

**CITY OF LA VISTA**  
**MAYOR AND CITY COUNCIL REPORT**  
**FEBRUARY 1, 2022 AGENDA**

<b>Subject:</b>	<b>Type:</b>	<b>Submitted By:</b>
CONSTRUCTION MANAGEMENT AT RISK CONTRACT – JE DUNN CONSTRUCTION CO	ORDINANCE ◆ RESOLUTION RECEIVE/FILE	PAT DOWSE CITY ENGINEER

**SYNOPSIS**

A resolution has been prepared to approve a Construction Management at Risk contract with JE Dunn Construction Company, Omaha, Nebraska, consisting of the Standard Form of Agreement Between Owner and Construction Manager as Constructor and the General Conditions of the Contract for Construction, and authorizing Preconstruction Services at an amount not to exceed \$15,000.

**FISCAL IMPACT**

The FY21/22 Biennial Budget provides funding for this project.

**RECOMMENDATION**

Approval

**BACKGROUND**

The City Council on April 20, 2021 approved use of the Construction Management at Risk (CMR) process for the Central Park Pavilion and Site Improvement Project. As part of the CMR process, Requests for Letter of Interest were received and subsequently an RFP was issued and interviews were conducted. On September 21, 2021 approved JE Dunn Construction Company as the CMR and authorized contract negotiations to begin.

Negotiations with JE Dunn have concluded, and a proposed contract is being presented at this meeting, comprised of the Standard Form of Agreement Between Owner and Construction Manager as Constructor and the General Conditions of the Contract for Construction (“Contract”). Said contract has been reviewed and approved by the City Attorney and JE Dunn’s legal team. The Contract, among other things, authorizes JE Dunn to proceed with Preconstruction Services in an amount not to exceed of \$15,000 which Services are necessary for design and further progressing with the project. Upon completion of Preconstruction Services, a Contract amendment will be brought to Council for consideration, which amendment will include a guaranteed maximum contract price. It is anticipated this amendment will be brought forth in the next 30-45 days.

**RESOLUTION NO. \_\_\_\_\_**

A RESOLUTION OF THE MAYOR AND CITY COUNCIL OF THE CITY OF LA VISTA, NEBRASKA AUTHORIZING THE EXECUTION OF THE CONSTRUCTION MANAGER AT RISK CONTRACT FOR PRECONSTRUCTION SERVICES WITH JE DUNN CONSTRUCTION COMPANY, OMAHA, NEBRASKA IN AN AMOUNT NOT TO EXCEED \$15,000.

WHEREAS, the Mayor and City Council have determined that preconstruction and construction services for the Central Park Pavilion and Site Improvement Project are necessary; and

WHEREAS, the FY21/22 Biennial Budget provides funding for the proposed services;

WHEREAS, on September 21, 2021, City Council approved contract negotiations to begin with JE Dunn Construction; and

WHEREAS, Guaranteed Maximum Price to be established as part of the preconstruction efforts and will be added to this agreement by way of a Contract Amendment;

NOW, THEREFORE BE IT RESOLVED, the Mayor and City Council hereby adopt and approve the following:

1. A proposed contract with JE Dunn, comprised of the Standard Form of Agreement Between Owner and Construction Manager as Constructor and the General Conditions of the Contract for Construction, is presented at this meeting ("Contract").
2. The Contract is adopted and approved, subject to any additions, subtractions, or modifications as the City Administrator or City Engineer determines necessary or appropriate in consultation with the City Attorney.
3. The Mayor or any designee of the Mayor is authorized to execute the Contract.

The Mayor, City Administrator, City Engineer, or any designee of the Mayor, City Administrator, or City Engineer shall be authorized to take any action on behalf of the City as necessary or appropriate to carry out the Contract or actions approved in this Resolution.

BE IT FURTHER RESOLVED, by the Mayor and City Council of La Vista, Nebraska, that a Construction Manager at Risk contract, in a form satisfactory to the City Administrator and City Attorney, be authorized with JE Dunn Construction Company, Omaha, Nebraska for preconstruction services in an amount not to exceed \$15,000.

PASSED AND APPROVED THIS 1ST DAY OF FEBRUARY 2022.

CITY OF LA VISTA

ATTEST:

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Douglas Kindig, Mayor

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Pamela A. Buethe, MMC  
City Clerk



# AIA® Document A133™ – 2019

## **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 Eighth day of October in the year Two Thousand Twenty-One  
(In words, indicate day, month, and year.)

**BETWEEN** the Owner:  
(Name and address)

City of La Vista, Nebraska  
8116 Park View Boulevard  
La Vista, Nebraska 68128-2198

and the Construction Manager:  
(Name and address)

J.E. Dunn Construction Company  
14606 Branch Street, Suite 300  
Omaha, Nebraska 68154

for the following Project:  
(Name and location)

Central Park Pavilion and Site Improvements  
9302 City Centre Drive  
La Vista, Nebraska 68128

The Architect:  
(Name and address)

RDG Planning & Design  
1302 Howard Street  
Omaha, Nebraska 68102

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. A vertical line in the left margin of this document indicates where the author has added necessary information and where the author has added to or deleted from the original AIA text.

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

AIA Document A201™–2017, 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.

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### ARTICLE 1 INITIAL INFORMATION

§ 1.1 This Agreement is based on the Initial Information set forth in this Section 1.1.

*(For each item in this section, insert the information or a statement such as "not applicable" or "unknown at time of execution.")*

§ 1.1.1 The Owner's program for the Project, as described in Section 4.1.1:

*(Insert the Owner's program, identify documentation that establishes the Owner's program, or state the manner in which the program will be developed.)*

The Central Park Pavilion Project will consist of public improvements within Central Park, including a two-story pavilion structure with restroom and service facilities. The upper level will include plaza areas with an overlook onto the existing lake, restrooms, concessions, storage, and mechanical spaces. The lower level will include restrooms, storage areas, gathering spaces, and pavement connecting with the park's trail network. Upper and lower areas will be connected by stairs. The Project will also establish a new public plaza space in the vicinity of City Centre Drive and Main Street within the Mixed-Use Redevelopment Project Area. The Project will include covered and open-air plaza spaces, pedestrian connections, boardwalk, planting and seating areas, water features, lighting, and elements to attract people to the area, and will provide pedestrian connectivity between Central Park and the adjacent Mixed-Use Redevelopment Project Area in the form of stairs and an accessible path.

§ 1.1.2 The Project's physical characteristics:

*(Identify or describe pertinent information about the Project's physical characteristics, such as size; location; dimensions; geotechnical reports; site boundaries; topographic surveys; traffic and utility studies; availability of public and private utilities and services; legal description of the site, etc.)*

The project site begins north of the intersection of City Centre Drive and Main Street within La Vista's City Centre Development and extends north toward the lake within Central Park. Site components include a two-story pavilion structure with food services, restrooms and storage and the surrounding sites include site paving, site amenities, and landscaping.

**§ 1.1.3** The Owner's budget for the Guaranteed Maximum Price, as defined in Article 6:  
(Provide total and, if known, a line item breakdown.)

\$10,000,000

**§ 1.1.4** The Owner's anticipated design and construction milestone dates:

.1 Design phase milestone dates, if any:

To be set forth in the GMP Amendment

.2 Construction commencement date:

To be set forth in the GMP Amendment.

.3 Substantial Completion date or dates:

To be set forth in the GMP Amendment.

.4 Other milestone dates:

To be set forth in the GMP Amendment

**§ 1.1.5** The Owner's requirements for accelerated or fast-track scheduling, or phased construction, are set forth below:  
(Identify any requirements for fast-track scheduling or phased construction.)

To be set forth in the GMP Amendment

**§ 1.1.6** The Owner's anticipated Sustainable Objective for the Project:

(Identify and describe the Owner's Sustainable Objective for the Project, if any.)

To be set forth in the GMP Amendment

**§ 1.1.6.1** If the Owner identifies a Sustainable Objective, the Owner and Construction Manager shall complete and incorporate a mutually acceptable Sustainable Projects Exhibit, , into this Agreement to define the terms, conditions and services related to the Owner's Sustainable Objective..

**§ 1.1.7** Other Project information:

(Identify special characteristics or needs of the Project not provided elsewhere.)

**§ 1.1.8** The Owner identifies the following representative in accordance with Section 4.2:  
(List name, address, and other contact information.)

Patrick Dowse, City Engineer  
City of La Vista, Nebraska  
8116 Park View Boulevard  
La Vista, Nebraska 68128-2198

**§ 1.1.9** The persons or entities, in addition to the Owner's representative, who are required to review the Construction Manager's submittals to the Owner are as follows:  
(List name, address and other contact information.)

**§ 1.1.10** The Owner shall retain the following consultants and contractors:  
(List name, legal status, address, and other contact information.)

.1 Geotechnical Engineer:

.2 Civil Engineer:

.3 Other, if any:

(List any other consultants retained by the Owner, such as a Project or Program Manager.)

**§ 1.1.11** The Architect's representative:

(List name, address, and other contact information.)

Bruce Niedermeyer  
RDG Planning & Design  
1302 Howard Street  
Omaha, Nebraska 68102

**§ 1.1.12** The Construction Manager identifies the following representative in accordance with Article 3:  
(List name, address, and other contact information.)

Chris Pesek  
J.E. Dunn Construction Company  
14606 Branch Street, Suite 300  
Omaha, Nebraska 68154

**§ 1.1.13** The Owner's requirements for the Construction Manager's staffing plan for Preconstruction Services, as required under Section 3.1.9:

(List any Owner-specific requirements to be included in the staffing plan.)

**§ 1.1.14** The Owner's requirements for subcontractor procurement for the performance of the Work:  
(List any Owner-specific requirements for subcontractor procurement.)

**§ 1.1.15** Other Initial Information on which this Agreement is based:

**§ 1.2** The Owner and Construction Manager may rely on the Initial Information. Both parties, however, recognize that such information may change and, in that event, the Owner and the Construction Manager shall appropriately adjust the Project schedule, the Construction Manager's services, and the Construction Manager's compensation. The Owner shall adjust the Owner's budget for the Guaranteed Maximum Price and the Owner's anticipated design and construction milestones, as necessary, to accommodate changes in the Initial Information.

**§ 1.3** Neither the Owner's nor the Construction Manager's representative shall be changed without ten days' prior notice to the other party.

## ARTICLE 2 GENERAL PROVISIONS

### § 2.1 The Contract Documents

The Contract Documents consist of this Agreement and all specified exhibits, Conditions of the Contract (General and Supplementary), Drawings, Specifications, Addenda issued prior to 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 Guaranteed Maximum Price proposal (referred to as "Guaranteed Maximum Price proposal" or "GMP Proposal", and upon acceptance by Owner referred to as "Guaranteed Maximum Price Amendment" or "GMP Amendment"), the Contract Documents will also include the documents identified in the Guaranteed Maximum Price Amendment and revisions prepared by the Architect, agreed to by Owner and Construction Manager, and furnished by the Owner as described in Section 3.2.8. 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, conflicts with this Agreement, this Agreement shall govern. An enumeration of the Contract Documents, other than a Modification, appears in Article 15.

## **§ 2.2 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 Architect and exercise the Construction Manager's skill and judgment consistent with the industry standards in furthering the interests of the Owner and the Project. The Construction Manager shall furnish efficient construction administration, management services, and supervision; furnish at all times an adequate supply of workers and materials; and perform the Work in an expeditious and economical manner consistent with the Owner's and Project's interests, and with the skill and care of a construction manager with experience in projects that are similar to the Project. 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.

## **§ 2.3 General Conditions**

**§ 2.3.1** For the Preconstruction and Construction Phases, AIA Document A201™-2017, General Conditions of the Contract for Construction, as modified and attached as Exhibit A, shall apply. The term "Contractor" as used in A201-2017 shall mean the Construction Manager.

*(Paragraph deleted)*

## **ARTICLE 3 CONSTRUCTION MANAGER'S RESPONSIBILITIES**

The Construction Manager's Preconstruction Phase responsibilities are set forth in Sections 3.1 and 3.2, and in the applicable provisions of A201-2017. The Construction Manager's Construction Phase responsibilities are set forth in Section 3.3 and in the applicable provisions of A201-2017. 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.

### **§ 3.1 Preconstruction Phase**

#### **§ 3.1.1 Extent of Responsibility**

The Construction Manager shall exercise reasonable care in performing its Preconstruction Services. The Construction Manager, however, does not warrant or guarantee estimates and schedules except as may be included as part of the Guaranteed Maximum Price Amendment. Input of the Construction Manager concerning design alternatives shall be subject to the review and approval of the Architect, Owner, and other Owner consultants. Owner acknowledges that the Construction Manager is not a licensed design professional and is not responsible for designing the Project, except if any specifications of the Contract Documents identify Construction Manager as being responsible for any of the design. Additionally, the Construction Manager is not required to ascertain that the Drawings and Specifications are in accordance with applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities. The Construction Manager shall promptly report 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.

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

#### **§ 3.1.3 Consultation**

**§ 3.1.3.1** 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.

**§ 3.1.3.2** The Construction Manager shall advise the Owner and Architect on proposed site use and improvements, selection of materials, building systems, and equipment. The Construction Manager shall also provide recommendations to the Owner and Architect, consistent with the Project requirements, on constructability; availability of materials and labor; time requirements for procurement, installation and construction; prefabrication; 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. The Construction Manager shall consult with the Architect regarding professional services to be provided by the Construction Manager during the Construction Phase. Owner and Construction Manager agree that Construction Manager is not an architect or engineer and that Construction Manager is not providing design services as part of the Agreement, unless otherwise specifically provided in the Contract Documents. Any recommendations or input by Construction Manager relating to the design, Drawings and Specifications, including from Construction Manager's participation in value engineering or other cost and constructability efforts, are intended as suggestions only for the consideration of Owner, Architect, and their engineers and consultants. Such recommendations and input from the Construction Manager shall be independently reviewed, evaluated and, if accepted and approved by Owner, Architect, and their engineers and consultants, the Owner and Architect or their consultants shall be responsible for the confirmation of compliance with applicable laws, statutes, ordinances, codes, rules and regulation, or lawful orders of public authorities and incorporation of such recommendations and input into the Contract Documents. Construction Manager makes no representation or warranties that its recommendations or input relating to value engineering, design, or Drawings and Specifications complies with applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities, or with the Owner's or its Architect's design or design intent, or that such recommendations or input are suitable or compatible with the design intent

**§ 3.1.3.3** The Construction Manager shall assist the Owner and Architect in establishing building information modeling and digital data protocols for the Project as provided in Section 1.7 of the AIA A201-2017, as modified, to establish the protocols for the development, use, transmission, and exchange of digital data.

#### **§ 3.1.4 Project Schedule**

When Project requirements in Section 4.1.1 have been sufficiently identified, the Construction Manager shall prepare and periodically update a Project schedule for the Architect's review and the Owner's acceptance. 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. 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 affect the Project's timely completion. The updated Project schedule shall include the following dates: submission of the Guaranteed Maximum Price proposal; components of the Work; times of commencement and proposed substantial completion required of each Subcontractor; ordering and delivery of products, including those that must be ordered in advance of construction; and the occupancy requirements of the Owner.

#### **§ 3.1.5 Phased Construction**

The Construction Manager, in consultation with the Architect, shall provide recommendations to the Owner and Architect with regard to the advisability of phased issuance of Drawings and Specifications, accelerated or fast-track scheduling, procurement, and sequencing for phased construction 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.

#### **§ 3.1.6 Cost Estimates**

**§ 3.1.6.1** Based on the preliminary design and other design criteria prepared by the Architect, the Construction Manager shall prepare, for the Architect's review and the Owner's approval, preliminary estimates of the Cost of the Work or the cost of program requirements using area, volume, quantity take-offs of individual components, subcontractor input, or similar conceptual estimating techniques. If the Architect or Construction Manager suggests alternative materials and systems, the Construction Manager shall provide cost evaluations of those alternative materials and systems.

**§ 3.1.6.2** As the Architect progresses with the preparation of the Schematic Design, Design Development and Construction Documents, the Construction Manager shall prepare and update, at appropriate intervals agreed to by the Owner, Construction Manager and Architect, an estimate of the Cost of the Work, including any mutually acceptable contingency, with increasing detail and refinement ("Projected Cost of the Work"). The Construction Manager shall include in the estimate those costs to allow for the further development of the design, price escalation, and market conditions, until such time as the Owner and Construction Manager agree on a Guaranteed Maximum Price ("Guaranteed Maximum Price" or "GMP") for the Work. Such Projected Cost of the Work shall be provided for the Architect's review

and the Owner's approval. The Construction Manager shall inform the Owner and Architect in the event that the Projected Cost of the Work exceeds the latest approved Project budget, and make recommendations for corrective action. Upon request of Owner, all estimates included in the Projected Cost of the Work shall be broken down, to the extent reasonably practicable, by individual trades and cost components and including any quantity take offs associated with the various identifiable elements of each trade. Such estimates also shall include descriptions of any applicable scope, assumptions, conditions, quality standards, limitations or other considerations of the estimates.

**§ 3.1.6.3** If the Architect is providing cost estimating services as a Supplemental Service, and a discrepancy exists between the Construction Manager's cost estimates and the Architect's cost estimates, the Construction Manager and the Architect shall work together to reconcile the cost estimates.

**§ 3.1.7** As the Architect progresses with the preparation of the Schematic Design, Design Development and Construction Documents, the Construction Manager shall consult with the Owner and Architect and make recommendations regarding constructability and schedules, for the Architect's review and the Owner's approval.

**§ 3.1.8** The Construction Manager shall provide recommendations and information to the Owner and Architect regarding equipment, materials, services, and temporary Project facilities.

**§ 3.1.9** The Construction Manager shall provide a staffing plan for Preconstruction Phase services for the Owner's review and approval.

**§ 3.1.10** If the Owner identified a Sustainable Objective in Article 1, the Construction Manager shall fulfill its Preconstruction Phase responsibilities as required in the Sustainable Projects Exhibit, attached to this Agreement.

#### **§ 3.1.11 Subcontractors and Suppliers**

**§ 3.1.11.1** If the Owner has provided requirements for subcontractor procurement in Section 1.1.14, the Construction Manager shall provide a subcontracting plan, addressing the Owner's requirements, for the Owner's review and approval.

**§ 3.1.11.2** The Construction Manager shall develop bidders' interest in the Project and furnish Owner and Architect a proposed list of subcontractors or suppliers to bid on the Work, including without limitation suppliers to furnish any materials or equipment fabricated to a special design. The Architect will notify the Construction Manager in writing of any known objection to any subcontractor or supplier on the list; provided, however, neither Owner nor Architect has any duty to investigate the qualifications of proposed subcontractors or suppliers. Construction Manager shall not use any subcontractor or supplier with respect to which the Owner objects. The Construction Manager will develop a list of proposed bidders, subject to review of Architect and Owner, and approval of Owner. The Construction Manager will obtain from Owner and Architect and update the Owner periodically as the drawings and specifications are developed and throughout the vendor solicitation and selection process.

**§ 3.1.11.3** The processes described in Article 9 shall apply if bid packages will be issued during the Preconstruction Phase.

#### **§ 3.1.12 Procurement**

The Construction Manager shall prepare, for the Architect's review and the Owner's acceptance, a procurement schedule for items that must be ordered in advance of construction. The Construction Manager shall expedite and coordinate the ordering and delivery of materials that must be ordered in advance of construction. 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 acceptable to the Construction Manager and in accordance with good practice and procedures for procuring such items as mutually acceptable to Owner and Construction Manager. Upon the establishment of the Guaranteed Maximum Price, the Owner shall assign all contracts for these items to the Construction Manager and the Construction Manager shall thereafter accept responsibility for them.

#### **§ 3.1.13 Compliance with Laws**

The Construction Manager shall comply with applicable laws, statutes, ordinances, codes, rules and regulations, and 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. In the event there is a change in law after execution of this Agreement, including, without limitation changes in laws that affect taxes or tariffs the Guaranteed Maximum Price, Projected Cost of the Work, Construction Manager's Fee, the construction schedule for the Work, or the Contract Time, shall be equitably adjusted in accordance with Article 7 of the AIA

A201-2017, as modified, for additional costs or delay resulting from the laws enacted or changed after the date of this Agreement.

#### **§ 3.1.14 Other Preconstruction Services**

Insert a description of any other Preconstruction Phase services to be provided by the Construction Manager, or reference an exhibit attached to this document

*(Paragraph deleted)*

#### **§ 3.2 Guaranteed Maximum Price Proposal**

**§ 3.2.1** At such time as design development drawings for the Project satisfy AIA Best Practice for Design Development Quality Management, the Construction Manager shall prepare a Guaranteed Maximum Price proposal for the Owner's and Architect's review, and the Owner's acceptance. The proposed Guaranteed Maximum Price in the Guaranteed Maximum Price proposal shall be the sum of the Construction Manager's Projected Cost of the Work, the Contingency described in Section 3.2.4, and the Construction Manager's Fee described in Section 6.1.2.

**§ 3.2.2** To the extent that the Contract Documents are anticipated to require further development, the proposed Guaranteed Maximum Price includes the costs attributable to such further development consistent with the Contract Documents and reasonably inferable therefrom. Such further development does not include changes in scope, systems, kinds and quality of materials, finishes, or equipment, all of which, if required, shall be incorporated by Change Order.

**§ 3.2.3** The Construction Manager shall include with the Guaranteed Maximum Price 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 list of the clarifications and assumptions made by the Construction Manager in the preparation of the Guaranteed Maximum Price proposal, including assumptions under Section 3.2.2;
- .3 A statement of the Guaranteed Maximum Price proposal, including a statement of the Projected Cost of the Work organized by trade categories or systems, including allowances and the Construction Manager's Fee;
- .4 The anticipated date of Substantial Completion upon which the Guaranteed Maximum Price proposal is based;
- .5 A date by which the Owner must accept the Guaranteed Maximum Price proposal, (which will not be any sooner than 30 days after the date of the Guaranteed Maximum Price proposal).
- .6 A list of allowances and a statement of their basis;
- .7 The construction schedule upon which the Guaranteed Maximum Price proposal is based;
- .8 The anticipated date(s) of Substantial Completion upon which the Guaranteed Maximum Price proposal is based;
- .9 A schedule of anticipated issuance dates of Construction Documents upon which the date(s) of Substantial Completion or interim milestones is based;
- .10 A matrix of responsibilities in connection with equipment, fixtures or furnishings as furnished or installed by Contractor or Owner, if applicable; and
- .11 A proposed contingency and contingency reduction plan as described in Section 3.2.4.

**§ 3.2.4** In preparing the Construction Manager's Guaranteed Maximum Price proposal, the Construction Manager shall include a contingency for the Construction Manager's exclusive use to cover those costs that are included in the Guaranteed Maximum Price but not otherwise allocated to another line item or included in a Change Order ("Contingency"). The use of the Contingency will be managed by the Construction Manager in a transparent manner acceptable to both parties. The Contingency shall not be used for any scope changes, and no portion of the Contingency shall be allocated to any specific portion of the Work. The Construction Manager shall maintain a log of uses against the Contingency and provide the same to the Owner at such times as the Owner may reasonably request.

**§ 3.2.5** The Construction Manager shall meet with the Owner and Architect to review the Guaranteed Maximum Price proposal. In the event that the Owner or Architect discover any inconsistencies or inaccuracies in the information presented, they shall promptly notify the Construction Manager, who shall make appropriate adjustments to the Guaranteed Maximum Price proposal, its basis, or both.

**§ 3.2.6** If the Owner notifies the Construction Manager that the Owner has accepted the Guaranteed Maximum Price proposal in writing before the date specified in the Guaranteed Maximum Price proposal, the Guaranteed Maximum Price proposal shall be deemed effective without further acceptance from the Construction Manager. Following acceptance of a Guaranteed Maximum Price proposal, the Owner and Construction Manager shall execute the Guaranteed Maximum Price Amendment amending this Agreement, a copy of which the Owner shall provide to the Architect. The Guaranteed Maximum Price Amendment shall set forth the agreed upon Guaranteed Maximum Price with the information and assumptions upon which it is based.

**§ 3.2.7** The Construction Manager shall not incur any cost to be reimbursed as part of the Cost of the Work prior to the execution of the Guaranteed Maximum Price Amendment, unless the Owner provides prior written authorization for such costs.

**§ 3.2.8** The Owner shall authorize preparation of any necessary revisions to the Contract Documents to incorporate the agreed-upon assumptions and clarifications contained in the Guaranteed Maximum Price Amendment. The Owner shall promptly furnish such revised Contract Documents to the Construction Manager upon completion. The Construction Manager shall notify the Owner and Architect of any inconsistencies between the agreed-upon assumptions and clarifications contained in the Guaranteed Maximum Price Amendment and the revised Contract Documents.

**§ 3.2.9** The Construction Manager shall include in the Guaranteed Maximum Price all 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 Guaranteed Maximum Price Amendment is executed. To the extent purchases for the Project are exempt from sales, consumer, use and similar taxes due to the Owner's status as a governmental or political subdivision, any savings of such taxes that may have been included in the GMP shall not be subject to the shared savings provision described below and shall solely belong to the Owner.

**§ 3.2.10** The Construction Manager shall achieve Substantial Completion of the Work within the time periods established in the Guaranteed Maximum Price Amendment, as may be adjusted by Change Order.

### **§ 3.3 Construction Phase**

#### **§ 3.3.1 General**

**§ 3.3.1.1** For purposes of Section 8.1.2 of A201–2017, the date of commencement of the Work shall mean the date of commencement of the Construction Phase.

**§ 3.3.1.2** The Construction Phase shall commence upon the Owner's execution of the Guaranteed Maximum Price Amendment or, prior to acceptance of the Guaranteed Maximum Price proposal, by written agreement of the parties and Owner's issuance of notice to proceed.

**§ 3.3.1.3** The date for Substantial Completion of the Work shall be as stated in the Guaranteed Maximum Price Amendment signed by the parties, subject to any subsequent adjustments in the time for completion as provided in the Contract Documents.

#### **§ 3.3.2 Administration**

**§ 3.3.2.1** The Construction Manager shall schedule and conduct meetings to discuss such matters as procedures, progress, coordination, scheduling, and status of the Work. The Construction Manager shall prepare and promptly distribute minutes of the meetings to the Owner and Architect.

**§ 3.3.2.2** Upon the execution of the Guaranteed Maximum Price Amendment, the Construction Manager shall prepare and submit to the Owner and Architect a construction schedule for the Work and a submittal schedule in accordance with Section 3.10 of A201–2017.

#### **§ 3.3.2.3 Monthly Report**

The Construction Manager shall record the progress of the Project. On a monthly basis, or otherwise 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.

