



# AIA® Document A201® – 2017

## General Conditions of the Contract for Construction

### for the following PROJECT:

*(Name and location or address)*

#### PSYCHIATRIC EMERGENCY CENTER (PEC) - CONNECTOR

1500 S Main Street  
Fort Worth, Texas 76104

#### THE OWNER:

*(Name, legal status and address)*

#### TARRANT COUNTY HOSPITAL DISTRICT D/B/A JPS HEALTH NETWORK

1500 South Main Street  
Fort Worth, Texas 76104

#### THE ARCHITECT:

*(Name, legal status and address)*

Beck Architecture, LLC  
810 Hemphill St.  
Fort Worth, Texas 76104

#### THE CONSTRUCTION MANAGER:

*(Name, legal status and address)*

#### J.T. VAUGHN CONSTRUCTION, LLC

9160 Sterling Street, Suite 100  
Irving, Texas 75063

#### THE PROJECT MANAGER:

*(Name, legal status, address and other information)*

Broaddus-Levis  
916 Bryan Avenue  
Fort Worth, Texas 76104

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

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## ARTICLE 1 GENERAL PROVISIONS

### § 1.1 Basic Definitions

**§ 1.1.1 Agreement.** The "Agreement" means the *Standard Form of Agreement Between Owner and Construction Manager as Constructor where the basis of payment is the Cost of the Work Plus a Fee with a Guaranteed Maximum Price*, AIA A133, as modified for the Project.

**§ 1.1.2 Applicable Law.** "Applicable Law" or "Applicable Laws" means any and all laws, statutes, rules, regulations, ordinances, codes, permits, or orders of any federal, state, or local Authorities Having Jurisdiction (including but not limited to the City of Fort Worth) over the Project, all as in effect as of the date of the Agreement and as amended during the term of the Contract including those governing labor, equal employment opportunity, safety, and environmental protection, and further including, without limitation, (i) all applicable zoning ordinances, building codes, and fire and life safety codes; (ii) all accessibility laws and codes including but not limited to the Texas Accessibility Standards of the Architectural Barriers Act (TAS), *Chapter 469 of the Texas Government Code*, Elimination of Architectural Barriers, the Americans with Disabilities Act of 1990 (42 U.S.C. Section 12101), the 2010 ADA Standards for Accessible Design, and current ADAAG Standards; (iii) all standards relating to construction, inspection, and safety of hospitals set forth in *Tex. Admin. Code §133* particularly including, but not limited to Subchapter F, H and I, and *Tex. Admin. Code § 135*, particularly including, but not limited to Subchapters B and C, excluding the development, implementation, or enforcement of any operational policy or plan, periodic inspection requirements following the issuance of the Certificate of Occupancy, and any "reporting" required of Owner by *Tex. Admin. Code §135*; (iv) occupational safety acts and requirements applicable to the Project, including United States Occupational Safety and Health Administration requirements and related federal and state regulations; (v) requirements of the Fair Labor Standards Act and applicable state wage and hour laws including *Tex. Gov't. Code § 2258.001 et seq.*; (vi) any laws respecting the assumption of liability for taxes, contributions and premiums for unemployment insurance, old age or retirement benefits, pensions, annuities or other similar benefits for Construction Manager's and its Subcontractors' employees; (vii) applicable laws relating to civil/human rights, including but not limited to (a) requirements under Titles VI and VII of the Civil Rights Act of 1964, as amended, (b) the Equal Pay Act of 1963, (c) the Rehabilitation Act of 1973, and (d) the Age Discrimination in Employment Act requirements; (viii) green building policies and regulations and sustainable building codes, including those implemented by the City of Fort Worth; (ix) all Environmental Laws, applicable storm water, street, utility and other related infrastructure requirements, requirements related to the use, removal, storage, transportation, disposal and remediation of Hazardous Materials and lead based paint, and all related health laws and regulations; (x) the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"); and (xi) The Facilities Guidelines Institute Guidelines for Design and Construction of Outpatient Facilities (2018 edition) and Guidelines for Design and Construction of Hospitals (2018 edition); (xii) Centers for Medicare and Medicaid Services (CMS.gov) State Operations Manual for Ambulatory Surgical Centers and State Operations Manual for Hospitals; and (xiii) any other applicable local, state, and federal laws respecting the Project, including, but not limited to those listed in **Exhibit C** and **Exhibit D** hereto.

**§ 1.1.3 Architect.** The "Architect" is the professional architect or engineer employed by the Owner to perform all or part of the design services and the construction administration services, as detailed in that certain agreement between Owner and Architect and discussed herein in Article 4.

**§ 1.1.4 As-Built Documents.** "As-Built Documents" means the Drawings, Specifications, and other materials maintained by the Construction Manager that document all addenda, Architect's supplemental instructions, Change Orders, responses to Requests for Information, and other postings and markings that record the as-constructed conditions of the Work and all changes made to the Construction Documents during construction.

**§ 1.1.5 Authority/ies Having Jurisdiction.** "Authority Having Jurisdiction" or "Authorities Having Jurisdiction" means a federal, state, local, or other regional department, or an individual such as a fire marshal, building official, electrical inspector, utility provider or other individual having statutory authority.

**§ 1.1.6 Building Information Model.** "Building Information Model" or "BIM" means the computable, digital, multi-dimensional representation of the physical and functional characteristics of the Project's facilities and their related life-cycle information in Autodesk Revit format and Autodesk Civil 3D, to be used as a repository of design and construction information for use by the Project team during the design, bidding and construction phases of the Project, and for Owner's use throughout the life-cycle of the Project. Members of the Project Team are required to coordinate all efforts with respect to the BIM in accordance with the protocols established by the Owner.

**§ 1.1.7 Close-Out Documents.** "Close-out Documents" means the product brochures, Submittals, product/equipment maintenance and operations instructions, manuals, and other documents/warranties, As-Built Documents, Record Drawings, waiver and release of lien documents, consent of surety, and any other document required of the Construction Manager as a condition to Final Payment as set forth in more detail in Section 11.2 of the Agreement and Section 9.10 herein.

**§ 1.1.8 Confidential Information.** "Confidential Information" shall mean all information, whether or not originated by Owner, which is used in, or a part of, Owner's business and operations and is: (i) proprietary to, about, or created by Owner; (ii) gives Owner some competitive advantage or the opportunity of obtaining such advantage or the disclosure of which could be detrimental to the interests of Owner; (iii) designated as "Confidential Information" by Owner, or from all the relevant circumstances should reasonably be assumed by Construction Manager to be confidential and proprietary to Owner; or (iv) not generally known by Construction Manager. "Confidential Information" shall not include information that: (i) is or becomes available to the public generally, other than as a result of disclosure by Construction Manager in breach of the terms of this Agreement; (ii) becomes available to Construction Manager from a source (other than Owner) which source is not, to the best of Construction Manager's knowledge, subject to any legally binding obligation to keep the same confidential; or (iii) has been independently acquired or developed by Construction Manager.

**§ 1.1.9 Construction Document(s).** "Construction Document(s)" means, collectively, the Drawings, Specifications, details, Submittals, and other documents prepared by the Architect or Architect Consultants, that describe the scope and quality of the Project and the materials, supplies, equipment, systems and other elements required for construction of the Project.

**§ 1.1.10 Construction Services.** "Construction Services" means and includes methods, techniques, sequences and procedures provided or to be provided to the Construction Manager in connection with the Work, all of which shall be performed in a good and workmanlike manner, in strict accordance with the Contract Documents and all Applicable Laws, within the Contract Time, and not to exceed the Final Guaranteed Maximum Price as provided in **Exhibit AA**. Also referred to in the Contract Documents as the "Construction Phase" and/or the "Construction Services Phase".

**§ 1.1.11 Contingency.** The "Contingency" is a separately identified amount agreed to by Owner and Construction Manager included in the Cost of the Work as set forth in the Final Guaranteed Maximum Price Amendment (**Exhibit A**) to be used only in the limited circumstances described in Section 3.2.3 of the Agreement and only with prior written approval of the Owner.

**§ 1.1.12 The Contract.** The Contract Documents form the "Contract" for Construction. The Contract includes the Agreement, this AIA Document A201-2017 (as modified for this Project), and all other Contract Documents and represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations, or agreements, either written or oral. The Contract may be amended or modified only by a Modification. A Modification is a (1) written amendment to the Contract signed by both parties, (2) a Change Order, or (3) an Owner Change Directive. The Contract Documents shall not be construed to create a contractual relationship of any kind (a) between the Construction Manager and the Architect or the Architect's consultants, (b) between the Owner and a Subcontractor or a Sub-subcontractor, (c) between the Owner and the Architect or the Architect's consultants, (d) between the Project Manager and Construction Manager, or (e) between any persons or entities other than the Owner and the Construction Manager. The Project Manager and Architect shall, however, be entitled to performance and enforcement of obligations under the Contract intended to facilitate performance of the Project Manager's and Architect's duties. Conflicts or inconsistencies in the Contract Documents shall be resolved as set forth in Section 2.1.1 of the Agreement.

**§ 1.1.13 Contract Documents.** "Contract Documents" shall have the meaning assigned to it in Article 2 of the Agreement.

*(Paragraphs deleted)*

**§ 1.1.14 Contract Sum.** The "Contract Sum" is the amount to be paid to the Construction Manager for performance of the Work, as identified in Article 6 of the Agreement.

*(Paragraphs deleted)*

**§ 1.1.15 Contract Time.** Unless otherwise provided, the "Contract Time" is the period of time, including authorized adjustments, as set forth in the Final Guaranteed Maximum Price Amendment for Substantial Completion of the Work.

**§ 1.1.16 Day.** "Day" means calendar day, unless otherwise stated herein.

*(Paragraphs deleted)*

**§ 1.1.17 Drawings.** The "Drawings" are the plans, drawings, profiles, cross-sections, and supplemental drawings, or reproductions thereof, prepared by the Architect and approved by Owner, which show the locations, character, dimensions, elevations, sections, and details of the Work for the Project.

**§ 1.1.18 Environmental Laws.** "Environmental Laws" shall mean any and all federal, state, or local law, statute, ordinance, or regulation, whether now or hereafter in effect, pertaining to health, industrial hygiene, or the environmental conditions on, under, or about the Project or Owner's property, including without limitation the following, as now or hereafter amended: (i) the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C.A. § 9601 *et seq.*, as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613; (ii) the Resource, Conservation and Recovery Act, 42 U.S.C.A. § 6901 *et seq.* as amended by the Used Oil Recycling Act of 1980 (Pub. L. No. 96-463, 94 Stat. 2055 (1980)), the Solid Waste Disposal Act Amendments of 1980 (Pub. L. No. 96-482, 94 Stat. 2334 (1980)), and the Hazardous and Solid Waste Amendments of 1984 (Pub. L. No. 98-616, 98 Stat. 3221 (1984)), and regulations promulgated thereunder; (iii) the Toxic Substances Control Act, 15 U.S.C.A. § 2601 *et seq.*; (iv) Emergency Planning and Community Right to Know Act of 1986, 42 U.S.C.A. § 11001 *et seq.*; (v) the Clean Water Act, 33 U.S.C.A. § 1251 *et seq.* and National Pollutant Discharge Elimination System (NPDES) regulations; (vi) the Clean Air Act, 42 U.S.C.A. § 7401 *et seq.*; (vii) 2008 Lead Based Paint Renovation, Repair and Painting Program Rule, 40 CFR Part 7445, Subpart E; and (viii) any corresponding state laws or ordinances including, without limitation, the (a) Texas Water Quality Control Act; (b) the Texas Water Code Chapter 26; (c) Texas Solid Waste Disposal Act; (d) Texas Health & Safety Code Chapter 361; (e) Texas Clean Air Act, THSC Chapter 382; and (ix) regulations, rules, guidelines, or standards promulgated pursuant to such laws, statutes and regulations, rules, guidelines, and standards as are amended from time to time.

*(Paragraphs deleted)*

**§ 1.1.19 Final Completion.** "Final Completion" shall mean the date when the Work of the Project has been fully performed pursuant to the Contract Documents, including completion of any Change Orders and Owner Change Directives, but excluding warranty or repair work, and all requirements of Section 9.10 herein and Section 11.2 of the Agreement have been satisfied.

**§ 1.1.20 Final Payment.** "Final Payment" shall mean the final payment made to the Construction Manager following achievement of Final Completion of the Work in accordance with Section 9.10 herein and Section 11.2 of the Agreement.

*(Paragraphs deleted)*

**§ 1.1.21 General Conditions Costs.** "General Conditions Costs" shall mean the Construction Manager's allowed reimbursable expenses, including dedicated on-Site management, administrative, and supervisory personnel costs, insurance, bonds, equipment, utilities and incidental work, including minor field labor and materials and other on-Site costs and expenses incurred by the Construction Manager in the performance of its administrative, supervisory, and management responsibilities under the Contract as further described in Section 7.1.4 of the Agreement and as set forth in the Final Guaranteed Maximum Price Amendment **Exhibit A** and **Attachment 5 to Exhibit A**.

*(Paragraphs deleted)*

**§ 1.1.22 Final Guaranteed Maximum Price or Final GMP.** "Final Guaranteed Maximum Price" or "Final GMP" means that certain not-to-exceed amount, proposed and guaranteed by Construction Manager and accepted by Owner, for construction of the Project in accordance with and as reasonably inferred by the Contract Documents, as such amount may be adjusted pursuant to the terms of the Contract Documents, including authorized Change Orders, as set forth in the Final Guaranteed Price Amendment (**Exhibit A**).

*(Paragraphs deleted)*

**§ 1.1.23 Hazardous Materials.** "Hazardous Material(s)" or "Hazardous Substance" shall mean any flammables, explosives, radioactive materials, petroleum-based materials exceeding applicable federal, state, or local regulatory

limits, asbestos, polychlorinated biphenyl (PCB), radon, and other toxic substances or related materials, including without limitation substances defined as "hazardous wastes," "hazardous substances," "hazardous materials," "toxic substances," or "solid wastes" in the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. Section 9601 *et seq.*; the Resource Conservation and Recovery Act, 42 U.S.C. Section 2601, *et seq.*; and any other Applicable Law, including Environmental Laws, and all amendments and revisions thereto. The term "Hazardous Materials" shall be interpreted in the broadest sense to include any and all substances, materials, wastes, pollutants, oils, or governmental regulated substances or contaminants as defined or designated as hazardous, toxic, radioactive, dangerous, or any other similar term in or under any of the Environmental Laws, including but not limited to, asbestos and asbestos containing materials, petroleum products including crude oil or any fraction thereof, gasoline, fuels, lubricating oils and solvents, urea formaldehyde, flammable materials, explosives, PCBs, radon, radioactive materials or waste, or any other substance that, because of its quantity, concentration, physical, chemical, or infectious characteristics may cause or threaten a present or potential hazard to human health or the environment or which may impair the beneficial use of property.

**§ 1.1.24 Instruments of Service.** "Instruments of Service" are representations, in any medium of expression now known or later developed, of the tangible and intangible creative work performed by the Architect, the Architect's consultants, Owner's Consultants, or Construction Manager's consultants under their respective agreements. Instruments of Service may include, without limitation, studies, surveys, models, BIM Models, sketches, Drawings, Specifications, and other similar materials.

*(Paragraphs deleted)*

**§ 1.1.25 Notice to Proceed.** A "Notice to Proceed" is written authorization from the Owner to the Construction Manager specifying the date Preconstruction Services and Construction Services shall begin and any conditions regarding the commencement of such services and/or Work.

**§ 1.1.26 Owner.** The "Owner" is the person or entity identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number. The term "Owner" means the Owner or the Owner's designated representative.

*(Paragraph deleted)*

**§ 1.1.27 Owner Consultant.** An "Owner Consultant" is a person or entity providing professional services for the Owner directly for a portion of the Work. "Owner Consultant" is referred to throughout the Contract Documents as if singular in number. To the extent required by the relevant jurisdiction, an Owner Consultant shall be lawfully licensed to provide the required professional services.

**§ 1.1.28 Owner's Estimated Construction Cost.** The Owner's Estimated Construction Cost is that amount the Owner estimates as the Costs of construction of the Project not including Construction Manager's General Conditions Costs or Fee.

