### CONSTRUCTION MANAGER-AT-RISK AGREEMENT

### between

**Houston Independent School District** 

and

[insert legal name of firm]

for

[insert name of school or project]

### **DRAFT**

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### CONSTRUCTION MANAGER-AT-RISK AGREEMENT

This Construction Manager-at-Risk Agreement ("Agreement") is entered into effective as of [insert date]

(the "Effective Date"), by and between the <b>HOUSTON INDEPENDENT SCHOOL DISTRICT</b> , a Texas Independent School District, created under and by virtue of the laws of the State of Texas, (hereinafter "Owner") and [ <i>insert legal name of firm</i> ]
, a Texas,
hereinafter also called "Construction Manager", (each also hereinafter referred to as "Party" individually or "Parties" collectively).
ARTICLE I PROJECT
1.01 Owner intends to construct, expand, or remodel the [insert name of school or project]
(the "Project"). The Contract Time and the date by which Substantial Completion must be achieved will be established when and if Owner accepts Construction Manager's Guaranteed Maximum Price Proposal. It is the intention of the Owner to construct this Project within [insert contract time in words (and in numbers in parentheses)]
calendar days after issuance of notice to proceed or a not to exceed date of and that the total cost of construction shall not exceed
[insert project construction budget in words (and in numbers in parentheses)]. In the performance of all of its duties hereunder, Construction Manager shall endeavor to perform its services in a manner consistent with these time and price targets.

1.02 For each consecutive calendar day after the date of Substantial Completion, as set forth in a Guaranteed Maximum Price Proposal executed by the Parties and as may be adjusted herein, that any Work is not substantially completed, the amount of [insert liquidated damages amount in words (and in numbers in parentheses)]

will be deducted from the money due or which becomes due the Construction Manager, not as a penalty but as liquidated damages representing the Parties' estimate at the time of contract execution of the damages which the Owner will sustain for late completion. In the event a school facility or a portion there of is unable to carry on student attendance and instruction, liquidated damages shall not apply and HISD's actual damages will be assessed.

1.03 Construction Manager commits to a Minority/Women Business Enterprise (M/WBE) plan with a participation goal of

[insert accepted percentage from proposal in words plus "percent" (and in numbers plus "%" in parentheses)] of the full Guaranteed Maximum Price of the Project.

# ARTICLE II DEFINITIONS

#### 2.01 Certain Definitions:

- (a) <u>Additional Services</u>: Those services which are in addition to those services required or reasonably inferred from the Contract Documents.
- (b) <u>Construction Manager's Contingency</u>: A sum included in the Guaranteed Maximum Price which is not allocated to any particular item of the Cost of the Work established for the Construction Manager's use as may be required for costs incurred in the Work from unforeseen causes or details which should have been anticipated by the Construction Manager at the time of the Owner's approval of the Guaranteed Maximum Price.
- (c) <u>Construction Phase</u>: The implementation and execution of the construction work required by the Contract Documents. The construction of the Project may be divided into different stages each with different dates for implementation and completion (referred to as a "Stage").
- (d) <u>Program Manager (PM):</u> The consultant the Owner may employ to assist it in managing various of its obligations and/or to perform certain functions under this Agreement in addition to the Design Consultant.
- (e) <u>Contract Documents</u>: The Contract Documents are this Agreement, including Owner's General and/or Supplemental Conditions, Special Conditions and the M/WBE plan, the Project Manual(s) to be developed for the construction of the Project or a portion thereof, if applicable, all documents required thereunder, and

the Drawings and Specifications to be developed by the Design Consultant(s). The Contract Documents form the Contract between Owner and Construction Manager. Construction Manager shall perform all of its services and construct the Work (as defined below) pursuant to the entire Contract. Duties and obligations of Construction Manager which are described in this Agreement may be expanded or further defined by additional provisions of the other Contract Documents. "Construction Manager" shall be substituted for "Contractor" or "General Contractor" in Owner's General and/or Supplemental Conditions.

- (f) <u>Costs of the Work</u>: Costs which the Construction Manager must necessarily incur to properly perform the Work in strict compliance with the Contract Documents and which is described in Article VIII of this Agreement.
- (g) <u>Day</u>: The calendar day unless otherwise specifically designated.
- (h) <u>Design Consultant</u>: Licensed professionals, or firms employing such licensed professionals, engaged by Owner as independent consultants for design of all or a portion of the Project Improvements (hereafter defined) and to prepare drawings and specifications for the construction of the Project (the "Drawings and Specifications"). More than one such professional or firm may be employed by Owner. (All such professionals or firms, regardless of number, may be referred to in the singular herein.)
- (i) <u>Final Completion</u>: As defined by Owner's General and/or Supplemental Conditions.
- (j) <u>General Conditions</u>: The General Conditions are AIA Document A201-2007, General Conditions of the Contract, as modified by the Owner, which are attached hereto as Exhibit "F," and as amended by Owner's Supplemental/Supplementary Conditions, if any.
- (k) <u>General Conditions Work</u>: On-site management, administrative personnel, equipment, and incidental work including minor field labor and materials.
- (l) <u>Guaranteed Maximum Price</u>: As defined in Section 5.01(g) of this Agreement.
- (m) <u>Guaranteed Maximum Price Proposal</u>: The proposal submitted by Construction Manager which sets forth its Guaranteed Maximum Price and which is in the form of Exhibit "B" to this Agreement.
- (n) Minority and Women Business Enterprise (M/WBE) Subcontracting Plan: The Owner has adopted Exhibit "H", Policy on Utilization of M/WBE's ("Policy"), which is incorporated herein by reference. Construction Manager, as a provision of the Agreement, must comply with monthly reporting requirements and the requirements of the Policy, as it pertains to development and submission of M/WBE Subcontracting Plans at the time trade packages are bid in buying out the Guaranteed Maximum Price.

- (o) <u>Pre-Construction Phase</u>: The programming, schematic design, design development, construction documents, and bidding phases.
- (p) <u>Pre-Construction Phase Services</u>: Those services as set forth in Article V of this Agreement.
- (q) <u>Project Improvements</u>: All Project facilities requiring construction, including all preparatory matters prior to construction, such as site preparation.
- (r) <u>Project Team</u>: The Owner, Construction Manager, Program Manager, Design Consultant(s), any separate contractors employed by Owner, and other consultants employed for the purpose of programming, design, and construction of the Project. The constitution of the Project Team may vary at different phases of the Project. The Project Team will be designated by Owner and may be modified from time to time by Owner.
- (s) <u>Standards and Standard Specifications</u>: The construction and design requirements and standards of the Owner and all applicable building and life safety codes.
- (t) <u>Subcontractors</u>: All trade contractors, separate contractors, and subcontractors entering into contracts ("Subcontracts") with the Construction Manager for the performance of the Work. The relationship between the Construction Manager and the Subcontractors shall be that of a general contractor to its subcontractors unless otherwise approved in advance in writing by Owner, or except when Owner enters into a separate contract directly with a Subcontractor.
- (u) <u>Substantial Completion (date of)</u>: As defined by Owner's General and Supplemental Conditions.
- (v) <u>Supplemental Conditions</u>: The Owner's Supplemental and/or Supplementary Conditions, if any.
- (w) <u>Texas Government Code 2267:</u> All references to *Texas Government Code* Chapter 2267 shall mean the chapter titled "Contracting and Delivery Procedures for Construction Projects".
- (x) Work: The provision of all services, labor, materials, supplies, and equipment, which are required or reasonably inferable to complete the Project in strict accordance with the requirements of the Contract Documents (as such may be modified or amended). The term "reasonably inferable" takes into consideration the understanding of the parties hereto that not every detail will be shown in the Contract Documents. The Construction Manager shall not be entitled to an increase in the Guaranteed Maximum Price (as described in Section 5.01(g)) due to the absence of any detail or specification the Contractor may require for any construction or which may be found necessary as the Work progresses in order to complete the construction of the Project. If an item or system is either shown or specified, all material and equipment required for the proper installation of such item or system and needed to make a complete operating installation shall be

provided whether or not detailed or specified, omitting only such parts as are specifically excepted by the Owner. Notwithstanding the above, the Contractor shall not be responsible for design, except incidental designing/detailing as required by the Specifications for shop drawing purposes.

# ARTICLE III DESIGNATION OF CONSTRUCTION MANAGER AND DUTIES

- 3.01 The Owner hereby designates and appoints the Construction Manager and authorizes the Construction Manager to so act in connection with the scope of work and services set forth and described in this Agreement.
- 3.02 Notwithstanding anything to the contrary contained in this Agreement, Owner and Construction Manager agree and acknowledge that Owner is entering into this Agreement in reliance on Construction Manager's special and unique abilities with respect to performing its obligations hereunder, and Construction Manager's special and unique abilities with respect to construction management. The Construction Manager accepts the relationship of trust and confidence established between it and the Owner by this Agreement. Construction Manager covenants with Owner to use its best efforts, skill, judgment, and abilities to perform the services hereunder and to further the interests of Owner in accordance with Owner's requirements and procedures, in accordance with the highest standards of Construction Manager's profession or business and in compliance with all applicable national, federal, state, municipal, laws, regulations, codes, ordinances, orders and with those of any other body having jurisdiction. Construction Manager warrants, represents, covenants, and agrees that there are no obligations, commitments, or impediments of any kind that will limit or prevent performance of the services required hereunder.
- 3.03 The Construction Manager warrants, represents, covenants, and agrees that all of the services to be performed by the Construction Manager under or pursuant to this Agreement shall be of the standard and quality which prevail among similar businesses and organizations of superior knowledge and skill engaged in providing similar services in major United States urban areas under the same or similar circumstances and involving a project such as the Project.
- 3.04 The Construction Manager's duties as set forth herein shall at no time be in any way diminished by reason of any approval by the Owner nor shall the Construction Manager be released from any liability by reason of such approval by the Owner, it being understood that the Owner at all times is ultimately relying upon the Construction Manager's skill and knowledge in performing the services required hereunder.
- 3.05 The Construction Manager warrants, represents, covenants, and agrees that all persons connected with the Construction Manager directly in charge of its services are duly registered and/or licensed under the laws, rules and regulations of any authority having jurisdiction, if so required by such laws, rules and regulations and have the requisite training and skill to perform their role.
- 3.06 The Construction Manager warrants, represents, covenants, and agrees to call to Owner's attention anything of any nature in any drawings, specifications, plans, sketches, instructions, information, requirements, procedures, and other data supplied to the Construction Manager (by

the Owner or any other party) which it regards in its opinion as unsuitable, improper, or inaccurate in connection with the purposes for which such document or data is furnished. Nothing shall excuse or detract from the Construction Manager's responsibilities or obligations hereunder in a case where such document or data is furnished unless the Construction Manager advises Owner in writing that in its opinion such document or data and any requests made therein for action are unsuitable, improper, or inaccurate and Owner confirms in writing that it wishes the Construction Manager to proceed in accordance with the data as originally given.

- 3.07 The Construction Manager warrants, represents, covenants, and agrees to furnish efficient business administration and superintendence and perform its services hereunder or pursuant to this Agreement in the best way and in the most expeditious and economical manner consistent with the interests of Owner.
- 3.08 The Construction Manager warrants, represents, covenants, and agrees that it shall, at its own cost, make good any defects in the Pre-Construction Phase Services as soon as the Construction Manager becomes aware of such defects or is notified of such defects. Should the Construction Manager refuse or neglect to make good such defects within a reasonable time after receiving notice requesting such remedial work, then the Owner shall be entitled to make good such defective services at the expense of the Construction Manager. This commitment by Construction Manager is in addition to, and not in substitution for, any other remedy for defective Services which the Owner may have at law or in equity. Construction Manager's obligations with respect to Construction Phase Services are set forth in Owner's General and/or Supplemental Conditions and elsewhere as may be noted.
- 3.09 Construction Manager warrants, represents, and agrees that if (i) it is a corporation or limited liability company, then it is a corporation duly organized, validly existing and in good standing under the laws of the State of Texas, or a foreign corporation or limited liability company duly authorized and in good standing to conduct business in the State of Texas, that it has all necessary corporate power and has received all necessary corporate approvals to execute and deliver the Agreement, and the individual executing the Agreement on behalf of Construction Manager has been duly authorized to act for and bind Construction Manager; or (ii) if it is a partnership, limited partnership, or limited liability partnership, then it has all necessary partnership power and has secured all necessary approvals to execute and deliver this Agreement and perform all its obligations hereunder; and the individual executing this Agreement on behalf of Construction Manager has been duly authorized to act for and bind Construction Manager.
- 3.10 Construction Manager and the individual signatory hereto warrant and represent that neither the execution and delivery of this Agreement by Construction Manager nor the performance of its obligations hereunder will result in the violation of any provision, if a corporation, of its articles of incorporation or by-laws, if a limited liability company, of its articles of organization or regulations, or if a partnership, by any partnership agreement by which Construction Manger is bound, or any agreement, including a "Company Agreement" as defined under the applicable Texas Statutes, by which Construction Manager is bound, will conflict with any order or decree of any court or governmental instrumentality relating to Construction Manager.
- 3.11 Except for the obligation of Owner to pay Construction Manager certain fees and expenses pursuant to the terms of this Agreement, and to perform certain other obligations

pursuant to the terms and conditions explicitly set forth herein, Owner shall have no liability to Construction Manager or to anyone claiming through or under Construction Manager by reason of the execution or performance of this Agreement. Notwithstanding any obligation or liability of Owner to Construction Manager, no present or future partner or affiliate of Owner or any agent, officer, director, employee, or trustees of Owner, or anyone claiming under Owner has or shall have any personal liability to Construction Manager or to anyone claiming through or under Construction Manager by reason of the execution or performance of this Agreement.

3.12 Construction Manager, to the extent required to execute all of the requirements of the Contract Documents and as may be required to adequately perform Construction Manager's Pre-Construction Services, has familiarized itself with the provisions of the United States Green Building Council's Leadership in Environmental and Energy Design (LEED®) program. The Construction Manager shall be prepared to participate as a team member with specific requirements relating to obtaining LEED® points. Construction Manager shall assume that Owner will require that construction be accomplished so as to maximize the number of points obtained for construction phase activities and may require that a certain certification level be achieved.

# ARTICLE IV CONSTRUCTION MANAGER'S PERSONNEL AND SUBCONTRACTORS

- 4.01 The Construction Manager's personnel, and the Construction Manager's associated sub-consultants, to be employed in the Project, to the extent they perform Construction Manager's duties, shall be identified in Exhibit "A". The personnel and entities identified in Exhibit "A" shall not be changed except with the Owner's prior written agreement, which shall not be unreasonably withheld.
- All subcontracts shall be awarded in accordance with the applicable provisions of *Texas* 4.02 Government Code Sections 2267.255, 2267.256 and 2267.257. Construction Manager shall notify Owner in advance in writing of the identities of all Subcontractors with which it intends to subcontract. Construction Manager shall not subcontract with any Subcontractor to which Owner has a reasonable objection. Such notice shall be given sufficiently in advance to permit Owner adequate time for review without delay to the Project, and allowing time for Construction Manager to make substitute selections, but in no event shall such notice be given less than ten (10) days before the intended subcontract date. Construction Manager shall not be required to subcontract with any Subcontractor to which it has reasonable objection, except as otherwise allowed by the applicable provisions of Texas Government Code Section 2267.256. Construction Manager intends to submit a proposal for subcontract work, it shall notify Owner in writing prior to soliciting proposals from potential subcontractors. Manager's Subcontractors for constructing the Work have been identified, they shall not be changed without Owner's prior written approval, which shall not be unreasonably withheld. Construction Manager shall not incur any Subcontract costs prior to issuance by Owner of Notice to Proceed for such Work.
- 4.03 Should Construction Manager propose the deletion of an M/WBE classified/certified subconsultant or Subcontractor firm from its employ, the Construction Manager shall substitute a sub-consultant or Subcontractor firm of like classification/certification, and if Construction

Manager is unable to substitute a sub-consultant or Subcontractor firm of like classification, Construction Manager shall provide Owner with documentation of its efforts to acquire the services of an M/WBE replacement firm.

# ARTICLE V CONSTRUCTION MANAGER'S SERVICES: PRE-CONSTRUCTION PHASE SERVICES

5.01 In implementation of the responsibilities and duties of the Construction Manager as set forth herein, the Construction Manager shall perform, in accordance with the Schedule (as defined in Section 5.01 (b)), the following Pre-Construction Phase Services:

#### (a) General Coordination.

- (1) Participate as a member of the Project Team in the development of the Project Facility Program if such program has not been developed prior to the Effective Date of this Agreement.
- (2) Attend up to 10 regular meetings with other members of the Project Team during the development of the design of the Project to advise them on site usage and site improvements, selection of materials, building systems and equipment, and methods of delivery of materials, systems, and equipment and the development of a program to achieve LEED® points.
- Provide recommendations and information to the other members of the Project Team on: construction feasibility; availability of materials and labor; time requirements for installation and construction; assignment of responsibilities for safety precautions and programs, temporary Project facilities; equipment, materials and services for common use of the Construction Manager and Owner's separate contractors, if any; cost factors, including costs of alternative materials or designs, preliminary budgets, and possible cost savings; methods of verification for determining that the requirements and assignment of responsibilities are included in the proposed Contract Documents, and any other matters necessary to accomplish the Project in accordance with the Schedule (as defined below) and Project Construction Budget.
- (4) At Owner's request, attend public meetings and hearings concerning the development and schedule of the Project.
- (5) Implement and conduct a constructability program as set forth in Exhibit "D" hereto, which is hereby incorporated herein by reference.
- (6) Use Building Information Modeling (BIM) to analyze the design of the building and identify any potential construction problems. Collaborate with the Design Consultant to relocate any conflicting building systems or elements.
- (7) Develop and update a "Constructability Review" report which is a report

resulting from frequent communication with the Project Team and which will outline items that, in the Construction Manager's opinion, may cause problems in the way the Project is to be constructed and which will review the overall coordination of specifications and drawings, details, and discrepancies that if left unattended may result in Change Orders or claims once Project construction commences. Constructability recommendations and documentation shall be in conformance with the Owner's design standards.

- (8) Creation and continuous updating of a decision tracking system in a format acceptable to Owner.
- (9) Attend and participate in Owner's "Partnering" Program for all phases of the Project, if requested by Owner.

#### (b) Scheduling.

- (1) Develop a critical path Project schedule ("Schedule") for the other Project Team members' review and the Owner's approval, that coordinates and integrates the Construction Manager's services, the Design Consultant's design, the work of other consultants and suppliers, and the Owner's activities with the anticipated construction schedules for other contractors.
- (2) A separate Schedule shall be prepared for each Stage and each set of bidding documents.
- (3) Update the Schedule as is reasonably required but at least monthly to incorporate an updated, detailed listing for all activities of the Project, including, without limitation:
  - a) commencement, milestone and completion dates for Facility Program Phase, Schematic Design Phase, Design Development Phase, Construction Documents Phase, Bidding/Proposals Phase, construction phasing and Project Stages;
  - b) times of commencement and completion for each Subcontractor;
  - c) required activity sequences and durations;
  - d) contract document packages, completion dates, Owner contract document package review periods, Project building permits acquisition time requirements, construction contract bid dates;
  - e) processing of shop drawings and samples; and
  - f) a recommended schedule for the Owner's purchase of materials and equipment requiring long lead time procurement, delivery dates of products requiring long lead time procurement, and methods to expedite and coordinate delivery of long lead time procurements including coordination of the Schedule with the early preparation of relevant portions of the Contract Documents by the Design Consultant.

- (4) Provide the necessary critical path schedule control with a goal to attain the Substantial Completion of the Project on or before the date set forth hereinabove, so that the Owner can occupy and utilize the entire Project facilities on such date; and
- (5) Create and maintain the Schedule using the latest available version of the Primavera software program (the license and training for which shall be at Construction Manager's sole expense).

#### (c) <u>Budget and Cost Consultation</u>.

- (1) Obtain from Owner all Project service, materials and property costs and expenses not known directly by the Construction Manager, such costs to include, without limitation, force account labor and special consultants.
- Prepare and update a Project budget at conclusion of the schematic design phase, design development phase, and during construction documents phase at Sixty percent (60%) and Ninety-Five percent (95%) completion (for each Stage), for written approval by the Owner, such budget to include estimating, updating and reporting of all Project costs including, without limitation, construction, Design Consultant fees, fixtures, furnishings and equipment, special consultants and contractors, and moving/relocation expenses. The design development phase and construction documents phase estimates shall be detailed estimates derived from cost quantity surveys and from Building Information Modeling (BIM). Such cost quantity surveys shall be based upon unit prices for labor, materials, and overhead and profit, in Construction Specifications Institute Division 1-49 format for each portion of the Work.
- (3) Provide, throughout the duration of the Project, 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 Project Team at regular intervals and, if the actual and projected costs for the Project are anticipated to exceed the Guaranteed Maximum Price, make recommendations to the Project Team for corrective action.
- (4) At the completion of the Construction Contract Documents (for any Stage of the Project), update the variance report actual and projected costs for the Project, and in the event such actual and projected costs exceed the Guaranteed Maximum Price, develop and implement reasonable strategies to be approved by the Owner to reduce the costs projected to be incurred during all phases of the Project. Whenever the term "value engineering" is used in conjunction with this Agreement or the Project, it has its commonly accepted meaning within the construction industry and does not imply the practice of architecture or professional engineering without a license. Construction Manager is not required, in connection with value

engineering, to render services that would constitute the professional practice of architecture or engineering, and any value engineering activities of Construction Manager shall be reviewed and approved by an architect or engineer licensed in Texas for or on behalf of Owner.

### (d) <u>Coordination of Design and Construction Contract Documents.</u>

- (1) Review all plans, specifications, and other design documents during the schematic design phase, design development phase, and construction documents phase, and advise Owner on site use, foundations, systems, materials, equipment, construction feasibility, availability of labor and materials, procurement time requirements, installation and construction, relative costs, and provide recommendations to Owner without assuming Design Consultants' professional responsibility. Use Building Information Modeling (BIM) to visualize and understand the Project.
- (2) Coordinate the incorporation of the Owner's Design Guidelines and Standard Specifications and procedures all of which are hereby incorporated by reference, into the Construction Contract Documents, and use of the Owner's format as directed by the Owner.
- (3) Assist in development of any Special Conditions of the Construction Contract Documents, which shall be approved in writing by the Owner at Owner's sole option and discretion.
- (4) At specified times required by the Owner, review the drawings and Project Manual as they are being prepared, advise Owner of any error, inconsistency, or omission discovered and recommend alternative solutions whenever the design affects construction feasibility, budget, risks, or schedules (without assuming the Design Consultants' professional responsibility) and potential impace on obtaining LEED® points.
- (5) Prepare a constructability review report based on Exhibit "D".
- (6) Coordinate with the Owner to ensure that the Construction Contract Documents comply with all applicable Owner's procurement requirements (without assuming any of the Owner's responsibility therefor).
- (7) Consult with Owner and Design Consultant to determine what materials, equipment, component systems, and construction types should be included in the Contract Documents; suggest reasonable adjustments in the scope of the Project; and suggest alternate bids in the Construction Documents to adjust the Construction Cost to the Guaranteed Maximum Price (as defined herein).

#### (e) Construction Planning.

- (1) Identify for and recommend to the Owner the need for purchase of items requiring extended delivery times ("long lead items"), and expedite the procurement of such items to ensure their delivery by the required dates. Participate with Design Consultant, as requested by Owner and subject to Owner's prior approval, in the preparation of performance specifications and request for technical proposals for the procurement and installation of systems, components, and for the procurement of long lead time equipment and materials. If requested by Owner, and subject to Owner's prior approval, issue requests for technical proposals to qualified sources and receive proposals and assist in their evaluation.
- (2) Make recommendations to the other members of the Project Team regarding the division of the Construction Contract Documents and Project Manual to facilitate the bidding and awarding of construction contracts, to allow for phased or staged construction, or multiple separate contracts, and to take into consideration such factors as time of performance, type and scope of work, availability of labor and materials, overlapping trade jurisdictions, provisions for temporary facilities, comparisons of factory and on-site production costs, shipping costs, code restrictions, the Owner's goals for M/WBE contractor participation, and other constraints.
- (3) Review the Drawings and the Project Manual with the other members of the Project Team to eliminate areas of conflict and overlap in the work to be performed by the various Subcontractors or Owner's separate contractors.
- (4) Schedule and conduct pre-bid conferences with interested bidders, subcontractors, material suppliers, and equipment suppliers, and record minutes of same.
- (5) Coordinate and develop with Design Consultant bid packages and work scope descriptions for each separate bid category that represent the entirety of the scope of the Work for each phase and stage of the Project.
- (6) In accordance with *Texas Government Code* Sections 2267.255 and 2267.256 Construction Manager shall publicly advertise and solicit either competitive bids or competitive sealed proposals from trade contractors or subcontractors for the performance of all major elements of the work other than the minor work that may be included in General Conditions Work. Construction Manager may seek to perform portions of the work itself if Construction Manager submits its bid or proposal for those portions of the Work in the same manner as all other trade contractors or subcontractors and if Owner determines that Construction Manager's bid proposal provides the best value for Owner. Owner's determination in such matters is final. If Construction Manager intends to submit a proposal for such work, it shall notify Owner in writing prior to soliciting proposals. Criteria for determination of best value shall be provided by Owner.

Construction Manager shall receive and open all trade contractor or subcontractor bids or proposals in a manner that does not disclose the contents of the bid or proposal to a person not employed by the Construction Manager, the Owner, the engineer or the architect during the selection process. All bids and proposals shall be made available to the public within seven (7) days after the date of final selection. Construction Manager reviews, evaluates, and recommends to Owner a bid or proposal from a trade contractor or subcontractor, but Owner requires a bid or proposal from another trade contractor or subcontractor to be accepted, then, pursuant to the terms of the Contract, Owner shall compensate Construction Manager by a change in price, time, or Guaranteed Maximum Price for any additional cost and risk, which has been demonstrated to Owner's satisfaction and as required by the Contract, which Construction Manager may incur because of Owner's requirement that another trade contractor or subcontractor bid or proposal be accepted.

- (7) Assist the Owner, the appropriate separate Owner's contractor, the appropriate Design Consultant or other consultant, in obtaining all applicable risk management, code, and regulatory agency reviews and approvals for the Project or any portion thereof including, without limitation, the Texas Department of Licensing and Regulation, the fire department providing fire protection, and Factory Mutual Engineering, a wholly owned subsidiary of the Factory Mutual System.
- (8) Refine, implement and monitor the M/WBE Subcontracting Plan (included at Exhibit "H") which promotes equal employment opportunity in the provision of goods and services to the Owner for the Project.
- (9) Advise Owner of any tests to be performed, and assist Owner in selecting testing laboratories and consultants, without assuming direct responsibility for the work of such laboratories and consultants.
- (10) Construction Manager shall review the Contract Documents to ensure that they contain adequate provision for all temporary facilities necessary to enable the Subcontractors to perform their work, and provisions for all of the job site facilities necessary to manage, inspect, and supervise construction of the Work.
- (11) In accordance with Owner's General and/or Supplemental Conditions, Construction Manager is responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the Work. Construction Manager shall provide recommendations and information to Owner and Design Consultant with respect to the assignment of responsibilities for safety precautions and programs, temporary Project facilities, and equipment, materials, and services for common use of the Subcontractors. Construction Manager shall verify that such assignments with respect to the Subcontractors are included in

- the Contract Documents. The existence or creation of any Owner controlled insurance program in connection with the Work shall in no way lessen or reduce the foregoing responsibilities set forth in this subparagraph of Construction Manager.
- (12) Provide an analysis of the types and quantities of labor required for the Project and review the appropriate categories of labor required for critical phases or Stages. Make recommendations for actions, which will minimize adverse effects of labor shortages.
- (13) Assist the Design Consultant's efforts to design the project to meet Owner's LEED® goals and other considerations including but not limited to, providing input on alternatives and changes and helping the Design Consultant to assess impact of LEED® driven efforts on cost and constructability.
- (f) <u>Furniture Fixtures and Equipment.</u> Consult with and make recommendations to the Owner on the acquisition schedule for fixtures, furniture and equipment, and coordinate the Owner's purchase and installation of such items with the Owner as may be required to meet the Schedule.

#### (g) Guaranteed Maximum Price.

- (1) When the Drawings and Specifications are sufficiently complete, Construction Manager shall submit a Guaranteed Maximum Price proposal to Owner in the form attached hereto as Exhibit "B" which shall also state a Contract Time and date of Substantial Completion upon which the proposal is based. If Owner accepts the proposal, both parties shall sign the proposal and the Guaranteed Maximum Price, Contract Time and date of Substantial Completion therein shall become part of the Contract. Based on particular Project requirements and the development of the Project design, Owner, at its sole option and discretion, may specify a different format than that contained at Exhibit "B", which is provided as an example only.
- Owner, at its sole option and discretion, may reject the Guaranteed Maximum Price proposal, or attempt to renegotiate the proposal with Construction Manager (with the right to cease negotiations at any time and reject the proposal). Construction Manager shall not withdraw its Guaranteed Maximum Price proposal, and its proposal shall be irrevocable and open to acceptance by Owner for ninety (90) days after Owner's receipt of the proposal.
- (3) The Guaranteed Maximum Price proposal must be prepared in the format specified by Owner which shall require a breakdown of estimated costs organized by trade, allowances, contingencies, insurance, bonds, Construction Manager's General Conditions Work, and Construction Manager's Construction Phase Fee.