#### § 3.3.2.4 Daily Logs

The Construction Manager shall 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, 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.

#### § 3.3.2.5 Cost Control

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 3.3.2.3 above.

### ARTICLE 4 OWNER'S RESPONSIBILITIES

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

§ 4.1.1 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.

§ 4.1.2 The Owner shall, at the written request of the Construction Manager prior to commencement of the Construction Phase and thereafter, furnish to the Construction Manager satisfactory evidence that financial arrangements have been made to fulfill the Owner's obligations under the Contract. After execution of the Guaranteed Maximum Price Amendment, the Construction Manager may request such information as set forth in A201-2017 Section 2.2.

§ 4.1.3 The Owner shall periodically communicate the Owner's budget for the Project, including (1) the budget for the Cost of the Work as defined in Article 7, (2) the Owner's other costs, and (3) reasonable contingencies related to all of these costs. If Construction Manager's preliminary estimates exceed the Owner's budget, Construction Manager, in consultation with Owner and Architect, shall pursue alternative designs, value engineering options, or finishes during the preconstruction phase to align with Owner's budget, or the Scope of the Work or budget of Owner might be modified, as elected by Owner. If the Owner significantly increases or decreases the Owner's budget for the Cost of the Work, the Owner shall notify the Construction Manager and Architect. The Owner and the Architect, in consultation with the Construction Manager, shall thereafter agree to a corresponding change in the Project's scope and / or quality.

§ 4.1.4 **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 non-privileged 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. The Construction Manager shall be entitled to rely on the accuracy of information and services furnished by the Owner, except if Construction Manager discovers such information or services are inaccurate or incomplete, in which case Construction Manager shall promptly report the inaccuracy of incompleteness in writing to the Owner or Architect. Construction Manager shall exercise proper precautions relating to the safe performance of the Work.

§ 4.1.4.1 The Owner shall furnish tests, inspections, and reports, required by 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.

§ 4.1.4.2 The Owner shall furnish surveys describing physical characteristics, legal limitations and utility locations for the site of the Project, and a written 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 other 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 invert and depths. All the information on the survey shall be referenced to a Project benchmark.

§ 4.1.4.3 The Owner, when such services are required by the scope of the Project, shall furnish services of geotechnical engineers, which may include 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.

**§ 4.1.5** 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.

**§ 4.1.6** If the Owner identified a Sustainable Objective in Article 1, the Owner shall fulfill its responsibilities as required in the Sustainable Projects Exhibit.

#### **§ 4.2 Owner's Designated Representative**

The Owner shall identify a representative authorized to act on behalf of the Owner with respect to the Project, subject to any required approval by the Mayor or City Council of Owner identified in advance by Owner. The Owner's representative shall render decisions promptly and furnish information expeditiously, so as to avoid unreasonable delay in the services or Work of the Construction Manager. Except as otherwise provided in Section 4.2.1 of A201–2017, the Architect does not have such authority. The term "Owner" means the Owner or the Owner's authorized representative. Any directive or directions from anyone other than the Owner's designated representative, as designated in writing, shall not be deemed a directive or direction from the Owner.

**§ 4.2.1 Legal Requirements.** The Owner shall furnish such legal services connected with the Project as it may determine necessary or appropriate to meet the Owner's needs and interests.

#### **§ 4.3 Architect**

The Owner shall retain an Architect to provide services, duties and responsibilities as described in the agreement between Owner and Architect, including any additional services requested by the Construction Manager that are necessary for the Preconstruction and Construction Phase services under this Agreement. The Owner shall provide the Construction Manager with a copy of the scope of services in the executed agreement between the Owner and the Architect, and any further modifications to the Architect's scope of services in the agreement.

### **ARTICLE 5 COMPENSATION AND PAYMENTS FOR PRECONSTRUCTION PHASE SERVICES**

#### **§ 5.1 Compensation**

**§ 5.1.1** For the Construction Manager's Preconstruction Phase services described in Sections 3.1 and 3.2, the Owner shall compensate the Construction Manager as follows:

*(Insert amount of, or basis for, compensation and include a list of reimbursable cost items, as applicable.)*

The Owner shall pay the Construction Manager a lump sum of Fifteen Thousand Dollars (\$15,000) for Preconstruction Services based on a three (3) month Preconstruction Phase duration. The lump sum amount shall be equitably adjusted as agreed in writing by Contractor and Owner if the Preconstruction Phase exceeds three (3) months. Amounts paid for Preconstruction Services will be included in the Guaranteed Maximum Price.

*(Paragraphs deleted)*

*(Table deleted)*

*(Paragraphs deleted)*

#### **§ 5.2 Payments**

**§ 5.2.1** Unless otherwise agreed, payments for services shall be made monthly in proportion to services performed.

**§ 5.2.2** Payments are due and payable upon presentation of the Construction Manager's invoice. Amounts unpaid forty five (45) days after the invoice is received by Owner shall bear interest at the rate entered below, or in the absence thereof at the legal rate prevailing from time to time at the principal place of business of the Construction Manager.

*(Insert rate of monthly or annual interest agreed upon.)*

Five percent (5%) per annum, except if a rate is required by the Nebraska Prompt Pay Act, in which case the specified rate under the Act shall be used.

## ARTICLE 6 COMPENSATION FOR CONSTRUCTION PHASE SERVICES

### § 6.1 Contract Sum

§ 6.1.1 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 Article 7 plus the Construction Manager's Fee.

#### § 6.1.2 The Construction Manager's Fee:

*(State a lump sum, percentage of Cost of the Work or other provision for determining the Construction Manager's Fee.)*

In consideration of the performance of the Contract, the Owner agrees to pay the Construction Manager a Fee equal to two and one half percent (2.5%) of the Projected Cost of the Work used to establish the Guaranteed Maximum Price, reduced by all of the following to the extent included in the Guaranteed Maximum Price: sales, consumer, use or similar taxes with respect to which Owner is exempt or is entitled to a refund, or Construction Manager, its subcontractors and suppliers will not be required to pay.

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

For additive change orders, the Construction Manager's Fee shall be increased by an amount equal to two and one half percent (2.5%) of the Cost of the Work of the additional work. The Construction Manager's Fee shall not be reduced for deductive changes or if the actual Cost of the Work is less than the Projected Cost of the Work.

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

##### § 6.1.5 Rental rates for Construction Manager-owned equipment are discussed below.

##### § 6.1.6 Liquidated damages, if any:

*(Insert terms and conditions for liquidated damages, if any.)*

Specified in General Conditions

##### § 6.1.7 Other:

*(Insert provisions for bonus, cost savings or other incentives, if any, that might result in a change to the Contract Sum.)*

Construction Manager shall perform the concrete and rough and finish carpentry and such other selected trade packages approved in advance by Owner on a negotiated Guaranteed Maximum Price (under a separate Guaranteed Maximum Price within the overall Guaranteed Maximum Price) basis with a fee of seven and one half percent (7.5%) of the Cost of Work (as defined in Article 7 herein) for such trade packages. All such trade package work shall be treated as a Subcontract Cost for purposes of calculating Construction Manager's overall Fee.

If the final Contract Sum is less than the Guaranteed Maximum Price (as adjusted by change order), such savings shall accrue one hundred percent (100%) to the Owner.

### § 6.2 Guaranteed Maximum Price

The Construction Manager guarantees that the Contract Sum shall not exceed the Guaranteed Maximum Price set forth in the Guaranteed Maximum Price Amendment, as may be amended by subsequent Guaranteed Maximum Price amendments, and subject to additions and deductions by Change Order as provided in the Contract Documents. Costs which would cause the Guaranteed Maximum Price to be exceeded shall be paid by the Construction Manager without reimbursement or additional compensation by the Owner. If the final Contract Sum is less than the Guaranteed Maximum Price (as adjusted by change order), such savings shall accrue and be realized one hundred percent (100%) to the sole benefit of Owner.

### § 6.3 Changes in the Work

§ 6.3.1 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 equitable adjustment in the Contract Time as a result of changes in the Work.

**§ 6.3.1.1** The Architect and Owner may order minor changes in the Work as provided in Article 7 of AIA Document A201–2017, General Conditions of the Contract for Construction.

**§ 6.3.2** Adjustments to the Guaranteed Maximum Price on account of changes in the Work subsequent to the execution of the Guaranteed Maximum Price Amendment may be determined by any of the methods listed in Article 7 of the General Conditions.

**§ 6.3.3** Adjustments to subcontracts awarded on the basis of a stipulated sum shall be determined in accordance with Article 7 of A201–2017, as it refers to "cost" and "fee," and not by Articles 6 and 7 of this Agreement. Adjustments to subcontracts awarded with the Owner's prior written consent on the basis of cost plus a fee shall be calculated in accordance with the terms of those subcontracts.

**§ 6.3.4** In calculating adjustments to the Guaranteed Maximum Price, the terms "cost" and "costs" as used in Article 7 of AIA Document A201–2017 shall mean the Cost of the Work as defined in Article 7 of this Agreement and the term "fee" shall mean the Construction Manager's Fee as defined in Section 6.1.2 of this Agreement.

**§ 6.3.5** If no specific provision is made in Section 6.1.3 for adjustment of the Construction Manager's Fee in the case of changes in the Work, or if the extent of such changes is such, in the aggregate, that application of the adjustment provisions of Section 6.1.3 will cause substantial inequity to the Owner or Construction Manager, the Construction Manager's Fee shall be equitably adjusted on the same basis that was used to establish the Fee for the original Work, and the Guaranteed Maximum Price shall be adjusted accordingly.

## ARTICLE 7 COST OF THE WORK FOR CONSTRUCTION PHASE

### § 7.1 Costs to Be Reimbursed

**§ 7.1.1** The term Cost of the Work shall mean costs necessarily incurred by the Construction Manager in the proper performance of the Work and at rates not higher than those that the Construction Manager customarily pays at the place of the Project. The Cost of the Work shall include only the items set forth in Sections 7.1 through 7.7.

**§ 7.1.2** Where, pursuant to the Contract Documents, any cost is subject to the Owner's prior approval, the Construction Manager shall obtain such approval in writing prior to incurring the cost.

**§ 7.1.3** Costs shall be at rates set forth in this Article and if not specifically set forth herein then at rates not higher than the standard rates paid at the place of the Project, except with prior approval of the Owner.

### § 7.2 Labor Costs

**§ 7.2.1** Wages or salaries of construction workers directly employed by the Construction Manager to perform the construction of the Work at the site or, with the Owner's prior approval, at off-site workshops.

**§ 7.2.2** Wages or salaries of the Construction Manager's supervisory and administrative personnel, including staffing and support cost of Project Administration, Construction Operations, Purchasing, Billings and Payables staff assigned to the Project, for that portion of their time attributable to the Work, at the Personnel Rates set forth in Exhibit B.

*(Paragraphs deleted)*

**§ 7.2.3** Wages and salaries of the Construction Manager's supervisory or administrative personnel engaged at factories, workshops or while traveling, in expediting the production or transportation of materials or equipment required for the Work, but only for that portion of their time required for the Work.

**§ 7.2.4** Costs paid or incurred by the Construction Manager, as required by law or collective bargaining agreements, for taxes, insurance, contributions, assessments and benefits and, for personnel not covered by collective bargaining agreements, customary benefits such as sick leave, medical and health benefits, insurance, holidays, vacations and pensions, provided such costs are based on wages and salaries included in the Cost of the Work under Sections 7.2.1 through 7.2.3.

**§ 7.2.5** The Personnel Rates set forth in Exhibit B are the hourly rates current as of the date of the Agreement and will be adjusted periodically. Any changes to such rates shall be subject to approval of Owner in its reasonable discretion and shall not change more than once in any year.

### § 7.3 Subcontract Costs

Payments made by the Construction Manager to Subcontractors and consultants in accordance with the requirements of the agreements and this Agreement. Any Subcontractors under a cost-plus arrangement each shall provide its wage rate schedule. Construction Manager shall provide Owner notice of any changes to such schedule within ten days of the date Construction Manager first becomes aware of such changes, including changes for any union rate adjustments.

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

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

§ 7.4.2 Costs of materials described in the preceding Section 7.4.1 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 Work.

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

§ 7.5.1 Costs of transportation, storage, installation, dismantling, maintenance, 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.

§ 7.5.2 Rental charges for temporary facilities, machinery, equipment, and hand tools not customarily owned by construction workers that are provided by the Construction Manager and used at the Project site, and the costs of transportation, installation, dismantling, minor repairs, and removal of such temporary facilities, machinery, equipment, and hand tools at the rental charges consistent with those prevailing in the area. Rental charges for vehicles operated by employees of Construction Manager for that portion of time attributable to the Project, whether rented from Construction Manager or others, and costs of minor repairs, maintenance, oil and fuel. Rates and quantities of equipment owned by the Construction Manager, or a related party as defined in Section 7.8, shall be subject to Construction Manager's rate schedule attached hereto as Exhibit \_\_\_\_ *[If applicable, identify, mark, reference in Article 15, and attach exhibit as appropriate.]* The rental rate of any such equipment may not exceed ninety percent (90%) of the local market rate of any comparable item. All rental equipment shall be delivered to the Project site in good operating condition.

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

§ 7.5.4 Costs of the Construction Manager's site office, including general office equipment and supplies.

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

### § 7.6 Miscellaneous Costs

§ 7.6.1 Amounts for (1) Construction Manager's insurance coverage program, including, but not limited to, General Liability Insurance and other insurance at the rate of one and nine hundredths percent (1.09%) of the Contract Sum for coverage of Construction Manager and enrolled contractors (as defined in the CIP Manual); (2) Construction Manager's Payment and Performance Bonds at the rate of eight tenths of one percent (0.8%) of the Contract Sum, if required; (3) Builders' Risk insurance at the rate of four tenths of one percent (0.4%) of the Contract Sum and deductibles incurred for Builders' Risk claims, if applicable; and (4) Construction Manager's subcontractor default program at the rate of one and five hundredths percent (1.05%) of the value of the subcontract and material agreements.

*(Paragraphs deleted)*

§ 7.6.2 Sales, use, or similar taxes, imposed by a governmental authority, that are related to the Work and for which the Construction Manager is liable, excluding any such taxes from which the Owner is exempt or is entitled to a refund, or which Construction Manager or its subcontractors, as purchasing agent(s) of the Owner, will not be required to pay.

§ 7.6.3 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.

**§ 7.6.4** Fees of laboratories for tests required by the Contract Documents; except those related to defective or nonconforming Work for which reimbursement is excluded under Article 13 of the General Conditions or by other provisions of the Contract Documents, and which do not fall within the scope of Section 7.7.3.

**§ 7.6.5** Royalties and license fees paid for the use of a particular design, process, or product, required by the Contract Documents.

**§ 7.6.5.1** The cost of defending suits or claims for infringement of patent rights arising from requirements of the Contract Documents, 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, unless the Construction Manager had reason to believe that the required design, process, or product was an infringement of a copyright or a patent, and the Construction Manager failed to promptly furnish such information to the Architect as required by Article 3 of AIA Document A201–2017. The costs of legal defenses, judgments, and settlements shall not be included in the Cost of the Work used to calculate the Construction Manager's Fee or subject to the Guaranteed Maximum Price.

**§ 7.6.6** Costs for communications services, electronic equipment, and software, directly related to the Work, including web-based collaboration tools for distributing Project information, as disclosed by Construction Manager to Owner.

**§ 7.6.7** Costs of document reproductions and delivery charges.

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

**§ 7.6.9** 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.

**§ 7.6.10** Expenses incurred in accordance with the Construction Manager's standard written personnel policy for relocation and temporary living allowances of the Construction Manager's personnel required for the Work, with the Owner's prior approval.

**§ 7.6.11** That portion of the reasonable expenses of the Construction Manager's supervisory or administrative personnel incurred while traveling outside the metropolitan area in which the Project is located in discharge of duties connected with the Work, subject to Owner's prior written approval of the necessity, means and cost of such travel.

## **§ 7.7 Other Costs and Emergencies**

**§ 7.7.1** Other costs incurred in the performance of the Work, with the Owner's prior approval.

**§ 7.7.2** 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 Article 10 of AIA Document A201–2017, unless caused by negligence of the Construction Manager.

**§ 7.7.3** Costs of repairing or correcting damaged or nonconforming Work executed by the Construction Manager or Construction Manager's Subcontractors, or suppliers, provided that such damaged or nonconforming Work was not caused by the negligence of, or failure to fulfill a specific responsibility by, the Construction Manager, and only to the extent that the cost of repair or correction is not recoverable by the Construction Manager from insurance.,

**§ 7.7.4** The costs described in Sections 7.1 through 7.7 shall be included in the Cost of the Work, notwithstanding any provision of AIA Document A201–2017 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 Section 7.9.

**§ 7.7.5** The costs charged against the Contingency.

## **§ 7.8 Related Party Transactions**

**§ 7.8.1** For purposes of this Agreement, the term "related party" shall mean (1) a parent, subsidiary, affiliate, or other entity having common ownership of, or sharing common management with, the Construction Manager; (2) any entity in

which any stockholder or other owner in, or management employee of, the Construction Manager holds an equity interest in excess of ten percent (10%) in the aggregate; (3) any entity which has the right to control the business or affairs of the Construction Manager, or is controlled by the Construction Manager; or (4) any person, or any member of the immediate family of any person, who has the right to control the business or affairs of the Construction Manager.

*(Paragraph deleted)*

#### **§ 7.9 Costs Not To Be Reimbursed**

##### **§ 7.9.1 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 7.2, or as may be provided in Article 14;
- .2 Bonuses, profit sharing, incentive compensation, and any other discretionary payments, paid to anyone hired by the Construction Manager or paid to any Subcontractor or vendor, unless the Owner has provided prior approval;
- .3 Expenses of the Construction Manager's principal office and offices other than the site office;
- .4 Overhead and general expenses, except as may be expressly included in Sections 7.1 to 7.7;
- .5 The Construction Manager's capital expenses, including interest on the Construction Manager's capital employed for the Work;
- .6 Except as provided in Section 7.7.3 of this Agreement, costs due to the negligence of, or failure to fulfill a specific responsibility of the Contract by, the Construction Manager, or any Subcontractors, or suppliers, or anyone directly or indirectly employed by any of them or for whose acts any of them may be liable;
- .7 Any cost not specifically and expressly described in Sections 7.1 to 7.7; and
- .8 Costs, other than costs included in Change Orders approved by the Owner, that would cause the Guaranteed Maximum Price to be exceeded.
- .9 Legal expenses of any kind including the cost of defending suits or claims for infringement of patent rights arising from such requirement by the Contract Documents; payment made in accordance with legal judgments against the Construction Manager resulting from such suits or claims and payments of settlements, except to the extent allowed as a Cost of Work.
- .10 Cost in repairing and correcting work improperly executed by Construction Manager or anyone for whom Construction Manager is responsible, except to the extent allowed as a Cost of Work.

*(Paragraph deleted)*

- .11 [omitted].
- .12 Costs which exceed the Guaranteed Maximum Price.

.13 Sales, use or similar taxes normally imposed by a governmental authority that are related to the Work but for which the Owner is exempt from paying or Construction Manager or its subcontractors, as purchasing agent(s) of the Owner, are not required to pay.

#### **ARTICLE 8 DISCOUNTS, REBATES, AND REFUNDS**

**§ 8.1** Cash discounts obtained on payments made by the Construction Manager shall accrue to the Owner if (1) before making the payment, the Construction Manager included the amount to be paid, less such discount, 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 (other than (i) those from Construction Manager's related parties or (ii) incentive payments made to Construction Manager through Construction Manager's credit agreements), and the Construction Manager shall make provisions so that they can be obtained.

**§ 8.2** Amounts that accrue to the Owner in accordance with the provisions of Section 8.1 shall be credited to the Owner as a deduction from the Cost of the Work.

#### **ARTICLE 9 SUBCONTRACTS AND OTHER AGREEMENTS**

**§ 9.1** Those portions of the Work that the Construction Manager does not customarily perform with the Construction Manager's own personnel shall be performed under subcontracts or other appropriate agreements with the Construction Manager. The Owner may designate specific persons from whom, or entities from which, the Construction Manager shall obtain bids. The Construction Manager shall obtain bids from Subcontractors, and from suppliers of materials or equipment fabricated especially for the Work, who are qualified to perform that portion of the Work in accordance with the requirements of the Contract Documents and Construction Manager's subcontracting standards. The Construction Manager shall quantify and qualify each bid received and deliver such bids to the Architect and Owner with an indication

as to which bids the Construction Manager intends to accept. The Owner then has the right to review the Construction Manager's list of proposed subcontractors and suppliers in consultation with the Architect and, subject to Section 9.1.1, to approve or object to any subcontractor or supplier. Any advice of the Architect, or approval or objection by the Owner, shall not relieve the Construction Manager of its responsibility to perform the Work in accordance with the Contract Documents. The Construction Manager shall not be required to contract with anyone to whom the Construction Manager has reasonable objection. If the Construction Manager recommends a specific bidder that may be considered a "related party" defined in Section 7.8, the Construction Manager shall include with the recommendation to Owner notice and description of such relationship and the nature of the contemplated transaction.

**§ 9.1.1** When a specific subcontractor or supplier (1) is recommended to the Owner by the Construction Manager; (2) is qualified to perform that portion of the Work; and (3) has submitted a bid that conforms to the requirements of the Contract Documents without reservations or exceptions, but the Owner requires that another bid be accepted, then the Construction Manager may require that a Change Order be issued to adjust the Guaranteed Maximum Price by the difference between the bid of the person or entity recommended to the Owner by the Construction Manager and the amount of the subcontract or other agreement actually signed with the person or entity designated by the Owner.

**§ 9.1.2** If the total amount of all accepted Subcontractor and supplier bids is less than the total estimated for all Subcontractor and supplier bids contained in the Projected Costs of the Work within the GMP Amendment, based upon one hundred percent (100%) Construction Documents, the aggregate difference will be incorporated into the Contingency.

**§ 9.2** Subcontracts or other agreements shall conform to the applicable payment provisions of this Agreement, and shall not be awarded on the basis of cost plus a fee without the Owner's prior written approval. If a subcontract is awarded on the basis of cost plus a fee, the Construction Manager shall provide in the subcontract for the Owner to receive the same audit rights with regard to the Subcontractor as the Owner receives with regard to the Construction Manager in Article 10.

## **ARTICLE 10 ACCOUNTING RECORDS**

The Construction Manager shall and keep full and detailed records and accounts related to the Cost of the Work, and exercise such controls, as may be necessary for proper financial management under this Contract and to substantiate all costs incurred. The accounting and control systems shall be satisfactory to the Owner. The Owner and the Owner's auditors, upon reasonable request in their sole discretion, 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, job cost reports, correspondence, instructions, drawings, receipts, subcontracts, Subcontractor's proposals, Subcontractor's invoices, purchase orders, vouchers, memoranda, and other data relating to this Contract. Failure to request or exercise any such access, audit, or copy rights shall not constitute a waiver of any rights or remedies of Owner. The Construction Manager shall preserve these records for a period of three years after final payment, or for such longer period as may be required by law.

## **ARTICLE 11 PAYMENTS FOR CONSTRUCTION PHASE SERVICES**

### **§ 11.1 Progress Payments**

**§ 11.1.1** Based upon Applications for Payment submitted to the Architect by the Construction Manager, and Certificates for Payment issued by the Architect, the Owner shall make progress payments on account of the Contract Sum accurately reflecting properly executed Work, to the Construction Manager, as provided below and elsewhere in the Contract Documents. Applications for payment shall be submitted on AIA Documents G702 and G703.

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

**§ 11.1.3** Provided that an Application for Payment is received by the Architect not later than fourteen days before the third Tuesday of a month, the Architect shall certify payment to the Owner not less than ten days before the third Tuesday of the month, and the Owner shall make payment of the amount certified to the Construction Manager not later than fourteen days after the third Tuesday of the month. If an Application for Payment is received by the Architect after the applicable date fixed above, payment of the amount certified shall be made by the Owner not later than forty five days after the Architect receives the Application for Payment and Owner receives the certification.

**§ 11.1.4** With each Application for Payment, the Construction Manager shall submit reasonable evidence required by the Owner or Architect to demonstrate that payments 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, plus payrolls for the period covered by the present Application for Payment, less that portion of the progress payments attributable to the Construction Manager's Fee.

**§ 11.1.5** 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: (1) the various portions of the Work; (2) any contingency for costs that are included in the Guaranteed Maximum Price but not otherwise allocated to another line item or included in a Change Order; and (3) the Construction Manager's Fee.

**§ 11.1.5.1** The schedule of values shall be prepared in such form and supported by such data to substantiate its accuracy as the Architect or Owner may require. The schedule of values shall be used as a basis for reviewing the Construction Manager's Applications for Payment.

**§ 11.1.5.2** The allocation of the Guaranteed Maximum Price under this Section 11.1.5 shall not constitute a separate guaranteed maximum price for the Cost of the Work of each individual line item in the schedule of values.

**§ 11.1.5.3** When the Construction Manager allocates costs from a contingency to another line item in the schedule of values, the Construction Manager shall submit supporting documentation to the Architect.

**§ 11.1.6** 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 percentage of that portion of the Work which has actually been completed.

**§ 11.1.7** In accordance with AIA Document A201–2017 and subject to other provisions of the Contract Documents, the amount of each progress payment shall be computed as follows:

**§ 11.1.7.1** The amount of each progress payment shall first include:

- .1 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 most recent schedule of values;
- .2 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 completed construction or, if approved in writing in advance by the Owner, suitably stored off the site at a location agreed upon in writing;
- .3 That portion of Construction Change Directives that the Architect determines, in the Architect's professional judgment, to be reasonably justified; and
- .4 The Construction Manager's Fee, computed upon the Cost of the Work described in the preceding Sections 11.1.7.1.1 and 11.1.7.1.2 at the rate stated in Section 6.1.2 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 included in Sections 11.1.7.1.1 and 11.1.7.1.2 bears to a reasonable estimate of the probable Cost of the Work upon its completion.

**§ 11.1.7.2** The amount of each progress payment shall then be reduced by:

- .1 The aggregate of any amounts previously paid by the Owner;
- .2 The amount, if any, for Work that remains uncorrected and for which the Architect has previously withheld a Certificate for Payment as provided in Article 9 of AIA Document A201–2017;
- .3 Any amount for which the Construction Manager does not intend to pay a Subcontractor or material supplier, unless the Work has been performed by others the Construction Manager intends to pay;
- .4 For Work performed or defects discovered since the last payment application, any amount for which the Architect may withhold payment, or nullify a Certificate of Payment in whole or in part, as provided in Article 9 of AIA Document A201–2017;
- .5 The shortfall, if any, indicated by the Construction Manager in the documentation required by Section 11.1.4 to substantiate prior Applications for Payment, or resulting from errors subsequently discovered by the Owner's auditors in such documentation; and
- .6 Retainage withheld pursuant to Section 11.1.8.

