to the Project with the Owner's own forces, and to award separate contracts in connection with other portions of the Project or other construction or operations on the site under contracts with substantially similar provisions related to insurance and waiver of subrogation. If the Contractor claims that delay or additional cost is involved because of such action by the Owner, the Contractor shall make such Claim as provided in Article 15.

§ 6.1.2 When separate contracts are awarded for different portions of the Project or other construction or operations on the site, the term "Contractor" in the Contract Documents in each case shall mean the Contractor who executes each separate Owner-Contractor Agreement.

§ 6.1.3 The Owner shall provide for coordination of the activities of the Owner's own forces and of each separate contractor with the Work of the Contractor, who shall cooperate with them. The Contractor shall participate with other separate contractors and the Owner in reviewing their construction schedules. The Contractor shall make any revisions to the construction schedule deemed necessary after a joint review and mutual agreement. The construction schedules shall then constitute the schedules to be used by the Contractor, separate contractors and the Owner until subsequently revised.

§ 6.1.4 Unless otherwise provided in the Contract Documents, when the Owner performs construction or operations related to the Project with the Owner's own forces, the Owner shall be deemed to be subject to the same obligations and to have the same rights that apply to the Contractor under the Conditions of the Contract, including, without excluding others, those stated in Article 3, this Article 6 and Articles 10, 11 and 12.

#### § 6.2 MUTUAL RESPONSIBILITY

§ 6.2.1 The Contractor shall afford the Owner and separate contractors reasonable opportunity for introduction and storage of their materials and equipment and performance of their activities, and shall connect and coordinate the Contractor's construction and operations with theirs as required by the Contract Documents.

§ 6.2.2 If part of the Contractor's Work depends for proper execution or results upon construction or operations by the Owner or a separate contractor, the Contractor shall, prior to proceeding with that portion of the Work, promptly report to the Architect and the Owner apparent discrepancies or defects in such other construction that would render it unsuitable for such proper execution and results. Failure of the Contractor so to report shall constitute an acknowledgment that the Owner's or separate contractor's completed or partially completed construction is fit and proper to receive the Contractor's Work, except as to defects not then reasonably discoverable.

§ 6.2.3 The Owner shall be reimbursed by the Contractor for costs incurred by the Owner which are payable to a separate contractor because of delays, improperly timed activities or defective construction of the Contractor. The

Owner shall be responsible to the Contractor for costs incurred by the Contractor because of delays, improperly timed activities, damage to the Work or defective construction of a separate contractor.

§ 6.2.4 The Contractor shall promptly remedy damage the Contractor wrongfully causes to completed or partially completed construction or to property of the Owner or separate contractors as provided in Section 10.2.5.

§ 6.2.5 The Owner and each separate contractor shall have the same responsibilities for cutting and patching as are described for the Contractor in Section 3.14.

#### § 6.3 OWNER'S RIGHT TO CLEAN UP

If a dispute arises among the Contractor, separate contractors and the Owner as to the responsibility under their respective contracts for maintaining the premises and surrounding area free from waste materials and rubbish, the Owner may clean up and equitably allocate the cost among those responsible.

### ARTICLE 7 CHANGES IN THE WORK

#### § 7.1 GENERAL

§ 7.1.1 Changes in the Work may be accomplished after execution of the Contract, and without invalidating the Contract, by Change Order, Construction Change Directive or order for a minor change in the Work, subject to the limitations stated in this Article 7, and elsewhere in the Contract Documents.

§ 7.1.2 A Change Order shall be based upon agreement between the Owner and Contractor which may or may not be agreed to by the Architect; a Construction Change Directive may or may not be agreed to by the Contractor.

§ 7.1.3 Changes in the Work shall be performed under applicable provisions of the Contract Documents, and the Contractor shall proceed promptly, unless otherwise provided in the Change Order or Construction Change Directive.

§ 7.1.4 The Contractor, upon receipt of written notification by the Owner of a proposed item of change in the Work, shall prepare and deliver to the Owner and the Architect as soon as possible a Change Proposal in such form or forms as directed by the Owner or the Architect and in accordance with the following:

- .1 Each Change Proposal shall be numbered consecutively and shall include material's costs, labor costs, fees, overhead and profit. The Change Proposal shall specify all costs related to the proposed Change in the Work, including any disruption or impact on performance.
- .2 The Subcontractor's itemized accounting shall be included with the Change Proposal.
- .3 If Change Proposal is returned to the Contractor for additional information or if the scope of the proposed change in the Work is modified by additions, deletions or other revisions, the Contractor shall revise the Change Proposal accordingly and resubmit the revised Change Proposal to the Owner.
- .4 A revised Change Proposal shall bear a new Change Proposal number but shall cross-reference the previous Change Proposal.
- .5 Upon written approval of a Change Proposal by the Owner, the Contractor (or the Architect if otherwise required by the Contract Documents or directed by the Owner) will prepare a Change Order authorizing such change in the Work on such form as directed by the Owner.
- .6 The Contractor shall request extensions of Contract Time due to changes in the Work only at the time of submitting his Change Proposal. Contractor's failure to do so shall represent a waiver of any right to request a time extension.
- .7 The Contractor shall maintain such Change Order log (with Change Proposals) in such form as directed by Owner.

§ 7.1.5 Except as permitted in the Agreement or these General Conditions with regard to amounts to which Owner is entitled to payment or offset arising from Contractor's breach or default hereunder, a change in the Contract Sum or the Contract Time shall be accomplished only by Change Directive or Change Order. No course of conduct or

dealings between the parties, nor express or implied acceptance of alterations or additions to the Work, and no claim that the Owner has been unjustly enriched by any alteration or addition to the Work, whether or not there is, in fact, any unjust enrichment to the Work, shall be the basis of any claim to any increase in any amounts due under the Contract Documents or a change in any time period provided for in the Contract Documents.

## § 7.2 CHANGE ORDERS

§ 7.2.1 A Change Order is a written instrument signed by the Owner and the Contractor (which may or may not be agreed to by the Architect) stating their agreement upon all of the following:

- .1 The change in the Work;
- .2 The amount of the adjustment, if any, in the Contract Sum; and
- .3 The extent of the adjustment, if any, in the Contract Time.

§ 7.2.2 Unless otherwise provided in the Change Order, agreement on any Change Order shall constitute a final settlement of all matters relating to the change in the Work which is the subject of the Change Order, including but not limited to, all direct and indirect costs associated with such change and any and all adjustments to the Contract Sum and the construction schedule. In the event a Change Order increases the Contract Sum, Contractor shall include the Work covered by such Change Orders in Applications for Payment as if such Work were originally part of the Contract Documents.

## § 7.3 CONSTRUCTION CHANGE DIRECTIVES

§ 7.3.1 A Construction Change Directive is a written order signed by the Owner (which may or may not be agreed to by the Architect), directing a change in the Work prior to agreement on adjustment, if any, in the Contract Sum or Contract Time, or both. The Owner may by Construction Change Directive, without invalidating the Contract, order changes in the Work within the general scope of the Contract consisting of additions, deletions or other revisions, the Contract Sum and Contract Time being adjusted accordingly.

§ 7.3.2 A Construction Change Directive shall be used in the absence of total agreement on the terms of a Change Order.

§ 7.3.3 If the Construction Change Directive provides for an adjustment to the Contract Sum, the adjustment shall be based on one of the following methods:

- .1 Mutual acceptance of a lump sum properly itemized and supported by sufficient substantiating data to permit evaluation with the applicable mark-up as may be authorized under the Agreement;
- .2 Unit prices stated in the Contract Documents or subsequently agreed upon;
- .3 Cost to be determined in a manner agreed upon by the parties with the applicable mark-up as may be authorized by the Agreement; or
- .4 As provided in Section 7.3.7.

§ 7.3.4 If unit prices are stated in the Contract Documents or subsequently agreed upon, and if quantities originally contemplated are materially changed in a proposed Change Order or Construction Change Directive so that application of such unit prices to quantities of Work proposed will cause substantial inequity to the Owner or Contractor, the applicable unit prices shall be equitably adjusted.

§ 7.3.5 Upon receipt of a Construction Change Directive, the Contractor shall promptly proceed with the change in the Work involved and advise the Architect and the Owner of the Contractor's agreement or disagreement with the method, if any, provided in the Construction Change Directive for determining the proposed adjustment in the Contract Sum or Contract Time.

§ 7.3.6 A Construction Change Directive signed by the Contractor indicates the Contractor's agreement therewith, including adjustment in Contract Sum and Contract Time or the method for determining them. Such agreement shall be effective immediately and shall be recorded as a Change Order.

§ 7.3.7 If the Contractor does not object in writing to the Owner within ten (10) calendar days after receipt of the Construction Change Directive, such Directive shall be deemed accepted by the Contractor and shall be effective

and recorded as a Change Order. If the Contractor disagrees with the method for adjustment in the Contract Sum and timely and properly objects, the method and the adjustment shall be determined on the basis of reasonable expenditures and savings of those performing the Work attributable to the change, subject to such provisions for adjustments to the Contract Sum as provided in the Contract Documents and as further limited immediately below, including, in case of an increase in the Contract Sum, with the applicable mark-up as may be authorized in the Agreement. In such case, and also under Section 7.3.3.3, the Contractor shall keep and present, in such form as the Owner may prescribe, an itemized accounting together with appropriate supporting data. Unless otherwise provided in the Contract Documents, costs for the purposes of this Section 7.3.7 shall be limited to the following and shall be subject to such terms and conditions regarding Change Order Pricing as provided in the Agreement (which terms and conditions shall control over the provisions hereof, to the extent in conflict):

- .1 Costs of labor, including social security, old age and unemployment insurance, fringe benefits required by agreement, and workers' compensation insurance, or, with regard to Contractor's benefits costs, such labor burden as may be expressly recoverable under the Agreement in lieu thereof;
- .2 Costs of materials, supplies and equipment, including cost of transportation, whether incorporated or consumed;
- .3 Rental costs of machinery and equipment, exclusive of hand tools, whether rented from the Contractor or others;
- .4 Costs of additional premiums for all bonds and insurance, permit fees, and sales, use or similar taxes related to the Work; and
- .5 Additional costs of supervision and field office personnel directly attributable to the change.

#### § 7.3.8 [Intentionally deleted.]

§ 7.3.9 Pending final determination of the total cost of a Construction Change Directive to the Owner, the Contractor may request payment for Work completed under the Construction Change Directive in Applications for Payment. The Owner will make an interim good faith determination for purposes of monthly certification for payment for those costs. The Owner's interim determination of cost shall adjust the Contract Sum on the same basis as a Change Order, subject to the right of either party to disagree and assert a Claim in accordance with Article 15.

§ 7.3.10 When the Owner and Contractor reach agreement upon the adjustments, such agreement shall be effective immediately and shall be recorded by preparation and execution of an appropriate Change Order. Change Orders may be issued for all or any part of a Construction Change Directive.

#### § 7.4 MINOR CHANGES IN THE WORK

The Owner will have authority to order minor changes in the Work not involving adjustment in the Contract Sum or extension of the Contract Time and not inconsistent with the intent of the Contract Documents. Such changes will be effected by written order and shall be binding on the Owner and Contractor. The Contractor shall carry out such written orders promptly.

### ARTICLE 8 TIME

#### § 8.1 DEFINITIONS

§ 8.1.1 Unless otherwise provided, Contract Time is the period of time, including authorized adjustments, allotted in the Contract Documents for Substantial Completion and Final Completion of the Work.

§ 8.1.2 The date of commencement of the Work is the date established in the Agreement.

§ 8.1.3 The term "Final Completion" shall mean the actual completion of the Work (or applicable portion thereof) in accordance with the Contract Documents, including any Work covered by Change Directives and Change Orders issued under the Contract, other than warranty work on Work that has previously been accepted by the Owner.

§ 8.1.4 The term "day" as used in the Contract Documents shall mean calendar day unless otherwise specifically defined.

#### § 8.2 PROGRESS AND COMPLETION

§ 8.2.1 Time limits stated in the Contract Documents are of the essence of the Contract. By executing the Agreement the Contractor confirms that the Contract Time is a reasonable period for performing the Work.



§ 8.2.2 The Contractor shall not knowingly, except by agreement or instruction of the Owner in writing, prematurely commence operations on the site or elsewhere prior to the effective date of insurance required by Article 11 to be furnished by the Contractor and Owner. The date of commencement of the Work shall not be changed by the effective date of such insurance.

§ 8.2.3 The Contractor shall proceed expeditiously with adequate forces and shall achieve Substantial Completion within the Contract Time.

### § 8.3 DELAYS AND EXTENSIONS OF TIME

§ 8.3.1 If the Contractor is delayed at any time in the commencement or progress of the Work by an act or neglect of the Owner or Architect, or of an employee of either, or of a separate contractor employed by the Owner; or by changes ordered in the Work (not caused or resulting from the failure of Contractor or its Subcontractors or Sub-subcontractors to comply with their obligations arising under the Contract); or by labor disputes (not arising from the labor practices of Contractor or its Subcontractors or Sub-subcontractors), fire (not caused by Contractor or its Subcontractors or Sub-subcontractors), unusual delay in deliveries (not attributable to or caused by Contractor or its Subcontractors or Sub-subcontractors), unavoidable casualties or other causes beyond the control and reasonable ability to avoid by the Contractor or its Subcontractors or Sub-subcontractors (such causes are collectively referred to in the Contract Documents as causes "not the fault of the Contractor"), then the Contract Time shall be extended by Change Order by the number of days by which the critical path to completion of the Project has been delayed by the event giving rise to the right to an extension. Notwithstanding the foregoing, the Contractor acknowledges and agrees that adjustments in the Contract Time will be permitted for a delay only to the extent such delay (1) is not caused, or could not have been reasonably anticipated and mitigated, by the Contractor, (2) could not be limited or avoided by the Contractor's timely notice to the Owner of the delay, (3) is in addition to any time contingency periods set forth in the critical path for completion of the Work, and (4) is of a duration not less than one (1) day.

§ 8.3.2 Claims relating to time shall be made in accordance with applicable provisions of Article 15.

§ 8.3.3 Nothing herein shall authorize the Contractor to recover an increase in the Contract Sum as a result of price escalations in the marketplace or price increases due to labor or materials shortages or to recover such increases in excess of the Contract Sum.

## ARTICLE 9 PAYMENTS AND COMPLETION

### § 9.1 CONTRACT SUM

The Contract Sum is stated in the Agreement and, including authorized adjustments, is the total amount payable by the Owner to the Contractor for performance of the Work under the Contract Documents.

§ 9.1.2 Notwithstanding anything to the contrary contained in the Contract Documents, the Owner may withhold any payment to the Contractor hereunder of and for so long as the Contractor fails to perform any of its obligations hereunder or otherwise is in default under any of the Contract Documents; provided, however, that any such holdback shall be limited to an amount sufficient, in the opinion of the Owner, to cure any such default or failure to perform by the Contractor. If the Contractor disputes Owner's determination, he shall nevertheless expeditiously continue to prosecute the Work.

### § 9.2 SCHEDULE OF VALUES

A Schedule of Values fairly allocating the various portions of the Work, prepared in such form and supported by such data to substantiate its accuracy as required by the Contract Documents or as otherwise reasonably required by the Owner shall be made a part of the GMP Amendment. The Schedule of Values shall be prepared in such a manner that each major item of work and each subcontracted item of work is shown as a single line item on AIA Document G703, Application and Certificate for Payment, Continuation Sheet or other form acceptable to Owner. Once approved by the Owner and updated for changes in the Work, the Schedule of Values shall be used only as a basis for reviewing the Contractor's Applications for Payment and is not to be taken as evidence of market or other value. The Schedule and any modifications or amendments thereto shall not overvalue early job activities. The schedule shall follow the trade divisions of the Specifications so far as practicable. Any modifications or amendments thereto must be approved by the Owner.

### § 9.3 APPLICATIONS FOR PAYMENT

§ 9.3.1 Based upon Applications for Payment submitted to the Owner and the Architect by the Contractor and Certificates for Payment issued by the Architect (if so required by the Owner), the Owner shall make progress payments on account of the Contract Sum to the Contractor as provided below and in the Agreement. Owner shall have the right to condition payment on the receipt of a Certificate of Payment from the Architect. In such event, Architect shall be given a period of ten (10) days in which to review and certify the amounts due under an Application for payment. Such time period shall be added to any time periods for payment as provided herein.

§ 9.3.1.1 Without limiting the foregoing, the Contractor shall submit to the Owner and the Architect an itemized Application for Payment prepared in accordance with the Schedule of Values for completed portions of the Work. Such application shall be notarized, if required, and supported by such data substantiating the Contractor's right to payment as required by the Agreement or as the Owner may otherwise reasonably require, such as copies of requisitions from Subcontractors and material suppliers, and shall reflect retainage if provided for in the Contract Documents.

§ 9.3.1.2 As provided in Section 7.3.9 above, such applications may include requests for payment on account of changes in the Work that have been properly authorized by Construction Change Directives, or by interim good faith determinations of the Owner, but not yet included in Change Orders.