**§ 1.1.29 Preconstruction Services.** "Preconstruction Services" are those set forth in Section 3.1 of the Agreement to be provided by Construction Manager prior to the execution of the Final Guaranteed Maximum Price Amendment and as designated in writing by Owner. Also referred to in the Contract Documents as the "Preconstruction Phase" and the "Preconstruction Services Phase".

**§ 1.1.30 The Project.** The "Project" is identified on the first page of this AIA Document A201-2017 (as modified for this Project) and the first page of the Agreement. The Project includes 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.

**§ 1.1.31 Project Manager.** "Project Manager" means the entity identified in Section 1.1.9 of the Agreement, and, comprised of licensed professionals retained by the Owner to provide general oversight within its professionals' licensed capabilities, including but not limited to project management services for the Project, strategic Project planning, Site planning, operational planning, budgetary impact analysis, scheduling analysis, review and approvals of Applications for Payment, and Project controls, all as detailed in that certain agreement between Owner and Project Manager.

**§ 1.1.32 Project Schedule.** The "Project Schedule" is that certain schedule prepared by Construction Manager Based on the Preliminary Schedule provided by Construction Manager, and included as **Attachment 7** to the Final Guaranteed Maximum Price Amendment (**Exhibit A**).

**§ 1.1.33 Project Team.** "Project Team" means the Owner, Construction Manager, Architect, Project Manager, Owner's designated design consultant(s), any Separate Contractors employed by Owner, and other consultants employed by any of them for the purpose of programming, design, construction, and commissioning 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.

**§ 1.1.34 Quality Assurance.** "Quality Assurance" means the review, inspection, and testing of materials and Work by Owner through its Project Manager in accordance with Section 3.1.12 of the Agreement during construction of the Work to verify Construction Manager's compliance with the Contract Documents as to performance, effectiveness, and freedom of the Work from defects or errors.

**§ 1.1.35 Quality Control.** "Quality Control" means a program of testing, coordination, start-up, operational checkout and commissioning of all items of Work included in the Project by Construction Manager that ensures conformance of the Work with the Contract Documents.

**§ 1.1.36 Record Drawings.** "Record Drawings" are those final, compiled drawings, prepared by the Architect and approved by the Architect and Construction Manager after review of the As-Built Documents and Construction Manager's notes, drawings, and markings thereupon, wherein Architect verifies, in accordance with its Standard of Care, the as-built conditions of the Work.

**§ 1.1.37 Request for Information or RFI.** "Request for Information" or "RFI" means a written request by Construction Manager directed to the Architect for a clarification of the information contained in the Contract Documents, any Specification, or any Drawing or requesting direction concerning information necessary to perform the Work that may not be contained in the Contract Documents.

**§ 1.1.38 Site.** "Site" means the property on which the Project is located and surrounding environs otherwise affected or impacted in performing the Work.

**§ 1.1.39 Specifications.** The "Specifications" are those portions of the Contract Documents prepared by the Architect consisting of the written requirements for materials, equipment, systems, standards and workmanship for the Work, and performance of related services.

**§ 1.1.40 Subcontractor.** A "Subcontractor" is a person or entity that has a direct contract with the Construction Manager or a Subcontractor of any tier to perform a portion of the construction required in connection with the Work on the Project. The term "Subcontractor" is referred to throughout the Contract Documents as if singular in number and means a Subcontractor or an authorized representative of the Subcontractor. The term "Subcontractor" includes sub-subcontractors and lower tier contractors (entities who have contracts with sub-subcontractors) but does not include a Separate Contractor retained by Owner.

**§ 1.1.41 Submittal.** A "Submittal" is any submission by the Construction Manager to the Owner for review and approval, demonstrating how the Construction Manager proposes to conform to the Contract Documents for those portions of the Work for which the Contract Documents require Submittals. Submittals include, but are not limited to, shop drawings, product data, and samples.

**§ 1.1.42 Substantial Completion.** "Substantial Completion" shall have the meaning set forth in Section 9.8.1 herein and Section 1.1.4.3 of the Agreement.

**§ 1.1.43 The Work.** The term "Work" means the Preconstruction Services and Construction Services required under the Agreement and as further detailed in the Contract Documents (including the Final Guaranteed Maximum Price Amendment), whether completed or partially completed, and includes all labor, materials, equipment, and services provided or to be provided by the Construction Manager to fulfill the Construction Manager's obligations thereunder. The Work may constitute the whole or a part of the Project. The Work includes all labor, parts, supplies, skill, supervision, transportation, services and other facilities and things necessary, proper or incidental to the carrying out and completion of the terms of the Contract Documents and all other items needed to produce, construct, and fully complete the Work items shown by the Contract Documents.

## **§ 1.2 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 Construction Manager. The Contract Documents are complementary, and what is required by one shall be as binding as if required by all; performance by the Construction Manager 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 invalidity of any provision of the Contract Documents shall not invalidate the Contract or its remaining provisions. If it is determined that any provision of the Contract Documents violates any law, or is otherwise invalid or unenforceable, then that provision shall be revised to the extent necessary to make that provision legal and enforceable. In such case the Contract Documents shall be construed, to the fullest extent permitted by law, to give effect to the parties' intentions and purposes in executing the Contract.

**§ 1.2.2** Organization of the Specifications into divisions, sections and articles, and arrangement of Drawings shall not control the Construction Manager in dividing the Work among Subcontractors or in establishing the extent of Work to be performed by any trade. When standards, codes, manufacturer's instructions and guarantees are required by the Contract Documents with no edition specified, the current edition at the time of Contract execution shall apply. References to standards, codes, manufacturer's instructions and guarantees shall apply in full, except (1) they do not supersede more stringent standards set out in the Contract Documents, and (2) any exclusions or waivers that are inconsistent with the Contract Documents will be reported to and timely resolved by the Architect after presentation of an RFI by the Construction Manager.

**§ 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** The Drawings and Specifications are correlative and have equal authority and priority. Should there be a conflict of terms within themselves, or with each other, base the bids on (and furnish) the most efficient combination of quality and quantity of work indicated. The Architect will clarify the Project requirements in the event of the above mentioned conflicts.

- .1 Figures take precedence over scale measurements.
- .2 Large scale details take precedence over smaller scale details.
- .3 Architectural Drawings take precedence in regard to dimensions, when in conflict with Mechanical and Structural Drawings, except for the size of the structural members.
- .4 Specifically titled Drawings and sections of the Specifications take precedence over indication of the item in a collateral way.
- .5 Existing conditions take precedence over Drawings and Specifications for dimensions.
- .6 Note entries take precedence over graphic indications.

## **§ 1.3 Capitalization**

Terms capitalized in this AIA Document A201–2017 (as modified for this Project) 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 Copyrights/Trademarks/Instruments of Service.** Drawings, Specifications and other documents prepared by Architect, its consultants, other consultants retained by Owner for the Project, or by Construction Manager or its Subcontractors, that describe the Work to be executed by the Construction Manager are Instruments of Service and shall remain the property of their authors (or Owner, as may be provided in the respective contractual agreements between Owner and the respective design professional). These documents are for use on the Project only and the Construction Manager and its Subcontractors shall not use the documents on any other projects. The Construction Manager shall be permitted to retain one record set of such documents. All other copies of the documents shall be returned to their respective authors or owners or otherwise suitably accounted for. The Construction Manager and its Subcontractors are authorized to reproduce and use portions of the documents as necessary and appropriate for the execution of the Work. Submission or distribution of the documents to meet official regulatory requirements or for other purposes in connection with the Project shall not diminish the author's or owner's rights.

**§ 1.5.1.1** Construction Manager agrees that all Instruments of Service prepared by Construction Manager pursuant to this Agreement are subject to the rights of Owner in effect on the date of execution of this Agreement. These rights include the right to use, duplicate and disclose such subject matter and data, in whole or in part, in any manner for alterations, additions, remodels or maintenance; and to have others do so including production of the instruments of service in response to a public information request pursuant to *Tex. Gov't. Code Ch. 552*. If the instruments of service produced by Construction Manager are subject to copyright protection, Construction Manager hereby grants to Owner a royalty-free, nonexclusive, and irrevocable license to reproduce, publish, and use such and to authorize others to do so. Owner shall be further authorized to make subsequent use of any instruments of service for any and all future renovations, modifications, alterations, maintenance, repairs, and the like, of the Project. Construction Manager shall include appropriate provisions to achieve these purposes in all Subcontracts entered into that produce information subject to copyright protection. All Instruments of Service, including Shop Drawings and Drawings and Specification, shall be stamped "Confidential Information" by the Architect and/or Architect's Consultants, Construction Manager, or Subcontractors.

**§ 1.5.1.2** Construction Manager shall promptly provide copies of all Instruments of Service in Construction Manager's possession to Owner upon completion, termination, or cancellation of this Agreement for any reason, including all copies in any form or medium specified by Owner in this Agreement, whether written, digital, or electronic.

**§ 1.5.1.3 No Use of Owner's Name or Trademark.** Construction Manager agrees not to make any written use of or reference to Owner's name or registered or unregistered trademarks for any marketing, public relations, advertising, display or other business purpose or make any use of Owner's facilities for any activity related to the express business purposes and interests of Owner pursuant to this Agreement, without the prior written consent of Owner which consent may be withheld or granted in Owner's sole discretion. Construction Manager shall not advertise that it is doing business with Owner or use this Agreement as any sort of marketing or sales tool without the prior written consent of Owner.

**§ 1.5.2 Works Made for Hire.** All Work performed by Construction Manager and its Subcontractors shall constitute the exclusive property of Owner. All right, title and interest in and to said Work shall automatically and without further notice or action vest in Owner upon creation and shall be deemed to be a work for hire and made in the course of the services rendered pursuant to this Agreement. To the extent that title to any such Work may not, by operation of law, vest in Owner, or such Work may not be considered a work made for hire, all rights, title and interest therein are hereby irrevocably and unconditionally assigned to Owner. Owner shall also have the right to obtain and to hold in its name any and all patents, copyrights, registrations or such other protection as may be appropriate to the subject matter, and any extensions and renewals thereof. Construction Manager must give Owner, as well as any person designated by Owner, all assistance reasonably necessary to effectuate the intent of this section and to perfect the rights and interests defined herein without any charge or expense to Owner beyond those amounts payable to Construction Manager for the services rendered under this Agreement.

**§ 1.5.3** The Owner may provide the Construction Manager with pre-existing drawings, documents, designs, and other information which the Construction Manager may use in connection with performance of the Work under this Contract. The Construction Manager confirms and agrees that the Owner has and shall retain all rights, title, and interest in and to such drawings, documents, designs and information, including, without limitation, any copyright or other intellectual property rights, and that by use of such drawings, documents, designs and information, the

Construction Manager shall not acquire any right, title, or interest in such drawings, documents, designs and information, including, without limitation, any copyright or other intellectual property rights.

## **§ 1.6 Notice**

**§ 1.6.1** Except as otherwise provided in Section 1.6.2, where the Contract Documents require one party to notify or give notice to the other party, such notice shall be provided in writing to the designated representative of the party to whom the notice is addressed as set forth in Section 14.4 of the Agreement and shall be deemed to have been duly served if delivered in person, by mail, by courier, or by electronic transmission if a method for electronic transmission is set forth in the Agreement.

**§ 1.6.2** Notice of Claims as provided in Section 15.1.3 shall be provided in writing and shall be deemed to have been duly served only if delivered to the designated representative of the party to whom the notice is addressed as set forth in Section 14.4 of the Agreement by certified or registered mail, or by courier providing proof of delivery.

## **§ 1.7 Digital Data Use and Transmission**

If the parties intend to transmit Instruments of Service or any other information or documentation in digital form, they shall endeavor to establish necessary protocols governing such transmissions, unless otherwise already provided in the Agreement or the Contract Documents.

## **§ 1.8 Building Information Models Use and Reliance**

Pursuant to Section 3.1.5 of the Agreement, Construction Manager shall coordinate efforts with the Owner, Project Manager, and the Architect to successfully implement the BIM plan for the Project. Construction Manager will provide personnel, including a BIM Coordinator, and appropriate services to ensure the proper flow of information is provided to enable appropriate input into and output from the BIM, including, but not limited to, importing information into the BIM, providing updated information on changes to the Project Drawings and Specifications during construction, assisting on conflict resolution, coordinating the sharing of information, facilitating file exchange, and other deliverables as assigned to it in the BIM plan. Construction Manager will provide reports and other BIM deliverables as designated by Owner on a recurring basis.

# **ARTICLE 2 OWNER**

## **§ 2.1 General**

**§ 2.1.1** The Owner's representative(s) who is authorized to act on Owner's behalf with respect to all matters with respect to the Project is set forth in Sections 1.1.8 and 4.2 of the Agreement; provided, however, the scope of such representative(s) authority shall be limited to the extent previously delegated in writing by Owner. Except as otherwise provided in Section 4.2.1, the Architect does not have such authority. Owner shall provide Construction Manager notice of any change in any representative within **ten (10)** Days of such change.

**§ 2.1.2** The Owner shall, with reasonable promptness, provide Construction Manager with copies of, or reasonable access to information and documentation regarding the Project and to the property on which the Project is located, including but not limited to the information set forth in Sections 2.2 and 2.3 below, as well as information regarding Owner's Project program which shall set forth Owner's objectives, constraints, and Owner Criteria. Such information may include schedule, space requirements and relationships, flexibility and expandability, special equipment, systems sustainability and Site requirements.

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

**§ 2.2.1** In accordance with *Tex. Bus. & Comm. Code §56.054(e)*, Owner will provide Construction Manager with reasonable evidence that the Owner has made financial arrangements to fulfill the Owner's obligations under the Contract if requested in writing by the Construction Manager.

**§ 2.2.2** *[Intentionally deleted].*

**§ 2.2.3** *[Intentionally deleted].*

*(Paragraph deleted)*

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

**§ 2.3.1** The Owner shall cooperate with the Construction Manager in securing building and other permits, licenses and inspections. Except for permits and fees that are the responsibility of the Construction Manager under the Contract

Documents, including those required under Section 3.7.1, the Owner shall secure and pay for necessary approvals, easements, assessments and charges required for construction, use or occupancy of permanent structures or for permanent changes in existing facilities.

§ 2.3.2 *[Intentionally Deleted]*.

§ 2.3.3 *[Intentionally deleted]*.

§ 2.3.4 The Owner shall promptly obtain easements, zoning variances, and legal authorizations or entitlements regarding Site utilization where essential to the execution of the Project. The Owner shall furnish, as available, maps, surveys describing physical characteristics, legal limitations and utility locations for the Site, and Drawings in the possession of Owner that reflect or depict Site boundaries, recorded easements, geological formation/conditions, test borings/reports, topography, and utility locations and any related document reflecting Site conditions.

§ 2.3.5 *[Intentionally deleted]*.

§ 2.3.6 Unless otherwise provided in the Contract Documents, the Owner shall furnish to the Construction Manager such copies of Contract Documents, including Drawing and Specifications, bidding information and instructions, payment and performance bond forms, schedules, communications, health screenings, credentialing protocols, HIPAA compliance information, Owner provided information as set forth in **Exhibit D** and any other information relevant to the performance of the Work as are reasonably necessary for execution of the Work. Construction Manager shall comply with such information.

§ 2.3.7 The Owner may arrange for the services of a Commissioning Agent as is necessary for the Project. The Owner's hiring of such Commissioning Agent shall in no event relieve Construction Manager from its commissioning obligations under Section 3.7.6 herein and in the Contract Documents.

§ 2.3.8 The Owner may request that the Project Manager perform inspections at the Project on behalf of Owner. Construction Manager shall give Project Manager access to the Work as need to perform such inspections. The performance of inspections by the Project Manager shall not lessen or reduce Construction Manager's responsibility for the Work. Construction Manager shall remain fully and solely responsible for constructing the Work in strict accordance with the Contract Documents.

§ 2.3.8.1 Visits to the Site by the Owner or Project Manager shall not be construed to create an obligation on the part of the Owner to make on-Site inspections to check the quality or quantity of the Work. Neither the Owner nor the Project Manager shall have control over or charge of, nor be responsible for, the construction means, methods, techniques, sequences or procedures, or for the safety precautions and programs in connection with the Work, because these are solely the Construction Manager's rights and responsibilities under the Contract Documents.