**§ 11.1.8 Retainage**

**§ 11.1.8.1** For each progress payment made prior to Substantial Completion of the Work, the Owner may withhold the following amount, as retainage, from the payment otherwise due:

*(Insert a percentage or amount to be withheld as retainage from each Application for Payment. The amount of retainage may be limited by governing law.)*

Ten percent (10%) until the Project is fifty percent (50%) complete, then five percent (5%) until Substantial Completion, except with the Owner's prior approval.

**§ 11.1.8.1.1** The following items are not subject to retainage:

*(Insert any items not subject to the withholding of retainage, such as general conditions, insurance, etc.)*

Construction Manager's Fee, general requirements and general conditions costs, and fee

**§ 11.1.8.2** Reduction or limitation of retainage, if any, shall be as follows:

*(If the retainage established in Section 11.1.8.1 is to be modified prior to Substantial Completion of the entire Work, insert provisions for such modification.)*

**§ 11.1.8.3** Except as set forth in this Section 11.1.8.3, upon Substantial Completion of the Work, the Construction Manager may submit an Application for Payment that includes the retainage withheld from prior Applications for Payment pursuant to this Section 11.1.8. The Application for Payment submitted at Substantial Completion shall not include retainage as follows:

*(Insert any other conditions for release of retainage, such as upon completion of the Owner's audit and reconciliation, upon Substantial Completion.)*

At Substantial Completion, all retainage shall be paid to Construction Manager, less an amount equal to one hundred fifty percent (150%) of the value of the incomplete punch list work.

**§ 11.1.9** If final completion of the Work is materially delayed through no fault of the Construction Manager, the Owner shall pay the Construction Manager any additional amounts in accordance with Article 9 of AIA Document A201-2017.

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

**§ 11.1.11** The Owner and the Construction Manager shall agree upon a mutually acceptable procedure for review and approval of payments to Subcontractors, and the percentage of retainage held on Subcontracts, and the Construction Manager shall execute subcontracts in accordance with those agreements.

**§ 11.1.12** 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 such action shall not be deemed to be a representation that (1) the Owner or Architect has made a detailed examination, audit, or arithmetic verification, of the documentation submitted in accordance with Section 11.1.4 or other supporting data; (2) that the Architect has made exhaustive or continuous on-site inspections; or (3) 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.

**§ 11.2 Final Payment**

**§ 11.2.1** Final payment, constituting the entire unpaid balance of the Contract Sum, shall be made by the Owner to the Construction Manager when

- .1 the Construction Manager has fully performed the Contract, except for the Construction Manager's responsibility to correct Work as provided in Article 12 of AIA Document A201-2017, 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 and has delivered all maintenance and operating instructions, schedules, guarantees and warranties, bonds, certificates of inspection, marked-up record documents, occupancy permits and other closeout submittals required by the Contract Documents;

- .3 a final Certificate for Payment has been issued by the Architect in accordance with Section 11.2.2.2, and if requested by Owner, the Owner has received the consent of Construction Manager's surety;
- .4 appropriate adjustments have been made for allowances, savings, liquidated damages and contingencies; and
- .5 Construction Manager has provided proof of payment and completed all other close-out requirements as described in Specifications or AIA Document A201–2017. In the case of Subcontractors or suppliers, acceptable proof of payment shall include final lien waivers. The sum of all such subcontractor and supplier outstanding amounts shall not be more than the total amount of retainage remaining to be paid on the Contract. All final lien waivers shall be certified by each Subcontractor, supplier, and the Construction Manager for an amount to cover the final contract value for the entire Project.

**§ 11.2.2** Within thirty (30) days of the Owner's receipt of the Construction Manager's final accounting for the Cost of the Work, the Owner shall conduct an audit of the Cost of the Work or notify the Architect that it will not conduct an audit.

**§ 11.2.2.1** If the Owner conducts an audit of the Cost of the Work, the Owner shall, within ten (10) days after completion of the audit, submit a written report based upon the auditors' findings to the Architect.

**§ 11.2.2.2** Within seven days after receipt of the written report described in Section 11.2.2.1, or receipt of notice that the Owner will not conduct an audit, and provided that the other conditions of Section 11.2.1 have been met, the Architect will either issue to the Owner a final Certificate for Payment 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 Article 9 of AIA Document A201–2017. The time periods stated in this Section 11.2.2 supersede those stated in Article 9 of AIA Document A201–2017. The Architect is not responsible for verifying the accuracy of the Construction Manager's final accounting.

**§ 11.2.2.3** If the Owner's auditors' report concludes that the Cost of the Work, as substantiated by the Construction Manager's final accounting, is less than claimed by the Construction Manager, the Construction Manager shall be entitled to request mediation of the disputed amount without seeking an initial decision pursuant to Article 15 of AIA Document A201–2017. Pending a final resolution of the disputed amount, the Owner shall pay the Construction Manager the amount certified in the Architect's final Certificate for Payment.

**§ 11.2.3** The Owner's final payment to the Construction Manager shall be made no later than 30 days after the issuance of the Architect's final Certificate for Payment.

**§ 11.2.4** If, subsequent to final payment, and at the Owner's request, the Construction Manager incurs costs, described in Sections 7.1 through 7.7, and not excluded by Section 7.9, to correct defective or nonconforming Work, the Owner shall reimburse the Construction Manager for such costs, and the Construction Manager's Fee applicable thereto, on the same basis as if such costs had been incurred prior to final payment, but not in excess of the Guaranteed Maximum Price. If adjustments to the Contract Sum are provided for in Section 6.1.7, the amount of those adjustments shall be recalculated, taking into account any reimbursements made pursuant to this Section 11.2.4 in determining the net amount to be paid by the Owner to the Construction Manager.

### **§ 11.3 Interest**

Payments due and unpaid under the Contract shall bear interest from the date payment is due at the rate stated below, or in the absence thereof, at the legal rate prevailing from time to time at the place where the Project is located.  
(Insert rate of interest agreed upon, if any.)

Five percent (5%) per annum

## **ARTICLE 12 DISPUTE RESOLUTION**

### **§ 12.1 Initial Decision Maker**

**§ 12.1.1** Any Claim between the Owner and Construction Manager shall be resolved in accordance with the provisions set forth in Article 15 of A201–2017. However, for Claims arising from or relating to the Construction Manager's Preconstruction Phase services, no decision by the Initial Decision Maker shall be required and Section 12.1.2 of this Agreement shall not apply.

**§ 12.1.2** The Architect will serve as the Initial Decision Maker pursuant to Article 15 of AIA Document A201–2017 for Claims arising from or relating to the Construction Manager's Construction Phase services, unless the parties appoint below another individual, not a party to the Agreement, to serve as the Initial Decision Maker.

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

**§ 12.2 Binding Dispute Resolution**

For any Claim not resolved, the method of binding dispute resolution shall be as follows:  
*(Check the appropriate box.)*

Arbitration pursuant to Article 15 of AIA Document A201–2017

Litigation in a court of competent jurisdiction

Other: *(Specify)*

If the Owner and Construction Manager do not select a method of binding dispute resolution, or do not subsequently agree in writing to a binding dispute resolution method other than litigation, Claims will be resolved by litigation in a court of competent jurisdiction.

**ARTICLE 13 TERMINATION OR SUSPENSION**

**§ 13.1 Termination Prior to Execution of the Guaranteed Maximum Price Amendment**

**§ 13.1.1** If the Owner and the Construction Manager do not reach an agreement on the Guaranteed Maximum Price, the Owner may terminate this Agreement upon not less than seven days' written notice to the Construction Manager, and the Construction Manager may terminate this Agreement, upon not less than seven days' written notice to the Owner.

**§ 13.1.2** In the event of termination of this Agreement pursuant to Section 13.1.1 before commencement of the Construction Phase and before execution of the Guaranteed Maximum Price Amendment, the Construction Manager shall be compensated for Preconstruction Phase services performed prior to receipt of a notice of termination and other costs authorized in writing, but shall not be otherwise compensated for demobilization or other costs, anticipated profit, indirect or consequential damages (including without limitation loss of business opportunity, unabsorbed overhead, bid preparation costs, loss of use, etc.) or any other losses, costs or expenses of the Construction Manager or any Subcontractors or suppliers.

**§ 13.1.3** If the Owner terminates the Contract pursuant to Section 13.1.1 after commencement of the Construction Phase but before execution of the Guaranteed Maximum Price Amendment, the Owner shall pay to the Construction Manager the amounts described in Section 14.4 of A201-2017.

*(Paragraphs deleted)*

**§ 13.2 Termination or Suspension Following Execution of the Guaranteed Maximum Price Amendment**

**§ 13.2.1 Termination**

Following execution of the Guaranteed Maximum Price Amendment and subject to applicable provisions of Sections 13.2.2 or 13.2.3 below, the Contract may be terminated by the Owner or the Construction Manager as provided in Article 14 of AIA Document A201–2017.

**§ 13.2.2 Termination by the Owner for Cause**

**§ 13.2.2.1** If the Owner terminates the Contract for cause as provided in Article 14 of AIA Document A201–2017, the amount, if any, to be paid to the Construction Manager under Article 14 of AIA Document A201–2017 shall not cause the Guaranteed Maximum Price to be exceeded, nor shall it exceed an amount calculated as follows:

- .1 Take the Cost of the Work properly completed by the Construction Manager to the date of termination;
- .2 Add the Construction Manager's Fee, computed upon the Cost of the Work properly completed to the date of termination at the rate stated in Section 6.1 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 upon its completion;
- .3 Subtract the aggregate of previous payments made by the Owner; and

.4 Subtract the costs and damages incurred, or to be incurred, by the Owner under Article 14 of AIA Document A201–2017.

**§ 13.2.2.2** The Owner shall also pay the Construction Manager fair compensation, by purchase, for any equipment owned by the Construction Manager that the Owner elects to retain and that is not otherwise included in the Cost of the Work under Section 13.2.2.1.1. 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 13, 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. Subcontracts, purchase orders and rental agreements entered into by the Construction Manager will contain provisions allowing for assignment to the Owner as described above.

**§ 13.2.3 Termination by the Owner for Convenience**

If the Owner terminates the Contract for convenience in accordance with Article 14 of AIA Document A201–2017, then the Owner shall pay the Construction Manager a termination fee as follows:

*(Insert the amount of or method for determining the fee, if any, payable to the Construction Manager following a termination for the Owner's convenience.)*

One percent of the remaining Guaranteed Maximum Price

**§ 13.3 Suspension**

The Work may be suspended by the Owner as provided in Article 14 of AIA Document A201–2017; in such case, the Guaranteed Maximum Price or Contract Time shall be adjusted as provided in Article 14 of AIA Document A201–2017, except that the term "profit" shall be understood to mean the Construction Manager's Fee as described in Sections 6.1 and 6.3.5 of this Agreement.

**ARTICLE 14 MISCELLANEOUS PROVISIONS**

**§ 14.1** Except as otherwise expressly provided in any Contract Documents, terms in this Agreement shall have the same meaning as those in A201–2017. Where reference is made in this Agreement to a provision of AIA Document A201–2017 or another Contract Document, the reference refers to that provision as amended or supplemented by other provisions of the Contract Documents.

**§ 14.2 Successors and Assigns**

**§ 14.2.1** The Owner and Construction Manager, respectively, bind themselves, their partners, successors, assigns and legal representatives to covenants, agreements, and obligations contained in the Contract Documents. Except as provided in Section 14.2.2 of this Agreement, and in Section 13.2.2 of A201–2017, neither party to the Contract shall assign the Contract as a whole without written consent of the other. If either party attempts to make an assignment without such consent, that party shall nevertheless remain legally responsible for all obligations under the Contract.

**§ 14.2.2** The Owner may, without consent of the Construction Manager, 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. The Construction Manager shall execute all consents reasonably required to facilitate the assignment.

**§ 14.3 Insurance and Bonds**

**§ 14.3.1 Preconstruction Phase**

The Construction Manager shall maintain the following insurance for the duration of the Preconstruction Services performed under this Agreement, as provided by insurers licensed to provide insurance in Nebraska and containing such terms and conditions as reasonably satisfactory to the City Engineer of Owner. If any of the requirements set forth below exceed the types and limits the Construction Manager normally maintains, the Owner shall reimburse the Construction Manager for any additional cost.

**§ 14.3.1.1** Commercial General Liability with policy limits of not less than one million dollars (\$1,000,000) for each occurrence and two million dollars (\$2,000,000) in the aggregate for bodily injury and property damage.

**§ 14.3.1.2** Automobile Liability covering vehicles owned, and non-owned vehicles used, by the Construction Manager with policy limits of not less than one million dollars (\$1,000,000) per accident for bodily injury, death of any person, and

property damage arising out of the ownership, maintenance and use of those motor vehicles, along with any other statutorily required automobile coverage.

**§ 14.3.1.3** The Construction Manager may achieve the required limits and coverage for Commercial General Liability and Automobile Liability through a combination of primary and excess or umbrella liability insurance, provided that such primary and excess or umbrella liability insurance policies result in the same or greater coverage as the coverages required under Sections 14.3.1.1 and 14.3.1.2, and in no event shall any excess or umbrella liability insurance provide narrower coverage than the primary policy. The excess policy shall not require the exhaustion of the underlying limits only through the actual payment by the underlying insurers.

**§ 14.3.1.4** Workers' Compensation at statutory limits and Employers Liability with policy limits not less than one million dollars (\$1,000,000) each accident, one million dollars (\$1,000,000) each employee, and one million dollars (\$1,000,000) policy limit.

**§ 14.3.1.5** Intentionally omitted.

**§ 14.3.1.6 Other Insurance**

*(List below any other insurance coverage to be provided by the Construction Manager and any applicable limits.)*

<b>Coverage</b>	<b>Limits</b>
<i>(Row deleted)</i>	
<b>§ 14.3.1.7 Additional Insured Obligations.</b>	To the fullest extent permitted by law, the Construction Manager shall cause the primary and excess or umbrella policies for Commercial General Liability and Automobile Liability to include the Owner as an additional insured for claims caused in whole or in part by the Construction Manager's negligent acts or omissions. The additional insured coverage shall be primary and non-contributory to any of the Owner's insurance policies and shall apply to both ongoing and completed operations.

**§ 14.3.1.8** The Construction Manager shall provide certificates of insurance to the Owner that evidence compliance with the requirements in this Section 14.3.1.

**§ 14.3.2 Construction Phase**

After execution of the Guaranteed Maximum Price Amendment, the Construction Manager shall purchase and maintain insurance as set forth in AIA Document A201-2017 and elsewhere in the Contract Documents.

**§ 14.3.2.1** The Construction Manager shall provide payment and performance bonds with a penal sum equal to the Guaranteed Maximum Price following execution of the Guaranteed Maximum Price Amendment.

*(Paragraphs deleted)*

**§ 14.5 Other Provisions**

**§ 14.5.1** The performance of construction phase services is contingent upon obtaining all necessary zoning and permits for the Project and written notice to proceed with the Work from the Owner to the Construction Manager.

**§ 14.5.2** The Owner, in order to take advantage of its tax exemption, shall provide the Construction Manager with a copy of its current Tax Exemption letter and shall execute and deliver to the Construction Manager an original Project Exemption Certificate for use by Construction Manager, contractors, subcontractors, and suppliers in the purchase of materials, equipment and other property for the Project. The sales and/or use tax saved by use of Owner's Tax Exemption will not be included in the Guaranteed Maximum Price established under this Agreement.

**§ 14.5.3** The Owner agrees to defend, indemnify, and hold harmless Construction Manager, subcontractors, and suppliers against any liability for sales tax, compensating use tax, interest, penalty, and attorney's fees incurred as a result of the failure to pay sales or use tax upon the value of material, equipment or other property purchased by Construction Manager, contractors, subcontractors, or suppliers in accordance with the procedure set forth in this Agreement. This indemnity shall survive the acceptance of final payment by Construction or other termination of the Agreement.

**§ 14.5.4 CONSTRUCTION MANAGER PAYMENT INSTRUCTIONS – DO NOT CHANGE.**

Owner shall make all payments to Construction Manager by check. Construction Manager shall provide Owner with payment instructions in writing on Construction Manager's letterhead after the parties execute this Agreement. Owner

acknowledges that Construction Manager does not change its bank routing or account numbers. Owner shall not accept or rely on emails or correspondence requesting changes to these payment instructions. The payment instructions provided by Construction Manager in accordance with this Section 14.5.4 may only be altered in a fully executed Change Order.

**§ 14.5.5 Early Notice to Proceed.** If Construction Manager's performance hereunder commenced with written consent of Owner prior to the date set forth in the GMP Amendment, the parties agree that all such performance as authorized in advance by Owner shall be governed by the terms and conditions of this Agreement.

**§14.5.6 Interpretation.** The Contract Documents have been carefully reviewed and negotiated by both parties at arm's length and they shall be given fair and reasonable interpretation in accordance with the words contained in them without any weight being given to whether any provisions might have been drafted by one party or its counsel. The Exhibits and Schedules attached hereto are made a part this Agreement. Whenever a provision of this Agreement uses the words "include" or "including" or words of similar meaning, the words shall not be construed so as to be limiting but shall be treated as illustrative.

**§ 14.5.10 Severability.** If any term or condition of the Contract Documents at any time is determined by a court of competent jurisdiction to be illegal, invalid, or unenforceable, the illegal, invalid, or unenforceable provision shall be deemed stricken and the remainder of the Contract Documents shall continue in full force and effect.

**§ 14.5.11 Classification of Workers.** Construction Manager and all Subcontractors and Sub-subcontractors performing any of the Work shall comply with all applicable provisions of the Nebraska Employee Classification Act (Neb.Rev.Stat. §§ 48-2901 et seq.). Not in limitation of the foregoing, Construction Manager and all Subcontractors and Sub-subcontractors shall properly classify all workers as either employees of Construction Manager, Subcontractor, or Sub-subcontractor, or as independent contractors according to applicable law, and shall treat them accordingly for purposes of workers' compensation insurance coverage, unemployment taxes, social security taxes, income tax withholding and any and all other payments or benefits incident to or affected by such status.

Construction Manager and all Subcontractors and Sub-subcontractors utilizing services of workers who are properly classified under applicable law as independent contractors, and not as employees, shall provide written notice to said workers of their status as independent contractors. Said notice shall include a provision advising said workers that they are not eligible for workers' compensation insurance coverage, unemployment taxes, social security taxes, income tax withholding or any other payments or benefits incident to or affected by such status, from Owner, Construction Manager, Subcontractor(s), or Sub-subcontractor(s). Copies of such notices shall be made available to Owner upon request. Construction Manager shall require all Subcontracts and Sub-subcontracts to include the agreement of Subcontractors and Sub-subcontractors to comply with this Section.

**§ 14.5.13 Completion of Affidavit.** Construction Manager agrees to complete and submit to Owner the affidavit required by Neb.Rev.Stat. § 48-2911, attesting that (1) each individual performing services for Construction Manager is properly classified under the Nebraska Employee Classification Act (Neb.Rev.Stat. §§ 48-2901 et seq.), (2) Construction Manager has completed a federal I-9 immigration form and has such form on file for each employee performing services, (3) Construction Manager has complied with Neb.Rev.Stat. § 4-114, (4) Construction Manager has no reasonable basis to believe that any individual performing services for Construction Manager is an undocumented worker, and (5) as of the time of the Contract, Construction Manager is not barred from contracting with the state or any political subdivision pursuant to Neb.Rev.Stat. § 48-2912. Construction Manager agrees to require that each Subcontractor engaged to perform services under this Agreement to also complete and submit to Owner the affidavit required by Neb.Rev.Stat. § 48-2911.

**§ 14.5.15** Notwithstanding any other provision of this Contract:

- .1 Construction Manager shall not be entitled to any Construction Fee, self-performed fee, if any, or any other fee, with respect to any sales, consumer, use or similar taxes that are not properly collected, collectible, or payable for any reason whatsoever (including as a result of Owner's tax-exempt status as a governmental or political subdivision), or that if initially collected are refundable;
- .2 no such uncollected, uncollectible non-payable, or refundable sales, consumer, use or similar taxes shall be included in the Cost of the Work or the Projected Cost of the Work; and
- .3 shared savings provisions of this Agreement, if any, shall not apply to any savings that result from any uncollected, uncollectible non-payable, or refunded sales, consumer, use or similar taxes, and the full amount of any such savings shall be the exclusive property and solely accrue to the benefit of the Owner.

## ARTICLE 15 SCOPE OF THE AGREEMENT

§ 15.1 This Agreement 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 Agreement may be amended only by written instrument signed by both Owner and Construction Manager.

§ 15.2 The following documents comprise the Agreement:

- .1 AIA Document A133™-2019, 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

- .2 AIA Document

*(Paragraphs deleted)*

A201™-2017, Exhibit A, General Conditions of the Contract for Construction, as modified ("General Conditions", "General Conditions of the Contract for Construction

*(Paragraphs deleted)*

", "AIA Document A201-2017", "AIA Document A201" or "A201-2017"). The provisions of this document (AIA Document A133-2019, as modified) control over any contrary or inconsistent provisions of such General Conditions.

*(Table deleted)*

- .3 Other documents, if any, listed below:

Exhibit B – Personnel Rates

Exhibit \_\_\_\_\_ - *[if applicable, identify, mark and attach any other exhibits, as appropriate, such as equipment rates, labor rate, or special procurement conditions]*

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

**CITY OF LA VISTA, NEBRASKA**

**J.E. DUNN CONSTRUCTION COMPANY**

**OWNER** *(Signature)*

*(Printed name and title)*

**CONSTRUCTION MANAGER** *(Signature)*

*(Printed name and title)*

Init.



## **General Conditions of the Contract for Construction**

for the following PROJECT:

(Name and location or address)

Central Park Pavilion and Site Improvements  
9302 City Centre Drive  
La Vista, Nebraska 68128

**THE OWNER:**

(Name and address)

City of La Vista, Nebraska  
8116 Park View Boulevard  
La Vista, Nebraska 68128-2198

**THE ARCHITECT:**

(Name and address)

RDG Planning & Design  
1302 Howard Street  
Omaha, Nebraska 68102

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**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. A vertical line in the left margin of this document indicates where the author has added necessary information and where the author has added to or deleted from the original AIA text.

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

For guidance in modifying this document to include supplementary conditions, see AIA Document A503™, Guide for Supplementary Conditions.

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## ARTICLE 1 GENERAL PROVISIONS

### § 1.1 Basic Definitions

#### § 1.1.1 The Contract Documents

The Contract Documents, as may be enumerated in the AIA Document A101-2017, Standard Form of Agreement Between Owner and Contractor, AIA Document A133-2019, Standard Form of Agreement Between Owner and Construction Manager as Constructor, or other applicable agreement executed by the Owner and Contractor (hereinafter the Agreement), shall consist of the Agreement, Conditions of the Contract (General and Supplementary Conditions, as revised, and other Conditions), Drawings, Specifications, Addenda issued prior to execution of the Contract, other documents listed in the Agreement, and Modifications issued after execution of the Contract. A Modification is (1) a written amendment to the Contract signed by both parties, (2) a Change Order, (3) a Construction Change Directive, or (4) a written order for a minor change in the Work issued by the Architect. Unless specifically enumerated in the Agreement, the Contract Documents do not include the advertisement or invitation to bid, Instructions to Bidders, sample forms, other information furnished by the Owner in anticipation of receiving bids or proposals, the Contractor's bid or proposal, or portions of Addenda relating to bidding or proposal requirements. The Contract Documents also include the bidding or proposal requirements (Notice, Advertisement, Invitation to Bid, or Request for Proposal, sample forms, portions of Addenda relating to bidding or proposal requirements or the Contract Documents, other information furnished by Owner in anticipation of receiving bids or proposals, and Instruction to Bidders or those submitting proposals). Unless specifically enumerated in the Agreement, the Contract Documents do not include the Contractor's Bid.

#### § 1.1.2 The Contract

The Contract Documents memorialize 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. Where these General Conditions of the Contract are attached to an Agreement where the Contractor is a construction manager performing preconstruction and construction related services, then all references herein to the "Contractor" shall be deemed to mean the "Construction Manager" as that term is defined in the Agreement.

#### § 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 shall also include all labor, supervision, materials, fixtures, special facilities, built-ins, equipment, tools, supplies, taxes, permits (including occupancy permits, if required), building and occupancy permit related inspections, and other property and services necessary to timely and properly produce all work and completed construction required or reasonably inferable from the Contract Documents. Contractor is responsible for obtaining and reviewing the provisions of all of 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.

### § 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. Instruments of Service may include, without limitation, studies, surveys, models, sketches, drawings, specifications, and other similar materials.

### § 1.1.8 Initial Decision Maker

The Initial Decision Maker is the person identified in the Agreement to render recommendations on Claims in accordance with Section 15.2.

### § 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, 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.

**.1** In the event of conflict, inconsistency, or ambiguity between, in or among any provisions of the Contract Documents after applying the controlling order of precedence described in the list described below ("Order of Precedence"), then the more specific provision will take precedence over the less specific.

Order of Precedence: In the event of conflict, inconsistency, or ambiguity between, in or among the Contract Documents, the provisions of the Contract Documents will be controlling in accordance with the following descending (highest to lowest) order of precedence:

1. Change Orders (as to changes in Contract Time and Contract Sum only)
2. The Agreement (together with GMP Amendment and any additional amendments thereto, the later dated taking precedence)
3. Addenda (with those of most current date taking precedence over those of earlier date)
4. These General Conditions
5. The Drawings and Specifications
  - a) Detailed technical specifications
  - b) Detailed drawings
1. with figured dimensions
2. with scaled measurements
  - c) General technical specifications
  - d) General drawings
1. with figured dimensions
2. with scaled measurements

On all drawings, figures take precedence over scaled dimensions. Scaling of dimensions, if done, is done at the Contractor's own risk.

**.2** Contractor is solely responsible for coordination of bidding and scope of Work of subcontractors and shall assume full responsibility for complete coordination of subcontractors.

**§ 1.2.1.1** The invalidity of any provision of the Contract Documents shall not invalidate the Contract or its remaining provisions. If it is determined that any provision of the Contract Documents violates any law, or is otherwise invalid or unenforceable, then that provision shall be construed or revised to the extent permitted by law and necessary to make that provision legal and enforceable and give effect to the parties' intentions and purposes in executing the Contract.