- (4) The Guaranteed Maximum Price Proposal must include a written statement describing how it was derived and prepared, which shall include, at a minimum, a list of the Drawings and Specifications (including all addenda), and Owner's General and/or Supplemental Conditions which were used in the preparation of the Guaranteed Maximum Price Proposal as well as any allowances, clarifications and assumptions made by the Construction Manager due to the incompleteness of the Drawings and Specifications, and assumptions as to when Contract Documents will be issued. The proposed Guaranteed Maximum Price Proposal must also include a statement of the estimated cost organized by trade categories, allowances, contingencies, insurance, bonds, and other items and the fee that comprise the Guaranteed Maximum Price.
- (5) In formulating the Guaranteed Maximum Price Proposal, Construction Manager shall allow for the continued development and completion of the Drawings and Specifications which are reasonably inferable, except for material changes in scope, and the Guaranteed Maximum Price Proposal shall include a Construction Manager's contingency to allow for costs arising out of such development and completion which do not qualify for a change order. Amounts attributable to clarifications, assumptions, and further development and completion of the Drawings and Specifications shall be specified as part of the Construction Manager's contingency in an itemized breakdown as part of the proposal.
- (6) In formulating the Guaranteed Maximum Price Proposal, Construction Manager shall be entitled to add no more than

### [insert accepted percentage from proposal in words plus "percentage" (and in numbers plus "%" in parentheses)]

to the total of all costs by trade, allowances and contingencies to cover Construction Manager's General Conditions Work, provided that this markup shall not be allowed to the extent that Construction Manager has provided for the cost of any of its General Conditions Work, as defined in Exhibit "I" within another category of its cost. Upon the determination of the Guaranteed Maximum Price for the entire Project, there will be no line item Guaranteed Maximum Price for General Conditions Work, or for any other item in the Schedule of Values.

(7) Whenever the words "Contract Sum" are used in the Owner's General and/or Supplemental Conditions, they shall be deemed to mean "Guaranteed Maximum Price".

#### (h) Partial Guaranteed Maximum Price.

(1) It is anticipated that there will be some phases of the Work ready for construction before it is appropriate to arrive at an overall Guaranteed Maximum Price for the entire Project. If the Owner elects to proceed with

any packages of the Work before the parties arrive at an overall Guaranteed Maximum Price, the Construction Manager shall develop Guaranteed Maximum Price proposals for any phases of the Work identified by the Owner.

(2) If a Guaranteed Maximum Price proposal for any phase of the Work is agreed upon by the parties, and if other proposals for other phases, or the entire Work, are subsequently agreed upon by the parties, the Guaranteed Maximum Price amounts, including the Guaranteed Maximum Price for General Conditions Work shall be combined and all other Guaranteed Maximum Price proposals previously agreed to by the parties shall be of no further force and effect. There is no line item Guaranteed Maximum Price for General Conditions Work in the Schedule of Values, or for any other item in the Schedule of Values.

#### (i) Cost Accounting.

Maintain cost accounting records in good form on expenditures and materials, or for any other expenditures requiring accounting records during the Pre-Construction Phase; and afford the Owner access to these records and preserve them for a period of three (3) years after final payment is made by the Owner to the Construction Manager.

# ARTICLE VI CONSTRUCTION MANAGER'S SERVICES: CONSTRUCTION PHASE SERVICES

6.01 The Construction Phase shall be deemed to commence upon the earlier of (i) the date specified in a Notice to Proceed issued by Owner after approval by Owner of a Guaranteed Maximum Price for the Work or portion of the Work specified in such Notice to Proceed, (ii) the issuance of a purchase order by Construction Manager for materials or equipment for the Project after prior written authorization by Owner, or (iii) award of a Subcontract in accordance with the requirements of this Contract and after prior written authorization by Owner. Pre-Construction Phase Services may overlap Construction Phase Services. In implementation of the responsibilities and duties of the Construction Manager for the Construction Phase, the Construction Manager shall provide the following services:

#### (a) Project Control.

(1) Construction Manager shall construct the Work in strict accordance with the Contract Documents within the time required by the Schedule approved by Owner and as required by the Contract and the Owner's General and/or Supplemental Conditions and Division I Specifications. Construction Manager shall award and enter into, as a general contractor, all Subcontracts necessary and appropriate to provide all labor and materials for the construction of the Project. Construction Manager shall self-perform only General Conditions Work and other Work which has been awarded to Construction Manager in accordance with the

- requirements of *Texas Government Code* section 2267.255 and this Contract. Owner reserves the right to perform Work related to the Project and to award separate contracts for Work related to the Project.
- (2) Monitor the Work of the Subcontractors as required and coordinate such Work with the activities and responsibilities of the Project Team with a goal to attain completion of the Project at a cost not to exceed the Project Construction Budget and Guaranteed Maximum Price, and to attain Substantial Completion by the date set forth in Exhibit "B" herein when executed.
- (3) Attend all Owner's Project progress meetings scheduled by Owner no less often than once per month, and fully advise the Project Team at such meetings as to Project status.
- (4) Schedule, direct and attend regular meetings with other members of the Project Team during the construction of the Project to discuss jointly such matters as procedures, progress, problems and scheduling. Prior to each meeting, the Construction Manager shall prepare and distribute to the other Project Team members a written agenda for the meeting. Prepare and distribute at each Project Team meeting a memorandum setting forth the list of critical activities, which require immediate action and the date(s) by when the activity must be completed, and record and distribute the minutes of each meeting.
- (5) Maintain a competent, full-time staff at the Project site to coordinate and provide general direction over the Work and progress of the Subcontractors of the Project.
- (6) Establish on-site organization of personnel and clearly defined lines of authority in order to effectuate the overall plans of the Project Team. At a minimum, Construction Manager's site personnel shall include a project manager, project superintendent, project engineer, and appropriate administrative support personnel.
- (7) In consultation with Owner, establish procedures for coordination among the Project Team, Subcontractors, separate contractors, Design Consultants, and other consultants with respect to all aspects of the construction of the Project, and implement such procedures.
- (8) Expedite and coordinate delivery and installation of Owner-procured material and equipment.
- (9) Construction Manager shall supervise and direct the Work and shall be solely responsible for construction means, methods, techniques, sequences, and procedures for the Work, subject to Section 3.3.1 of the Owner's General Conditions.

- (10) In accordance with Owner's General and/or Supplemental Conditions, provide and pay for all labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, and all other facilities and services necessary for the proper execution and completion of the Work in strict accordance with the requirements of the Contract Documents.
- (11) Assist Owner in securing building permits and special permits for permanent improvements as required by law or the Contract Documents. Assist Owner or Design Consultant in obtaining all approvals required from authorities having jurisdiction over the Project.
- (12) Inspect the Work of Subcontractors to ensure conformance with the Contract Documents.
- (13) Support HISD's efforts to obtain LEED® points and/or certification in areas over which Construction Manager has control.

#### (b) <u>Scheduling.</u>

Perform Project scheduling in compliance with the Contract Documents and provide regular monitoring, updating, and reissuing of all the Project Schedules as construction progresses, including, without limitation, master Project schedules, detailed construction schedules, submittal schedules, inspection schedules, and occupancy schedules; identify potential and actual variances between scheduled and probable completion dates, review the schedules for Work not started or incomplete and recommend to the Owner adjustments in the schedules to conform with the probable completion dates and provide summary reports to the Owner of each schedule update and document all changes in construction schedules. Incorporate activities of the Subcontractors and other parties affecting the progress of the Work, including, without limitation, activity sequences and durations, allocation of labor and materials, processing of shop drawings, data, and samples, delivery of long lead-time items. Include Owner's occupancy requirements and occupancy priorities. Evaluate Subcontractor's personnel and equipment, and availability of supplies and materials, with respect to each Subcontractor's ability to meet the Schedule. Recommend action to Owner when any Subcontract requirements are not met, or appear unlikely to be met.

#### (c) Cost Control.

- (1) Maintain cost accounting records in good form on expenditures and materials, or for any other expenditures requiring accounting records; and afford the Owner access to these records and preserve them for a period of three (3) years after final payment is made by the Owner to the Construction Manager.
- (2) Prepare and administer, and provide to Owner, Subcontractors' schedule of values, Subcontractors' sworn statements and waivers of lien as

- required, contract and disbursement summaries, change order listings and change orders, and budget cost summary reports as required by Owner.
- (3) Construction Manager shall promptly identify all variances between estimated costs and actual costs, and shall promptly report such variances to the Project Team along with recommendations for action, but in any event, no more than two (2) business days after acquiring such information.
- (d) <u>Change Orders.</u> Develop and implement a system acceptable to the Owner for the preparation, review and processing of Change Orders, change order requests, and requests for information, in accordance with Owner's General and/or Supplemental Conditions, and Contract Documents. Construction Manager shall use Prolog Construction Project Management software or other software, as directed by Owner. If Owner directs Construction Manager to use Prolog software, Owner shall provide access to Owner's Prolog system.
- (e) <u>Wage Rates</u>. Maintain strict enforcement of Owner's prevailing wage laws in accordance with Owner's General and/or Supplemental Conditions. Cooperate with Owner in monitoring the submission to the Owner of payroll records by the various Subcontractors when requested.
- (f) <u>Special Consultants</u>. Assist the Owner in selecting and retaining professional services not otherwise described in this Agreement for the Project, and coordinate these services at the Owner's request in order to meet the Schedule, without, however, assuming direct responsibility for the work of these consultants.
- (g) Documents, Shop Drawings, and Submissions.
  - (1) The Design Consultant shall be the interpreter of the design intent of the Construction Contract Documents, subject to the terms and conditions of the agreement between the Design Consultant and the Owner, provided, however, the Construction Manager shall request such interpretations from the Design Consultant, with Owner consent, from time to time in order to facilitate the Construction Manager's accomplishment of its duties under this Agreement.
  - (2) In collaboration with the other members of the Project Team, the Construction Manager shall establish and implement procedures for expediting the processing and Design Consultants' approval of shop drawings and other submissions; receive from the Subcontractors, and review, all shop drawings and other submissions for conformance with the Contract Documents; and coordinate shop drawings and other submissions with the Contract Documents and other related documents prior to transmitting them to other members of the Project Team.
  - (3) The Construction Manager shall record the progress of the Project, submit written progress reports to the other members of the Project Team,

including information on the Subcontractor's Work and the percentage of completion, and keep a daily log of Project construction activities available to the other members of the Project Team in accordance with Owner's General and.or Supplemental Conditions; and each member of the Construction Manger's site personnel, whose job function involves or includes observation of Project construction, shall maintain a daily log of construction activities and observations, which daily logs shall be submitted to the Owner no less frequently than weekly for the immediately preceding week.

- (4) The Construction Manager shall maintain at the Project site and make available to Owner, updated records of subcontracts, drawings, examples, purchases, materials, equipment, maintenance and operating manuals and instructions, and other construction related documents, including all changes and revisions, a directory of personnel, Project correspondence, inspection procedures (as prepared by others), testing laboratory procedures (as prepared by others), contract changes, time extensions, progress payment data, final acceptance procedures, instructions from Owner; and shall obtain data from Subcontractors, and maintain a current set of record drawings and project manual.
- (5) Construction Manager shall coordinate and facilitate the creation of record and as-built drawings, and the procurement of warranties and guarantees.
- (6) Construction Manager shall provide Owner with complete, unaltered copies of all Subcontracts, and all amendments thereto.
- (7) Construction Manager shall submit to Owner all documents substantiating payments to qualifying M/WBE in a format designated by Owner.
- (8) Construction Manager shall document and submit to the Owner all documents reasonably required to support Owner's efforts to obtain LEED® points and/or certification.
- (h) <u>Safety</u>. Construction Manager is solely responsible for all safety precautions and programs in connection with the Work. Construction Manager shall review the safety programs developed by each of the Subcontractors and prepare and submit to Owner a comprehensive safety program which complies with all applicable requirements of the Occupational Safety and Health Act of 1970, and all other applicable state, local, or federal laws or regulations. Construction Manager shall ensure compliance by the Subcontractors with their contractual safety requirements.
- (i) <u>Bonds.</u> Payment and Performance Bonds in the form prescribed in Exhibit "E" shall be required within ten (10) days of execution of Exhibit "B".

## ARTICLE VII PAYMENTS TO THE CONSTRUCTION MANAGER

#### 7.01 For Pre-Construction Phase Services:

(a) In full consideration of Construction Manager's Services during the Pre-Construction Phase of this Agreement, Owner will pay to Construction Manager the Pre-Construction Phase Fee, which is a stipulated sum of [insert fee amount from proposals in words (and in numbers in parentheses)]

inclusive of all expenses and disbursements payable proportionately on a monthly basis based on the amount of effort expended by Construction Manager. The Pre-Construction Phase Fee is not included in the Contract Sum and is payable in addition to the Contract Sum.

#### (b) Additional Services:

- (1) From time to time Owner may request that Construction Manager perform services in addition to those Pre-Construction Phase Services required or reasonably inferable herein (such services in addition are hereinafter called "Additional Services"). Each time that Construction Manager is requested to perform services which Construction Manager deems to be Additional Services, and prior to performing such Additional Services, Construction Manager shall complete and forward to Owner for acceptance by Owner an Additional Services Requisition in the form of Exhibit "C" attached hereto, which shall describe in detail the nature or scope of the Additional Services, the basis upon which Construction Manager has determined that the requested services are Additional Services, a proposal for the addition to the lump sum fee for preconstruction services which Construction Manager believes is proper for the additional services, together with a proposed schedule for the performances of such Additional Services. Construction Manager shall proceed only after written acceptance by Owner of the Additional Services Requisition and written approval from Owner to proceed.
- (2) If Owner concludes that all or part of the services described in the Additional Services Requisition are Services already required to be performed by Construction Manager pursuant to this Agreement or are reasonably inferable therefrom, then Owner shall notify Construction Manager of Owner's determination and Owner and Construction Manager shall attempt, in good faith, to resolve by negotiation their differences. If within seven (7) business days Owner and Construction Manager are unable to resolve their differences, then Construction Manager shall nevertheless perform the services requested by Owner as if the services were Services required to be performed pursuant to this Agreement, without prejudice, however, to Construction Manager's right to pursue a

claim for compensation for such disputed services.

- (3) Upon acceptance by Owner, each Additional Services Requisition and the services performed by Construction Manager pursuant to such Additional Services Requisition shall become part of this Agreement and shall be subject to all the terms and conditions of this Agreement, as fully and completely as though the same had been included in this Agreement as a required Service at the original execution of this Agreement.
- (c) Construction Manager shall not be entitled to any increase in the Pre-Construction Phase Fee because of Schedule extensions or delays, or changes in the scope of the proposed Project including changes necessitated by Owner's LEED® certification efforts, unless such extensions, delays, or changes are material and significant, as determined by Owner at its reasonable discretion.

#### 7.02 Construction Phase

- Owner shall compensate Construction Manager for Construction Phase services (a) on the basis of the sum of the Cost of the Work as defined herein plus the Construction Manager's Construction Phase Fee (such sum is referred to as the "Contract Sum") as set forth below. The Contract Sum shall not exceed the Guaranteed Maximum Price set forth in Exhibit "B" hereto, subject to changes authorized by the terms and conditions of the Contract Documents. Any cost which is not authorized by the terms and conditions of the Contract Documents, but which would cause the Guaranteed Maximum Price to be exceeded shall be paid by Construction Manager without reimbursement by Owner. In the event that the Contractor is required to pay or bear the burden of any new federal, state, or local tax, or of any rate increase of an existing tax (except a tax on income) with respect to its forces and/or its performance of the Work (not including the forces and Work performed by Subcontractors) as a result of any statute, court decision, written ruling, or regulation taking effect after the effective date of this Agreement, the Guaranteed Maximum Price shall be increased by the amount of the new tax or tax increase which is actually paid by Construction Manager.
- (b) The Owner has afforded the Construction Manager with reasonable access to the existing improvements and conditions on the site and has given the Construction Manager the opportunity to thoroughly investigate the existing conditions, which the Construction Manager represents it has done. The results of Construction Manager's investigation have been taken into account in establishing the Guaranteed Maximum Price of the Work. Construction Manager shall not be entitled to a claim for an adjustment in time or price under Owner's General and/or Supplemental Conditions for conditions which Construction Manager discovered or ought to have discovered in Construction Manager's investigation. Before proceeding with the Work, the Construction Manager shall review the Drawings and Specifications and notify the Design Consultant and Owner of any errors, omissions, or discrepancies in the Drawings and Specifications it discovers with respect to the existing conditions. The Construction Manager shall not proceed with the Work if any defect, defined as any error, omission, conflict,

inconsistency, or lack of clarity, is known or should be known by Construction Manager to exist in the Drawings or Specifications or other Contract Documents. If Construction Manager nevertheless proceeds to perform the work then Construction Manager shall be responsible for all foreseeable resulting cost, including the cost of redoing or remedying the Work and time delays resulting therefrom unless and to the extent such costs result from design or concealed conditions. Upon discovering a defect in the Drawings or Specifications, the Construction Manager shall immediately submit a written request for an explanation or decision to the Design Consultant and the Owner.

(c) If the actual Cost of the Work plus Construction Manager's Construction Phase Fee is less than the Guaranteed Maximum Price, then such savings shall be split

# [insert percentage number from proposal in words plus "percent" (and in numbers plus "%" in parentheses)]

to Construction Manager up to an amount not to exceed \$100,000 or one-half percent of Cost of the Work, whichever is the lesser amount and

the balance of the savings to Owner

For items in the Contract Documents and on Exhibit "B" hereto which are noted as "Allowances", 100% of any savings shall be the Owner's. The Cost of the Work included in the Allowances shall be determined in accordance with Owner's General and/or Supplemental Conditions, except that any claim by the Contractor for an adjustment to the Guaranteed Maximum Price based on the cost for Allowance work shall be made within a reasonable time after the issuance of the Drawings and Specifications for the Allowance items. Any increase to an Allowance established by Owner based upon estimates by the Contractor shall not result in any increase to the Contractor's Fee.

(d) In full consideration of Construction Manager's services during the Construction Phase of this Agreement, Owner shall pay Construction Manager a Construction Phase Fee of

# [insert percentage number from proposal in words plus "percent" (and in numbers plus "%" in parentheses)]

of the reimbursable Cost of the Work:

[[Option to (d) above: instead of fee based on percentage, a lump sum from the original proposal may be used. This may be appropriate if the original fee is held while the construction cost is increased. With this option, delete the paragraph 7.02(d) above and substitute the following:

(d) In full consideration of Construction Manager's services during the Construction Phase of this Agreement, Owner shall pay Construction Manager a Construction Phase Fee

#### as follows:

a lump sum Construction Phase Fee of [insert amount from proposal in words (and in numbers in parentheses)]. In the event the overall Guaranteed Maximum Price for the entire Project is increased due to Change Orders or Construction Change Directives, the Construction Manager shall be entitled to additional Construction Phase Fee as set forth in the General and/or Supplemental Conditions.]]

- (e) In Owner's General and/or Supplemental Conditions, references to adjustments in "cost" or "costs" refer to Costs of the Work as defined herein below, and references to Construction Manager's "overhead" and "profit" refer to Construction Manager's Construction Phase Fee.
- (f) The Construction Manager's Construction Phase Fee shall cover the Construction Manager's profit, general overhead and the following costs and expenses:

All expenses in connection with maintaining and operating Construction Manager's main office and any branch or field offices (except for the job site office), including (except as otherwise provided hereinafter):

- (1) Salaries of Construction Manager's officers and home office or other off site personnel, except for those individuals listed in Exhibit "A" who will be charged as a Cost of the Work.
- (2) Salaries of persons employed in the main or branch offices of the Construction Manager whose time is devoted to the general conduct of the Construction Manager's business, such as office managers, stenographers, plan clerks, file clerks, and draftsmen.
- (3) Overhead or general expenses of any kind except those specifically included herein.
- (4) Services and expenses of the estimating, personnel, accounting, budget control, audit and management information systems (other than preconstruction services) relating to accounting in Construction Manager's office and even if at the site, except as specifically identified herein.
- (5) Interest on the Construction Manager's capital or on money borrowed by the Construction Manager, including the capital employed by the Construction Manager in the performance of the Work.
- (6) Amounts required to be paid by Construction Manager for Federal and/or State income, franchise taxes or other business taxes, but not including any applicable sales taxes.
- (7) Legal, accounting, or other similar professional services provided by or to Construction Manager, in regard to disputes, arbitrations, litigations or

other such proceedings with Subcontractors, with municipal authorities, with the Owner, the Design Consultants or any other person or entity relating to the Project or otherwise.

- (8) Sales, entertainment, and meal expenses.
- (9) Employee vehicle expenses, including fuel.
- (10) Employee cell phone expenses.

Construction Manager shall not be entitled to charge any of the above listed costs as Costs of the Work.

- In addition to the payment procedures described in Owner's General and/or (g) Supplemental Conditions, Division I Specifications, Contractor shall submit with each application for payment consisting of a schedule of values percent complete along with any receipts, invoices with check vouchers or other evidence of payment, petty cash account information, payrolls, and any and all other evidence which Owner or Design Consultant shall deem necessary to support the amount requested. The Construction Manager's Construction Phase Fee shall be shown as a separate line item on the schedule of values. In determining the percentage of completion, Construction Manager shall use the lesser of the percentage of the Work actually completed for each classification on the schedule of values, or the percentage of the Guaranteed Maximum Price allocable to that item which has been actually incurred and demonstrated as an expense by the Construction Manager. The amount requested for Construction Manager's Construction Phase Fee shall be in the same proportion to the total fee as the amount requested for the Cost of the Work relative to the total Cost of the Work used in deriving the then current Guaranteed Maximum Price. Retainage of 5% will be applied to the entire amount requested including the Cost of the Work and the Construction Manager's Construction Phase Fee. Each schedule of values submitted shall maintain the originally established value for each work classification line item or subcontractor, and shall contain any revisions to costs or cost estimates for each such classification or subcontractor. The format and tracking method of the original schedule of values and of all updates thereto shall be subject to the approval of Owner and Design Consultant. At all times, the estimated cost of performing the uncompleted and unpaid portion of the Work (including Construction Manager's overhead and profit) shall not exceed the unpaid balance of the Guaranteed Maximum Price (less retainage on Work previously completed). Payments to Subcontractors included in an application for payment shall not exceed the percentage of Work allocable to that Subcontractor for each respective schedule of values classification which has been actually completed.
- 7.03 Owner shall have the right to withhold from payments due Construction Manager such sums as are necessary to protect Owner, in Owner's sole discretion, against any loss or damage which may result from negligence by Construction Manager or failure of Construction Manager to perform Construction Manager's obligations under this Agreement.

7.04 The final request for payment shall not be made until Construction Manager delivers to Owner a complete release of all claims arising out of this Agreement, subject to any claims reserved in accordance with the terms of the Owner's General and/or Supplemental Conditions, and an affidavit that so far as Construction Manager has knowledge or information, the release includes and covers all materials and services over which Construction Manager has control for which a claim could be filed, subject to any claims reserved in accordance with the terms of the Owner's General and/or Supplemental Conditions.

7.05 In addition to the procedures contained in Owner's General and/or Supplemental Conditions, Owner shall have no obligation to make final payment until a final accounting of the Cost of the Work has been submitted by Construction Manager and has been verified by Owner or Owner's representatives. The aggregate total of payments to Construction Manager shall not exceed the total of the actual Cost of the Work as verified by Owner or Owner's representative from Construction Manager's final accounting plus the applicable Construction Manager's Construction Phase Fee, as certified for payment in accordance with the Contract, but in no event more than the Guaranteed Maximum Price. If payments made to Construction Manager exceed that which is due and owing pursuant to this Article VII, then Construction Manager shall promptly refund such excess to Owner.

7.06 Any provision hereof to the contrary notwithstanding, Owner shall, to the extent reasonably required to protect Owner, not be obligated to make any payment (whether a progress payment or final payment) to Construction Manager hereunder if any one or more of the following conditions precedent exist:

- (a) Construction Manager is in breach or default under this Agreement;
- (b) Any part of such payment is attributable to services which are not performed in accordance with this Agreement; provided, however, such payment shall be made as to the part thereof attributable to services which were performed in accordance with this Agreement;
- (c) If Owner, in its good faith judgment, determines that the portion of the compensation then remaining unpaid will not be sufficient to complete the services in accordance with this Agreement, no additional payments will be due Construction Manager hereunder unless and until Construction Manager, at Construction Manager's sole cost, performs a sufficient portion of the remaining services so that such portion of the compensation then remaining unpaid is determined by Owner to be sufficient to so complete the then remaining services.
- (d) Nothing contained herein shall require the Owner to pay the Construction Manager an aggregate amount exceeding the Guaranteed Maximum Price or to make payment if in the Owner's belief the cost to complete the Work would exceed the Guaranteed Maximum Price less previous payments to Construction Manager.

7.07 No partial payment made hereunder shall be, or shall be construed to be, final acceptance or approval of that part of the services to which such partial payment relates, or a release of Construction Manager of any of Construction Manager's obligations hereunder or liabilities with

respect to such services.

7.08 Construction Manager shall promptly pay all bills validly due and owing for labor and material performed and furnished by others in connection with the performance of the Pre-Construction Phase Services and the construction of the Work.

The Construction Manager shall keep full, auditable and detailed accounts and exercise such cost controls as may be necessary for proper financial management under this Agreement. The accounting and control systems shall be satisfactory to Owner. The accounting and control systems shall identify all costs in the distinct categories of (1) costs incurred during Pre-Construction services including costs incurred prior to a Notice to Proceed, (2) reimbursable Costs of the Work, (3) non-reimbursable costs, and (4) costs for Owner's Allowances. This accounting shall include Construction Manager's personnel costs identified in each of the aforementioned categories. Owner, Owner's accountants, Owner's agents, or its authorized representative shall be afforded reasonable access, at reasonable times, to the Construction Manager's personnel and documents, such as, without limitation, time sheets, payroll burden calculations, insurance rates (worker's compensation and general liability) and the support thereof, insurance contracts, invoices, bills reimbursable expenses reports, records, books, foreman's reports, superintendent daily logs, correspondence, instructions, record drawings, receipts, subcontracts, purchase orders, vouchers, memoranda, and other records, drawings, or data relating to the Work performed in accordance with this Agreement, and the Construction Manager shall preserve these for a period of three (3) years after final payment, or for such longer period as may be required by law.

7.09.1 The Construction Manager's records which shall include accounting records (hard copy, as well as computer readable data if it can be made available), written policies and procedures, subcontract files (including proposals of successful and unsuccessful bidders, bid recaps, etc.); original estimates; estimating work sheets; correspondence; change order files (including documentation); general ledger entries detailing cash and trade discounts earned; insurance rebates and dividends; and any other supporting evidence necessary to substantiate charges related to this Agreement. All foregoing, hereinafter referred to as "records," shall be opened to inspection and subject to audit and/or reproduction by Owner's agent or its authorized representative to the extent necessary to adequately permit evaluation and verification of (1) Construction Manager's compliance with this Agreement; and (2) compliance with provisions for Change Orders, payments or claims submitted by the Construction Manager or any of its subcontractors or other payees.

7.09.2 Such audits may require inspection and copying from time-to-time and at reasonable times and places of any and all such information, materials and data as set forth above of every kind and character. Such records subject to audit shall also include those records necessary to evaluate and verify direct costs (including overhead allocations) as they may apply to costs associated with this Agreement.

7.09.3 Owner's agent or its authorized representative shall have reasonable access at reasonable times to the Construction Manager's facilities, shall be allowed to interview all current or former employees to discuss matters pertinent to the performance of this Agreement, may contact subcontractors or other vendors related to the Project, shall have access to all necessary records, shall be provided adequate and appropriate work space in order to conduct audits in compliance

with this Section, and will be provided support from the Construction Manager's staff as required. In the event that Construction Manager does not provide such access and/or all necessary records or support upon reasonable notice to Construction Manager by Owner (at least 7 business days), Construction Manager shall be responsible for the reasonable actual cost of Owner's fees and any associated expenses for any attempted audit which can not be completed for such reasons.

7.09.4 If at the conclusion of any audit performed as set forth herein, the audit discloses overcharges by the Construction Manager to the Owner that are (i) proven; and (ii) in excess of one half percent (0.5%) of the total Cost of Work, then the reasonable actual cost of the Owner's audit shall be reimbursed to the Owner by the Construction Manager within thirty (30) days of submission. Any adjustments and/or records due to the overcharges shall be made within a reasonable amount of time (not to exceed 90 days) from presentation of Owner's findings to Construction Manager.

7.10 The acceptance by Construction Manager or Construction Manager's successors of final payment under this Agreement, shall constitute a full and complete release of Owner from any and all claims, demands, and causes of action whatsoever which Construction Manager or Construction Manager's successors have or may have against Owner under the provisions of this Agreement except those previously made in writing and identified by Construction Manager as unsettled at the time of the final request for payment.

#### ARTICLE VIII COST OF THE WORK

8.01 The term Cost of the Work means costs which the Construction Manager must necessarily incur to properly perform the Work in strict compliance with the Contract Documents. Cost of the Work includes only the items set forth in this Article VIII.

#### (a) Labor and Administrative:

- (1) Reasonable and customary wages paid to construction workers directly employed by Construction Manager who perform the construction of the Work.
- (2) Reasonable and customary wages or salaries of Construction Manager's supervisory and administrative personnel who are identified on Exhibit "A", but only when stationed full-time at the site, or if stationed part time at the site or off site, to the extent their time is directly attributable to the furtherance of the Work.
- (3) Costs paid or incurred by Construction Manager for labor costs arising out of taxes, insurance, and benefits which are (i) required by law, (ii) required by collective bargaining agreements, (iii), or otherwise customary, so long as such costs are based on wages and salaries which are properly included in the Cost of the Work as defined herein.
- (4) Reasonable and customary travel expenses of Construction Manager's

- personnel incurred directly and solely in support of the Project and approved in advance in writing by Owner.
- (5) Cost of long-distance telephone calls, telegrams, postage, package delivery and courier service, telephone service, and reasonable and customary petty cash expenses of Construction Manager's job site office, incurred directly and solely in support of the Work, and all incurred at the site.

#### (b) Materials, Equipment, Tools, Rentals:

- (1) Costs of materials and equipment to be incorporated (or incorporated) into the Work, including transportation charges, and a reasonable and customary allowance for waste and spoilage. Owner shall be entitled to take possession of excess materials not incorporated into the Work, or at Owner's option, Construction Manager shall sell such materials and deduct the gross proceeds from the Cost of the Work. Payment for stored materials is subject to Owner's General and/or Supplemental Conditions.
- (2) Cost of materials, supplies, temporary facilities, equipment, and hand tools except for those customarily owned by construction workers, all provided at the site by Construction Manager, if such items are fully consumed in the construction of the Work, and Owner approves such purchase in advance in writing. Cost for used items shall be based on fair market value and may include costs of transportation, installation, minor maintenance costs, and removal. If the item is not fully consumed, then the cost shall be based on cost of the item minus its fair market salvage value.
- (3) Rental charges for temporary facilities, equipment, and hand tools except for those customarily owned by construction workers, all provided at the site by Construction Manager, and may include transportation, installation, and minor maintenance costs, and removal, all so long as Owner has approved such items and the rental rates in advance in writing. If tools, machinery or construction equipment are rented from the Construction Manager, the amount of such rental, the rate of such rentals, including the freight and delivery cost thereon and all operating expenses except labor, shall be approved by the Owner before commitments are made and shall in no event be higher than the prevailing competitive rates paid in the locality for similar equipment, as documented by Construction Manager with two or more competitive quotes from local rental companies. In no event shall the aggregate rental cost to Owner exceed the purchase price and maintenance cost of the item. In the event equipment can be purchased for an amount comparable to the aggregate rental cost of said equipment, Construction Manager shall purchase such equipment and turn it over to Owner upon final completion of the Work, or, at Owner's option, credit to the Owner with the amount of the fair market resale value.