§ 2.3.8.2 Neither the Owner nor the Project Manager shall be responsible for the Construction Manager's failure to perform the Work in accordance with the requirements of the Contract Documents. Neither the Owner nor the Project Manager shall have control over nor charge of, and will not be responsible for acts or omissions of the Construction Manager, Subcontractors, or their agents or employees, or any other persons or entities performing portions of the Work for the Construction Manager.

§ 2.3.9 While not obligated to do so, and in addition to the observations of the Architect and Project Manager, if Owner observes or otherwise becomes aware of a fault or defect in the Work or non-conformity with the Construction Documents, the Owner may give written notice thereof to the Construction Manager. Notwithstanding the foregoing, no review by Owner shall relieve Construction Manager of its responsibilities for the performance of its obligations under this Agreement of the accuracy, adequacy, fitness, suitability or coordination of the Work.

§2.3.10 The Owner shall approve the date of Substantial Completion in accordance with Section 9.8 and the date of Final Completion in accordance with Section 9.10.

## § 2.4 Owner's Right to Stop the Work

If the Construction Manager fails to correct Work that is not in accordance with the requirements of the Contract Documents as required by Section 12.2 or fails to carry out Work in accordance with the Contract Documents, the

Owner may issue a written order to the Construction Manager 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 Construction Manager or any other person or entity, except to the extent otherwise required by Section 6.1.3.

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

*(Paragraphs deleted)*

**§ 2.5.1** If the Construction Manager defaults or neglects to carry out the Work in accordance with the Contract Documents and fails within a **ten (10)** 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 Construction Manager the reasonable cost of correcting such deficiencies, including, without limitation, Owner's expenses and compensation for the Architect's and Project Manager's additional services made necessary by such default, neglect or failure. Such action by the Owner and amounts charged to the Construction Manager shall be reasonable and necessary. If payments then or thereafter due the Construction Manager are not sufficient to cover such amounts, the Construction Manager shall pay the difference to the Owner. The rights of the Owner hereunder shall not give rise to any duty on the part of the Owner to exercise same for the benefit of the Construction Manager or any other person or entity. If providing the above-referenced prior notice to the Construction Manager is not reasonable because of emergency or exigent circumstances, the Owner shall provide only such prior notice that is reasonable under the circumstances.

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

## **§ 2.6 Acceleration for Owner's Convenience**

**§ 2.6.1** In the event Owner desires to accelerate the Project Schedule, Owner shall so notify the Construction Manager in writing.

**§ 2.6.2** Upon receipt of such written instruction, Construction Manager shall require its personnel and its Subcontractors to work such overtime hours and/or to increase their respective work forces as may be reasonably necessary to meet Owner's acceleration goals.

**§ 2.6.3** Unless a Change Order is issued and approved by Owner, such written acceleration instructions shall be considered an Owner Change Directive and Construction Manager shall respond in accordance with Section 7.3 herein.

## **§ 2.7 Project Manager**

**§ 2.7.1** The Project Manager 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 term "Project Manager" means the Project Manager or the Project Manager's designated representative identified in the Agreement. The Project Manager has authority to act on the Owner's behalf only to the extent provided in Section 2.7.4.

### **§ 2.7.2 Notices to Project Manager**

All notices or information to be provided under the Contract Documents to the Owner are also required to be provided, contemporaneously, to the Project Manager, unless Owner expressly notifies the Construction Manager in writing to the contrary. This obligation to furnish all such notices or information to the Project Manager exists whether or not these General Conditions or any other Contract Documents expressly provide for notice to the Project Manager.

### **§ 2.7.3 Rights of Project Manager**

Project Manager shall have the same rights of access to the Site as Owner and Architect and shall participate in all meetings or conferences in which Owner designates the Project Manager to participate, unless Owner expressly notifies the Construction Manager in writing to the contrary.

### **§ 2.7.4 Authority of Project Manager**

The Project Manager is an independent contractor retained by the Owner to assist it as a consultant and advisor to the Owner on the Project until Final Completion, unless otherwise designated by Owner. Notwithstanding the presence of the Project Manager at the Project and in Project meetings, the Owner directly employs representatives who will actively participate in Project meetings and be authorized to provide any approval, grant any consent, assert any objection, or make any decision required by the Contract Documents. Unless Construction Manager has been provided with written notice from one of the Owner's designated representatives granting specific authority to the Project Manager, Project Manager shall not be authorized to bind the Owner as to any approval, consent, objection, or decision except to the extent expressly authorized by the Contract Documents. Such limitation of authority, however, shall not obviate or limit Construction Manager's obligation to provide notices to the Project Manager as required by Section 2.7.2 above and to provide access to the Project Manager as required by Section 2.7.3 above.

### **§ 2.7.5 Project Manager's Duties**

**§ 2.7.5.1** The Project Manager shall perform the duties required of it as directed by Owner which shall include, but not be limited to planning, management, and coordination the Project, providing an initial Project program scope and strategy, review of request for proposals/request for qualification and other solicitation documents, review of responses received to request for proposals/request for qualifications, including creating a due diligence process for such review, development and maintenance of a Project cost control system, collaboration with Construction Manager and monitoring of the Project Schedule, oversight and creation of a Quality Assurance program to monitor and report to Owner with respect to the quality of the Construction Manager's Work, functional and space programming services, coordination of BIM systems and protocols, review of Construction Manager's Site-specific safety program, peer review of designed systems, reporting on Project progress, and other such deliverables as assigned by Owner.

**§ 2.7.5.2 Quality Assurance.** Project Manager shall perform Quality Assurance testing as necessary to ensure the Work and materials and systems incorporated into the Work are in compliance with the performance requirements of the Contract Documents, the Specifications and Applicable Law. The Owner may request that the Project Manager perform inspections at the Project on behalf of Owner as part of Project Manager's Quality Assurance responsibilities.

## **ARTICLE 3 CONSTRUCTION MANAGER**

### **§ 3.1 General**

**§ 3.1.1** The Construction Manager 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 Construction Manager shall comply, and shall require its Contractors, Subcontractors, and consultants to comply with any applicable licensing requirements in the jurisdiction where the Project is located. The Construction Manager's representative(s) who is authorized to act on Construction Manager's behalf with respect to the Project is set forth in Section 1.1.12 of the Agreement. Construction Manager's representative(s) shall be the primary point of contact during the Work of the Project and shall have express authority to bind the Construction Manager with respect to all matters under this Contract. The term "Construction Manager" means the Construction Manager or the Construction Manager's authorized representative.

**§ 3.1.2** The Construction Manager shall perform the Work and provide all labor, materials, equipment, tools, transportation, and supplies necessary to complete the Work described in, reasonably inferable from, and in accordance with the Contract Documents and in strict compliance with Applicable Law. Construction Manager shall supervise, direct and perform the Work in a good and workmanlike manner and shall exercise the degree of care, skill, and diligence in the performance of the Work in accordance and consistent with industry standards for similar projects and circumstances and in furtherance of the interests of Owner To this end, Construction Manager shall deliver the Work on time and within the Final Guaranteed Maximum Price and will provide cost-effective capital solutions, innovation and resource stewardship while completing the Work under this Agreement, including complete coordination and cooperation with the Owner and Project Manager. Construction Manager shall furnish efficient business administration and supervision to and for the Project in accordance with Section 3.1.2. Construction Manager 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. Construction Manager shall at all times use reasonable measures to protect the Work from damage caused by weather and casualties. Construction Manager shall communicate promptly to Owner any and all concerns that Construction Manager may have with regard to the Work, or services of others on the Project, including, without limitation, any defects or potential defects in planning, design, or construction of the Work, and shall cooperate with Owner and other professionals and experts if errors or omissions are discovered in the Contract Documents.

§ 3.1.3 The Construction Manager accepts this level of trust and confidence between the Construction Manager and Owner established by the Contract Documents. The Construction Manager shall not be relieved of obligations to perform the Work in accordance with the Contract Documents either by activities or duties of the Project Manager, or the Architect in the Architect's administration of the Contract, or by tests, inspections, duties, or approvals required or performed by persons or entities other than the Construction Manager.

§ 3.1.4 The Construction Manager represents and warrants to Owner that it and its employees, Subcontractor, and material suppliers are experienced in the type of construction necessary to perform and complete the Work required under this Agreement. Construction Manager understands the complexity involved in this type of construction and the necessity of coordination of its Work with Owner, Project Manager, Owner's Separate Contractors, and Authorities Having Jurisdiction.

### § 3.2 Review of Contract Documents and Field Conditions by Construction Manager

§ 3.2.1 Execution of the Contract by the Construction Manager is a representation that the Construction Manager has visited the Site, become generally familiar with local conditions under which the Work is to be performed, and correlated personal observations with requirements of the Contract Documents. The Construction Manager and each Subcontractor shall evaluate and satisfy themselves as to the conditions and limitations under which the Work is to be performed, including, without limitation (1) the location, condition, layout and nature of the Site and surrounding areas including all access requirements, hoisting requirements and conditions, and Site logistics; (2) prevailing climatic conditions; (3) anticipated labor supply and costs; (4) availability and cost of materials, tools and equipment; (5) any applicable policies, procedures, rules and restrictions of Owner relating to construction on the real property, including but not limited to any credentialing, HIPAA, and health screening protocols required by Owner, including all requirements of Owner's Special Terms and Conditions attached hereto as **Exhibit C** and Owner-Provided Information in **Exhibit D** and any other Owner provided information or documents; (6) Applicable Law; (7) Executive Orders by local, State of Texas, or federal government authorities or other Authorities Having Jurisdiction relating to COVID-19; and (8) other similar issues. The Owner shall not be required to make any adjustment in either the Contract Sum or Contract Time in connection with any failure by the Construction Manager or any Subcontractor to comply with the requirements of this Section. Construction Manager and its Subcontractors shall be solely responsible for providing a safe place for the performance of the Work.

§ 3.2.2 The Construction Manager 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 4.1.4 of the Agreement, 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 Construction Manager and are not for the purpose of discovering errors, omissions, or inconsistencies in the Contract Documents. Notwithstanding any limitations in *Tex. Bus. & Comm. Code § 59.001 et. seq.* regarding Construction Manager's responsibilities for defects in plans, Drawings and Specifications, Construction Manager acknowledges that it is responsible for the consequences of design defects in, and does warranty the accuracy, adequacy, sufficiency, and suitability of plans, Drawings, Specifications, or other design documents that it provides and that are provided to the Construction Manager by its agents, contractors, Subcontractors, fabricators, or suppliers, or its consultants of every tier. Further, Construction Manager is responsible where Construction Manager provides input and guidance on plans, Drawings, Specifications or other design documents through work product signed and sealed by a licensed professional that is incorporated into plans, Drawings, Specifications, or other design documents used in the Work.

§ 3.2.2.1 The Construction Manager acknowledges the Owner does not represent or warrant the accuracy or completeness of information provided by the Owner related to existing conditions and locations of existing utilities and services. Such information if provided, is provided to the Construction Manager as a matter of convenience and does not substitute for the Construction Manager using due diligence to reasonably observe and or to access space to determine errors, inconsistencies or omissions. Construction Manager shall verify the exactness of grades, elevations, dimensions, or locations given on any drawings issued by Architect. In all cases of interconnection of the Work with existing conditions, Construction Manager shall verify at the Site all dimensions relating to such existing conditions.

§ 3.2.3 Recognizing the limitations under *Tex. Bus. & Comm. Code § 59.001 et. seq.*, and as indicated in Section 3.2.2 above, if upon review of the plans, Drawings, Specifications, or other design documents, the Construction Manager discovers a defect, inaccuracy, inadequacy or insufficiency in the plans, Drawings, Specifications or other design documents, the Construction Manager shall promptly report to the Owner, in writing, the existence of any defect in the

plans, Drawings, Specifications, or other design documents that is discovered by the Construction Manager, or that reasonably should have been discovered by the Construction Manager, using ordinary diligence, before or during construction. If the Construction Manager performs any construction activity when it knew or reasonably should have known it was not in accordance with Applicable Law without such notice to the Architect and Owner and instruction to proceed, the Construction Manager shall be liable for any damages, costs or liability resulting therefrom, including, without limitation, any fines, Architect's fees, consulting fees, and costs of correction of the Work.

**§ 3.2.4** If the Construction Manager believes that additional cost or time is involved because of clarifications or instructions the Architect issues in response to the Construction Manager's notices or Requests for Information pursuant to Sections 3.2.2 or 3.2.3, the Construction Manager shall submit a Claim as provided in Article 15. If the Construction Manager fails to perform the obligations of Sections 3.2.2 or 3.2.3, the Construction Manager shall pay such costs and damages to the Owner as would have been avoided if the Construction Manager had performed such obligations. The Construction Manager shall not implement any such change without written direction from Owner in the form of a Change Order or Owner Change Directive, as appropriate.

**§ 3.2.5** Prior to performing any affected Work, Construction Manager shall locate all utility lines, including telephone company lines and cables, sewer lines, water pipes, gas lines, electrical lines, including, but not limited to, all buried pipelines and buried telephone cables, as shown and located on the Drawings and Specifications and the survey (if any) furnished pursuant to Section 4.1.4 of the Agreement and shall perform any Work in such a manner so as to avoid damaging any such lines, cables, pipes and pipelines. Construction Manager shall be responsible, if, during the performance of the Work it or its Subcontractors negligently or intentionally damage said lines, cables, pipes and pipelines. In addition, Construction Manager shall review any applicable Hazardous Materials surveys for the particular buildings, if any, involved in the Project(s), and shall notify all Subcontractors and Sub-subcontractors of the necessity to review said surveys. Construction Manager shall perform all Work in such a manner as to comply with all Environmental Laws concerning remediation of Hazardous Materials found on the Site or identified and located in any Hazardous Material surveys.

**§ 3.2.6** Neither any oral representation by or oral agreement with the Owner, Project Manager, Architect, or any representative, consultant, officer, agent, or employee of any of them before execution of this Contract shall affect or modify any of Construction Manager's rights or obligations hereunder, all such prior oral representations, understandings, and agreements being superseded by this Contract. Construction Manager is not aware of any facts that are misleading or inaccurate in any material respect, or any information Owner, Project Manager, or Architect or any of their representatives, consultants, officers, agents, or employees have furnished to Construction Manager which would have a material, adverse effect on the Contract Time or Final Guaranteed Maximum Price and if, during the course of the performance of the Work, Construction Manager learns of any such facts, it will so advise each of said parties.

### **§ 3.3 Supervision and Construction Procedures**

**§ 3.3.1** The Construction Manager shall supervise and direct the Work, using the Construction Manager's best skill and attention. Construction Manager shall commence, diligently prosecute, and complete the Work in accordance with the Contract Documents and within the Contract Time set forth in the Agreement. The Construction Manager 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 Construction Manager shall evaluate the Site safety thereof and, except as stated below, shall be fully and solely responsible for the Site safety of such means, methods, techniques, sequences or procedures. If the Construction Manager determines that such means, methods, techniques, sequences or procedures may not be safe, the Construction Manager shall give timely written notice to the Owner, Project Manager, and Architect and shall not proceed until resolution of any such concerns.

**§ 3.3.2 CONSTRUCTION MANAGER IS RESPONSIBLE TO OWNER FOR ALL ACTS AND OMISSIONS OF CONSTRUCTION MANAGER'S EMPLOYEES, SUBCONTRACTORS AND THEIR AGENTS AND EMPLOYEES, AND ANY OTHER PERSONS PERFORMING ANY OF THE WORK UNDER A CONTRACT WITH CONSTRUCTION MANAGER OR ITS SUBCONTRACTORS OR ANYONE OVER WHOM CONSTRUCTION MANAGER OR ITS SUBCONTRACTORS EXERCISE CONTROL.**

§ 3.3.3 The Construction Manager shall be responsible for inspection of portions of the Work already performed to determine that such portions are in proper condition to receive subsequent Work. Construction Manager shall provide competent supervision of all phases of the Work and inspect the Site at intervals appropriate to the stage of construction and the status of the Project. Construction Manager will keep the Owner informed of the progress of the Work and potential for delays foreseeable by Construction Manager, and shall guard the Owner against defects and deficiencies in the Work. Construction Manager shall be responsible for correction of any Work rejected as not being in accordance with the Construction Documents.

§ 3.3.4 Construction Manager has the responsibility to ensure that all Subcontractors, and their agents and employees, adhere to the Contract Documents and that they order and provide materials to the Site on time, taking into account the current market and delivery conditions. Construction Manager shall coordinate its performance of the Work with that of all others on the Project, including deliveries, storage, installations and construction of utilities.