**§ 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. No attempt has been made in the Specifications to segregate Work to be performed by any trade, Subcontract, or portion of the Project under any one specification. Any segregation between trade or craft jurisdiction limits, and the establishment of Subcontract limits will be solely a matter of Agreement between the Contractor, its employees, and its Subcontractors.

**§ 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. In the interest of conciseness, certain sentences, statements, and clauses omit any form of the verb "shall," normally expressed in verb phrase with verbs such as "furnish", "install", "provide", "perform", "construct", "erect", "comply", "apply", "submit", etc. Any such sentences, statements, and clauses shall be interpreted to include the applicable form of the phrase "the Contractor shall", and requirements described therein shall be interpreted as mandatory elements of the Contract.

### § 1.5 Ownership and Use of Drawings, Specifications, and Other Instruments of Service

**§ 1.5.1** The Architect and the Architect's consultants shall be deemed the authors and owners of their respective Instruments of Service, including the Drawings and Specifications, and retain all common law, statutory, and other reserved rights in their Instruments of Service, including copyrights. The Contractor, Subcontractors, Sub-subcontractors, and suppliers shall not own or claim a copyright in the Instruments of Service. Submittal or distribution to meet official regulatory requirements or for other purposes in connection with the Project is not to be construed as publication in derogation of the Architect's or Architect's consultants' reserved rights.

**§ 1.5.2** The Contractor, Subcontractors, Sub-subcontractors, and suppliers are authorized to use and reproduce the Instruments of Service provided to them, subject to any protocols established pursuant to Section 1.7 solely and exclusively for execution of the Work. All copies made under this authorization shall bear the copyright notice, if any, shown on the Instruments of Service. The Contractor, Subcontractors, Sub-subcontractors, and suppliers may not use the Instruments of Service on other projects or for additions to the Project outside the scope of the Work without the specific written consent of the Owner, Architect, and the Architect's consultants.

**§ 1.5.3** Shop Drawings or BIM models created specifically for the Project by Contractor, Subcontractors, Sub-subcontractors, or suppliers will be made available in electronic format to Owner. Owner, at its own risk, may utilize such drawings or models as Owner deems desirable.

### § 1.6 Notice

Where the Contract Documents require one party to notify or give notice to the other party, such notice shall be provided in writing to the designated representative of the party to whom the notice is addressed at its address set forth in the Agreement (or at such other address as shall be specified by like notice) and shall be deemed to have been duly served if delivered in person, by mail (certified mail, return receipt requested, prepaid), by nationally recognized overnight commercial courier, or by electronic transmission (with delivery-receipt confirmation of transmission

or other confirmation of receipt). Notices shall be deemed to have been duly given as follows: (i) if delivered by hand or certified mail, on the date of delivery; (ii) if delivered by overnight courier, on the next Business Day after the notice is deposited with the overnight courier; or (iii) if delivered by electronic transmission, on the date that the electronic transmission was sent, provided that the sending party receives a delivery-receipt confirmation of transmission or other confirmation of receipt, regardless of normal business hours of recipient. If notice is tendered pursuant to this Agreement and is refused by the intended recipient, the notice shall nonetheless be considered to have been received and shall be effective.

### § 1.7 Digital Data Use, Transmission and Reliance

If the parties will transmit and use Instruments of Service, Shop Drawings, building information models, or any other information or documentation in digital form, they shall endeavor to establish necessary protocols governing such transmission or use, unless already specified in the  
*(Paragraph Deleted)*

Agreement or Contract Documents.

Any use of, or reliance on, all or any portion of Instruments of Service, Shop Drawings, building information models, or any other information or documentation without agreement as to protocols governing such use or reliance

shall be at the using or relying party's sole risk and without liability to the other party, its contractors, or consultants, except in cases of negligent acts or omissions of such other party, its contractors, or consultants

## 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. The Owner shall designate in writing a representative who shall have express authority to bind the Owner with respect to all matters requiring the Owner's approval or authorization, except as required by City Ordinance and or Policy. Except as otherwise provided in Section 4.2.1, the Architect does not have such authority. The term "Owner" means the Owner or the Owner's authorized representative.

**§ 2.1.2** The Owner shall furnish to the Contractor, within a reasonable time after receipt of a written request, information in Owner's possession necessary and relevant for the Contractor to evaluate, give notice of, or enforce mechanic's lien rights. Such information shall include a correct statement of the record legal title to the property on which the Project is located, usually referred to as the site, and the Owner's interest therein.

### § 2.2 Evidence of the Owner's Financial Arrangements

**§ 2.2.1** The Owner by executing the Agreement represents that it has the financial capacity or has made financial arrangements to fulfill its obligation under the Contract. . Upon written request by the Contractor, the Owner shall furnish to the Contractor reasonable evidence of such financial capacity or financial arrangements. The Contractor shall have no obligation to commence the Work until the Owner provides such evidence. If commencement of the Work is delayed under this Section 2.2.1, the Contract Time shall be extended appropriately.

The phrase "reasonable evidence", as used in Section 2.2, shall mean, the following:

- .1 If paying for the Project in whole or in part through cash, adopted City Budget appropriating the necessary funds for the Project.
- .2 If financing the Project in whole or in part through bonds or any kind of indebtedness the following or equivalent: Final official statement, bond purchase agreement, and/or confirmation of receipt.

**§ 2.2.2** Following commencement of the construction phase of the Work and upon written request by the Contractor, the Owner shall furnish to the Contractor information as described in Section 2.2.1 -only if (1) the Owner fails to make payments of undisputed amounts to the Contractor as the Contract Documents require; (2) due to material change in circumstances of Owner, the Contractor identifies in writing a reasonable concern regarding the Owner's ability to make payment when due; or (3) a change in the Work materially changes the Contract Sum. If the Owner fails to provide such evidence, as required, within thirty days of the Contractor's request, the Contractor may immediately stop the Work and, in that event, shall notify the Owner that the Work has stopped. However, if the request is made because a change in the Work materially changes the Contract Sum under (3) above and the portion of the Work affected by the change is separate and discrete from all other Work, the Contractor may immediately stop only that portion of the Work affected by the change until reasonable evidence is provided. If the Work is stopped under this Section 2.2.2, the Contract Time shall be extended appropriately and the Contract Sum shall be equitably adjusted for any changes by the amount of the Contractor's reasonable costs caused by shutdown, delay and start-up, plus interest as provided in the Contract Documents.

### § 2.2.3

Where the Owner has designated information furnished under this Section 2.2 as "confidential," the Contractor shall keep the information confidential and shall not disclose it to any other person. However, the Contractor may disclose "confidential" information, after seven (7) days' notice to the Owner, where disclosure is required by law, including a subpoena or other form of compulsory legal process issued by a court or governmental entity, or by court or arbitrator(s) order. The Contractor may also disclose "confidential" information to its employees, consultants, lenders, sureties, Subcontractors and their employees, Sub-subcontractors, and others who need to know the content of such information solely and exclusively for the Project and who agree to maintain the confidentiality of such information.

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

**§ 2.3.1** 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.

**§ 2.3.2** The Owner shall retain an architect lawfully licensed to practice architecture, or an entity lawfully practicing architecture, in the jurisdiction where the Project is located. That person or entity is identified as the Architect in the Agreement and is referred to throughout the Contract Documents as if singular in number.

**§ 2.3.3** If the employment of the Architect terminates, the Owner shall employ a successor to whom the Contractor has no reasonable objection and whose status under the Contract Documents shall be that of the Architect.

**§ 2.3.4** To the extent reasonably necessary for the performance of the Work, 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 Contractor shall be entitled to rely on the accuracy of information furnished by the Owner. The Contractor shall exercise proper precautions relating to the safe performance of the Work in its reliance on Owner-supplied information. Not in limitation of other Contractor obligations in this **§2.3.4**, the Contractor shall compare information furnished by the Owner (including surveys and soil tests with observable physical conditions) and the Contract Documents and on the basis of such review, shall report to the Owner and Architect any conflicts, errors or omissions.

**§ 2.3.5** 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 Contractor's performance of the Work with reasonable promptness after receiving the Contractor's written request for such information or services.

**§ 2.3.6** 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. Contractor shall provide all subcontractors and suppliers with access to the Contract Documents upon request.

#### **§ 2.4 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 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, except to the extent required by Section 6.1.3. Any delay resulting from stoppage of the Work pursuant to this Section 2.4 shall not extend the

Contract Time or any schedule or milestone for completing all or any portion of the Work.

#### **§ 2.5 Owner's Right to Carry Out the Work**

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 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 default or neglect. In such case, Contractor shall reimburse Owner the reasonable cost of correcting such default or neglect, and if any Contract Sum remains to be paid, a Change Order shall be issued deducting from payments then or thereafter due the Contractor the reasonable cost of correcting such default or neglect, including without limitation Owner's expenses and compensation for the Architect's additional services made necessary by such default, neglect or failure. The Architect may, pursuant to Section 9.5.1, withhold or nullify a Certificate for Payment in whole or in part, to the extent reasonably necessary to reimburse the Owner for 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. If current and future payments are not sufficient to cover such amounts, the Contractor shall pay the difference to the Owner. If the Contractor disagrees with the actions of the Owner or the Architect, or the amounts claimed as costs to the Owner, the Contractor may file a Claim pursuant to Article 15. Notwithstanding the foregoing, however, the Owner shall not be responsible for, and will not have control or charge of, Contractor's construction means, methods, techniques, sequences or procedures, or for Contractor's safety precautions and programs in connection with the Work, and shall not be responsible for the Contractor's failure to carry out the Work in accordance with the Contract Documents.

#### **§ 2.6 Owner's Exercise or Non-Exercise of Rights**

**§ 2.6.1** The Owner's exercise or non-exercise of its authority to stop the Work or its exercise or non-exercise of any other right or remedy herein given, or any decision made by Owner either to exercise or not to exercise any such authority, right or remedy, shall not give rise to any duty or liability with respect to any Subcontractor, sub-Subcontractor or to any agent or employee thereof, or to any other person performing any of the Work or to any other party whatsoever.

### **ARTICLE 3 CONTRACTOR**

#### **§ 3.1 General**

**§ 3.1.1** The Contractor is the person or entity identified as such 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 Contractor or the Contractor's authorized representative.

**§ 3.1.2** The Contractor shall perform the Work in accordance with the Contract Documents.

**§ 3.1.3** The Contractor shall not be relieved of its 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.

**§ 3.1.4** The Contractor shall (a) record a daily log of the progress of the Work; and (b) submit to Owner a written progress report on the first day of every month or as otherwise requested by Owner.

#### **§ 3.2 Review of Contract Documents and Field Conditions by Contractor**

**§ 3.2.1** Execution of the Contract by the Contractor is a representation that the Contractor has visited the site, become familiar with local conditions under which the Work is to be performed, and correlated personal observations with requirements of the Contract Documents. The Contractor also represents that all Contract Documents for the Project have been examined, including those intended for work of trades not normally performed by the Contractor's own forces, and has become familiar with all conditions which may pertain to or affect the Work under the Contract. Contractor accepts all local requirements and all known existing conditions of the site. No allowance or additional compensation shall be made to Contractor on account of the conditions of the work site and the area surrounding the site, if such conditions could have been ascertained through exercise of reasonable diligence by Contractor. Notwithstanding the foregoing, nothing in this Section shall prejudice or otherwise preclude claims for concealed or unforeseen subsurface conditions submitted pursuant to Section 3.7.6, below.

The Contractor acknowledges that prior to establishing the GMP it has reviewed the Drawings and Specifications and other Contract Documents for the Project that set forth Owner's requirements and performance criteria, if any, and is sufficiently familiar in its opinion with the foregoing documents. The Contractor further acknowledges that the Owner, in entering into this Contract, is relying on the Contractor to perform the Work as depicted in the Drawings and described in the Specifications and Work reasonably inferable therefrom. The foregoing shall not imply any requirement that the Contractor assume responsibility for design, for checking the Architect's calculations, for determining performance criteria and standards or for determining that all of the Owner's requirements have been included in the Drawings and Specifications. The Contractor is not responsible for the Architect's or the Owner's other consultant's professional errors and omissions.

**§ 3.2.2** 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 2.3.4, 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 Architect 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. It is recognized that the Contractor's review is made for constructability purposes in the Contractor's capacity as a contractor and not as a licensed design professional, unless otherwise specifically provided in the Contract Documents. The Contractor shall be responsible for properly notifying the local utility locator agency and other appropriate utility agencies of

any proposed excavation required by the Work and obtaining the location of underground utilities, before commencing with any digging operations. Any charges resulting from damaged utilities shall be borne by the Contractor, unless such facilities and utilities were not identified by the local utility locator agency or other utility agencies, in which case Owner will reimburse Contractor its costs arising from encountering such unidentified facilities or utilities.

**§ 3.2.3** The Contractor is not required to ascertain that the Contract Documents are in accordance with applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities, but the Contractor shall promptly report to the Architect any nonconformity discovered by or made known to the Contractor 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 the Architect issues in response to the Contractor's notices or requests for information pursuant to Sections 3.2.2 or 3.2.3, the Contractor shall submit 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, subject to Section 15.1.7, 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, for differences between field measurements or conditions and the Contract Documents, or for nonconformities of the Contract Documents to applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities.

**§ 3.2.5** The Contractor may submit requests for information to the Architect to help facilitate the Contractor's performance of the Contract. Prior to submitting each request for information, the Contractor shall first carefully study and compare the Contract Documents, field conditions, other Owner provided information, Contractor prepared Coordination Drawings, and prior Project correspondence and documentation to determine that the information to be requested is not reasonably obtained from such sources.

**§ 3.2.6** Each request for information shall be submitted to the Architect, in writing, on such form as the Architect and Contractor agree and with such accompanying information as the Architect may require for such purpose. Each request for information shall identify the specific sources, which were reviewed by the Contractor in its efforts to determine the information requested, and a statement to the effect that the information being requested could not be determined from such sources.

### **§ 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 the Work under the Contract.

**§ 3.3.2** The Contractor shall be responsible to the Owner for acts and omissions of the Contractor's employees, 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.

**§ 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 shall perform the Work, so as to cause a minimum of inconvenience to and interruption of the Owner's operations. Any and all interruptions of the operations of the Owner necessary for the performance of the Work shall be noted in the progress schedule, and the Contractor shall additionally give the Owner sufficient advance notice of such interruption as to allow the Owner to adjust operations accordingly. Contractor's failure to give the Owner timely notice of such intentions shall place the responsibility of any resulting delays or additional costs solely with the Contractor.

**§ 3.3.5** The Contractor shall be responsible for coordinating all involved trades, including without limitation mechanical and electrical Subcontractors, to ensure the proper timing, sequencing and placement of ducts, piping, lights, conduit, and other items, in order to fit those items within the times and spaces provided.

### § 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. Work required by the Contract Documents to be performed after working hours or work the Contractor elects to perform after hours shall be completed at no additional cost to the Owner.

§ 3.4.2 Except in the case of minor changes in the Work approved by the Architect and Owner in accordance with Section 3.12.8 or ordered by the Architect in accordance with Section 7.4, the Contractor may make substitutions only with the consent of the Owner, after evaluation by the Architect and in accordance with a Change Order or Construction Change Directive.

§ 3.4.2.1 In requesting approval of any proposed changes, deviations or substitutions, the Contractor shall provide, upon the Architect's or Owner's request, evidence available to Contractor to assist Architect's evaluation that the proposed substitution or deviation will provide a quality of result and performance at least equal to that otherwise attainable, unless the specified item is not reasonably available. If, in the sole good faith opinion of the Architect or Owner, the evidence presented by the Contractor does not provide a sufficient basis for such reasonable certainty, the Architect or Owner may reject such substitution or deviation without further investigation unless the specified item is not reasonably available, in which case the Architect and Owner shall not unreasonably withhold approval.

§ 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. Contractor shall use its best efforts to maintain harmonious labor relations, prevent labor disturbances.

3.4.3.1 Subcontractors or their employees whose Work is unsatisfactory to the Owner because they are careless, incompetent, or unskilled, shall be removed by the Contractor from the Work upon reasonable notice from the Owner.

§ 3.4.4 Materials shall be delivered, stored and handled with proper equipment in a manner to protect them from damage. Materials shall be stored in or under appropriate weatherproof enclosures if necessary. Materials and equipment storage shall be confined to the areas of the Owner's premises allotted to the Contractor for storage. Finished materials shall be protected from soiling and damage. After the Contract has been executed, the Owner and the Architect will consider a formal request for the substitution of products in place of those specified only under the conditions set forth in the Contract Documents

§ 3.4.5 Provided the specified product is reasonably available, by making requests for substitutions pursuant to § 3.4.4 above, the Contractor:

- .1 Represents that the Contractor has personally investigated the proposed substitute product and determined that it is equal or superior in all respects to that specified;
- .2 Represents that the Contractor will provide the same warranty for the substitute product that the Contractor would for the product as specified;
- .3 Certifies that the cost data presented is complete and includes all related costs under this Contract, except the Architect-Engineer's redesign costs, and waives all claims for additional costs related to the substitution which subsequently become apparent; and
- .4 Will coordinate the installation of the accepted substitute product, making such changes as may be required for the Work to be complete in all respects.

### § 3.5 Warranty

§ 3.5.1 The Contractor warrants to the Owner and Architect 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, including without limitation substitutions not properly approved and authorized, may be considered defective at any time by Owner. 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, provided such damage or defect is not caused by Contractor. If required by the Architect or Owner, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment. The Contractor shall procure for the Owner, and in the Owner's name, any special or extended warranties specified in the Contract Documents. All defective Work, whether or not in place, may be rejected, corrected or accepted by Owner as provided for herein, all at no additional cost to Owner. The warranties and guarantees set forth by this Section 3.5 are in addition to and without limitation or waiver of any other rights or remedies, at law or in equity, which Owner may have under the Contract or to which it may otherwise be entitled. Subject to applicable statutes of limitations periods, Contractor's obligations shall survive the Owner's final payment, acceptance, inspection or failure of inspection of the Work. Before final payment will be authorized and issued, the Contractor shall deliver to the Owner a signed affidavit representing and warranting that, to the best of his knowledge and belief, the Work has been constructed in accordance with the Contract Documents.

**§ 3.5.2** All material, equipment, or other special warranties required by the Contract Documents shall be issued in the name of the Owner, or shall be transferable to the Owner, and shall commence in accordance with Section 9.8.4.

**§ 3.5.3** The Contractor further warrants that the normal warranties of manufacturers shall fully apply to all materials and equipment and shall inure to and be enforceable by the Owner, which manufacturer's warranty shall be in addition to, and not in lieu of, any separate warranty or guarantee of the Contractor.

### **§ 3.6 Taxes**

The Contractor shall pay sales, consumer, use and similar taxes for the Work provided by the Contractor that are legally enacted when bids are received or negotiations concluded, whether or not yet effective or merely scheduled to go into effect.

**§ 3.6.1** All Contractors, Subcontractors, Sub-subcontractors and those submitting bids or proposals shall be responsible for informing themselves of, and complying with, all tax laws, requirements, regulations, and interpretations as they apply to this Project.

**§ 3.6.2** Unless specified otherwise and agreed by Owner, the Contract Sum includes all taxes applicable to the Work.

**§ 3.6.3** Notwithstanding anything in the Agreement or Contract Documents to the contrary, the following provisions shall apply to the extent in accordance with applicable laws and regulations: Owner is a tax exempt governmental unit. The Contractor is appointed as Purchasing Agent of the Owner for purposes of carrying out purchases for the Project in accordance with this §3.6.3. Materials or labor for the Project shall be purchased as exempt from sales and use taxes in the name of the Owner, and the Contractor and all Subcontractors and Sub-subcontractors shall exclude from its bid or proposal, and the Contract Sum, all State of Nebraska, Local Option Sales and Use Taxes, and sales or use taxes of other states or political subdivisions for such purchases, to the extent exempt under applicable law. The City upon request will provide exemption certificates as appropriate under the circumstances. If any materials, equipment or labor are not exempt from such taxes, the Contractor shall include such taxes in its bid, proposal and Contract Sum.

**§ 3.6.4** The Contractor shall know and comply with all governing laws, rules, and regulations connected with the Work. This may include, without limitation, such laws, rules, and regulations as:

- .1 Licensing of Contractors for special requirements;
- .2 Requirements for special construction permits;
- .3 Exemption from sales and use taxes, if applicable;
- .4 Wage rates and employment requirements when required by law or by Owner;
- .5 Local labor requirements; and
- .6 Non-discriminatory hiring practices.

### **§ 3.7 Permits, Fees, Notices and Compliance with Laws**

**§ 3.7.1** Unless otherwise provided in the Contract Documents, the Contractor shall secure and pay for the building permit as well as for other permits, fees, licenses, and inspections (and associated costs) by government agencies necessary for proper execution and completion of the Work that are customarily secured after execution of the Contract and legally required at the time bids are received or negotiations concluded.

**§ 3.7.2.1** All applicable laws, and all standard specifications, manuals and codes referred to for the performance of the Work or for the establishment of construction, materials or equipment standards, shall be and include the latest revisions thereof on the date of the Contract Specification, or Change Order, as applicable, unless the Contract Specifications state otherwise.

**§ 3.7.2.2** If the Contractor performs Work that is contrary to applicable laws or standard specifications, manuals or codes referred to for the performance of the Work or for the establishment of construction, materials or equipment standards, the Contractor shall assume responsibility for such Work and shall bear any costs, expenses or liabilities arising out of or resulting from the same, including, but not limited to, costs of correction.

**§ 3.7.3** All references to the "Manufacturer's Specifications", "Manufacturer's Directions" or "Manufacturer's Recommendations" shall refer to the referenced manufacturer's published specifications or manuals. These publications hereby are made a part of and incorporated by this reference in the Contract Specifications as though repeated therein in full, and all manufacturer's articles, materials and equipment shall be applied, installed, connected, erected, used, cleaned and conditioned accordingly, unless specified to the contrary. Owner shall cause the Architect to provide access, if readily available, to the "Manufacturer's Specifications", "Manufacturer's Directions" or "Manufacturer's Recommendations" made a part of the Contract Documents.

**§ 3.7.4** No provision or term of any referenced standard specification, manual, or code, or manufacturer's specification, direction, recommendation or publication, whether or not specifically made a part of or incorporated by reference in the Contract Documents, shall be effective to change the duties and responsibilities of the parties or the Architect, or any of their consultants, agents or employees from those set forth in the Contract Documents.

**§ 3.7.5** Wherever an article, device and/or piece of equipment is referred to in the singular, such reference shall apply to as many such articles as shown on the Contract Documents or are required to complete installation.

#### **§ 3.7.6 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 (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) undisclosed and unknown hazardous materials or substances (all of the foregoing (1), (2) and (3) conditions each being, and collectively called, "Differing Conditions"), the Contractor shall promptly provide notice (in reasonable detail as to understand location and/or type of the alleged Differing Conditions) to the Owner and the Architect before such conditions are disturbed and in no event later than 7 business days after first observance of the conditions. The Architect will promptly investigate such conditions upon notice by Contractor and, if such conditions are in fact Differing Conditions 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 to the Owner that an equitable adjustment be made in the Contract Sum or Contract Time, or both. If the Architect determines that the conditions at the site are not Differing Conditions or that no change in the terms of the Contract is justified, the Architect shall promptly notify the Owner and Contractor, stating the reasons. If either party disputes the Architect's determination or recommendation, that party may submit a Claim as provided in Article 15.

**§ 3.7.7** If, in the course of the Work, the Contractor encounters and recognizes human remains, 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.

**§ 3.7.8** The Contractor is responsible for scheduling inspections required by the Contract Documents and ensuring work is complete for inspections. Any costs associated with re-inspection caused by irregularities, deficiencies, or non-conforming work, including all Architectural and Engineering Services related to evaluation of the problem and development of an acceptable solution, will be borne by the Contractor, which costs Contractor may elect to recover from any responsible Subcontractor or Sub-subcontractor.

### § 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 allowance and the overhead and profit shall be included in the Contract Sum but not in the allowances; and
- .3 whenever costs are more than or less than allowances, the GMP 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 Contractor's costs under Section 3.8.2.2.

§ 3.8.3 Materials and equipment under an allowance shall be selected by the Owner with reasonable promptness.

### § 3.9 Superintendent

§ 3.9.1 The Contractor shall adequately staff the Project site to properly and thoroughly layout, schedule, coordinate, direct, administer and supervise all construction activities. Contractor shall employ competent and appropriately qualified and experienced personnel based on the complexity of the Project, each of whom shall be reasonably acceptable to the Owner. The superintendent shall be satisfactory to the City Engineer of the Owner, and the Contractor shall provide a replacement superintendent satisfactory to such City Engineer if the employment of the superintendent terminates or the City Engineer advises Contractor that the performance of any superintendent is unsatisfactory. The superintendent and other appropriate personnel and necessary assistants shall be in attendance at the Project site during performance of the Work and at any time in which any construction activity is to take place, until the date of Substantial Completion. The superintendent and project manager, if any, shall represent the Contractor, and communications given to the superintendent, project manager or other designee shall be as binding as if given to the Contractor.

§ 3.9.2 The Contractor, as soon as practicable, and not more than 7 business days, after award of the Contract, shall furnish in writing to the Owner and Architect the name and qualifications of the Contractor's proposed superintendent and project manager (if any). Within 14 days of receipt of the information, the Architect may notify the Contractor, stating whether the Owner or the Architect (1) has reasonable objection to the proposed superintendent. Failure of the Owner to provide notice within the 14-day period shall constitute notice of no reasonable objection.

§ 3.9.3 The Contractor shall not employ a proposed superintendent or project manager to whom the Owner or Architect has made reasonable and timely objection. The superintendent and project manager will assume all duties and responsibilities for supervision and scheduling of all facets of construction including those of Subcontractors and Sub-subcontractors. The superintendent will be the onsite point of contact for the Contractor and will coordinate construction efforts with the Owner. All communications given the superintendent or project manager shall be binding as if given to the Contractor. Contractor agrees not to change the superintendent or project manager, unless he/she is terminated by Contractor or resigns or is no longer physically able to perform the responsibilities required of him, without first providing written ten (10) days' notice and obtaining the Owner's written consent, which shall not be unreasonably withheld or delayed. In the event the superintendent or project manager is terminated by Contractor or resigns or is physically unable to work, Contractor shall provide notice of such to Owner as soon as practicable thereafter. Any substitute superintendent or project manager shall have similar qualifications and experience as the superintendent or project manager for whom the substitution is proposed and shall be satisfactory to Owner.