§ 9.3.1.3 Applications for Payment shall not include requests for payment for portions of the Work for which the Contractor does not intend to pay promptly to a Subcontractor or material supplier, unless such Work has been performed by others whom the Contractor intends to pay.

§ 9.3.2 Unless otherwise provided in the Contract Documents, payments shall be made on account of materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work. If approved in advance by the Owner, payment may similarly be made for materials and equipment suitably stored off the site at a location agreed upon in writing. Payment for materials and equipment stored on or off the site shall be conditioned upon compliance by the Contractor with procedures satisfactory to the Owner to establish the Owner's title to such materials and equipment or otherwise protect the Owner's interest, and shall include the costs of applicable insurance, storage and transportation to the site for such materials and equipment stored off the site.

§ 9.3.3 The Contractor warrants that title to all Work covered by an Application for Payment will pass to the Owner no later than the time of payment. The Contractor further warrants that upon submittal of an Application for Payment all Work for which Applications for Payment have been previously submitted and payments received from the Owner shall, to the best of the Contractor's knowledge, information and belief, be free and clear of liens, claims, security interests or encumbrances in favor of the Contractor, Subcontractors, Sub-subcontractors, material suppliers, or other persons or entities making a claim by reason of having provided labor, materials and equipment relating to the Work. The Contractor further warrants that it shall acquire no Work, materials, or equipment whether directly or through a Subcontractor or Sub-subcontractor, subject to an agreement under which a lien is retained by the seller or otherwise imposed by the Contractor, any Subcontractor or Sub-subcontractor, or any other person or entity. The Contractor shall defend the Owner, at the Contractor's sole cost and expense, against any actions, lawsuits, or proceedings brought against the Owner as a result of liens filed against the site of the Project or otherwise, except to the extent that such liens arise due to the Owner wrongfully withholding payment. The Contractor shall indemnify, defend, and hold harmless the Owner against any such liens or claims for lien and agrees to pay any judgment or lien against the Owner or the Owner's property resulting from any such actions, lawsuits or proceedings brought to enforce any such lien or claim.

§ 9.3.3.1 With each Application for Payment, and as a condition to such payment by the Owner, Contractor shall submit waiver/release and bills paid affidavit from Contractor and such Subcontractors performing Work during the period covered by the Application for Payment as may be required by the Agreement.

### § 9.4 CERTIFICATES FOR PAYMENT

§ 9.4.1 If the Owner requires certification of payment requests by the Architect, the Architect will, within ten days after receipt of the Contractor's Application for Payment, either issue to the Owner a Certificate for Payment, with a copy to the Contractor, for such amount as the Architect determines is properly due, or notify the Contractor and Owner in writing of the Architect's reasons for withholding certification in whole or in part as provided in Section 9.5.1.



§ 9.4.2 The issuance of a Certificate for Payment, if any, will not be a representation that the Architect has (1) made exhaustive or continuous on-site inspections to check the quality or quantity of the Work, (2) reviewed construction means, methods, techniques, sequences or procedures, (3) reviewed copies of requisitions received from Subcontractors and material suppliers and other data requested by the Owner to substantiate the Contractor's right to payment, or (4) made examination to ascertain how or for what purpose the Contractor has used money previously paid on account of the Contract Sum.

§ 9.4.3 The issuance of a Certificate for Payment by the Architect (if requested by the Owner) shall constitute a recommendation to the Owner in respect to the amount to be paid. This recommendation is not binding on the Owner if, in Owner's opinion, legitimate reasons for nonpayment exist including, but not limited to the reasons set out in Section 9.5.1. If the Owner declines to make payment upon a Certificate of Payment, the Owner shall promptly notify the Contractor of the reasons therefor.

#### § 9.5 DECISIONS TO WITHHOLD PAYMENT

§ 9.5.1 The Architect may withhold a Certificate for Payment and an Owner may withhold payment in whole or in part, to the extent reasonably necessary to protect the Owner from loss for which the Contractor is responsible, including loss resulting from acts and omissions described in Section 3.3.2, because of

- .1 defective Work not remedied;
- .2 third party claims filed or reasonable evidence indicating probable filing of such claims unless security acceptable to the Owner is provided by the Contractor;
- .3 failure of the Contractor to make payments properly to Subcontractors or for labor, materials or equipment;
- .4 reasonable evidence that the Work cannot be completed for the unpaid balance of the Contract Sum;
- .5 damage to the Owner or a separate contractor;
- .6 reasonable evidence that the Work will not be completed within the Contract Time, and that the unpaid balance would not be adequate to cover actual or liquidated damages for the anticipated delay; or
- .7 repeated failure to carry out the Work in accordance with the Contract Documents.

§ 9.5.2 When the above reasons for withholding certification for payment or for payment are removed, payment will be made for amounts previously withheld (although Owner may require Contractor to submit an Application for Payment covering such previously withheld payment).

§ 9.5.3 If the Owner is entitled to withhold payment under Section 9.5.1.3, the Owner may, at its sole option, issue joint checks to the Contractor and to any Subcontractor or material or equipment suppliers to whom the Contractor failed to make payment for Work properly performed or material or equipment suitably delivered.

§ 9.5.4 If Contractor disputes any determination by Owner with regard to all or any part of an Application for Payment or a Certificate of Payment, Contractor shall nevertheless expeditiously continue to prosecute the Work but shall be entitled to make a Claim as provided in Article 15.

#### § 9.6 PROGRESS PAYMENTS

§ 9.6.1 The Owner shall make payment in the manner and within the time provided in the Contract Documents.

§ 9.6.2 Contractor shall pay each Subcontractor no later than seven days after receipt of payment from the Owner out of the amount paid to the Contractor on account of such Subcontractor's portion of the Work, reflecting percentages actually retained from payments to the Contractor on account of the Subcontractor's portion of the Work. The Contractor shall, by appropriate agreement with each Subcontractor, require each Subcontractor to make payments to Sub-subcontractors in a similar manner.

§ 9.6.3 The Contractor hereby authorizes the Owner, on request by a Subcontractor or Sub-subcontractor, to furnish to such Subcontractor or Sub-subcontractor, if practicable, information regarding percentages of completion or amounts applied for by the Contractor and action taken thereon by the Owner on account of portions of the Work done by such Subcontractor or Sub-subcontractor.

§ 9.6.4 The Owner has the right to request written evidence from the Contractor that the Contractor has properly paid Subcontractors and material and equipment suppliers amounts paid by the Owner to the Contractor for subcontracted Work. Without limiting the foregoing, the Owner shall have the right to contact Subcontractors and Sub-subcontractors, including material and equipment suppliers, to ascertain whether they have been properly paid. Neither the Owner nor Architect shall have an obligation to pay or to see to the payment of money to a Subcontractor or Sub-subcontractor, except as may otherwise be required by law.

§ 9.6.5 Contractor payments to material and equipment suppliers shall be treated in a manner similar to that provided in Sections 9.6.2, 9.6.3 and 9.6.4.

§ 9.6.6 A Certificate for Payment, a progress payment, or partial or entire use or occupancy of the Project by the Owner shall not constitute acceptance of Work not in accordance with the Contract Documents.

## § 9.7 FAILURE OF PAYMENT

§ 9.7.1 If the Owner does not pay the Contractor within ten (10) days after the date established in this Article 9 (or any other specific payment provision in the Agreement) for payment, subject to Owner's right to withhold payment as set out in Subsection 9.5.1 above or awarded by binding dispute resolution, then the Contractor may, after giving written notice to the Owner no less than the minimum number of days as required by Applicable Law and otherwise strictly complying with the requirements of Section 2251.051 of the Texas Government Code, stop the Work until payment of the amount owing has been received. The Contract Time shall be extended appropriately and the Contract Sum shall be increased by the amount of the Contractor's reasonable costs of shut-down, delay and start-up, plus interest as provided for in the Contract Documents.

§ 9.7.2 If the Owner is entitled to reimbursement or payment from the Contractor under or pursuant to the Contract Documents, such payment shall be made within thirty (30) days of written demand by the Owner. Notwithstanding anything contained in the Contract Documents to the contrary, if the Contractor fails to promptly make any payment due the Owner, or the Owner incurs any costs and expenses to cure any default of the Contractor or to correct defective Work, the Owner shall have an absolute right to offset such amount against the Contract Sum and may, in the Owner's sole discretion, elect either to: (1) deduct an amount equal to that which the Owner is entitled from any payment then or thereafter due the Contractor from the Owner, or (2) issue a written notice to the Contractor reducing the Contract Sum by an amount equal to that which the Owner is entitled.

## § 9.8 SUBSTANTIAL COMPLETION

§ 9.8.1 Substantial Completion is the stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use; provided, however, as a condition precedent to Substantial Completion, the Owner has received all certificates of occupancy and any other permits, approvals, licenses, and other documents from any governmental authority having jurisdiction thereof necessary for the beneficial occupancy of the Project (or if the same cannot be delivered for reasons not the fault or responsibility of Contractor, nevertheless all Contractor's obligations necessary to the issuance of such certificates, permits, approvals, or licenses will have been performed). In general, the only remaining Work shall be minor in nature, so that the Owner could occupy and utilize the Project on that date and the completion of the Work by the Contractor would not materially interfere or hamper the Owner's normal business operations and the "punchlist" may be completed within 30 calendar days following the Substantial Completion Date (or such other date as required by the Agreement).

§ 9.8.2 When the Contractor considers that the Work, or a portion thereof which the Owner agrees to accept separately, is substantially complete, the Contractor shall prepare and submit to the Owner and the Architect (if required by the Owner) a comprehensive list of items to be completed or corrected prior to final payment. Failure to include an item on such list does not alter the responsibility of the Contractor to complete all Work in accordance with the Contract Documents.

§ 9.8.3 Upon receipt of the Contractor's list, the Owner and, upon the Owner's request, the Architect will make an inspection to determine whether the Work or designated portion thereof is substantially complete. If the Architect's and/or Owner's inspection discloses any item, whether or not included on the Contractor's list, which is not sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work

or designated portion thereof for its intended use, the Contractor shall, before issuance of the Certificate of Substantial Completion, complete or correct such item upon notification by the Owner or the Architect. In such case, the Contractor shall then submit a request for another inspection by the Owner and the Architect to determine Substantial Completion.

§ 9.8.4 When the Work or designated portion thereof is substantially complete, upon request by the Owner, the Contractor will prepare and execute a Certificate of Substantial Completion that shall set out the agreed upon date of Substantial Completion and the responsibilities of the Owner and Contractor for security, maintenance, heat, utilities, damage to the Work and insurance, and shall fix the time within which the Contractor shall finish all items on the list accompanying the Certificate. Warranties required by the Contract Documents shall commence on the date of Substantial Completion of the Work or designated portion thereof unless otherwise provided in the Certificate of Substantial Completion agreed to by the Owner pursuant to Section 9.8.5.

§ 9.8.5 The Certificate of Substantial Completion shall be submitted to the Architect for its certification of Substantial Completion (if required by Owner) and to the Owner for its written approval (if the Owner agrees thereto). Upon such written approval by the Owner, the Architect (if required by the Owner), and consent of surety, if any, the Owner shall make payment of retainage applying to such Work or designated portion thereof. Such payment shall be adjusted for Work that is incomplete or not in accordance with the requirements of the Contract Documents.

#### § 9.9 PARTIAL OCCUPANCY OR USE

§ 9.9.1 The Owner may occupy or use any completed or partially completed portion of the Work at any stage when such portion is designated by separate agreement with the Contractor, provided such occupancy or use is consented to by the insurer as required under Section 11.3.1.5 and authorized by public authorities having jurisdiction over the Project. Such partial occupancy or use may commence whether or not the portion is substantially complete, provided the Owner and Contractor have accepted in writing the responsibilities assigned to each of them for payments, retainage, if any, security, maintenance, heat, utilities, damage to the Work and insurance, and have agreed in writing concerning the period for correction of the Work and commencement of warranties required by the Contract Documents. When the Contractor considers a portion substantially complete, the Contractor shall prepare and submit a list to the Owner and the Architect as provided under Section 9.8.2. Consent of the Contractor to partial occupancy or use shall not be unreasonably withheld.

§ 9.9.2 Immediately prior to such partial occupancy or use, the Owner, the Architect (if required by the Owner), and the Contractor shall jointly inspect the area to be occupied or portion of the Work to be used in order to determine and record the condition of the Work.

§ 9.9.3 Unless otherwise agreed upon, partial occupancy or use of a portion or portions of the Work shall not constitute acceptance of Work not complying with the requirements of the Contract Documents.

#### § 9.10 FINAL COMPLETION AND FINAL PAYMENT

§ 9.10.1 Upon receipt of the Contractor's written notice that the Work is ready for final inspection and acceptance and upon receipt of a final Application for Payment, the Owner and the Architect (if required by the Owner) will promptly make such inspection and, when the Owner finds the Work acceptable under the Contract Documents and the Contract fully performed, the Owner will make the final payment as provided by the Contract Documents. All close-out documentation required by the Contract Documents, including but not limited to all warranties and guarantees required under or pursuant to the Contract Documents, shall be assembled and delivered by the Contractor to the Owner as part of the final Application for Payment. The final payment will not be made by the Owner until all close-out documentation required by the Contract Documents, including but not limited to all warranties and guarantees, have been received and accepted by the Owner.

§ 9.10.2 Except as otherwise required by the Agreement, neither final payment nor any remaining retained percentage shall become due until the Contractor submits to the Owner (1) an affidavit that payrolls, bills for materials and equipment, and other indebtedness connected with the Work for which the Owner or the Owner's property might be responsible or encumbered (less amounts withheld by Owner) have been paid or otherwise satisfied, (2) a certificate evidencing that insurance required by the Contract Documents to remain in force after final payment is currently in effect and will not be canceled or allowed to expire until at least 30 days' prior written notice has been given to the Owner, (3) a written statement that the Contractor knows of no substantial reason that the insurance will not be renewable to cover the period required by the Contract Documents, (4) consent of surety, if

any, to final payment and (5), if required by the Owner, other data establishing payment or satisfaction of obligations, such as receipts, releases and waivers of claims for payment, security interests or encumbrances arising out of the Contract, to the extent and in such form as may be designated by the Owner.

§ 9.10.3 If, after Substantial Completion of the Work, Final Completion (as defined in Section 8.1.3) thereof is materially delayed through no fault of the Contractor or by issuance of Change Orders affecting Final Completion, the Owner shall, upon application by the Contractor and certification by the Architect (if requested by the Owner), and without terminating the Contract, make payment of the balance due for that portion of the Work fully completed and accepted. If the remaining balance for Work not fully completed or corrected is less than retainage stipulated in the Contract Documents, and if bonds have been furnished, the written consent of surety to payment of the balance due for that portion of the Work fully completed and accepted shall be submitted by the Contractor to the Owner prior to payment. Such payment shall be made under terms and conditions governing final payment, except that it shall not constitute a waiver of claims.

§ 9.10.4 The making of final payment shall constitute a waiver of Claims by the Owner except those arising from

- .1 Claims, security interests or encumbrances arising out of the Contract and unsettled;
- .2 failure of the Work to comply with the requirements of the Contract Documents;
- .3 terms of special warranties required by the Contract Documents;
- .4 matters previously identified by the Owner that remain unsettled at the time of making final payment;  
or
- .5 any matter which was not known to or reasonably discoverable by the Owner at the time of making final payment.

§ 9.10.5 Acceptance of final payment by the Contractor, a Subcontractor or material supplier shall constitute a waiver of claims by that payee except those previously made in writing and identified by that payee as unsettled at the time of final Application for Payment.

§ 9.10.6 Except as otherwise provided in the Agreement, records of reimbursable expenses and costs incurred by the Contractor and for which payment is sought or received from Owner for Work performed or to be performed hereunder on a "time and material" or "cost-plus" basis shall be made available to Owner for its reasonable review and examination. Such records shall be preserved by the Contractor and made available to the Owner for a period of at least three years after Final Completion of the Work.

## ARTICLE 10 PROTECTION OF PERSONS AND PROPERTY

### § 10.1 SAFETY PRECAUTIONS AND PROGRAMS

As between the Owner and the Contractor, the Contractor shall be solely responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the Contract. Where consideration of labor, equipment or safety is involved, Contractor is solely responsible for all decisions and Owner shall not incur any liability as a result of Contractor's decisions.

### § 10.2 SAFETY OF PERSONS AND PROPERTY

§ 10.2.1 The Contractor shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to

- .1 employees on the Work and other persons who may be affected thereby;
- .2 the Work and materials and equipment to be incorporated therein, whether in storage on or off the site, under care, custody or control of the Contractor or the Contractor's Subcontractors or Sub-subcontractors; and
- .3 other property at the site or adjacent thereto, such as trees, shrubs, lawns, walks, pavements, roadways, structures and utilities not designated for removal, relocation or replacement in the course of construction.