§ 3.3.5 As between Owner and Construction Manager, the Construction Manager: (a) assumes full responsibility for the safety of all persons employed or utilized by the Construction Manager or under the Construction Manager's control and supervision; (b) shall maintain complete supervision and control over the Construction Manager's agents, employees, and Subcontractors; and (c) agrees to perform all of the Construction Manager's obligations under this Agreement in accordance with the Construction Manager's own methods subject to compliance with this Agreement. In no event shall the Owner have control over, charge of, or any responsibility for construction means, methods, techniques, sequences, or procedures, or for safety precautions and programs in connection with the Work, notwithstanding any of the rights and authority granted the Owner in the Contract Documents.

§ 3.3.6 **Quality Control/Quality Assurance.** Construction Manager shall develop, implement, and at all times comply with, the Quality Control Plan prepared during Preconstruction and approved through the approval of the Final Guaranteed Maximum Price Amendment (**Exhibit A**) as **Attachment 12**. The Quality Control Plan shall govern all testing, inspection, and review of the Work to ensure the Work complies with Applicable Law, standards and requirements of Owner and Project Manager, and any insurance requirements. At a minimum, Construction Manager's Quality Control Plan shall include identification of the Quality Control supervisor, the details of the proposed Quality Control Plan and implementation of same; production and implementation of Quality Control reports; confirmation that any Quality Control Plan complies with Applicable Law and requirements set forth in any insurance requirements. Construction Manager's Quality Control Plan shall contain a methodology for incorporation of the Quality Control Plan into all subcontracts and appropriate oversight to deliver the Project such that it complies with the Contract Documents in all respects. Construction Manager shall provide Owner and Project Manager Quality Control reports for their review and approval. Pursuant to Section 2.7.5, Project Manager shall perform Quality Assurance testing on behalf of Owner at the Project, as necessary.

§ 3.3.7 **Budget Control.** To provide for timely and detailed control of costs and expenditures, Construction Manager will:

- .1 maintain cost accounting records in good form on expenditures for materials, labor, or for any other expenditures;
- .2 promptly identify all variances between estimated costs and actual costs during construction and report such variances, and recommend to the Project Team measures to counter any adverse cost movements, no more than **five (5) Days** after acquiring such information;
- .3 comply with requirements for submission of progress and final pay applications and related documents as provided in Article 11 of the Agreement and Article 9 herein;
- .4 prepare and administer its Schedule of Values and all Subcontractors' Schedule of Values together with sworn statements and waivers of lien, contract and disbursement summaries, Change Order logs, Change Orders, and budget cost summary reports and submit same to Owner on a monthly basis;
- .5 identify all variances (increases or decreases) between estimated costs and actual costs and report such variances to Owner within **five (5) Days**, along with recommendations for corrective action; and
- .6 notify Owner within **five (5) Days** of identification of any item or portion of the Project that Construction Manager contends is not within the scope of the Project, or if Construction Manager contends that an adjustment to the Final Guaranteed Maximum Price or the Contract Time.

**§ 3.3.8 Communication and Reporting.** Construction Manager will establish procedures for effective communication and coordination among the Project Team, Subcontractors, and others regarding the construction of the Project, and implement and continuously modify such procedures as necessary. To the extent of an apparent conflict in the sequencing of the Work or services with another service provider, Construction Manager shall report the concern to the Project Manager. Construction Manager shall coordinate delivery and installation of Owner-procured material and equipment and shall cooperate with any commissioning agent, consultant, vendor, or service provider engaged by Owner.

**§ 3.3.8.1 Meetings.** Construction Manager shall schedule and conduct periodic meetings with the Owner to review matters such as procedures, progress, coordination, and scheduling of the Work. Construction Manager shall actively participate in all meetings and/or teleconferences to bring the full measure of Construction Manager's collective experience, expertise and recommendations to the Project as it pertains to the overall Project or to a specific discipline including, but not limited to, all explanatory presentations with other Project Team members as may be requested by Owner, and matters concerning the proposed Site use and improvements, selection of materials, and building systems and equipment. Construction Manager shall attend regularly scheduled and any interim Project progress meetings and fully advise the Owner and Project Team of the Project status including progress, schedule, costs, quality, and proposed changes. Construction Manager shall be responsible for preparing and distributing (on the business day preceding the meeting) to Owner, Project Manager, and Architect a written agenda for the meeting, in a form and with such content as reasonably required by Owner, which includes a status report of all pending Submittals, RFIs, known or anticipated impediments to construction, accidents and injuries, and pending business/action items (with a designation of who is responsible for each pending item), and all other information required by Section 3.3.8.2 below. When it appears to Owner or Construction Manager that a contract milestone or completion date cannot be met for reasons not the fault of the Construction Manager, Owner may request a plan and a budget from Construction Manager that will provide input on any schedule revisions and/or increased costs, if any, to accelerate or suspend the Work.

**§ 3.3.8.2 Reporting.**

**§ 3.3.8.2.1 Monthly.** The Construction Manager shall keep the Owner informed of the progress and quality of the Work. On a weekly basis, or as otherwise agreed to by Owner and Construction Manager, the Construction Manager shall submit written progress reports to Owner, Project Manager, and Architect, reporting Construction Manager's assessment of the progress of the Work, estimated percentages of completion, and other information identified below:

- .1 Work completed for the period and any discrepancies with its conformance with the Contract Documents;
- .2 Project Schedule status and any look-ahead schedules;
- .3 Submittal Schedule and status report, including a summary of outstanding Submittals;
- .4 Responses to Requests for Information;
- .5 Approved Change Orders and Owner Change Directives;
- .6 Pending Change Order and Owner Change Directive status reports;
- .7 Tests and inspection reports;
- .8 Status report of Work rejected by the Owner;
- .9 Status of Claims previously submitted in accordance with Article 15;
- .10 Cumulative total of the Cost of the Work to date including the Construction Manager's Fee;
- .11 Current Project cash-flow and forecast reports;
- .12 Storage inventory, purchase order status, equipment, and material supply issues identified;
- .13 Weather condition log in accordance with Section 8.3.1.1; and
- .14 Additional information as agreed to by the Owner and Construction Manager.

**§ 3.3.8.2.2** In addition, the Construction Manager shall include the following additional information in its progress reports:

- .1 Construction Manager's work force report and Daily Log reporting including weather conditions, any delay impacts, Work performed, number of workers by company and by trade, and any other information requested by Owner;
- .2 Equipment utilization report;
- .3 Cost summary, comparing actual costs to updated cost estimates;
- .4 Construction Manager invoices supporting the costs billed for the period;
- .5 Executed Conditional Waiver and Release on Progress Payment documents for current draws from Construction Manager and Subcontractors (of every tier); and

- .6 Any other evidence reasonably required by Owner to assist in the confirmation and validation of the Cost of the Work.

**§ 3.3.8.2.3 Daily Log.** Unless and until instructed otherwise in writing by Owner, Construction Manager shall also prepare a daily log (the "Daily Log") containing: (i) a record for each Day's weather; (ii) a statement of which Days since the previous monthly report are claimed by Construction Manager to be subject of a weather delay; (iii) portions of the Work in progress and accomplished; (iv) identification of Subcontractors on the Site; (v) identification of all equipment on the Site; (vi) problems or anticipated delays that might affect progress of the Work; and (vii) all accidents or injuries that may have occurred; and (viii) any other information that may be requested by Owner or Project Manager. The log shall be made available to Owner, Project Manager, and Architect.

## **§ 3.4 Labor and Materials**

**§ 3.4.1** Unless otherwise provided in the Contract Documents, the Construction Manager shall provide and pay for labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, and other facilities and services necessary for proper execution and completion of the Work, whether temporary or permanent and whether or not incorporated or to be incorporated in the Work. The Construction Manager shall check all materials entering into the Work and shall keep full accounts thereof. Construction Manager shall cause all labor, materials and other such items and services to be readily available as and when required in or needed for the orderly and timely progress of the Work.

**§ 3.4.2 Substitutions.** When a material or system is specified in the Contract Documents, the Construction Manager may make substitutions only with the consent of the Owner and in accordance with a Change Order or Owner Change Directive in accordance with Article 7. The Owner may approve or deny substitutions in its sole discretion. No approved substitution shall change the requirements of the Contract Documents until it has been approved by Owner and incorporated into the Contract Documents.

**§ 3.4.2.1** Construction Manager may submit for consideration proposed substitutions of materials, equipment or processes from those set out in the Contract Documents via a "Request for Substitution." A Request for Substitution must be made in writing at such time as not to delay the Work and should contain sufficient information to allow Owner, with assistance from Architect and Project Manager, to determine if the proposed substitution is, in fact, equal to or better than the requirements of the Contract Documents. Notwithstanding the foregoing, a Request for Substitution shall include, at a minimum, the following:

- .1 Product identification: product name, product type, manufacturer's name, manufacturer's address, supplier's name, and supplier's address;
- .2 Product Data: description, performance and test data, reference standards, finishes, and colors;
- .3 Samples: finishes, colors, styles, patterns, thicknesses, etc.;
- .4 The name and address of similar projects on which the product was used as well as the date of installation;
- .5 Complete and accurate Drawings indicating construction revisions, if any, required to accommodate the substituted product;
- .6 Any problems, peculiarities, or other matters of concern known to the Construction Manager at the time it proposes the substitution. Relevant concerns include, by way of example and not limitation, any and all matters related to the environment, legal requirements affecting the Site, building codes, safety of persons on the Site, and/or Hazardous Materials; and
- .7 The basis for the substitution and the adjustment, if any, in the Contract Time and Final Guaranteed Maximum Price, in the event that the substitution is accepted.

**§ 3.4.2.2** In submitting a Request for Substitution, Construction Manager represents to the Owner that (1) the Construction Manager has investigated the proposed substitution and has determined that it conforms to and meets or exceeds all the requirements of the specified product and other requirements of the Contract Documents; (2) the warranty conditions, obligations, and representations of the proposed substitution meet or exceed those of the specified product and evidence of such conditions, obligations, and representations shall be submitted in triplicate to the Architect and Owner in sufficient time for the Architect and Owner to review; (3) the Construction Manager accepts the warranty and correction obligations in connection with the proposed substitution; (4) the Construction Manager shall coordinate installation and make other changes that may be required for proper integration of the proposed substitution; and (5) the Construction Manager waives and releases the Owner from any and all Claims for adjustments in the Final Guaranteed Maximum Price and/or Contract Time arising from or related to the proposed substitution to the extent such adjustments are not otherwise stated in the Request for Substitution.

**§ 3.4.2.3** The Construction Manager shall submit Requests for Substitution as soon as practicable after the need for the substitution is determined to allow for adequate consideration of such request and to minimize delay in the progress of the Work. The Owner, with assistance from the Architect and Project Manager, shall review proposed substitutions within a reasonable time. Each proposed substitution shall require the written approval of the Owner before its incorporation into the Work. Construction Manager acknowledges that no product proposed for substitution shall be ordered, purchased, installed, or otherwise utilized in any way without the Owner's prior written acceptance. Owner shall promptly act on such request so as to also minimize delay in the progress of the Work. Notwithstanding Section 3.2.2 above, Construction Manager acknowledges its responsibility for the accuracy, adequacy, sufficiency, and suitability of the substitution it proposes and that *Tex. Bus. Comm. Code § 59.002(d)* applies to the substitution. Construction Manager shall procure and furnish to Owner any design certifications required to include the substitution in the Drawings or Specifications.

**§ 3.4.2.4** When specific products, systems or items of equipment are referred to in the Contract Documents, any ancillary devices necessary for proper functioning shall also be provided, but not including any manufacturers' options on any particular device, which device is specified in the Contract Documents.

**§ 3.4.3** The Construction Manager shall at all times furnish an adequate supply of qualified and legal workers and proper materials and shall enforce strict discipline and good order among the Construction Manager's employees and other persons carrying out the Work. The Construction Manager shall not permit employment of unfit persons or persons not properly skilled in tasks assigned to them.

**§ 3.4.4 Prevailing Wage Requirements.**

Construction Manager and each Subcontractor shall, at all times, comply with *Tex. Gov't. Code § 2258* with respect to the payment of wages for the Work performed under the Contract. All persons employed in the performance of the Work under the Contract or any subcontracts hereunder, shall be paid not less than the general prevailing rates of per diem, holiday, and overtime wages prevailing in the locality for Work of a similar character as shown on the prevailing wage schedule provided by Owner. The specified wage rates are minimum rates only. Owner is not bound to pay any claims for additional compensation made by any Construction Manager because the Construction Manager pays wages in excess of the applicable minimum rate. The prevailing wage schedule is not a representation that qualified labor adequate to perform the Work is available locally at the prevailing wage rates. Failure to comply with this provision shall subject the Construction Manager to the penalties prescribed in *Tex. Gov't. Code § 2258*.

**§ 3.4.4.1 Notification to Workers.** Pursuant to *Tex. Gov't Code § 2258.022*, Owner has determined the prevailing rate of per diem wages in the locality in which the public work is to be performed for each craft or type of worker needed to perform the Work on the Project and the prevailing rate for legal and holiday overtime work by utilizing the prevailing wage rate as determined by the United States Department of Labor in accordance with the Davis-Bacon Act (40 U.S.C. Section 276a et seq.). Construction Manager shall post the prevailing wage schedule in a place conspicuous to all workers on the Site. Pursuant to *Tex. Gov't Code § 2258.024*, Construction Manager shall keep, on-Site, true and accurate records showing the name and occupation of each worker employed by the Construction Manager or subcontractors and the actual per diem wages paid to each worker. The record shall be open to inspection by the Project Manager at all reasonable hours for the duration of the Contract. When requested by Owner, Construction Manager shall furnish evidence of compliance with the Texas Prevailing Wage Law and the addresses of all workers.

**§ 3.4.4.1.1** With each Application for Payment, Construction Manager shall make available upon request certified payroll records, including from Subcontractors of any tier level, on Form WH-347 as promulgated by the U.S. Department of Labor, as may be revised from time to time and in unlocked and unprotected Excel format, along with copies of any and all Contract Documents between Construction Manager and any Subcontractors. Pursuant to *Tex. Penal Code §§ 37.02 and 37.10*, employees of Construction Manager and any Subcontractors shall be subject to prosecution for submitting certified payroll records that contain materially false information.

**§ 3.4.4.1.2** The prevailing wage schedule is in compliance with *Tex. Gov't. Code § 2258*. Should Construction Manager at any time become aware that a particular skill or trade not reflected on the wage schedule will be or is being employed in the Work, whether by Construction Manager or by Subcontractor, Construction Manager shall promptly inform Project Manager of the proposed wage to be paid for the skill along with a justification for same and Project Manager shall promptly concur with or reject the proposed wage and classification.

**§ 3.4.4.1.3** Construction Manager is responsible for determining the most appropriate wage for a particular skill in relation to similar skills or trades identified on the prevailing wage schedule. In no case, shall any worker be paid less than the wage indicated for laborers. Pursuant to *Tex. Labor Code § 214.008*, Owner requires Construction Manager and all Subcontractors properly classify individuals as employees or independent contractors.

**§ 3.4.4.2 Complaints and Violations.**

**§ 3.4.4.2.1 Owner's Determination of Good Cause.** Upon receipt of information concerning a violation of *Tex. Gov't. Code § 2258*, Owner will conduct an investigation and make an initial determination as to whether good cause exists that a violation occurred. Upon making a good cause finding, Owner will retain the full amounts claimed by the claimant or claimants as the difference between wages paid and wages due under the prevailing wage schedule and any supplements thereto, together with the applicable penalties in accordance with *Tex. Gov't. Code § 2258.023*, such amounts being subtracted from successive progress payments pending a final decision on the violation.

**§ 3.4.4.2.2 No Extension of Time.** Construction Manager shall not be entitled to an extension of Contract Time for any delay arising directly or indirectly from any investigation of a violation if Owner's investigation reveals good cause existed for the investigation or arising out of a determination pursuant to Section 3.4.4.2.4 below that wages were not appropriately paid by Construction Manager or any Subcontractor.