### § 3.10 Contractor's Construction and Submittal Schedules

§ 3.10.1 The Contractor, within a reasonable time after being awarded the Contract, shall submit for the Owner's and Architect's review a Contractor's construction schedule in critical path method (CPM) format for the Work. The schedule shall contain detail appropriate for the Project, including (1) the date of commencement of the Work,

interim schedule milestone dates, and the dates of Substantial Completion; (2) an apportionment of the Work by construction activity; and (3) the time required for completion of each portion of the Work. The schedule shall provide for the orderly progression of the Work to completion and shall not exceed time limits current under the Contract Documents. The schedule shall be revised at appropriate intervals as required by the conditions of the Work and Project. All construction schedules (and revisions) shall be subject to the approval of the Owner. The completion dates and other milestone dates set forth by the Agreement shall govern and the schedule shall be prepared so as to meet those dates. Contractor shall prepare at least monthly a progress report and updated construction schedule. The schedule update must include and be related to a "baseline" schedule to facilitate identification of variances therefrom. The progress report shall specify, among other things; the estimated percentage of completion of the Work; whether the Project is on schedule, and if not, the reasons therefore and any proposed changes to the construction schedule; and representative pictures showing stage of completion. Owner's review and/or approval of the construction schedule will not relieve the Contractor from responsibility for errors and omissions in the Contractor's schedule submittals.

**§ 3.10.2** The Contractor, promptly after being awarded the Contract and thereafter as necessary to maintain a current submittal schedule, shall submit a submittal schedule for the Architect's and Owner's approval. The Architect's and Owner's approval shall not be unreasonably delayed or withheld. The submittal schedule shall (1) be coordinated with the Contractor's construction schedule, and (2) allow the Architect and Owner reasonable time to review submittals. If the Contractor fails to submit a submittal schedule, the Contractor, at the election of the Owner, shall not be entitled to any increase in Contract Sum or extension of Contract Time based on the time required for review of submittals, except to the extent that the Architect's review extends more than 21 days after notice to the Architect that a timely review is needed.

**§ 3.10.3** The Contractor shall commence and diligently proceed with performance of the Work at all times in accordance with the Contract Documents and the approved construction schedule. Such performance shall continue despite disputes and pending resolution of any request for relief, claim, appeal or other legal or equitable action related to the Project, provided that Contractor is paid for performance of undisputed work in accordance with the Contract Documents.

**§ 3.10.4** If the Owner determines that performance of the Work is not progressing to achieve Project milestones or completion due to the fault of Contractor or its Subcontractors or suppliers, the Owner shall have the right to order the Contractor to take corrective measures necessary to expedite the progress of the Work, including, without limitation, (i) working additional shifts or overtime, (ii) supplying additional manpower, equipment and facilities, and (iii) other similar measures (collectively ("Extraordinary Measures")). Such Extraordinary Measures shall continue until the progress of the Work generally complies with the stage of completion required at that time by the accepted construction schedule. In no event shall the Owner have control over, charge of, or any responsibility for construction means, methods, techniques, sequence of procedures, or safety precautions and programs in connection with the Work, notwithstanding the rights and authority granted in this Section or elsewhere in the Contract Documents.

### **§ 3.11 Documents and Samples at the Site**

The Contractor shall make available, at the Project site, the Contract Documents, including Change Orders, Construction Change Directives, and other Modifications, in good order and marked currently to indicate field changes and selections made during construction, and the approved Shop Drawings, Product Data, Samples, and similar required submittals. These shall be in electronic form or paper copy, available to the Architect and Owner, and delivered to the Architect for submittal to the Owner upon completion of the Work as a record of the Work as constructed.

### **§ 3.12 Shop Drawings, Product Data and Samples**

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

**§ 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 how 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 is subject to the limitations of Section 4.2.7. Informational submittals upon which the Architect is not expected to take responsive action may be so identified in the Contract Documents. Submittals that are not required by the Contract Documents may be returned by the Architect without action.

**§ 3.12.5** The Contractor shall review for compliance with the Contract Documents, approve, and submit to the Architect, Shop Drawings, Product Data, Samples, and similar submittals required by the Contract Documents, in accordance with the submittal schedule approved by the Owner and 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, including without limitation, one (1) electronic copy, and a printed copy, upon request, of shop or setting drawings and schedules required for the Work. Where Revit or BIM models are utilized in the design of the Project, Contractor shall prepare and integrate Shop Drawing information into the BIM model and shall identify any conflicts and verify that the system locations fit within the spaces provided without alteration to finish dimensions and heights.

- .1 Architect's approval of such drawings and schedules does not relieve the Contractor from responsibility for deviations from contract drawings or specifications unless he has, in writing, called the Architect's attention to such deviations at the time of submission of shop drawings or dimensions of all various members, the arrangement and construction of all connections at joints and other necessary details, as well as all holes, straps, and other fittings required by other contractors for the attaching of their work to the work for which the shop drawings were prepared.
- .2 Where required, engineering computations shall also be submitted.
- .3 When requested or required by the Architect, copies of approved shop drawings of the Contractor's work shall be furnished by him to other contractors whose work comes in contact with or is attached to the work for which such drawings were prepared, if any.
- .4 Contractor shall indicate his review of shop drawings by means of a stamp with its initials and date of review prior to submitting to the Architect for review. Nonetheless, all submitted drawings, whether stamped or not, shall be deemed to have been reviewed by Contractor. Submittals, which are not marked as reviewed for compliance with the Contract Documents or are not required by the Contract Documents, may be returned by the Architect without action.
- .5 Only shop drawings, schedules, models and templates that bear the approved stamp of the Architect shall be used on the Work. Work materials or equipment for which shop drawings are required shall not be fabricated, performed or installed until the Architect has approved the shop drawings. Such work, materials or equipment performed or installed without prior approval of shop drawings may not be accepted. It shall be the Contractor's responsibility to submit shop drawings to the Architect.

**§ 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 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.

**§ 3.12.8** The Work shall be in accordance with reviewed submittals, except that the Contractor shall not be relieved of responsibility for deviations from requirements of the Contract Documents by the Architect's review or Owner's approval of Shop Drawings, Product Data, Samples, or similar submittals, unless the Contractor has specifically informed the Architect and Owner in writing of such deviation at the time of submittal and (1) the Architect has taken appropriate action relative to the specific deviation as a minor change in the Work, subject to approval of Owner or (2) a Change Order or Construction Change Directive has been issued and approved by Owner authorizing

the deviation. The Contractor shall not be relieved of responsibility for errors or omission in Shop Drawings, Product Data, Samples, or similar submittals by the Architect's review or Owner's City Engineer approval thereof.

**§ 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 on previous submittals. In the absence of such notice, the Architect's approval of a resubmission shall not apply to such revisions.

**§ 3.12.10** The Contractor shall not be required to provide 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 professional services in violation of applicable law.

**§ 3.12.10.1** The Contractor shall be entitled to rely upon the adequacy and accuracy of the performance and design criteria provided in the Contract Documents. If professional design services or certifications by a design professional related to systems, materials, or equipment are specifically required of the Contractor by the Contract Documents, the Owner and the Architect will specify all performance and design criteria that such services must satisfy. Contractor represents and warrants that all such professional design services to be furnished or provided by Contractor pursuant to the terms of Contract Documents ("Design/Build Portions") will be furnished by an architect or an engineer who is a licensed design professional in Nebraska ("Contractor's Designer"), and Contractor shall be liable to the Owner for any errors and omissions of Contractor's Designer. Contractor shall require Contractor's Designer to (1) properly seal all drawings and properly perform its obligation in accordance with this Contract and all laws, ordinances, codes, rules and regulations of every governmental agency having jurisdiction over the Project and/or Contractor's Designer, (2) furnish all design services for the benefit of the Owner as designated intended third-party beneficiary, (3) provide professional liability insurance with limits of not less than \$1,000,000 per claim. For any Design/Build Portions, Contractor shall furnish for Owner's review and approval working drawings and specifications that delineate the design and performance criteria that are either described within the Contract Documents or that are provided by Owner. Design of any Design/Build Portions shall meet the applicable standards of professional skill and care practiced by regionally recognized architects and engineers with respect to projects of comparable size and complexity. The design of any Design/Build Portions and working drawings submitted by Contractor shall comply with all applicable laws, codes, and regulations and requirements of governmental authorities having jurisdiction over the Project, shall be fully adequate to take into account all construction, labor and materials necessary to bring about completion of such Design/Build Portions, and shall satisfy all performance specifications identified by Owner or Architect. Shop Drawings and other submittals related to the Work designed or certified Contractor's Designer shall bear such professional's written approval when submitted to the Architect and Owner. 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 any Contractor's Designer, provided the Owner and Architect have specified to the Contractor the performance and design criteria that such services must satisfy. Pursuant to this Section 3.12.10, the Architect will review and 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.

**§ 3.12.10.2** If the Contract Documents require the Contractor's design professional to certify that the Work has been performed in accordance with the design criteria, the Contractor shall furnish such certifications to the Architect at the time specified by the Architect and in a reasonable form.

**§ 3.12.11** Upon Substantial Completion of the Work, the Contractor shall compile and deliver to the Owner As Built Documents conforming to the construction records of the Contractor. This set of documents shall consist of corrected specifications and drawings showing the recorded location of the changes in the work.

**§ 3.12.11** Additional provisions for Shop Drawings, Product Data, and Samples are included in the Contract Documents.

### **§ 3.13 Use of Site**

The Contractor shall confine construction equipment, the storage of materials and equipment, and the operations at the site to areas permitted by Owner and in compliance with applicable laws, statutes, ordinances, codes, rules and regulations, lawful orders of public authorities, and the Contract Documents and shall not unreasonably encumber

the site with materials or equipment. Contractor shall use all reasonable efforts to cooperate and coordinate the Work with property owners, contractors, and others and construction, improvements, and work on other lots in the vicinity. Additionally, Contractor shall use reasonable efforts to not interfere with the business of property owners, tenants or occupants within the vicinity where the Project is located. Contractor's use of signage, parking and existing facilities shall be subject to Owner's approval, which may be withheld or denied in Owner's sole discretion.

**§ 3.13.1** The Contractor, each Subcontractor, or Sub-subcontractor shall provide for suitable storage and protection from the elements and loss of materials or equipment delivered to the site or to another location agreed upon in writing, to be incorporated into this Project, and shall provide such trailers or sheds for storage of such materials, equipment, tools, or supplies. Any proposed areas, trailers, or sheds for storage shall be subject to Owner approval. All materials, including without limitation cement, caulking materials, paint materials, lime, plaster, adhesives, acoustical materials shall be delivered to the site or designated storage location in original sealed containers, with original labels indicating manufacturer's name, brand, type and grade of materials. Any damaged materials, or materials in packaging that is broken, opened, water-marked or otherwise damaged, are unacceptable and shall be immediately removed from the premises and replaced.

**§ 3.13.2** The Contractor shall provide for traffic control and maintenance of roads or streets involved in or adjacent to the Project, keeping such roads or streets free from obstructions litter, hazards, or conditions that might interfere with traffic. When operations in connection with the Work necessitates the closing or restriction of all or any part of traffic lanes or streets, Contractor shall coordinate such closing or restriction in advance with Owner and provide appropriate barricades, signs, flares, guards and other devices as Owner determines necessary or appropriate. All such closings or restrictions shall be subject to Owner approval.

**§ 3.13.3** Additional provisions for use of site are included in the Contract Documents.   

#### **§ 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, or patching shall be restored to the condition existing prior to the cutting, fitting, or 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 construction by the Owner or a Separate Contractor except with written consent of the Owner and of the Separate Contractor. Consent shall not be unreasonably withheld. The Contractor shall not unreasonably withhold, from the Owner or a Separate Contractor, its consent to cutting or otherwise altering the Work.

**§ 3.14.3** Additional provisions for cutting and patching of work are included in the Contract Documents.

#### **§ 3.15 Cleaning Up**

**§ 3.15.1** The Contractor on a daily basis shall keep the premises and surrounding area free from accumulation of waste materials and 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. In addition to general broom cleaning and trash removal, the Contractor shall do and perform the more stringent of a) the cleaning required of the Contractor by the Contract Documents, or b) the following cleaning as a condition precedent to achieving final completion or Final Payment

- .1 Remove all stains and dirt from all glass, walls, and fixtures;
- .2 Wash all glass inside and out, taking care not to scratch or damage surfaces;
- .3 Remove all marks, stains, and other soil or dirt from all painted, decorated, stainless steel or finish work of all nature;
- .4 Clean all hardware;
- .5 Remove all spots, soil, plaster, stucco, and paint from all ceramic tile, marble, and all other finish surfaces;
- .6 Clean all fixtures, cabinet work, and equipment, removing all stains, adhesives, labels, and appliques;
- .7 Dust and damp mop all interior hard surface floors;
- .8 Remove all temporary protective covering or sheathing;
- .9 Clean all surfaces and other Work in accordance with recommendations of the manufacturer; and

.10 Remove all debris, construction waste and trash from the work site.

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

**§ 3.16 Access to Work**

The Contractor shall provide the Owner and Architect with access to the Work in preparation and progress wherever located, in addition to other representatives of the Owner, testing agencies and governmental agencies who will have access to the Project at reasonable times for their observation, inspection and testing.

**§ 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 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 an infringement of a copyright or patent is discovered by, or made known to, the Contractor, the Contractor shall be responsible for the loss unless the information is promptly furnished to the Architect.

**§ 3.18 Indemnification**

**§ 3.18.1** To the fullest extent permitted by law, the Contractor shall indemnify defend, and hold harmless the Owner and its employees, officials, and officers, from and against claims, damages, losses, and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss, or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them, or anyone for whose acts they may be liable (the "Contractor Parties"), regardless of whether or not such claim, damage, loss, or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity that would otherwise exist as to a party or person described in this Section 3.18. The obligations of this section 3.18.1 shall survive completion of the Project or termination of this Contract.

**§ 3.18.2** In claims against any person or entity indemnified under this Section 3.18 by an employee of any of the Contractor Parties, anyone directly or indirectly employed by any of the Contractor Parties, or by anyone for whose acts any of the Contractor Parties may be liable, the indemnification obligation under Section 3.18.1 shall not be limited by a limitation on amount or type of damages, compensation, or benefits payable by or for any of the Contractor Parties under workers' compensation acts, disability benefit acts, or other employee benefit acts.

**ARTICLE 4 ARCHITECT**

**§ 4.1 General**

**§ 4.1.1** The Architect is the person or entity retained by the Owner pursuant to Section 2.3.2 and identified as such in the Agreement. For purposes of this Contract the "Architect" shall be the Architect or Engineer lawfully licensed by the State to practice architecture or engineering or an entity, licensed by the State to lawfully practice architecture or engineering identified as such in the Agreement or otherwise by the Owner and as is referred to throughout the Contract Documents as if singular in number. The term "Engineer", "Architect/Engineer", "Engineer/Architect", "Architect's authorized representative", "Engineer's authorized representative", or Architect/Engineer's authorized representative" shall mean "Architect" as defined in this **§4.1.1**.

**§ 4.1.2** Duties, responsibilities, and limitations of authority of the Architect as set forth in the Contract Documents shall not be restricted, modified, or extended without written consent of the Owner, Contractor, and Architect. Consent shall not be unreasonably withheld.

**§ 4.2 Administration of the Contract**

**§ 4.2.1** The Architect will provide administration, or assist Owner in providing administrator, of the Contract as described in the Contract Documents and will be an Owner's representative during construction until the date that final payment is due. The Architect will have authority to act on behalf of the Owner only to the extent provided in the Contract Documents. The Architect will advise and consult with the Owner. The primary point of contact of Architect with the Owner will be the Owner's City Engineer or the City Engineer's designee.

**§ 4.2.2** The Architect 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 Architect will not be required 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.

**§ 4.2.3** On the basis of the site visits, the Architect will keep the Owner reasonably informed about the progress and quality of the portion of the Work completed, and promptly report to the Owner (1) known deviations from the Contract Documents, (2) known deviations from the most recent construction schedule submitted by the Contractor, and (3) defects and deficiencies observed in the Work. The Architect will not be responsible for the Contractor's failure to perform the Work in accordance with the requirements of the Contract Documents. The Architect will not have control over or charge of, and will not be responsible for acts or omissions of, the Contractor, Subcontractors, or their agents or employees, or any other persons or entities performing portions of the Work.

**§ 4.2.4 Communications**

The Owner and Contractor shall endeavor to include the Architect in all communications that relate to or affect the Architect's services or professional responsibilities. The Owner shall endeavor to promptly notify the Architect of the substance of any direct communications between the Owner and the Contractor otherwise relating to the Project. Communications by and with the Architect's consultants shall be through the Architect; provided, however, Owner and Contractor may communicate directly with consultants if Architect, in the judgement of Owner or Contractor, is determined to be unavailable or unresponsive. Communications by and with Subcontractors and suppliers shall be through the Contractor. Communications by and with Separate Contractors shall be through the Owner. The Contract Documents may specify other communication protocols.

**§ 4.2.5** Based on the Architect's evaluations of the Contractor's Applications for Payment, the Architect will review the Work and certify the amounts due the Contractor and will issue Certificates for Payment in such amounts. All payments to the Contractor shall be subject to Owner's approval.

**§ 4.2.6** The Architect in consultation with the Owner has authority to reject Work that does not conform to the Contract Documents. Whenever the Architect considers it necessary or advisable, the Architect will have authority to require inspection or testing of the Work in accordance with Sections 13.4.2 and 13.4.3, whether or not the Work is fabricated, installed or completed. However, neither this authority of the Architect 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 to the Contractor, Subcontractors, suppliers, their agents or employees, or other persons or entities performing portions of the Work. Architect shall promptly notify the Owner if Architect rejects work or request additional inspection/testing.

**§ 4.2.7** The Architect will review and take other appropriate action upon the Contractor's submittals such as Shop Drawings, Product Data, and Samples for the limited purpose of checking for conformance with the Contract Documents. The Architect's and its consultant's action will be taken with reasonable promptness as to not cause delay of the Work, Owner, Contractor, or Subcontractors, while allowing sufficient time in the Architect's professional judgment to permit adequate review. In the event a submittal is critical to the immediate execution of the Work, the Architect shall make every effort to expedite the review process rapidly, so long as the Contractor marks such submittal as needing "immediate review for immediately pending work". Submittal review time shall not be considered as delay to the Work unless (i) the specific submittal is specifically marked as critical to the progress of the Work or is otherwise submitted in coordination with the approved construction schedule and (ii) the actual review time exceeds the stipulated review time set forth in the approved construction schedule or 21 days in the absence of a submittal schedule. 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 Architect's review of the Contractor's submittals shall not relieve the Contractor of the obligations under Sections 3.3, 3.5, and 3.12. The Architect's review shall not constitute approval

of safety precautions or of any construction means, methods, techniques, sequences, or procedures. The Architect's review of a specific item shall not indicate approval of an assembly of which the item is a component.

**§ 4.2.8** The Architect, or Owner at its election, will prepare Change Orders and Construction Change Directives, and may order minor changes in the Work as provided in Section 7.4. The Architect will investigate and make determinations and recommendations regarding concealed and unknown conditions as provided in Section 3.7.4.

**§ 4.2.9** The Architect, or Owner at its election, will conduct inspections to determine 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** If the Owner and Architect agree, the Architect will provide one or more Project representatives to assist in carrying out the Architect's responsibilities at the site. The Owner shall notify the Contractor of any change in the duties, responsibilities and limitations of authority of the Project representatives.

**§ 4.2.11** The Architect, in consultation with Owner, will interpret and make recommendations on matters concerning performance under, and requirements of, the Contract Documents on written request of either the Owner or Contractor. 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** Interpretations and recommendations of the Architect will be consistent with the intent of, and reasonably inferable from, the Contract Documents and will be in writing or in the form of drawings. When making such interpretations and recommendations, the Architect will endeavor to secure faithful performance by both Owner and Contractor, will not show partiality to either party in connection with recommendations rendered in good faith.

**§ 4.2.13** The Architect's decisions on matters relating to aesthetic effect will be final if consistent with the intent expressed in the Contract Documents.

**§ 4.2.14** The Architect will review and respond to requests for information about 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. If appropriate, the Architect will prepare and issue supplemental Drawings and Specifications in response to the requests for information.

## 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" does not include a Separate Contractor or the subcontractors of a Separate Contractor.

**§ 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" is referred to throughout the Contract Documents as if singular in number and means a Sub-subcontractor or an authorized representative of the 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, the Contractor, within a reasonable time after the date of the notice of award of the Contract, shall notify the Owner and Architect in writing of the persons or entities proposed for each principal portion of the Work, including those who are to furnish materials or equipment fabricated to a special design. Within 14 days of receipt of the information, the Architect or Owner may notify the Contractor whether the Owner or the Architect (1) has reasonable objection to any such proposed person or entity or (2) requires additional time for review. Failure of the Owner or Architect to provide notice within the 14-day period shall constitute notice of no reasonable objection.

**§ 5.2.2** The Contractor shall not contract with a proposed person or entity to whom the Owner or Architect has made reasonable and timely objection. The Contractor shall not be required to contract with anyone to whom the Contractor has made reasonable objection.

**§ 5.2.3** If the Owner or Architect has reasonable objection to a person or entity proposed by the Contractor, the Contractor shall propose another to whom the Owner or Architect has no reasonable objection. If the proposed but rejected Subcontractor was reasonably capable of performing the Work, the Contract Sum and Contract Time shall be increased or decreased by the difference, if any, occasioned by such change, and an appropriate Change Order shall be issued before commencement of the substitute Subcontractor's Work. However, no increase in the Contract Sum or Contract Time shall be allowed for such change unless the Contractor has acted promptly and responsively in submitting names as required.

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

### **§ 5.3 Subcontractual Relations**

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 that the Contractor, by these Contract Documents, assumes toward the Owner. 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. Where appropriate, the Contractor shall require each Subcontractor to enter into similar agreements with Sub-subcontractors.

### **§ 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; 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.

**§ 5.4.2** Upon such assignment, if the Work has been suspended for more than 30 days, the Subcontractor's compensation shall be equitably adjusted for increases in cost resulting from the suspension.

**§ 5.4.3** Upon 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.

## **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 term "Separate Contractor(s)" shall mean other contractors retained by the Owner under separate agreements. The Owner reserves the right to perform construction or operations related to the Project with the Owner's own forces, and with Separate Contractors retained under Conditions of the Contract substantially similar to those of this Contract, including those provisions of the Conditions of the Contract related to insurance and waiver of subrogation. Contractor shall be entitled to make a Claim in accordance with Article 15 if its Work is delayed or costs are incurred due to such Separate Contractors.

**§ 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 take overall responsibility for coordinating the Work and shall notify the Owner in writing if any of the Owner's own forces or contractors fails to cooperate with the Contractor. The Contractor shall participate with any Separate Contractors and the Owner in reviewing their construction schedules. The Contractor shall make any revisions to its 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 and approved by Owner.

**§ 6.1.4** The Contractor shall cooperate fully with all separate contractors, including all necessary coordination of his own subcontractors. It is understood that reasonable cooperation in all phases of the work is to be expected by all separate contractors. Scheduling of their portions of work shall be arranged mutually between them and the Contractor for smooth sequence of operations.

**§ 6.1.5** Contractor shall permit separate contractors reasonable use of Contractor's temporary facilities, power, water or other similar facilities (not equipment, tools, or related items) available for use by subcontractors in the execution of their work. Contractor may not charge any fees to separate contractors for permitting the use of Contractor's facilities, except for the actual out-of-pocket cost resulting to the Contractor.

**§ 6.1.6** Additional provisions for separate contracts are included in the Contract Documents.

## **§ 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 notify the Architect of apparent discrepancies or defects in the construction or operations by the Owner or Separate Contractor that would render it unsuitable for proper execution and results of the Contractor's Work. Failure of the Contractor to notify the Architect of apparent discrepancies or defects prior to proceeding with the Work 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. The Contractor shall not be responsible for discrepancies or defects in the construction or operations by the Owner or Separate Contractor that are not apparent or known.

**§ 6.2.3** The Contractor shall reimburse the Owner for costs the Owner incurs that are payable to a Separate Contractor because of the Contractor's delays, improperly timed activities or defective construction. The Owner shall be responsible to the Contractor for costs the Contractor incurs because of a Separate Contractor's delays, improperly timed activities, damage to the Work or defective construction.

**§ 6.2.4** The Contractor shall promptly remedy damage that the Contractor wrongfully causes to completed or partially completed construction or to property of the Owner or Separate Contractor as provided in Section 10.2.5. The Owner shall promptly remedy damage to the Contractor's work equipment or property caused by the Owner or the Owner's separate contractors.

**§ 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 the Architect will 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 an agreement among the Owner and Contractor. A Construction Change Directive requires agreement by the Owner and Architect and may or may not be agreed to by the Contractor. An order for a minor change in the Work may be issued by the Owner through the Architect alone.

§ 7.1.3 Changes in the Work shall be performed under applicable provisions of the Contract Documents. The Contractor shall proceed promptly with the continuation of the Work, however, shall not proceed with the Work required by the changes in the Work, unless presented with a properly executed Change Order, Construction Change Directive, or order for a minor change in the Work.

§ 7.1.4 Unless instructed otherwise by Owner, Contractor shall not commence work on, provide materials for or make changes in the Work which will require additional payment from the Owner until Contractor has requested and obtained written approval from the Owner to proceed with the extra work.

### § 7.2 Change Orders

§ 7.2.1 A Change Order is (i) a written Change Proposal prepared by Contractor and approved by Owner as evidenced by Owner's execution thereon, or (ii) a written instrument prepared by the Architect or Contractor and signed by the Owner and Contractor, either of which must state the parties agreement upon all of the following:

- .1 The change in the Work which shall explicitly state the change in the quality and/or quantity of 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.

### § 7.3 Construction Change Directives

§ 7.3.1 A Construction Change Directive is a written order prepared and signed by the Owner, 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;
- .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 and a mutually acceptable fixed or percentage fee; or
- .4 As provided in Section 7.3.4.

§ 7.3.4 If the Contractor does not respond promptly or disagrees with the method for adjustment in the Contract Sum, the Architect shall determine the adjustment on the basis of reasonable expenditures and savings of those performing the Work attributable to the change, including, in case of an increase in the Contract Sum, an amount for overhead and profit as set forth in the Agreement, or if no such amount is set forth in the Agreement, a reasonable amount. In such case, and also under Section 7.3.3.3, the Contractor shall keep and present, in such form as the Architect may prescribe, an itemized accounting together with appropriate supporting data. Unless otherwise provided in the Contract Documents, costs for the purposes of this Section 7.3.4 shall be limited to the following:

- .1 Costs of labor, including applicable payroll taxes, fringe benefits required by agreement or custom, workers' compensation insurance, and other employee costs approved by the Architect;
- .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 premiums for all bonds and insurance, permit fees, and sales, use, or similar taxes, directly related to the change; and
- .5 Costs of supervision and field office personnel directly attributable to the change.