§ 10.2.2 The Contractor shall comply with and give notices required by Applicable Law, including all lawful orders of public authorities bearing on safety of persons or property or their protection from damage, injury or loss.

§ 10.2.3 The Contractor shall erect and maintain, as required by existing conditions and performance of the Contract, reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards, promulgating safety regulations and notifying owners and users of adjacent sites and utilities.

§ 10.2.4 When use or storage of explosives or other Hazardous Materials or equipment or unusual methods are necessary for execution of the Work, the Contractor shall give the Owner reasonable advance notice thereof and shall exercise utmost care and carry on such activities under supervision of properly qualified personnel.

§ 10.2.5 The Contractor shall promptly remedy damage and loss (other than damage or loss insured under property insurance required by the Contract Documents) to property referred to in Sections 10.2.1.2 and 10.2.1.3 caused in whole or in part by the Contractor, a Subcontractor, a Sub-subcontractor, or anyone directly or indirectly employed by any of them, or by anyone for whose acts they may be liable and for which the Contractor is responsible under Sections 10.2.1.2 and 10.2.1.3, except damage or loss attributable to acts or omissions of the Owner or Architect or anyone directly or indirectly employed by either of them, or by anyone for whose acts either of them may be liable, and not attributable to the fault or negligence of the Contractor. The foregoing obligations of the Contractor are in addition to the Contractor's obligations under Section 3.1.8.

§ 10.2.6 The Contractor shall designate a responsible member of the Contractor's organization at the site whose duty shall be the prevention of accidents. This person shall be the Contractor's superintendent unless otherwise designated by the Contractor in writing to the Owner.

§ 10.2.6.1 Without limiting any other requirement hereunder regarding safety, Contractor shall bear responsibility for designing and execution of acceptable trenching and shoring procedures, in accordance with Texas Government Code, Section 2166.303 and Texas Health and Safety Code, Subchapter C, Sections 756.021, et. seq.

§ 10.2.7 The Contractor shall not permit any part of the construction or site to be loaded so as to cause damage or create an unsafe condition.

#### § 10.2.8 INJURY OR DAMAGE TO PERSON OR PROPERTY

The Contractor shall promptly report in writing to the Owner all accidents arising out of or in connection with the Work which cause death, personal injury, or property damage, giving full details and statements of any witnesses. In addition, if death, serious personal injuries, or serious property damages are caused, the accident shall be reported immediately by telephone or messenger to the Owner.

§ 10.2.9 The performance of the services by the Contractor set forth in this Article 10 shall not relieve the Subcontractors of their responsibility for the safety of persons and property and for compliance with Applicable Law, including but not limited to all federal, state and local statutes, rules, regulations and orders of any governmental authority applicable to the conduct of the Work or the Project.

§ 10.2.10 When all or a portion of the Work is suspended for any reason, the Contractor shall securely fasten down all coverings and protect the Work, as necessary, from injury by any cause.

#### § 10.3 HAZARDOUS MATERIALS

§ 10.3.1 The Contractor is responsible for compliance with any requirements included in the Contract Documents regarding Hazardous Materials.

§ 10.3.1.1 For purposes of this Section 10.3, the term "Hazardous Materials" shall mean any flammables, explosive, radioactive materials, petroleum based materials exceeding applicable federal, state, or local regulatory limits, asbestos, toxic substances or related materials, including without limitation, substances defined as "hazardous wastes," "hazardous substances," "Hazardous Materials," "toxic substances" or "solid wastes" in the Comprehensive Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. Section 9601 *et. seq.*, the Resource Conservation and Recovery Act, 42 U.S.C. Section 2601, *et. seq.*, and any other Applicable Law, including all regulations and all amendments and revisions thereto.



§ 10.3.1.2 If the Contractor encounters a Hazardous Material not addressed in the Contract Documents and if reasonable precautions will be inadequate to prevent foreseeable bodily injury or death to persons resulting from a Hazardous Material, including but not limited to asbestos or polychlorinated biphenyl (PCB), encountered on the site by the Contractor, the Contractor shall, upon recognizing the condition, immediately stop Work in the affected area and report the condition to the Owner and Architect in writing.

§ 10.3.2 Upon receipt of the Contractor's written notice, the Owner shall obtain the services of a licensed laboratory to verify the presence or absence of the Hazardous Material reported by the Contractor and, in the event such Hazardous Material is found to be present, to cause it to be rendered harmless. When the Hazardous Material has been rendered harmless, Work in the affected area shall resume. By Change Order, the Contract Time shall be extended appropriately and the Contract Sum shall be increased in the amount of the Contractor's reasonable additional costs (as reimbursable under the Contract Documents) of shut-down, delay and start-up.

§ 10.3.3 *[Intentionally deleted.]*

§ 10.3.4 The Owner shall not be responsible under this Section 10.3 for Hazardous Materials the Contractor brings to the site unless such Hazardous Materials are required by the Contract Documents. The Owner shall be responsible for Hazardous Materials required by the Contract Documents, except to the extent of the Contractor's fault or negligence in the use and handling of such Hazardous Materials.

§ 10.3.5 Contractor agrees that it shall not transport to, use, generate, dispose of, or install at the Project site any Hazardous Materials, except in accordance with applicable environmental laws. Further, in performing the Work, Contractor shall not cause any release of Hazardous Materials into, or contamination of, the environment, including the soil, the atmosphere, any water course or ground water unless required by the Contract Documents. In the event Contractor engages in any of the activities prohibited in this Section 10.5 or fails to stop work as provided in Section 10.5, to the fullest extent permitted by law, Contractor shall indemnify, defend, and hold harmless the Indemnified Parties and their respective officers, agents, employees and tenants from and against any and all claims, damages, losses, causes of action, suits and liabilities of every kind, including, but not limited to, expenses of litigation, court costs, punitive damages and attorneys' fees, arising out of, incident to or resulting from the activities prohibited in this Section 10.5 or Contractor's failure to stop work as required.

§ 10.3.5.1 Contractor shall obtain from manufacturers and furnish to Owner Material Safety Data Sheets (OSHA Form 20) for all Hazardous Materials incorporated into the Project by the Contractor.

#### § 10.4 EMERGENCIES

In an emergency affecting safety of persons or property, the Contractor shall act, at the Contractor's discretion, to prevent threatened damage, injury or loss. Additional compensation or extension of time claimed by the Contractor on account of an emergency shall be determined as provided in Article 15 and Article 7, provided the Contractor shall not be entitled to additional compensation or an extension of time if an emergency is caused by the negligence or failure to fulfill a specific responsibility of the Contractor to the Owner set forth in the Contract Documents or the failure of the Contractor's personnel to supervise adequately the Work of the Subcontractors or suppliers.

#### ARTICLE 11 INSURANCE AND BONDS

##### § 11.1 CONTRACTOR'S LIABILITY INSURANCE

§ 11.1.1 The Contractor shall purchase from and maintain in a company or companies lawfully authorized to do business in the State of Texas such insurance as expressly required by the insurance requirements in the Agreement (which expressly includes the Insurance and Surety Requirements attached as an Exhibit thereto).

§ 11.1.2 The insurance required by Section 11.1.1 and the Agreement shall be written for not less than limits of liability specified in the Contract Documents or required by law, whichever coverage is greater. Coverages, whether written on an occurrence or claims-made basis, shall be maintained without interruption from the date of commencement of the Work until the date of final payment and termination of any coverage required to be maintained after final payment, and, with respect to the Contractor's completed operations coverage, until the expiration of the period for correction of Work or for such other period for maintenance of completed operations coverage as specified in the Contract Documents.

§ 11.1.3 Certificates of insurance acceptable to the Owner and in accordance with the requirements of the Agreement shall be filed with the Owner prior to commencement of the Work and thereafter upon renewal or replacement of

each required policy of insurance. An additional certificate evidencing continuation of liability coverage, including coverage for completed operations, shall be submitted with the final Application for Payment as required by Section 9.10.2 and thereafter upon renewal or replacement of such coverage until the expiration of the time required by Section 11.1.2. Information concerning reduction of coverage on account of revised limits or claims paid under the General Aggregate, or both, shall be furnished by the Contractor with reasonable promptness.

§ 11.1.4 Without limiting any rights set out in the Agreement, the Owner and the “Indemnified Parties” shall be added as an additional insured on general, auto, umbrella and all other liability policies, including completed operations coverage, required to be carried and maintained hereunder by Contractor excepting workers' compensation/employer's liability. All such liability policies carried and maintained by Contractor must be endorsed to be primary to any liability insurance policies carried by Owner with respect to Contractor's operations hereunder. Waivers of Subrogation shall be provided in favor of Owner and the “Indemnified Parties” on general, auto, workers' compensation/employers, umbrella and all other liability policies carried and maintained by Contractor.

§ 11.1.5 If the Contractor fails to purchase and maintain, or require to be purchased and maintained, any insurance required under this Article 11 or the insurance requirements in the Agreement, Owner may, but shall not be obligated to, upon five (5) days' written notice to the Contractor, purchase such insurance on behalf of the Contractor and shall be entitled to be reimbursed by the Contractor upon demand.

§ 11.1.6 When any required insurance, due to the attainment of a normal expiration date or renewal date shall expire, the Contractor shall supply the Owner with certificates of insurance and amendatory riders or endorsements that clearly evidence the continuation of all coverage in the same manner, limits of protection, and scope of coverage as was provided by the previous policy. In the event any renewal or replacement policy, for whatever reason obtained or required, is written by a carrier other than that with whom the coverage was previously placed, or the subsequent policy differs in any way from the previous policy, the Contractor shall also furnish the Owner with a certified copy of the renewal or replacement policy unless the Owner provides the Contractor with prior written consent to submit only a Certificate of Insurance for any such policy. All renewal and replacement policies shall be in form and substance satisfactory to the Owner and written by carriers acceptable to the Owner.

## § 11.2 OWNER'S LIABILITY INSURANCE

The Owner shall be responsible for purchasing and maintaining such liability insurance as Owner deems necessary.

## § 11.3 PROPERTY INSURANCE

§ 11.3.1 The party required to furnish Builders Risk Insurance (if any) as set out in the Insurance and Surety Requirements attached to the Agreement and incorporated therein shall purchase and maintain property insurance with limits sufficient to cover the replacement cost of the Work. This insurance shall include interests of the Owner, the Contractor, Subcontractors and Sub-subcontractors in the Project.

§ 11.3.1.1 Property insurance shall conform to the requirements set forth in the Insurance and Surety Requirements attached to the Agreement and incorporated therein. In the event that Owner is required to furnish property insurance under this Section 11.3, such property insurance provided by the Owner shall not cover any tools, apparatus, machinery, hoists, and similar items commonly referred to as construction equipment, which may be on the site and the capital value of which is not included in the Work. The Contractor shall make its own arrangements for any insurance it may require on such construction equipment. Any such policy obtained under this Section 11.4 shall include a waiver of subrogation in accordance with the requirements of Section 11.3.7.

§ 11.3.1.2 *[Intentionally deleted.]*

§ 11.3.1.3 Contractor shall be responsible for losses within its deductibles (up to a maximum of \$10,000 per claim) to the extent such loss resulted from the negligence of Contractor or its Subcontractors (of any tier).

§ 11.3.1.4 *[Intentionally deleted.]*

§ 11.3.1.5 Partial occupancy or use in accordance with Section 9.9 shall not commence until the insurance company or companies providing property insurance have consented to such partial occupancy or use by endorsement or



otherwise. The Owner and the Contractor shall take reasonable steps to obtain consent of the insurance company or companies and shall, without mutual written consent, take no action with respect to partial occupancy or use that would cause cancellation, lapse or reduction of insurance.

#### § 11.3.2 BOILER AND MACHINERY INSURANCE

Unless expressly required by the insurance requirements in the Agreement, the Owner shall not be required to purchase and maintain boiler and machinery insurance.

#### § 11.3.3 LOSS OF USE INSURANCE

The Owner, at the Owner's option, may purchase and maintain such insurance as will insure the Owner against loss of use of the Owner's property due to fire or other hazards, however caused. If the Owner purchases such insurance, Owner waives all rights of action against the Contractor for loss of use of the Owner's property, including consequential losses due to fire or other hazards however caused to the extent (1) of actual recovery of any insurance proceeds under policies obtained pursuant to Section 11.3 and (2) permitted by the applicable policies of insurance.

#### § 11.3.4 *[Intentionally deleted.]*

§ 11.3.5 If during the Project construction period the Owner insures properties, real or personal or both, at or adjacent to the site by property insurance under policies separate from those insuring the Project, or if after final payment property insurance is to be provided on the completed Project through a policy or policies other than those insuring the Project during the construction period, the Owner shall waive all rights in accordance with the terms of Section 11.3.7 for damages caused by fire or other causes of loss covered by this separate property insurance. All separate policies shall provide this waiver of subrogation by endorsement or otherwise.

#### § 11.3.6 *[Intentionally deleted.]*

#### § 11.3.7 WAIVERS OF SUBROGATION

See Insurance and Surety Requirements attached to the Agreement as an Exhibit.

§ 11.3.8 Any insured property loss or claim of loss shall be adjusted by the Owner, whether such coverage is provided by Owner or Contractor under the Contract Documents, and any settlement payments shall be made payable to the Owner as trustee for the insured, as their interests may appear, subject to the requirements of any applicable mortgage clause. Upon the occurrence of an insured loss or claim of loss, monies received will be held by Owner who shall make distribution in accordance with an agreement to be reached in such event between Owner and Contractor. If the parties are unable to agree between themselves on the settlement of the loss, such dispute shall be submitted to a court of competent jurisdiction to determine ownership of the disputed amounts, but the Work of the Project shall nevertheless progress during any such period of dispute without prejudice to the rights of any party to the dispute, provided, however, the timing of the lawsuit shall not be governed by the Claims provision set out herein. The Contractor shall pay Subcontractors their just shares of insurance proceeds received by the Contractor, and by appropriate agreements, written where legally required for validity, shall require Subcontractors to make payments to their Sub-subcontractors in similar manner.

§ 11.3.9 The Owner shall deposit in a separate account proceeds so received from the adjustment of a loss, which the Owner shall distribute in accordance with such agreement as the parties in interest may reach, or as determined in accordance with the method of binding dispute resolution selected in the Agreement between the Owner and Contractor. If after such loss no other special agreement is made and unless the Owner terminates the Contract for convenience, replacement of damaged property shall be performed by the Contractor after notification of a Change in the Work in accordance with Article 7.

§ 11.3.10 The Owner shall have power to adjust and settle a loss with insurers in good faith.

#### § 11.4 PERFORMANCE BOND AND PAYMENT BOND

§ 11.4.1 The Contractor shall furnish a Performance Bond and a Payment Bond meeting all applicable requirements of state law, written by a surety on bond forms satisfactory to the Owner and, without limitation, complying with the specific requirements stated below and in the Contract Documents. Each bond shall be in a penal sum which is not less than the Contract Sum.

§ 11.4.2 Upon the request of any person or entity appearing to be a potential beneficiary of bonds covering payment of obligations arising under the Contract, the Contractor shall promptly furnish a copy of the bonds or shall authorize a copy to be furnished.

§ 11.4.3 The Contractor shall deliver the required Bonds to the Owner after the execution of the first Work Authorization Amendment or GMP Amendment, in the amount of such signed document. All Bonds will be on forms and amounts mutually agreed to between Owner and Contractor or as otherwise required by the Contract Documents.

§ 11.4.4 All Bonds shall be originals. The Contractor shall require the attorney-in-fact who executes the required Bonds on behalf of the Surety to affix thereto a certified and current copy of the power-of-attorney. The name, address and telephone number of a contact person for the Bonding Company shall be provided.

§ 11.4.5 Bonds shall guarantee the faithful performance of all the covenants, stipulations and agreements of the Contract and shall comply with the Insurance and Surety Requirements attached to the Agreement. Bonds shall be signed by an agent resident in the State of Texas and date of bond shall be the date of execution of the first Work Authorization Amendment or GMP Amendment. If at any time during the continuance of the Contract, the surety of the Contractor's Bonds becomes insolvent or financially inadequate in the opinion of Owner, the Owner shall have the right to require additional and sufficient sureties which the Contractor shall furnish to the satisfaction of the Owner within ten (10) days after notice to do so. In default thereof, all payment or money due to the Contractor may be withheld until Contractor provides additional surety.

## ARTICLE 12 UNCOVERING AND CORRECTION OF WORK

### § 12.1 UNCOVERING OF WORK

§ 12.1.1 If a portion of the Work is covered contrary to the Owner's or the Architect's request or to requirements specifically expressed in the Contract Documents, it must, if requested in writing by the Owner or the Architect, be uncovered for the Owner's and/or the Architect's examination and be replaced at the Contractor's expense without change in the Contract Time or the Contract Sum.

§ 12.1.2 If a portion of the Work has been covered that the Owner or the Architect has not specifically requested to examine prior to its being covered, the Owner may request to see such Work and it shall be uncovered by the Contractor. If such Work is in accordance with the Contract Documents, costs of uncovering and replacement shall, by appropriate Change Order, be at the Owner's expense. If such Work is not in accordance with the Contract Documents, such costs and the cost of correction shall be at the Contractor's expense unless the condition was caused by the Owner or a separate contractor in which event the Owner shall be responsible for payment of such costs.