**§ 3.4.4.2.3 Cooperation with Owner's Investigation.** Construction Manager shall cooperate with Owner during any investigations hereunder. Such cooperation shall include, but not necessarily be limited to, timely providing the information and/or documentation requested by Owner, which may include certified payroll records on Form WH-347 as promulgated by the U.S. Department of Labor, as may be revised from time to time and in unlocked and unprotected Excel format and copies of any and all Contract Documents between Construction Manager and any Subcontractors.

**§ 3.4.4.2.4 Appeals.** In the event Construction Manager or Subcontractor elect to appeal an initial determination made pursuant to Section 3.4.4.2.1, Construction Manager or Subcontractor may do so in accordance with *Tex. Gov't. Code § 2258.023*. The Construction Manager and/or Subcontractor, as applicable, shall deliver notice of said appeal to Owner.

**§ 3.4.4.2.5 Penalty for Violation.** Construction Manager or any Subcontractor who violates *Tex. Gov't Code § 2258* shall pay to the Owner a penalty of sixty dollars (\$60) for each worker employed for each Day, or portion thereof, that the worker is paid less than the wage rates stipulated in the prevailing wage schedule.

**§ 3.5 Warranty**

**§ 3.5.1** The Construction Manager warrants to the Owner that the Work will be performed in a good and workmanlike manner and that materials and equipment furnished under the Contract will be of specified quality, recent manufacture, and new. The Construction Manager further warrants that the Work will conform to the requirements of the Contract Documents, will be complete in all parts and with the required finishes, in accordance with approved practices and customs, and will be free from defects. Work, materials, or equipment not conforming to these requirements, including substitutions not properly approved and authorized, shall be considered defective. The Construction Manager's warranty excludes remedy for damage or defect caused by abuse, alterations to the Work not executed by the Construction Manager, improper or insufficient maintenance, improper operation, or normal wear and tear and normal usage. If required by the Owner, the Construction Manager shall furnish satisfactory evidence as to the kind and quality of materials and equipment. The warranties set out in this subsection are in addition to and not exclusive of any other warranties or guarantees set out in other places in the Contract Documents or implied under Applicable Law, or the Construction Manager's obligations under the corrective period set out in Article 12 below. Construction Manager's obligation to perform the Work in a good and workmanlike manner in accordance with the Contract Documents is absolute and no actions of Owner or Project Manager shall act to waive Construction Manager's obligations hereunder.

**§ 3.5.2** Construction Manager shall furnish individual written warranties to the Owner for each product, building component, system, or equipment specified to have a written warranty and incorporating the warranty of this Section 3.5. Such separate warranties shall be deemed to run from Substantial Completion regardless of whether the product, building component, system or equipment was placed into service prior to Substantial Completion.

**§ 3.5.3** If extended warranties in addition to those required by the Contract Documents are available from Subcontractors, manufacturers, or suppliers, Construction Manager shall advise Architect and Owner of such availability and the cost thereof and, if requested by Change Order, shall purchase the extended warranty for Owner's benefit, in which event the Change Order shall reflect an increase in the Final Guaranteed Maximum Price equal to the cost of the extended warranty submitted to and accepted by Owner.

**§ 3.5.4** All guarantees and warranties of materials and services furnished to Construction Manager or Subcontractors by any Subcontractor, manufacturer, or supplier shall be assigned to Owner and be deemed to run for the benefit of the Owner. Construction Manager hereby assigns to Owner the benefits of all guarantees and warranties of all Subcontractors, manufacturers, and suppliers engaged for the Project, but such assignment shall not relieve Construction Manager of its warranty obligations to Owner under the Contract Documents or Applicable Law. During the **two (2)** year period set forth in Section 12.2, Construction Manager shall enforce the Subcontractors', manufacturers' and suppliers' warranties for the benefit of Owner or its assigns. After expiration of such period, the Construction Manager shall continue to aid Owner in enforcing any continuing warranties assigned to Owner. The Construction Manager further agrees to perform the Work in such a manner so as to preserve any and all such guarantees and warranties. Construction Manager's warranties shall be in addition to any warranties, indemnities, claims, rights, actions or remedies that Owner may have in the Contract Documents, or at law, or in equity, for defective Work or breach of the Contract Documents, or otherwise provided under any repose period.

### **§ 3.6 Taxes**

Owner is a hospital district and political subdivision of the State of Texas. Materials and services utilized in the construction of the Project may be exempt from state and local sales and use taxes pursuant to *Texas Tax Code* § 151.309(5). Construction Manager is responsible for compliance with all tax exemptions applicable to the Project. Owner will process all invoices submitted by Construction Manager to ensure the invoices comply with the Owner's tax-exempt status.

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

**§ 3.7.1** Unless otherwise provided in the Contract Documents, the Construction Manager shall secure and pay for the building permit as well as any other trade permits, fees, licenses, and inspections by Authorities Having Jurisdiction necessary for proper execution and completion of the Work that are customarily secured after execution of the Contract and legally required.

**§ 3.7.2** The Construction Manager shall comply with and give notices required by Applicable Laws, statutes, ordinances, codes, rules and regulations, and lawful orders Authorities Having Jurisdiction, applicable to performance of the Work.

**§ 3.7.3** If the Construction Manager performs Work knowing it to be contrary to Applicable Laws, statutes, ordinances, building codes, rules and regulations, or lawful orders of Authorities Having Jurisdiction, the Construction Manager shall assume appropriate responsibility for such Work and shall bear the costs attributable to correction.

### **§ 3.7.4 Concealed or Unknown Conditions**

If the Construction Manager 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, the Construction Manager shall promptly provide notice to the Owner, Project Manager, and the Architect before conditions are disturbed and in no event later than **seven (7)** Days after the first observance of the conditions. The Architect and/or Project Manager will promptly investigate such conditions and, if the Architect and Project Manager determine that they differ materially and cause an increase or decrease in the Construction Manager's cost of, or time required for, performance of any part of the Work, may recommend an equitable adjustment in the Final Guaranteed Maximum Price or Contract Time, or both, the actual adjustment of which is subject to Owner approval. If the Owner and Construction Manager cannot agree on an adjustment in the Final Guaranteed Maximum Price or Contract Time, the Construction Manager may make a Claim pursuant to Article 15. If the Architect or Project Manager determine 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 and/or Project Manager shall promptly notify the Owner and Construction Manager in writing, stating the reasons. Notwithstanding the foregoing, no adjustment in the Final Guaranteed Maximum Price

or Contract Time shall be allowed to the extent that the Construction Manager knew, or reasonably should have known of those conditions prior to the date of this Agreement.

**§ 3.7.5** If, in the course of the Work, the Construction Manager encounters human remains or recognizes the existence of burial markers, archaeological sites or wetlands not indicated in the Contract Documents, the Construction Manager shall immediately suspend any operations that would affect them and shall notify the Owner, Project Manager, Architect and any required Authorities Having Jurisdiction. Upon receipt of such notice, the Owner shall promptly take any action necessary to obtain authorization from Authorities Having Jurisdiction required to resume the operations. The Construction Manager shall continue to suspend such operations until otherwise instructed by the Owner or permitted by applicable Authorities Having Jurisdiction but shall continue with all other operations that do not affect those remains or features to the extent permitted by Applicable Law. The Final Guaranteed Maximum Price and Contract Time may be equitably adjusted due to delays or increased costs arising from the existence of such remains or features. Notwithstanding the foregoing, no adjustment in the Final Guaranteed Maximum Price or Contract Time shall be allowed to the extent that (a) the Construction Manager knew of those conditions prior to the date of this Agreement, or (b) information was given to the Construction Manager by Owner or Architect from which those conditions could have been discovered prior to the date of the Construction Manager's execution of the Agreement.

**§ 3.7.6 Commissioning.** The Construction Manager shall assist the Owner in obtaining commissioning of the Work as may be required by Owner's commissioning agent and all Authorities Having Jurisdiction over the Project including, but not limited, to TDHHS, the City of Fort Worth, Authorities Having Jurisdiction responsible for ensuring compliance with the ADA and TAS, and any other applicable Authorities Having Jurisdiction, organization, or other public authority.

### **§ 3.8 Allowances**

**§ 3.8.1** To the extent included in the Final Guaranteed Maximum Price Amendment, items covered by allowances shall be supplied for such amounts and by such persons or entities as the Owner may direct, but the Construction Manager shall not be required to employ persons or entities to whom the Construction Manager has reasonable objection.

**§ 3.8.2** Unless otherwise provided in the Contract Documents,

- .1 allowances shall cover the cost to the Construction Manager of materials and equipment delivered at the Site, costs for unloading and handling at the Site, labor, installation costs, and all required taxes (except for those from which Owner is exempt), less applicable trade discounts;
- .2 Construction Manager's costs for indirect overhead and profit for stated allowance amounts shall be included in the Construction Manager's Fee but not in the allowances; and
- .3 whenever costs are more than or less than allowances, the Final Guaranteed Maximum Price shall be adjusted accordingly by Change Order. No adjustments will be made unless Owner approves such adjustment. 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 Construction Manager's Fee under Section 3.8.2.2. Construction Manager shall keep separate and adequate records of all allowances and shall submit such records to Owner and Project Manager no less than on a monthly basis. Owner shall be responsible for costs incurred in excess of allowance amounts only to the extent approved by Owner in writing.

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

### **§ 3.9 Key Personnel**

**§ 3.9.1** The Construction Manager's representative(s) designated in Section 1.1.12 of the Agreement, shall be those responsible for the day-to-day management of the Work. Construction Manager shall keep a competent superintendent in attendance at the Project site at all times, fully authorized to act on behalf of the Construction Manager. The Construction Manager's superintendent shall be designated in accordance with Section 3.9.2 below. Other key personnel shall be designated in the Final Guaranteed Maximum Price Amendment (**Exhibit A**) as **Attachment 8**. Each person shall be designated with a title and a brief description of the obligations and limitations (if any) of each representative's authority. Construction manager shall not change representatives/assignments without the Owner's written consent, which consent shall not be unreasonably withheld. The Construction Manager's superintendent shall

represent the Construction Manager, and written communications given to the superintendent shall be as binding as if given to the Construction Manager. Construction Manager shall employ a competent safety professional and necessary assistants who shall be in attendance at the Site during performance of the Work pursuant to Section 10.1.4 herein. The safety professional shall be designated as required by Section 10.1.4 and shall enforce all applicable construction safety standards, develop a progressive discipline program, monitor employee safety compliance, and document safety violations. Construction Manager shall not assign or retain on the Project any person or entity to whom Owner reasonably objects. Once designated, the key personnel will not be changed unless such person becomes unable to perform any required duties due to death, injury, transfer, or termination of employment with Construction Manager. If the Construction Manager changes any of the personnel, Subcontractors, or suppliers identified in the Contract Documents, the Construction Manager shall notify the Owner and provide the name and qualifications of the new personnel, Subcontractor or supplier. The Construction Manager's Superintendent, safety professional, and other key personnel for Construction Services shall be designated in Attachment 8 of Exhibit A, the Final Guaranteed Maximum Price Amendment.

**§ 3.9.2** The Construction Manager, as soon as practicable after award of the Contract, shall furnish in writing to the Owner the name and qualifications of a proposed Superintendent.

**§ 3.9.3** The Construction Manager shall not employ a proposed Superintendent, safety professional, or any other senior project personnel to whom the Owner has made reasonable and timely objection.

**§ 3.9.4** If Owner reasonably determines that any employee of Construction Manager (including but not limited to its Superintendent or other administrative or supervisory personnel) or of its Subcontractors or their Sub-subcontractors is careless or not qualified to perform the Work or responsibilities assigned to him or is otherwise not competently performing the Work or responsibilities assigned to him in accordance with the standards required by the Contract Documents, upon Owner's written request, the Construction Manager shall promptly remove such employee from the Work and replace such employee or cause such employee to be replaced in accordance with any requirements hereof.

### **§ 3.10 Construction Manager's Construction and Submittal Schedules**

**§ 3.10.1** Based on the Preliminary Schedule provided during the Preconstruction Phase, Construction Manager shall update and submit, as **Attachment 7** to the Final Guaranteed Maximum Price Amendment (**Exhibit A**) a Project Schedule for the Work. The Project Schedule will include various dates critical to the progress of the Project, including deliverables to Owner, critical milestone dates, mobilization, procurement, installation, testing, inspection, the Required Date of Substantial Completion, the Final Completion Date, any Interim Milestone Dates, delivery of Close-Out Documents, acceptance of all the Work required under this Agreement, and any other details required for tracking the progress of the Work. The Project Schedule shall be computerized Critical Path Method (CPM) with fully editable logic with adequate detail so the schedule is capable of measuring and forecasting the effect of delaying events on completed and uncompleted activities. The Project Schedule and all monthly updates should address Submittal activities as well as actual field construction activities. The Project Schedule shall not exceed time limits current under the Contract Documents, shall be revised at appropriate intervals as required by the conditions of the Work and Project, shall be related to the entire Project, shall provide for expeditious and practicable execution of the Work, and shall include allowances for periods of time required for the Owner's review and for approval of submissions by Authorities Having Jurisdiction. All Project Schedule updates shall address the subject of how the Construction Manager intends to address any critical path delays previously encountered.

**§ 3.10.2** Prior to submission of any Submittals, the Construction Manager shall also submit a "Submittal Schedule" for the Architect's and the Owner's approval which shall not be unreasonably delayed or withheld. The Submittal Schedule shall (1) be coordinated with the Construction Manager's Project Schedule, (2) allow the Owner, Architect, and Project Manager reasonable time to review Submittals; (3) be periodically updated to reflect the progress of the Work. If the Construction Manager fails to submit a Submittal Schedule, or fails to provide Submittals in accordance with the approved Submittal Schedule, the Construction Manager shall not be entitled to any increase in the Final Guaranteed Maximum Price or extension of Contract Time based on the time required for review of Submittals.

**§ 3.10.3** The Construction Manager shall perform the Work in accordance with the most recent schedules submitted to and accepted by the Owner and the Architect. Revisions by the Construction Manager to the Project Schedule shall not amend, change or otherwise affect the Required Date of Substantial Completion, Date of Final Completion, any Interim Milestone Date, or any other significant dates unless approved by appropriate Change Order. Failure of the Work to proceed in the sequence scheduled by Construction Manager shall not alone serve as the basis for a Claim for

additional compensation or Contract Time. In the event there is interference with the Work which is beyond its control, Construction Manager shall attempt to reschedule the Work in a manner that will hold resulting additional Contract Time and costs to a minimum.

**§ 3.10.4** The Project Schedule shall provide for the most expeditious and practicable execution of the Work. The Construction Manager shall also work closely with the Project Team to confirm that the Project Schedule accurately reflects the status of the Project. The Construction Manager's Project Schedule shall be updated every month by the Construction Manager and submitted to the Owner and Project Manager. The Construction Manager is responsible for expediting the Work, identifying potential conflicts and coordination problems that could affect the Contract Time and proposing measures to avoid such problems.

**§ 3.10.4.1** Whenever it becomes apparent from the updated Project Schedule or progress report that any critical date previously established by the Project Schedule is more than **ten (10)** Days behind schedule and may not be met, the Construction Manager shall, at the Owner's request, take any or all of the following actions with no increase to the Final Guaranteed Maximum Price or Contract Time (unless the delay is otherwise approved by Owner with an increase in the Final Guaranteed Maximum Price or Contract Time via Change Order):

- (a) Increase construction manpower and perform overtime to substantially eliminate the back-log of work and return the Project to schedule;
- (b) Increase the number of working hours per shift, shifts per Day, working Days per week, the amount of construction equipment, or any combination of the foregoing which will substantially eliminate the back-log of work and return the Project to schedule;
- (c) Reschedule activities to concurrently accomplish activities, to the maximum degree practicable, in the time required by the Contract Documents;
- (d) Take such other action as may be requested or directed by the Owner to return the Project to Schedule.