- (4) Site debris removal and disposal costs in accordance with all applicable laws and regulations.
- (c) Subcontracts: Payments made to Subcontractors by Construction Manager for the construction of the Work in accordance with the Contract Documents and the requirements of the subcontracts with such Subcontractors.

#### (d) Other costs:

- (1) Governmental sales and use taxes directly attributable to the Work. Owner is a tax-exempt organization and Construction Manager shall avail itself of all exemptions which may exist for such taxes based on Owner's status.
- (2) Permit and inspection fees for which Owner is not exempt or for which the Owner has responsibility, but elects not to pay directly.
- (3) Net Premiums (less return premiums, rebates and bond dividends) for insurance and bonds to the extent directly attributable to this Contract.
- (4) Testing fees pursuant to the terms and conditions of Owner's General and/or Supplemental Conditions and approved in advance in writing by Owner.
- (5) Intellectual property royalties and licenses for items specifically required by the Contract Documents, which are, or will be, incorporated into the Work.
- (6) Forfeited deposits, but only if such deposit has been forfeited in the absence of any fault or negligence of Construction Manager.
- (7) Other costs approved in advance in writing by Owner at Owner's sole option and discretion.
- (8) General Conditions costs for items set forth in Exhibit "I" to the extent not otherwise described above as Costs of the Work.

#### 8.02 Costs Not Included in the Cost of the Work

The following shall not be included in the Cost of Work to be paid by Owner:

- (a) Any cost including legal and administrative costs relating to the failure to perform of any Subcontractor or the bankruptcy or insolvency of any Subcontractor.
- (b) Any costs, including legal and administrative costs, to review and negotiate these Contract Documents.
- (c) Travel and subsistence expense of Construction Manager, its officers or employees incurred while traveling between the Project and Construction Manager's principal or branch offices, and travel in the metropolitan area of the

Project.

- (d) Fines, penalties, sanctions or impositions assessed or imposed by any governmental body, instrumentality or tribunal arising from the fault of Construction Manager.
- (e) Cost incurred by Construction Manager resulting from the failure of Construction Manager or its Subcontractors to coordinate their work with that of Owner and its contractors, if any, after agreeing to the schedules thereof, or failure of Construction Manager to comply with directives of Owner not in conflict with said schedules.
- (f) Costs resulting from the failure of Construction Manager or any Subcontractor to procure and maintain insurance as and to the extent required by the Contract Documents.
- (g) Any and all personnel costs, including, without limitation, wages, salaries, and benefits, except for personnel based at the site office and only as specifically provided herein or except as set forth in 8.01(a) above.
- (h) Any and all overhead expense or office expense at any location, except site office expense to the extent specifically included herein.
- (i) Costs related to Construction Manager's indemnification obligations.
- (j) The cost of capital, including, without limitation, interest on capital, regardless of whether it is related to the Project.
- (k) Any cost arising out of the fault or negligence of Construction Manager, its Subcontractors, or any person or entity for whom they may be liable, including, without limitation, costs related to defective, rejected, or nonconforming work, materials or equipment, and damage to persons or property, including warranty work.
- (l) Liquidated or actual damages imposed by Owner for failure of Construction Manager to complete the Work within the Contract Time.
- (m) Any and all costs not specifically authorized herein, including, without limitation, any cost which would cause the Guaranteed Maximum Price to be exceeded.
- (n) Any printing or reproduction costs, unless approved in advance in writing by Owner.
- (o) Any and all education, training, and certification expenses including, but not limited to, LEED® training or certifications.

#### 8.03 Discounts, Rebates, and Refunds:

The Cost of the Work to be paid by Owner shall be credited with the following items:

- (a) Proceeds of the sale of all tools, surplus materials, construction equipment, and temporary structures which have been charged to the Work other than by way of rental, and remaining after completion, whether such sale is made to the Owner, the Construction Manager, or to some other party; and any such sale, if made to others than the Owner, shall be at fair market price. Upon completion of the Work or when no longer required, all tools, construction equipment and materials purchased for the Work shall be sold and the Construction Manager shall use its best efforts to obtain the highest price in respect of such sales.
- (b) If Owner makes funds available to Construction Manager, discounts earned by the Construction Manager through advance or prompt payments. The Construction Manager shall obtain all possible trade and time discounts on bills for material furnished, and shall pay said bills within the highest discount periods. The Construction Manager shall purchase materials for this Project in such quantities as will provide the most advantageous prices to the Owner.
- (c) Reasonable market value as approved by the Owner at the time of removal of all materials, tools, and equipment actually purchased for the work and upon completion of the work retained by the Construction Manager.
- (d) Rebates, discounts, or commissions allowed to and collected by the Construction Manager from suppliers of materials or from subcontractors, together with all other refunds, returns, or credits received for return of materials and/or on bond premiums, by way of dividend or otherwise and/or insurance and/or sales taxes at the time received by Construction Manager.
- (e) Construction Manager shall reimburse Owner for deposits made by Owner and not returned to Owner due to the fault of the Construction Manager. Should Construction Manager not promptly so reimburse Owner upon demand, Owner shall be entitled to recover said amount from Construction Manager, including, but not limited to, by deducting the amount from payments due the Construction Manager.

# ARTICLE IX OWNER'S RESPONSIBILITIES

- 9.01 The Owner shall be fully acquainted with the Project and shall facilitate and coordinate the Owner's Project issues with the Construction Manager. Upon request, the Owner will furnish in writing the authorization of each representative of the Owner to represent it in connection with the Project.
- 9.02 The Owner shall cooperate in providing information to the other members of the Project Team regarding its requirements for the Project.
- 9.03 Owner shall furnish for the site of the Project any necessary surveys describing the physical characteristics, soil reports and subsurface investigations, known legal limitations, utility locations, and the legal description, to the extent such items may be required by agreements between Owner and Design Consultant or other consultants. Owner shall inform all

special consultants retained by the Owner that they shall coordinate their services through the Construction Manager. Owner shall provide special testing and inspection services to the extent required by Texas Government Code Section 2267.058.

- 9.04 If the Owner has actual knowledge of any fault or defect in the Project or non-conformance with the Drawings and Project Manual, Owner shall give prompt written notice thereof to the Construction Manager.
- 9.05 Owner shall furnish Construction Manager with the number of copies of the Contract Documents requested by Construction Manager, not to exceed 5, each time an estimate is required while Construction Manager is rendering Preconstruction Services and the number of copies of Contract Documents and cost proposal request documents issued during bidding and construction requested by Construction Manager, not to exceed 60. Owner, at its sole discretion, may provide additional copies to Construction Manager at Construction Manager's request. Should Owner elect to not provide additional copies, Construction Manager shall not seek reimbursement from Owner for any reproduction expenses incurred by Construction Manager related to the Contract Documents.

### ARTICLE X INDEMNITY

10.01 See Owner's General and/or Supplemental Conditions.

### ARTICLE XI CONSTRUCTION MANAGER'S BONDS

11.01 Texas Government Code § 2267.258 requires that Construction Manger provide Owner with payment and performance bonds in the full amount of the project budget at the time of contract. Payment and Performance Bonds shall be in the form prescribed in Exhibit "E".

# ARTICLE XII CONSTRUCTION MANAGER'S INSURANCE

- 12.01 The Construction Manager shall not commence work under the Agreement until it has obtained all required insurance and until such insurance has been reviewed and approved in writing by the Owner. Approval of the insurance by the Owner shall not relieve nor decrease the liability of the Construction Manager hereunder. Prior to commencing any of the Pre-Construction Services, Construction Manager shall provide evidence as required by this Article that coverages for Employer's Liability, Workers' Compensation, Commercial General Liability, and Owner's and Contractor's Protective Insurance as set forth in Owner's General and/or Supplemental Conditions are in full force and effect. Prior to commencing any construction work, Builder's Risk as set forth in Owner's General and/or Supplemental Conditions shall be in full force and effect and shall be increased as necessary for each separate bid package, phase, or Stage of construction prior to the commencement of construction for that package, phase, or Stage.
- 12.02 The Construction Manager shall not cause or allow any of its insurance to be canceled nor permit any insurance to lapse during the term of this Agreement or as required in this

#### Agreement.

12.03 The Owner reserves the right to review the insurance requirements set forth in this Article during the effective period of this Agreement and to make reasonable adjustments to the insurance coverages and their limits when deemed necessary and prudent by the Owner based upon changes in statutory law, court decisions, or the claims history of the industry as well as the Construction Manager.

12.04 The Owner shall be entitled, upon request, and without expense, to receive copies of the policies and all endorsements thereto and may make any reasonable requests for deletion, or revision or modification of particular policy terms, conditions, limitations, or exclusions, except where policy provisions are established by law or regulation binding upon either of the Parties or the underwriter of any of such policies. Actual losses not covered by insurance as required by this Article shall be paid by the Construction Manager.

#### ARTICLE XIII TERMINATION

13.01 In addition to the termination options and procedures set forth in Owner's General and/or Supplemental Conditions, Owner may terminate the Contract with or without cause, at the following times:

- (a) At the conclusion of the Schematic Design Phase.
- (b) At the conclusion of the Design Development Phase.
- (c) At the conclusion of the Construction Documents Phase.
- (d) If any Guaranteed Maximum Price proposal from Construction Manager is not accepted by Owner.
- (e) During the Pre-Construction Services phase, if Construction Manager is in default or breach under this Agreement and does not cure such default or breach within seven (7) days after written notice from Owner specifying the nature of the default.
- (f) Prior to the commencement of construction, Owner may terminate for convenience upon seven (7) days' written notice to Construction Manager.

If the Contract is terminated under subparagraphs 13.01 (a), (b), (c), (d) or (f), then Construction Manager shall be compensated for the Pre-Construction Phase Services which it has properly completed in accordance with this Agreement prior to the date of termination as provided hereunder. Construction Manager shall thereafter, upon Owner's written request, deliver all estimates and other data Owner may reasonably request in connection with Construction Manager's Pre-construction Phase Services. No termination expenses will be paid to Construction Manager and Construction Manager shall have no claim for lost profits, or other consequential, direct, indirect or special damages of any kind on account of such termination. The date of the conclusion of the Schematic Design Phase, Design Development Phase, and

Construction Documents Phase is determined by the date of Owner's acceptance of the respective submittals from the Design Consultant.

13.02 A termination under this Contract above shall not relieve Construction Manager or any of its employees of liability for violations of this Agreement, any act or omission, or negligence of Construction Manager.

13.03 As of the date of termination of this Contract, Construction Manager shall furnish to Owner all statements, accounts, reports and other materials as are required hereunder or as have been prepared by Construction Manager in connection with Construction Manager's responsibilities hereunder. Owner shall have the right to use the ideas and designs therein contained for the completion of the services described by this Agreement, and for completion of the Project, or otherwise. All drawings, plans, specifications, renderings and models, etc., prepared by the Design Consultant are the property of Owner or Design Consultant, as set forth in the terms and conditions of the agreement between Owner and the Design Consultant. They are not to be used by any person or entity other than Owner on other projects unless expressly authorized by Owner.

# ARTICLE XIV MISCELLANEOUS PROVISIONS

14.01 Exhibits. All exhibits hereto are hereby incorporated herein by reference for all purposes.

14.02 Assignment. This Agreement is a personal service contract for the services of Construction Manager, and Construction Manager's interest in this Agreement, duties hereunder and/or fees due hereunder may not be assigned or delegated to a third party. The benefits and burdens of this Agreement are, however, assignable by Owner.

#### 14.03 Certifications.

Family Code Child Support Certification. By signing this Agreement, the undersigned certifies as follows: "Under Section 231.006, *Texas Family Code*, the vendor or applicant certifies that the individual or business entity named in this contract, bid, or application is not ineligible to receive the specified grant, loan, or payment and acknowledges that this contract may be terminated and payment may be withheld if this certification is inaccurate."

Sales Tax Certification. "Under Section 2155.004, Government Code, the vendor certifies that the individual or business entity named in this bid or contract is not ineligible to receive the specified contract and acknowledges that this contract may be terminated and payment withheld if this certification is inaccurate."

14.04 Entire Agreement; Modifications, Conflicts. This Agreement supersedes all prior agreements, written or oral, between Construction Manager and Owner and shall constitute the entire agreement and understanding between the Parties with respect to the subject matter hereof. This Agreement and each of its provisions shall be binding upon the Parties and may not be waived, modified, amended or altered except by a writing signed by Owner and Construction Manager. If there is a conflict between this Agreement and Owner's General and/or Supplemental Conditions, then the provision which provides the greatest benefit to Owner shall govern.

14.05 Captions. The captions of paragraphs in this Agreement are for convenience only and shall not be considered or referred to in resolving questions of interpretation or construction.

14.06 Governing Law. This Agreement and all of the rights and obligations of the parties hereto and all of the terms and conditions hereof shall be construed, interpreted and applied in accordance with and governed by and enforced under the laws of the State of Texas. The exclusive venue for contract disputes and all other matters related to this Agreement shall be Houston, Texas.

14.07 Waivers. No delay or omission by either of the parties hereto in exercising any right or power accruing upon the non-compliance or failure of performance by the other party hereto of any of the provisions of this Agreement shall impair any such right or power or be construed to be a waiver thereof. A waiver by either of the parties hereto of any of the covenants, conditions or agreements hereof to be performed by the other party hereto shall not be construed to be a waiver of any subsequent breach thereof or of any other covenant, condition or agreement herein contained.

14.08 Binding Effect. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective permitted assigns and successors.

14.09 Appointment. Owner hereby expressly reserves the right from time to time to designate by notice to Construction Manager one or more representatives to act partially or wholly for Owner in connection with the performance of Owner's obligations hereunder. Construction Manager shall act only upon instructions from such representatives unless otherwise specifically notified to the contrary.

14.10 Notices. All notices, consents, approvals, demands, requests or other communications provided for or permitted to be given under any of the provisions of this Agreement shall be in writing and shall be deemed to have been duly given or served when delivered by hand delivery or when deposited in the U.S. mail by registered or certified mail, return receipt requested, postage prepaid, and addressed as follows:

If to Owner: Dillon Brady

General Manager-Construction

HISD Construction and Facility Services

3200 Center Street Houston, Texas 77007 Phone: 713-556-9250

Fax: 713-713-9315

If to Construction Manager:

[insert name of person]

[insert title]

[insert name of firm]
[insert address of firm]
[insert city, state, zip code]

[insert "Phone:" and phone number]

[insert "Fax:" and fax number]

or to such other person or address as may be given in writing by either party to the other in accordance with the aforesaid.

- 14.11 Dispute Resolution. See Owner's General and/or Supplemental Conditions for a description of dispute resolution procedures which are applicable to all Claims (as defined therein) during the Construction Phase of this Agreement. Otherwise, any disputes concerning Pre-construction Phase Services shall be resolved as set forth for mediation and litigation under Owner's General and/or Supplemental Conditions.
- 14.12 Reformation. If any provision of this Contract is held to be illegal, invalid, or unenforceable under present or future laws, such provision shall be reformed to provide as close to the original intent of the provision as possible while still being enforceable. However, in the event such a reformation is not possible then (i) such provision shall be fully severable; (ii) this Contract shall be construed and enforced as if such illegal, invalid, or unenforceable provision had never been comprised a part of this Contract; and (iii) the remaining provisions of this Contract shall remain in full force and effect and shall not be affected by the illegal, invalid or unenforceable provision or by its severance from this Contract. In the event any law, ordinance, standard, specification, rule or authority is referenced and/or incorporated herein, such reference shall be construed to be the law, ordinance, rule or authority in effect at the time of performance of the Work or other obligation to which such law, ordinance, rule or authority applies. Further, in the event that a provision of the contract conflicts in such a manner that the provision of the contract requires something impermissible according to any applicable law, ordinance, rule or authority, the contract shall be interpreted to give precedence to the applicable, law, ordinance, rule or authority. A contract provision that requires the contractor to satisfy a higher level of performance or standard than a law, ordinance, rule or authority shall be given precedence in interpreting the obligations of the contractor.
- 14.13 Enforcement. It is acknowledged and agreed that Construction Manager's services to Owner are unique, which gives Construction Manager a peculiar value to Owner and for the loss of which Owner cannot be reasonably or adequately compensated in damages; accordingly, Construction Manager acknowledges and agrees that a breach by Construction Manager of the provisions hereof will cause Owner irreparable injury and damage. Construction Manager, therefore, expressly agrees that Owner shall be entitled to injunctive and/or other equitable relief in any court of competent jurisdiction to prevent or otherwise restrain a breach of this Agreement, but only if Owner is not in material breach of this Agreement.
- 14.14 Independent Contractor. Construction Manager recognizes that it is engaged as an independent contractor and acknowledges that Owner will have no responsibility to provide transportation, insurance or other fringe benefits normally associated with employee status. Construction Manager, in accordance with its status as an independent contractor, covenants and agrees that it shall conduct itself consistent with such status, that it will neither hold itself out as nor claim to be an officer, partner, employee, or agent of Owner by reason hereof, and that it will not by reason hereof make any claim, demand, or application to or for any right or privilege applicable to an officer, partner, employee, or agent of Owner, including, but not limited to, unemployment insurance benefits, social security coverage or retirement benefits. Construction Manager hereby agrees to make its own arrangements for any of such benefits as it may desire

and agrees that it is responsible for all income taxes required by applicable law.

### Optional "PFC" Insurance and Liability Language:

- 14.15 The Houston Independent School District Public Facility Corporation's ("PFC") liability under this Agreement to Construction Manager is limited to the total sum of [insert project construction budget in words (and in numbers in parentheses)]. Construction Manager Waives and Releases any claim, demand and/or suit, of any kind or character, including any Claim, for the payment of any sum in excess of [insert project construction budget in words (and in numbers in parentheses)], as against PFC and, further, agrees to look solely to the Houston Independent School District ("HISD") for payment of any claim, including a Claim, to which Construction Manager may become entitled under the terms and conditions of this Agreement.
- 14.16 Subject to the limitations of liability herein, whenever the term "Owner" is used in the General Conditions or other conditions to this Agreement, it shall be construed to refer to both HISD and PFC, it being the intent of this provision that PFC be entitled to all the rights and benefits of this Agreement and the Contract Documents, acting either jointly with HISD or in PFC's name only.
- 14.17 In addition to the requirement for insurance set forth at 11.1.2 of the General Conditions, as modified by the Supplemental Conditions, Contractor shall provide excess liability insurance, using an Umbrella form following the underlying form coverage, with a drop down provision, in the minimum amount of \$10,000,000.00. Further, as to all liability policies of insurance, excepting only workers compensation, Houston Independent School District Public Facility Corporation and New York Mellon Trust Company, National Association, Trustee (as defined in the Lease with Option to Purchase made between the Houston Independent School District Public Facility Corporation and the Houston Independent School District), shall also be named as additional insureds.
- 14.18 In addition to the requirements for bonds set forth at Section 14.8, as provided by the Supplemental Conditions, Contractor's surety shall provide a "Dual Obligee Rider", acceptable to Owner, naming the Houston Independent School District Public Facility Corporation and New York Mellon Trust Company, National Association, or its successor and/or assignee, as Trustee (as defined in the Lease with Option to Purchase made between the Houston Independent School District Public Facility Corporation and the Houston Independent School District), as additional obligee's under the Performance and Payment Bonds.

IN WITNESS WHEREOF, intending to be bound, the Parties have entered into this Agreement as of the Effective Date.

[Signatures on Next Page]

## **CONSTRUCTION MANAGER**

		By:	
		Name:	(print or type)
		Title:	(print of type)
OHEN	TD		
OWN	ER on Independent School Distr	ict	
Houst	on independent school bish	ict	
By:			
	Terry B. Grier, Ed.D.	Date	
	Superintendent of School	S	
Appro	oved as to Funding and Busin	ess Terms:	
	•		
D			
By:	Kenneth Huewitt	Date	
	Chief Financial Officer	Date	
Appro	oved as to Form:		
Appro	oved as to Form.		
By:			
	Thomas R. Barber	Date	
	Attorney for HISD		

4811-8071-4258, v. 6

#### EXHIBIT "A" TO THE CONSTRUCTION MANAGER-AT-RISK AGREEMENT

[Exhibit "A" shall be submitted concurrently with Exhibit "B". This exhibit is referenced in the Construction Manager-at-Risk Agreement in paragraphs 4.01, 7.02 (f) (1), and 8.01 (a) (2).]

PROJECT:		
PERSONNE	L AND SUBCONSULTA	NTS OF CONSTRUCTION MANAGER
[EXAMPLE:		
<u>Name</u>	<u>Title/Role</u>	Full/Part time
	_ – Project Manager, Part t	ime
	– General Superintendent	t, Full time
	_ – Assistant Superintenden	nt, Full time
	_ – Project Engineer, Full t	ime
	_ – Safety Manager, Part tir	me
	_ – Assistant/ Field Office S	Support, Full time



# EXHIBIT "B" TO THE CONSTRUCTION MANAGER-AT-RISK AGREEMENT GUARANTEED MAXIMUM PRICE PROPOSAL

We hereby submit to the Houston Independent School District pursuant to the provisions of Article V of the Construction Manager-at-Risk Agreement by and between Owner and

I	incort name	αf	Construction	M	magarl	1
l	inseri name	<u>UI</u>	Construction	IVIU	<u>inager j</u>	,

dated

#### [insert date from page 1 of Agreement]

(the "Agreement"), a Guaranteed Maximum Price for the Project (as defined in the Agreement) based on the Contract Documents (as defined by the Agreement) developed for the Project, as follows:

1.	An amount for the reimbursable Cost of the Work provided by the Agreement (exclusive of contingencies for design, bidding, and price escalation). The amount shall include all the work described or reflected in Attachment 1 and Attachment 2 to Exhibit "B". (See Attachments 1 and 2)	\$[insert cost of work as agreed upon in figures after estimates and value engineering]
2.	An amount for contingencies for design completion, assumptions and clarifications, bidding, and price escalation (Construction Manager's Contingency): (2% of the Cost of the Work)	\$[insert contingency amount as 2% of cost of work above]
3.	An amount for General Conditions items provided by Construction Manager pursuant to the Agreement (exclusive of contingencies for design, bidding, and price escalation): (provide detailed breakdown by project element, phase, stage, schedule of values, separate subcontract, or as otherwise specified by Owner for this Project)	\$[insert General Conditions amount not to exceed the percentage indicated at 5.01 (g)(6) p.15 of Agreement]
1.	Total estimated Cost of the Work	\$[insert subtotal of amounts 1 through 3 above]
5.	Total of Construction Manager's Construction Phase Fees pursuant to the Agreement	\$[insert amount calculated using the percentage (shown in 7.02(d) p. 23 of Agreement) of the subtotal in item 4 above

TOTAL OF 4 PLUS 5 \$\_\_\_\_\_\_[insert total of 4 + 5]

This figure shall be the Guaranteed Maximum Price ("GMP" or "Contract Sum" for the purposes of the General Conditions and/or any Supplementary/Supplemental and/or Special Conditions, if any) which we hereby guarantee to the Owner.

## EXHIBIT "B" TO THE CONSTRUCTION MANAGER-AT-RISK AGREEMENT

Substantial Completion shall be within

# [insert number of days in words (and in numbers in parentheses)]

	ar days after issuance of Notice ich the Guaranteed Maximum Pri			
[insert	<u>t date]</u> .			
			CONSTRUCTION N	MANAGER
			[insert legal name	of firm]
		D		
		By: Name:	[insert name]	(print or type)
		Title:	[insert title]	(Ferrer en 12 F.s.)
OWN	ER			
Housto	on Independent School District			
By:			-	
	Terry B. Grier, Ed.D.			
	Superintendent of Schools			
	1 . 5 1' 15 ' "	7		
Appro	ved as to Funding and Business T	erms:		
By:			-	
	Kenneth Huewitt Chief Financial Officer			
Appro	ved as to Form:			
By:				
-	Attorney for HISD		•	

# ATTACHMENT 1 TO EXHIBIT "B" TO THE CONSTRUCTION MANAGER-AT-RISK AGREEMENT

PROJECT	•		
LIST OF A	ADDENDA		
<u>Number</u>	<u>Date</u>	<u>Pages</u>	
1 2	[date] [date]	Pages and drawings Pages and drawings	
END OF LI	ST OF ADDENDA		
LIST OF D	PRAWINGS [Inclu	ude all Drawings issued in Addenda]	
Drawings F	Prepared by [A/E Fir	m Name]:	
<u>Date</u>	<u>Drawing</u> <u>Number</u>	Sheet Title	
[]	[]	[]	
Drawings F	Prepared by [Hazard	ous Materials Consultant Firm Name]:	
<u>Date</u>	<u>Drawing</u> <u>Number</u>	Sheet Title	
[]	[]	[]	
END OF LI	ST OF DRAWINGS		
LIST OF S	PECIFICATION SE	ECTIONS [Include all Specifications issued in Addenda]	
<b>Specification</b>	ons Prepared by [A/F	E Firm Name]:	
<u>Date</u>	<u>Section</u> Number	Title	
	[ ]		

# ATTACHMENT 1 TO EXHIBIT "B" TO THE CONSTRUCTION MANAGER-AT-RISK AGREEMENT

<b>Specifications Pre</b>	pared by [hazaı	dous materials consultant name]:
<u>Date</u>	Section Number	<u>Title</u>
[]	[]	[]
END OF LIST OF	SPECIFICATIO	N SECTIONS
LIST OF OTHER	DOCUMENTS	<u>3</u>
<u>Date</u>	Page Number	<u>Title</u>
[] [] []	[] []	GEOTECHNICAL ENGINEERING REPORT prepared by [geotechnical engineer name] HISD School Operations Parameter Statement HISD Minimum Safety Requirements Wage Rate Schedule

 $[date] \\ ATTACHMENT 1 TO EXHIBIT B \\ Page 2 of 2 \\$ 

END OF LIST OF OTHER DOCUMENTS

# ATTACHMENT 2 TO EXHIBIT "B" TO THE CONSTRUCTION MANAGER-AT-RISK AGREEMENT

PROJECT	Г:			
LIST OF	<u>ALLOWANCES</u>			
below are delivery ch	ving Owner allowances are included in the G "turn key", including without limitation harges and all other charges of whatever kin tive allowance item.	all labor, material, eq	quipment, rentals,	services,
<u>Number</u>	<b>Description</b>			Amount
1 2 3	Payment and Performance Bonds Builder's Risk Insurance, General Liability Project Insurance, and insurance on rented []		ral	
[Special te	ext for brick allowances:]			
charges ar	ances stated below are for material cost only nd all other charges of whatever kind or n allowance items are included in the GMP, bu	ature required to perf	form all of the wo	
1	(Unit Price Allowance): \$per thouse Total Quantity: units = \$		or #1	
2	(Unit Price Allowance): \$per thouse Total Quantity: units = \$		or #2	
END OF L	LIST OF ALLOWANCES			
LIST OF	UNIT PRICES			
	wing unit prices include all necessary mate and profit for the items listed.	erial, delivery costs, ec	quipment, labor, i	insurance,
<u>Descriptio</u>	<u>on</u>	Unit	Deduct	Add
END OF L	LIST OF UNIT PRICES			

## LIST OF ALTERNATES

The following alternates are included in the Guaranteed Maximum Price.

# **DRAFT**

# ATTACHMENT 2 TO EXHIBIT "B" TO THE CONSTRUCTION MANAGER-AT-RISK AGREEMENT

Number Description Amount

END OF LIST OF ALTERNATES

# EXHIBIT "C" TO THE CONSTRUCTION MANAGER-AT-RISK AGREEMENT

# **ADDITIONAL SERVICES REQUISITION**

Requisition Number	
Project Number	
Date	, 20
Contractor:	
Project Name:	
Campus:	
Disease mafers to the	Agreement dated 20 hetween
	Agreement dated, 20 between, construction with the undersigned ("Construction of the undersigned of the undersig
Manager") as amended to the date called the "Agreement") pursuant	hereof (such agreement as so modified and amended being hereafter to which Construction Manager is to perform certain services. The reement, shall have the same meanings when used in this letter.
Owner has requested the Manager deems to be Additional Se	performance of the services described below which Construction ervices.
[Description of Services]	
in accordance with the terms and	tes to perform the Additional Services described above subject to and provisions of the Agreement for a fee which will be determined in which will not exceed Dollars
(\$) ar	nd for reimbursement of expenses in accordance with the Agreement
	he performance of such Additional Services, but which reimbursement Dollars (\$).
	perform the services in accordance with any schedule attached hereto in any event not later than () days after to proceed.

### DRAFT

#### EXHIBIT "C" TO THE CONSTRUCTION MANAGER-AT-RISK AGREEMENT

If the foregoing is acceptable to you, please so execute by signing the enclosed copy of this letter at the space provided for this purpose and by inserting the date upon which Construction Manager is authorized to commence performance of the Additional Services described in Paragraph 1 above.