### § 12.2 CORRECTION OF WORK

#### § 12.2.1 BEFORE OR AFTER SUBSTANTIAL COMPLETION

The Contractor shall promptly correct Work rejected by the Owner or failing to conform to the requirements of the Contract Documents, whether discovered before or after Substantial Completion and whether or not fabricated, installed or completed. Costs of correcting such rejected Work, including additional testing and inspections, the cost of uncovering and replacement, and compensation for the Architect's services and expenses made necessary thereby, shall be at the Contractor's expense. If prior to the date of Substantial Completion, the Contractor, a Subcontractor or Sub-subcontractor or anyone for whom either is responsible uses or damages any portion of the Work, including, without limitation, mechanical, electrical, plumbing and other building systems, machinery, equipment or other mechanical device, the Contractor shall cause such item to be restored to "like new" condition at no expense to the Owner.

#### § 12.2.2 AFTER SUBSTANTIAL COMPLETION

§ 12.2.2.1 In addition to the Contractor's obligations under Section 3.5, if, within one year after the date of Substantial Completion of the Work (or any longer period expressly required by the Agreement) or by terms of an applicable special warranty required by the Contract Documents, any of the Work is found to be not in accordance with the requirements of the Contract Documents, the Contractor shall correct it promptly after receipt of written notice from the Owner to do so unless the Owner has previously given the Contractor a written acceptance of such condition. The Owner shall give such notice promptly after discovery of the condition. During the required period for correction of Work, if the Owner fails to notify the Contractor and give the Contractor an opportunity to make

the correction, the Owner waives the right to require correction by the Contractor except when emergency repairs are necessary to prevent further damage to the Work or damages to the Owner. If the Contractor fails to correct nonconforming Work within a reasonable time during that period after receipt of notice from the Owner or the Architect, the Owner may correct it in accordance with Section 2.4. Nothing herein shall be construed to negate or limit Contractor's obligations set forth in Section 3.18 above, including without limitation Contractor's duties to defend and indemnify the Indemnified Parties.

§ 12.2.2.2 Contractor shall maintain a complete and accurate schedule of the dates upon which the corrective periods or express warranties will expire. Contractor agrees to provide notice of the warranty expiration date to Owner and Architect at least one (1) month prior to the expiration of each such applicable corrective / warranty period. Prior to termination of the one year corrective / warranty period required in Section 12.2.2.1 above, Contractor shall accompany the Owner and Architect on re-inspection of the improvements or building(s) covered thereby and be responsible for correcting any reasonable additional deficiencies not caused by the Owner or by the use of the respective improvements or building which are observed or reported during the re-inspection. For extended warranties expressly required by the Contract Documents (*i.e.*, roofing, compressors, mechanical equipment), Owner will notify the Contractor of deficiencies and Contractor shall start remedying these defects within five (5) days of initial notification from Owner. Contractor shall prosecute the work without interruption until accepted by the Owner and the Architect, even though such prosecution should extend beyond the limit of the warranty period. If Contractor fails to provide notice of the expiration of the one (1) year corrective / warranty period at least one (1) month prior to the expiration date, Contractor's correction / warranty obligations described in this paragraph shall continue until such inspection is conducted and any deficiencies found in the inspection corrected.

§ 12.2.2.3 The one-year period for correction of Work shall be extended with respect to portions of Work first performed after Substantial Completion by the period of time between Substantial Completion and the actual completion of that portion of the Work. Any corrective work performed or to be performed under or pursuant to Section 12.2 shall be warranted to the same extent as the Work is warranted hereunder for the greater of the remainder of the applicable warranty period or ninety (90) days from the date such corrective work has been completed.

§ 12.2.2.4 If the Contractor fails to correct nonconforming Work within a reasonable time, the Owner may correct it in accordance with Paragraph 2.4. If the Contractor does not proceed with correction of such nonconforming Work, Owner may remove such nonconforming Work and store the salvageable materials or equipment and charge the cost thereof to the Contractor. If the Contractor does not pay costs of such removal and storage within ten (10) days after written notice, Owner may upon ten (10) additional days written notice sell such materials and equipment at auction or at private sale, and shall account for the proceeds thereof, after deducting costs and damages that should have been borne by the Contractor, including compensation for the Architect's services and expenses made necessary thereby. If such proceeds of sale do not cover costs which the Contractor should have borne, the Contract Sum shall be reduced by the deficiency. If payments then or thereafter due the Contractor are not sufficient to cover such amount, Contractor shall pay the difference to the Owner.

§ 12.2.3 The Contractor shall remove from the site portions of the Work that are not in accordance with the requirements of the Contract Documents and are neither corrected by the Contractor nor accepted by the Owner.

§ 12.2.4 The Contractor shall bear the cost of correcting destroyed or damaged construction, whether completed or partially completed, of the Owner or separate contractors caused by the Contractor's correction or removal of Work that is not in accordance with the requirements of the Contract Documents.

§ 12.2.5 Nothing contained in this Section 12.2 shall be construed to establish a period of limitation with respect to other obligations the Contractor has under the Contract Documents. Establishment of the required period for correction of Work as described in Section 12.2.2 relates only to the specific obligation of the Contractor to correct the Work, and has no relationship to the time within which the obligation to comply with the Contract Documents may be sought to be enforced, nor to the time within which proceedings may be commenced to establish the Contractor's liability with respect to the Contractor's obligations other than specifically to correct the nonconforming or defective Work that was discovered or reasonably discoverable during the one year corrective period established herein.

§ 12.2.6 If the Project involves work on more than one building or facility, the work in each building and facility, or approved phase of each building or facility, shall have its own, separate, and independent date of Substantial Completion or Final Completion. Contractor shall maintain a complete and accurate schedule of the dates of Substantial Completion, dates upon which the one year warranty on each phase or building which is substantially completed will expire, and dates of Final Completion. Contractor agrees to provide notice of the warranty expiration date to Owner and Architect at least one month prior to the expiration of the one year warranty period on each building or facility, or each phase of the building or facility, which has been substantially completed. Prior to termination of the one year period, Contractor shall accompany Owner and Architect on re-inspections of the work and be responsible for correcting any warranty items which are observed or reported during the warranty period. Contractor shall prosecute such warranty work without interruption until accepted by Owner and Architect, even though such work should extend beyond the warranty period. If Contractor fails to provide notice of the expiration of the one year period at least one month prior to the expiration date, Contractor's warranty obligations described in this paragraph shall continue until such inspection is conducted and any deficiencies found corrected.

### § 12.3 ACCEPTANCE OF NONCONFORMING WORK

If the Owner prefers to accept Work that is not in accordance with the requirements of the Contract Documents, the Owner may do so instead of requiring its removal and correction, in which case the Contract Sum will be reduced as appropriate and equitable. Such adjustment shall be effected whether or not final payment has been made.

## ARTICLE 13 MISCELLANEOUS PROVISIONS

### § 13.1 GOVERNING LAW

The Contract shall be governed by the law of the State of Texas and this Contract is performable solely in Tarrant County, Texas. To the fullest extent permitted by Applicable Law, the parties expressly agree to exclusive venue for any action brought hereunder in Tarrant County, Texas. Contractor expressly waives any right to bring an action in any county other than Tarrant County, Texas.

### § 13.2 SUCCESSORS AND ASSIGNS

§ 13.2.1 The Owner and Contractor respectively bind themselves, their partners, successors, assigns and legal representatives to covenants, agreements and obligations contained in the Contract Documents. Contractor shall not assign the Contract as a whole without written consent of the Owner, nor shall Contractor assign any monies due or to become due to it hereunder without the written consent of the Owner. If Contractor attempts to make such an assignment without such consent, such purported assignment shall constitute a material breach of the Contract. Notwithstanding the foregoing, Contractor shall nevertheless remain legally responsible for all obligations under the Contract.

§ 13.2.2 Without limiting the foregoing, Contractor acknowledges and agrees that Owner may, without consent of the Contractor, assign the Contract to a lender providing construction financing for the Project, if the lender assumes the Owner's rights and obligations under the Contract Documents with regard to the Work to be performed after such assignment. The Contractor shall execute all consents reasonably required to facilitate such assignment.

§ 13.2.3 If the Owner leases, sells or conveys all or any portion of the real property on which the improvements were constructed under the Contract Documents to another person or entity, any rights with respect to the property so leased, sold or conveyed which the Owner may have against the Contractor under Section 3.5 or Article 12 or by virtue of claims or rights which are reserved to the Owner after the making and acceptance of final payment or that arise from such provisions that survive completion or termination of the Contract, shall automatically transfer to such person or entity, subject to any defenses which the Contractor may have against the Owner. Nothing herein shall be construed to negate or limit Contractor's obligations set forth in Section 3.18 above, including without limitation Contractor's duties to defend and indemnify the Indemnified Parties.

### § 13.3 WRITTEN NOTICE

Except as expressly provided to the contrary in the Agreement, written notice shall be deemed to have been duly served if delivered in person to the individual, to a member of the firm or entity, or to an officer of the corporation for which it was intended; or if delivered at, or sent by registered or certified mail or by courier service providing proof of delivery to, the last business address known to the party giving notice.

## § 13.4 RIGHTS AND REMEDIES

§ 13.4.1 Duties and obligations imposed by the Contract Documents and rights and remedies available thereunder shall be in addition to and not a limitation of duties, obligations, rights and remedies otherwise imposed or available by law.

§ 13.4.2 Except as expressly provided in the Contract Documents, no action or failure to act by the Owner, Architect or Contractor shall constitute a waiver of a right or duty afforded them under the Contract, nor shall such action or failure to act constitute approval of or acquiescence in a breach there under, except as may be specifically agreed in writing.

## § 13.5 TESTS AND INSPECTIONS

§ 13.5.1 Tests, inspections and approvals of portions of the Work shall be made as required by the Contract Documents and by Applicable Law, including all lawful orders of public authorities. Unless otherwise provided, the Contractor shall make arrangements for such tests, inspections and approvals with an independent testing laboratory or entity acceptable to the Owner, or with the appropriate public authority, and shall bear all related costs of tests, inspections and approvals. The Contractor shall give the Owner and the Architect timely notice of when and where tests and inspections are to be made so that the Owner and the Architect may be present for such procedures. The Owner shall bear costs of (1) tests, inspections or approvals that do not become requirements until after bids are received or negotiations concluded, and (2) tests, inspections or approvals where building codes or other Applicable Law or regulations prohibit the Owner from delegating their cost to the Contractor.

§ 13.5.2 If the Owner, the Architect, or public authorities having jurisdiction determine that portions of the Work require additional testing, inspection or approval not included under Section 13.5.1, the Owner will instruct the Contractor to make arrangements for such additional testing, inspection or approval by an entity acceptable to the Owner, and the Contractor shall give timely notice to the Owner and the Architect of when and where tests and inspections are to be made so that the Owner and the Architect may be present for such procedures. Such costs, except as provided in Section 13.5.3, shall be at the Owner's expense.

§ 13.5.3 If such procedures for testing, inspection or approval under Sections 13.5.1 and 13.5.2 reveal failure of the portions of the Work to comply with requirements established by the Contract Documents, all costs made necessary by such failure including those of repeated procedures and compensation for the Architect's services and expenses shall be at the Contractor's expense. The Contractor also agrees that the cost of testing services required for the convenience of the Contractor in his scheduling and performance of the Work, and the cost of testing services related to remedial operations performed to correct deficiencies in the Work shall be borne by the Contractor.

§ 13.5.4 Required certificates of testing, inspection or approval shall, unless otherwise required by the Contract Documents, be secured by the Contractor and promptly delivered to the Owner and the Architect.

§ 13.5.5 If the Owner and/or the Architect are to observe tests, inspections or approvals required by the Contract Documents, the Owner and/or the Architect will do so promptly and, where practicable, at the normal place of testing.

§ 13.5.6 Tests or inspections conducted pursuant to the Contract Documents shall be made promptly to avoid unreasonable delay in the Work.

## § 13.6 INTEREST

*[See applicable terms, if any, in Agreement.]*

## § 13.7 TIME LIMITS ON CLAIMS

The Owner and Contractor shall commence all claims and causes of action, whether in contract, tort, breach of warranty or otherwise, against the other arising out of or related to the Contract in accordance with the requirements of the final dispute resolution method selected in the Agreement within the time period specified by Applicable Law.

## ARTICLE 14 TERMINATION OR SUSPENSION OF THE CONTRACT

### § 14.1 TERMINATION BY THE CONTRACTOR

§ 14.1.1 The Contractor may terminate the Contract if the Work is stopped for a period of 30 consecutive days through no act or fault of the Contractor or a Subcontractor, Sub-subcontractor or their agents or employees or any



other persons or entities performing portions of the Work under direct or indirect contract with the Contractor, for any of the following reasons, subject to the requirements and provisions of Section 14.1.3 below:

- .1 Issuance of an order of a court or other public authority having jurisdiction that requires all Work to be stopped;
- .2 An act of government, such as a declaration of national emergency that requires all Work to be stopped; or
- .3 The Contractor is entitled to and has suspended performance in accordance with Section 9.7 above.

§ 14.1.2 The Contractor may terminate the Contract if, through no act or fault of the Contractor or a Subcontractor, Sub-subcontractor, or their agents or employees or any other persons or entities performing portions of the Work under direct or indirect contract with the Contractor, repeated suspensions, delays or interruptions of the entire Work by the Owner as described in Section 14.3 constitute in the aggregate more than 100 percent of the total number of days scheduled for completion, or 120 days in any 365-day period, whichever is less, subject to the requirements and provisions of Section 14.1.3 below.

§ 14.1.3 If the Work has been suspended or delayed for one of the reasons described in Section 14.1.1 or 14.1.2 for a period of at least 30 consecutive days, the Contractor may, upon thirty (30) additional days' written notice to the Owner and Architect, terminate the Contract, but only if the basis for the suspension, delay or interruption has not been removed or cured within such additional thirty (30) day period after giving notice of intent to terminate.

§ 14.1.4 If the Work is stopped for a period of 60 consecutive days through no act or fault of the Contractor or a Subcontractor or their agents or employees or any other persons performing portions of the Work under contract with the Contractor because the Owner has otherwise repeatedly failed to fulfill the Owner's obligations under the Contract Documents with respect to matters important to the progress of the Work (other than Owner's failure to make payment under Article 9 above), the Contractor may, upon ten (10) additional days' written notice to the Owner and the Architect, terminate the Contract and recover from the Owner as provided in Section 14.1.3, but only if the basis for such termination has not been removed or cured prior to the effective date of termination.

§ 14.1.5 In the event of a termination by Contractor under this Section 14.1, Contractor shall recover from the Owner only such amount that would be recoverable from the Owner in the event of the Owner's termination for convenience under Subsection 14.4.3 below.

## § 14.2 TERMINATION BY THE OWNER FOR CAUSE

§ 14.2.1 The Owner may terminate the Contract if

- .1 the Contractor repeatedly refuses or fails to supply enough properly skilled workers or proper materials;
- .2 the Contractor fails to make payment to Subcontractors for materials or labor in accordance with the respective agreements between the Contractor and the Subcontractors;
- .3 the Contractor repeatedly disregards Applicable Law, including lawful orders of a public authority;
- .4 the Contractor is otherwise guilty of substantial breach of a provision of the Contract Documents;
- .5 the Contractor becomes insolvent, or makes a transfer in fraud of creditors, or makes an assignment for the benefit of creditors;
- .6 the Contractor files or has filed against it a petition under any chapter or section of the United States Bankruptcy Code, as amended, or under any similar law or statute of the United States or any state thereof, or shall be adjudged bankrupt or insolvent in any legal proceeding;
- .7 a receiver or trustee is appointed for all or a significant portion of the assets of Contractor;
- .8 the Contractor actually or constructively abandons, or puts Owner on actual or constructive notice that it intends to abandon, the Project; or
- .9 the progress of construction is such that Owner reasonably believes that the Contractor shall not be able to achieve Substantial Completion within thirty (30) days following the Date of Substantial Completion required by the Agreement. Without limiting the foregoing, Owner shall be deemed to have a reasonable belief that the Contractor shall not be able to achieve Substantial Completion by the date required pursuant to the preceding sentence if the Contractor shall fail to achieve a Critical



Milestone (as defined in the Agreement) within thirty (30) days of the date for such Critical Milestone as set forth in the Schedule of the Work.

§ 14.2.2 When any of the above reasons exist, the Owner may without prejudice to any other rights or remedies of the Owner and after giving the Contractor and the Contractor's surety, if any, seven days' written notice, terminate employment of the Contractor and may, subject to any prior rights of the surety:

- .1 Exclude the Contractor from the site and take possession of all materials, equipment, tools, and construction equipment and machinery thereon owned by the Contractor;
- .2 Accept assignment of subcontracts pursuant to Section 5.4; and
- .3 Finish the Work by whatever reasonable method the Owner may deem expedient. Upon written request of the Contractor, the Owner shall furnish to the Contractor a detailed accounting of the costs incurred by the Owner in finishing the Work.