**§ 7.3.5** If the Contractor disagrees with the adjustment in the Contract Time, the Contractor may make a Claim in accordance with applicable provisions of Article 15.

**§ 7.3.6** Upon receipt of a Construction Change Directive, the Contractor shall promptly proceed with the change in the Work involved and advise the Architect 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.

**§ 7.3.6.1** 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** The amount of credit to be allowed by the Contractor to the Owner for a deletion or change that results in a net decrease in the Contract Sum shall be actual net cost. When both additions and credits covering related Work or substitutions are involved in a change, the allowance for overhead and profit shall be figured on the basis of net increase, if any, with respect to that change.

**§ 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.

**§ 7.3.10** When the Owner and Contractor agree with a determination made by the Architect concerning the adjustments in the Contract Sum and Contract Time, or otherwise reach agreement upon the adjustments, such agreement shall be effective immediately and the Architect will prepare a 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 acting through the Architect may order minor changes in the Work that are consistent with the intent of the Contract Documents and do not involve an adjustment in the Contract Sum or an extension of the Contract Time. The Architect's order for minor changes shall be in writing after notice to and consultation with the Owner.

#### **§ 7.5 Final Settlement.**

Any change in or adjustment to the Contract Sum or Contract Time in a Change Order, shall be a representation by Contractor that such change or adjustment is inclusive of all costs, required time, and other requirements connected with any related change in the Work (and reasonably inferable therefrom) and applicable Change Order. Contractor agrees that changes in the Work evidenced by an executed Change Order shall be the final expression of entitlement of Contractor as to the amount of the adjustment, if any, in Contract Sum or Contract Time unless otherwise mutually agreed. The Contract Sum and Contract Time shall only be adjusted by Change Order executed by Contractor and Owner; and no course of dealing, express or implied, estoppel, waiver or claim of unjust enrichment, quantum merit, or otherwise shall be the basis of any claim, demand, or action to an increase in the Contract Sum or Contract Time.

### **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 date for Substantial Completion of the Work is the date mutually agreed upon between Owner and Contractor, as set forth in the GMP Amendment as may be adjusted in accordance with the terms of the Contract. Substantial Completion is attained when progress of the Work reaches the stage of completion described in Section 9.8.

**§ 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 agreeing to the Contract Time, as established by the Contract Documents, the Contractor confirms that the Contract Time is a reasonable period for performing the Work and the Owner confirms that it will perform all of its obligations in a manner so as to not delay the Contractor's activities to complete the Work within the Contract Time.

**§ 8.2.2** The Contractor shall not knowingly, except by agreement or instruction of the Owner in writing, commence the Work prior to the effective date of insurance required to be furnished by the Contractor and Owner.

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

**§ 8.2.4** The Owner shall have the right, without giving the Contractor the right to any extra compensation, at any time the Work is not proceeding in accordance with the approved progress schedule, subject to adjustments in accordance with the terms of the Contract, to require the Contractor to take such measures or adopt such methods as may be necessary in the Owner's opinion to obtain and maintain satisfactory progress, but the failure of the Owner to demand that the Contractor adopt such measures shall not relieve the Contractor of his obligation to secure the rate of progress necessary to complete the Work within the time required by the Contract.

### **§ 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 (1) an act or neglect of the Owner or Architect, of an employee of either, or of a Separate Contractor; (2) by changes ordered in the Work; (3) by labor disputes, fire, unusual delay in deliveries, unavoidable casualties, adverse weather conditions documented in accordance with Section 15.1.6.2, or other causes beyond the Contractor's control; (4) by delay authorized by the Owner pending resolution of a claim or Dispute or (5) by other causes that the Contractor asserts, and the Architect determines, justify delay, then the Contract Time shall be equitably adjusted.

**§ 8.3.2** Claims relating to time shall be made in accordance with applicable provisions of Article 15. The Contractor shall provide an estimate of the probable effect of such delay on progress of the Work and shall notify Owner within seven (7) days after the event causing the delay has ceased.

**§ 8.3.3** This Section 8.3 does not preclude recovery of damages for delay by either party under other provisions of the Contract Documents.

## **ARTICLE 9 PAYMENTS AND COMPLETION**

### **§ 9.1 Contract Sum**

**§ 9.1.1** 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. If these General Conditions are attached to a cost-plus contract (i.e. AIA Document A111 or A133), then references herein to "Contract Sum" shall be deemed to mean Guaranteed Maximum Price or GMP, unless the context clearly indicates otherwise.

**§ 9.1.2** If unit prices are stated in the Contract Documents or subsequently agreed upon, and if quantities originally contemplated are materially changed so that application of such unit prices to the actual quantities causes substantial inequity to the Owner or Contractor, the applicable unit prices shall be equitably adjusted.

## § 9.2 Schedule of Values

Where the Contract is based on a stipulated sum or Guaranteed Maximum Price, the Contractor shall submit a schedule of values to the Architect and Owner, promptly after the execution of this Agreement and before the first Application for Payment, allocating the entire Contract Sum to the various portions of the Work. The schedule of values shall be prepared in the form, and supported by the data to substantiate its accuracy, as required by the Architect or Owner. This schedule, unless objected to by the Architect or Owner, shall be used as a tool for reviewing the Contractor's Applications for Payment. Any changes to the schedule of values shall be submitted to the Architect and supported by such data to substantiate its accuracy as the Architect or Owner may require, and unless objected to by the Architect or Owner, shall be used as a tool for reviewing the Contractor's subsequent Applications for Payment.

## § 9.3 Applications for Payment

**§ 9.3.1** Within the time specified by this Contract, the Contractor shall submit to the Architect an itemized Application for Payment for Work completed in accordance with the Schedule of Values, indicating the Contractor's right to payment, which Application shall be subject to review and certification of payment by Architect.

Applications shall be notarized, if requested by Architect or Owner, and include such supporting data and breakdowns substantiating the Contractor's right to payment as the Owner or Architect may reasonably request. If requested by Owner or Architect, Contractor, Architect, and Owner shall meet at the job site, review Contractor's Application for Payment, and together determine the appropriate amounts owing for each item of Work. Contractor then will make any adjustments as appropriate and resubmit the Application for Payment, together with additional substantiating data or breakdowns if requested. If the Contract Documents require the Owner to retain a portion of the payments until some future time, the Applications for Payment shall clearly state the percentage and the amount to be retained. Once the Application is approved and payment is certified by the Architect, the Application must be submitted for approval of the Owner. Applications received at the Owner's office at least ten business days prior to the third Tuesday of each month will be included in the scheduled business of the second regular Council meeting of that month. The form of Application for Payment shall be AIA Documents G702 and G703, or such other form as Owner may approve, and shall include without limitation (i) upon reasonable request, a breakdown by trade of the amounts due under the applicable subcontract, (ii) notarized "conditional" lien waiver and release of claims (in form and content required by Owner in its reasonable discretion) from the Contractor for the Work detailed in the current Application for Payment, and (iii) any other information Owner may deem reasonably necessary to substantiate an Application for Payment. In the event of a dispute with regard to any item included in an Application for Payment, the Owner shall make payment for items not in dispute and shall have the right to withhold from payment the amount of such disputed item while the parties attempt to resolve the dispute in accordance with the dispute resolution procedures provided for in the Contract Documents, and the Contractor shall continue to perform the Work in accordance with the Construction Schedule and shall not stop, delay, slow down or hinder progress of the Work and Project so long as Owner continues to pay undisputed amounts in accordance with this Agreement.

**§ 9.3.1.1** As provided in Section 7.3.9, such applications may include requests for payment on account of changes in the Work that have been properly authorized by Construction Change Directives but not yet included in Change Orders.

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

**§ 9.3.2** Except as otherwise provided in the Contract Documents, payments only shall be made for materials or equipment as follows: (i) on account of materials or equipment incorporated into the Work or stored on the site, or (ii) if approved in advance by Owner in writing, for materials or equipment suitably stored off the jobsite or at another location approved by Owner in writing, provided, however, Owner generally will consider requests for payment pursuant to this subsection (ii) only for special order or specially fabricated materials or equipment that is not readily available and advance order and delivery of which are necessary for proper sequencing and execution of the Work within the Contract Time. 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. The Contractor shall take such actions to store, preserve, maintain and protect materials and equipment, and title to

such materials and equipment, whether or not stored on or off-site or incorporated into the Work, from deterioration, destruction, theft, vandalism and any other damage, loss, or diminution in value.

**§ 9.3.3** Subject to Contractor's risk of loss for the Work pursuant to §11.1.1, 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 Certificates for Payment have been previously issued 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, suppliers, or other persons or entities that provided labor, materials, or equipment relating to the Work. Should any lien or claim of lien be filed with respect to the Work for which Owner has paid Contractor, Contractor shall post security for such lien or claim of lien in form and content satisfactory to the City - if not resolved within fourteen days.

**§ 9.3.4** By submitting each Application for Payment, the Contractor represents and warrants that, except as otherwise expressly stated in the Application for Payment, (1) there are no known mechanics or materialmen liens outstanding as of the date hereof, (2) all due and payable bills with respect to the Work have been paid to date or are included in the amount requested in the current Application, and, (3) except for such bills not paid but so included (or such bills as are being contested in good faith by appropriate action diligently pursued, provided Contractor has notified the Owner of the nature of such lien and informed Owner of the type of action being pursued by Contractor and, if requested by Owner, has provided Owner with a security sufficient to cover such claims in the event Contractor is unsuccessful in contesting same or has made other arrangements satisfactory to Owner), there is no known basis for the filing of any mechanics or materialmen liens on the Work, and (4) waivers from all subcontractors and materialmen for which payment was made from the last advance made by the Owner have been obtained.

#### **§ 9.4 Certificates for Payment**

**§ 9.4.1** The Architect, provided that the Application for Payment is received not later than 14 days before the third Tuesday of the month, shall certify payment to the Owner not less than 10 days before the third Tuesday of the month, and, either (1) issue to the Owner a Certificate for Payment in the full amount of the Application for Payment, with a copy to the Contractor; or (2) issue to the Owner a Certificate for Payment for such amount as the Architect determines is properly due, and notify the Contractor and Owner of the Architect's reasons for withholding certification in part as provided in Section 9.5.1; or (3) withhold certification of the entire Application for Payment, and notify the Contractor and Owner of the Architect's reason for withholding certification in whole as provided in Section 9.5.1.

**§ 9.4.2** The issuance of a Certificate for Payment will constitute a representation by the Architect to the Owner, based on the Architect's evaluation of the Work and the data in the Application for Payment, that, to the best of the Architect's knowledge, information, and belief, the Work has progressed to the point indicated, the quality of the Work is in accordance with the Contract Documents, and that the Contractor is entitled to payment in the amount certified. The foregoing representations are subject to an evaluation of the Work for conformance with the Contract Documents upon Substantial Completion, to results of subsequent tests and inspections, to correction of minor deviations from the Contract Documents prior to completion, and to specific qualifications expressed by the Architect. However, the issuance of a Certificate for Payment 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 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.

#### **§ 9.5 Decisions to Withhold Certification**

**§ 9.5.1** The Architect may withhold a Certificate for Payment in whole or in part, to the extent reasonably necessary to protect the Owner, if the representations to the Owner required by Section 9.4.2 cannot be made. If the Architect is unable to certify payment in the amount of the Application, the Architect will notify the Contractor and Owner as provided in Section 9.4.1. If the Contractor and Architect cannot agree on a revised amount, the Architect will promptly issue a Certificate for Payment for the amount for which the Architect is able to make such representations to the Owner. The Architect or Owner may also withhold a Certificate for Payment or, because of subsequently discovered evidence, may nullify the whole or a part of a Certificate for Payment previously issued, to such extent as

may be necessary in the Architect's or Owner's opinion 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 otherwise agreed by the Owner in writing and security in form and content satisfactory to the Owner is provided by the Contractor;
- .3 failure of the Contractor to make payments properly to Subcontractors or suppliers for labor, materials or equipment;
- .4 reasonable evidence that the Work cannot be completed for the unpaid balance of the GMP;
- .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;
- .7 repeated failure to carry out the Work in accordance with the Contract Documents; or
- .8 items in dispute between the Owner and Contractor

**§ 9.5.2** When either party disputes the Architect's decision regarding a Certificate for Payment under Section 9.5.1, in whole or in part, that party may submit a Claim in accordance with Article 15.

**§ 9.5.3** When the reasons for withholding certification are removed, certification will be made for amounts previously withheld.

*(Paragraph Deleted)*

**§ 9.6 Progress Payments**

**§ 9.6.1** After the Architect has issued a Certificate for Payment, the Owner shall make payment in the manner and within the time provided in the Contract Documents, except if otherwise required by applicable law.

**§ 9.6.2** From the amount paid to the Contractor on account of any Subcontractor's portion of the Work, the Contractor shall pay such Subcontractor, no later than seven days after receipt of payment from the Owner (or such shorter period required by applicable law, if shorter), the amount to which the Subcontractor is entitled under the terms of the applicable subcontract. Contractor's payments to a Subcontractor shall reflect percentages actually retained from payments to the Contractor on account of such 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 Architect will, on request, furnish to a Subcontractor, if practicable, information regarding percentages of completion or amounts applied for by the Contractor and action taken thereon by the Architect and Owner on account of portions of the Work done by such Subcontractor.

**§ 9.6.4** The Owner has the right to request written evidence from the Contractor that the Contractor has properly paid Subcontractors and suppliers amounts paid by the Owner to the Contractor for subcontracted Work. If the Contractor fails to furnish such evidence within seven days, the Owner shall have the right to contact Subcontractors and 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 supplier.

**§ 9.6.5** The Contractor's payments to 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.

**§ 9.6.7** Unless the Contractor provides the Owner with a payment bond in the full penal sum of the Contract Sum, payments received by the Contractor for Work properly performed by Subcontractors or provided by suppliers shall be held by the Contractor for those Subcontractors or suppliers who performed Work or furnished materials, or both, pursuant to the terms of the applicable subcontract or supplier contract. Nothing contained herein shall require money to be placed in a separate account. The Contract Documents shall not prohibit commingling of this money.

with money of the Contractor, nor the Contract Documents create any fiduciary liability or tort liability on the part of the Contractor for breach of trust, or entitle any person or entity to an award of punitive damages against the Contractor for breach of the requirements of this provision unless the Contractor cannot tender the funds owing in accordance with payment provisions of the Subcontract or other applicable contract to the Subcontractor or suppliers

**§ 9.6.8** Provided the Owner has fulfilled its payment obligations under the Contract Documents, the Contractor shall defend and indemnify the Owner from all loss, liability, damage or expense, including reasonable attorney's fees and litigation expenses, arising out of any lien claim or other claim for payment by any Subcontractor or supplier of any tier. Upon receipt of notice of a lien claim or other claim for payment, the Owner shall notify the Contractor. If approved by the applicable court, when required, the Contractor may substitute a surety bond for the property against which the lien or other claim for payment has been asserted.

#### **§ 9.7 Failure of Payment**

§ 9.7.1 If the Architect does not issue a Certificate for Payment, through no fault of the Contractor, within [fourteen days after receipt of the Contractor's Application for Payment, or if the Owner does not pay the Contractor within seven days after the date established in the Contract Documents, the undisputed amount certified by the Architect or the amount awarded by binding dispute resolution, then the Contractor may, upon ten additional days' written notice to the Owner and Architect, 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 shutdown, delay and start-up, plus interest, as provided for in the Contract Documents.

§ 9.7.2 If Owner is entitled to reimbursement or payment from Contractor under or pursuant to the Contract Documents, such payment shall be made promptly upon demand by Owner. Notwithstanding anything contained in the Contract Documents to the contrary, if Contractor fails to promptly make any payment due Owner, or Owner incurs any costs and expenses to correct any defective work or cure any default of Contractor, Owner shall have an right to offset such amount against any sums currently or subsequently payable by Owner to Contractor.

#### **§ 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, subject only to completion of minor punch list items, the absence of completion of which does not interfere with the Owner's intended use of the Project. Notwithstanding anything in these General Conditions to the contrary, Substantial Completion shall be determined with respect to and shall not be certified before Substantial Completion of the entire Work, subject to any partial completion specified in AIA Document A101 or A133, as applicable. By way of specification and not limitation of the foregoing, Substantial Completion shall not be determined or certified with respect to any particular task, component, or portion of the Work before Substantial Completion of the entire Work unless otherwise expressly provided in AIA Document A101 or A133, as applicable.

§ 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 notify and meet with the Architect to jointly prepare and submit to the Owner a comprehensive list of items ("Punch List") 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. Any inspection by Owner or Architect of the accuracy of the Punch List shall not relieve the Contractor from its responsibility to complete the Work nor waive claims by the Owner.

§ 9.8.3 In addition to the Punch List, the Architect will make an inspection to determine whether the Work or designated portion thereof is substantially complete. If the Architect's inspection discloses any item, whether or not included on the Contractor's Punch 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 Architect will notify the Contractor of the item and the Contractor shall, before issuance of the Certificate of Substantial Completion, complete or correct such item. In such case, the Contractor shall then submit a request for another inspection by the Architect to determine Substantial Completion. Upon Substantial Completion, Owner may withhold 125% of all uncompleted work as determined by the Owner

**§ 9.8.4** When the Work or designated portion thereof is substantially complete, the Architect will prepare a Certificate of Substantial Completion that shall reference the date of Substantial Completion; establish responsibilities of the Owner and Contractor for security, maintenance, heat, utilities, damage to the Work and insurance; and fix the time within which the Contractor shall finish all items on the Punch List accompanying the Certificate. Warranties required by the Contract Documents shall commence on the date of Substantial Completion of the Work that has been completed as of that date, unless a later date of commencement is provided in the Certificate of Substantial Completion or any special warranty, or otherwise required by any Contract Documents. Warranties with respect to Punch List items or any other Work completed after the date of Substantial Completion shall commence when the Work has been completed.

**§ 9.8.5** The Certificate of Substantial Completion shall be submitted to the Owner and Contractor for their written acceptance of responsibilities assigned to them in the Certificate. Upon such acceptance, and consent of surety if any, the Owner shall make payment for the Work Substantially Completed, including retainage. Such payment shall be adjusted for withholdings allowed under the Contract Documents, incomplete Work or Work that is not in accordance with the Contract Documents, and liquidated damages.

**§ 9.8.6** Substantial Completion of the entire Work shall not in any event be granted before testing of any mechanical or electrical system, or any other system, of the Work under normal operating conditions has been completed, and the same is operating to the reasonable satisfaction of Architect and Owner

#### **§ 9.9 Partial Occupancy or Use**

**§ 9.9.1** The Owner in its discretion may elect to take possession of and use any completed or partially completed portion of the Work, provided that such possession and use do not interfere with the Contractor's completion of the Work. Contractor is given reasonable advance written notice of Owner's intent to exercise any such right, such use is subject to a written agreement, and such occupancy or use is consented to by the insurer 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 Punch List to 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, Contractor, and Architect 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 notice that the Work is ready for final inspection and acceptance and upon receipt of a final Application for Payment, the Architect will promptly make such inspection. When the Work complies with the Contract Documents and is fully completed, the Architect will promptly issue a final Certificate for Payment stating that to the best of the Architect's knowledge, information and belief, and on the basis of the Architect's on-site visits and inspections, the Work has been completed in accordance with the Contract Documents and that the entire balance found to be due the Contractor and noted in the final Certificate is due and payable. The Architect's final Certificate for Payment will constitute a further representation that conditions listed in Section 9.10.2 as precedent to the Contractor's being entitled to final payment have been fulfilled. Notwithstanding anything in the Contract Documents to the contrary, Final Completion shall not be certified nor final payment made until the Contract has been fully performed, including without limitation, completion of all Punch List items, final testing and the training of Owner's employees in the use of all materials, equipment and systems furnished under the Contract, Contractor's submission to Owner of the items listed below, and completion of such other items required by any Contract Documents, Owner or Architect in form and content to the satisfaction of Owner and Architect:

- .1 Consent of Surety;
- .2 Contractor's Affidavit of Payment of Debts and Claims;

- .3 Certification of Unemployment Compensation Contributions;
- .4 a notarized Final Unconditional Lien Waiver and Final Release on Owner's "Final Unconditional Lien Waiver and Final Releases" form from Contractor;
- .5 Individual Releases of Waiver of Liens from Subcontractors;
- .6 Guarantees, Warranties and Bonds in connection with the Work or any component or portion thereof
- .7 Certificates or receipts, if any, for inspecting or testing the Work or any part thereof;
- .8 Any operation, maintenance, instruction, schedules, or parts list, information or manual, certificates of inspection, marked-up record documents, occupancy permits and other closeout submittals required by the Contract Documents, and all other requirements, data or information regarding the Work or any component or portion thereof.

**§ 9.10.2** Neither final payment nor any remaining retained percentage shall become due until the Contractor submits to the Architect (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, or will be promptly paid upon receipt of payment from the Owner, (2) a certificate evidencing that insurance required by the Contract Documents to remain in force after final payment is currently in effect, (3) a written statement that the Contractor knows of no 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, (5) documentation of any special warranties, such as manufacturers' warranties or specific Subcontractor warranties, and (6) if required by the Owner, other data establishing payment or satisfaction of obligations, such as receipts and releases and waivers of liens, claims, security interests, or encumbrances arising out of the Contract, to the extent and in such form as may be designated by the Owner. If a Subcontractor refuses to furnish a release or waiver required by the Owner, the Contractor may furnish a bond satisfactory to the Owner to indemnify the Owner against such lien, claim, security interest, or encumbrance. If a lien, claim, security interest, or encumbrance remains unsatisfied after payments are made, the Contractor shall refund to the Owner all reasonable payments that the Owner has made in discharging the lien, claim, security interest, or encumbrance, including all costs and reasonable attorneys' fees. The Contractor shall not be obligated to bond around a lien, indemnify and defend, or refund any money if the lien arose from actions or inactions of the Owner or anyone for whom Owner is legally responsible.

**§ 9.10.3** If, after Substantial Completion of the Work, final completion thereof is materially delayed through no fault of the Contractor or by issuance of Change Orders affecting final completion, and the Architect so confirms, the Owner shall, upon application by the Contractor and certification by the Architect, and without terminating the Contract, make payment of the balance due for that portion of the Work fully completed, corrected, 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 the 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 Architect prior to certification of such 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 liens, 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 or with applicable codes or standards in the industry;
- .3 terms of any applicable warranties, including without limitation special warranties required by the Contract Documents;
- .4 latent or hidden defects discovered after final completion to the extent of State law; or
- .5 items listed on a "Punch List" that are not corrected or otherwise resolved; or
- .6 audits performed by the Owner, if permitted by the Contract Documents, after final payment.

**§ 9.10.5** Acceptance of final payment by the Contractor, a Subcontractor, or a supplier, shall constitute a waiver of all Claims, disputes, causes of actions, and legal and equitable 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.

#### **§ 9.11 LIQUIDATED DAMAGES**

**§ 9.11.1** Time limits stated in the Contract Documents for Substantial Completion and Final Completion of the Work ("Contract Time") are the essence of the Contract. By executing the Contract, the Contractor confirms that the periods for completion of the Work stated in the Contract are reasonable and acknowledges that the Owner will

incur substantial damages if the Work is not completed in accordance with the Contract Time as adjusted in accordance with the terms of the Contract. The Contractor further agrees that the amount of damages which the Owner might reasonably anticipate upon the Contractor's failure to complete the Work on or before all or any of the dates stated in the Contract Time will be difficult to ascertain because of indefiniteness or uncertainty.

Consequently, the Contractor agrees that there shall be liquidated damages in the event that the Work is not complete on or before the dates stated in the Contract Time as follows:

.1 The Contractor and the Contractor's surety shall be liable for and pay the Owner the sums hereinafter stipulated as liquidated damages for each calendar day that the Work remains incomplete after the date established for Substantial Completion of the Work, including any extension allowed in accordance with the Contract Documents:

Two Thousand dollars (\$2,000.00),

which sum is agreed upon as a reasonable and proper measure of damages which the Owner will sustain per day by failure of the Contractor to complete the Work within the time stipulated; it being recognized by the Owner and the Contractor that the injury to the Owner which could result from a failure of the Contractor to complete such Work on schedule is uncertain and cannot be construed as a penalty on the Contractor. The damages shall begin to accrue on the day following the date stated in the Contract Documents for Substantial Completion and shall cease accruing on the date that the Contractor achieves substantial completion, subject to any extensions in accordance with the Contract Documents.

.2 Subject to earlier Substantial Completion required for portions of the Work described in §9.11.1.1, the Contractor and the Contractor's surety shall be liable for and pay the Owner the sums hereinafter stipulated as liquidated damages for each calendar day that the Work remains incomplete after the date established for Final Completion of the Work and subject to any extensions allowed in accordance with the Contract Documents:

Five Hundred dollars (\$500.00),

which sum is agreed upon as a reasonable and proper measure of damages which the Owner will sustain per day by failure of the Contractor to complete the all remedial work, current deficient work, clean up the project, and other miscellaneous tasks as required to complete all work specified. The damages shall begin to accrue on the day following the date that both of the following conditions are satisfied: (i) Substantial Completion of the Work has been achieved, and (ii) the date stated in the Contract Documents for Final Completion has passed (or if no date is stated, on the sixty-first day following the day on which the Contractor achieves Substantial Completion); and shall cease accruing on the date the Contractor achieves Final Completion for all punch list items, subject to any extensions in accordance with the Contract

Documents.

.3 The Contractor agrees that the amounts stated herein constitute reasonable estimates of the damages which would probably be caused by a breach of the Contract Time and are reasonably proportionate to the damages anticipated from such a breach. The Owner may at its election offset any amounts arising hereunder against and reduce the Contract Sum. The damages stated herein shall be in addition to any other right for remedy which the Owner has in law or equity for Contractor's failure to complete the Work by the Contract Time.

.4 Final payment shall be subject to final completion of all Work and satisfaction of all requirements in accordance with the Contract Documents, and approval of such payment by the Mayor and City Council.