	Sincerely y	ours,				
	CONSTRUCTION MANAGER					
	NT					
Accepted this day of Construction Manager is authorized to commence, 20	e performan	ce of	the	Additional	, 20 Services	on
OWNER						
By:	_					
Name:Title:	_					
Title:	_					
PART I: PRE-CONSTRUCTION PHASE SERVICES						
ORIGINAL CONTRACT AMOUNT	(\$			)		
PREVIOUS ADDITIONS	(\$			)		
PREVIOUS DEDUCTIONS	(\$			)		
NET BALANCE CONTRACT AMOUNT	(\$			)		
THIS (Addition) (Deduction):	(\$			)		
ADJUSTED CONTRACT AMOUNT	(\$			)		
xc: Project Manager						

Construction Manager Accounting

# EXHIBIT "D" TO THE CONSTRUCTION MANAGER-AT-RISK AGREEMENT CONSTRUCTABILITY PROGRAM

#### **Primary Goal**:

To eliminate or reduce potential Change Orders, Construction Change Directives, Architect's Supplemental Instructions, requests for information, delays, and claims during construction through review and improvement of design and construction documents, resulting in documents that are complete, coordinated, non ambiguous, buildable, and have the benefit of HISD's "lessons learned" from previous projects

#### **Secondary Goals**: a.

- To improve communication and relationships between Construction Manager, design consultants, owner, and other parties involved in the construction process
- b. To have the Construction Manager become familiar with the detail of the project at the earliest date to facilitate the construction of the project

### **Requirements**:

Conduct a complete constructability review that includes, but is not limited to, the following:

- The Construction Manager shall assemble a constructability review team comprised of the Construction Manager's selected staff and advisors.
- 2. Draft a constructability check list for review by HISD. Incorporate additions as directed by HISD.
- 3. Using the Construction Manager's firm history, review design and construction documents to identify issues that led to disputes, scope gaps, delays, and an excessive number of requests for information on other projects.
- 4. Conduct constructability reviews upon completion of:
  - a. Schematic Design
  - b. Design Development
  - c. 60% Construction Documents
  - d. 95% Construction Documents
  - e. Permit Approval

- Identify and advise on appearance of ambiguous terms in the design or construction documents, such as "as needed", "if necessary" and "as required".
- 6. Identify and advise on any use or variation on the terms "by Owner", "by Others", "by Division \_\_\_" to reduce potential for gaps in scope between subcontractors.
- 7. Become familiar with HISD Design and Construction Standards. Verify the project requirements in the design and construction documents meet the standards.
- Review design and construction documents using information from HISD regarding issues from previous projects, including "lessons learned" and causes of common reoccurring Change Orders.
- Review design and construction documents using information from the design team or other sources, on errors and omissions encountered on similar projects.
- Review design and construction documents using information obtained from roofing consultants with experience on HISD's projects regarding issues of non compliance to roofing details, specifications, and standards.
- 11. Review existing and as-built conditions at the project site and incorporate information in the design and construction document review.
- 12. Review land surveys, geotechnical reports, and utility surveys for coordination with design and construction documents.
- 13. Consider the design of the project as it affects construction. Make recommendations to improve the construction process, including modular construction, phasing, sequencing, staging, and simplification.
- 14. Verify that the scope required to obtain the LEED points targeted by the design team is clearly indicated, as well as the Construction Manager's and subcontractor's roles and obligations in obtaining and documenting the points.

#### EXHIBIT "D" TO THE CONSTRUCTION MANAGER-AT-RISK AGREEMENT

- 15. Verify the availability of construction materials and design elements required by the design and construction documents.
- 16. Review hazardous materials surveys; recommend any feasible destructive testing to identify concealed existing conditions.
- 17. Review construction documents for completeness of miscellaneous steel requirements.
- 18. Verify the construction documents provide sufficient information to build the project, including views, details, and sections.
- 19. Review design and construction documents for coordination between consultants. Identify gaps, overlaps, and/or dissimilar information.
- 20. Verify plenum space is adequate for all elements required to occupy the space.
- 21. Verify that electrical power is indicated for all miscellaneous design elements requiring power, such as drinking fountains, overhead doors, card access, motion sensors, alarms, irrigation controllers, and miscellaneous mechanical equipment.
- 22. Review and coordinate owner furnished elements, such as data cabling and miscellaneous equipment (copiers) with locations and power requirements indicated in the construction documents.
- 23. Conduct additional reviews to meet the stated goals of the constructability program.

## EXHIBIT "E" TO THE CONSTRUCTION MANAGER-AT-RISK AGREEMENT

# **BONDS**

Owner's Payment and Performance Bond Forms will be used.

## General Conditions of the Contract for Construction

#### Modified 4/12/2013

#### PROJECT:

(Name and location or address)

Refer to the Project Manual or other Contract Documents for project information.

#### THE OWNER:

(Name and address)

Houston Independent School District

4400 West 18<sup>th</sup> Street

Houston, Texas 77092 Phone: 713-746-8256

Facsimile: 713-746-5249

#### THE ARCHITECT:

(Name and address)

Refer to the Project Manual or other Contract Documents for Architect information.

#### **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.

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#### ARTICLE 1 **GENERAL PROVISIONS**

#### § 1.1 BASIC DEFINITIONS

#### § 1.1.1 THE CONTRACT DOCUMENTS

The Contract Documents are enumerated in the Agreement between the Owner and Contractor (hereinafter the Agreement) and consist of the Agreement, Conditions of the Contract (General, Supplementary 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 requirements.

#### § 1.1.2 THE CONTRACT

Throughout the General Conditions to the Contract, the term "Contractor" shall mean either "Contractor" or "Construction Manager" as may be applicable for project delivery by Construction Manager at Risk. Owner may employ its own consultants to assist it in managing various of its obligations and/or to perform certain functions under this Agreement in addition to the Architect. Such consultant is referred to herein as Program Manager, or "PM".

The Contract Documents form the Contract for Construction. The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. The Contract may be amended or modified only by a written modification. The Contract Documents shall not be construed to create a contractual relationship:

- (1) between the Architect or the Architect's consultants and the Contractor,
- (2) between the Owner and a Subcontractor or a Sub-subcontractor,
- (3) between any persons or entities other than the Owner and the Contractor; or
- (4) between the Program Manager and the Contractor.

The Program Manager and/or Architect shall, however, be entitled to performance and enforcement of obligations of the Contractor under the Contract intended to facilitate performance of the Architect's duties.

#### § 1.1.3 THE WORK

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

#### § 1.1.4 THE PROJECT

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

#### § 1.1.5 THE DRAWINGS

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

#### § 1.1.6 THE SPECIFICATIONS

The Specifications are that portion of the Contract Documents consisting of the written requirements for materials, equipment, systems, standards and workmanship for the Work, and performance of related services.

#### § 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 a design professional and its consultants under their respective professional

**User Notes:** 

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

#### § 1.1.8 PROGRAM MANAGER

The Owner may use Program Manager to carry out some of the functions of administration of the Owner's construction program. Should Owner not use a Program Manager, then references to Program Manager in the General Conditions shall be deemed as references to Owner. The Contractor, Architect, and Program Manager (when applicable) shall cooperate with each other in the performance of their respective functions. The management and reporting systems used by the Owner and/or Program Manager, including the use of the Program Manager, may be changed by Owner during the Project. Any such changes shall not provide the basis for a Claim for additional time or compensation by the Contractor.

#### § 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.

§ 1.2.1.1 The most recently issued document takes precedence over previously issued forms of the same document. Figures given on Drawings govern scale management, and large scale details govern smaller scale Drawings. If an item is shown one place in the Drawings, but not another, or called for in a schedule or the specifications but not shown on the Drawings, or shown on the Drawings but not in a schedule, it is to be included. Existing conditions take precedence over Drawings and Specifications for dimensions and shall be verified by the Contractor. The order of precedence is as follows with the highest authority listed first:

- A. The Agreement;
- B. Addenda;
- C. General Conditions;
- D. Specifications; and
- E. Drawings

§ 1.2.1.2 In the event of inconsistencies within or between parts of the Contract Documents, or between the Contract Documents and standards, codes, ordinances applicable to the trade work performed by or through the Contractor, the Contractor shall:

- .1 provide the better quality or greater quantity of Work; or
- comply with the more stringent requirement, either or both in accordance with the Architect's interpretation.

The terms and conditions of this Section 1.2.1.2, however, shall not relieve the Contractor of any of the obligations set forth in Section 3.2 and 3.7, and this provision shall not be considered to be more important than Section 1.2.1.1.

- § 1.2.2 Organization of the Specifications into divisions, sections and articles, and arrangement of Drawings shall not control the Contractor in dividing the Work among Subcontractors or in establishing the extent of Work to be performed by any trade.
- § 1.2.3 Unless otherwise stated in the Contract Documents, words that have well-known technical or construction industry meanings are used in the Contract Documents in accordance with such recognized meanings.
- § 1.2.4 Optional Materials, Equipment and Processes. Contractor may submit for consideration proposed substitutions of materials, equipment or processes from those set out in the Contract Documents. Submittals of proposed substitutions must be made in writing within thirty (30) days of the Notice to Proceed and should contain sufficient information to allow the Architect and Owner to determine if the proposed substitution is in fact equal or better than the requirements of the Contract Documents. The Architect shall review proposed substitutions within a reasonable time. Contractor shall bear the risk of any delay in performance caused by submitting substitutions. The

Owner may approve substitutions only when the substitution is clearly proven by the Contractor to be equal in performance characteristics to the requirements of the Contract Documents, equally compatible with existing installations and complimentary to the architectural design for the Work.

- § 1.2.5 Product and Reference Standards. When specific products, systems or items of equipment are referred to in the Contract Documents, any ancillary devices necessary for proper functioning shall also be provided. When standards, codes, manufacturer's instructions and guarantees are required and no edition is specified by the Contract Documents, the current edition at the time of Contract execution shall apply whether or not the proper edition was set out in the Contract Documents. References to standards, codes, manufacturer's instructions and guarantees shall apply in full, except:
  - .1 they do not supersede more stringent standards set out in the Contract Documents, and
  - .2 any exclusions or waivers that are inconsistent with the Contract Documents do not apply.
- § 1.2.6 The Contractor shall include, with any request for substitution, a written representation identifying any potential effect the substitution may have on the Project's achievement of LEED® points. The Owner and Architect shall be entitled to rely on any such representation. In preparing this representation, the Contractor may request additional information from the Architect describing how the product, material or equipment, for which a substitution is proposed, was intended to contribute toward achievement of the LEED® objective.

#### § 1.3 CAPITALIZATION

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

#### § 1.4 INTERPRETATION

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

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

§ 1.5.1 The Contractor, Subcontractors, Sub-subcontractors and material or equipment suppliers are authorized to use and reproduce the Instruments of Service provided to them 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 material or equipment suppliers may not use the Instruments of Service on other projects or for additions to this Project outside the scope of the Work without the specific written consent of the Owner, Architect and the Architect's consultants.

(Paragraph deleted)

#### § 1.6 FORMS AND FORMAT

The Owner requires that the Contractor shall use and/or respond to certain Owner-furnished forms during the course of the Project. These forms, as presently constituted, are available for viewing and copying in the Houston Independent School District Construction and Facility Services office. From time to time, there may be future revisions, changes, additions or deletions to these forms. The fact that the Owner modifies and increases reasonable reporting requirements shall not serve as the basis for a Claim for additional time or compensation by the Contractor.

#### ARTICLE 2 OWNER

#### § 2.1 GENERAL

- § 2.1.1 The Owner is the person or entity identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number.
- § 2.1.2 The presence of the Owner, Program Manager or Architect at the Project site does not imply acceptance or approval of the Work.
- § 2.1.3 The Owner, being a public body under the laws of the State of Texas, must have funds in the full amount of the Contract on hand prior to award and execution of the Contract. Furthermore, no Contract exists between the Owner and the Contractor until the Contract is approved by a majority of the Board of Education of the Owner in open session at a duly held Board meeting, and the Contract is signed by Owner's authorized representative.

#### § 2.2 INFORMATION AND SERVICES REQUIRED OF THE OWNER

- **§ 2.2.1** (*Paragraph intentionally deleted.*)
  - § 2.2.2 Except for permits and fees that are the responsibility of the Contractor under the Contract Documents, including those required under Section 3.7.1, the Owner shall secure and pay for necessary approvals, easements, assessments and charges required for construction, use or occupancy of permanent structures or for permanent changes in existing facilities.
  - § 2.2.3 If requested to do so by the Contractor, Owner shall furnish a survey describing physical characteristics, legal limitations and utility locations for the site of the Project, and a legal description of the site. The Contractor may rely on the accuracy of the survey produced by the Owner, unless reasonable inspection of the site would disclose variances between the site conditions and those shown on Owner's survey. The survey shall not relieve Contractor from its obligations to examine the site.
  - § 2.2.4 Information or services reasonably necessary for the Work and under the Owner's control shall be furnished by the Owner with reasonable promptness where requested in writing by the Contractor. Under normal circumstances, fourteen (14) days will be considered a reasonable time for Owner's response unless there is a critical need for an earlier response and that need was addressed by the Contractor in its request. In any instance where information or services from the Owner, Program Manager or Architect is required, Contractor shall promptly notify in writing the Architect, with copy to the Owner and Program Manager, of the particular need. Absent such notification, any Claim based upon lack of such information or services shall be waived.
  - § 2.2.5 Copies of the Drawings and Project Manuals returned by unsuccessful bidders will be furnished, free of charge "as is" to the Contractor. Contractor's use of returned bidding materials will be at its sole risk. The Contractor will be furnished as many additional copies as it may require, at its sole cost and expense unless otherwise stated in the Contract Documents.

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

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

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

- § 2.4.1 If the Contractor defaults or neglects to carry out the Work in accordance with the Contract Documents and fails within a ten-day period after receipt of written notice from the Owner to commence and continue correction of such default or neglect with diligence and promptness, the Owner may, without prejudice to other remedies the Owner may have, correct such deficiencies. In such case an appropriate Change Order shall be issued deducting from payments then or thereafter due the Contractor the reasonable cost of correcting such deficiencies, including Owner's expenses and compensation for the Architect's additional services made necessary by such default, neglect or failure. If payments then or thereafter due the Contractor are not sufficient to cover such amounts, the Contractor shall pay the difference to the Owner.
- § 2.4.2 After the Work is completed the Owner may make emergency repairs to the Work if necessary to prevent further damage, or if the Contractor does not promptly respond to a notice of a condition requiring repairs. Contractor shall be responsible to Owner for this cost if the reason for the repairs is defects in Contractor's Work. If payments then or thereafter due the Contractor are not sufficient to cover such costs, the Contractor shall pay the difference to the Owner.

# 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 obligations to perform the Work in accordance with the Contract Documents either by activities or duties of the Architect in the Architect's administration of the Contract, or by tests, inspections or approvals required or performed by persons or entities other than the Contractor.

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

- § 3.2.1 Execution of the Contract by the Contractor is a representation that the Contractor has visited the site, become generally familiar with local conditions under which the Work is to be performed and correlated personal observations with requirements of the Contract Documents.
- § 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 2.2.3, shall take field measurements of any existing conditions related to that portion of the Work, and shall observe any conditions at the site affecting it. These obligations are for the purpose of facilitating coordination and construction by the Contractor and are not for the purpose of discovering errors, omissions, or inconsistencies in the Contract Documents; however, the Contractor shall promptly report to the Architect any errors, inconsistencies or omissions discovered by, made known to, or which reasonably should have been discovered by 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 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 not be liable to the Owner or Architect for damages resulting from errors, inconsistencies or omissions in the Contract Documents unless the Contractor recognized, or reasonably should have recognized, such error, inconsistency or omission and failed to report it to the Architect.
- § 3.2.2.1 The Contractor shall meet with the Owner and Architect to discuss alternatives in the event the Owner or Architect recognizes a condition that will affect the ability to achieve LEED® points. If any condition is discovered by, or made known to, the Contractor that will adversely affect achievement of LEED® points for which the Contractor is responsible, the Contractor will promptly provide notice to the Architect and meet with the Owner and Architect to discuss the alternative to remedy the condition.
- § 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 fails to perform the obligations of Sections 3.2.2 or 3.2.3, the Contractor shall pay such costs and damages to the Owner as would have been avoided if the Contractor had performed such obligations. If the Contractor performs those obligations, the Contractor shall not be liable to the Owner or Architect for damages resulting from errors, inconsistencies or omissions in the Contract Documents, 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 unless the Contractor recognized or reasonably should have recognized such error, inconsistency, omission or difference and knowingly failed to report it to the Architect.
- § 3.2.5 The Contractor and each Subcontractor shall evaluate and satisfy themselves as to the conditions and limitations under which the Work is to be performed, including:
  - the location, condition, layout and nature of the Project site and surrounding areas; .1
  - .2 generally prevailing climatic conditions,
  - .3 anticipated labor supply and costs;
  - availability and cost of materials, tools and equipment; and .4
  - .5 other similar issues.

#### § 3.3 SUPERVISION AND CONSTRUCTION PROCEDURES

- § 3.3.1 The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for, and have control over, construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract, unless the Contract Documents give other specific instructions concerning these matters. If the Contract Documents give specific instructions concerning construction means, methods, techniques, sequences or procedures, the Contractor shall evaluate the jobsite safety thereof and, except as stated below, shall be fully and solely responsible for the jobsite safety of such means, methods, techniques, sequences or procedures may not be safe, the Contractor determines that such means, methods, techniques, sequences or procedures may not be safe, the Contractor shall give timely written notice to the Owner and Architect and shall not proceed with that portion of the Work without further written instructions from the Architect. If the Contractor is then instructed to proceed with the required means, methods, techniques, sequences or procedures without acceptance of changes proposed by the Contractor, the Owner shall be solely responsible for any loss or damage arising solely from those Owner-required means, methods, techniques, sequences or procedures.
- § 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. It is understood and agreed that the relationship of Contractor to Owner shall be that of an independent contractor. Nothing contained herein or inferable herefrom shall be deemed or construed to (1) make Contractor the agent, servant or employee of the Owner, or (2) to create any partnership, joint venture, or other association between Owner and Contractor. Any direction or instruction by Owner or any of its authorized representatives in respect to the Work shall relate to the results the Owner desires to obtain from the Work, and shall in no way affect Contractor's independent contractor status described herein.
- § 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 The Contractor shall execute the Work in a good and workmanlike manner, continuously and diligently in accordance with generally accepted standards of construction management and practice for construction of projects similar to the Project, using qualified, careful and efficient workers and in conformity with the provisions of this Contract and the other Contract Documents.

#### § 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.
- § 3.4.2 Except in the case of minor changes in the Work authorized by the Architect in accordance with Sections 3.12.8 or 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.
- § 3.4.3 The Contractor shall enforce strict discipline and good order among the Contractor's employees and other persons carrying out the Work. The Contractor shall not permit employment of unfit persons or persons not properly skilled in tasks assigned to them.

#### § 3.5 WARRANTY

§ 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 may be considered defective. The Contractor's warranty excludes remedy for damage or defect caused by abuse, alterations to the Work not executed by the Contractor, improper or insufficient maintenance, unless such maintenance is Contractor's responsibility, improper operation, or normal wear and tear. If required by the Architect, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment. The warranties set out in this Section are not exclusive of any other warranties or guarantees set out in other places in the Contract Documents or implied under applicable law.

- § 3.5.2 Prior to final payment, Contractor shall furnish any manufacturer warranties required by the Contract Documents.
- § 3.5.3 When deemed necessary by the Owner and prior to installation of any item specifically made subject to a performance standard or regulatory agency standard under any provision of the Contract Documents, Contractor shall furnish proof of conformance to the Architect. Proof of conformance shall be in the form of:
  - an affidavit from the manufacturer certifying that the item is in conformance with the applicable standard, or
  - an affidavit from a testing laboratory certifying that the product has been tested within the past year and is in conformance with the applicable standard, or
  - .3 such further reasonable proof as is required by the Architect.
- § 3.5.4 The warranties of Contractor provided in Section 3.5.1 shall in no way limit or abridge the warranties of the suppliers of equipment and systems which are to comprise a portion of the Work and all of such warranties shall be in form and substance as required by the Contract Documents. Contractor shall take no action or fail to act in any way which results in the termination or expiration of such third party warranties or which otherwise results in prejudice to the rights of Owner under such warranties. Contractor agrees to provide all notices required for the effectiveness of such warranties and shall include provisions in the contracts with the providers and manufacturers of such systems and equipment whereby Owner shall have a direct right, but not a duty, of enforcement of such warranty obligations.

#### § 3.6 TAXES

- § 3.6.1 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.
- § 3.6.2 Houston Independent School District stipulates that it is an exempt organization as defined by the Limited Sales, Excise and Use Tax Act and as such is exempt from the payment of the sales tax on materials and supplies used in the performance of this Contract. The Contractor shall issue exemption certificates to its suppliers and subcontractors in lieu of said sales tax for all such materials and supplies, and said exemption certificates must comply with current rulings of the Texas State Comptroller.

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

- § 3.7.1 Unless otherwise provided in the Contract Documents, the Owner shall secure and pay for the building permit as well as for other permits, fees, licenses, and inspections 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. All connection charges or inspection fees as may be imposed by any municipal agency or utility company are not included in the Contract Sum and shall be the Owner's responsibility.
- § 3.7.2 The Contractor shall comply with and give notices required by applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders and all other requirements of public authorities applicable to performance of the Work. The Contractor shall procure and obtain all bonds required of the Owner or the Contractor by the municipality in which the Project is located or by any other public or private body with jurisdiction over the Project. In connection with such bonds, the Contractor shall prepare all applications, supply all necessary back-up material and furnish its surety with any required personal undertakings. The Contractor shall also obtain and pay all charges for all approvals for street closings, traffic control, parking meter removal and other similar matters as may be necessary or appropriate from time to time for the performance of the Work.
- § 3.7.3 If the Contractor performs Work knowing it to be contrary to applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities, the Contractor shall assume appropriate responsibility for such Work and shall bear the costs attributable to correction.
- § 3.7.4 Concealed or Unknown Conditions. If the Contractor encounters conditions at the site that are (1) subsurface or otherwise concealed physical conditions that differ materially from those indicated in the Contract Documents or (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, the Contractor shall promptly provide notice to the Owner and the Architect before conditions are disturbed and in no

event later than 21 days after first observance of the conditions. The Architect will promptly investigate such conditions and, if the Architect determines that they differ materially and cause an increase or decrease in the Contractor's cost of, or time required for, performance of any part of the Work, will recommend an equitable adjustment in the Contract Sum or Contract Time, or both. If the Architect determines that the conditions at the site are not materially different from those indicated in the Contract Documents and that no change in the terms of the Contract is justified, the Architect shall promptly notify the Owner and Contractor in writing, stating the reasons. If either party disputes the Architect's determination or recommendation, that party may proceed as provided in Article 15.

- § 3.7.5 If, in the course of the Work, the Contractor encounters human remains or recognizes the existence of burial markers, archaeological sites or wetlands not indicated in the Contract Documents, the Contractor shall immediately suspend any operations that would affect them and shall notify the Owner and Architect. Upon receipt of such notice, the Owner shall promptly take any action necessary to obtain governmental authorization required to resume the operations. The Contractor shall continue to suspend such operations until otherwise instructed by the Owner but shall continue with all other operations that do not affect those remains or features. Requests for adjustments in the Contract Sum and Contract Time arising from the existence of such remains or features may be made as provided in Article 15.
- § 3.7.6 The Owner shall pay directly to the City of Houston those fees presently called "acreage fees" to the water and sewage departments. Contractor shall ascertain amounts and advise Architect. Water meter charges shall be paid by the Contractor.
- § 3.7.7 The Contractor shall be responsible for timely notification to and coordination with all utility companies regarding the provision or revising of services to the Project. The Contractor shall inform the Architect at once when the Owner's participation is required. Installation of temporary and permanent utilities required for the Work, whether the Work is new construction or rehabilitation of an existing facility are the responsibility of the Contractor. Payment for temporary and/or permanent utility service monthly billings shall be the responsibility of the Owner.

#### § 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.
- § 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, overhead, profit and other expenses contemplated for stated allowance amounts shall be included in the Contract Sum but not in the allowances; and
  - .3 whenever costs are more than or less than allowances, the Contract Sum shall be adjusted accordingly by Change Order. The amount of the Change Order shall reflect (1) the difference between actual costs and the allowances under Section 3.8.2.1 and (2) changes in Contractor's costs under Section 3.8.2.2.
- § 3.8.3 Materials and equipment under an allowance shall be selected in a reasonable period of time by the Owner to avoid delays in the Work (provided that if a decision is needed to avoid delay, Contractor shall notify Architect in writing sufficiently in advance of the needed date to allow reasonable time for selections to be made).

#### § 3.9 SUPERINTENDENT

§ 3.9.1 The Contractor shall employ a competent superintendent and necessary assistants who shall be in attendance at the Project site during performance of the Work. The superintendent shall represent the Contractor, and communications given to the superintendent shall be as binding as if given to the Contractor. Notwithstanding the foregoing, Contractor shall keep on the job the superintendent approved by Owner who shall not be transferred from the Work without Owner's consent (which shall not be unreasonably withheld). However, such obligation to furnish the superintendent shall not be construed (1) to preclude the promotion within Contractor's organization of any person assigned to Work or (2) to give rise to any liability of Contractor if any person assigned to the Work leaves Contractor's employ. If Owner reasonably determines that any employee of Contractor or of its subcontractors is careless or not qualified to perform the Work assigned to him, and Owner and Contractor cannot, after a diligent and good faith attempt, agree what action should be taken with respect to the removal or reassignment of such employees, the Contractor shall promptly remove such employee from the Work and replace such employee. All times while procurement activities are being performed in Contractor's Houston office, Contractor shall appoint an individual

(approved by Owner, acting reasonably) authorized to act on behalf of Contractor and with whom Owner may consult at all reasonable times, and who shall be authorized to receive the instructions, requests and decisions of Owner. All of Contractor's and Subcontractor's personnel shall comply with all applicable health, safety, and loss prevention rules of applicable authorities. Contractor shall, at its own expense, remove from the Work any person who fails to comply with such rules and instructions in any material respect.

- § 3.9.2 The Contractor, as soon as practicable after award of the Contract, shall furnish in writing to the Owner through the Architect the name and qualifications of a proposed superintendent. The Architect may reply within 14 days to the Contractor in writing stating (1) whether the Owner or the Architect has reasonable objection to the proposed superintendent or (2) that the Architect requires additional time to review. Failure of the Architect to reply within the 14 day period shall constitute notice of no reasonable objection.
- § 3.9.3 The Contractor shall not employ a proposed superintendent to whom the Owner or Architect has made reasonable and timely objection. The Contractor shall not change the superintendent without the Owner's consent, which shall not unreasonably be withheld or delayed.

#### § 3.10 CONTRACTOR'S CONSTRUCTION SCHEDULES

- § 3.10.1 If the bid documents contain a Project schedule setting out the beginning and ending of construction, or if there are any other limits on the time of performance set out in the Contract Documents, the Contractor shall, promptly after being awarded the Contract, develop a construction schedule reasonably defining a plan for completing the Work within the required time. The format and detail of the schedule shall be in keeping with the size and complexity of the Project. The schedule and any updates of it shall be subject to approval of the Owner. The schedule and any updates shall not exceed time limits current under the Contract Documents (including granted time extensions) and shall be revised at appropriate intervals as reasonably required by the Owner, shall be related to the entire Project (if more than one Contract is involved in the Project), and shall provide for expeditious and practicable execution of the Work. All updated schedules shall address the subject of how the Contractor intends to overcome any delays previously encountered.
- § 3.10.2 The Contractor shall prepare a submittal schedule, promptly after being awarded the Contract and thereafter as necessary to maintain a current submittal schedule, and shall submit the schedule(s) for the Architect's approval. The Architect's approval shall not unreasonably be delayed or withheld. The submittal schedule shall (1) be coordinated with the Contractor's construction schedule, and (2) allow the Architect reasonable time to review submittals. If the Contractor fails to submit a submittal schedule, the Contractor shall not be entitled to any increase in Contract Sum or extension of Contract Time based on the time required for review of submittals.
- § 3.10.3 The Contractor shall perform the Work in general accordance with the most recent schedules submitted to the Owner and Architect.
- § 3.10.4 The process of approving Contractor's schedules and updates to Contractor's schedule shall not constitute a warranty by the Owner that any non-Contractor milestones or activities will occur as set out on Contractor's schedule. Approval of Contractor's schedule does not constitute a commitment by the Owner to furnish any Owner-furnished information or material any earlier than Owner would otherwise be obligated to furnish that information or material under the Contract Documents. Failure of the Work to proceed in the sequence scheduled by Contractor shall not alone serve as the basis for a Claim for additional compensation or time. In the event there is interference with the Work which is beyond its control, Contractor shall attempt to reschedule the Work in a manner that will hold resulting additional time and costs to a minimum. The construction schedule shall be in a detailed format satisfactory to the Owner and the Architect and shall also:
  - provide a graphic representation of all activities and events that will occur during performance of Work;
  - .2 identify each phase of construction and occupancy; and
  - .3 set forth dates that are critical in ensuring the timely and orderly completion of the Work in accordance with the requirements of the Contract Documents (hereinafter referred to as "Milestone Dates").

If not accepted, the construction schedule shall be promptly revised by the Contractor in accordance with the recommendations of the Owner and the Architect and re-submitted for acceptance. The Contractor shall monitor the

progress of the Work for conformance with the requirements of the construction schedule and shall promptly advise the Owner of any delays or potential delays. The accepted construction schedule shall be updated to reflect actual conditions (sometimes referred to herein as progress reports) as set forth in Section 3.10.1 or if requested by either the Owner or the Architect. In the event any progress report indicates any delays, the Contractor shall propose an affirmative plan to correct the delay, including overtime and/or additional labor, if necessary. In no event shall any progress report constitute an adjustment in the Contract Time, any Milestone Date or the Contract Sum unless any such adjustment is agreed to by the Owner and authorized pursuant to Change Order.

- § 3.10.5 The Owner's need for delivery of completed Work, or portions thereof, is largely controlled by the necessities of the school calendar and operations of school programs within that calendar. These needs are reflected in any scheduled completion dates and milestone dates set out in the Contract Documents. The Contractor shall perform the Work in such a way as to not interfere with school operations, the importance of meeting milestones and completion dates, and Contractor acknowledges and agrees that if these dates are not met, there may be a relaxation in the needed delivery dates because of the school calendar. When it appears to Owner or Contractor that a Contract milestone or completion date cannot be met for reasons not the fault of the Contractor, Contractor will develop with Owner and Architect a plan and a budget under the Change Order provision of the Contract Documents to meet such a situation (at Owner's option) either by accelerating the Work to overcome the delays, or suspending or otherwise slowing the Work to efficiently take advantage of any relaxation in Owner's need for the completed Work.
- § 3.10.6 The Owner shall have the right to reschedule the time of day for the performance of any part of the Work that may interfere with the operation of the Owner's premises or any tenants or invitees thereof. The Contractor shall, upon the Owner's request, reschedule any portion of the Work affecting operation of the premises during hours when the premises are not in operation. Any rescheduling of performance of the Work under this Section 3.10.6 may be grounds for an extension of the Contract Time, if permitted under Section 8.3.1, and an equitable adjustment in the Contract Sum, if: (1) the performance of the Work was properly scheduled by the Contractor in compliance with the requirements of the Contract Documents, (2) such rescheduling is required for the convenience of the Owner and is not attributable to any act or omission of Contractor, and (3) if Owner agrees to the Contract Sum adjustment prior to any rescheduling.