§ 14.2.3 After any termination of this Contract by Owner pursuant to this Subsection 14.2, Contractor shall not be entitled to any further payment except to the extent of any amount by which Work completed or installed by Contractor prior to such termination and not previously paid for by Owner exceeds the amount due by Contractor to Owner under this Section 14.2 (including all damages which Owner would be entitled to recover at law from Contractor by reason of Contractor's breach), and even then only at such time as the Work is finally completed. It is expressly agreed that pursuit by Owner of any one or more of the remedies provided herein or otherwise available at law or in equity shall not constitute an election of remedies by Owner, nor shall forbearance by Owner to enforce one or more of the remedies provided herein upon an event of default by Contractor be deemed or construed to constitute a waiver of such default.

§ 14.2.4 If the unpaid balance of the Contract Sum exceeds costs of finishing the Work, including compensation for the Architect's services and expenses made necessary thereby, and other damages incurred by the Owner and not expressly waived, such excess shall be paid to the Contractor. If such costs and damages exceed the unpaid balance, the Contractor shall pay the difference to the Owner. This obligation for payment shall survive termination of the Contract.

§ 14.2.5 It is recognized that: (1) if an order for relief is entered on behalf of the Contractor pursuant to Title 11 of the United States Bankruptcy Code, (2) if any other similar order is entered under any other debtor relief laws, (3) if Contractor makes a general assignment for the benefit of its creditors, (4) if a receiver is appointed for the benefit of its creditors, or (5) if a receiver is appointed on account of its insolvency, any such event could impair or frustrate Contractor's performance of the Contract Documents. Accordingly, it is agreed that upon the occurrence of any such event, Owner shall be entitled to request of the Contractor or its successor interest adequate assurance of future performance in accordance with the terms and conditions of the Contract Documents. Failure to comply with such request within ten (10) days of delivery of the request shall entitle Owner to terminate the Contract Documents and to the accompanying rights set forth above in Subsections 14.2.1 through 14.2.4 hereof. In all events pending receipt of adequate assurance of performance and actual performance in accordance therewith, Owner shall be entitled to proceed with the Work with its own forces or with other contractors on a time and material or other appropriate basis, the cost of which will be backcharged against the Contract Sum.

#### § 14.3 SUSPENSION BY THE OWNER FOR CONVENIENCE

§ 14.3.1 The Owner may, without cause, order the Contractor in writing to suspend, delay or interrupt the Work in whole or in part for such period of time as the Owner may determine.

§ 14.3.2 The Contract Sum and Contract Time shall be adjusted for increases in the cost and time caused by suspension, delay or interruption as described in Section 14.3.1. No adjustment shall be made to the extent

- .1 that performance is, was or would have been so suspended, delayed or interrupted by another cause for which the Contractor is responsible; or
- .2 that an equitable adjustment is made or denied under another provision of the Contract.

#### § 14.4 TERMINATION BY THE OWNER FOR CONVENIENCE

§ 14.4.1 The Owner may, at any time, terminate the Contract for the Owner's convenience and without cause.

§ 14.4.2 Upon receipt of written notice from the Owner of such termination for the Owner's convenience, the Contractor shall

- .1 cease operations as directed by the Owner in the notice;
- .2 take actions necessary, or that the Owner may direct, for the protection and preservation of the Work; and
- .3 except for Work directed to be performed prior to the effective date of termination stated in the notice, terminate all existing subcontracts and purchase orders and enter into no further subcontracts and purchase orders.

§ 14.4.3 In the event of a termination under Section 14.4, Contractor shall, as Contractor's sole and exclusive remedy, be paid for (i) the Work properly executed in accordance with the Contract Documents prior to the effective date of termination, as measured by the Contract Sum, and (ii) the direct, actual, and unavoidable (by exercising reasonable care) costs incurred by Contractor in terminating the Work, including the cost of canceling subcontracts and purchase orders not assumed by Owner and other such out-of-pocket costs incurred by Contractor to third parties with respect to termination of this Contract. Owner shall not be responsible for damages other than those expressly provided in this subsection and specifically shall not be responsible for any lost profits or reimbursement for overhead on the Work not performed. The amounts owing by Owner to Contractor pursuant to this Subsection shall be as specified in Contractor's final Application for Payment approved by Owner. In addition to payment for the Work performed prior to the effective date of termination and for any Work performed following the date of termination pursuant to Owner's written request, Contractor shall be entitled to payment for materials timely fabricated off the Project site and delivered and stored in accordance with the Owner's instructions.

## ARTICLE 15 CLAIMS AND DISPUTES

### § 15.1 CLAIMS

#### § 15.1.1 DEFINITION

For purposes of Section 15.1, a Claim is a demand or assertion by the Contractor seeking from the Owner, as a matter of right, payment of money, or other relief with respect to the terms of the Contract. The term "Claim" also includes other disputes and matters in question which the Contractor may have or assert against the Owner arising out of or relating to the Contract. The responsibility to substantiate Claims shall rest with the party making the Claim.

#### § 15.1.2 NOTICE OF CLAIMS

Claims by the Contractor must be initiated by written notice (the Notice of Potential Claim) to the Owner within ten (10) days after occurrence of the event giving rise to such Claim or within ten (10) days after the Contractor first recognizes the condition giving rise to the Claim, whichever is later; provided, however, that the Contractor shall use its best efforts to furnish the Owner, as expeditiously as possible, with notice of any Claim including, without limitation, those in connection with concealed or unknown conditions, once such Claim is recognized, and shall cooperate with the Owner in any effort to mitigate the alleged or potential damages, delay or other adverse consequences arising out of the condition which is the cause of such a Claim. The Notice of Potential Claim shall clearly set out the specific matter of complaint, and the impact or damages which may occur or have occurred as a result thereof, to the extent the impact or damages can be assessed at the time of the Notice. If the impact or damages cannot be assessed as of the date of the Notice, the Notice shall be amended at the earliest date this is reasonably possible. Any Claim or portion of a Claim that has not been made the specific subject of a Notice strictly in accordance with the requirements of this Article shall be waived. The parties acknowledge that it is imperative that the Owner have timely, specific notice of any potential problem in order that the problem can be mitigated promptly and economically.

#### § 15.1.3 CONTINUING CONTRACT PERFORMANCE

Pending final resolution of a Claim, except as otherwise agreed in writing or as provided in Section 9.7 and Article 14, the Contractor shall proceed diligently with performance of the Contract and the Owner shall continue to make payments in accordance with the Contract Documents.

#### § 15.1.4 CLAIMS FOR ADDITIONAL COST

If the Contractor wishes to make a Claim for an increase in the Contract Sum (and such increase is recoverable under the Contract Documents), written notice as provided herein shall be given before proceeding to execute the Work. Without limiting the requirements of Section 15.1.2, such notice shall include, to the extent then-known by the Contractor, full details and substantiating data to permit evaluation by Owner and the Architect. If further or other information subsequently becomes known to the Contractor, it shall be promptly furnished to the Owner and

Architect in writing. Prior notice is not required for Claims relating to an emergency endangering life or property arising under Section 10.4.

§ 15.1.4.1 Except as otherwise provided in the Agreement, in calculating the amount of any Claim recoverable by the Contractor, the following standards will apply:

- .1 No indirect or consequential damages will be allowed.
- .2 No recovery shall be based on a comparison of planned expenditures to total actual expenditures, or on estimated losses of labor efficiency, or on a comparison of planned manloading to actual manloading, or any other analysis that is used to show damages indirectly.
- .3 Damages are limited to extra costs specifically shown to have been directly caused by a proven wrong.
- .4 No damages will be allowed for home office overhead or other home office charges or any Eichlay formula calculation.
- .5 No profit will be allowed on any damage claim, except as expressly recoverable under the Agreement.

#### § 15.1.5 CLAIMS FOR ADDITIONAL TIME

§ 15.1.5.1 If the Contractor wishes to make a Claim for an increase in the Contract Time, written notice as provided in Section 15.1.2 above (the Notice) shall be given. The Contractor's Notice shall include an estimate of cost (to the extent recoverable under the Contract Documents) and of probable effect of delay on progress of the Work. In the case of a continuing delay, only one Claim is necessary; provided, however, that the Contractor shall provide to the Owner and Architect, promptly upon request, additional information regarding the status of such delay. Any change in the Contract Time resulting from such Claim shall be authorized by a Change Order in accordance with the provisions of Section 7.2. In any claim by Contractor for any increase in the Contract Time or the Guaranteed Maximum Price, if permitted in the Contract Documents, Contractor shall demonstrate that the event giving rise to the claim was beyond the Contractor's control and would not have been avoided by an experienced, competent Contractor under similar circumstances and that Contractor has provided Owner with such notice as required herein and has cooperated with Owner to make reasonable efforts to mitigate any delay.

§ 15.1.5.2 Consistent with the requirements of section 8.3, if adverse weather conditions are the basis for a Claim for additional time, such Claim shall be documented by reasonable, reliable data substantiating that weather conditions were abnormal for the period of time, as compared with the 10-year average for the area, could not have been reasonably anticipated, and had an adverse effect on the Critical Path for the scheduled construction.

#### § 15.1.6 CLAIMS FOR CONSEQUENTIAL DAMAGES *[Intentionally deleted.]*

#### § 15.2 INITIAL DECISION *[Intentionally deleted.]*

#### § 15.3 MEDIATION

§ 15.3.1 All Claims and disputes by and between the Owner and the Contractor not resolved within fifteen (15) days shall be subject to mediation in accordance with applicable Texas law.

\* \* \* \* \*

**EXHIBITS TO  
AGREEMENT [AIA / A133 - 2009]**

**BETWEEN  
THE TARRANT COUNTY COLLEGE DISTRICT  
AND**

**[REDACTED]**

**PROJECT: [REDACTED]**

**EXHIBIT A**  
**PROJECT SITE DESCRIPTION**

[See Attached]

**EXHIBIT B**  
**CONSTRUCTION MANAGER'S FORM OF GMP**  
**PROPOSAL**

[See Attached]



**EXHIBIT C**  
**REIMBURSABLE CONDITIONS COSTS BREAKDOWN**

[See Attached]

**EXHIBIT D**  
**FELONY CONVICTION NOTICE**

[See Attached]

**EXHIBIT E**  
**LABOR COSTS REQUIREMENTS**

[See Attached]

## **Exhibit E**

### **Labor Cost Requirements**

1. When computing actual costs chargeable to the Cost of the Work for payroll taxes, the Construction Manager shall give proper consideration to the annual limitations of the wages subject to applicable Payroll taxes. The Construction Manager may accomplish this through the use of an accounting system which computes actual costs for payroll taxes when incurred up to the wage limit cut-off and allocated same to all jobs by Individual based on the time worked on each job by the individual. Alternatively, the Construction Manager may use an estimated net effective payroll tax percentage to allocate payroll tax costs during the year and make appropriate adjustments at the end of the year or at the end of the project (whichever is more appropriate) to adjust the costs to actual net payroll tax cost. Using the latter approach, if 50% of the wages paid to an employee during the year were chargeable to the Cost of the Work, then only 50% of the actual annual costs of payroll taxes would be allocable to the Cost of the Work, etc.
2. Cost of the Work shall include the actual net cost to the Construction Manager for worker's compensation insurance attributable to the wages chargeable to the Cost of the Work per this agreement. The actual net cost of worker's compensation shall take into consideration all cost adjustments due to experience modifiers, premium discounts, policy dividends, retrospective rating plan premium adjustments, assigned risk pool rebates, any applicable weekly maximums, etc. The Construction Manager may charge an estimated amount for worker's compensation insurance costs, but will make appropriate cost adjustments to actual cost within 45 days of receipt of actual cost adjustments from the insurance carrier.
3. Overtime wages paid to salaried personnel (if approved in advance in writing by the Owner) will be reimbursed at the actual rate of overtime pay paid to the individual. No time charges for overtime hours worked on the project will be allowed if the individual is not paid for the overtime worked.
4. Any overtime premium or shift differential expense to be incurred by Construction Manager for hourly workers shall require Owner's advance written approval before the incremental cost of the overtime premium or shift differential will be considered a reimbursable cost. If the Construction Manager is required to work overtime as a result of an inexcusable delay or other coordination problems caused by the Construction Manager or anyone they are responsible for, the overtime premium and/or shift differential expense portion of the payroll expense and related labor burden costs will be considered as cost not to be reimbursed.
5. Reimbursable labor burden costs will be limited to payroll taxes, worker's compensation insurance, the employer's portion of union benefit costs for union employees working on the project, and the actual verifiable fringe benefit costs incurred by Construction Manager for non-union individuals working on the project subject to the following maximum percentage for the following reimbursable non-union fringe benefit costs. The following maximums (as a percentage of reimbursable actual wages by individual) shall apply for each of the following types of fringe benefit costs specifically attributable to the each of the non-union personnel working on the project:

Medical Insurance, Dental, Life & AD&D Insurance	12.00%
Holiday, vacation and other paid time not worked	10.00%
Pension Plan Contributions to Vested Employee Account, Simplified Employee Pension Plans, or 401K matching plans (Note: ESOP related costs are covered by Construction Manager FEE)	10.00%

Note: For non-union personnel, no other fringe benefit costs (other than the 3 specific categories listed immediately above shall be considered reimbursable Cost of the Work. Any labor burden costs that are in excess of the amounts considered reimbursable or are otherwise not considered reimbursable under the terms of this agreement are intended to be covered by Construction Manager FEE.

**EXHIBIT F**  
**LIST OF PARTIES' REPRESENTATIVES**

[See Attached]



**EXHIBIT F**

**LIST OF PARTIES' REPRESENTATIVES**

**OWNER'S AUTHORIZED REPRESENTATIVE(S) [See Exhibit I, Owner's Supplementary Conditions]:**

\_\_\_\_\_.

**OWNER'S PROJECT REPRESENTATIVES FOR NOTICE (ONLY):**

All notices required to be given to the Owner must be sent to the Owner's Authorized Representative(s) above and to the following:

\_\_\_\_\_.

**CONSTRUCTION MANAGER'S AUTHORIZED REPRESENTATIVE(S) [See Exhibit I, Owner's Supplementary Conditions]:**

\_\_\_\_\_.

**EXHIBIT G**

**CONSTRUCTION MANAGER'S PERSONNEL RATES  
SCHEDULE**

[See Attached]

**EXHIBIT H**  
**INSURANCE AND SURETY REQUIREMENTS**

[See Attached]

## EXHIBIT H

### INSURANCE AND SURETY REQUIREMENTS

#### I. BUILDER'S RISK INSURANCE / PROPERTY INSURANCE COVERAGE.

Prior to commencement of the Work and as otherwise agreed by the parties in writing, **the party noted below** shall obtain and thereafter at all times during the performance of the Work maintain, "**All Risk" Builder's Risk Insurance** insuring the interest of Owner, Owner's Lender (if requested), Construction Manager and Subcontractors (of every tier) as their interest may appear, set forth in the single policy, including coverage against the perils of fire and extended coverage and physical loss or damage including, without duplication of coverage, for earthquake, theft, vandalism, malicious mischief, falsework, windstorm, and collapse including the coverage available under the so-called "Installation Floater", written on the completed value basis in an amount not less than the Contract Price of Construction Manager's contract (including subcontracts) and all authorized and approved Change Orders. Coverage will include all materials, supplies and equipment that are specifically intended for installation into the Work while such materials, supplies and equipment are temporarily located off the Site of the Work, in transit to the Site of the Work, or are temporarily located or stored off the Site of the Work for the purpose of repair, adjustment or storage at the risk of one of the insured parties. Such coverage shall also cover temporary buildings and debris removal including demolition occasioned by enforcement of any applicable legal requirements, delay in opening / delay in start-up benefiting Owner, and reasonable compensation for the services and expenses of the Owner's Architect and such other professionals required as a result of such insured loss ("Soft Costs").

#### **Party to furnish Builder's Risk Insurance: CONSTRUCTION MANAGER**

**DEDUCTIBLES.** Deductibles shall be in amounts agreed by Owner; however, except as otherwise expressly agreed by Owner and Construction Manager, **deductibles shall not be less than \$10,000.00 per claim (land movement and water damage deductible shall not be less than \$25,000.00 per claim).**

**STORAGE AND IN-TRANSIT LIMITS.** Except as otherwise agreed by Owner and Construction Manager, sub-limits for losses arising from materials, supplies and equipment in transit or in storage off the Site of the Work **shall not exceed \$500,000.00.**

Deductibles shall be in amounts agreed by Owner; however, except as otherwise expressly agreed by Owner and Construction Manager, **deductibles shall not be less than \$10,00.00 per claim.**

All such coverage must be written with insurance companies authorized by the state in which the Project is located to provide such insurance coverage in such state and must be written under either standard forms approved by the Department of Insurance of the state in which the Project is located or forms of policies satisfactory to Owner.