## ARTICLE 10 PROTECTION OF PERSONS AND PROPERTY

### § 10.1 Safety Precautions and Programs

The Contractor shall be responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the performance of the Contract, including without limitation the following on the Project site or in connection with the Work: Ensuring adequate strength, stability, and safety of all scaffolding, staging and hoisting equipment and for temporary shoring, bracing and typing; furnishing approved hard hats, other personal protective equipment as required, approved first aid supplies, a posted list of emergency facilities; and taking prompt action to correct any hazardous conditions report; complying with the requirements of the Occupational Safety and Health Act ("OSHA"), the Construction Safety Act of 1969, and other applicable laws, rules and regulations, as periodically enacted, amended, or superseded, (together "Acts"), including compliance with all applicable standards and regulations under such Acts, which are incorporated herein by reference. The Contractor shall be directly responsible for all citations, assessments, fines or penalties which may be incurred by reason of the failure of Contractor, Subcontractors, Sub-subcontractors, or suppliers to comply with applicable requirements in connection with the Work.

## **§ 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, a Subcontractor, or a Sub-subcontractor; 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 laws, statutes, ordinances, codes, rules and regulations, and 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 implement, 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 the owners and users of adjacent sites and utilities of the safeguards.

**§ 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 and 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. The Contractor may make a Claim for the cost to remedy the damage or loss to the extent such damage or loss is 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 3.18.

**§ 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 and Architect.

**§ 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**

If either party suffers injury or damage to person or property because of an act or omission of the other party, or of others for whose acts such party is legally responsible, notice of the injury or damage, whether or not insured, shall be given to the other party within a reasonable time not exceeding 21 days after discovery. The notice shall provide sufficient detail to enable the other party to investigate the matter.

## **§ 10.3 Hazardous Materials and Substances**

**§ 10.3.1** The Contractor is responsible for compliance with any requirements included in the Contract Documents regarding hazardous materials or substances. If the Contractor encounters a hazardous material or substance that is not the responsibility of the Contractor as part of its Work and if reasonable precautions will be inadequate to prevent foreseeable bodily injury or death to persons resulting from such material or substance encountered on the site by the Contractor, the Contractor shall, upon recognizing the condition, immediately stop Work in the affected area and notify the Owner and Architect in writing of the condition. Not in limitation of the foregoing, Contractor shall not bring nor permit any Subcontractor, Sub-subcontractor, or supplier to bring on the site any asbestos, PCB's, petroleum, hazardous waste, or radioactive materials (except as properly required for performing the Work).

**§ 10.3.2** Upon receipt of the Contractor's notice described in Section 10.3.1, the Owner shall obtain the services of a licensed laboratory to verify the presence or absence of the material or substance reported by the Contractor and, in the event such material or substance is found to be present, to cause it to be rendered harmless. Unless otherwise required by the Contract Documents, the Owner shall furnish in writing to the Contractor and Architect the names and qualifications of persons or entities who are to perform tests verifying the presence or absence of the material or substance or who are to perform the task of removal or safe containment of the material or substance. The Contractor and the Architect will promptly reply to the Owner in writing stating whether or not either has reasonable objection to the persons or entities proposed by the Owner. If either the Contractor or Architect has an objection to a person or entity proposed by the Owner, the Owner shall propose another to whom the Contractor and the Architect have no reasonable objection. If the absence of the material or substance is verified, Work shall immediately resume without adjustment to the Contract Time or Contract Sum. If the presence of the material or substance is verified, Owner shall have the option to terminate the Contract (pursuant to Article 14) entirely or with respect to that portion of the Work involving the affected area, or to render the material or substance harmless. In the latter case, when the material or substance has been rendered harmless, Work in the affected area shall resume upon written agreement of the Owner and Contractor. By Change Order, the Contract Time shall be extended appropriately and the Contract Sum shall be increased by the amount of the Contractor's reasonable additional costs of shutdown, delay, and start-up, if any, which adjustments shall be accomplished as provided in the Contract Documents. Notwithstanding anything in the Contract Documents to the contrary, if the Contractor, any Subcontractor or any Sub-subcontractor disturbs, removes, disposes or encapsulates the materials or substances knowing or suspecting that such materials or substances are or might be hazardous without written authorization from the Owner; or disturbs, removes, disposes or encapsulates these materials or substances in a manner not in accordance with written authorizations of Owner, the Contractor shall be solely responsible for any and all loss, damage, or liability arising or resulting from such acts.

**§ 10.3.2.1** To the fullest extent permitted by law, the Owner shall indemnify and hold harmless the Contractor, Subcontractors, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses, and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work in the affected area if in fact the material or substance presents the risk of bodily injury or death as described in Section 10.3.1 and has not been rendered harmless, provided that such claim, damage, loss, or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), except to the extent that such damage, loss, or expense is due to the fault or negligence of the party seeking indemnity.

**§ 10.3.3** Contractor shall not incorporate in the Work any materials or substances containing asbestos, PCBs, or other hazardous materials or substances unless required by the Contract Documents. Contractor shall not use, produce, store, release, dispose, or handle, in or about the Project, or transfer to or from the Project (or permit any other party to do such acts), any hazardous materials or substances except in compliance with all applicable environmental laws. Contractor shall not have violated the foregoing covenant if (a) the Contractor, any Subcontractor or Sub-subcontractor temporarily uses or stores hazardous materials or substances at the Project and such hazardous materials or substances are reasonably required for and are in quantities appropriate to the performance of the Work then being done; (b) such use or storage is called for by the Drawings and Specifications; (c) Contractor specifically identifies such hazardous materials or substances to Owner and Owner approved in writing in advance and (d) Contractor exercises reasonable oversight over the use and storage of such hazardous materials or substances and compliance with all applicable governmental requirements, including without limitation all Environmental Laws (defined in Section 10.3.4 below), Contractor shall have Material Safety Data Sheets (MSDS) for all hazardous materials or substances used in the workplace and make them available to employees who are potentially exposed to those hazardous materials or substances. The MSDS and other information shall be available at the jobsite with two (2) full copies of all information to be turned over to the Owner as it is received. The Contractor will be solely responsible for compliance with any "Right to Know" law relating to notice to its employees and others concerning hazardous materials or substances to which they could be exposed in the course or the conduct of the Work, including the labeling of such materials, the filing of any necessary reports relating thereto, and related requirements. The Owner shall be responsible for hazardous materials or substances required by the Contract Documents, except to the extent of the Contractor's fault or negligence in the use and handling of such materials or substances.

**§ 10.3.4** Hazardous substances" and "hazardous materials" shall include without limitation (a) asbestos, (b) petroleum-based chemicals and substances, (c) urea formaldehyde, (d) radon, (e) PCB and (f) any chemical, material, element, compound, solution, mixture, substance, waste or matter of any kind whatsoever which is

defined, classified, listed, designated or regulated as hazardous, toxic, infectious or radioactive under any Environmental Law. "Environmental Laws" shall mean any federal, state, or local statute, ordinance, rule, regulation, order, or guidance pertaining to health, industrial hygiene or the environment, including without limitation the Federal Comprehensive Environmental Response, Compensation, and Liability Act.

**§ 10.3.5** The Contractor shall indemnify, defend, and hold harmless Owner and its officers, agents and employees from and against any and all claims, causes of action, liabilities, damages, penalties, or fines, caused by (i) Contractor's breach of any prohibition or requirement set forth in this Section 10.3, or (ii) Contractor's breach of any applicable federal, state or local law or regulation governing in any respect Hazardous Substances, except to the extent the cost and expense are due to the Owner's fault or negligence. If the Contractor is held liable for the cost of remediation of a hazardous material or substance by reason of performing Work as required by the Contract Documents, the Owner shall reimburse the Contractor for all cost and expense thereby incurred, except to the extent such cost and expense is caused by the negligence or intentional acts or omissions of Contractor, its agent's, employees', Subcontractors, Sub-subcontractors, or their respective employees, representatives, or agents.

#### **§ 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.

### **ARTICLE 11 INSURANCE AND BONDS**

#### **§ 11.1 Contractor's Insurance and Bonds**

**§ 11.1.1** The Contractor shall purchase and maintain in continuous effect insurance not less than the types and limits of liability, containing the endorsements, and subject to the terms and conditions listed below or otherwise required by applicable law, whichever is greater, and insuring Contractor against liability from damages to persons because of injuries, including death, suffered by persons, or damages to property, arising from and flowing out of Contractor's operations, including Subcontractor, Sub-subcontractor, or supplier operations, in connection with performance of this Agreement; provided, however, by requiring insurance, Owner does not represent that the coverage and limits required will be adequate to protect the Contractor's interest in the Work. Coverages at a minimum shall be maintained without interruption from the date of commencement of the Work until the date of final payment and termination of any period of 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.

The Contractor shall purchase and maintain the required insurance from an insurance company or insurance companies lawfully authorized to issue insurance in the jurisdiction where the Project is located and satisfactory to the City Engineer of Owner. The Owner shall be named as an additional insured under the Contractor's commercial general liability and excess liability policies. Contractor's insurance shall be regarded as primary insurance to any other applicable insurance maintained by Owner. Required coverage and limits shall not be deemed or construed to be any limitation on the Contractor's liabilities or obligations to Owner under this Contract.

##### **.1 Workers' Compensation and Employer's Liability**

State Statutory, as required by law, and

Employer's Liability \$1,000,000 minimum limits each accident and policy limit for bodily injury or death by accident or disease. USL&H and/or Jones Act coverage shall be provided where applicable. Owner shall be named as an additional insured.

##### **.2 Commercial General Liability** shall be no less comprehensive and no more restrictive than coverage provided by a standard form Commercial General Liability Policy with minimum limits shown below covering bodily injury, death, and property damage including loss of use and personal and advertising injury.

\$5,000,000 – Bodily Injury & Property Damage – Each Occurrence

\$6,000,000 – General Aggregate Limit

\$6,000,000 – Completed Operations Aggregate Limit

\$2,000,000 - Personal and Advertising Injury per person Limit

\$50,000 - Fire Damage Limit (any one fire)

\$5,000 - Medical Damage Limit (any one person)

This insurance must include the following features:

1. Coverage shall be on an occurrence basis and not claims made basis.
2. Coverage for all premises and operations.
3. The General Aggregate limit shall apply on a Per Project basis.
4. Operations by independent contractors.
5. If work to be performed by Contractor includes construction or demolition operations within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, road beds, tunnel, underpass, or crossing, then such policy will include coverage for work done within 50 feet of a railroad right of way.
6. Policy shall not exclude coverage for XCU (explosion, collapse, underground) hazards
7. Policy shall not contain a total or absolute pollution exclusion. Coverage shall be provided for pollution exposures arising from products and completed operations. (As per standard CG0001 Pollution Exclusion or equivalent.)
8. Products and completed operations shall be maintained for duration of Work, and shall be further maintained for a minimum period of three years after final acceptance and payment, unless modified in the Special Provisions.
9. Employment exclusion shall be deleted.
10. Broad form property damage coverage.
11. Contractual liability coverage shall be included and shall not be amended by any limiting endorsements. Defense costs shall be in addition to policy limits.
12. Completed Operations shall provide coverage for work performed by subcontractors.
13. If applicable, coverage for EIFS-related work shall be included.

**.3** Comprehensive Commercial Automobile Liability shall be at least as broad as and no less restrictive than ISO form CA 0001, covering all owned, non-owned, hired, and/or leased vehicles used in connection with performance of the Work or Contract, with a minimum limit for bodily injury of \$2,000,000 per person and \$5,000,000 per occurrence and property damage of \$2,000,000 per occurrence. Insurance must include contractual liability coverage. If applicable, policy shall provide auto cargo pollution endorsement (ISO CA 99 48, or equivalent). If work to be performed by Contractor includes construction or demolition operations within 50 feet of any railroad property and/or affecting any railroad bridge or trestle, tracks, road beds, tunnel, underpass, or crossing, then such policy will include coverage for work done within 50 feet of a railroad right-of-way

**.4** Excess Liability shall provide liability coverage in excess of the specified Employer's Liability, Commercial General Liability, and Comprehensive Commercial Automobile Liability with limits not less than the following:

\$5,000,000 – Bodily Injury & Property Damage Each Occurrence  
\$5,000,000 – Annual Aggregate Limit  
\$5,000,000 – Completed Operations Aggregate Limit

**.5** Builder's Risk. Contractor shall purchase and maintain, in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located, property insurance written on a builder's risk "all-risk" or equivalent policy form in the amount of the initial Contract Sum, plus value of subsequent Contract modifications, comprising total value for the entire Work of the Project at the site on a replacement cost basis. Such property insurance shall be maintained, unless otherwise provided in the Contract Documents or otherwise agreed in writing by Owner and Contractor. Such property insurance shall be on an "all-risk" or equivalent policy form and shall include, without limitation, insurance against the perils of fire (with extended coverage) and physical loss or damage including, without duplication of coverage, theft, vandalism, malicious mischief, collapse, earthquake (subject to sublimit), flood (subject to sublimit), windstorm, falsework, testing and startup, temporary buildings and debris removal including demolition occasioned by enforcement of any applicable legal requirements, and shall cover reasonable compensation for Architect's and Contractor's services and expenses required as a result of such insured loss. This insurance shall include the Owner and all tiers of Subcontractors as additional insureds. The form of policy for this coverage shall be Completed Value.

1. The Owner will not carry Builder's Risk or other property insurance on the Work, or any part thereof. Notwithstanding anything in this Contract to the contrary, the Contractor shall bear the risk of loss of the Work until Final Completion and acceptance of the Work and shall fully insure its interests in the Work accordingly, and name Owner as an additional insured.

1. If the Contractor fails to purchase and maintain such property insurance, or any other insurance, required by the Contract, the Owner shall have the right, but not the duty, to purchase such insurance on behalf of Contractor and the cost thereof will be charged and at Owner's option withheld from any amount owing to the Contractor. If the Owner is damaged in any way by the failure or neglect of the Contractor to purchase or maintain insurance as described above then the Contractor shall bear all costs and expenses arising out of or resulting from such failure or neglect.
1. If the property insurance requires deductibles, the Contractor shall pay such deductibles and costs not covered because of such deductibles.
1. This property insurance shall cover portions of the Work stored off the site, and also portions of the Work in transit. The Contractor shall purchase and maintain mechanical breakdown coverage in association with the property insurance as required by this Section 11.1.1.5 which shall specifically cover such insured objects during installation and until final acceptance by the Owner, and Owner shall be named as an additional insured.
1. The property insurance provided by Contractor pursuant to this Section 11.1.1.5 shall be endorsed to allow for partial occupancy or use in accordance with Section 9.9, evidence of which shall be provided with other evidence of coverages.

.6 Contractor insurance shall contain a Non-Waiver of Government Immunity Endorsement.

.7 Contractor shall file with the Owner and Architect prior to commencement of the Work, and thereafter upon renewal or replacement of each required policy of insurance, certificates of insurance reasonably acceptable to the Owner and executed by a licensed and authorized representative of the participating insurer. If required by Owner, copies of endorsement and/or policies shall be made available. Contractor shall notify Owner within three business days of learning of any cancellation, non-renewal, reduction of limits, or material modification of any policies of insurance required by this agreement; the occurrence of any of which shall (i) require the prior written approval of Owner or (ii) Contractor obtaining and providing Owner certificates of additional or replacement insurance that is satisfactory to Owner and effective no later than the effective date of such cancellation, non-renewal, reduction of limits, or material modification. Contractor shall cause all policies of insurance to be endorsed to provide Owner 30 days' notice prior to material change, reduction of coverage or non-renewal, or cancellation (ten days for nonpayment of premium). Contractor shall obtain and provide Owner certificates of additional or replacement insurance that is satisfactory to Owner and effective no later than the effective date of such cancellation. 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 this Section 11.1.1. Failure of Owner to demand such certificate(s) or other evidence of full compliance with these insurance requirements or failure of Owner to identify any deficiency from evidence provided by Contractor shall not be construed as a waiver of Contractor's obligation to maintain such insurance or satisfy any other requirement of this Section 11.1.1.

*(Paragraph Deleted)*

.8 The Contractor shall cause the commercial general liability and umbrella policies required by the Contract Documents to include on a primary and non-contributory basis (1) the Owner as additional insured for claims caused in whole or in part by the Contractor's negligent acts or omissions during the Contractor's operations; (2) the Owner as additional insured for Completed Operations for three years following substantial completion for claims caused in whole or in part by the Contractor's negligent acts or omissions; (3) the Architect and Architect's Consultants as additional insured using ISO Form CG 2032 0704 or equivalent; (4) other parties as identified by Owner through special supplemental conditions.

.9 All liability policies that include the Owner as an additional insured shall include a Governmental Immunities Endorsement, which endorsement shall include the following provisions:

"Non-Waiver of Government Immunity: The insurance carrier expressly agrees and states that the purchase of this policy and including the Owner as an Additional Insured does not waive any of the defenses of governmental immunity available to the Owner under applicable law as it now exists and as it may be amended from time to time."

.10 Contractor waives all rights of subrogation against Owner, Architect, and Architect's Consultants and

Contractor shall cause its insurers for Workers' Compensation, Comprehensive Commercial Automobile Liability, Commercial General Liability, and Excess Liability to endorse said policies to waive all rights of subrogation against Owner with respect to losses arising out of or in connection with the Work.

**.11** Contractor shall require all Subcontractors, suppliers or others performing any part of the Work to procure insurance reasonably satisfactory to the Owner and provide certificates of insurance upon Owner's request. Owner shall be named as an additional insured under such policies to the same extent as required of Contractor by this Section 11.1.

**§ 11.1.2** Unless otherwise specified by Owner in writing, the Contractor before commencing the work shall furnish in duplicate a Performance Bond for the faithful completion of the Work and performance of the Contract in the amount of the Contract Sum, and a Payment Bond insuring payment of all obligations owing under the Contract, in the amount of the Contract Sum, written by a surety licensed to do business in the State of Nebraska and acceptable to the Owner. The forms of the Performance Bond and Payment Bond shall be AIA Document No. A312, or such other forms specified by the Architect and satisfactory to the Owner, with the following modifications: Add an endorsement to the Performance Bond and to the Payment Bond thereto stating:

"Notwithstanding any other provision in this bond to the contrary, the period of time for instituting suit hereunder shall be the maximum time allowed under Nebraska Law for the institution of suit on written bonds."

Also add an endorsement to the Payment Bond stating:

"This bond is intended to comply with the provisions of Sections 52-118 through 52-118.02 inclusive of the Revised Statutes of Nebraska, as amended from time to time, and in the event the bond does not meet the requirements of, or is contrary to, said Statutes, then in such event the bond shall be deemed amended so as to comply therewith."

**.1** Such bonds shall be a condition of this Contract. 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.

**.2** If at any time a surety on any such Bond is declared bankrupt or loses its right to do business in Nebraska, Contractor shall immediately notify Owner of the same in writing and obtain and provide to Owner a replacement Bond (or bonds) in form, content, and surety satisfactory to the Owner. No further payment of Contract Sum shall be due or made under this Contract until an acceptable replacement Bond (or bonds) is provided to Owner. The premiums for all bonds provided under this Section 11.1.2, including, but not limited to, any substitute or replacement bonds, shall be paid by Contractor.

**.3** 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.

**.4** The principal amount of the payment and performance bond furnished by Contractor shall be modified as a result of (and to the extent of) a Change Order that increases the Contract Sum, and the Contractor shall provide to the Owner written confirmation from the Surety indicating that the bond has been modified and to what extent it has been modified.

**§ 11.2 Owner's Insurance** The Owner shall be responsible for purchasing and maintaining the Owner's usual insurance.

### **§ 11.3 Waivers of Subrogation**

**§ 11.3.1** The Owner and Contractor waive all rights against (1) each other and any of their subcontractors, sub-subcontractors, agents, and employees, each of the other; (2) the Architect and Architect's consultants; and (3) Separate Contractors, if any, and any of their subcontractors, sub-subcontractors, agents, and employees, for damages caused by fire, or other causes of loss, to the extent of insurance proceeds actually recovered under property or casualty insurance obtained pursuant to this Article 11 or other property insurance applicable to the

Work, except such rights as they have to proceeds of such insurance, and provided such waiver is not prohibited by any insurance policy paying the loss. The Owner or Contractor, as appropriate, shall require similar written waivers in favor of the individuals and entities identified above from the Architect, Architect's consultants, Separate Contractors, subcontractors, and sub-subcontractors. This waiver of subrogation shall be effective as to a person or entity (1) even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, (2) even though that person or entity did not pay the insurance premium directly or indirectly, or (3) whether or not the person or entity had an insurable interest in the damaged property. Contractor shall require a similar waiver of all Subcontractors and Sub-subcontractors performing any of the Work.

**§ 11.3.2** 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 Work, or if after final payment property insurance is to be provided on the completed Work through a policy or policies other than those insuring the Work during the construction period, the Owner agrees to submit claims for damages covered by such insurance and waives all rights for damages caused by fire or other causes of loss covered by this separate property insurance to the extent of amounts actually paid to Owner under such Owner insurance and the applicable policy or policies permit such waiver; provided, however, Owner's submission of a claim shall not constitute a waiver by Owner of any requirement of this Contract that Contractor's insurance shall be primary or noncontributory.

#### **§ 11.4 Loss of Use, Business Interruption, and Delay in Completion Insurance**

The Owner, at the Owner's option, may purchase and maintain additional insurance that will protect the Owner against loss of use of the Owner's property, or the inability to conduct normal operations, due to fire or other hazards or causes of loss. The Owner waives all rights of action against the Contractor and Architect for loss of use of the Owner's property, or the Owner's inability to conduct normal operations, due to fire or other hazards however caused. This waiver includes any consequential damages arising from such loss or inability.

If the Owner requests in writing that insurance of risks other than those described in this 11.1 or other special causes of loss be included in the property insurance policy, the Contractor shall, if possible, include such insurance, and the costs thereof shall be charged to the Contractor by appropriate Change Order.

#### **§11.5 Adjustment and Settlement of Insured Loss**

A loss insured under the property insurance required by the Agreement shall be adjusted by the Contractor as fiduciary and made payable to the Contractor as fiduciary for the insureds, as their interests may appear. The Contractor shall pay all insureds their respective shares of insurance proceeds, including without limitation, Subcontractors (and requiring Subcontractors to make payments to their Sub-subcontractors in similar manner).

*(Paragraph Deleted)*

### **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 Architect's or Owner's request or to requirements specifically expressed in the Contract Documents, it must, if requested in writing by the Architect or Owner's, be uncovered and exposed for the Architect's or Owner's examination and be replaced or reconstructed at the Contractor's expense without change in the Contract Time or Contract Sum.

**§ 12.1.2** If a portion of the Work has been covered that is not contrary to requirements of the Contract Documents and the Architect or Owner has not specifically requested to examine prior to its being covered, the Architect or 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, the Contractor shall be entitled to an equitable adjustment to the Contract Sum and Contract Time as may be appropriate. If such Work is not in accordance with the Contract Documents, the costs of uncovering the Work, and the cost of correction and recovering, shall be at the Contractor's expense.

#### **§ 12.2 Correction of Work**

##### **§ 12.2.1 Before Substantial Completion**

The Contractor shall promptly correct Work rejected by the Architect or failing to conform to the requirements of the Contract Documents, discovered before 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.

#### **§ 12.2.2 After Substantial Completion**

**§ 12.2.2.1** In addition to the Contractor's obligations under Section 3.5, if, within two years after the date of Substantial Completion of the Work or designated portion thereof or after the date for commencement of warranties established under Section 9.9.1, or by terms of any applicable special warranty required by the Contract Documents, any of the Work is found to be defective or not in accordance with the requirements of the Contract Documents, the Contractor shall correct it promptly after receipt of 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 two-year period for correction of Work, if the Owner has actual knowledge of defective or nonconforming Work and fails to notify the Contractor and give the Contractor an opportunity to make the correction, the Owner waives the rights to require correction by the Contractor and to make a claim for breach of warranty. If the Contractor fails to correct defective or nonconforming Work promptly after receipt of notice from the Owner, the Owner may correct it.

**§ 12.2.2.2** The two-year period required by the Contract 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.

**§ 12.2.2.3** The two-year period for correction of Work shall not be extended by corrective Work performed by the Contractor pursuant to this Section 12.2.

**§ 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 of the Owner or Separate Contractors, whether completed or partially completed, 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 two-year 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 Work.

#### **§ 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 Nebraska. All lawsuits shall be filed and remain until final resolution in the District Court of Nebraska located in Sarpy County.

#### **§ 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. Except as provided in Section 13.2.2, neither party to the Contract shall assign the Contract or any rights or obligations under the Contract, in whole or in part, without written consent of the other. If either party attempts to make an assignment without such consent, that party shall nevertheless remain legally responsible for all obligations under the Contract.

**§ 13.2.2** The 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.

The Contractor shall execute all consents reasonably required to facilitate the assignment, provided, however, Contractor will not be required to assume any obligations directly towards the lender.

**§ 13.2.3** No assignment by Contractor whether voluntary or involuntary, or by operation of law, shall be valid or effective without Owner's consent. If Contractor makes or suffers any such assignment, it shall be a breach of the Contract Documents by Contractor.

### **§ 13.3 Rights and Remedies**

**§ 13.3.1** 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. All rights and remedies afforded hereunder are cumulative in nature and may be exercised at any time singularly or collectively.

**§ 13.3.2** 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 thereunder, except as may be specifically agreed upon in writing.

### **§ 13.4 Tests and Inspections**

**§ 13.4.1** Tests, inspections, and approvals of portions of the Work shall be made as required by the Contract Documents and by applicable laws, statutes, ordinances, codes, rules, and regulations or lawful orders of public authorities. Unless otherwise provided, the party responsible for such tests shall make arrangements for such tests, inspections, and approvals with an independent testing laboratory or entity acceptable to the other party, or with the appropriate public authority, and shall bear all related costs of tests, inspections, and approvals. The party who arranges for a test shall give the Contractor, Architect and Owner timely notice of when and where tests and inspections are to be made so that the Contractor, Architect and Owner may be present for such procedures. The Owner shall bear costs of tests, inspections, or approvals that do not become requirements until after bids or proposals are received, negotiations concluded, and GMP Amendment is entered, and for tests, inspections, or approvals where building codes or applicable laws or regulations so require. The parties shall work together to ensure the testing conducted pursuant to this Section 13.4.1 is performed in an efficient and cost-effective manner.

In addition to any responsibility of Contractor for testing, inspections, or approvals specified by the Contract Documents, Contractor shall pay for retesting or re-inspection of any portion of the Work after correction of any defects, or if such retesting or reinspection is necessitated by any Contractor negligence or error that causes original testing or inspection to be unreliable, inconclusive or deficient.