# § 3.11 DOCUMENTS AND SAMPLES AT THE SITE

The Contractor shall maintain at the site for the Owner one copy of the Drawings, Specifications, Addenda, Change Orders and other Modifications, in good order and marked currently to indicate field changes and selections made during construction, and one copy of approved Shop Drawings, Product Data, Samples and similar required submittals. These shall be available to the Architect and shall be 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 drawings, diagrams, schedules and other data specially prepared for the Work by the Contractor or a Subcontractor, Sub-subcontractor, manufacturer, supplier or distributor to illustrate some portion of the Work.
- § 3.12.2 Product Data are illustrations, standard schedules, performance charts, instructions, brochures, diagrams and other information furnished by the Contractor to illustrate materials or equipment for some portion of the Work.
- § 3.12.3 Samples are physical examples that illustrate materials, equipment or workmanship and establish standards by which the Work will be judged.
- § 3.12.4 Shop Drawings, Product Data, Samples and similar submittals are not Contract Documents. Their purpose is to demonstrate the way by which the Contractor proposes to conform to the information given and the design concept expressed in the Contract Documents for those portions of the Work for which the Contract Documents require submittals. Review by the Architect 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 Architect or, in the absence of an approved submittal

schedule, with reasonable promptness and in such sequence as to cause no delay in the Work or in the activities of the Owner or of separate contractors.

- § 3.12.6 By submitting Shop Drawings, Product Data, Samples and similar submittals, the Contractor represents to the Owner and Architect that the Contractor has (1) reviewed and approved them, (2) determined and verified materials, field measurements and field construction criteria related thereto, or will do so and (3) checked and coordinated the information contained within such submittals with the requirements of the Work and of the Contract Documents.
- § 3.12.7 The Contractor shall perform no portion of the Work for which the 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 approved submittals except that the Contractor shall not be relieved of responsibility for deviations from requirements of the Contract Documents by the Architect's approval of Shop Drawings, Product Data, Samples or similar submittals unless the Contractor has specifically informed the Architect in writing of such deviation at the time of submittal and (1) the Architect has given written approval to the specific deviation as a minor change in the Work, or (2) a Change Order or Construction Change Directive has been issued authorizing the deviation. The Contractor shall not be relieved of responsibility for errors or omissions in Shop Drawings, Product Data, Samples or similar submittals by the Architect's 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 written 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. 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. The Contractor shall cause such services or certifications to be provided by a properly licensed design professional, whose signature and seal shall appear on all drawings, calculations, specifications, certifications, Shop Drawings and other submittals prepared by such professional. Shop Drawings and other submittals related to the Work designed or certified by such professional, if prepared by others, shall bear such professional's written approval when submitted to the Architect. The Owner and the Architect shall be entitled to rely upon the adequacy, accuracy and completeness of the services, certifications and approvals performed or provided by such design professionals, provided the Owner and Architect have specified to the Contractor all performance and design criteria that such services must satisfy. Pursuant to this Section 3.12.10, the Architect will review, approve or take other appropriate action on submittals only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. The Contractor shall not be responsible for the adequacy of the performance and design criteria specified in the Contract Documents.
- § 3.12.11 Adequate copies of Shop Drawings for architectural, structural, mechanical and electrical work shall be submitted to the Architect for review.
- § 3.12.12 The Contractor represents and warrants that all Shop Drawings shall be prepared by persons and entities possessing expertise and experience in the trade for which the Shop Drawing is prepared and, if required by the Architect or applicable law, by a licensed engineer.

#### § 3.13 USE OF SITE

§ 3.13.1 The Contractor shall confine operations at the site to areas permitted by applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities and the Contract Documents and shall not unreasonably encumber the site with materials or equipment. When the Work is to be performed at an existing school location, Contractor shall schedule and perform the Work in a manner that does not compromise the safety to school students, faculty and staff, and does not unreasonably disrupt or interfere with the continuing normal routine of the

school. If a School Operations Parameters Statement is a part of the Contract Documents, Contractor will comply with its terms, at no increase in price.

- § 3.13.2 Only materials and equipment which are to be used directly in the Work shall be brought to and stored on the Project site by the Contractor. After equipment is no longer required for the Work, it shall be promptly removed from the Project site. Protection of construction material and equipment stored at the Project site from weather, theft, damage and all other adversity is solely the responsibility of the Contractor.
- § 3.13.3 The Contractor and any entity for whom the Contractor is responsible shall not erect any sign on the Project site without the prior written consent of the Owner.
- § 3.13.4 Contractor shall ensure that the Work, at all times, is performed in a manner that affords reasonable access, both vehicular and pedestrian, to the site of the Work and all adjacent areas. The Work shall be performed, to the fullest extent reasonably possible, in such a manner that public areas adjacent to the Project site shall be free from all debris, building materials and equipment likely to cause hazardous conditions. Without limitation of any other provision in the Contract Documents, Contractor shall use its best efforts to minimize any interference with the occupancy or beneficial use of:
  - .1 any area and buildings adjacent to the site or the Work; or
  - .2 the Building in the event of partial occupancy.
- § 3.13.5 Without prior approval of the Owner, the Contractor shall not permit any workers to use any existing facilities at the Project site, including, without limitation, lavatories, toilets, entrance and parking areas other than those designated by the Owner. Without limitation of any other provision of the Contract Documents, the Contractor shall use its best efforts to comply with all rules and regulations promulgated by the Owner in connection with the use and occupancy of the Project site and the Building, as amended from time to time.

#### § 3.14 CUTTING AND PATCHING

- § 3.14.1 The Contractor shall be responsible for cutting, fitting or patching required to complete the Work or to make its parts fit together properly. All areas requiring cutting, fitting and patching shall be restored to the condition existing prior to the cutting, fitting and patching, unless otherwise required by the Contract Documents.
- § 3.14.2 The Contractor shall not damage or endanger a portion of the Work or fully or partially completed construction of the Owner or separate contractors by cutting, patching or otherwise altering such construction, or by excavation. The Contractor shall not cut or otherwise alter such construction by the Owner or a separate contractor except with written consent of the Owner and of such separate contractor; such consent shall not be unreasonably withheld. The Contractor shall not unreasonably withhold from the Owner or a separate contractor the Contractor's consent to cutting or otherwise altering the Work.

# § 3.15 CLEANING UP

- § 3.15.1 The Contractor shall keep the premises and surrounding area free from accumulation of waste materials or rubbish caused by operations under the Contract. At completion of the Work, the Contractor shall remove waste materials, rubbish, the Contractor's tools, construction equipment, machinery and surplus materials from and about the Project. The Contractor shall be responsible for protection of the Work, including damaged or broken glass, and at substantial completion of the Work, shall repair or replace damaged work. The Contractor shall also recycle, reuse, remove or dispose of materials as required by the Contract Documents. The Contractor shall perform the following final cleaning at the completion of the Work:
  - .1 Remove all temporary protections;
  - .2 Remove marks, stains, fingerprints and other soil or dirt from all surfaces and other work;
  - .3 Remove spots, mortar, plaster, soil and point from ceramic tile, marble and other finish materials from all surfaces and other Work;
  - .4 Clean fixtures, cabinetwork and equipment, removing stains, paint, dirt, and leave in an undamaged and new condition; and
  - .5 Clean all surfaces and other work in accordance with recommendations of the manufacturer.

- § 3.15.2 The Contractor, in accordance with the Contract Documents, shall prepare and submit to the Architect and Owner a construction waste management and disposal plan setting forth the procedures and processes for salvaging, recycling or disposing of construction waste generated from the Project. Contractor will require all of its Subcontractors to follow the Project's recycling and waste disposal plan.
- § 3.15.3 If the Contractor fails to clean up in accordance with Section 3.15.1 and as provided in the Contract Documents, the Owner may do so and Owner shall be entitled to reimbursement from the Contractor.

#### § 3.16 ACCESS TO WORK

The Contractor shall provide the Owner, Program Manager (if applicable) and Architect access to the Work in preparation and progress wherever located.

#### § 3.17 ROYALTIES, PATENTS AND COPYRIGHTS

The Contractor shall pay all royalties and license fees. The Contractor shall defend suits or claims for infringement of copyrights and patent rights and shall hold the Owner, Architect, Owner's Program Manager (if applicable to the project) and their respective officers, Directors, Trustees, Agents, board members, volunteers, invitees, and employees harmless from loss on account thereof, but shall not be responsible for such defense or loss when a particular design, process or product of a particular manufacturer or manufacturers is required by the Contract Documents, or where the copyright violations are contained in Drawings, Specifications or other documents prepared by the Owner or Architect. However, if the Contractor has reason to believe that the required design, process or product is an infringement of a copyright or a patent, the Contractor shall be responsible for such loss unless such information is promptly furnished to the Architect.

# § 3.18 INDEMNIFICATION

- § 3.18.1 .THE CONTRACTOR AGREES TO INDEMNIFY, SAVE, PROTECT, DEFEND, AND HOLD HARMLESS THE OWNER, ARCHITECT, OWNER'S PROGRAM MANAGER (IF APPLICABLE TO THE PROJECT) AND THEIR RESPECTIVE OFFICERS, DIRECTORS, TRUSTEES, AGENTS, BOARD MEMBERS, VOLUNTEERS, INVITEES, AND EMPLOYEES ("INDEMNIFIED PARTIES") FROM AND AGAINST ANY AND ALL LIABILITY, COST, DAMAGE, EXPENSES, FINES AND ALL REASONABLE LEGAL FEES AND COURT COSTS, CLAIMS, LOSSES, CAUSES OF ACTION, SUITS, AND LIABILITY OF ANY KIND, INCLUDING ALL EXPENSES OF LITIGATION AGAINST THE INDEMNIFIED PARTIES, WHETHER OR NOT CAUSED IN PART BY ANY ACT OR OMISSION OF A PERSON OR ENTITY INDEMNIFIED HEREUNDER, ARISING FROM OR OUT OF THE CONTRACTOR'S ACTS OR OMISSIONS, INCLUDING, BUT NOT LIMITED TO CONTRACTOR'S NEGLIGENT OR GROSSLY NEGLIGENT PERFORMANCE OF THE WORK; NEGLIGENT OR GROSSLY NEGLIGENT USE OR MISUSE OF OWNER'S PROPERTY; NEGLIGENT OR INTENTIONAL ACTIONS, ERRORS OR OMISSIONS AND THOSE OF ITS EMPLOYEES, OFFICERS, DIRECTORS, AGENTS OR SUBCONTRACTORS; CONTRACTOR'S OR ITS SUBCONTRACTOR'S USE OF PROPERTY, EQUIPMENT, VEHICLES, OR MATERIALS; DEFECTIVE WORKMANSHIP; NEGLIGENT OR GROSSLY NEGLIGENT USE OR MISUSE OF UTILITIES; OR SUBCONTRACTORS', EMPLOYEES', AGENTS', OFFICERS', OR DIRECTORS' NEGLIGENCE OR INTENTIONAL TORTS. IT IS THE EXPRESSED INTENT OF CONTRACTOR TO INDEMNIFY OWNER FROM THE CONSEQUENCES OF OWNER'S JOINT AND/OR CONCURRENT NEGLIGENCE BUT NOT OWNER'S SOLE NEGLIGENCE. THIS INDEMNIFICATION SHALL NOT BE LIMITED TO DAMAGES, COMPENSATION OR BENEFITS PAYABLE UNDER INSURANCE POLICIES, WORKERS' COMPENSATION ACTS, DISABILITY BENEFIT ACTS OR OTHER EMPLOYEE BENEFIT ACTS.
- § 3.18.1.1 NOTWITHSTANDING ANYTHING HEREIN TO THE CONTRARY, THE INDEMNITY PROVISIONS INCLUDED HEREIN SHALL BE LIMITED SUCH THAT CONTRACTOR SHALL NOT BE REQUIRED TO INDEMNIFY, HOLD HARMLESS OR DEFEND OWNER OR ANY THIRD PARTIES AGAINST A CLAIM CAUSED BY THE NEGLIGENCE OR FAULT, THE BREACH OR VIOLATION OF A STATUTE, ORDINANCE, GOVERNMENTAL REGULATION, STANDARD, OR RULE, OR THE BREACH OF CONTRACT OF THE INDEMNITEE, ITS AGENT OR EMPLOYEE, OR ANY THIRD PARTY UNDER THE CONTROL OR SUPERVISION OF THE INDEMNITEE, OTHER THAN CONTRACTOR OR ITS AGENT, EMPLOYEE, OR SUBCONTRACTOR OF ANY TIER EXCEPT THAT CONTRACTOR SHALL INDEMNIFY, HOLD HARMLESS AND DEFEND THE INDEMNITEES AGAINST ANY CLAIMS FOR THE BODILY

INJURY OR DEATH OF AN EMPLOYEE OF SUBCONTRACTOR, ITS AGENTS, OR ITS SUBCONTRACTORS OF ANY TIER.

- § 3.18.2 It is agreed with respect to any legal limitations now or hereafter in effect and affecting the validity or enforceability of the indemnification obligations hereunder, such legal limitations are made a part of the indemnification obligation and shall operate to amend the indemnification obligation to the minimum extent necessary to bring the provision into conformity with the requirements of such limitations, and as so modified, the indemnification obligations shall continue in full force and effect
- § 3.18.3 It is understood and agreed that Article 10 of the Agreement is subject to, and expressly limited by, the terms and conditions of Texas Civ. Prac. & Rem. Code Ann. Sec. 130.001 to 130.005, as amended.
- § 3.18.4 Contractor's obligations of indemnity shall survive completion of the Work, abandonment and/or termination of the Contract.

# ARTICLE 4 ARCHITECT

#### § 4.1 GENERAL

- § 4.1.1 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.
- § 4.1.2 Owner shall notify Contractor when the duties, responsibilities or limitation of authority of the Architect have been modified.
- § 4.1.3 In case of termination of employment of the Architect, the Owner may elect to appoint a replacement Architect, or at its option may elect to complete the Project using members of Owner's staff to perform the balance of the Architect's functions on the Work.
- § 4.1.4 Except as herein expressly provided, the Contractor shall not be relieved of his obligation to perform the Work in strict accordance with the Contract Documents by the activities or duties of the Architect.

### § 4.2 ADMINISTRATION OF THE CONTRACT

- § 4.2.1 Certain portions of the administration of the Contract will be performed by the Architect. The Architect will be treated as the Owner's representative to the extent set out in the Contract Documents. The Architect shall not have the authority to act on behalf of Owner unless such authority is expressly granted in the Contract Documents, nor shall such authority be implied from any act or representation of the Architect.
- § 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. In no event shall Owner or any other party, aside from the Contractor, have control over, be in charge of, or be responsible for construction means, methods, techniques, sequences, procedures, or for safety precautions and programs in connection with the Work, since these are solely Contractor's responsibility. Owner will not be responsible for the Contractor's failure to carry out the Work in accordance with the Contract Documents. Owner will not have control over, be in charge of, and will not be responsible for the acts or omissions of Contractor, Subcontractors, or their agents or employees, or of any other persons performing portions of the Work.
- § 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 report to the Owner (1) known deviations from the Contract Documents and from the most recent construction schedule submitted by the Contractor, and (2) defects and deficiencies observed in the Work. 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 FACILITATING CONTRACT ADMINISTRATION

Communications by and with the Architect's consultants shall be through the Architect. Communications by and with Subcontractors and material suppliers shall be through the Contractor. Communications by and with separate contractors shall be through the Owner.

- § 4.2.5 Based on the Architect's evaluations of the Contractor's Applications for Payment, the Architect will review and certify the amounts due the Contractor and will issue Certificates for Payment in such amounts.
- § 4.2.6 The Architect 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 13.5.2 and 13.5.3, whether or not such 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, material and equipment suppliers, their agents or employees, or other persons or entities performing portions of the Work.
- § 4.2.7 The Architect will review and approve, or take other appropriate action upon, the Contractor's submittals such as Shop Drawings, Product Data and Samples, but only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. The Architect's action will be taken in accordance with the submittal schedule approved by the Architect or, in the absence of an approved submittal schedule, with reasonable promptness while allowing sufficient time in the Architect's professional judgment to permit adequate review. 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, unless otherwise specifically stated by the Architect, of any construction means, methods, techniques, sequences or procedures. The Architect's approval of a specific item shall not indicate approval of an assembly of which the item is a component. The Architect shall promptly report to Contractor and Owner any errors, inconsistencies and omissions discovered by the Architect in the Shop Drawings, Product Data, and Samples.
- § 4.2.8 The Architect will prepare Change Orders and Construction Change Directives, and may authorize 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 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 duties, responsibilities and limitations of authority of such project representatives shall be as set forth in an exhibit to be incorporated in the Contract Documents.
- § 4.2.11 The Architect will interpret and decide 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 decisions 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.
- § 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 and with concurrence of Owner.

§ 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 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 or the bidding requirements, the Contractor, as soon as practicable after award of the Contract, shall furnish in writing to the Owner through the Architect the names of persons or entities (including those who are to furnish materials or equipment fabricated to a special design) proposed for each principal portion of the Work. The Architect may reply within 14 days to the Contractor in writing stating (1) whether the Owner or the Architect has reasonable objection to any such proposed person or entity or (2) that the Architect requires additional time for review. Failure of the Owner or Architect to reply 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 previously selected if the Owner or Architect makes reasonable objection to such substitution.
- § 5.2.5 The Contractor shall not sublet the Work as a whole. The approval of Subcontractors in no way relieves the Contractor from full responsibility for performance and completion of the Work and its obligations under the Contract Documents.
- § 5.2.6 Throughout the period of work, the Contractor shall attempt to maintain the M/WBE goals as described in the

#### § 5.3 SUBCONTRACTUAL RELATIONS

By appropriate agreement, written where legally required for validity, the Contractor shall require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound to the Contractor by terms of the Contract Documents, and to assume toward the Contractor all the obligations and responsibilities, including the responsibility for safety of the Subcontractor's Work, which the Contractor, by these Documents, assumes toward the Owner and Architect. Each subcontract agreement shall preserve and protect the rights of the Owner and Architect under the Contract Documents with respect to the Work to be performed by the Subcontractor so that subcontracting thereof will not prejudice such rights. Where appropriate, the Contractor shall require each Subcontractor to enter into similar agreements with Sub-subcontractors. The Contractor shall make available to each proposed Subcontractor, prior to the execution of the subcontract agreement, copies of the Contract Documents to which the Subcontractor will be bound, and, upon written request of the Subcontractor, identify to the Subcontractor terms and conditions of the proposed

subcontract agreement that may be at variance with the Contract Documents. Subcontractors will similarly make copies of applicable portions of such documents available to their respective proposed Sub-subcontractors.

# § 5.4 CONTINGENT ASSIGNMENT OF SUBCONTRACTS

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

When the Owner accepts the assignment of a subcontract agreement, the Owner assumes the Contractor's rights and obligations under the subcontract.

- § 5.4.2 Owner shall only be responsible for compensating Subcontractors for Work done or materials furnished after the date Owner gives written notice of its acceptance of the subcontract agreement.
- § 5.4.3 Upon such assignment to the Owner under this Section 5.4, the Owner may further assign the subcontract to a successor contractor or other entity. If the Owner assigns the subcontract to a successor contractor or other entity, the Owner shall nevertheless remain legally responsible for all of the successor contractor's obligations under the subcontract.
- § 5.4.4 Each subcontract shall specifically provide that the Owner shall only be responsible to the Subcontractor for those services and materials furnished and approved by the Owner subsequent to the Owner's exercise of any rights under this conditional assignment.

#### § 5.5 RESPONSIBILITY

§ 5.5.1 Contractor shall be fully responsible for the performance of its Subcontractors, including those selected or approved by the Owner.

# ARTICLE 6 CONSTRUCTION BY OWNER OR BY SEPARATE CONTRACTORS § 6.1 OWNER'S RIGHT TO PERFORM CONSTRUCTION AND TO AWARD SEPARATE CONTRACTS

- § 6.1.1 The Owner reserves the right to perform other construction work, maintenance and repair work and school program operations at the site and near the site during the time period of the Work. Owner may perform other work with separate contractors or forces. Owner shall have access to the buildings on the site at all times.
- § 6.1.2 When separate contracts are awarded for different portions of the Project or other construction or operations on the site, the term "Contractor" in the Contract Documents in each case shall mean the Contractor who executes each separate Owner-Contractor Agreement.
- **§ 6.1.3** The Owner shall provide for coordination of the activities of the Owner's own forces and of each separate contractor with the Work of the Contractor, who shall cooperate with them. The Contractor shall participate with other separate contractors and the Owner in reviewing their construction schedules.

(Paragraph deleted)

# § 6.2 MUTUAL RESPONSIBILITY

- § 6.2.1 The Contractor shall afford the Owner and separate contractors reasonable opportunity for introduction and storage of their materials and equipment and performance of their activities, and shall connect and coordinate the Contractor's construction and operations with theirs as required by the Contract Documents.
- § 6.2.2 If part of the Contractor's Work depends for proper execution or results upon construction or operations by the Owner or a separate contractor, the Contractor shall, prior to proceeding with that portion of the Work, promptly report to the Architect apparent discrepancies or defects in such other construction that would render it unsuitable for such proper execution and results. Failure of the Contractor so to report shall constitute an acknowledgment that the Owner's or separate contractor's completed or partially completed construction is fit and proper to receive the Contractor's Work, except as to defects not then reasonably discoverable.

- § 6.2.3 The 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 the Contractor wrongfully causes to completed or partially completed construction or to property of the Owner, separate contractors as provided in Section 10.2.5.
- **§ 6.2.5** The Owner and each separate contractor shall have the same responsibilities for cutting and patching as are described for the Contractor in Section 3.14.

# § 6.3 OWNER'S RIGHT TO CLEAN UP

If a dispute arises among the Contractor, separate contractors and the Owner as to the responsibility under their respective contracts for maintaining the premises and surrounding area free from waste materials and rubbish, the Owner may clean up and reasonably 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. The Contract Sum and/or Contract Time may be increased for changes in the Work if the provisions of Article 7 have been met.
- § 7.1.1.1 No change in the Contract Sum and/or Contract Time will be allowed for a change in the Work unless prior to performing the changed Work the Contractor has been issued a Construction Change Directive or has provided the Owner in writing with a proposal for any change in price and/or change in Contract Time caused by the change in Work, and a Change Order is subsequently executed. A field directive or field order shall not be recognized as having any impact upon the Contract Sum or the Contract Time, and Contractor shall have no Claim therefore, unless it shall, prior to complying with the directive and in any event within ten (10) days of receiving the directive, submit a change proposal to the Owner, and a Construction Change Directive is issued, or a Change Order is subsequently executed, or Contractor satisfies the requirements of Article 15.
- § 7.1.2 A Change Order shall be based upon agreement among the Owner, Contractor and Architect; 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 Architect alone.
- § 7.1.3 Changes in the Work shall be performed under applicable provisions of the Contract Documents, and the Contractor shall proceed promptly, unless otherwise provided in the Change Order, Construction Change Directive or order for a minor change in the Work. Except as permitted in Paragraph 7.3, a change in the Contract Sum or the Contract Time shall be accomplished only by Change Order.
- § 7.1.4 The Contractor, upon receipt of written notification by the Architect of a proposed item of change in the Work, shall prepare as soon as possible a Change Proposal in such form or forms as directed by the Architect.
- § 7.1.4.1 Each separate Change Proposal shall be numbered consecutively and shall include materials, costs, labor costs, fees, overhead and profit. The Proposal shall specify all costs related to the proposed change in the Work, including any disruption or impact on performance.
- § 7.1.4.2 The Subcontractor's itemized accounting shall be included with the Change Proposal.
- § 7.1.4.3 If a Change Proposal is returned to the Contractor for additional information or if the scope of the proposed change in the Work is modified by additions, deletions or other revisions, the Contractor shall revise the Change Proposal accordingly and resubmit the revised Change Proposal to the Architect.
- § 7.1.4.4 A revised Change Proposal shall bear the original Change Proposal number suffixed by the letter "R" to designate a revision in the original Change Proposal. If additional revisions to a revised Change Proposal are necessary, each subsequent revision shall be identified by an appropriate numeral suffix immediately following the "R" suffix.

- § 7.1.4.5 Upon written approval of a Change Proposal by the Owner, the Architect will prepare a Change Order authorizing such change in the Work.
- § 7.1.4.6 The Contractor shall request extensions of Contract Time due to changes in the Work only at the time of submitting its Change Proposal. Contractor's failure to do so shall represent a waiver of any right to request a time extension.

#### § 7.2 CHANGE ORDERS

- § 7.2.1 A Change Order is a written instrument prepared by the Architect and signed by the Owner, Contractor and Architect stating their agreement upon all of the following:
  - .1 The change in the Work;
  - .2 The amount of the adjustment, if any, in the Contract Sum; and
  - .3 The extent of the adjustment, if any, in the Contract Time.
- § 7.2.2 Methods used in determining adjustment to the Contract Sum may include those listed below:
  - mutual acceptance of a lump sum properly itemized and supported by sufficient substantiating data to permit evaluation. Contractor's overhead and profit shall not exceed the Fee Percentage or 10%, whichever is less, of the Cost of the Work under any such proposal. Sufficient substantiating data shall include a proposal itemized for the various components of work added or deleted, segregated by labor, material and equipment. Details to be submitted will include detailed line item estimates showing detailed material quality take-offs, material prices by item and of related labor hour pricing information and extension (by line item by drawings as applicable);
  - .2 unit prices stated in the Contract Documents or subsequently agreed upon and supported by sufficient substantiating data to permit evaluation;
  - .3 Cost to be determined in a manner agreed upon by the parties and a mutually acceptable fixed or percentage fee not to exceed the Fee Percentage or 10%, whichever is less, of the Cost of the Work; or
  - .4 as provided in Section 7.3.7.
- § 7.2.3 Agreement on any Change Order shall constitute a final settlement of all Claims by the Contractor directly or indirectly arising out of or relating to the change in the Work which is the subject of the Change Order, including, but not limited to, all direct and indirect costs and impact costs associated with such change and any and all adjustments to the Contract Sum and the Contract Time.

# § 7.3 CONSTRUCTION CHANGE DIRECTIVES

- § 7.3.1 A Construction Change Directive is a written order prepared by the Architect and signed by the Owner and Architect, directing a change in the Work prior to agreement on adjustment, if any, in the Contract Sum or Contract Time, or both. The Owner may by Construction Change Directive, without invalidating the Contract, order changes in the Work within the general scope of the Contract consisting of additions, deletions or other revisions, the Contract Sum and Contract Time being adjusted accordingly.
- § 7.3.2 A Construction Change Directive shall be used in the absence of total agreement on the terms of a Change Order.

#### § 7.3.3

(Paragraphs deleted)

The Construction Change Directive shall include a unilateral change in the Contract Sum and/or Contract Time reflecting the Owner's reasonable view of the appropriate change in the Contract Sum and/or Contract Time for the change in the Work covered by the Construction Change Directive. Until agreement is reached by the Owner and Contractor on these issues, the changes in Contract Sum and Contract Time set out in the Construction Change Directive shall be used for schedule of values, payment and scheduling purposes.

§ 7.3.4 If unit prices are stated in the Contract Documents or subsequently agreed upon, and if quantities originally contemplated are materially changed in a proposed Change Order or Construction Change Directive so that

application of such unit prices to quantities of Work proposed will cause substantial inequity to the Owner or Contractor, the applicable unit prices shall be equitably adjusted.

- § 7.3.5 Upon receipt of a Construction Change Directive, the Contractor shall promptly proceed with the change in the Work involved and advise the Architect of the Contractor's agreement or disagreement with the method, if any, provided in the Construction Change Directive for determining the proposed adjustment in the Contract Sum or Contract Time.
- § 7.3.6 A Construction Change Directive signed by the Contractor indicates the Contractor's agreement therewith, including adjustment in Contract Sum and Contract Time or the method for determining them. Such agreement shall be effective immediately and shall be recorded as a Change Order.
- § 7.3.7 In the absence of agreement between Owner and Contractor on the proper change to the Contract Sum or Contract Time because of a change in the Work, Contractor may treat the matter as a Claim under Article 15. In such event, the Contractor shall be entitled to recover only the amount by which its direct costs have been reasonably increased over the direct cost of performing the Work without the change in the Work, plus the Fee Percentage or 10%, whichever is less, of the cost of the Work to cover home office overhead and fee. In the event that performance of the change order work necessarily extends the date for substantial completion, Contractor shall be entitled to recover its extended General Conditions costs attributable to the time extension. Direct costs shall be limited to the following:
  - .1 Reasonable Cost of Labor, including Social Security, old age and unemployment insurance, fringe benefits required by agreement or custom, and worker's compensation insurance;
  - .2 Materials, supplies and equipment including cost of transportation, whether incorporated or consumed;
  - .3 Rental cost of machinery and equipment, exclusive of hand tools, whether rented from the Contractor or others at rates that are no greater than market rates in the locale of the Work at the time of the Work. Unless otherwise established in the Contract, the rental value of the Contractor's own equipment shall not be more than normal local rental rates for contractor-owned equipment;
  - .4 Premiums for all bonds and insurance permit fees and sales, use or similar taxes related to the Work; and
  - .5 Cost of Subcontractor for performing the change Work. The amount allowable for Subcontractors shall be calculated using the same standards set out herein for direct Work by the Contractor.

Contractor and each subcontractor involved shall furnish evidence of costs such as copies of original invoices for materials, payroll vouchers for labor, etc., upon request by the Architect or Owner. Any increase in Contract Time shall be limited to the amount of time by which activities critical to overall completion of the Project are delayed by the change in the Work. If it is reasonably possible to perform the change in the Work concurrently with Work that is critical to overall completion, no time extension shall be granted by reason of a change in the Work.