If the Construction Manager fails to take any of these actions within **three (3)** Days after receiving notice from the Owner, the Owner may in addition to its other rights and remedies (i) take action to attempt to return the Project to schedule, and (ii) deduct the cost of such actions from the monies due or to become due to the Construction Manager, unless the delay is an Excusable Delay and the Owner requests the Construction Manager shall submit a recovery plan to resolve the effects of said delay. Construction Manager shall not be entitled to compensation from the Owner or any increase in the Final Guaranteed Maximum Price for the scheduled recovery efforts, except as to causes of delay to the critical path as allowed under Section 8.3 herein, and not caused by the Construction Manager or any Subcontractor or supplier. No approval or consent by the Owner of any plan for re-sequencing or acceleration of the Work submitted by Construction Manager pursuant to this Section shall constitute a waiver by Owner of any damages or losses which Owner may suffer and for which Construction Manager is liable hereunder by reason of such re-sequencing or the failure of Construction Manager to meet the Required Date of Substantial Completion, Interim Milestone Dates, or other requirements of the Agreement with regard to the Contract Time. The Owner may exercise the rights furnished pursuant to this Section 3.10.4.1 as frequently as the Owner deems necessary to facilitate the Construction Manager's performance of the Work's compliance with the Required Date of Substantial Completion, Final Completion Date, Interim Milestone Dates, and other critical dates set forth in the Contract Documents or accepted Project Schedule.

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

**§ 3.11.1** The Construction Manager shall maintain at the Site for the Owner one hard copy of the Drawings, Specifications, Addenda, Change Orders and other Modifications, in good order and marked currently to record changes (including changes in the field and selections made during construction). At the end of construction, the As-Built Documents shall be provided to Architect with a request to complete Record Drawings. The Construction Manager shall further maintain at the Site and available for Owner's inspection one record hard copy of approved shop drawings, product data, samples and similar required Submittals, along with the Submittal Log. These shall be available to the Owner, Architect, and Project Manager, 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, at a time and place designated by Owner. These documents shall be available to Architect, Owner, and Project Manager during the progress of the Work. As-Built Documents shall contain, but not be limited to: (i) the actual location of the underground utilities and appurtenances as referenced to permanent surface improvements; (ii) the location of internal utilities and appurtenances concealed in building structures; and (iii) changes during the construction process. The As-Built Documents are to be kept accurately and no Work shall be permanently concealed until the required information has been recorded. As part of the Project Close-out Documents, and prior to release by Owner of Final Payment,

Construction Manager shall submit two (2) sets of accurate and complete As-Built Documents and Record Drawings, in electronic form, to Owner and Project Manager in accordance with *Tex. Gov't Code § 2269.310* with Construction Manager's representation that the documents show complete "as-built" conditions of the Work.

**§ 3.11.2** Construction Manager shall at all times maintain job records, including, but not limited to, invoices, payment records, payroll records, daily reports, logs, diaries, and job meeting minutes, applicable to the Project. Construction Manager shall make such reports and records available to inspection by the Owner, Project Manager, Architect, or their representative agents, within **five (5) Days** of request by Owner, Project Manager, Architect, or their agents.

### **§ 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 Construction Manager 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 Construction Manager 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** Prior to the submission of any Submittals, Construction Manager shall prepare and submit to Owner, Project Manager, and Architect a Submittal log organized by specification section, listing all items to be furnished for review and approval by Architect and Owner (the "Submittal Log"). The list shall include Shop Drawings, manufacturer's literature, certificates of compliance, materials Samples, materials, colors, guarantees, and all other items identified throughout the Specifications. Informational Submittals upon which the Owner and 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 and Owner without action.

**§ 3.12.4.1 Submittal Log.** Construction Manager shall indicate the type of item, contract requirements reference, and Construction Manager's scheduled dates for submitting the item along with the requested dates for approval answers from Architect and Owner in the Submittal Log. The Submittal Log shall indicate the projected dates for procurement of all included items and shall be updated at least monthly with actual approval and procurement dates and included with each monthly Application for Payment. Construction Manager's Submittal Log must be reasonable in terms of the review time for complex Submittals and shall be consistent with the Project Schedule. The Submittal Log shall be used to confirm status and disposition of particular items submitted, including approval or other action taken on the submittal. Construction Manager will not schedule Work requiring a submittal to begin prior to scheduling review and approval of the related Submittal.

**§ 3.12.5** The Construction Manager shall review for compliance with the Contract Documents, approve, and submit to the Architect, Owner, and Project Manager, Shop Drawings, Product Data, Samples, and similar Submittals required by the Contract Documents, or subsequently required by a Change Order, in accordance with the Submittal Schedule and Submittal Log, or if not contained therein, 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 taking into account the time the Architect and Owner need to review the Submittals. Construction Manager shall allow a minimum of **fourteen (14) Days** duration after receipt by Owner and Architect for review and approval of any Submittal and shall show the duration of each Submittal in the Submittal Log. If resubmittal is required, Construction Manager shall allow a minimum of an additional **ten (10) Days** for review. Owner may establish routine review procedures and schedules for Submittals at an initial construction conference and/or elsewhere in the Contract Documents. Submittals which are not marked as reviewed for compliance with the Contract Documents and approved by the Construction Manager may be returned by the Architect without action.

**§ 3.12.6** By submitting Shop Drawings, Product Data, Samples, and similar Submittals, the Construction Manager represents to the Owner that the Construction Manager has (1) reviewed and approved them, (2) determined and verified materials, field measurements and field construction criteria related thereto, or will do so if Work is not yet in place, 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 Construction Manager 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 Owner and Architect.

§ 3.12.8 **Review of Submittals.** Architect's, Project Manager's, or Owner's review is only for conformance with the design concept and the information provided in the Contract Documents. Responses to Submittals will be in writing. The Work shall be in accordance with approved Submittals except that the Construction Manager shall not be relieved of its responsibility to perform the Work consistent with the requirements of the Contract Documents by the Architect's, Project Manager's, or Owner's approval of Shop Drawings, Product Data, Samples or similar Submittals, unless the Construction Manager has specifically informed the Architect, Owner, and Project Manager in writing of such deviation at the time of Submittal and a Change Order or Owner Change Directive has been issued authorizing the deviation. The Construction Manager shall not be relieved of responsibility for errors or omissions in Shop Drawings, Product Data, Samples, or similar Submittals, by the Architect's or Owner's approval thereof.

§ 3.12.9 Construction Manager shall make any corrections required to a Submittal and resubmit the required number of corrected copies promptly so as to avoid delay, until Submittal approval. The Construction Manager 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 Owner or Architect on previous Submittals. In the absence of such written notice, the Architect's or Owner's approval of a resubmission shall not apply to such revisions.

§ 3.12.10 The Construction Manager 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 Construction Manager needs to provide such services in order to carry out the Construction Manager's responsibilities for construction means, methods, techniques, sequences and procedures. The Construction Manager shall not be required to provide professional services in violation of Applicable Law.

§ 3.12.10.1 If professional design services or certifications by a design professional related to systems, materials or equipment are specifically required of the Construction Manager by the Contract Documents, the Owner and the Architect will specify performance and design criteria that such services must satisfy. The Construction Manager shall cause such services or certifications to be provided by a properly licensed or registered 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, Project Manager, and Owner. The Owner and the Architect shall be entitled to rely upon the adequacy, accuracy and completeness of the services, certifications and approvals performed or provided by such design professionals, provided the Owner and Architect have specified to the Construction Manager all performance and design criteria that such services must satisfy. Pursuant to this Section 3.12.10, the Owner and 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.

*(Paragraph deleted)*

### § 3.13 Use of Site

§ 3.13.1 The Construction Manager shall confine operations at the Site to areas permitted by Applicable Law, easements, statutes, ordinances, codes, rules and regulations, and lawful orders of Authorities Having Jurisdiction, and the Contract Documents and shall not unreasonably encumber the Site with materials or equipment.

§ 3.13.2 Only machinery, equipment and materials that are to be used directly in the Work shall be brought to and stored on the Site by the Construction Manager. The Construction Manager shall confine its operations and restrict its staging and storage of machinery, equipment, and materials to those areas within the Site or to such other areas authorized in writing by the Owner. Construction Manager shall not encumber the Site and adjacent areas with any materials or equipment and shall arrange and maintain its materials and equipment in an orderly manner so that Owner and Owner's Separate Contractors shall have reasonable access to and within the Site and any construction occurring there and in adjacent areas. After equipment is no longer required for the Work, it shall be promptly removed from the Site. Protection of the Work and of construction materials and equipment stored at the Site from weather, theft, damage and all other adversity is solely the responsibility of the Construction Manager. The Construction Manager shall ensure that the Work, at all times, is performed in a manner that affords reasonable access, both vehicular and

pedestrian, to the Site 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 Site shall be free from all debris, building materials, and equipment likely to cause hazardous conditions.

**§ 3.13.3** The Construction Manager, Subcontractors, and any entity for whom the Construction Manager is responsible shall, other than as required by Applicable Law, not erect any sign on the Site without the prior written consent of the Owner, which may be withheld in the sole discretion of the Owner.

**§ 3.13.4** Without limitation of any other provision of the Contract Documents, the Construction Manager shall use best efforts to minimize any interference with the occupancy or beneficial use of (i) any areas and buildings adjacent to the Site and (ii) that portion of the Work of which Owner has partial occupancy, as more specifically described in Section 9.9. The Construction Manager shall use its best efforts to not interfere with the use of and enjoyment by neighboring landowners of their property and shall keep noise and dust to the lowest levels reasonably possible to accomplish the Work. Without prior approval of the Owner, the Construction Manager shall not permit any workers to use any existing facilities at the Site, including, without limitation, lavatories, toilets, entrances, and parking areas other than those designated by the Owner.

#### **§ 3.14 Cutting and Patching**

**§ 3.14.1** The Construction Manager 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 Construction Manager 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 Construction Manager shall not cut or otherwise alter construction by the Owner or a Separate Construction Manager except with written consent of the Owner and of the Separate Contractor. Consent shall not be unreasonably withheld. The Construction Manager shall not unreasonably withhold, from the Owner or a Separate Contractor, its consent to cutting or otherwise altering the Work.

#### **§ 3.15 Cleaning Up**

**§ 3.15.1** The Construction Manager shall thoroughly wash and clean all glass and mirror surfaces and leave the Work neat and ready for occupancy and use before final turnover. The Construction Manager shall use its best efforts to prevent dust. The Construction Manager shall keep the premises and surrounding area free from accumulation of waste materials or rubbish caused by operations under the Contract. All waste and rubbish containers shall be covered at all times. At the end of each week, the Construction Manager shall remove waste materials, and rubbish and shall properly store the Construction Manager's tools, construction equipment, machinery and surplus materials that could cause a hazard from and about the Project. Construction Manager shall restore to satisfactory condition all new and existing walks, roads, curbs and other interior or exterior improvements that have been damaged as a result of operations under the Agreement. Upon completion of the Work, the Construction Manager shall remove any remaining waste materials, rubbish, tools, construction equipment, machinery and surplus materials and shall leave the completed Project ready for use and occupancy and with all Work in new condition and working order.

**§ 3.15.2** If the Construction Manager fails to clean up as provided in the Contract Documents, the Owner may do so with its own forces or contracted services and the Owner shall be entitled to reimbursement from the Construction Manager or to deduct such costs from the Construction Manager's next Application for Payment.

**§ 3.15.3** In addition to the clean-up requirements in Section 3.15.1 above, Construction Manager shall perform the following final cleaning at Substantial 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 paint 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.

### § 3.16 Access to Work

The Construction Manager shall provide the Owner, Project Manager, and Architect access to the Work in preparation and progress wherever located. The Construction Manager shall notify the Owner regarding Project safety criteria and programs, which the Owner, Project Manager, and Architect shall comply with while at the Site. The Work shall be performed, to the fullest extent reasonably possible, in such a manner that public areas adjacent to the Site shall be free from all debris, building materials, and equipment likely to cause hazardous conditions.

### § 3.17 Royalties, Patents and Copyrights

The Construction Manager shall pay all royalties and license fees. The Construction Manager shall defend suits or claims for infringement of copyrights and patent rights and shall hold the Owner, Project Manager, and Architect harmless from loss on account thereof as set forth in Section 3.18.3 below, but shall not be responsible for such indemnity, defense or loss when a particular design, process or product of a particular manufacturer or manufacturers is required by the Owner, or where the copyright violations are contained in Drawings, Specifications or other documents prepared by the Owner or Architect. However, if the Construction Manager knows that the required design, process or product is an infringement of a copyright or a patent, the Construction Manager shall be responsible for such indemnity, defense or loss unless such information is promptly furnished to the Owner and the Architect.

### § 3.18 Indemnification

**§ 3.18.1 TO THE FULLEST EXTENT PERMITTED BY LAW, AND EXCEPT AS SET OUT IN §3.18.2 AND §3.18.3 BELOW, CONSTRUCTION MANAGER SHALL INDEMNIFY, HOLD HARMLESS AND DEFEND OWNER, ITS OFFICERS, DIRECTORS, AGENTS AND EMPLOYEES (THE "INDEMNITEES" AND INDIVIDUALLY "INDEMNITEE"), FROM AND AGAINST ALL CLAIMS, DAMAGES, LOSSES AND EXPENSES, INCLUDING, BUT NOT LIMITED TO REASONABLE ATTORNEYS' FEES, ARISING OUT OF OR RESULTING FROM THE PERFORMANCE OF THE WORK, OR OTHER ACTIVITIES OF CONSTRUCTION MANAGER OR ANY SUBCONTRACTOR, INCLUDING, BUT NOT LIMITED TO (1) THE VIOLATION OF ANY ORDINANCE, REGULATION, STATUTE OR OTHER APPLICABLE LAW BY CONSTRUCTION MANAGER OR ANY SUBCONTRACTOR (OR ANY OF THEIR EMPLOYEES) OF ANY TIER; (2) ANY BOND OR LIEN CLAIM ASSERTED BY ANY SUBCONTRACTOR OR SUPPLIER OF ANY TIER FOR WORK OR MATERIALS PROVIDED TO THE PROJECT, TO THE EXTENT PAYMENT HAS BEEN RECEIVED FROM OWNER; (3) BODILY INJURY OR DEATH OF ANY PERSON, OR PROPERTY DAMAGE, INCLUDING LOSS OF USE OF PROPERTY, EXCEPT TO THE EXTENT CAUSED BY THE NEGLIGENT ACTS OR OMISSIONS OF OWNER OR ANY OF THE INDEMNITEES.**

**§ 3.18.2 INDEMNITY – EMPLOYEE INJURY CLAIMS. IN ADDITION TO THE INDEMNIFICATION PROVIDED IN SUBSECTIONS 3.18.1 AND 3.18.3, CONSTRUCTION MANAGER SHALL INDEMNIFY, DEFEND, AND HOLD HARMLESS OWNER AND ALL INDEMNITEES FROM AND AGAINST ANY CLAIM, DAMAGE, LOSS, OR EXPENSE (INCLUDING BUT NOT LIMITED TO REASONABLE ATTORNEYS' FEES AND COSTS), ARISING OUT OF, RESULTING FROM OR ATTRIBUTABLE TO ANY CLAIM OF BODILY INJURY, SICKNESS, DISEASE OR DEATH OF ANY EMPLOYEE OF CONSTRUCTION MANAGER, ANY SUBCONTRACTOR OR ANYONE DIRECTLY OR INDIRECTLY EMPLOYED BY CONSTRUCTION MANAGER OR ANY OF ITS SUBCONTRACTORS, BROUGHT BY SUCH INJURED EMPLOYEE OR THE EMPLOYEE'S WORKERS COMPENSATION INSURANCE CARRIER (HEREINAFTER REFERRED TO AS AN "EMPLOYEE INJURY CLAIM"), EVEN TO THE EXTENT SUCH CLAIM, DAMAGE, LOSS OR EXPENSE IS ALLEGED TO BE CAUSED, IN WHOLE OR IN PART, BY THE SOLE OR CONCURRENT NEGLIGENCE OF OWNER OR ANY INDEMNITEE, IT BEING THE EXPRESSED INTENT OF THE OWNER AND CONSTRUCTION MANAGER THAT, IN SUCH EVENT, THE CONSTRUCTION MANAGER IS TO INDEMNIFY, HOLD HARMLESS AND DEFEND THE OWNER AND INDEMNITEES FROM THE CONSEQUENCES OF THEIR OWN NEGLIGENCE, WHETHER IT IS ALLEGED TO BE THE SOLE OR CONCURRING CAUSE OF THE BODILY INJURY, SICKNESS, DISEASE OR DEATH OF THE EMPLOYEE. THE INDEMNIFICATION OBLIGATIONS UNDER THIS PARAGRAPH SHALL NOT BE LIMITED BY ANY LIMITATION ON THE AMOUNT OR TYPE OF DAMAGES, COMPENSATION OR BENEFITS PAYABLE BY OR FOR CONSTRUCTION MANAGER UNDER WORKERS COMPENSATION ACTS, DISABILITY BENEFIT ACTS OR OTHER EMPLOYEE BENEFIT ACTS. CONSTRUCTION MANAGER SHALL PROCURE LIABILITY INSURANCE COVERING ITS OBLIGATIONS UNDER THIS PARAGRAPH.**

**§ 3.18.3 INDEMNITY – COPYRIGHT INFRINGEMENT CLAIMS. IN ADDITION TO THE INDEMNIFICATION PROVIDED IN SUBSECTION 3.18.1 AND 3.18.2 ABOVE, CONSTRUCTION MANAGER SHALL INDEMNIFY, DEFEND, AND HOLD HARMLESS OWNER AND ANY INDEMNITEE(S) FROM AND AGAINST ANY CLAIM, DAMAGE, LOSS, OR EXPENSE (INCLUDING BUT NOT LIMITED TO REASONABLE ATTORNEYS' FEES AND COSTS) ARISING OUT OF OR RELATING TO ANY CLAIM AGAINST OWNER OR INDEMNITEES ASSERTING INFRINGEMENT OR ALLEGED INFRINGEMENT OF A PATENT, TRADEMARK, COPYRIGHT OR OTHER INTELLECTUAL PROPERTY RIGHT IN CONNECTION WITH ANY INSTRUMENTS OF SERVICE FURNISHED BY OR THROUGH CONSTRUCTION MANAGER OR ITS SUBCONTRACTORS, EVEN TO THE EXTENT SUCH CLAIM, DAMAGE, LOSS, OR EXPENSE IS CAUSED OR IS ALLEGED TO BE CAUSED, IN WHOLE OR IN PART, BY THE SOLE OR CONCURRENT NEGLIGENCE OF OWNER OR ANY OF THE INDEMNITEES OR ANYONE DIRECTLY OR INDIRECTLY EMPLOYED BY THEM.**

**§ 3.18.4** In claims against any person or entity indemnified under Section 3.18.1 by an employee of the Construction Manager, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligations hereunder shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for the Construction Manager or a Subcontractor under workers' compensation acts, disability benefit acts or other employee benefit acts.