Except as otherwise agreed by Owner and Construction Manager, coverage for flood perils, either as part of the Builders Risk or by separate policy obtained by the party required to furnish the Builders Risk with **limits of not less than \$5,000,00.00.**

Losses or claims not paid by insurance because such losses or claims do not exceed the deductible amounts expressly stated above shall be borne by the Construction Manager to the extent Construction Manager or its subcontractors (of any tier) caused or are responsible for the loss.

**WAIVER OF SUBROGATION.** The Owner and Construction Manager waive all rights against each other and any of their consultants, Subcontractors, sub-subcontractors, agents and employees, each of the other, for damages caused by fire or other causes of loss to the extent covered by property insurance required to be

obtained by the Contract Documents, or other property insurance applicable to the Work, except such rights as they have to proceeds of such insurance. The policies shall provide such waivers of subrogation by endorsement or otherwise. This waiver of subrogation shall be effective as to a person or entity even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, did not pay the insurance premium directly or indirectly, and whether or not the person or entity had an insurable interest in the property damaged.

## **II. CONSTRUCTION MANAGER LIABILITY INSURANCE**

Construction Manager shall provide and maintain in effect at all times during the full term of its Work insurance coverages with Limits not less than those set forth below and subject to the conditions and requirements also set forth below. None of the requirements contained herein, including but not limited to requirements relating to types and limits of coverage, are intended to and shall not in any manner limit, qualify, or quantify the liabilities and obligations assumed by the Construction Manager under this Agreement or as otherwise provided by law. As used herein, the term "Agreement" shall refer to the AIA A133– 2009 / Owner – Construction Manager Agreement as modified by the parties and to which this Exhibit is attached and such relevant portions of the AIA A201 – 1997 as modified by the parties and incorporated into the Agreement.

### **A. Coverage Provided**

1. **Commercial General Liability.** Construction Manager shall provide and maintain during the term of the Work and for a period of not less than five (5) years after completion of the entire Work of the Contract, including any warranty periods (or for such additional period as may be required herein) commercial general liability insurance covering Bodily Injury, Property Damage and Personal Injury on a coverage form at least as broad as the most recent edition of Commercial General Liability Coverage Form (CG 00 01) as published by the Insurance Services Office, Inc., covering losses that occur during the policy period regardless of when the claim is made, at limits of at least:

\$ 2,000,000	General Aggregate
\$ 2,000,000	Products/Completed Operations Aggregate
\$ 2,000,000	Personal Injury
\$ 2,000,000	Each Occurrence – Property Damage / Bodily Injury

Without limiting the foregoing, coverage provided shall include the following:

- a. Premises/operations,
- b. Contractor's Protective for Construction Manager's liability arising out of the hire of Subcontractors (Independent Contractors),
- c. Aggregate Limits of Insurance per Project,
- d. Broad Form Contractual Liability specifically in support of, but not limited to, the indemnity provisions of the Contract Documents (including the indemnity obligations arising under Section 3.18 of the General Conditions),
- e. Broad Form Property Damage including Completed Operations,
- f. Product/Completed Operations for a period of **ten (10) years** following the issuance of the Final Certificate of Payment,
- g. Explosion, collapse, and underground damage to property of others, (XCU) where such exposures exist,
- h. Employees as Named Insureds,
- i. Cross Liability Endorsement, and
- j. Waiver of Subrogation Endorsement, as required by contract.

The policy shall include endorsement ISO CG2503 (or equivalent) amendment of limits (designated project or premises), in order to extend the policy's limits specifically to the Project.

2. **Business Automobile Liability.** Construction Manager shall provide and maintain during the term of the Work, including any warranty periods, business automobile liability insurance on a standard form (approved by the Texas Department of Insurance) written to cover all owned, hired and non-owned automobiles and motor vehicles, subject to the following minimum limits:

\$ 1,000,000 Combined Single Limit Each Accident

3. **Workers' Compensation/Employers' Liability.** Construction Manager shall provide and maintain during the term of the Work, including any warranty periods, statutory Workers' Compensation Insurance Coverage [as defined in Sec. 402.011(44) of the Texas Labor Code] for all of Construction Manager's workers at the site of the Project. In case any work is sublet, the Construction Manager shall require all Subcontractors similarly to provide Workers' Compensation insurance for all the latter's employees unless such employees are covered by the protection afforded by the Construction Manager, or, when applicable, Construction Manager has complied with the requirements for joint agreements with independent contractors under applicable law [see Sections 406.141 - 406.145, Texas Labor Code]. U.S.L. and H. shall be provided where such exposure exists. No "alternative" form of coverage will be accepted under any condition ("Occupational Accident and Excess Employers Indemnity Policies" are not acceptable.)

Additionally, Construction Manager shall maintain during the term of the Work Employers' Liability Coverage with limits of \$1,000,000 Bodily Injury per Accident/Employee; \$1,000,000 Bodily Injury per Disease/Employee; and \$1,000,000 Policy limit by disease.

**Owner shall be named "Alternate Employer" on Construction Manager's Workers Compensation policy.**

4. **Umbrella / Excess Liability Insurance.** Construction Manager shall provide and maintain during the term of the Work, including any warranty periods, umbrella excess liability insurance coverage on a policy form acceptable to Owner, providing coverage in excess of the limits specified above (except for Workers' Compensation Insurance). Such policy shall have the same inception and expiration dates as the underlying liability policies and coverage no less broad than those in the primary policies or program (shall include "Following Form" language to the primary policy). Minimum limits shall be:

\$ 10,000,000 Each Occurrence  
\$ 10,000,000 Completed Operations Aggregate  
\$ 10,000,000 Annual Aggregate

5. **Construction Manager's Professional Liability Insurance.** Construction Manager shall provide and maintain on an annual basis, at its expense, professional liability insurance coverage for claims or damages arising from professional services provided by or through the Construction Manager for the Project. Minimum limits shall be:

\$1,000,000 Each Occurrence  
\$2,000,000 Project Aggregate

Construction Manager shall maintain such insurance for a period that will cover claims made within three (3) years after the date of the completion of the Work under the Contract.



6. **Construction Manager's Pollution Liability Insurance.** Construction Manager shall provide and maintain during the term of the Work and a thirty (30) day extended reporting period, pollution liability insurance coverage, **including mold coverage**, with the following minimum limits:

\$1,000,000 Each Occurrence  
\$2,000,000 Aggregate

The coverage will be evidenced on an occurrence form basis and apply to both sudden & accidental, as well as pollution incidents arising from activities of the Construction Manager working at the Project Site and causing bodily injury, property or environmental damage to third parties. Coverage will also be evidenced for transportation. Such coverage may be provided as part of the Construction Manager's Commercial General Liability policy or by separate policy.

## **B. Other Terms and Conditions**

1. **Subcontractors Insurance.** Except with Owner's written approval or as otherwise provided hereinbelow, insurance similar to that required of Construction Manager, other than the Professional Liability, Pollution Liability, and Umbrella Liability Insurance, shall be furnished by all Subcontractor(s) to cover their operation performed under any Agreement. Construction Manager shall maintain Certificates of Insurance from all Subcontractors, enumerating, among other things, the Waivers in favor of, the Owner, as required herein, and make them available to the Owner upon request. The term "Subcontractor(s)" shall include Subcontractor of any tier.

Each Subcontractor required to furnish professional design services within that Subcontractor's respective scope of Work shall furnish and maintain Professional Liability Insurance with such limits as expressly approved by Owner. Selected Subcontractors as identified jointly by Owner and Construction Manager shall furnish and maintain Pollution Liability Insurance with such limits as expressly approved by Owner.

2. **Insurer Requirements, Rating and Forms.** Construction Manager's insurance coverage must be written with insurance companies licensed and admitted by the Texas Department of Insurance to provide such insurance coverage in the State of Texas and must be written under either the Texas Department of Insurance standard forms or forms of policies satisfactory to Owner. All such insurers must be reasonably acceptable to Owner and, other than the insurer(s) providing the Workers' Compensation Insurance Coverage, rated no less than A VI as shown in the most current issue of A.M. Best's Key Rating Guide.

3. **Occurrence Basis.** All such policies other than Professional Liability shall be written on an Occurrence (not Claims made) basis.

4. **Deductibles and Self-Insured Retentions.** All deductibles and self-insured retention amounts (except as expressly set forth herein or in any of the Contract Documents) must be acceptable to the Owner. Any and all deductibles in the above-described insurance policies shall be assumed by, for the account of, and at the sole risk of the Construction Manager.

5. **Additional Insured.** The Commercial General Liability, the Umbrella / Excess Liability, the Construction Manager's Pollution Liability, and the Business Automobile Liability policies each must name the Owner and the other Indemnified Parties identified in the Agreement or Section 3.18 of the General Conditions, as Additional Insureds, using an endorsement form at least as broad as the ISO Additional Insured Endorsement Form CG 2010 11 85 or ISO Additional Insured Endorsement CG 2010 1001 if used with ISO Form 2037 1001 (or their combined equivalent). It is the intent of the parties to this Contract that this Additional Insured status shall include, without limitation, coverage for completed operations and for the Owner's negligence (but only to the extent allowed by Applicable Law, including Chapter 151, Texas Insurance Code).

**6. Primary / Non-Contributing Liability.** All liability policies required to be furnished and maintained by Construction Manager shall be primary insurance to any other insurance that may be available to Owner and the other Indemnified Parties identified in the Agreement or Section 3.18 of the General Conditions. It is the intent of the parties to this Contract that all insurance coverage required herein shall be primary to and shall seek no contribution from all insurance available to Owner and such other Indemnified Parties, with Owner's and such other Indemnified Parties' insurance being excess, secondary, and non-contributing.

**7. Waivers of Subrogation.** Waivers of Subrogation shall be provided in favor of the Owner and the other Indemnified Parties identified in the Agreement or Section 3.18 of the General Conditions with regard to Commercial General Liability, the Umbrella / Excess Liability, the Construction Manager's Pollution Liability, Business Automobile Liability, and Workers' Compensation/Employers policies required to be furnished and maintained by Construction Manager.

**8. Evidence of Insurance.** Before commencing performance of the Work, the Construction Manager (and those Subcontractors requested by Owner) must furnish to Owner certificates of insurance for the coverage required hereunder (on ACORD form 28 for Builders Risk insurance, if provided by Construction Manager, and on ACORD form 25 for liability insurance) or, if requested by Owner, copies of such insurance policies evidencing the terms and conditions required hereunder.

New certificates of Insurance shall be provided to Owner prior to the current certificate(s) coverage termination date if prior to completion of the Work. Lapsed coverage of insurance required by the Agreement is an act of default under the Agreement.

In addition to copies of policies or endorsements as requested by Owner, proof of insurance required hereunder (or copies of policies and/or endorsements to the extent certificates of insurance do not set forth this information) must be furnished that clearly set forth:

- a. Insurance coverage as required herein (including all endorsements providing coverage).
- b. The effective expiration dates of policies.
- c. 30 days' prior written notice to the Owner of cancellation or non-renewal of policy.
- d. A waiver of subrogation endorsement in the policies as required herein.
- e. Any deductible and/or self-insured retention.
- f. Any exclusions to the policy (clearly identifying any endorsements excluding coverages) which are not part of the required standard form of policy.
- g. Owner and the other Indemnified Parties named as Additional Insureds on all liability policies required hereunder by Owner.

Upon Owner's request, Construction Manager shall provide Owner a certified copy of the Construction Manager's actual insurance policy thereof, along with endorsements.

**9. Notice of Cancellation.** The CGL (including any excess/umbrella liability coverage) and the Business Automobile Liability coverage (whether by policy language or endorsement) must provide for thirty (30) days' notice of cancellation or non-renewal to Owner (by certified mail, return receipt requested). The obligation to notify the Owner shall not be limited to the insurer's obligation to merely "endeavor to" notify the Owner. Owner shall be provided a policy endorsement from each insurance carrier.

**10. Additional Required Insurance.** Owner may elect at any time during the term of this Agreement to require Construction Manager to procure and maintain other or additional insurance. Notice of such election shall be given at least thirty (30) days prior to the effective date of the required modifications. Any additional costs incurred by these parties in securing insurance shall be reimbursed by Owner as a part of the Cost of the Work, and the Contract Price shall be revised by Change Orders to be increased by the amount of such additional reimbursement.

**11. Construction Manager Obligations.** Construction Manager shall not violate or knowingly permit to be violated by itself or any of its Subcontractors any conditions of the policy of insurance provided by Construction Manager under the terms of this Agreement and shall at all times satisfy the requirements of the insurance companies issuing them. All requirements imposed by the policies referred to above, and to be performed by Construction Manager shall likewise be imposed upon, assumed and performed by each of the Subcontractors. Construction Manager and each Subcontractor shall execute with their Subcontractors a written agreement, which shall include all such requirements.

**12. Coverages.** The coverages referred to above are set forth in full in the respective policy forms, and the foregoing description of such policies are not intended to be complete, or to alter or amend any provisions of the actual policies and in matters, if any, in which the said description may be conflicting with such instruments, the provision of the actual policies of insurance shall govern.

**13. No Limitation on Liability.** The amount and types of insurance coverage required to be provided by Construction Manager and/or Subcontractors herein, including any limitation on Construction Manager's obligation to include Owner and related parties as Additional Insureds on Construction Manager's liability policies, shall not be construed to be a limitation of the liability on the part of the Construction Manager or any of its Subcontractors.

### **III. SURETY REQUIREMENTS**

1. **CONSTRUCTION MANAGER SHALL FURNISH A PAYMENT BOND AND A PERFORMANCE BOND MEETING ALL STATUTORY REQUIREMENTS FOR SUCH BONDS [INCLUDING CHAPTER 2253, TEXAS GOVERNMENT CODE], BOTH IN FORM AND SUBSTANCE SATISFACTORY TO THE OWNER AND IN COMPLIANCE WITH THE SPECIFIC REQUIREMENTS STATED BELOW.**
2. Each bond shall be in a penal sum which is not less than the Guaranteed Maximum Price under the Agreement.
3. The cost of the premiums for such bonds shall be included in the Cost of the Work and shall be reimbursable to the Construction Manager only in the event that such bonds fully comply with applicable law and all the requirements and conditions of the Agreement, including these requirements set forth in the Agreement and the applicable provisions of the General Conditions (A201 as modified by the parties).
4. Construction Manager shall keep the surety issuing the performance bond and payment bond noted above informed of the progress of the Work, and, where necessary, obtain the surety's consent to and waiver of: (1) notice of changes in the Work; (2) request for reduction or release of retention; (3) request for final payment; and (4) any other material required by the surety. Owner may, in the Owner's sole discretion, inform the surety of the progress of the Work and obtain consents as necessary to protect the Owner's rights, interest, privileges, and benefits under and pursuant to any bond issued in connection with the Work.
5. All surety bonds required or authorized to be furnished under the Agreement, including, but not limited to, the payment and performance bonds noted above, shall be executed by a responsible corporate surety acceptable to the Owner, holding a current certificate of authority from the United States Department of Treasury to issue bonds to the federal government ("Treasury Listed"), and duly licensed and authorized by the Texas Department of Insurance to issue surety bonds in Texas or as otherwise expressly permitted by Applicable Law.
6. Without waiving or limiting the foregoing, the following provisions shall apply to the payment and performance bonds noted above. Construction Manager shall furnish its Surety with a copy of these

requirements and, upon request of the Owner, shall obtain a written acknowledgment from the Surety or an endorsement or rider to the bonds from the Surety acknowledging that Surety has agreed to be bound to the requirements hereof, including, without limitation, the following:

By furnishing the bonds required by the Contract Documents, the Surety expressly agrees that:

- (1) it consents to and waives notice of any extension of time and of any addition, alteration, omission, change, or other modification of the Contract Documents which, singularly or in the aggregate, does not increase the Contract Sum (Guaranteed Maximum Price) in excess of twenty-five percent (25%);
- (2) except to the extent of increases in the Contract Sum (Guaranteed Maximum Price) in excess of the percentage set forth immediately above, any such addition, alteration, change, or other modification of the Contract Documents, or a forbearance on the party of either the Owner or the Construction Manager to the other, shall not release the Surety of its obligations hereunder and notice to the Surety of such matters is hereby waived;
- (3) it is obligated under the Performance Bond and the Payment Bond to any successor, grantee or assignee of the Owner; and
- (4) in the event of an addition, alteration, change, extension, or modification of the Contract Documents without notice to the Surety that does not increase the Contract Sum (GMP) in excess of the percentage set forth above, the Surety shall remain obligated under the bonds for all of the Work performed or to be performed by the Construction Manager, including any Work required by such addition, alteration, change, extension, or modification; provided, however, that the penal sum of the bonds shall not be increased to cover such increase without the Surety's consent. In the event such addition, alteration, change, or modification without notice to the Surety does increase the Contract Sum (GMP) in excess of the percentage set forth above, the Surety's obligations under the bonds shall continue to remain in full force and effect except with regard to such additions, alterations, changes, or modifications which increased the Contract Sum (GMP) in excess of such percentage.