**§ 13.4.2** If the Architect, Owner, or public authorities having jurisdiction determine that portions of the Work require additional testing, inspection, or approval not included under Section 13.4.1, the Architect will, upon written authorization from the Owner, 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 Architect of when and where tests and inspections are to be made so that the Architect may be present for such procedures. Such costs, except as provided in Section 13.4.3, shall be at the Owner's expense. Contractor shall notify Owner of any additional testing or inspection that is required prior to performing such work.

**§ 13.4.3** If procedures for testing, inspection, or approval under Sections 13.4.1 and 13.4.2 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.

**§ 13.4.4** 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 Architect.

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

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

**§ 13.4.7** If the Owner requires laboratory tests to establish the quality of a materials submitted by the Contractor as a substitute for specified materials, such tests shall be made and the laboratory reports submitted to the Owner for

Owner review and approval. The Contractor shall pay all charges connected with such testing, except for testing a proposed substitute material because the specified material is not reasonably available due to no Fault of the Contractor, a Subcontractor or a Sub-subcontractor pursuant to Section 3.4.2.1.

**§ 13.4.8** Where materials are specified to conform to the standard specifications of the American Society for Testing and Materials, American Concrete Institute, American Institute of Steel Construction, other recognized technical organizations or the Federal government, but testing is not required in connection therewith, the Contractor shall furnish certificates to the Owner as evidence that the proposed materials meet all applicable requirements of such standard specifications.

**§ 13.4.9** The Contractor shall provide the Owner and Architect, or any Federal, State, county, municipal, or local authority or agency specified by the Owner, or any representative, agent or designee of any of them, access to, or observation, inspection or testing of the Work or any materials, payrolls, records, invoices, other data, records or information related to the Work or this Contract, provided such access to, or observation, inspection or testing does not delay or interfere with the Work.

#### § 13.5 Interest

Unless otherwise provided in the Agreement, payments due and unpaid under the Contract Documents shall bear interest from the date payment is due at the rate of 5% per annum.

### § 13.6 Conformance with Laws

**The Contractor and all Subcontractors and Sub-subcontractor shall fully comply with all applicable Federal, State, and local laws, rules, regulations, ordinances, policies, and procedures, including without limitation those described in the following sections:**

**§ 13.6.1** Nondiscrimination and Equal Opportunity. The Contractor shall ensure compliance with all applicable provisions of Title VI of the Civil Rights Act of 1964 and the Civil Rights Restoration Act of 1987, Vietnam Era Veterans' Readjustment Assistance Act of 1974, Section 504 of the Rehabilitation Act of 1973, Americans with Disabilities Act of 1990, and other applicable federal laws, and all applicable regulations or other guidance promulgated thereunder. The Contractor in employment and in connection with its performance of the Work or its other programs or activities shall not discriminate against any employee or applicant because of race, color, religion, sex, national origin, ancestry, age, marital status, disability, physical or mental handicap, protected veteran or other status or class. In accordance with applicable laws, regulations, and other guidance, including Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d to 2000d-4, the parties agree, and any invitation to bid any part of the Work shall provide, that minority business enterprises will be afforded full opportunity to submit bids in response to any invitation to bid for the Work and will not be discriminated against on the grounds of race, color, national origin, sex, age, disability or handicap in consideration of such award or otherwise. Pursuant to Neb. Rev. Stat. Section 48-1222, neither the Contractor nor any Subcontractor or Sub-subcontractors shall discriminate against any employee or applicant for employment, to be employed in the performance of the Work or Contract, with respect to the employee's or applicant's hire, tenure, terms, conditions, or privileges of employment, because of the employee's or applicant's race, color, religion, sex, disability, or national origin.

**§ 13.6.2** Occupational Safety and Health Act of 1970. Contractors shall comply with all requirements of the Occupational Safety and Health Act of 1970.

**§ 13.6.3** Nebraska Fair Labor Standards. Contractor shall comply with fair labor standards in the pursuit of its business and in the execution of the Contract awarded to him by Owner as required by Section 73-101 through 73104 R.R.S. Nebr. 1943, as amended from time to time, and shall pay a scale of wages and make such reports as thereby required.

**§ 13.6.4** Nebraska Employment Security Law. Pursuant to Neb. Rev. Stat. Section 48-657(2), as amended from time to time, the Contractor and all Subcontractors and Sub-subcontractors shall pay to the Unemployment Compensation Fund of the State of Nebraska and the State Unemployment Insurance Trust Fund unemployment combined tax and interest due under the Employment Security Law on wages paid to individuals employed in the performance of the Contract of which these conditions are a part; and before final payment shall be made of the final 3% of this Contract, the Contractor shall secure and file with the Owner, and cause all Subcontractors and Sub-subcontractors to secure and file with the Owner, a written clearance from the State Commissioner of Labor of Nebraska, as required by Section 48-657(4), certifying that all payments then due of combined tax or interest which may have arisen under this Contract have been made by the Contractor, Subcontractors and Sub-subcontractors to the Unemployment Compensation Fund, as required.

**§ 13.6.5 Verification of Immigration Status.** The Contractor agrees to use the federal immigration verification system to determine the work eligibility status of new employees physically performing services on the Project within the State of Nebraska. The federal immigration verification system means the electronic verification of the work authorization program authorized by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. 1324a, known as the E-Verify Program, or an equivalent federal program designated by the United States Department of Homeland Security or other federal agency authorized to verify the work eligibility status of a newly hired employee. This requirement applies to the Contractor and all Subcontractors and Sub-subcontractors. The Contractor shall, by written agreement, require compliance with the federal immigration verification system by all Subcontractors and Sub-subcontractors. If the Contractor is an individual or sole proprietorship, the following applies:

- .1 The Contractor must complete the United States Citizenship Attestation Form, available on the Department of Administrative Services website at [www.das.state.ne.us](http://www.das.state.ne.us).
- .2 If the Contractor indicates on such attestation form that he or she is a qualified alien, the Contractor, Subcontractor or Sub-subcontractor agrees to provide the U.S. Citizenship and Immigration Services documentation required to verify the Contractor's lawful presence in the United States using the Systematic Alien Verification for Entitlements (SAVE) Program.
- .3 The Contractor understands and agrees that lawful presence in the United States is required and the Contractor, Subcontractor or Sub-subcontractor may be disqualified or the contract terminated if such lawful presence cannot be verified as required by Neb. Rev. Stat. §4-108.

The Contractor shall require similar clauses to those in Section 13.6.5 above in all subcontracts for service or materials.

**§ 13.6.6 Drug Free Work Place.** Neither Contractor nor any employee of Contractor shall engage in unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance including alcohol or alcoholic beverages, in conducting any activity covered by this Agreement. The Owner reserves the right to request and receive a copy of the Contractor's Drug Free Work Place Policy. The Contractor hereby acknowledges that the Owner reserves the right to prohibit the use of tobacco on the Project site. Contractor further agrees that a provision similar to this statement shall be included in all subcontracts for services required under this Contract.

**§ 13.6.7 Kickbacks.** The Contractor certifies and warrants that no gratuities, kickbacks, or contingency fees were paid in connection with this Agreement, nor were any fees, commissions, gifts, or other considerations made contingent upon the award of this Agreement. If the Contractor breaches or violates this warranty, the Owner may, at its discretion, terminate this Agreement without liability of any kind, including any unpaid amounts otherwise due for Work completed. The remedy provided to the Owner herein as a result of a breach of warranty by the Contractor shall be in addition to any other contractual or legal remedies which the Owner may have.

**§ 13.6.8 Sexual Harassment.** The Contractor hereby acknowledges that the Owner prohibits sexual harassment. In the event that Owner or Contractor, in its reasonable judgment, determines that Contractor or a subcontractor has committed an act of sexual harassment, the Contractor, as a condition of this Agreement, will remove the harasser from the Project site and from the Owner's premises and take such other action as is deemed necessary to cause the sexual harassment to cease.

**§ 13.6.9 Weapons Prohibited.** Contractor hereby acknowledges that possession of dangerous weapons (concealed or unconcealed) on the Owner's property, the Project site or in vehicles or on persons arriving at or leaving the Project site is prohibited by Owner. The Contractor shall ensure that dangerous weapons (which shall include guns, knives, explosives or any other device as determined by the Owner) are not allowed on the Project site and any person who violates such policy shall be banned from the Project site.

### **§ 13.7 Other**

**§ 13.7.1 Product Certification.** Each supplier of material incorporated into this project shall provide to the Owner through the Contractor Material Safety Data Sheets, and a certification statement from the manufacturer of each material, that the material does not contain asbestos materials. These Material Safety Data Sheets and certifications must be submitted to the Owner prior to final closeout on the project.

**§ 13.7.2 Start of Construction.** The Contractor shall not begin construction of the Project before both the Owner and the Contractor have signed applicable Contract Documents, including the Agreement, and satisfied any and all conditions to commencement of Work including but not limited to any notice to proceed.

**§ 13.7.3 Record Retention.** The Contractor shall retain records for the minimum period required by applicable law, and in any event for not less than three years after final payment is made under the Contract. If an audit, litigation, or other action involving the records is started before the end of the period determined in accordance with this Section, the records must be retained until all issues arising out of the action are resolved, or until the end of the minimum document retention period, whichever is later.

**§ 13.7.4 Compliance with Owner's Directives.** Contractor shall comply, and shall cause Contractor's employees and agents and all Subcontractors and Sub-subcontractors to comply, with any applicable health or safety directives issued by Owner.

**§ 13.7.5 Owner Review and Approval.** Terms or conditions providing for review or approval of the Owner shall be satisfied by review or approval of the City Administrator or City Engineer or any person designated in writing by the City Administrator or City Engineer to provide review or approval under the circumstances, except if the City Administrator, City Engineer, or any such designee determines that review or approval of the Mayor or City Council is necessary or appropriate.

**§ 13.8 Applicable Laws.** Nothing contained in the specifications or drawings shall be construed as authority for violation by the Contractor or any Subcontractor or Sub-subcontractor of any applicable codes, ordinances, laws, or regulations, which shall take precedence over any such specifications or drawings to the contrary. When specifications or drawings require higher standard than required by applicable codes, ordinances, laws, or regulations, the the higher standards shall govern.

**§ 13.9 Trade Sections.** Specifications generally are divided into trade sections for the purpose of ready reference, consistent with the Construction Specifications Institute's format. Division of the Work among Subcontractors or Sub-subcontractors is the Contractor's responsibility and neither the Architect nor Owner assumes responsibility to act as arbiter or establish subcontract limits of work.

**§ 13.10 Disposal of Water**

**§13.10.1** Trenches and other excavations shall be kept reasonably free of water at all times. Contractor immediately shall pump, bail, and remove water found in any trench or other excavation, whether rain or seepage.

**§13.10.2** The Contractor shall dispose of water (including waste water) in such manner as will not endanger public health or safety or damage or adversely affect other property. Contractor shall comply with all applicable laws, rules, and regulations governing disposal of water (including waste water).

**§ 13.12 Staking.** The Contractor shall be responsible and pay for all exterior and building construction staking and layout, including without limitation, building corners, boundary corners, elevation references, and locations of all gridlines, utilities, curbs and finish floor elevations. Contractor shall not begin paving operations until Owner and Architect have approved grades. Owner reserves the right to have an independent registered civil engineer, employed by Owner, verify any or all locations, grades or elevations, and the Contractor shall make all corrections as required at no cost to the Owner. During progress and upon completion of the Work, the Contractor shall engage the services of a registered professional engineer or land surveyor who shall record, certify, and provide on as-built drawings actual locations of all buildings, structures, roads, utilities, site grading and associated Work, and GPS coordinates of all utilities, including without limitation, any spare conduits.

**§13.13 Signs.** Contractor shall not erect or locate any signs, billboards, or advertisements on or about the Project Site, except as required by the Contract, the Work, or applicable law, or as otherwise approved by Owner in its sole discretion. If Owner permits Contractor to erect advertisement signage at the Project site, at Owner's election Contractor shall also be responsible for adding Owner to such signage, at Contractor's cost. The display of signs other than those required by law shall be limited to those required by the Contract Documents and for safety. Contractor shall furnish and maintain all signs as required for execution of the Work and as required by 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, a Subcontractor, a Sub-subcontractor, their agents or employees, or any other persons or entities performing portions of the Work, for any of the following reasons:

- .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;
- .3 Because the Architect has not issued a Certificate for Payment and has not notified the Contractor of the reason for withholding certification, or because the Owner has not made payment on undisputed amounts of a Certificate for Payment within the time stated in the Contract Documents; or.
- .4 The Owner has failed to furnish to the Contractor reasonable evidence as required by Section 2.2.

**§ 14.1.2** The Contractor may terminate the Contract if, through no act or fault of the Contractor, a Subcontractor, a Sub-subcontractor, their agents or employees, or any other persons or entities performing portions of the Work, 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.

**§ 14.1.3** If one of the reasons described in Section 14.1.1 or 14.1.2 exists, the Contractor may only terminate after giving written notice of the intent, and reasons necessitating the decision, to terminate and the Owner fails to satisfy or eliminate the stated conditions necessitating termination within seven days after the notice is received from Contractor, at which point Contractor may terminate the Contract and recover from the Owner payment for cost of Work executed to the termination date, including Contractor's fee reasonably allocated thereto, and reasonable costs incurred by reason of termination but in no event shall Contractor be paid anticipated profit or overhead for Work not yet performed.

**§ 14.1.4** If the Work is stopped for a period of 60 consecutive days through no act or fault of the Contractor, a Subcontractor, a Sub-subcontractor, or their agents or employees or any other persons or entities performing portions of the Work because the Owner has repeatedly failed to fulfill the Owner's obligations under the Contract Documents with respect to matters important to the progress of the Work, the Contractor may, upon seven additional days' notice to the Owner and the Architect and failure to cure, terminate the Contract and recover from the Owner as provided in Section 14.1.3.

## **§ 14.2 Termination by the Owner for Cause**

**§ 14.2.1** The Owner may terminate the Contract if the Contractor

- .1 repeatedly refuses or fails to supply enough properly skilled workers or proper materials;
- .2 fails to make payment to Subcontractors or suppliers in accordance with the respective agreements between the Contractor and the Subcontractors or suppliers;
- .3 repeatedly disregards applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of a public authority; or
- .4 otherwise is guilty of material breach of a provision of the Contract Documents.
- .5 files a petition under any federal or state law concerning bankruptcy, reorganization, insolvency or relief from creditors, or if such a petition is filed against the Contractor without its consent, and it is not dismissed within sixty (60) days;
- .6 is generally not paying its debts as they become due; or if the Contractor becomes insolvent; or if the Contractor consents to the appointment of a receiver, trustee, liquidator, custodian or the like of the Contractor or of all or any substantial portion of its assets; or if a receiver, trustee, liquidator, custodian or the like is appointed with respect to the Contractor or takes possession of all or any substantial portion of its assets and such appointment or possession is not terminated within sixty (60) days; or if the Contractor makes an assignment for the benefit of creditors; or
- .7 actually or constructively abandons, or puts Owner on actual or constructive notice that it intends to abandon, the Project.

**§ 14.2.2** When any of the reasons described in Section 14.2.1 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 any materials and equipment thereon that are owned by the Contractor and intended to be incorporated into the Work;
- .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** When the Owner terminates the Contract for one of the reasons stated in Section 14.2.1, the Contractor shall not be entitled to receive further payment until the Work is finished, at which time Owner shall pay for the portion of the Work Contractor properly completed before the termination date in accordance with the Contract Documents, reduced by any damages or additional costs incurred by Owner in connection with termination of the Contract or completion of the Work by Owner or others.

**§ 14.2.4** If the unpaid balance of the Contract Sum exceeds costs of finishing the Work or incurred by Owner in connection with termination of the Contract, including without limitation compensation for the Architect's services and expenses made necessary thereby and other damages, costs or expenses 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. The amount to be paid to the Contractor or to Owner, as the case may be, shall be determined by the Owner; and Contractor's surety, if any, shall be liable with Contractor for payment of any sums due to the Owner by reason thereof. Any such obligation for payment shall survive termination of this Contract.

**§ 14.2.5** 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, except as may otherwise be provided pursuant to a liquidated damages agreement between Owner and Contractor for damages arising from any failure of Contractor to complete Work within any applicable Contract Time.

**§ 14.2.6** If the Contractor files a petition in Bankruptcy seeking an order for relief, or if such an order for relief in Bankruptcy is entered on behalf of Contractor pursuant to Title 11 of the United States Code, or if any other similar order is entered under any other debtor relief laws, or if Contractor makes a general assignment for the benefit of its creditors, or if a receiver is appointed for the benefit of its creditors, or if a receiver is appointed on account of Contractor's 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 Contractor or its successor in interest adequate assurance of future performance in accordance with the terms and conditions of the Contract Documents. Failure to comply with such request within seven days of delivery of the request shall entitle Owner to terminate the Contract Documents and to the accompanying rights set forth above in this Section 14.2. 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 shall be deducted from the unpaid Contract Sum, together with any other damages, costs or expenses as provided in Section 14.2.4. Contractor shall be liable for and pay Owner the amount of any damages, costs or expenses in excess of the unpaid Contract Sum as provided in Section 14.2.4.

### **§ 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 in accordance with the Contract Documents for increases in the cost and time caused by suspension, delay, or interruption under Section 14.3.1. Adjustment of the Contract Sum shall include overhead and profit. 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 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;
- .4 obtain materials from Subcontractors, Sub-subcontractors, and suppliers for which payment has been made and deliver them to the jobsite or such other location as designed by Owner; and move stockpiled materials at the site to locations within buildings or other locations designated by Owner; and
- .5 where orders have been placed, determine to what extent and at what cost the orders may be canceled. Provide such information to Owner so Owner can decide whether to cancel or accept delivery, and if accepted, deliver all such materials to the jobsite or to other location designated by Owner.

**§ 14.4.3** In case of such termination for the Owner's convenience, the Owner shall pay the Contractor for Work properly executed; reasonable demobilization or other costs incurred that are directly related to such termination, including reasonable and verifiable costs of actually incurred and associated with the termination of Subcontracts as described in detail in invoices and descriptions provided by Contractor, and the termination fee set forth in the Agreement.

**§ 14.4.4** In the event a court of competent jurisdiction determines that termination of Contractor pursuant to **§14.2** does not satisfy one or more of the reasons set forth in **§14.2.1**, then such termination shall be deemed a termination for convenience pursuant to **§14.4**, and the amount due and owing Contractor, if any, shall be determined pursuant to **§14.4.3**.

## ARTICLE 15 CLAIMS AND DISPUTES

### § 15.1 Claims

#### § 15.1.1 Definition

A Claim is a demand or assertion by one of the parties seeking, as a matter of right, payment of money, a change in the Contract Time, or other relief with respect to the terms of the Contract. The term "Claim" also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract. The responsibility to substantiate Claims shall rest with the party making the Claim.

#### § 15.1.2 Time Limits on Claims

Notwithstanding anything in the Contract Documents to the contrary, the Owner and Contractor shall commence all Claims and causes of action against the other and arising out of or related to the Contract, whether in contract, tort, breach of warranty or otherwise, within the period specified by applicable law, but in any case not more than the applicable statute of repose. The Owner and Contractor waive all Claims and causes of action not commenced in accordance with this Section 15.1.2.

#### § 15.1.3 Notice of Claims

Claims by either the Owner or Contractor may be initiated by written notice to the other party within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first has knowledge the condition giving rise to the Claim, whichever is later.

*(Paragraph Deleted)*

#### § 15.1.4 Continuing Contract Performance

**§ 15.1.4.1** 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, the Architect will diligently prepare Certificates for Payment, and the Owner shall continue to make payments of undisputed amounts in accordance with the Contract Documents.

*(Paragraph Deleted)*

#### § 15.1.5 Claims for Additional Cost

If the Contractor wishes to make a Claim for an increase in the Contract Sum, written notice as provided in Section 15.1.3 shall be given before proceeding to execute the portion of the Work that is the subject of the Claim. Prior notice is not required for Claims relating to an emergency endangering life or property arising under Section 10.4.

#### § 15.1.6 Claims for Additional Time

**§ 15.1.6.1** If the Contractor wishes to make a Claim for an increase in the Contract Time, written notice as provided in Section 15.1.3 shall be given. The Contractor's Claim shall include an estimate of cost and of probable effect of delay on progress of the Work. In the case of a continuing delay, only one Claim is necessary.

**§ 15.1.6.2** If adverse weather conditions are the basis for a Claim for additional time, such Claim shall be documented by data substantiating that weather conditions were abnormal for the period of time, could not have been reasonably anticipated, and had an adverse effect on the scheduled construction. Provided, the parties agree that the number of calendar days per month that the parties expect adverse weather to cause delays in weather-

dependent activities are set forth below. Contractor's construction schedule shall include the specified number of days for purposes of scheduling weather-dependent activities of the Work.

Monthly Anticipated Adverse Weather

Days:

*(Paragraph Deleted)*

Month: JAN FEB MAR APR MAY JUN JUL AUG SEP OCT NOV DEC  
Days: (08) (05) (03) (04) (06) (04) (05) (05) (03) (02) (03) (06)

The schedule above will constitute the baseline for monthly, or a portion thereof, weather time evaluations. Upon acknowledgement of the Notice to

Proceed and continuing until completion of the Work, on a monthly basis, actual adverse weather days will be recorded on a calendar day basis (including weekends and holidays) and compared to the monthly anticipated adverse weather schedule, above. The term "actual adverse weather days" shall mean the number of calendar days materially impacted by adverse weather. For this purpose, a day is materially impacted if adverse weather during 50% or more of the work day prevents performance of weather-dependent activities that are scheduled for that day and critical to timely completion of the Project. Contractor shall document actual adverse weather days in Contractor's quality control reports. Owner will review and determine the actual number of actual adverse weather days. Owner reserves the right to use any contingency specifically identified in applicable specifications or proposals to adjust the actual adverse weather days submitted by the Contractor. The number of actual adverse weather days shall be determined chronologically from the first weather-dependent activity, and shall be subject to agreement of Owner and Contractor. If the number of actual adverse weather days exceeds the number of anticipated adverse weather days, Owner will review all relevant information and determine whether or not the Contract Time should be extended. Any such extension shall be provided by Change Order.

**§ 15.1.6.3** The parties agree that any failure of Contractor or any Subcontractor or Sub-subcontractor to place orders for specified equipment, materials or supplies sufficiently in advance of scheduled date of installation or to submit shop drawings in a timely manner will not constitute sufficient reasons to request or extend the Contract Time or Contract Sum, or propose or grant any substitutions or any variances from applicable drawings or specifications.

**§ 15.1.7 Waiver of Claims for Consequential Damages**

Neither Contractor nor Owner shall be liable to the other for any punitive, indirect, or consequential damages, whether arising in contract, tort, or any other legal or equitable cause of action or claim for relief. This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination in accordance with Article 14. Nothing contained in this Section 15.1.7 shall be deemed to preclude assessment of liquidated damages, when applicable, in accordance with the requirements of the Contract Documents.

**§ 15.2 Initial Decision**

**§ 15.2.1** Claims, excluding those where the condition giving rise to the Claim is first discovered after expiration of the period for correction of the Work set forth in Section 12.2.2 or arising under Sections 10.3, 10.4, and Article 11, may be referred to the Initial Decision Maker for initial recommendation, unless the parties agree to conduct information negotiations or proceed to mediation. The Architect will serve as the Initial Decision Maker, unless otherwise indicated in the Agreement. Unless the Initial Decision Maker and all affected parties agree, the Initial Decision Maker will not decide disputes between the Contractor and persons or entities other than the Owner.

**§ 15.2.2** The Initial Decision Maker will review Claims referred to the Initial Decision Maker and within ten days of the receipt of the Claim take one or more of the following actions: (1) request additional supporting data from the claimant or a response with supporting data from the other party, (2) recommend rejecting the Claim in whole or in part, (3) recommend approval of the Claim in whole or in part, (4) recommend a compromise, or (5) advise the parties that the Initial Decision Maker is unable to make a recommendation if the Initial Decision Maker lacks sufficient information to evaluate the merits of the Claim or if the Initial Decision Maker concludes that, in the Initial Decision Maker's sole discretion, it would be inappropriate for the Initial Decision Maker to make a recommendation.

**§ 15.2.3** In evaluating Claims, the Initial Decision Maker may, but shall not be obligated to, consult with or seek information from either party or from persons with special knowledge or expertise who may assist the Initial Decision Maker in rendering a recommendation. The Initial Decision Maker may request the Owner to authorize retention of such persons at the Owner's expense. In the event Owner fails to authorize retention of such persons, the Initial Decision Maker shall render a recommendation based on the Initial Decision Maker's experience, or advise the Parties that the Initial Decision Maker is unable to make a recommendation.

**§ 15.2.4** If the Initial Decision Maker requests a party to provide a response to a Claim or to furnish additional supporting data, such party shall respond, within ten days after receipt of the request, and shall either (1) provide a response on the requested supporting data, (2) advise the Initial Decision Maker when the response or supporting data will be furnished, or (3) advise the Initial Decision Maker that no supporting data will be furnished. Upon receipt of the response or supporting data, if any, or a failure to respond, the Initial Decision Maker will take one of the actions described in Section 15.2.2..

**§ 15.2.5** The Initial Decision Maker will render an initial recommendation, or advise that no recommendation will be provided, in writing to the parties, which shall state the reasons therefor and include any recommended change in the Contract Sum or Contract Time. The initial recommendation shall be nonbinding, unless subsequently agreed to in a writing executed by the parties, and shall be subject to each party having the right to have such Claim or any other matter arising under this Contract decided by a court of competent jurisdiction at any time before, during or after the process set forth in this Section

15.2. Upon expiration of the longest limitations period for filing a lawsuit with respect to a Claim has expired, any initial decision pursuant to Paragraph 15.2 shall become final and binding on the parties.

**§ 15.2.6** [Reserved]

**§ 15.2.7** In the event of a Claim against the Contractor, the Owner may, but is not obligated to, notify the surety, if any, of the nature and amount of the Claim. If the Claim relates to a possibility of a Contractor's default, the Owner may, but is not obligated to, notify the surety and request the surety's assistance in resolving the controversy.

**§ 15.2.8** If a Claim relates to or is the subject of a mechanic's lien, the party asserting such Claim may proceed in accordance with applicable law to comply with the lien notice or filing deadlines.

**§ 15.3**

Notwithstanding anything in the Contract Documents to the contrary: All claims, disputes and other matters in question between the Contractor and the Owner arising out of or relating to the Contract Documents, including without limitation any breach thereof, shall be

*(Paragraph Deleted)*

decided by the courts of law, except as otherwise expressly agreed in a writing executed by the Contractor and the

*(Paragraph Deleted)*

Owner after a particular claim, dispute or other matter arises.

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