§ 7.3.8 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 as confirmed by the Architect. 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.

(Paragraphs deleted)

**User Notes:** 

# § 7.4 MINOR CHANGES IN THE WORK

The Architect has authority to order minor changes in the Work not involving adjustment in the Contract Sum or extension of the Contract Time and not inconsistent with the intent of the Contract Documents. Such changes will be effected by written order signed by the Architect and shall be binding on the Owner and Contractor.

#### 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 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 of Substantial Completion is the date certified by the Architect in accordance with 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 executing the Agreement the Contractor confirms that the Contract Time is a reasonable period for performing the Work.
- § 8.2.1.1 If Contractor fails to achieve Substantial Completion of the Work on or before the date(s) specified for Substantial Completion in the Contract, Contractor shall pay to the Owner, as liquidated damages, the sum set out in the Contract between Owner and Contractor for each calendar day that Substantial Completion is delayed after the date(s) specified for Substantial Completion. The total liquidated damage claim is determined by multiplying daily liquidated damage amount stated in the Contract by the number of days late. It is hereby agreed that the actual damages which Owner will suffer by reason of late completion would be difficult to ascertain, and the liquidated damages to which Owner is entitled hereunder are a reasonable forecast of just compensation for the harm that would be caused by Contractor's failure to achieve Substantial Completion of the Work on or before the date(s) specified for Substantial Completion, and not a penalty. Liquidated damages shall be paid as they accrue and may be deducted from any progress payment due.
- § 8.2.2 The Contractor shall not knowingly, except by agreement or instruction of the Owner in writing, prematurely commence operations on the site or elsewhere prior to the effective date of insurance required by Article 11 to be furnished by the Contractor and Owner. The date of commencement of the Work shall not be changed by the effective date of such insurance. Unless the date of commencement is established by the Contract Documents or a notice to proceed given by the Owner, the Contractor shall notify the Owner in writing not less than five days or other agreed period.
- § 8.2.3 The Contractor shall proceed expeditiously with adequate forces and shall achieve Substantial Completion within the Contract Time.

# § 8.3 DELAYS AND EXTENSIONS OF TIME

- § 8.3.1 If the Contractor is delayed in performing work that is critical to overall completion of the Work by an act or neglect of the Owner or Architect, or of a separate Contractor employed by the Owner, or by changes ordered in the Work, or by labor disputes, unavoidable casualties, including fire, or by unusually adverse weather conditions, as defined below, then the Contract Time shall be extended for a reasonable time to reflect the impact of the delay on Work critical to achieve Substantial Completion within the Contract Time, provided the performance of the Work was not delayed by any other cause for which the Contractor is not entitled to an extension in the Contract Time under the Contract Documents. Adjustments in the Contract Time will be permitted for a delay only to the extent such delay is not caused or could not have reasonably been anticipated by the Contractor, and could not be limited or avoided by the Contractor's timely notice to the Owner of the delay, and only if Contractor satisfies the conditions of this Section 8.3. Contractor has the burden to prove that any of the foregoing alleged causes of delay impacted construction progress on the critical path, as a condition precedent to any extension of the Contract Time.
- § 8.3.1.1 The Contractor shall anticipate and include in the construction schedule four (4) days of lost time each month due to adverse weather. Days not used in one month do not accumulate month to month. Contractor shall make all requests for additional time for lost time beyond the monthly allowance as provided herein.

A request for a time extension based on adverse weather conditions will not be granted unless the actual days of adverse weather conditions for the period when the critical path of the Project is subject to impact from adverse weather conditions exceeds the monthly allowance of adverse weather days for the same period. Contractor will

submit claimed adverse weather days in accordance with the submission times provided in Section 8.3.2. No day on which substantial Contractor forces are able to perform work on the Project for more than fifty percent (50%) of the usual work day will be counted as an adverse weather day. Adverse weather days will not be calculated for any period when the critical path of the Project is not subject to impact from adverse weather conditions.

§ 8.3.2 On or before the fifteenth (15<sup>th</sup>) day of each month of the Work, Contractor shall submit in writing a request for all time extensions to which it believes itself to be entitled for the preceding month, other than time extensions for changes in the Work, which are to be submitted in accordance with the requirements of Article 7. If Contractor's request for time extension for changes in the Work is denied and Contractor wishes to pursue the matter, Contractor shall submit in writing a request for that extension by the fifteenth (15<sup>th</sup>) day of the month following the denial. Any claim for time extension not submitted under the terms of this Section shall be waived.

#### (Paragraph deleted)

§ 8.3.2.1 Owner, after consultation with the Architect, may grant time extensions to the extent it believes them to be proper. Time extensions granted by the Owner may be incorporated into schedules for completion of the Work. In the event that Contractor believes that it is entitled to additional time extensions beyond those granted by the Owner, it may make a claim for them provided it can meet the requirements of Article 15.

#### § 8.4 NO DAMAGE FOR DELAYS

§ 8.4.1 Notwithstanding anything herein to the contrary, the Contractor shall receive no financial compensation for delay or hindrance of the Work. In no event shall Owner be liable to the Contractor or any Subcontractor or Supplier, or any other person or any surety for or any employee or agent of any of them, for any damages arising out of or associated with any delay, suspensions, postponements, re-scheduling, re-sequencing or hindrance to the Work, regardless of the source, include events of Force Majeure, AND EVEN IF SUCH DELAY, SUSPENSION, POSTPONEMENT, RE-SCHEDULING, RE-SEQUENCING, OR HINDERANCE RESULTS FROM, ARISING OUT OF OR IS DUE, IN WHOLE OR IN PART, TO THE NEGLIGENCE, BREACH OF CONTRACT OR OTHER FAULT OF THE OWNER. The Contractor's sole remedy in any such case shall be an extension of time.

§ 8.4.2 Owner, at its sole election, may decide to permit extensions of time or claims for delay. In the event Contractor would like to request additional Contract Time, the method and manner by which it should do so as well as the limits and conditions are as set out in the Contract Documents. In the event a court of competent jurisdiction may find exception to or invalidate, in whole or in part Paragraph 8.4, including but not limited to any determination that all or a portion of the Paragraph is unenforceable, then the remainder of the provisions of the contract relating to extensions of time and claims for delay shall remain in full force and effect. In the event this clause appears to conflict with any other contract provision, including any clauses which seemingly require the Owner to grant extensions of time or claims for delay, this Paragraph 8.4 shall supersede those provisions except as set forth herein.

# ARTICLE 9 PAYMENTS AND COMPLETION § 9.1 CONTRACT SUM

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

# § 9.2 SCHEDULE OF VALUES

Before the first Application for Payment, the Contractor shall submit to the Architect a schedule of values fairly allocating the various portions of the Work, prepared in such form and supported by such data to substantiate its accuracy as reasonably required by the Architect. Once approved by the Architect and Owner, and updated for changes in the Work, the schedule of values shall be used only as a basis for reviewing the Contractor's Applications for Payment and is not to be taken as evidence of market or other value. The schedule shall not overvalue early job activities. The schedule shall follow the trade divisions of the Specifications so far as practicable.

# § 9.3 APPLICATIONS FOR PAYMENT

§ 9.3.1 At the time specified in the Contract, the Contractor shall submit to the Architect an itemized Application for Payment prepared in accordance with the schedule of values, if required under Section 9.2., for completed portions of the Work. Such application shall be notarized, if required, and supported by such data substantiating the Contractor's right to payment as the Owner or Architect may require, such as copies of requisitions from Subcontractors and

material suppliers, and shall reflect retainage if provided for in the Contract Documents. The Contractor shall submit Applications for Payment in triplicate, using AIA document G-702 and 703 as referred to in Section 1.6.

- § 9.3.1.1 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 material supplier, unless such Work has been performed by others whom the Contractor intends to pay.
- § 9.3.2 Unless otherwise provided in the Contract Documents, payments shall be made on account of materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work. If approved in advance by the Owner, payment may similarly be made for materials and equipment suitably stored off the site at a location agreed upon in writing. Payment for materials and equipment stored on or off the site shall be conditioned upon compliance by the Contractor with procedures satisfactory to the Owner to establish the Owner's title to such materials and equipment or otherwise protect the Owner's interest, and shall include the costs of applicable insurance, storage and transportation to the site for such materials and equipment stored off the site.
- § 9.3.3 Upon payment by the Owner of the invoiced cost, title to all such materials and equipment shall irrevocably pass to the Owner. The Contractor warrants that title to all materials and equipment covered by an Application for Payment will pass to Owner upon the receipt of payment by the Contractor. Such title shall be free and clear of all liens, claims, security interests or encumbrances. No work, material or equipment covered by an Application for Payment shall be subject to an agreement under which an interest is retained or an encumbrance is attached by the seller, the Contractor, or other party.

#### § 9.4 CERTIFICATES FOR PAYMENT

- § 9.4.1 The Application for Payment will be reviewed first by the Architect who will certify to the Owner that portion, if any, of the Application for Payment it has determined is properly due. In the event that the Architect believes that payment should be withheld in whole or in part, it will notify the Owner and Contractor of the basis of this view 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 comprising the Application for Payment, that, to the best of the Architect's knowledge, information and belief, the Work has progressed to the point indicated and that the quality of the Work is in accordance with the Contract Documents. 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. The issuance of a Certificate for Payment will further constitute a representation that the Contractor is entitled to payment in the amount certified. 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 material suppliers and other data requested by the Owner to substantiate the Contractor's right to payment, or (4) made examination to ascertain how or for what purpose the Contractor has used money previously paid on account of the Contract Sum.
- § 9.4.3 The issuance of a Certificate for Payment shall constitute a recommendation to the Owner in respect to the amount to be paid. This recommendation is not binding on the Owner if Owner knows of other reasons under the Contract why payment should be withheld.

#### § 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 in the Architect's opinion 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 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 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 security acceptable to the Owner is provided by the Contractor;
- .3 failure of the Contractor to make payments properly to Subcontractors or for labor, materials or equipment;
- .4 reasonable evidence that the Work cannot be completed for the unpaid balance of the Contract Sum;
- .5 damage to the Owner or a separate contractor;
- reasonable evidence that the Work will not be completed within the Contract Time, and that the unpaid balance would not be adequate to cover actual or liquidated damages for the anticipated delay; or
- .7 repeated and substantial failure to carry out the Work in accordance with the Contract Documents.
- § 9.5.2 When the above reasons for withholding certification are removed, certification will be made for amounts previously withheld.
- § 9.5.3 If the Architect withholds certification for payment under Section 9.5.1.3, the Owner may, at its sole option, issue joint checks to the Contractor and to any Subcontractor or material or equipment suppliers to whom the Contractor failed to make payment for Work properly performed or material or equipment suitably delivered. If the Owner makes payments by joint check, the Owner shall notify the Architect and the Architect will reflect such payment on the next Certificate for Payment.

## § 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, and shall so notify the Architect.
- § 9.6.2 The Contractor shall pay each Subcontractor no later than seven days after receipt of payment from the Owner the amount to which the Subcontractor is entitled, reflecting percentages actually retained from payments to the Contractor on account of the Subcontractor's portion of the Work. The Contractor shall, by appropriate agreement with each Subcontractor, require each Subcontractor to make payments to Sub-subcontractors in a similar manner. Owner is not obligated to monitor payments to Subcontractors or Sub-subcontractors, and nothing in this Section shall create any right on the part of a Subcontractor or Sub-subcontractor against Owner or Architect.
- § 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 material and equipment 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 to ascertain whether they have been properly paid. Neither the Owner nor Architect shall have any obligation to pay or to see to the payment of money to a Subcontractor or a Sub-Subcontractor.
- § 9.6.5 Contractor payments to material and equipment suppliers shall be treated in a manner similar to that provided in Sections 9.6.2, 9.6.3 and 9.6.4.
- § 9.6.6 A Certificate for Payment, a progress payment, or partial or entire use or occupancy of the Project by the Owner shall not constitute acceptance of Work not in accordance with the Contract Documents.
- § 9.6.7 The Contractor shall not withhold as retainage a greater percentage on Subcontractors or materialmen than the percentage Owner withheld as retainage from payments to the Contractor.

# § 9.7 FAILURE OF PAYMENT

§ 9.7.1 If the Owner does not pay Contractor any payment which is due and owing under this Contract and which has been certified by the Architect within fifteen (15) days of the date when it is due, then the Contractor may, upon ten (10) additional days' written notice, stop the Work until payment of amount owing has been received. The Contract

**User Notes:** 

Time shall be extended appropriately, and the Contract Sum shall be increased by the amount of the Contractor's reasonable cost of shutdown, delay and start-up.

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

#### § 9.8 SUBSTANTIAL COMPLETION

- § 9.8.1 The Work or designated portions thereof as set out herein will not be considered Substantially Complete until (and the term "Substantial Completion" shall mean) the performance of the Work, or designated portion thereof, is to the point where (1) all Project systems included in the Work or designated portion thereof are operational, have been tested as required by the Contract Documents, and testing documentation has been submitted; (2) as to such Work or designated portion thereof, all required building and equipment governmental inspections and certifications required of Contractor have been made, posted, and also submitted; (3) as to such work or designated portion thereof, designated initial instruction described in the Contract Documents of Owner's personnel in the normal and emergency operation of systems has been completed and required documentation has been provided; (4) as to such Work or designated portion thereof, all the required finishes set out in the Contract Documents are in place; (5) all operation instructions and maintenance manuals required by the Contract Documents have been submitted; (6) project photographs required by the Contract Documents have been submitted; (7) project and special warranties and guarantees required by the Contract Documents have been submitted; (8) spare parts and maintenance materials required by the Contract Documents have been submitted; (9) all keys and key schedules required by the Contract Documents have been provided; (10) color and material schedules required by the Contract Documents have been submitted; and (11) the Contractor's list of remaining work to be completed or corrected work has been submitted. The only remaining work shall be minor in nature, so that the Owner or Owner's tenants could occupy the applicable portion of the Project on that date, and the completion of the Work by the Contractor would not materially interfere with or hamper the Owner or Owner's tenants' normal school operations or other intended use. As a further condition of Substantial Completion of the whole or designated portion thereof, the Contractor shall certify that all remaining Work with respect thereto will be completed within thirty (30) calendar days, unless another time period has been approved by Owner. The Contractor shall then promptly proceed to complete or correct the Work and otherwise render the Project suitable for Final Completion, including the submission of all LEED® compliance documentation, Project record drawings, record specifications, record project data, original executed documents required for final payment, and other documents specified herein, in the Project Manual, or as required by Owner's auditors, within thirty (30) calendar days after the date of Substantial Completion, unless another time period has been approved by Owner.
- § 9.8.2 When the Contractor considers that the Work, or a portion thereof which Owner agrees to accept separately, is Substantially Complete, the Architect shall prepare a comprehensive list of items to be completed or corrected prior to final payment. Failure to include an item on such list does not alter the responsibility of the Contractor to complete all Work in accordance with the Contract Documents.
- § 9.8.3 When Contractor notifies Architect that it believes it has reached Substantial Completion, 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 list, which is not sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work or designated portion thereof for its intended use, the Contractor shall, before issuance of the Certificate of Substantial Completion, complete or correct such item upon notification by the Architect. In such case, the Contractor shall then submit a request for another inspection by the Architect to determine Substantial Completion.

- § 9.8.4 When the Work or designated portion thereof is substantially complete, the Architect will prepare a Certificate of Substantial Completion that shall establish the date of Substantial Completion, shall establish responsibilities of the Owner and Contractor for security, maintenance, heat, utilities, damage to the Work and insurance, and shall fix the time within which the Contractor shall finish all items on the list accompanying the Certificate. Warranties required by the Contract Documents shall commence on the date of Substantial Completion of the Work or designated portion thereof unless otherwise provided in the Certificate of Substantial Completion. Warranties on any items which are not completed after the Substantial Completion date shall commence on the date of completion of such item.
- § 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 such Certificate. Upon such acceptance and consent of surety, if any, the Owner shall make payment of retainage applying to such Work or designated portion thereof. Such payment shall be adjusted for Work that is incomplete or not in accordance with the requirements of the Contract Documents.
- § 9.8.6 The Contractor shall keep all required insurance in full force, and utilities on, until the Certificate of Substantial Completion is issued, and accepted by the Owner in writing, regardless of the stated date of Substantial Completion. Acceptance shall not be unreasonably withheld. The Contractor shall not be responsible for utility or insurance certificates in areas which have been accepted by the Owner.

# § 9.9 PARTIAL OCCUPANCY OR USE

- § 9.9.1 The Owner may occupy or use any completed or partially completed portion of the Work at any stage when such portion is designated by separate agreement with the Contractor, provided such occupancy or use is consented to by the insurer as required under Section 11.3.1.5 and authorized by public authorities having jurisdiction over the Project.
- § 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 written 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 and, when the Architect finds the Work acceptable under the Contract Documents and the Contract fully performed, 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 terms and conditions of 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.
- § 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, (2) a certificate evidencing that insurance required by the Contract Documents to remain in force after final payment is currently in effect and will not be canceled or allowed to expire until at least 30 days' prior written notice has been given to the Owner, (3) a written statement that the Contractor knows of no substantial reason that the insurance will not be renewable to cover the period required by the Contract Documents, (4) consent of surety, if any, to final payment and (5), if required by the Owner, other data establishing payment or satisfaction of obligations, such as receipts, releases and waivers of claims, security interests or encumbrances arising out of the Contract, to the extent and in such form as may be designated by the Owner.
- § 9.10.2.1 Prior to final payment to the Contractor, the Contractor shall furnish Owner an electronic set of the Drawings & Specifications accurately showing the Project as constructed in the format designated by the Owner, or when it is impractical to do so, one (1) complete set of marked-up copies of the Drawings and Specifications accurately showing the Project as constructed. Such Specifications and Drawings shall be marked to show all changes and modifications that have been incorporated into the Work as performed. Further, prior to final payment Contractor

shall submit all warranties, operations and maintenance data and/or other data and "closeout" documents required under the Contract Documents or otherwise reasonably required by Owner.

§ 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 and accepted. If the remaining balance for Work not fully completed or corrected is less than retainage stipulated in the Contract Documents, and if bonds have been furnished, the written consent of surety to payment of the balance due for that portion of the Work fully completed and accepted shall be submitted by the Contractor to the 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 Acceptance of final payment by the Contractor shall constitute a waiver of Claims by (*Paragraphs deleted*)

Contractor, except for any Claims then pending that comply with the requirements of Article 15.

(Paragraph deleted)

# 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.

# § 10.2 SAFETY OF PERSONS AND PROPERTY

- § 10.2.1 The Contractor shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to
  - .1 employees on the Work and other persons who may be affected thereby;
  - .2 the Work and materials and equipment to be incorporated therein, whether in storage on or off the site, under care, custody or control of the Contractor or the Contractor's Subcontractors or Sub-subcontractors; and
  - 3 other property at the site or adjacent thereto, such as trees, shrubs, lawns, walks, pavements, roadways, structures and utilities not designated for removal, relocation or replacement in the course of construction.
- § 10.2.2 The Contractor shall comply with and give notices required by applicable 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 erect and maintain, as required by existing conditions and performance of the Contract, reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards, promulgating safety regulations and notifying owners and users of adjacent sites and utilities. The Contractor shall also be responsible, at the Contractor's sole cost and expense, for all measures necessary to protect any property adjacent to the Project and improvements therein. Any damage to such property or improvements shall be promptly repaired by the Contractor.
- § 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 exercise utmost care and carry on such activities under supervision of properly qualified personnel and shall give the Owner, Program Manager (if applicable) and the Architect reasonable advance notice of the presence or use of such materials, equipment, or methods.
- § 10.2.5 The Contractor shall promptly remedy damage and loss (other than damage or loss insured under property insurance required by the Contract Documents) to property referred to in Sections 10.2.1.2 and 10.2.1.3 caused in whole or in part by the Contractor, a Subcontractor, a Sub-subcontractor, or anyone directly or indirectly employed by any of them, or by anyone for whose acts they may be liable and for which the Contractor is responsible under Sections 10.2.1.2 and 10.2.1.3, except damage or loss attributable to acts or omissions of the Owner or Architect or anyone directly or indirectly employed by either of them, or by anyone for whose acts either of them may be liable, and not

attributable to the fault or negligence of the Contractor. The foregoing obligations of the Contractor are in addition to the Contractor's obligations under Section 3.18.

- § 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 to the Contract 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, written notice of such injury or damage, whether or not insured, shall be given to the other party as provided herein. The notice shall provide sufficient detail to enable the other party to investigate the matter.

- § 10.2.9 When all or a portion of the Work is suspended for any reason, the Contractor shall do all things necessary to protect the Owner's premises and all persons from damage and injury.
- § 10.2.10 The Contractor shall promptly report in writing to the Owner and Architect all accidents arising out of or in connection with the Work which cause death, personal injury, or property damage, giving full details and statement of any witnesses. In addition, if death, serious personal injuries, or serious property damages are caused, the accident shall be reported immediately by telephone or messenger to the Owner and the Architect.
- § 10.2.11 The Contractor shall be responsible for the protection and security of the Work and the Project, until it receives written notification that the Substantial Completion of the Work has been accepted by the Owner.

#### § 10.3 HAZARDOUS MATERIALS

- § 10.3.1 The Contractor is responsible for compliance with any requirements included in the Contract Documents regarding hazardous materials. If the Contractor encounters a hazardous material or substance not addressed in the Contract Documents and if reasonable precautions will be inadequate to prevent foreseeable bodily injury or death to persons resulting from a material or substance, including but not limited to asbestos or polychlorinated biphenyl (PCB), encountered on the site by the Contractor, the Contractor shall, upon recognizing the condition, immediately stop Work in the affected area and report the condition to the Owner and Architect in writing.
- § 10.3.2 Contractor is responsible for reviewing all Asbestos Hazard Emergency Act Management Plans on file with Owner and for obtaining sign-off from the Owner prior to commencing the Work, utilizing Owner's approved form. Contractor agrees that it shall not transport to, use, generate, dispose of, or install at the Project site any Hazardous Substance (as defined in Section 10.3.5), except in accordance with applicable Environmental Laws. Further, in performing the Work, Contractor shall not cause any release of Hazardous Substances into, or contamination of, the environment, including the soil, the atmosphere, any water course or ground water, except in accordance with applicable Environmental Laws (as hereafter defined at Section 10.3.5). In the event Contractor wishes to conduct any inspection or testing at the Project, it shall ensure that Owner is properly notified, as well as any landlord in the event Owner is leasing the Project premises.
- § 10.3.2.1 In the event Contractor engages in any of the activities prohibited in this Section 10.3.2, to the fullest extent permitted by law, Contractor hereby indemnifies and holds Owner, Architect, Owner's Program Manager (if applicable to the Project) and their respective officers, directors, trustees, agents, board members, volunteers, invitees, and employees harmless from and against any and all claims damages, losses, causes of action, suits and liabilities of every kind, including, but not limited to, expenses of litigation, court costs, punitive damages and attorneys' fees, arising out of, incidental to or resulting from the activities prohibited in this Section 10.3.
- § 10.3.3 In the event Contractor encounters on the Project site any Hazardous Substance, or what Contractor may reasonably believe to be a Hazardous Substance, and which is being introduced to the Work, or exists on the Project site, in a manner violative of any applicable Environmental Laws, Contractor shall immediately stop work in the area affected and report the condition to Owner and Architect in writing. The Work in the affected area shall not thereafter

be resumed except by written authorization of Owner if in fact a Hazardous Substance has been encountered and has not been rendered harmless. Contractor shall be responsible for the consequences of any failure to stop work under this Section 10.3.3.

- § 10.3.3.1 In the event Contractor fails to stop the Work upon encountering a Hazardous Substance at the Project site, to the fullest extent permitted by law, Contractor hereby indemnifies and holds Owner, Architect, Owner's Program Manager (if applicable to the Project) and their respective officers, directors, trustees, agents, board members, volunteers, invitees, and employees harmless from and against any and all claims damages, losses, causes of action, suits and liabilities of every kind, including, but not limited to, expenses of litigation, court costs, punitive damages and attorneys' fees, arising out of , incidental to or resulting from Contractor's failure to stop the Work.
- § 10.3.4 Owner and Contractor may enter into a separate agreement and/or Change Order for Contractor to remediate and/or render harmless the Hazardous Substance, but Contractor shall not be required to remediate and/or render harmless the Hazardous Substance absent such agreement. Contractor shall not be required to resume work in any area affected by the Hazardous Substance until such time as the Hazardous Substance has been remediated and/or rendered harmless.
- § 10.3.5 For purposes of this Agreement, the term "Hazardous Substance" shall mean and include any element, constituent, chemical, substance, compound, or mixture, which are defined as a hazardous substance by any local, state or federal law, rule, ordinance, by-law, or regulation pertaining to environmental regulation, contamination, clean-up or disclosure, including, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), the Resource Conservation and Recovery Act ("RCRA"), the Toxic Substances Control Act ("TSCA"), the Clean Water Act ("CWA"), the Clean Air Act ("CAA"), the Marine Protection Research and Sanctuaries Act ("MPRSA"), the Occupational Safety and Health Act ("OSHA"), the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), or other state superlien or environmental clean-up or disclosure statutes including all state and local counterparts of such laws (all such laws, rules and regulations being referred to collectively as "Environmental Laws"). It is the Contractor's responsibility to comply with this Section 10.3 based on the law in effect at the time its services are rendered and to comply with any amendments to those laws for all services rendered after the effective date of any such amendments.
- § 10.3.6 In those instances in which the presence of a Hazardous Substance was set forth in the AHERA documents or in which Contractor has other written notice of such through information given to Contractor by Owner or its representative prior to execution of the Agreement, Contractor shall not be entitled to a Claim for any delays, disruption or interference it encounters. In those instances of Work stoppage due to the existence of such Hazardous Substances which were not set forth in the AHERA plans and of which Contractor has no other prior notice, Contractor may be entitled to a Claim for delay or Work stoppage if the requirements of Article 15 are met.
- § 10.3.7 The Contractor shall indemnify the Owner for the cost and expense the Owner incurs (1) for remediation of a material or substance the Contractor brings to the site and negligently handles, or (2) where the Contractor fails to perform its obligations under Section 10.3.1, except to the extent that the cost and expense are due to the Owner's fault or negligence.

#### § 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 LIABILITY INSURANCE

§ 11.1.1 The Contractor shall purchase from and maintain in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located such insurance as will protect the Contractor from claims set forth below which may arise out of or result from the Contractor's operations and completed operations under the Contract and for which the Contractor may be legally liable, whether such operations be by the Contractor or by a Subcontractor or by anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable:

- .1 Claims under workers' compensation, disability benefit and other similar employee benefit acts that are applicable to the Work to be performed;
- **.2** Claims for damages because of bodily injury, occupational sickness or disease, or death of the Contractor's employees;
- .3 Claims for damages because of bodily injury, sickness or disease, or death of any person other than the Contractor's employees;
- .4 Claims for damages insured by usual personal injury liability coverage;
- .5 Claims for damages, other than to the Work itself, because of injury to or destruction of tangible property, including loss of use resulting therefrom;
- .6 Claims for damages because of bodily injury, death of a person or property damage arising out of ownership, maintenance or use of a motor vehicle;
- .7 Claims for bodily injury or property damage arising out of completed operations; and
- **.8** Claims involving contractual liability insurance applicable to the Contractor's obligations under Section 3.18.

All insurance to be provided by the Contractor shall be written by companies acceptable to Owner. No company without a current A.M. Best rating of at least B+ will be considered as possibly acceptable.

§ 11.1.2 The insurance required by Section 11.1.1 shall be written for not less than the following minimum limits of liability:

a. Workers' Compensation

b.

(1) State Statutory

(2) Applicable Federal (e.g., Longshoremen's) Statutory

(3) Employer's Liability \$1,000,000.00 per accident

Commercial General Liability (including Premises-Operations; Independent Contractor's Protective; Products and Completed Operation Broad Form Property Damage)

Combined Single Limit, per project \$1,000,000.00

Completed Operations and Products Liability shall be maintained for the full period of statutory limitations after final payment.

c. Business Automobile Liability (on all owned, non-owned and hired vehicles)

Combined Single Limit Per Accident \$1,000,000.00

§ 11.1.3 Certificates of insurance acceptable to the Owner shall be filed with the Owner prior to commencement of the Work and thereafter upon renewal or replacement of each required policy of insurance. These certificates and the insurance policies required by this Section 11.1 shall contain a provision that coverages afforded under the policies will not be canceled or allowed to expire until at least 30 days' prior written notice has been given to the Owner. An additional certificate evidencing continuation of liability coverage, including coverage for completed operations, shall be submitted with the final Application for Payment as required by Section 9.10.2 and thereafter upon renewal or replacement of such coverage until the expiration of the time required by Section 11.1.2. Information concerning reduction of coverage shall be furnished by the Contractor with reasonable promptness.

§ 11.1.4 The Contractor shall cause the commercial liability coverage required by the Contract Documents to include (1) the Owner, the Architect and the Architect's Consultants as additional insureds for claims caused in whole or in part by the Contractor's negligent acts or omissions during the Contractor's operations; and (2) the Owner as an additional insured for claims caused in whole or in part by the Contractor's negligent acts or omissions during the Contractor's completed operations.

- § 11.1.5 Contractor's coverage is not permitted to include any of the following endorsements:
  - 1 Contractual Liability Limitation, CG21 39 or its equivalent
  - .2 Amendment Of Insured Contract Definition, CG 24 26 or its equivalent
  - .3 Exclusion Explosion, Collapse And Underground Property Damage Hazard, CG 21 42 or CG 21 43 or its equivalent
  - .4 Limitation of Coverage to Designated Premises or Project, CG 21 44 07 98 or its equivalent
  - 5. Exclusion Damage to Work Performed By Subcontractors On Your Behalf, CG 22 94 or CG 22 95 or its equivalent
  - .6 Any type of Classification or Business Description Limitation endorsement
  - .7 Any type of Construction Defect Complete Operations exclusion endorsement

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- .8 Any type of endorsement modifying the Employer's Liability exclusion
- .9 Any type of Habitational or Residential exclusion
- .10 Any type of Controlled Insurance Program or "Wrap" exclusions unless residual coverage is provided
- .11 Any type of Punitive, Exemplary or Multiplied Damages exclusion
- Any type of Subsidence exclusion if the Contractor is engaged in any type of earth movement work, including but not limited to soil compaction, fill or installation of storm or sewer drains
- § 11.1.5 Contractor shall add Owner as an additional insured to any and all policies of insurance purchased by Contractor, using an endorsement form at least as broad as CG 2026 1185, excepting workers' compensation, whether or not such policies of insurance are required under this Contract, and such policies shall state that they shall be primary to any and all other available policies of insurance and shall be endorsed to waive subrogation, using an endorsement form at least as broad as CG 24 04 [Ed. 11-85]. Owner shall be added as an "alternate employer" on Contractor's workers' compensation insurance. Contractor shall furnish to Owner a Certificate of Insurance showing compliance with this obligation.
- § 11.1.6 Contractor must certify in writing to Owner that Contractor provided workers' compensation insurance coverage for each employee of the Contractor employed on the Project and Contractor shall provide a certificate from each Subcontractor certifying that the Subcontractor provides Workers' Compensation Insurance for each employee of the Subcontractor employed on the Project. The Contractor's certification must be received by Owner prior to Notice to Proceed. The certificate from each Subcontractor must be received by Owner prior to each Subcontractor being allowed to work on the Project.