\* \* \* \* \*

## EXHIBIT I

### OWNER'S SUPPLEMENTARY CONDITIONS

The following terms and provisions are hereby incorporated fully into the Agreement to which these Conditions are attached as an Exhibit, except to the extent these provisions have been expressly modified by the Agreement. References below to TCCD or Owner refer to the Tarrant County College District.

- 1. Permits, Fees, and Taxes.** With the exception of the building permit and asbestos notification fee and except as otherwise expressly provided in the Agreement, Construction Manager shall secure and pay for all other permits and governmental fees, licenses and inspections necessary for the proper execution and completion of the Work. Construction Manager shall give all notices and comply with all laws, ordinances, rules, regulations, statutes, policies and orders of any public authority bearing on the performance of the Work including, without limitation, those laws, ordinances, rules, regulations, statutes, policies and orders relating to health, safety and the environment, and shall promptly notify Owner if the Contract Documents are at variance therewith.

The Owner represents that this Project is eligible for exemption from the State Sales Tax on material incorporated in the Project, provided that the Construction Manager fulfills the requirements of the Limited Sales, Excise and Use Tax Rules and Regulations. For the purpose of establishing exemption, it is understood and agreed that the Construction Manager may be required to segregate materials and labor costs at the time a Contract is awarded, and will accept an exemption certificate from the Owner. The Construction Manager shall pay any taxes otherwise assessed because of Construction Manager's failure to comply with the requirements of State Law to qualify for that tax exemption.

- 2. Safety.** Without limiting the obligations of the Construction Manager with regard to the protection of persons and property under Article 10 of the General Conditions, Construction Manager shall be responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the Work. Construction Manager shall take all necessary precautions for the safety of, and shall provide all necessary protection to prevent damage, injury or loss to (a) all employees involved with the Work and other persons who may be affected thereby, (b) all the Work and all materials and equipment to be incorporated therein, and (c) other property at the site or adjacent thereto. Construction Manager shall give all notices and comply with all applicable laws, ordinances, statutes, policies, rules, regulations and orders of any public authority bearing on the safety of persons and property and their protection from damage, injury or loss. Where consideration of labor, equipment or safety is involved, Construction Manager is solely responsible for all decisions and Owner shall not incur any liability as a result of Construction Manager's decisions.

Construction Manager shall ensure that all Construction Managers (including Construction Manager and its Subcontractors of any tier) whose work force meets or exceed a total of 25 employees on site provide a dedicated and qualified safety professional whose only responsibility will be the prevention of injuries and accidents. A qualified safety professional is one who has completed an OSHA 30-hour course within two years of starting work on this project.

Construction Manager shall bear responsibility for designing and execution of acceptable trenching and shoring procedures, in accordance with Texas Government Code, Section 2166.303 and Texas Health and Safety Code, Subchapter C, Sections 756.021, et. seq.

3. **Project Site Rules and Campus Access.** Construction Manager shall require all construction workers, whether Construction Manager's own forces or the forces of Construction Manager's Subcontractors, to park their personal motor vehicles on Owner's property only in the parking spaces designated by Owner. Any vehicles not parked in the appropriate location may be towed at the vehicle owner's sole expense.

Construction Manager shall require all construction workers, whether Construction Manager's own forces or the forces of Construction Managers' Subcontractors, while on Owner's property, to refrain from the use of tobacco products or drugs, drinking alcoholic beverages, carrying weapons, speaking profane and/or offensive language, or engaging in any interactions of any nature whatsoever with students and teachers, including talking, touching, staring or otherwise contributing to a hostile or offensive environment for Owner's students and staff. All areas of a campus, other than the Defined Construction Area (as identified by the Owner or in the Agreement), shall be off limits to Construction Manager's forces, unless their work assignment specifies otherwise. Failure of an individual to adhere to these standards of conduct shall result in the immediate termination of the employment of the offending employee from all construction on any of Owner's property. Repeated termination of Construction Manager's or Construction Manager's Subcontractor's forces, or one serious infraction, can result in the immediate termination for cause of this Contract by Owner.

Construction Manager shall ensure that no uninvited or unescorted visitors are permitted on site. In addition to the badge identification requirements for all workers, a District staff member must always be present on campus while work is in progress. Campus support staff can generally cover during their assigned hours, but after hours and weekends are considered overtime. Throughout the duration of any Hazmat Abatement project, the overtime usage of any campus support staff will only be authorized by the Owner (A specific form will be provided to the Construction Manager to request custodial overtime).

4. **Conflict Of Interest.** No TCCD staff or Board Member shall have any conflict of interest or potential conflict of interest with the Construction Manager or its agents, including a financial interest, in this Agreement, either currently, within the past two (2) years, or within one (1) year following separation from the District.

**4.1** The Construction Manager covenants that the Construction Manager has no existing interest and will not acquire any interest, direct or indirect, which could conflict in any manner or degree with the performance of services required under this Agreement and that no person having any such interest shall be employed by the Construction Manager. Neither the Construction Manager nor the Owner shall have any conflict of interest or potential conflict of interest, including a financial interest, with any TCCD Staff, Board Member, Construction Manager, Subcontractor, vendor or supplier affected by this Agreement either currently or within the past two (2) years. This is not to include interest unknown due to involvements in retired accounts and/or investments that regularly acquire new stocks or bonds not under the direct control of the Construction Manager or its agent.

**4.2** No member or delegate of the Texas Legislature shall be admitted to any share or part of this Agreement, or to any benefit therefrom.

**4.3** The Construction Manager agrees that neither the Construction Manager nor its member companies nor their affiliated companies nor company principals nor their family members shall perform any direct design services in connection with Projects in which the Construction Manager has participated. The Construction Manager agrees that neither the Construction Manager nor its member companies nor their affiliated companies nor company principals nor their family members shall have any financial interest in a firm which performs any part of the design services in connection with Projects in which the Construction Manager has participated. The provisions of this Article are not intended to prevent the Construction Manager from performing follow-up work for others during subsequent phases of work at a particular site, but rather the Construction Manager is prohibited from activities which create conflicts of interest or apparent conflicts of interest as a result of work performed by the Construction Manager under this Agreement.

**4.4** The Construction Manager agrees to include language in all its sub-Construction Manager agreements stating that neither the sub-Construction Manager nor its member companies nor their affiliated companies nor company principals nor their family members shall perform any direct design services in connection with Projects in which that sub-Construction Manager has participated. The Agreements must contain, among other things, a prohibition to preclude Construction Managers, Construction Manager firms and/or principals and family members from having any financial interest in a firm which performs any part of the design services in connection with Projects in which that sub-Construction Manager has participated. The provisions of this Article are not intended to prevent the sub-Construction Manager from performing follow-up work for others during subsequent phases of work at a particular site, but rather the sub-Construction Manager is prohibited from activities which create conflicts of interest or apparent conflicts of interest as a result of work performed by the Construction Manager or by its sub-Construction Managers under their agreements with the Construction Manager.

**4.5** Any such conflict or potential conflict of interest shall be disclosed to the Owner by the party having such conflict before the execution of this Agreement or within ten (10) days after discovering the conflict. Owner representatives not affected by the conflict or potential conflict shall determine the severity of the conflict, if any, and recommend the appropriate remedial action to resolve the conflict without adversely affecting the interest of the Owner and its project schedule. Such remedial action could include cancellation of this Agreement for the conflicting party.

**5. Equal Employment Opportunity And Affirmative Action.**

**5.1** The Construction Manager shall comply with applicable laws, regulations and special requirements of the Contract Documents regarding equal employment opportunity and affirmative action programs. Without limiting the foregoing, the Construction Manager and the Construction Manager's Subcontractors shall not discriminate against any employee or applicant for employee because of race, religion, color, sex, or national origin. Construction Manager shall take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, religion, color, sex, or national origin. Such action shall include, but not be limited to, the following: employment, promotion, demotion, or transfer; recruitment, or recruitment advertising; lay-off or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Construction Manager agrees to post in conspicuous places, available to employees and applicants, notices setting forth the nondiscrimination policies.

**5.2** The Construction Manager and the Construction Manager's Subcontractors shall, in all solicitations or advertisements for employees placed by them or on their behalf, state that all qualified applicants will receive consideration for employment without regard to race, religion, color, sex, or national origin.

**5.3** The Construction Manager, the Construction Manager's sub-Construction Managers, vendors and suppliers shall comply with the Small MWBE/HUB Plan in effect as of the date of this Agreement. While the Contract is in effect and until the expiration of one year after final completion, the Owner may require information from the Construction Manager, and may conduct audits, to assure that the Plan is being followed/was followed.

**6. Prevailing Wages.** Attention is called to the Government Code, Chapter 2258, Prevailing Wage Rates. Among other things, this Article provides that it shall be mandatory upon the Construction Manager and upon any Subcontractor under him to pay not less than the prevailing rates of per diem wages in the locality at the time of construction to all laborers, workmen, and mechanics employed by them in the execution of the Contract. A Construction Manager or Subcontractor who violates the provisions of Chapter 2258, Government Code, shall pay to Owner, in addition to such other sums for which the Construction Manager is liable under the statute, the sum of Sixty Dollars and No/100 (\$60.00) for each worker employed for each calendar day or part of the day that the worker is paid less than the wage rate



stipulated in the scale of prevailing wages applicable to this Project, as required by Texas Government Code Section 2258.023(b).

Except as may otherwise be set out in the Agreement, the applicable prevailing rate of per diem wages for each respective craft or type of worker performing work by or through the Construction Manager (including workers of Subcontractors of all tiers) pursuant to the Contract and the prevailing rate for legal holiday and overtime work shall be the respective prevailing wage rates for Tarrant County as determined by the United States Department of Labor in accordance with the Davis-Bacon Act (40 U.S.C. Section 276a *et seq.*, as currently amended).

7. **Owner's Design Professional(s).** Construction Manager acknowledges that Owner may retain one or more architects or engineers ("Design Professionals") to assist and advise Owner with respect to the Work under this Contract. Construction Manager agrees to cooperate with all Design Professionals retained by Owner, as directed by Owner. The duties of such Design Professionals may include, without limitation, monitoring and observing Construction Manager's Work for compliance with the Contract Documents, and reviewing Applications for Payment. No action, omission to act, approval, or failure to advise Construction Manager as to any matter by the Design Professionals shall in any way relieve Construction Manager from its responsibility for the performance of the Work in strict accordance with the Contract Documents and applicable law.
8. **Owner's Authorized Representative.** Notwithstanding the identification in the Agreement of those persons to whom notices to the Owner must be sent, the Board of Trustees, by majority vote, is the only representative of the Owner, a Community College District, having the power to enter into a Contract, execute a change order requiring an increase in the Contract Sum, or agree to an extension to the contractual completion date. The Board shall designate, as appropriate, an authorized representative or representatives to act on its behalf during the course of construction (the **Owner's Authorized Representative**) with such limits of authority of a designated Authorized Representative as may be stated in such written designation. **This Authorized Representative will be the Chancellor or the Chancellor's designee, if any, identified in the Agreement (or in the List of Parties' Representatives attached as an Exhibit to the Agreement).**
9. **Construction Manager's Authorized Representative.** Construction Manager shall designate one or more representatives ("Construction Manager's Authorized Representative(s)") to whom all notices are to be provided and who is authorized to bind Construction Manager with regard to modifications to the Contract Documents and other agreements relative to the Contract and the performance of the Work. Construction Manager shall not change Construction Manager's Authorized Representative(s) except upon ten (10) days' written notice to Owner. Any notice required or authorized to be given hereunder to Construction Manager shall be deemed to be given 48 hours after mailing at any general branch of the United States postal office by certified mail, return receipt requested, postage prepaid, to Construction Manager at its address listed in the Agreement, addressed to the attention of one of more of the Construction Manager's Authorized Representatives, or upon actual delivery to one or more of the Construction Manager's Authorized Representatives.
10. **No Liens.** It is distinctly understood and agreed that Owner is a governmental entity and that neither Construction Manager nor any Subcontractor, supplier or worker shall be entitled to claim a lien on any property or improvements owned by Owner or on which improvements are to be constructed, renovated, or repaired pursuant to this Contract for the use and/or benefit of the Owner, and Construction Manager hereby waives any lien rights. In the event any Subcontractor, supplier or worker files a lien against any property or improvements of Owner or pertaining to the Work, Construction Manager shall, within thirty (30) days after notice from Owner, cause such lien to be released of record or shall furnish and record a statutory lien release bond in compliance with Subchapter H, Chapter 53, Texas Property Code. If Construction Manager fails to cause such lien to be released as required herein, Owner shall have the right to pay the lien claimant such amount as may be required to obtain a release of the lien and charge the costs thereof against any amounts Owner may owe to Construction Manager under the Contract.

**EXHIBIT J**  
**CHANGE ORDER PRICING**

[See Attached]

## EXHIBIT J

### CHANGE ORDER PRICING

The contract language contained in this Exhibit J will supplement and take precedence over all other Change Order pricing contract provisions in the Contract Documents.

It is understood that these contract provisions will govern the pricing and administration of all Change Order proposals to be submitted by Construction Manager's first tier subcontractors and suppliers ("Subcontractors") and /or all other lower tier sub-subcontractors ("Downstream Subcontractors") and, except as otherwise expressly agreed in writing by the Owner, with regard to all pricing for changes in connection with Construction Manager's Self Perform Work. **In the event of conflict between the other Contract Documents used for the project, the Change Order pricing contract provisions in this Exhibit J shall govern.**

Construction Manager agrees that it will incorporate the provisions of this Exhibit J into all agreements with its Subcontractors who will require all Subcontractors and Downstream Subcontractors to also include this Exhibit J into their respective agreements with Downstream Subcontractors. It is understood that these Change Order pricing provisions apply to all types of contracts and /or subcontracts including, but not limited to, lump sum (or fixed price) contracts, unit price contracts, and contracts based upon reimbursable cost of the Work. It is further understood that these Change Order provisions will apply to all methods of Change Order pricing specifically including lump sum Change Order proposals, unit price Change Order proposals, and cost plus Fee Change Order proposals.

Whenever Change Order proposals to adjust the contract price become necessary, the Owner will have the right to select the method of pricing to be used by the Construction Manager in accordance with the pricing provisions found in this Exhibit J. The options will be (1) lump sum Change Order proposal, (2) unit price Change Order proposal, or (3) cost plus Fee Change Order proposal as further defined and discussed below.

#### **1. Stipulated / Lump Sum Pricing:**

- 1.1 Lump Sum Change Order Proposals:** The Construction Manager will submit a properly itemized Lump Sum Change Order Proposal covering the additional work and/or the work to be deleted. This proposal will be itemized for the various components of work and segregated by labor, material, and equipment in a detailed format satisfactory to Owner. The Owner will require itemized change orders on all Change Order proposals from the Construction Manager, Subcontractors, and Downstream subcontractors regardless of tier. Details to be submitted will include detailed line item estimates showing detailed materials quantity take-offs, material prices by item and related labor hour pricing information and extensions (by line item or by drawing as applicable.)
- 1.2 Labor:** Estimated labor costs shall be based on the actual cost per hour paid by the Construction Manager (for Self Perform Work) and the respective Subcontractors and Downstream Subcontractors for those workers crews of workers who are reasonably anticipated to perform the Change Order work. Estimated labor hours shall include hours

only for those workmen and working foremen directly involved in performing the Change Order work.

For Construction Manager's Self Perform Work, supervision above the level of working foremen (such as general foremen, non-working foremen, superintendent, project manager, etc.) is considered to be included in the Markup Percentages as outlined in paragraph 1.6 below. For all other Work (performed by the respective Subcontractors and Downstream Subcontractors), such supervision above the level of working foreman is considered to be included in the Markup Percentages as outlined in paragraph 1.7 below .

**Note:** No separate allowances for warranty or safety expense will be allowed as a direct cost of a Change Order. Costs attributed to warranty expenses and safety expense will be considered to be covered by the respective Markup Percentages as outlined in paragraphs 1.6 and 1.7 below.