**§ 3.18.5** It is agreed with respect to any legal limitations now or hereafter in effect and affecting the validity or enforceability of the indemnification obligations under this Section 3.18 or the Additional Insured requirements of this Agreement, such legal limitations are made a part of the contractual obligations and shall operate to amend the obligations to the minimum extent necessary to bring the provision into conformity with the requirements of such limitations, and as so modified, the obligations shall continue in full force and effect. Should any provision in this Agreement be held invalid, unenforceable or contrary to public policy, law, statute or ordinance, then the remainder of the provision, paragraph, Section and/or Agreement shall not be affected thereby and shall remain valid and fully enforceable.

**§ 3.18.6** Insurance covering the indemnification obligations of Construction Manager under the foregoing paragraphs shall be provided by Construction Manager, but Construction Manager's liability to Owner as provided herein shall not be limited by the amount of the insurance coverage(s) required of and provided by Construction Manager.

**§ 3.18.7** In the event that any claim, damage, demand, cost, loss, expense or injury arises or is made, asserted or threatened against Owner or any Indemnitee, Owner shall have the right to withhold from any payments due or to become due to Construction Manager an amount sufficient in its judgment to protect and indemnify the Indemnitee from any and all such claims, damages, demands, costs, losses, expenses or injuries (including, without limitation, legal fees and disbursements) except to the extent covered by insurance proceeds.

**§ 3.18.8** The obligations contained in this Section 3.18 shall survive the expiration, completion, abandonment and/or termination of the Agreement and Final Completion of the Work.

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

**§ 4.1.2** Duties, responsibilities and limitations of authority of the Architect as set forth in the Contract Documents shall not be restricted, modified or extended without written consent of the Owner, and Architect, with notice to the Construction Manager.

§ 4.1.3 Owner may remove the Architect at any time with or without cause. If the Owner employs a new Architect, its status under the Contract Documents shall be that of the former Architect. In the case of such termination, the Owner may itself perform some or all of the responsibilities of Architect hereunder.

#### § 4.2 Administration of the Contract

§ 4.2.1 The Architect will provide administration of the Contract as described in the Contract Documents or as requested by Owner. The Architect will have authority to act on behalf of the Owner only to the extent provided in the Contract Documents.

§ 4.2.2 Upon the Owner's request, the Architect, and such other consultants retained by the Owner and Architect, will visit the Site at intervals appropriate to the stage of construction with the Project Manager, 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 or portion thereof observed is being performed in a manner indicating that the Work or portions observed, when fully completed, will be in accordance with the Contract Documents. However, the Owner does not currently intend for the Architect, Project Manager, or such other consultants of the Owner or Architect to make exhaustive or continuous on-Site inspections to check the quality or quantity of the Work. Neither the Architect, Project Manager, nor such other consultants of the Owner or Architect will 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 Construction Manager's rights and responsibilities as indicated in this Agreement.

§ 4.2.3 On the basis of the Site visits, the Architect will keep the Owner and Project Manager 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 Project Schedule submitted by the Construction Manager, and (2) defects and deficiencies observed in the Work. Neither the Owner, Architect, nor the Project Manager will be responsible for the Construction Manager's failure to perform the Work in accordance with the requirements of the Contract Documents. The Architect, Owner, and Project Manager will not have control over or charge of and will not be responsible for acts or omissions of the Construction Manager, Subcontractors, or their agents or employees, or any other persons or entities performing portions of the Work.

#### § 4.2.4 Communications Facilitating Contract Administration

Except as otherwise provided in the Contract Documents, the Architect, Project Manager, and such other persons designated by the Owner shall be copied on all correspondence between the Owner and Construction Manager. The Owner and Construction Manager may communicate directly with each other or indirectly through the Architect or Project Manager about matters arising out of or relating to the Contract. Communications by and with the Architect's consultants shall be through the Architect with the Owner copied on all written communications. Unless the Owner agrees otherwise, communications between Construction Manager and Owner's Consultants shall be through Owner and/or Project Manager. Except as otherwise provided in the Contract Documents, communications by and with Subcontractors and material suppliers shall be through the Construction Manager. Communications by and with Separate Contractors shall be through the Owner, except as may be required to facilitate coordination between Construction Manager and such Separate Contractors.

§ 4.2.5 Based on the Architect's and Project Manager's evaluations of the progress and condition of the Work, the Construction Manager's Applications for Payment, and all items required to be submitted by the Construction Manager in Sections 9.3 and 9.10 herein and Section 11.1 of the Agreement, the Architect will review and, after consultation with the Project Manager, the Architect and Project Manager will certify the amounts due the Construction Manager and the Project Manager will issue Certificates for Payment in such amounts.

§ 4.2.6 The Architect, Owner, and Project Manager have authority to reject Work that does not conform to the Contract Documents. Whenever the Owner or Architect considers it necessary or advisable, the Architect and Owner will have authority to require inspection or testing of the Work in accordance with Sections 13.4.1, 13.4.2 and 13.4.3, whether or not such Work is fabricated, installed or completed. However, neither this authority of the Architect or Owner nor a decision made in good faith either to exercise or not to exercise such authority shall give rise to a duty or responsibility of the Architect or Owner to the Construction Manager, Subcontractors, material and equipment suppliers, their agents or employees, or other persons or entities performing portions of the Work.

**§ 4.2.7** The Architect, in cooperation with the Owner and Project Manager, will review and approve, or take other appropriate action upon, the Construction Manager'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 Log approved by the Architect and Owner or, in the absence of an approved Submittal Log, with reasonable promptness as to cause no delay in the Work or in the activities of the Owner, Construction Manager or Separate Contractors 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 operating performance of equipment or systems, all of which remain the responsibility of the Construction Manager as required by the Contract Documents. The Architect's and Owner's review of the Construction Manager's Submittals shall not relieve the Construction Manager of the obligations under Sections 3.3, 3.5 and 3.12. The Architect's and Owner'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 or Owner's approval of a specific item shall not indicate approval of an assembly of which the item is a component.

**§ 4.2.8** The Project Manager will prepare Change Orders and Owner Change Directives. The Architect and/or Project Manager will investigate and make initial determinations and recommendations regarding concealed and unknown conditions as provided in Section 3.7.4.

**§ 4.2.9** Promptly after the Construction Manager has submitted to the Owner, Project Manager, and Architect a punch list of incomplete items (the "Punchlist") and has informed them that, in the Construction Manager's opinion, the Work or designated portion thereof is Substantially Complete as set forth in the Contract Documents, the Architect and Project Manager shall conduct an on-Site observation with the Owner to assist the Owner in determining the date of Substantial Completion and in supplementing the Construction Manager's Punchlist of items remaining to be completed. Thereafter, the Architect, in collaboration with the Project Manager and Owner, 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 Close-Out documents required by the Contract and assembled by the Construction Manager pursuant to Section 9.10; and assist the Project Manager in issuance of a final Certificate for Payment pursuant to Section 9.10.

**§ 4.2.10** If the Owner and Architect agree, the Architect will provide one or more Project representatives to assist in carrying out the Architect's responsibilities at the Site. The Owner shall notify the Construction Manager of any change in the duties, responsibilities and limitations of authority of the Project representatives.

**§ 4.2.11** In addition to responding to RFIs per Section 4.2.14, the Architect will interpret and make recommendations on matters concerning performance under, and requirements of, the Contract Documents on request of the Owner.

**§ 4.2.12** Interpretations and recommendations of the Architect will be consistent with the intent of, and reasonably inferable from, the Contract Documents and will be in writing or in the form of drawings.

**§ 4.2.13** On matters relating to aesthetic effect, Architect will review Submittals from Construction Manager to determine if they are consistent with the intent expressed in the Contract Documents. Matters relating to aesthetic effect will be referred to Owner for written approval prior to Architect providing final decisions to Construction Manager.

**§ 4.2.14** The Architect will review and respond to Requests for Information about the Contract Documents. The Construction Manager's RFIs shall be made to the Architect in writing with a copy to the Owner on an RFI form furnished by or acceptable to the Architect and Owner. If appropriate, the Architect will prepare and issue supplemental Drawings and Specifications in response to the Requests for Information. The Construction Manager shall copy and distribute the response to all persons or entities affected by response. The Architect's response to such RFIs will be made in writing within any time limits agreed upon or otherwise with reasonable promptness.

**§ 4.2.15** Subject to prior written notice and a reasonable opportunity to cure, if additional services of the Architect are required because of default or breach by the Construction Manager that causes additional services of the Architect to be necessary, the cost thereof shall be borne by the Construction Manager, and the Owner shall be entitled to reduce

amounts otherwise due to the Construction Manager by the costs of such additional services and/or demand that the Construction Manager reimburse the Owner for such costs.

## **ARTICLE 5 SUBCONTRACTORS**

### **§ 5.1 Definitions**

**§ 5.1.1** A Subcontractor is a person or entity defined in the Definitions section of this AIA A-201 General Conditions of the Contract, as modified for this Project.

**§ 5.1.2** *[Intentionally deleted].*

### **§ 5.2 Award of Subcontracts and Other Contracts for Portions of the Work**

**§ 5.2.1** Construction Manager shall publicly advertise and solicit competitive lump sum bids/proposals from Subcontractors for the performance of all major elements of the Work other than the minor Work that may be included in the Construction Manager's General Conditions Costs. Criteria for determining the bid/proposal that provides the best value to the Owner shall be established by the Construction Manager and Owner and included in the request for bids/proposals. The Construction Manager shall notify the Owner in advance in writing of the date it will receive the bids/proposals.

**§ 5.2.1.1** The Construction Manager shall schedule and conduct pre-bid conferences with interested bidders/proposers, Subcontractors, including material suppliers and equipment suppliers, and record minutes of the conferences. Construction Manager shall also respond in writing, to all parties attending, to questions raised in these conferences.

**§ 5.2.1.2** All Subcontractor bids/proposals shall be opened by Construction Manager in the presence of Owner and Project Manager. The Construction Manager, Owner, and Project Manager shall review all Subcontractor bids/proposals in a manner that does not disclose the contents of any bid/proposal to persons not employed by the Owner, Construction Manager, or Project Manager during the selection process. All bids/proposals shall be publicly available after award of the contract or within **seven (7)** Days after the date of final selection, whichever is later.

**§ 5.2.1.3** If Construction Manager reviews, evaluates, and recommends to Owner a bid/proposal from a Subcontractor, but Owner requires another bid/proposal to be accepted, Owner shall compensate Construction Manager by a change in the Contract Time or Contract Sum for any additional cost and risk that Construction Manager incurs because of Owner's requirement that the other bid/proposal be accepted.

**§ 5.2.1.4** Construction Manager may seek to self-perform portions of the Work identified for self-performance in the bid/proposal strategy ("Self-Performed Work"). Construction Manager must submit a bid/proposal for the Self-Performed Work in the same manner as all other Subcontractors, but must submit such bid/proposal directly to the Owner at least twenty-four (24) hours prior to receiving similar bids from other parties. After reviewing all bids, the Owner will determine whether the Construction Manager's bid/proposal provides the best value for Owner, which determination is final. If selected as the best value, the Contractor must perform the approved Self-Performed Work in accordance with the same terms and conditions as its other Subcontractors. For payment purposes, the Construction Manager shall account for Self-Performed Work in the same manner as it does all other Subcontractor costs. In the event an adjustment is required to the cost of any awarded Self-Performed Work, the awarded amount shall be treated as a lump sum amount and any adjustment to said amount must be approved through the Change Order process identified in Section 7.2 herein.

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

**§ 5.2.3** *[Intentionally deleted.]*

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

### **§ 5.3 Subcontractual Relations**

**§ 5.3.1** By appropriate written agreement, in form and substance acceptable to Owner, Construction Manager shall require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound by terms of

the Contract Documents, and to assume all the obligations and responsibilities, required to carry out the Work in accordance with the Contract Documents, including, but not limited to, the indemnity obligations and responsibility for safety of the Work. The Construction Manager 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. Each Subcontractor will similarly make copies of applicable portions of such documents available to their respective proposed sub-subcontractors. Construction Manager shall require all Subcontractors to (i) carry the insurance in the type and amount required by the Agreement and **Exhibit B**, (ii) indemnify the Owner to the same extent as required by the Construction Manager under the Contract Documents, and (iii) make the same warranties for the applicable portion of the Work to the Owner as required by the Construction Manager under the Contract Documents. The Construction Manager shall promptly inform the Owner in writing of any inability to comply with these requirements.

**§ 5.3.2** Construction Manager shall assign to Owner, from time to time as Owner may request, all assignable guaranties, warranties, and indemnities extended by any Subcontractor, materialman, mechanic or vendor with respect to any work, materials, equipment, or services performed or furnished by the issuing party and forming a part of the Work. Construction Manager shall use its best efforts to obtain assignable guaranties, warranties and indemnities with respect to the Work. Construction Manager shall, if requested by Owner, enforce any non-assignable guaranty, warranty or indemnity in its name but on behalf of Owner and otherwise assist Owner in realizing the full benefits thereof.

#### **§ 5.4 Contingent Assignment of Subcontracts**

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

- .1 assignment is effective only after termination of the Contract by the Owner pursuant to Sections 14.2 or 14.4, and only for those subcontract agreements that the Owner accepts by notifying the Subcontractor and Construction Manager 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 Construction Manager's rights and obligations under the subcontract. Owner shall only be responsible for those obligations of Construction Manager that (i) accrued prior to Owner's exercise of any rights under the conditional assignment and for which Owner has not made payment to Construction Manager and (ii) accrue subsequent to Owner's exercise of any rights under the conditional assignment. Each Subcontract shall so limit Owner's liability upon exercise of its rights under the conditional assignment. Nothing contained herein shall waive Construction Manager's obligations that arise out of Work performed under any agreement prior to Owner's acceptance of the assignment. Upon such assignment to the Owner under this Section 5.4.1, the Owner may further assign the agreement to a successor Construction Manager or other entity.

**§ 5.4.2** Upon such assignment, if the Work has been suspended for more than **ninety (90)** Days, the compensation of the Subcontractor whose agreement has been accepted for assignment by the Owner, may be equitably adjusted for increases in cost resulting from the suspension.