#### § 11.1.7 Additional Requirements for Worker's Compensation Insurance Coverage:

#### A. Definitions:

Certificate of coverage ("certificate") - A copy of a certificate of insurance, a certificate of authority to self-insure issued by the commission, or a coverage agreement (TWCC-81, TWCC-82, TWCC-83, or TWCC-84), showing statutory Workers' Compensation Insurance coverage for the person's or entity's employees providing services on a project, for the duration of the Project.

Duration of the Project - includes the time from the beginning of the Work on the Project until the Contractor's/person's work on the Project has been completed and accepted by the governmental entity.

Persons providing services on the Project - includes all persons or entities performing all or part of the services the Contractor has undertaken to perform on the Project, regardless of whether that person contracted directly with the Contractor and regardless of whether that person has employees. This includes, without limitation, independent contractors, subcontractors, leasing companies,

motor carriers, owner-operators, employees of any such entity, or employees of any entity which furnishes persons to provide services on the Project. "Services" include, without limitation, providing, hauling, or delivering equipment or materials, or providing labor, transportation, or other services related to the Project. "Services" does not include activities unrelated to the Project, such as food/beverage vendors, office supply deliveries, and delivery of portable toilets.

- B. The Contractor shall provide coverage, based on proper reporting of classification codes and payroll amounts and filing of any coverage agreements, which meets the statutory requirements of Texas Labor Code, Section 401.011(44) for all employees of the Contractor providing services on the Project, for the duration of the Project.
- C. The Contractor must provide a certificate of coverage to the Owner prior to being awarded the Contract.
- D. If the coverage period shown on the Contractor's current certificate of coverage ends during the duration of the Project, the Contractor must, prior to the end of the coverage period, file a new certificate of coverage with the Owner showing that coverage has been extended.

- E. The Contractor shall obtain from each person providing services on the Project, and provide to the Owner:
  - (1) a certificate of coverage, prior to that person beginning work on the Project, so the governmental entity will have on file certificates of coverage showing coverage for all persons providing services on the Project; and
  - no later that seven days after receipt by the Contractor, a new certificate of coverage showing extension of coverage, if the coverage period shown on the current certificate of coverage ends during the duration of the Project.
- F. The Contractor shall retain all required certificates of coverage for the duration of the Project and for one year thereafter.
- G. The Contractor shall notify the governmental entity in writing by certified mail or personal delivery, within 10 days after the Contractor knew or should have known, of any change that materially affects the provision of coverage of any person providing services on the Project.
- H. The Contractor shall post on each project site a notice, in the text, form and manner prescribed by the Texas Workers' Compensation Commission, informing all persons providing services on the Project that they are required to be covered, and stating how a person may verify coverage and report lack of coverage.
- I. The Contractor shall contractually require each person with whom it contracts to provide services on a project to:
  - (1) provide coverage, based on proper reporting of classification codes and payroll amounts and filing of any coverage agreements, which meets the statutory requirements of Texas Labor Code, Section 401.011(44) for all of its employees providing services on the Project, for the duration of the Project;
  - (2) provide to the Contractor, prior to that person beginning work on the Project, a certificate showing that coverage is being provided for all employees of the person providing services on the Project, for the duration of the Project;
  - provide the Contractor, prior to the end of the coverage period, a new certificate of coverage showing extension of coverage, if the coverage period shown on the current certificate of coverage ends during the duration of the Project;
  - (4) obtain from each other person with whom it contracts, and provide to the Contractor:
    - (a) a certificate of coverage, prior to the other person beginning work on the Project; and
    - (b) a new certificate of coverage showing extension of coverage, prior to the end of the coverage period. If the coverage period shown on the current certificate of coverage ends during the duration of the Project;
  - retain all required certificates of coverage on file for the duration of the Project and for one year thereafter;
  - (6) notify the Owner in writing by certified mail or personal delivery, within 10 days after the person knew or should have known, of any change that materially affects the provision of coverage of any person providing services on the Project; and
  - (7) contractually require each person with whom it contracts, to perform as required by paragraphs (1) (7), with the certificates of coverage to be provided to the person for whom they are providing services.

- J. By signing this Contract or providing or causing to be provided a certificate of coverage, the Contractor is representing to the Owner that all employees of the Contractor who will provide services on the Project will be covered by Workers' Compensation coverage for the duration of the Project, that the coverage will be based on proper reporting of classification codes and payroll amounts, and that all coverage agreements will be filed with the appropriate insurance carrier or, in the case of a self-insured, with the Commission's Division of Self-Insurance Regulation. Providing false or misleading information may subject the Contractor to administrative penalties, criminal penalties, civil penalties, or other civil actions.
- K. The Contractor's failure to comply with any of these provisions is a breach of Contract by the Contractor which entitles the Owner to declare the Contract void if the Contractor does not remedy the breach written ten (10) days after receipt of notice of breach from the Owner.

#### § 11.2 OWNER'S LIABILITY INSURANCE

(Paragraph intentionally deleted.)

#### § 11.3 PROPERTY INSURANCE

§ 11.3.1 Until the Work is completed and accepted by the Owner, the Contractor shall purchase and maintain property insurance upon the entire Work at the Project site to the full insurable value thereof. The property insurance shall also cover portions of the Work stored off site after written approval of the Owner of the value established in the approval, and also portions of the Work in transit. This insurance shall include the interests of the Owner, the Contractor, Subcontractors and Sub-subcontractors in the Work and shall insure against the perils of fire, wind, storm, hail, lightning and extended coverage including flood and earthquake and shall include all risk insurance for physical loss or damage, including, without duplication of coverage, theft, vandalism and malicious mischief. The insurance shall cover reasonable compensation for Architect's services and expenses required as a result of an insured loss. This all risk policy shall be written incorporating Texas Form No. 21 (Actual Completed Value Form) and Form No. 77 (General Change Endorsement) incorporating the following language:

Permission is given for the Project insured hereunder to become occupied, the insurance remaining in full force and effect until such time as the Project has been accepted by the Owner, all as currently approved by the Texas Board of Insurance Commissioners

The policy shall include coverage for Explosion, Collapse and Underground (ECU). Such insurance shall be evidenced by the kind of policy which does not have to be adjusted or reported upon periodically, but provides constant insurance at full one hundred percent (100%) of all insurable values as they are created during construction by performance of the Contract. When permissible by law, the Certificate of Insurance must include the names of the insured Contractor and the Board of Education, Houston Independent School District.

- § 11.3.1.1 Loss under such All Risk Builder's Risk Insurance shall be made payable jointly to the Board of Education, Houston Independent School District and to the Contractor by name (and, if separate mechanical contracts are awarded to each, by name, of the plumbing, heating, ventilating and electric contractors).
- § 11.3.1.2 In the case of loss under the risks covered, and of collection by insured, the Owner shall act as trustee for all parties concerned as their interests may appear.
- § 11.3.1.3 The original All Risk Builder's Risk Insurance Policy Certificate shall be delivered to and left in the safekeeping of the Owner, a Certificate or copy being retained by the Contractor (and Certificates or copies being furnished the separate Subcontractors, if any).
- § 11.3.1.4 (Paragraph intentionally deleted.)
- § 11.3.1.5 Partial occupancy or use in accordance with Section 9.9 shall not commence until the insurance company or companies providing property insurance have consented to such partial occupancy or use by endorsement or otherwise. The Owner and the Contractor shall take reasonable steps to obtain consent of the insurance company or companies and shall, without mutual written consent, take no action with respect to partial occupancy or use that would cause cancellation, lapse or reduction of insurance.

# § 11.3.3 LOSS OF USE INSURANCE

The Owner, at the Owner's option, may purchase and maintain such insurance as will insure the Owner against loss of use of the Owner's property due to fire or other hazards, however caused.

§ 11.3.4 If the Contractor requests in writing that insurance for risks other than those described herein or other special causes of loss be included in the property insurance policy, the Owner shall, at Owner's option, include such insurance, and the cost thereof shall be charged to the Contractor by appropriate Change Order.

#### § 11.3.5 Paragraph deleted.

§ 11.3.6 Before an exposure to loss may occur, the Owner shall file with the Contractor a copy of each policy that includes insurance coverages required by this Section 11.3. Each policy shall contain all generally applicable conditions, definitions, exclusions and endorsements related to this Project. Each policy shall contain a provision that the policy will not be canceled or allowed to expire, and that its limits will not be reduced, until at least 30 days' prior written notice has been given to the Contractor.

# § 11.3.7 WAIVERS OF SUBROGATION

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, and (2) the Architect, Architect's consultants, separate contractors described in Article 6, 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 covered by property insurance obtained pursuant to this Section 11.3 or other property insurance applicable to the Work, except such rights as they have to proceeds of such insurance held by the Owner as fiduciary. The Owner or Contractor, as appropriate, shall require of the Architect, Architect's consultants, separate contractors described in Article 6, if any, and the subcontractors, sub-subcontractors, agents and employees of any of them, by appropriate agreements, written where legally required for validity, similar waivers each in favor of other parties enumerated herein. The policies shall provide such waivers of subrogation by endorsement or otherwise. A waiver of subrogation shall be effective as to a person or entity even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, did not pay the insurance premium directly or indirectly, and whether or not the person or entity had an insurable interest in the property damaged.

§ 11.3.8 A loss insured under the Owner's property insurance shall be adjusted by the Owner as fiduciary and made payable to the Owner as fiduciary for the insureds, as their interests may appear, subject to requirements of any applicable mortgagee clause and of Section 11.3.10. The Contractor shall pay Subcontractors their just shares of insurance proceeds received by the Contractor, and by appropriate agreements, written where legally required for validity, shall require Subcontractors to make payments to their Sub-subcontractors in similar manner.

§ 11.3.9 (Paragraph intentionally deleted.)

§ 11.3.10 The Owner as fiduciary shall have power to adjust and settle a loss with insurers.

#### § 11.4 PERFORMANCE BOND AND PAYMENT BOND

§ 11.4.1 The Owner shall have the right to require the Contractor to furnish bonds covering faithful performance of the Contract and payment of obligations arising thereunder as stipulated in bidding requirements or specifically required in the Contract Documents on the date of execution of the Contract.

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

§ 11.4.3 If the Contract amount is \$100,000.00 or more, the Contractor shall furnish a Performance Bond equal to one hundred percent (100%) of the Contract Sum. If the Contract amount is \$25,000.00 or more, the Contractor shall furnish a Payment Bond equal to one hundred percent (100%) of the Contract Sum. There shall be separate bonds, the terms of which and the sureties of which are satisfactory to the Owner and which comply with Chapter 2253, Texas

**User Notes:** 

Government Code, Title 10 (Vernon Supp. 1999), and all other applicable law. Contractor shall furnish a copy of the Payment Bond to each of its Subcontractors at the beginning of the Work.

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

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

#### § 12.2 CORRECTION OF WORK

# § 12.2.1 BEFORE OR AFTER SUBSTANTIAL COMPLETION

The Contractor shall promptly correct Work rejected by the Architect or failing to conform to the requirements of the Contract Documents, whether discovered before or after Substantial Completion and whether or not fabricated, installed or completed. Costs of correcting such rejected Work, including additional testing and inspections, the cost of uncovering and replacement, and compensation for the Architect's services and expenses made necessary thereby, shall be at the Contractor's expense.

# § 12.2.2 AFTER SUBSTANTIAL COMPLETION

§ 12.2.2.1 In addition to the Contractor's obligations under Section 3.5, if, within one year after the date of Substantial Completion of the Work or designated portion thereof or after the date for commencement of warranties established under Section 9.9.1, or by terms of an applicable special warranty required by the Contract Documents, any of the Work is found to be not in accordance with the requirements of the Contract Documents, the Contractor shall correct it promptly after receipt of written notice from the Owner to do so unless the Owner has previously given the Contractor a written acceptance of such condition. The Owner shall give such notice promptly after discovery of the condition. During the one-year period for correction of Work, if the Owner fails to notify the Contractor and give the Contractor an opportunity to make the correction, the Owner waives the rights to require correction by the Contractor and to make a claim for breach of warranty. If the Contractor fails to correct nonconforming Work within a reasonable time during that period after receipt of notice from the Owner or Architect, the Owner may correct it in accordance with Section 2.4.

- § 12.2.2.2 The one-year period for correction of Work shall be extended with respect to portions of Work first performed after Substantial Completion by the period of time between Substantial Completion and the actual completion of that portion of the Work.
- § 12.2.2.3 The one-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, whether completed or partially completed, of the Owner or separate contractors caused by the Contractor's correction or removal of Work that is not in accordance with the requirements of the Contract Documents.
- § 12.2.4.1 Where nonconforming Work is found, the entire area of Work involved shall be corrected unless the Contractor can completely define the limits to the Architect's satisfaction. Additional testing, sampling, or inspecting needed to define nonconforming Work shall be at the Contractor's expense, and performed by the Owner's testing laboratory if such services are reasonably required by the Architect. All corrected Work shall be retested at the Contractor's expense. Reasonable Architectural services required to analyze nonconforming Work shall be paid for by the Contractor.

§ 12.2.5 Nothing contained in this Section 12.2 shall be construed to establish a period of limitation with respect to any obligations which the Contractor might have under the Contract Documents. Nothing contained in this Section 12.2 is intended to limit or modify any obligations under the law or under the Contract Documents, including any warranty obligations, expressed or implied.

#### § 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

This Contract and any disputes related to the Work shall be governed by the laws of the State of Texas, and any disputes shall be resolved in a state court in Harris County, Texas.

#### § 13.2 SUCCESSORS AND ASSIGNS

- § 13.2.1 The Owner and Contractor respectively bind themselves, their partners, successors, assigns and legal representatives to covenants, agreements and obligations contained in the Contract Documents. The Contractor shall not assign the Contract as a whole, or in part, without written consent of the Owner.
- § 13.2.2 Assignment. This Agreement is a personal service contract for the services of Contractor, and Contractor's interest in the Contract, duties hereunder and/or fees due hereunder may not be assigned or delegated to a third party. The benefits and burdens of this Agreement are, however, assignable by Owner.

#### § 13.3 WRITTEN NOTICE

Written notice shall be deemed to have been duly served only if the writing is delivered in person to the office of the party set out on the first page of the Standard Form of Agreement Between Owner and Contractor, or to such other address as has been previously clearly identified in writing by the addressee, or if delivered by mail or in form of electronic transmission to that office, or sent by registered or certified mail to that address.

### § 13.4 RIGHTS AND REMEDIES

- § 13.4.1 Neither Contractor nor any of its materialmen, laborers or Subcontractors shall have any lien rights against the Owner's land, buildings or funds. No materialmen, laborers or Subcontractors of the Contractor shall have any enforceable rights against the Owner on this Contract. Materialmen, laborers and Subcontractors of the Contractor may have rights under any Payment Bond provided by the Contractor, but cannot look to the Owner for any help in enforcement of those rights.
- § 13.4.2 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 there under, except as may be specifically agreed in writing.
- § 13.4.3 The invalidity of any part or provision of the Contract Documents shall not impair or affect in any manner whatsoever the validity, enforceability or effect of the remainder of the Contract Documents.
- § 13.4.4 Notwithstanding anything herein to the contrary, neither the execution of this Contract by Owner nor any other conduct of any representative of Owner relating to the Contract shall be considered a waiver of sovereign immunity to suit beyond what is provided for by Section 271.152 of the Texas Local Government Code.

#### § 13.5 TESTS AND INSPECTIONS

§ 13.5.1 Tests, inspections and approvals of portions of the Work required by the Contract Documents and by applicable laws, statutes, ordinances, codes, rules and regulations or lawful orders of public authorities having jurisdiction shall be made at appropriate times. Unless otherwise provided, the Contractor shall make arrangements for such tests, inspections and approvals with an independent testing laboratory or entity employed by the Owner, or with the appropriate public authority. Owner shall bear the normal costs of tests, inspections and approvals, but not any excess costs attributable to Contractor caused scheduling problems, or other Contractor error. The Contractor shall

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give the Architect timely notice of when and where tests and inspections are to be made so that the Architect may be present for such procedures.

- § 13.5.2 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 13.5.1, 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 13.5.3, shall be at the Owner's expense.
- § 13.5.3 If such procedures for testing, inspection or approval under Sections 13.5.1 and 13.5.2 reveal failure of the portions of the Work to comply with requirements established by the Contract Documents, all costs made necessary by such failure including those of repeated procedures and compensation for the Architect's services and expenses shall be at the Contractor's expense.
- § 13.5.4 Required certificates of testing, inspection or approval shall, unless otherwise required by the Contract Documents, be secured by the Contractor and promptly delivered to the Architect.
- § 13.5.5 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.
- § 13.5.6 Tests or inspections conducted pursuant to the Contract Documents shall be made promptly to avoid unreasonable delay in the Work.

# § 13.6 INTEREST

(Paragraph intentionally deleted.)

#### § 13.7 TIME LIMITS ON CLAIMS

(Paragraph intentionally deleted.)

# § 13.8 EQUAL OPPORTUNITY

- § 13.8.1 During the performance of this Contract, the Contractor agrees as follows:
  - .1 The Contractor will not discriminate against any employee or applicant for employment because of race, color, sex, religion, national origin or age.
  - The Contractor will take affirmative action to ensure that applicants are employed and that employees are treated during employment without regard to their race, color, sex, religion, national origin or age. Such action shall include, but not be limited to, the following: employment, upgrading, demotion or transfer, recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth the requirements of these non-discrimination provisions

# § 13.9 CERTIFICATION OF NONSEGREGATED FACILITY

- § 13.9.1 This Section is applicable to Contracts and Subcontracts exceeding \$10,000.00 which are not exempt from the provisions of the Equal Opportunity Clause.
- § 13.9.2 By the signing of this Contract, the Contractor signifies that it does not maintain or provide for its employees any segregated facilities at any of its establishments, and that it does not permit its employees to perform their services at any location, under its control, where segregated facilities are maintained. It certifies further that it will not maintain or provide for its employees any segregated facilities at any of its establishments, and that it will not permit its employees to perform their services at any location, under its control, where segregated facilities are maintained. The undersigned agrees that a breach of this certification is a violation of the Equal Opportunity Clause in this Contract. As used in this certification, the term "segregated facilities" means any waiting rooms, work areas, rest rooms and wash rooms, restaurants and other eating areas, time clocks, locker rooms and other storage or dressing areas, parking lots, drinking fountains, recreation or entertainment areas, transportation, and housing facilities

provided for employees which are segregated on the basis of race, creed, color, or national origin, because of habit, local custom, or otherwise. It further agrees that (except where it obtained identical certifications from proposed consultants for specific time period) it will obtain identical certification from proposed Subcontractors prior to the award of a Contract exceeding \$10,000.00 which are not exempt from the provisions of the Equal Opportunity Clause; that it will retain such certifications in its files; and that it will forward the following notice to such proposed Subcontractors (except where the proposed Subcontractors have submitted identical certifications for specific time periods): **Notice to Prospective Subcontractors of requirement for certification of nonsegregated facilities.** A certification of nonsegregated facilities, as required by the May 19, 1967 Order (32 FR. 7439, May 19, 1967) on elimination of segregated facilities, by the Secretary of Labor, must be submitted prior to the award of a Contract exceeding \$10,000.00 which is not exempt from the provisions of the Equal Opportunity Clause. The certification may be submitted either for each subcontract or for all subcontracts during a period (i.e., quarterly, semiannually, or annually).

Note: The penalty for making false statements in offers is prescribed in 18 U.S.C. 1001.11.

#### § 13.10 PREVAILING WAGE RATES

§ 13.10.1 In compliance with laws of the State of Texas relating to labor (Acts 1933, 43 Leg. p. 91, Chapter 45) the building construction wage rates listed in the Contract Documents have been ascertained and determined by the Owner as the general prevailing rates in the locality of Houston Independent School District for the classifications listed. The Contractor and each Subcontractor shall pay to all laborers, workers and mechanics employed by them in the execution of this Contract not less than such rates for each craft or type of worker or mechanic needed to execute the Contract. If it becomes necessary to employ any person in a trade or occupation not herein listed, such person shall be paid not less than an hourly rate fairly comparable to the rates shown hereinafter.

§ 13.10.2 This determination of prevailing wages shall not be construed to prohibit the payment of more than the rates named.

§ 13.10.3 The attention of the Contractor and all Subcontractors is called to the following laws of the State of Texas relating to labor: Texas Governmental Code § 2258.021 et seq. In compliance with the above cited code, the Contractor shall forfeit, as a penalty to the Owner, sixty dollars (\$60.00) for each laborer, worker or mechanic employed, for each calendar day, or portion thereof, such laborer, worker or mechanic is paid less than the rates stipulated hereinafter for any Work done under this Contract by him or by any Subcontractor under him.

# ARTICLE 14 TERMINATION OR SUSPENSION OF THE CONTRACT § 14.1 TERMINATION BY THE CONTRACTOR

§ 14.1.1 The Contractor may terminate the Contract if the Work is stopped for a period of 30 consecutive days through no act or fault of the Contractor or a Subcontractor, Sub-subcontractor or their agents or employees or any other persons or entities performing portions of the Work under direct or indirect contract with the Contractor, for any of the following reasons:

- .1 Issuance of an order of a court or other public authority having jurisdiction that requires all Work to be stopped;
- .2 An act of government, such as a declaration of national emergency that requires all Work to be stopped; or
- .3 Because the Architect has not issued a Certificate for Payment and has not notified the Contractor of the reason for withholding certification as provided in Section 9.4.1, or because the Owner has not made payment on a Certificate for Payment within the time stated in the Contract Documents provided Notice is given as required by Section 9.7.1.

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

§ 14.1.3 If the Work is stopped for thirty (30) consecutive days for any reason described in Section 14.1.1 or 14.1.2, the Contractor may, upon fourteen (14) days' written notice to the Owner and Architect, terminate the Contract and

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recover from the Owner payment for Work executed, including reasonable overhead and profit, costs incurred by reason of such termination, and damages to date of termination.

- § 14.1.4 If the Work is stopped for a period of 60 consecutive days through no act or fault of the Contractor or a Subcontractor or their agents or employees or any other persons performing portions of the Work under contract with the Contractor because the Owner has 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' written notice to the Owner and the Architect, terminate the Contract and recover from the Owner as provided in Section 14.1.3.
- § 14.1.5 Notwithstanding anything to the contrary contained herein or in the other Contract Documents, neither the Owner nor any other party shall be responsible for damages for loss of anticipated profits on Work not performed on account of any termination described in Sections 14.1.1, 14.1.2, and 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 repeatedly disregards applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of a public authority;
  - .3 otherwise is guilty of substantial breach of a provision of the Contract Documents; or
  - .4 fails to furnish the Owner, upon request, with assurances satisfactory to the Owner evidencing the Contractor's ability to complete the Work in compliance with all the requirements of the Contract Documents, or
  - .5 fails to proceed continuously and diligently with the construction and completion of the Work, except as permitted under the Contract Documents.
- § 14.2.2 When any of the above reasons exist, the Owner may without prejudice to any other rights or remedies of the Owner and after giving the Contractor and the Contractor's surety, if any, seven days' written notice, terminate employment of the Contractor and may:
  - .1 Exclude the Contractor from the site and take possession of all materials, equipment, tools, and construction equipment and machinery thereon owned by the Contractor;
  - .2 Accept assignment of subcontracts pursuant to Section 5.4; and
  - .3 Finish the Work by whatever reasonable method the Owner may deem expedient. Upon written request of the Contractor, the Owner shall furnish to the Contractor a detailed accounting of the costs incurred by the Owner in finishing the Work.
- § 14.2.3 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.
- § 14.2.4 If the unpaid balance of the Contract Sum exceeds costs of finishing the Work, including compensation for the Architect's services and expenses made necessary thereby, and other damages incurred by the Owner and not expressly waived, such excess shall be paid to the Contractor. If such costs and damages exceed the unpaid balance, the Contractor shall pay the difference to the Owner. The amount to be paid to the Contractor or Owner, as the case may be, shall be certified by the Initial Decision Maker, upon application, and this obligation for payment shall survive termination of the Contract.
- § 14.2.5 If a Performance Bond has been furnished and the Contractor is declared by the Owner to be in default under the Contract, the Surety shall promptly remedy the default by completing the Contract in accordance with its terms and conditions, or by obtaining a bid or bids in accordance with its terms and conditions. At Owner's election, upon determination by the Owner and the Surety of the lowest responsible bidder, the Surety will complete the Work or will arrange for a Contract between such bidder and the Owner, and make available as Work progresses sufficient funds to pay the cost of completion less the balance of the Contract Sum, but not exceeding the Penal Sum of the bond and other costs and damages for which the Surety may be liable under the bond. The phrase "balance of the Contract Sum" as used herein shall mean the total amount properly payable by the Owner to the Contractor under the Contract and amendments thereto less the amount previously paid by the Owner to the Contractor

on 10/02/2013, and is not for resale.

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#### § 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 An adjustment shall be made to the Contract Sum calculated under Article 7. Adjustment of the Contract Sum shall include 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, or any portion thereof, in whole or in part, for the Owner's convenience and without cause.
- § 14.4.2 Upon receipt of written notice from the Owner of such termination for the Owner's convenience, the Contractor shall:
  - .1 cease operations as directed by the Owner in the notice;
  - 2 take actions necessary, or that the Owner may direct, for the protection and preservation of the Work; and
  - .3 except for Work directed to be performed prior to the effective date of termination stated in the notice, terminate all existing subcontracts and purchase orders as to that portion of the Work that is the subject of the Owner's termination and enter into no further subcontracts and purchase orders as to that portion of the Work that is subject of the Owner's termination.
- § 14.4.3 In the event of a termination under Section 14.4, the Contractor shall be paid the Contract Value of its work to the date of termination, plus cost of termination calculated under the terms of Section 7.3 to cover the cost to Contractor, its Subcontractors and Suppliers, to shut down the Project. Owner shall not be responsible for damages for loss of anticipated profits on work not performed on account of any termination.
- § 14.4.4 Upon determination by Court of competent jurisdiction that termination of the Contractor pursuant to Section 14.2 was wrongful, such termination will be deemed converted to a termination for convenience pursuant to Section 14.4, and Contractor's remedy for wrongful termination shall be limited to the recovery of the payments permitted for termination for convenience as set forth in Section 14.4

# ARTICLE 15 CLAIMS AND DISPUTES § 15.1 CLAIMS

#### § 15.1.1 DEFINITION

A Claim is any demand or assertion by the Contractor that it should be paid more money than the Contract Sum or granted more contract time by the Owner because of action or inaction on the part of Owner, any Owner representative, Architect, or any party for whom Owner is responsible, or any party with whom Owner has separately contracted for other portions of the Project, including, but not limited to, any demand or assertion that Contractor's performance has been delayed, interrupted or interfered with, that Contractor's performance has been accelerated, constructively accelerated, or suspended, that Contractor's performance has been wrongfully terminated, that the Contract Documents have been misinterpreted, that there has been a failure of payment, that Contractor has encountered concealed or unknown conditions, that Contractor has encountered hazardous materials, that there are problems with the Contract Documents, or the timing of Architectural approvals or decisions, that actions of the Owner have been intentionally wrongful or deceptive, that Owner is directly or indirectly guilty of negligence or an intentional tort related in any way to the Work, that the amount of time or money granted in a Construction Change Directive is inadequate, that an item treated as a minor change in the Work should have been treated as a Change Order, that a time extension grant was inadequate, that there has been a breach of contract, or that Contractor is entitled to any other relief, on any legal or equitable theory, related to the Work or the Contract. This definition of Claim is not intended to create any right of action where the right of action does not otherwise exist under applicable law or other provisions of this Contract.

# § 15.1.2 NOTICE OF CLAIMS

(Paragraph deleted)

§ 15.1.2.1 Within five (5) days of the first occurrence of an event that Contractor has any reason to believe might result in a Claim, or within five (5) days of Contractor's discovery of the first occurrence of an event that Contractor has any reason to believe might result in a Claim if the first occurrence of the event was willfully hidden from the Contractor, the Contractor shall file a written document clearly captioned "Notice of Claim" with Owner and the Architect. The Notice shall clearly set out the specific matter of complaint, and the impact or damages which may occur or have occurred as a result thereof, to the extent the impact or damages can be assessed at the time of the Notice. If the impact or damages cannot be assessed as of the date of the Notice, the Notice shall be amended at the earliest date this is reasonably possible. Any Claim or portion of a Claim that has not been made the specific subject of a Notice strictly in accordance with the requirements of this section shall be waived. It is imperative that Owner have timely, specific Notice of any potential problem in order that the problem can be mitigated promptly.

§ 15.1.2.2 In addition to the Notice required by Section 15.1.2.1, the Contractor shall also file a document captioned "Claim" with the Owner within ninety (90) days of the occurrence of any event resulting in a Claim for damages, giving notice of the Claim. Contractor agrees that this is a reasonable Notice requirement. Any Claim or portion of a Claim that has not been made the specific subject of a Notice strictly in accordance with the requirements of this section is waived.