- 1.3 Labor Burden:** Labor burden allowable in Change Orders for Construction Manager's Self Perform Work (except for such personnel covered by the Markup Percentage as outlined in paragraph 1.6 below) and for Work to be furnished through Subcontractors and Downstream Subcontractors shall be defined as employer's net actual cost of payroll taxes (FICA, Medicare, SUTA, FUTA), net actual cost for employer's cost of union benefits (or other usual and customary fringe benefits if the employees are not union employees), and net actual cost to employer for worker's compensation insurance taking into consideration adjustments for experience modifiers, premium discounts, dividends, rebates, expense constants, assigned risk pool costs, net cost reductions due to policies with deductibles for self-insured losses, assigned risk rebates, etc. Standard payroll tax percentages shall be reduced to properly reflect the effective cost reduction due to the estimated impact of the annual max be used for pricing Change Orders. However, the percentage used for labor burden to price Change Orders will be examined at the conclusion of the Project and an adjustment to the approved Change Orders will be processed if it is determined that the actual labor burden percentage should have been more or less than the estimated percentage used.
- 1.4 Material:** Estimated material Change Order costs shall reflect the reasonably anticipated net actual cost for the purchase of the material needed for the Change Order work. Estimated material costs shall reflect cost reduction available due to "non-Cash" discount, trade discounts, free material credits, and/or volume rebates. Owner shall be entitled to "Cash" or "prompt pay" discounts available on material purchased for Change Order work as provided in the Agreement. Price quotations from material suppliers must be itemized with unit prices for each specific item to be purchased. "Lot pricing" quotations will not be considered sufficient substantiating detail.
- 1.5 Equipment:** Reimbursement for equipment costs incurred by the Construction Manager with regard to Self Perform Work and for equipment costs incurred by the Subcontractors and Downstream Subcontractors shall be governed by the provisions of Article 6 of the Agreement, subject to the following:

Allowable Change Order estimated costs may include appropriate amounts for rental of major equipment specifically needed to perform the Change Order work (defined

as tools and with an individual purchase cost of more than \$750). For equipment owned by the respective Subcontractors and Downstream Subcontractors (or a subsidiary or a related or affiliated entity of such subcontractor or sub-subcontractor), the “bare” equipment rental rates allowed to be used for pricing Change Order proposals shall be 75% of the monthly rate listed in the most current publication of the AED Green Book divided by 173 to arrive at a maximum hourly rate to be applied to the hours the equipment is used performing the Change Order work. Further, the aggregate equipment rent charges for any single piece of equipment used in all Change Order work shall be limited to 50% of the fair market value of the piece of equipment when the first Change Order is priced involving usage of the piece of equipment.

Fuel necessary to operate the equipment will be considered as a separate direct cost associated with the Change Order work.

- 1.6 Maximum Markup Percentage Allowable on Self-Perform Work:** With respect to pricing Change Orders, the maximum Markup Percentage Fee to be paid to any Subcontractors and Downstream Subcontractors on “self-performed work” by such subcontractor shall be a single markup percentage not-to-exceed fifteen percent (15%) of the net direct cost of (1) direct labor and allowable labor burden costs applicable to the Change Order or extra self-performed work; (2) the net cost of material and installed equipment incorporated into the change or extra work purchased directly by such subcontractor, and (3) net rental cost of major equipment and related fuel costs incurred by such subcontractor necessary to complete the Change Order or extra self-performed work.

The Markup Percentage Fee to be paid to Construction Manager for changes in the Construction Manager’s Self-Perform Work shall be a single markup percentage of seven and five-tenths percent (7.5%) of the net direct cost of (1) direct labor and allowable labor burden costs applicable to the changes in the Construction Manager’s Self Perform Work; (2) the net cost of material and installed equipment incorporated into the change or extra work purchased directly by the Construction Manager for the changes in the Construction Manager’s Self Perform Work, and (3) net rental cost of major equipment and related fuel costs incurred by the Construction Manager for the changes in the Construction Manager’s Self Perform Work.

- 1.7 Maximum Markup Percentages Allowed on Work Performed by Lower Tier Contractors:** With respect to pricing the portion of a Change Proposal involving work performed by lower tier subcontractors (Subcontractors and Downstream Subcontractors), the maximum Markup Percentage Fee allowable to the party directly supervising the respective lower tier subcontractor’s work shall not exceed five percent (5%) of the net of all approved Change Order Work performed by all the respective lower tier subcontractors directly supervised by such party combined for any particular Change Order proposal.

- 1.8 No Markup on Bonds and Liability Insurance Costs:** Change Order cost adjustments due increases or decreases in bond or insurance costs (if applicable) shall not be subject to any Markup Percentage Fee.

- 1.9 Direct and Indirect Costs Covered by Markup Percentages:** As a further clarification, the agreed upon Markup Percentage Fee as provided in Sections 1.6 and 1.7 above is intended to

cover the respective party's profit and all indirect costs associated with the Change Order Work (including such onsite overhead and indirect costs incurred by the Construction Manager in connection with the Construction Manager's Self Perform Work). Items intended to be covered by the Markup Percentage Fee include, but are not limited to: home office expenses, branch office and field office overhead expense of any kind; project management; superintendents, general foremen; non-working foremen, estimating, engineering; coordinating; expediting; purchasing; detailing; legal, accounting, data processing or other administrative expenses; shop drawing; permits; auto insurance and umbrella insurance; pick-up truck costs; and warranty expense costs. The cost for the use of small tools is also to be considered covered by the Markup Percentage Fee. Small tools shall be defined as tools and equipment (power or non-power) with an individual purchase cost of less than \$750.

- 1.10 Deduct Change Orders and Net Deduct Changes:** The application of the markup percentages referenced in the preceding paragraphs 1.6 and 1.7 will apply to both additive and deductive Change Orders. In those instances where a change involves both additive and deductive Work, the additions and deductions will be netted and the markup percentage adjustments will be applied to the net amount.
- 1.11 Contingency:** In no event will any lump sum or percentage amounts for "contingency" be allowed to be added as a separate line item in Change Order estimates. Unknowns attributable to labor hours will be accounted for when estimating labor hours anticipated to perform the Work. Unknowns attributable to material scrap and waste will be estimated as part of material costs.
- 1.12 Change Order Proposal Time and Change Directives:** The Construction Manager's proposals for changes in the Contract Sum or Contract Time shall be made in strict compliance with the requirements of the Contract Documents. If such proposals are not received in timely manner, if the proposals are not acceptable to Owner, if the changed Work should be started immediately to avoid damage to the Project or costly delay, or for such other reason as Owner may determine, the Owner may direct the Construction Manager to proceed with the changes without waiting for the Construction Manager's proposal or for the formal Change Order to be issued. Consistent with the requirements of Section 7.3 of the General Conditions, the Owner may direct the Construction Manager to proceed with the changed work on a cost-plus basis with an agreed upon "not-to-exceed" price for the Work to be performed or consistent with such other pricing provisions as authorized by Section 7.3.3 of the General Conditions. Such directions to the Construction Manager by the Owner shall be confirmed in writing by a "Notice to Proceed on Changes" letter within seven (7) days. The cost or credit, and/or Contract Time extensions will be determined by negotiations as soon as practical thereafter and incorporated in Change Order to the Contract.
- 1.13 General Liability Insurance and Bonds:** In the event the Construction Manager has been required to furnish comprehensive general liability insurance and/or performance and/or payment bonds as part of the base contract price, a final contract Change Order will be processed to account for the Construction Manager's net increase or decrease in comprehensive general liability insurance costs and/or bond premium costs associated with Change Orders to Construction Manager's base contract price.

## 2. Unit Price Pricing:

- 2.1 Unit Price Change Proposals:** Owner shall have the option to use Unit Prices as established in the Contract Documents or as otherwise agreed in writing by Owner and Construction Manager. Agreed upon Contract Unit Prices shall be the same for added quantities and deductive quantities. Unit Prices will not be used for pricing Change Orders where, in Owner's determination, other methods of pricing Change Order work are more equitable.
- 2.2** The Construction Manager will submit, within seven (7) days after receipt of the Owner's written request for a Unit Price Proposal, a written Unit Price proposal itemizing the quantities of each item of work for which there is an applicable Contract Unit Price. The quantities must be itemized in relation to each specific contract drawing.
- 2.3** Contract Unit Prices will be applied to net differences of quantities of the same item. Such Contract Unit Prices will be considered to cover all direct and indirect costs of furnishing and installing the item (*i.e.*, there will be NO Markup Percentage Fee as otherwise provided in Sections 1.6 and 1.7 above for stipulated or lump sum proposals).

## 3. Cost Plus Pricing:

- 3.1 Cost Plus Change Order Proposals:** As an alternative to either Lump Sum Change Order Proposals or Unit Price Change Order Proposals, the Owner may elect to have any extra work performed on a cost plus markup percentage fee basis. Upon written notice to proceed, the Construction Manager shall perform such authorized extra Work (for Construction Manager's Self Perform Work) or shall cause its Subcontractors to perform such authorized extra Work at actual cost for direct labor (working foremen, journeymen, apprentices, helpers, etc.), actual cost of labor burden, actual cost of material used to perform the extra work, and actual cost of rental of major equipment (without any charge for administration, clerical expense, general supervision or superintendent of any nature whatsoever, including general foremen, or the cost or rental of small tools, minor equipment, or plant) plus the approved Markup Percentage Fee (as provided under Subparagraphs 1.1 through 1.13 above).

The intent of this clause is to define allowable cost plus chargeable costs to be the same as those allowable when pricing Lump Sum Change Proposals as outlined in subparagraphs 1.1 through 1.13 above. Owner and Construction Manager may agree in advance in writing on a maximum price for this work and Owner shall not be liable for any charge in excess of the maximum. Daily time sheets with names of all employees of the Construction Manager (for Construction Manager's Self Perform Work) and all respective Subcontractors and Downstream Subcontractors working on the Project will be required to be submitted to the Owner for both labor and equipment used by the Construction Manager for time periods during which extra work is performed on a cost plus fee basis. Daily time sheets will break down the paid hours worked by the employees by the Construction Manager and the respective Subcontractors and Downstream Subcontractors showing both base Contract Work as well as extra Work performed by each employee.



#### 4. Provisions Applicable to all Pricing Proposals:

- 4.1 Accurate Change Order Pricing Information:** Construction Manager agrees that it is responsible for submitting accurate cost and pricing data to support its Lump Sum Change and/or Cost Plus Change Order Proposals or other Contract Sum adjustments under the Contract. Construction Manager further agrees to submit Change Order proposals with cost and pricing data which are accurate, complete, current, and in accordance with the terms of the Contract Documents with respect to pricing of Change Orders. Construction Manager agrees that any “buy-out savings” on Change Orders shall accrue 100% to Owner. “Buy-out savings” for purposes of this Exhibit are defined as any savings negotiated by the Construction Manager with a Subcontractor (including a materials supplier) after receiving approval of a Change Order amount that was designated to be paid to the specific Subcontractor for the approved Change Order Work.
- 4.2 Right to Verify Change Order Pricing Information:** Construction Manager agrees that any designated Owner’s representative will have the right to examine (copy or scan) the records of the Construction Manager or any respective Subcontractor or Downstream Subcontractor (during the contract periods and up to three years after final payment is made on the Contract) to verify the accuracy and appropriateness of the pricing data used to price all Change Order proposals and/or claims. Construction Manager agrees that if the Owner determines that cost and pricing data submitted (whether approved or not) was inaccurate, incomplete, not current, or not in compliance with the terms of the Contract Documents regarding pricing of Change Orders, an appropriate Contract price adjustment will be made. Such post-approval Contract price adjustments will apply to Construction Manager and all levels of Subcontractors and Downstream Subcontractors and to all types of Change Order proposals specifically including lump sum Change Orders, unit price Change Orders, and cost-plus Change Orders.
- 4.3 Requirements for Detailed Change Order Pricing Information:** Construction Manager agrees to provide and require all Subcontractors and Downstream Subcontractors providing Work for which a change in the Contract Sum shall be requested to provide a breakdown of allowable labor and labor burden cost information as outlined in this Exhibit J. This information will be used to evaluate the potential cost of labor and labor and an accurate estimate of the Construction Manager’s actual labor and labor burden cost components. This information is not intended to establish fixed billing or Change Order pricing labor rates. However, at the time the respective Change Order is priced, the submitted cost data for labor rates may be used to price such Change Order work. The accuracy of any such agreed upon labor cost components used to price Change Orders will be subject to later audit. Approved Change Order amounts may be adjusted later to correct the impact of inaccurate labor cost components if the agreed upon labor cost components are determined to be inaccurate.

**EXHIBIT K**  
**RIGHT OF AUDIT – EXAMINATION OF RECORDS**

[See Attached]

## **Exhibit K**

### **Right of Audit – Examination of Records**

The following provisions apply to all audits or other rights of the Owner to review the Construction Manager's records authorized or permitted under Applicable Law or the Contract Documents, including but not limited to the Owner's right to audit the Construction Manager's Final Accounting:

- .1 Records for all contractual agreements relating to the Project, specifically including but not limited to lump sum subcontracts (i.e. fixed priced or stipulated sum subcontracts), unit price, cost plus or time & material subcontracts with or without a guaranteed maximum price (or not-to-exceed amounts) shall upon reasonable notice be open to inspection and subject to audit, scanning, and/or reproduction during normal business working hours. Such audits may be performed by any Owner's representative or any outside representative engaged by Owner for the purpose of examining such records. The Owner or its designee may conduct such audits or inspections throughout the term of this contract and for a period of three years after final payment or longer if required by law or as expressly provided by the Contract Documents. Owner's representatives may (without limitation) conduct verification such as counting employees at the Project Site, witnessing the distribution of payroll, verifying information and amounts through interviews and written confirmation with Construction Manager employees, field and agency labor, subcontractors, and vendors.
  
- .2 Construction Manager's "records" as referred to in this Exhibit and the Contract Documents shall include any and all information, materials and data of every kind and character, including without limitation, records, books, papers, documents, subscriptions, recording, agreements, purchase orders, leases, contracts, commitments, arrangements, notes, daily diaries, superintendent reports, drawings, receipts, vouchers and memoranda, and any and all other agreements, sources of information and matters that may in Owner's judgment have any bearing on or pertain to any matters, rights, duties or obligations under or covered by any Contract Document. Such records shall include (hard copy, as well as computer readable data if it can be made available), written policies and procedures; time sheets; payroll register; payroll records; cancelled payroll checks; subcontract files (including proposals of successful and unsuccessful bidders, bid recaps, negotiation notes, etc.); original bid estimates; estimating work sheets; correspondence; change order files (including documentation covering negotiated settlements); backcharge logs and supporting documentation; invoices and related payment documentation; general ledger, information detailing cash and trade discounts earned, insurance rebates and dividends; and any other Construction Manager records which may have a bearing on matters of interest to the Owner in connection with the Construction Manager's dealings with the Owner (all foregoing hereinafter referred to as "records") to the extent necessary to adequately permit evaluation and verification of any or all of the following:
  - (a) Compliance with Contract requirements for deliverables
  - (b) Compliance with approved plans and specifications
  - (c) Compliance with Contract provisions regarding the pricing of change orders
  - (d) Accuracy of Construction Manager representations regarding the pricing of invoices
  - (e) Accuracy of Construction Manager representations related to claims submitted by the Construction Manager or any of his payees.
  
- .3 Construction Manager shall require all payees (examples of payees include subcontractors, material suppliers, insurance carriers, etc.) to comply with provisions of the Contract Documents by including the requirements of hereof in written subcontract agreement between Construction Manager and

payee. Construction Manager will ensure that Owner shall have the same right to audit provisions contained in the Contract Documents with regard to all payees.

- .4 Owner's authorized representative(s) shall have reasonable access to the Construction Manager's facilities, shall be allowed to interview all current or former employees to discuss matters pertinent to the performance of this Contract and shall be provided adequate and appropriate work space, in order to conduct audits in compliance with the Contract Documents.
- .5 If an audit inspection or examination in accordance with the Contract Documents, discloses overpricing or overcharges to the Owner (of any nature) by the Construction Manager and/or the Construction Manager's Subcontractors in excess of \$100,000 in addition to making adjustments for the overcharges, the reasonable actual cost of the Owner's audit shall be reimbursed to the Owner by the Construction Manager. Any adjustments and/or payments which must be made as a result of any such audit or inspection of the Construction Manager's invoices and/or records shall be made within a reasonable amount of time (not to exceed 90 days) from presentation of Owner's finding to Construction Manager.

In addition, to the normal paperwork documentation the Construction Manager typically furnishes to the Owner, in order to facilitate efficient use of Owner resources when reviewing and/or auditing the Construction Manager's billings and related reimbursable cost records, the Construction Manager agrees to furnish (upon request) the following types of information in the specified computer (PC) readable file format(s):

Type of Record	PC Readable File Format
Monthly Job Cost Detail	.pdf and Excel
Detailed Job Cost History To Date	.pdf and Excel
Monthly Labor Distribution detail (if not already separately detailed in the Job Cost Detail)	.pdf and Excel
Total Job to date Labor Distribution detail (if not already included in the detailed Job Cost History to date)	.pdf and Excel
Employee Timesheets documenting time worked by all individuals who charge reimbursable time to the project	.pdf
Daily Foremen Reports listing names and hours and tasks of personnel who worked on the project	.pdf
Daily Superintendent Reports	.pdf
Detailed Subcontract Status Reports (showing original subcontract value, approved subcontract change orders, subcontractor invoices, payment to subcontractors, etc.)	.pdf and Excel
Copies of executed subcontracts with all Subcontractors	.pdf
Copies of executed change orders issued to Subcontractors	.pdf
Copies of all documentation supporting all reimbursable job costs (subcontractor payment applications, vendor invoices, internal cost charges, etc.)	.pdf

**EXHIBIT L**  
**M/WBE REQUIREMENTS**

[See Attached]