# § 15.1.3 CLAIMS HANDLING DURING CONSTRUCTION

After receipt of a Notice of Claim, the Owner may elect to refer the matter to the Architect or another party for review. Contractor will attend meetings called to review and discuss the Claims and mitigation of the problem, and shall furnish any reasonable factual backup for the Claim requested. The Owner may also elect to defer consideration of the Claim until the Work is completed, in which case the same review options shall be available to the Owner at the completion of the Work. If a claim is deferred, Contractor shall be entitled to its legal right to interest on any subsequent recovery. At any stage, the Owner is entitled to refer a Claim to mediation under the Construction Industry Mediation Rules of the American Arbitration Association, and if this reference is made, Contractor will take part in the mediation process. The filing, mediation or rejection of a Claim does not entitle Contractor to stop performance of the Work. The Contractor shall proceed diligently with performance of the Contract during the pendency of any claim, excepting termination or under Owner's direction to stop the Work. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof. The parties shall share the Mediator's fee and any filing fees equally, and the Mediation shall be held in Houston, Texas.

#### § 15.1.4

(Paragraphs deleted)

# **CLAIMS HANDLING FOLLOWING CONSTRUCTION**

§ 15.1.4.1 The acceptance of final payment shall constitute a waiver of Claims by the Contractor which have not previously been identified in a Notice of Claim under Section 15.1.2.1 and a Claim under Section 15.1.2.2 and specifically reserved in the final Application for Payment.

§ 15.1.4.2 If a Claim has not been resolved within three (3) months of the date of the final Application for Payment through Claim review procedures, mediation, or other Claim settlement negotiations, then Contractor at that time, but not before, shall be entitled to institute litigation on the Claim in a State Court of competent jurisdiction in Harris County, Texas, and in no other forum.

§ 15.1.4.3 In connection with the Owner's defense of any suit against it and/or the Owner's prosecution of any claim, counterclaim or action to enforce any of its rights and/or claims hereunder, in which the Owner prevails as to all or any portion of its defense(s), claims, counterclaims or actions, Owner shall be entitled to recover its actual attorneys fees and expenses incurred in defending such suit and/or in prosecuting such claim or action.

## § 15.1.5 CLAIMS FOR CONCEALED OR UNKNOWN CONDITIONS

§ 15.1.5.1 Only if conditions are encountered at the site which are (a) subsurface or otherwise concealed physical conditions which differ materially from those indicated in the Contract Documents, (b) unknown physical conditions of an unusual nature, which 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 (c) in the case of renovation Work, any condition of the preexisting construction to be renovated which was hidden from view prior to demolition Work performed as a part of the renovation, that is materially different from any of the conditions that could reasonably have been expected to be present in preexisting construction of the age and type encountered on the Project, then Contractor shall be entitled to make a Claim if it can satisfy all of the requirements of Section 15.1.

§ 15.1.5.2 No adjustment in the Contract Time or Contract Sum shall be permitted, however, in connection with a concealed or unknown condition which does not differ materially from those conditions disclosed or which reasonably should have been disclosed by Contractor's (1) prior inspections, tests, reviews and preconstruction services for the Project, or (2) inspections, tests, review and preconstruction services which were given to Contractor by Owner, Architect or Owner's representative or which Contractor had the opportunity to make or should have performed in connection with the Project.

#### § 15.1.6 CALCULATING CLAIM AMOUNT

In calculating the amount of any Claim, the following standards will apply:

- .1 No indirect or consequential damages will be allowed;
- No recovery shall be based on a comparison of planned expenditures to total actual expenditures, or on estimated losses of labor efficiency, or on a comparison of planned manloading to actual manloading, or any other analysis that is used to show damages indirectly;
- Damages are limited to extra costs specifically shown to have been directly caused by a proven wrong;
- .4 The maximum daily limit on any recovery for delay shall be the amount originally estimated by the Contractor for job overhead costs divided by the total number of calendar days of Contract Time called for in the Contract;
- .5 No damages will be allowed for home office overhead or other home office charges, or any Eichlay formula calculation; and
- **.6** No profit will be allowed on any Claim.

This clause shall not reduce Contractor's entitlement to profit, if any, on a change order or Construction Change Directive.

#### § 15.1.7 CLAIMS FOR ADDITIONAL COST

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

# (Paragraph deleted)

§ 15.1.7.2 If the Contractor wishes to make Claim for an increase in the Contract Time, written Notice as provided herein shall be given. Any commencement of delayed Work after a delay will serve to terminate that delay for purpose of Notice. Subsequent delays, whether of similar or a different nature and whether based on the same, similar or a different cause, shall require Notice.

# (Paragraph deleted)

§ 15.1.7.3 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.

§ 15.1.6.4 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.

### (Paragraph deleted)

# ARTICLE 16 CONTRACTOR ACCOUNTS, RECORDS AND INSPECTION

Unless additional requirements are set forth in the Agreement or other Contract Documents, at minimum, Contractor's records, which shall include but not be limited to accounting records (hard copy, as well as computer readable data if it can be made available), written policies and procedures; subcontract files (including proposals of successful and unsuccessful bidders, bid recaps, etc.); original estimates; estimating work sheets; correspondence; backcharge logs and supporting documentation; general ledger entries detailing cash and trade discounts earned; insurance rebates and bond or other dividends; and any other supporting evidence deemed necessary by the Owner to substantiate charges regarding any matters related to the Contract (including interviews with Contractor's personnel and Subcontractor's

personnel) shall be open to inspection and subject to audit and/or reproduction by Owner's agent or its authorized representative to the extent necessary to adequately permit evaluation and verification of (a) Contractor compliance with Contract requirements, (b) compliance with Owner's business ethics policies, and (c) compliance with provisions for pricing or claims submitted by the Contractor or any of its payees. The Owner or its designee shall be afforded access to all of the Contractor's records pursuant to the provisions of this Article throughout the term of this Contract and for a period of three years after final payment or longer if required by law.

(Paragraph deleted)

#### ARTICLE 17 BUSINESS ETHICS

During the course of pursuing contracts, and the course of Contract performance, Contractor and its Subcontractors and vendors will maintain business ethics standards aimed at avoiding real or apparent impropriety or conflicts of interest. No substantial gifts, entertainment, payments, loans or other considerations beyond that which would be collectively categorized as incidental shall be made to any personnel of the Owner or its Architects, or to family members of any of them. At any time Contractor believes there may have been a violation of this obligation, Contractor shall notify Owner of the possible violation. Owner is entitled to request a representation letter from Contractor, its Subcontractors or vendors at any time to disclose all things of value passing from Contractor, its Subcontractors or vendors to Owner's personnel and its Architects.

(Paragraph deleted)

#### ARTICLE 18 SOVEREIGN IMMUNITY

(Paragraph deleted)

- § 18.1 No Waiver of Immunity. Owner does not waive or relinquish any immunity or defense on behalf of itself and its officers, trustees, employees, and agents as a result of their execution of this Contract and performance of the functions or obligations described herein. Nothing herein shall be construed as creating any personal liability on the part of any officer, director, employee or representative of the Owner.
- § 18.2 Nothing in this Contract shall be construed to create a claim or cause of action against Owner for which it is not otherwise liable, nor to waive any immunity or defense to which Owner may be entitled, nor to create an impermissible deficiency debt of Owner.

(Paragraph deleted)

# ARTICLE 19 BACKGROUND CHECKS, CERTIFICATES AND TAXES

(Paragraph deleted)

§ 19.1 Background Checks. Pursuant to Sections 22.085 and 22.0834 of the Texas Education Code, Contractor hereby certifies that all employees, consultants, subcontractors, and volunteers of the Contractor who have continuing duties related to the contracted services; and has or will have direct contact with students have passed a national criminal history background record information review as required by those sections.

(Paragraph deleted)

§ 19.1.1 Contractor shall send or ensure that the employee or applicant sends to the Texas Department of Public Safety ("DPS") information that is required by the DPS for obtaining national criminal history record information, which may include fingerprints and photographs. DPS shall obtain the person's national criminal history record information and report the results through the criminal history clearinghouse as provided by Section 411.0845, Government Code.

(Paragraph deleted)

- § 19.1.2 Contractor must also obtain certifications from all subcontractors that their employees to whom Section 22.0834 applies have also passed a national criminal history background record information review.
- § 19.1.3 Contractor must also provide assurances that all of its employees, consultants, subcontractors, and volunteers, including those hired before January 1, 2008, who have contact with students have passed a criminal history background check current within the last year. If an employee, consultant, subcontractor, or volunteer of the Contractor has a criminal conviction or has received deferred adjudication for a felony offense or a misdemeanor involving moral turpitude, the Owner may elect not to enter into this Contract, or cancel the Contract.

(Paragraph deleted)

**User Notes:** 

**§ 19.1.4** WARNING: Section 44.034 of the Texas Education Code requires that a person or business entity that enters into a contract with a school district must give advance notice to the district if the person or an owner or operator of the

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business entity has been convicted of a felony. The notice must include a general description of the conduct resulting in the conviction of a felony.

(Paragraphs deleted)

§ 19.1.5 Failure to comply with the provisions of Section 19.1 constitutes a default under this Contract, entitling Owner to terminate this Contract for cause.

(Paragraphs deleted)

§ 19.2 All individuals or entities entering into a contract with Owner must adhere to the following applicable Texas laws as they pertain to their individual type of ownership:

(Paragraph deleted)

§ 19.2.1 Corporations (domestic [formed under Texas law] or foreign [formed under laws of another state]) shall be properly registered with the Texas Secretary of State and the Comptroller of Public Accounts as required by TITLE 34, Part 1, Chapter 3, Subchapter V, Rule 3.546 of the Texas Administrative Code. A current "Certificate of Good Standing" from the Texas Comptroller of Public Accounts shall be made available upon request stating that the corporation charter is current and all Texas Franchise Reports and Taxes are paid.

(Paragraphs deleted)

§ 19.2.2 Partnership and Joint Stock Companies, and Limited Liability Partnerships (domestic [formed under Texas law] or foreign [formed under laws of another state]) shall be properly registered with the Texas Secretary of State in accordance with TITLE 105 – PARTNERSHIPS AND JOINT STOCK COMPANIES, CHAPTER OEN – PARTNERSHIPS, LIMITED PARTNERSHIPS, TEXAS REVISED LIMITED PARTNERSHIP ACT, Article 6132a-1, "Texas Revised Limited Partnership Act". All partners in a partnership must file a "Certificate of Limited Partnership" with the Texas Secretary of State, which shall be made available for inspection upon request.

(Paragraphs deleted)

§ 19.3 Contractor, whether Corporate, Partnership, or Sole Owner, must be current on its HISD Property Taxes. If commercial personal property is located in the jurisdiction, current renditions of these properties must be filed with the Chief Appraiser, as required by Chapter 22, Section 22.01, of the "TEXAS PROPERTY TAX CODE", and Contractor must be current on all applicable ad valorem taxes owing to Owner.

(Paragraph deleted)

§ 19.4 Contractor certifies, to the best of its knowledge and belief, that it is not presently debarred, suspended for debarment, declared ineligible, or voluntary excluded from covered transactions by any federal department or agency.

§ 19.5 Contractor agrees to comply with all applicable requirements of all federal laws, executive orders, regulations, applicable guidelines, and policies governing this program, particularly relating to nondiscrimination. These include but are not limited to: (i) Title VI of the Civil Rights Act of 1964, as amended; (ii) Title IX of the Education Amendments of 1972, as amended; (iii) Section 504 of the Rehabilitation Act of 1973, as amended; the Age Discrimination Act of 1975, as amended; and (iv) the Americans with Disabilities Act, as amended.

#### ARTICLE 20 REFORMATION

§ 20.1 If any provision of this Contract is held to be illegal, invalid, or unenforceable under present or future laws, such provision shall be reformed to provide as close to the original intent of the provision as possible while still being enforceable. However, in the event such a reformation is not possible then (i) such provision shall be fully severable; (ii) this Contract shall be construed and enforced as if such illegal, invalid, or unenforceable provision had never been comprised a part of this Contract; and (iii) the remaining provisions of this Contract shall remain in full force and effect and shall not be affected by the illegal, invalid or unenforceable provision or by its severance from this Contract. In the event any law, ordinance, standard, specification, rule or authority is referenced and/or incorporated herein, such reference shall be construed to be the law, ordinance, rule or authority in effect at the time of performance of the Work or other obligation to which such law, ordinance, rule or authority applies. Further, in the event that a provision of the contract conflicts in such a manner that the provision of the contract requires something impermissible according to any applicable law, ordinance, rule or authority, the contract shall be interpreted to give precedence to the applicable, law, ordinance, rule or authority. A contract provision that requires the contractor to satisfy a higher level

of performance or standard than a law, ordinance, rule or authority shall be given precedence in interpreting the obligations of the contractor.

(Paragraph deleted)



**User Notes:** 

## **DRAFT**

EXHIBIT "G" TO THE CONSTRUCTION MANAGER-AT-RISK AGREEMENT (NOT USED)

# MINORITY / WOMEN BUSINESS ENTERPRISES ("M/WBEs") PARTICIPATION PLAN

## 1. CONSTRUCTION MANAGER'S M/WBE PARTICIPATION GOAL

- a) Construction Manager commits to the M/WBE participation goal stated in the *Construction Manager-at-Risk Agreement*.
- b) While Construction Manager anticipates that 100% of its M/WBE participation will be derived through subcontractors, and their representative subcontractors and suppliers, Construction Manager will make every effort to use M/WBEs directly, wherever the opportunity should arise during the Project.

## 2. STRATEGIC PARTNERSHIPS SUPPORT FOR CONSTRUCTION

- a) The Business Assistance Department within HISD was established by the Houston Independent School District for the purpose of monitoring and providing assistance to all contractors engaged in construction activities within the Houston Independent School District ("HISD"). Two of the key functions of the department are:
  - i) Monitoring M/WBE participation on HISD projects; and
  - ii) Assisting prospective contractors to find and use qualified M/WBE subcontractors and suppliers.
- b) HISD's Business Assistance Department (713-556-7200) is charged with M/WBE documentation, monitoring, and support of business assistance efforts in the 2007 Facilities Capital Program.

## 3. M/WBE CERTIFICATIONS ACCEPTABLE TO HISD

- a) The Houston Independent School District recognizes ONLY THREE certifying agencies for purposes of counting M/WBE participation:
  - i) City of Houston;
  - ii) Houston Minority Supplier Development Council; and
  - iii) Women's Business Enterprise Alliance.
- b) Any other certification **WILL NOT** be counted towards M/WBE participation. Contact the Business Assistance Department at 713-556-7200 for assistance in sourcing M/WBE contractors that are certified with one of the three listed agencies.

#### 4. M/WBE SUBCONTRACTING PLANS

a) Construction Manager will make every effort to use qualified M/WBE subcontractors and

- suppliers. This may be accomplished by directly hiring M/WBE subcontractors, or by having non-M/WBE subcontractors use M/WBE subcontractors and suppliers.
- b) Construction Manager will integrate, as part of its bid package for its subcontractors, HISD's standard *Guidelines for CMARs*, *MWBE Paperwork for Subcontractor Proposals* (Exhibit H2).
- c) Construction Manager will include M/WBE participation as a criterion in its subcontractor bid evaluation process.
- d) The HISD Business Assistance Program (BAP) Office will be notified of the time and place of pre-proposal and pre-construction meetings so that a representative may be in attendance to promote the use of and assist in the sourcing of qualified M/WBE contractors.
- e) No M/WBE subcontractor shall be replaced or substituted without the expressed prior written approval of the Owner. Should it be contemplated that an M/WBE subcontractor or supplier needs to be terminated, every effort will be made to replace the M/WBE being terminated with another M/WBE. The BAP will be contacted prior to termination so that a replacement M/WBE can be identified.

## 5. M/WBE MONTHLY PARTICIPATION REPORTING

- a) Construction Manager will report M/WBE participation, including other tier-level subcontractors and suppliers, to the Owner.
- b) M/WBE participation and payment status will be reported using the following forms:
  - i) CERTIFICATION OF PAYMENT TO SUBCONTRACTORS AND SUPPLIERS (Exhibit H3).
  - ii) HISD MONTHLY SUBCONTRACTOR PAYMENTS REPORT (Exhibit H4).
  - iii) Copies of CMAR's **MONTHLY SUBCONTRACTOR PAYMENTS REPORTS** from their subcontractors.
- c) These forms will be submitted monthly as an attachment to the Construction Manager's application for payment. Pay applications will be considered "incomplete" without the M/WBE Forms attachment.
- d) For instructions on how to report other tier-level subcontractors and suppliers, please contact the Business Assistance Department at 713-556-7200.

## Business Assistance Program (BAP)

# **GUIDELINES**

for

## **CONSTRUCTION MANAGERS-AT-RISK**

# M/WBE PAPERWORK for SUBCONTRACTOR BIDS

Minority / Women Business Enterprise (M/WBE) FORMS

## **IMPORTANT NOTICE!**

The Construction Manager-at-Risk (CMAR), in accordance with paragraph 5.01(e) (8) and Exhibit H of its contract with the Houston Independent School District (HISD), integrates the following standard forms for M/WBE participation (pages 7 and 8) as part of its bid documents.

The CMAR will include M/WBE participation as a criterion in its subcontractor bid evaluation process.

In completing the M/WBE forms, carefully review the instructions on pages 5 and 6 of this packet.

## FOR FURTHER INFORMATION OR ASSISTANCE CONTACT:

HISD BUSINESS ASSISTANCE DEPARTMENT
4400 West 18<sup>th</sup> Street
Houston, TX 77092
(713) 556-7200 • FAX: (713) 556-7243

# SUMMARY OF M/WBE REQUIREMENTS INSTRUCTIONS FOR FORMS, SCHEDULES, AND STATEMENTS

Both of the following forms will be required by the CMAR. Please be sure to note **when** each must be submitted as part of your bidding and award process.

# 1) Schedule of M/WBE Participation (page 7)

Must be submitted with your bid

This form lists and identifies: a) the certified M/WBE firm(s) that the bidder will use for this project through subcontracted services or supplies upon award of the contract; b) the agreed price to each M/WBE subcontractor; and c) the participation percentage for each M/WBE.

If the bidder will not be using M/WBE subcontractors/suppliers, complete the form where applicable, and write the word "*None*" in the first column of the table.

## 2) Letter(s) of Intent to Subcontract (page 8)

When requested by CMAR, this form must be submitted to CMAR after bid date, but prior to HISD accepting CMAR's Guaranteed Maximum Price.

This form verifies the understanding between the bidder and the intended M/WBE subcontractor/supplier. It should be completed and **signed** by both the bidder and the M/WBE.

Complete one form for each M/WBE listed on the **Schedule of M/WBE Participation** that you submitted on bid-day.

## IMPORTANT - Please also note the following:

- In order to qualify as an M/WBE for purposes of contract with HISD, a firm must be certified by one of the following: the *City of Houston*, the *Houston Minority Supplier Development Council* (Formerly Houston Minority Business Council), or the *Women's Business Enterprise Alliance*.
- If the total amount of the bid for construction, construction related projects, or professional services is less than \$25,000, the bidder is not required to submit M/WBE forms, but is nonetheless encouraged to use M/WBEs when subcontracting work.

- It is strongly recommended that, prior to submitting your documents, you review the
  directions included above and verify the answers to any questions you may have in
  completing the M/WBE participation forms. HISD does not wish to lose a winning bid
  because of confusion over paperwork.
- Throughout the life of the contract, the CMAR will be required to report M/WBE participation on a periodic basis to HISD. Specific procedures and reporting forms will be provided by the CMAR and/or HISD's Bond Program Office.
- To ensure that all obligations under contracts awarded to M/WBEs are met, the CMAR, HISD's Manager of Supplier Diversity, the Procurement Department, HISD Facility Services, and/or HISD Construction Services will review the bidder's M/WBE participation efforts during the performance of the contract.
- For assistance in locating qualified M/WBE subcontractors/suppliers, please contact the Business Assistance Department at 713-556-7200.

## **HISD AUTHORITY AND INTERPRETATION**

HISD shall have sole authority for the interpretation of all rules and regulations concerning M/WBE participation and for all determinations of compliance or non-compliance of any bidder with the M/WBE participation requirements as set forth herein. The decision of HISD shall be final and conclusive as to such compliance or non-compliance. All bidders, by the submission of a proposal, acknowledge and agree that HISD shall have such sole and exclusive authority to make such interpretations and determinations and that all such interpretations and determinations shall be conclusive. Bidders shall not have the authority to contest same.

## **SCHEDULE OF M/WBE PARTICIPATION**

Name of Bidder: _					
Project description	ı:				
Bidder's Scope of	Work:				
Bid Amount: \$	M/	WBE Total: \$		M/WBE %:	<u></u> %
☐ If Bidder is a CERT Continue to complete If using M/WBE subconformation for each. If first column.	ete the table below ntractors/suppliers	ı. s, list them in the	e table below alon	g with the indica	ted
Name of M/WBE Firm*	Phone Number	Contact Person	Scope of Service	Agreed price to	% of Bid
					Amount
* FIRMS MUST BE CERTIF DEVELOPMENT COUNC CERTIFICATE.	IL, WOMEN'S BUSINE	SS ENTERPRISE A	ILLIANCE. PLEASE A	TTACH COPY OF C	
WHEN REQUESTED BY CM AGREEMENT WITH EACH					
Officer's signature			Date	_	
Officer's name and titl	le				

## LETTER-OF-INTENT TO SUBCONTRACT

Project description:	
	by the CMAR and the Houston Independent Schoo o execute a subcontractor/supplier agreement for the
for the amount of: \$  Bidder	M/WBE SUBCONTRACTOR
Name of Company	Name of Company
Address	M/WBE Certifying Agency
City/State Zip	Address
Telephone Number	City/State Zip
Fax Number	Telephone Number
Name of Officer (Print or Type)	Fax Number
Signature of Officer	Name of Officer (Print or Type)
Date	Signature of Officer
	Date

## HOUSTON INDEPENDENT SCHOOL DISTRICT M/WBE SOLICITATION INFORMATION

A list of Minority and Women Business Enterprises (M/WBE) currently registered with HISD may be accessed through our Website under *Doing Business with HISD*, *M/WBE Directory*. The physical location of the Hattie Mae White Educational Support Center is:

## HOUSTON INDEPENDENT SCHOOL DISTRICT

4400 West 18<sup>th</sup> Street Houston, Texas 77092-8501 Telephone: (713) 556-7200 Fax: (713) 556-7243 www.houstonisd.org

## M/WBE firms must be currently certified with one of the following:

## CITY OF HOUSTON MAYOR'S OFFICE

Affirmative Action and Contract Compliance
Ms. Velma Laws, Director
611 Walker, 20<sup>th</sup> Floor
Houston, Texas 77002
Telephone: (713) 837-9000
Fax: (713) 837-9050
www.houstontx.gov

# HOUSTON MINORITY SUPPLIER DEVELOPMENT COUNCIL (Formerly Houston Minority Business Council)

Mr. Richard Huebner, Executive Director
Three Riverway, Suite 555
Houston, Texas 77056
Telephone: (713) 271-7805
Fax: (713) 271-9770
Email: info@hmbc.org
www.hmbc.org

## **WOMEN'S BUSINESS ENTERPRISE ALLIANCE**

Ms. Susan Repka, Executive Director 4100 Westheimer, Suite 260 Houston, Texas 77027-4438 Telephone: (713) 681-9232 Fax: (713) 681-9242

Email: admin@wbea-texas.org

www.wbea-texas.org

## **CERTIFICATION OF PAYMENT TO SUBCONTRACTORS AND SUPPLIERS**

THE STATE OF TEXAS

## KNOW ALL MEN BY THESE PRESENTS:

COUNTY	OF								
BEFORE	ME,	the	undersigned	authority,	on	this	day	personally	appeared
			[Affiant]	, who being l	by me o	duly sw	orn on	Affiant's oath	n stated that
Affiant is _							.,		_ [Title], of
				("Company	"), the o	compan	y named	and referred	to within the
Contract D	ocument	; the Aff	fiant is fully co	mpetent and au	ıthorize	d to exe	cute thi	s Certification	of Payment
to Subcont	ractors a	nd Supp	liers; that Com	pany has made	payme	nts to si	ıbcontra	actors and sup	pliers for all
labor, mat	terials,	equipme	nt and service	es furnished	for wo	rk con	stituting	the whole	or part of
					Proj	ject in	the amo	ounts for which	ch Company
has been p	aid, purs	suant to	all previous Ce	ertifications of	Paymer	nt; that	Compai	ny will make	payments to
subcontrac	tors and	suppliers	s for all labor, r	naterial, equip	ment an	d servic	es furni	shed for work	constituting
the whole	or part	of such	Contract for w	which Compan	y will t	pe paid,	pursua	nt to this Cer	tification of
Payment; a	and that a	all such	payments were	and will be m	nade in	accorda	nce witl	h the Contract	Documents
and within	the laws	of the S	tate of Texas.						
							V CC' 12		
						[ <i>P</i>	Affiant's	s signature]	
SWORN A	ND SUI	BSCRIB	ED before me o	on [Date]					
								_	
				Notary Public	c in and	for the	State of	Texas	
								_	
				[Print or type	•		-		
				My Commiss	sion Exp	oires:			

## HOUSTON INDEPENDENT SCHOOL DISTRICT

## **REBUILD HISD Business Assistance Department**

## **Monthly Subcontractor Payments Report**

Contractor Name:		Project Name:					
Contractor's payments-to-date, this project:							
Person Preparing Report:		Preparer's phone Number:					
Please check this box if <u>Prime Contractor</u> is an MWBE register	red with	HISD or	certified by one of the agencies list	ed below*.			
SUBCONTRACTOR / VENDOR NAME	MWBE?* Y N		SUBCONTRACTOR CONTRACT AMOUNT	PAYMENT THIS PERIOD	TOTAL PAYMENTS TO DATE		
TOTALS							
MWBE subcontractor must be certified with one of: the City of Houston, the	ne Housto	n Minority	Business Council, or the Women's Bus	siness Enterprise Alliance	1		
certify that the contents of this document are true and correct.							
Signature		Name and	l Title	Date	e		
NOTE: Questions regarding the filling out of this form can be answered by -		Alexis Lice	assistance Department nta 713-556-7200 Fax: 713-556-7243				

Email: tlicata@houstonisd.org

## GENERAL CONDITIONS FOR CONSTRUCTION MANAGER-AT RISK SERVICES

- 1. The following items shall be included in the General Conditions:
  - A. Construction Manager Personnel as proposed for the Project, to the extent time is directly attributable to the furtherance of the Work. Positions may include:
    - 1. General Superintendent (full-time)
    - 2. Assistant Superintendent (part-time or full-time)
    - 3. Safety Manager (part-time)
    - 4. Project (Field) Engineer/Expeditor (full-time)
    - 5. Field office support staff (part-time or full time)
    - 6. LEED Specialist
    - 7. Project Manager (part-time)
    - 8. Project Executive (part-time)
  - B. Temporary Services and Support
    - 1. Dumpsters
    - 2. Security fencing, gates, and covered walkways, including installation, maintenance and removal
    - 3. Concrete wash pit for ready mix trucks
    - 4. Site erosion control
    - 5. Construction entrance(s)
    - 6. Traffic control rental and barricades
    - 7. Temporary electrical distribution and meters
    - 8. Temporary lighting
    - 9. Temporary fire protection
    - 10. Temporary telephone and fax system installation and monthly service costs ("land line")
    - 11. Temporary toilets
    - 12. Temporary water distribution and meters
    - 13. Temporary site signage
    - 14. Temporary stairs
    - 15. Temporary hoisting devices and materials
    - 16. Temporary barricades, cabling, and partitions
    - 16. Construction project identification signage
    - 17. Temporary weather and fire protection
  - C. Field Offices and Construction Supplies
    - 1. Drinking water, ice, and cups
    - 2. Drug testing
    - 3. Employee identification system, background checks, and badges
    - 4. First Aid supplies
    - 5. Job photos/videos
    - 6. Mobilization and demobilization
    - 7. Monthly office furnishings and office equipment costs, other than computers, electronics, and copiers

- 8. Monthly office supplies
- 9. Monthly office trailer rental costs
- 10. Monthly office trailer rental costs for office (half trailer) to be shared by Architect and Owner representative with desk and layout table
- 11. Office maintenance, repairs, and waste tank servicing
- 12. Move-In/Out and office setup
- 13. Office clean-up/janitorial services
- 14. Postage/special shipping/delivery and courier services
- 15. Aerial monthly construction progress photos
- 16. Project cleaning at Substantial Completion and Final Acceptance
- 17. Project specific signage
- 18. Project/As-Built and record drawings
- 19. Reference manuals
- 20. Preparation of operations and maintenance manuals
- 20. Remote parking expenses, if required
- 21. Miscellaneous reproduction services, except as provided in 2.2.5 of the General Conditions or as provided through Owner's printing vendors for construction documents, proposal documents, and any printed copies of submittals or other documents not required by the Construction Documents and requested by Owner
- 22. Safety material and equipment (including fire extinguishers)
- 23. Materials and supplies related to OSHA requirements
- 24. Security system/watchman (after hours, weekends)
- 25. Small tools and equipment rental or purchase
- 26. Storage trailers
- 27. Surveying supplies, layout equipment, and materials

## D. Construction

- 1. Trade permits
- 2. Mobilization
- 3. Scaffolding costs
- 3. Construction site cleaning and trash hauling
- 4. Surveys (during construction phase)
- 5. Fuel and oil costs for construction equipment
- 6. Equipment start-up and initial testing costs
- 7. Final cleaning

# 2. The following items shall NOT BE INCLUDED in the General Conditions. (If those are required, the cost should be included in the Construction Phase Fee.)

- A. Purchase/Lease of vehicles and maintenance costs
- B. Purchase/Rental of jobsite computer and electronic equipment, including copiers
- C. Purchase/Rental of radios/communication equipment
- D. Purchase/Rental of specialized telephone systems (including cellular cellular/digital phones)
- E. Construction Manager personnel bonuses, incentives, or rewards

- F. Field office travel and home office travel
- G. Employee vehicle expenses, including fuel
- H. Officer, partner, or employee liability insurance

# 3. The following items shall NOT BE INCLUDED in the General Conditions or Construction Phase Fee

- A. Partnering costs
- B. Commissioning
- C. Construction materials testing
- D. Independent mechanical systems testing and balancing
- E. Payment and Performance Bonds (include in Cost of Work within Owner's Allowance)
- F. Insurance Builder's Risk, General Liability, other general project insurance, insurance on rented equipment (include in Cost of Work within Owner's Allowance)
- G. Advertising for bids/proposals in news publications