**§ 5.4.3** *[Intentionally deleted].*

**§ 5.4.4** Notwithstanding the foregoing, in the event of a termination for convenience under Section 14.4 below, Construction Manager's rights under each subcontract agreement with regard to the respective Subcontractor's obligation to correct defective or non-conforming Work or with regard to the respective Subcontractor's warranty obligations for portions of the Work performed by the Subcontractor are assigned by the Construction Manager to the Owner in the event of such termination on a non-exclusive basis such that Owner shall also have the right to enforce such obligations.

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

#### **§ 6.1 Owner's Right to Perform Construction and to Award Separate Contracts**

**§ 6.1.1** The term "Separate Contractor(s)" shall mean other contractors retained by the Owner under separate agreements. The Owner reserves the right to perform construction or operations related to the Project with the Owner's own forces, and with Separate Contractors retained to award separate contracts in connection with other portions of the Project or other construction or operations on the Site under conditions of the Contract identical or

substantially similar to these, including those portions related to insurance and waiver of subrogation. If the Construction Manager claims that delay or additional cost is involved because of such action by the Owner, the Construction Manager shall make such Claim as provided in Article 15.

**§ 6.1.2** *[Intentionally deleted]*.

**§ 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 Construction Manager, who shall cooperate with them. The Construction Manager shall participate with all Separate Contractors and the Owner in reviewing their construction schedules. The Construction Manager shall make any revisions to the Project Schedule deemed necessary after a joint review and mutual agreement, and, if the result is an extension of the Contract Time, by a signed Change Order setting forth the agreed adjustment to the Contract Time. The construction schedules shall then constitute the schedules to be used by the Construction Manager, Separate Contractors, and the Owner until subsequently revised.

**§ 6.1.4** *[Intentionally deleted]*.

**§ 6.2 Mutual Responsibility**

**§ 6.2.1** The Construction Manager 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 Construction Manager's construction and operations with theirs as required by the Contract Documents.

**§ 6.2.2** If part of the Construction Manager's Work depends upon construction or operations by the Owner or a Separate Contractor, the Construction Manager shall, prior to proceeding with that portion of the Work, promptly prepare a written report to the Owner, identifying apparent discrepancies or defects in the construction or operations by Owner or Separate Contractor that would render it unsuitable for proper execution and results of Construction Manager's Work. Failure of the Construction Manager 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 Construction Manager's Work, except as to defects not then reasonably discoverable. If the Construction Manager fails to make such report, the Construction Manager shall be liable for any damages, costs or liability resulting therefrom, including, without limitation, any fines, consulting fees, and costs of correction of the Work.

**§ 6.2.3** The Construction Manager shall reimburse the Owner for costs the Owner incurs that are payable to a Separate Construction Manager because of the Construction Manager's delays, improperly timed activities, defective construction, or failure to protect the Work. The Owner shall be responsible to the Construction Manager for costs the Construction Manager incurs because of a Separate Construction Manager's delays, improperly timed activities, damage to the Work, or defective construction so long as the Construction Manager complies with Section 6.2.2.

**§ 6.2.4** The Construction Manager shall promptly remedy damage the Construction Manager wrongfully causes to completed or partially completed construction or to property of the Owner or Separate Contractor as provided in Section 10.2.5. Should the Construction Manager cause damage to the work or property of any Separate Contractor, the Construction Manager shall, upon due notice, promptly attempt to settle with such other Separate Contractor by agreement, or otherwise to resolve the dispute.

**§ 6.2.5** The Owner and each Separate Contractor shall have the same responsibilities for cutting and patching as are described for the Construction Manager in Section 3.14.

**§ 6.3 Owner's Right to Clean Up**

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

**ARTICLE 7 CHANGES IN THE WORK**

**§ 7.1 General**

**§ 7.1.1** Changes in the Work may be accomplished after execution of the Contract, and without invalidating the Contract, only by Change Order or Owner Change Directive, subject to the limitations stated in this Article 7 and elsewhere in the Contract Documents.

§ 7.1.2 A Change Order shall be based upon agreement between the Owner and Construction Manager.; The Owner may issue an Owner Change Directive without agreement by the Construction Manager.

§ 7.1.3 Changes in the Work shall be performed under applicable provisions of the Contract Documents, and the Construction Manager shall proceed promptly, unless otherwise provided in the Change Order or, Owner Change Directive. From time to time, Owner may authorize changes in the Work, issue additional instructions, require additional Work or direct the omission of Work previously ordered; provided, however, Construction Manager shall not, under any circumstances, proceed with any change without prior written authorization from Owner in accordance with this Article 7 if such change would (1) increase or decrease the Final Guaranteed Maximum Price or if prior to execution of the Final Guaranteed Maximum Price Amendment Construction Manager's compensation for Pre-Construction Phase Services; (2) extend the Contract Time; or (3) otherwise affect the Work.

## § 7.2 Change Orders

§ 7.2.1 A Change Order is a written instrument signed by the Owner and the Construction Manager stating their agreement upon all of the following for the items covered in each Change Order as well as the cumulative effect and impact of all previous Change Order(s):

- .1 The change in the Work;
- .2 The amount of the adjustment, if any, in the Final Guaranteed Maximum Price, or if prior to execution of the Final Guaranteed Maximum Price Amendment, the adjustment, if any, in the Construction Manager's compensation for Pre-Construction Phase Services; and
- .3 The extent of the adjustment, if any, in the Contract Time.

§ 7.2.2 Unless otherwise provided in the Change Order, agreement on any Change Order shall constitute a final settlement of all matters in whole or in part arising from 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 associated with such change and any and all adjustments to Construction Manager's compensation for Pre-Construction Phase Services, the Final Guaranteed Maximum Price, the Contract Time and the Project Schedule. In the event a Change Order increases the Final Guaranteed Maximum Price, Construction Manager shall include the Work covered by such Change Orders in Applications for Payment as if such Work were originally part of the Contract Documents. Only changes in the Work through properly authorized and executed Change Orders and Owner Change Directives may be included in Construction Manager's Application for Payment.

§ 7.2.3 The Construction Manager shall not accept any request for a Change Order from any person other than the Owner and may not perform any Work asserted to constitute a change in the Work until the Owner has issued an Owner Change Directive or executed the Change Order, unless the Owner authorizes in writing that the Construction Manager to proceed with a change prior to the Owner's final execution of a Change Order.

§ 7.2.4 **Change Order Requests ("CORs").** In the event (1) the Construction Manager determines it is necessary to propose a change in the Work or (2) the Owner notifies Construction Manager of a desired change in the Work, the Construction Manager shall promptly (but in no event later than **ten (10)** Days after receipt of the request) deliver to the Owner, Project Manager, and Architect three (3) completed copies of its Change Order Request ("COR") setting forth in detail, with a suitable breakdown by trades and work classifications, the Construction Manager's estimate of the changes in the Final Guaranteed Maximum Price (together with appropriate data acceptable to the Owner supporting such estimate, including but not limited to bids, cost estimates, and applicable unit prices) and any proposed adjustment to the Contract Time resulting from the change. CORs shall be in such form or forms as directed by the Owner or Project Manager and comply with the following requirements:

- .1 Each COR shall be numbered consecutively and shall include all material costs, labor costs, fees, and other reimbursable Cost of the Work, including all Subcontractors costs, and any applicable Construction Manager's Fee or profit. The COR shall specify all costs related to the proposed change in the Work, including any disruption or impact on performance.
- .2 The Subcontractor's itemized accounting shall be included with the COR.
- .3 If the COR is returned to the Construction Manager for additional information or if the scope of the proposed change in the Work is modified by additions, deletions or other revisions, the Construction Manager shall revise the COR accordingly and resubmit the revised COR to the Owner.

- .4 A revised COR shall bear the original COR number suffixed by the letter "R" to designate a revision in the original COR. If additional revisions to a revised COR are necessary, each subsequent revision shall be identified by an appropriate numeral suffix immediately following the "R" suffix.
- .5 The Construction Manager shall request extensions of Contract Time, if any, due to changes in the Work only at the time of submitting the COR. If no time is included in the COR, it shall conclusively be presumed that the Contract Time shall not be affected by the Work which is the subject of the COR.
- .6 The Construction Manager shall maintain such Change Order log (with CORs) in such form as directed by Owner.

#### **§ 7.2.5 Processing of CORs/Change Orders.**

**§ 7.2.5.1** The Owner, Project Manager, and the Architect shall review properly prepared, timely CORs submitted by the Construction Manager for changes in the Work, including adjustments to the Construction Manager's compensation for Pre-Construction Phase Services, the Final Guaranteed Maximum Price or Contract Time. Upon written approval of a COR by the Owner, unless otherwise specified by Owner, the Construction Manager shall prepare a Change Order reflecting the agreed-upon changes as set forth in the Construction Manager's COR (or such other changes agreed upon by the Owner and the Construction Manager). The Change Order may include several approved CORs in a Change Order so long as the Construction Manager clearly identifies each approved COR by number, description and amount approved and attaches the approved COR to the Change Order.

**§ 7.2.5.2** If the Construction Manager's COR is not agreed to by the Owner or if the Construction Manager fails to submit a COR to Owner within **ten (10) Days** of an Owner request for a COR, the Owner may nevertheless issue an Owner Change Directive directing the Construction Manager to perform the requested change in the Work. If so issued, the Construction Manager shall proceed with the Work authorized by same and the increase or decrease, as applicable, in the Construction Manager's compensation for Pre-Construction Phase Services or the Final Guaranteed Maximum Price as a result of such additive or deductive changes in the Work shall be calculated as set forth in Section 7.3 and the adjustment of the Contract Time shall be as proposed in the Owner Change Directive. If the Construction Manager disagrees with the adjustments stated in the Owner Change Directive, the Construction Manager may submit a Claim as set forth in Article 15.

**§ 7.2.6** Except as permitted in the Agreement or herein with regard to amounts to which Owner is entitled to payment or offset arising from Construction Manager's breach or default hereunder, a change in the Construction Manager's compensation for Pre-Construction Phase Services, the Final Guaranteed Maximum Price, or the Contract Time shall be accomplished **only** by an Owner Change Directive or Change Order without prejudice, however, to Construction Manager's right to assert its entitlement to a change in the Construction Manager's compensation for Pre-Construction Phase Services, the Final Guaranteed Maximum Price, or Contract Time in accordance with Article 15. No course of conduct or dealings between the parties, nor verbal instructions, express or implied acceptance of alterations or additions to the Work, nor refinement or further detailing of Drawings and Specifications, shall be the basis of any Claim to any increase in any amounts due under the Contract Documents or a change in any time period provided for in the Contract Documents and Construction Manager hereby releases and waives all Claims for extras, changes or increases therein, unless such extras, changes and increases are specifically authorized by a written Change Order or Owner Change Directive, signed by Owner, in accordance with this Article 7.

#### **§ 7.3 Owner Change Directives**

**§ 7.3.1** An Owner Change Directive is a written order signed by the Owner, directing a change in the Work prior to agreement on adjustment, if any, in the Construction Manager's compensation for Pre-Construction Phase Services, the Final Guaranteed Maximum Price, or Contract Time, or each. The Owner may, by Owner 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, Construction Manager's compensation for Pre-Construction Phase Services, the Final the Guaranteed Maximum Price and Contract Time being adjusted accordingly. The Owner at any time may also by an Owner Change Directive, without invalidating the Contract, order the Construction Manager to perform work in the event of a dispute with the Construction Manager as to whether such work is part of the Work under the Contract Documents and the Construction Manager may submit a claim in accordance with Article 15.

**§ 7.3.2** An Owner Change Directive shall be used in the absence of total agreement on the terms of a Change Order.

§ 7.3.3 If the Owner Change Directive provides for an adjustment to the Construction Manager's compensation for Pre-Construction Phase Services or the Final Guaranteed Maximum Price, the adjustment shall be based on one of the following methods:

- .1 Mutual acceptance of a lump sum properly itemized and supported by sufficient substantiating data to permit evaluation;
- .2 Unit prices stated in the Contract Documents or subsequently agreed upon;
- .3 Reimbursable Cost of the Work plus Construction Manager's Fee;
- .4 Actual cost of the Change in the Work to be determined in a manner agreed upon by the parties and a mutually acceptable fixed or percentage fee; or
- .5 As provided in Section 7.3.7.

§ 7.3.4 If

*(Paragraphs deleted)*

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 Owner Change Directive so that application of such unit prices to quantities of Work proposed will cause substantial inequity to the Owner or Construction Manager, the applicable unit prices shall be equitably adjusted.

§ 7.3.5 Upon receipt of an Owner Change Directive, the Construction Manager shall promptly proceed with the change in the Work involved and advise the Owner, Project Manager, and Architect of the Construction Manager's agreement or disagreement with the method, if any, provided in the Owner Change Directive for determining the proposed adjustment in the Construction Manager's compensation for Pre-Construction Phase Services, the Final Guaranteed Maximum Price, or Contract Time.

§ 7.3.6 An Owner Change Directive signed by the Construction Manager indicates the Construction Manager's agreement therewith, including adjustment in Construction Manager's compensation for Pre-Construction Phase Services, the Final Guaranteed Maximum Price, and Contract Time or the method for determining them. Such agreement shall be effective immediately and shall be recorded as a Change Order.

§ 7.3.7 If the Construction Manager does not respond within **ten (10)** Days of submittal of the Owner Change Directive or indicates a disagreement with the method for adjustment in the Construction Manager's compensation for Pre-Construction Phase Services or the Final Guaranteed Maximum Price within that same **ten (10)** Day period, the Architect in collaboration with the Project Manager shall determine the method and the adjustment on the basis of reasonable expenditures and savings of those performing the Work attributable to the change and including, in the case of an increase, an amount for Subcontractor overhead and profit, if any, as set forth in the Agreement, or if no such amount is set forth in the Agreement, a reasonable amount. In such case, and also under Section 7.3.3.3, the Construction Manager shall keep and present, in such form as the Owner, Project Manager and/or Architect may prescribe, an itemized accounting together with appropriate supporting data. Unless otherwise provided in the Contract Documents, costs for the purposes of this Section 7.3.7 shall be limited to the following:

- .1 Costs of labor, and labor burden as set forth in **Attachment 5.1** to **Exhibit A** if after execution of the Final Guaranteed Maximum Price Amendment or **Exhibit F** if prior to the execution of Final Guaranteed Maximum Price Amendment;
- .2 Costs of materials, supplies and equipment, including cost of transportation, whether incorporated or consumed;
- .3 Rental costs of machinery and equipment, exclusive of hand tools, whether rented from the Construction Manager or others;
- .4 Costs of permit fees, and sales, use or similar taxes related to the Work; and
- .5 Additional costs of supervision and field office personnel directly attributable to the Change unless otherwise included in another Cost of the Work.

The costs referred to in this Section 7.3.7 shall be reasonable costs. Construction Manager shall not be entitled to an increase of the Construction Manager's Fee or additional mark-up as a result of any Change Order, except as specifically permitted in Section 6.1.3 of the Agreement.

§ 7.3.8 Except as otherwise provided in the Agreement, the amount of credit to be allowed by the Construction Manager to the Owner for a deletion or change that results in a net decrease in the Final Guaranteed Maximum Price shall be calculated as provided in Section 6.1.3 of the Agreement. When both additions and credits covering related

Work or substitutions are involved in a change, the allowance for profit shall be figured on the basis of net increase or decrease, if any, with respect to that change, to the extent such change is authorized by the Agreement.

§ 7.3.9 Pending final determination of the total cost of an Owner Change Directive, amounts not in dispute for such changes in the Work shall be included in Applications for Payment accompanied by a Change Order indicating the parties' agreement with part or all of such costs. For any portion of such cost that remains in dispute, the Architect, in collaboration with the Project Manager, will make an interim determination for purposes of monthly certification for payment for those costs. That determination of cost shall adjust the Final Guaranteed Maximum Price, or if prior to the execution of the Final Guaranteed Maximum Price Amendment, the Construction Manager's compensation for Pre-construction Phase Services, on the same basis as a Change Order, subject to the right of either party to disagree and assert a Claim in accordance with Article 15. Further, pending final determination of any adjustment to the Contract Time, a Change Order shall be issued indicating the parties' agreement with part or all of the appropriate time adjustment, and for any portion of such time adjustment that remains in dispute, the Architect in collaboration with the Project Manager will make an interim determination, subject to the right of either party to disagree and assert a Claim in accordance with Article 15.

§ 7.3.10 When the Owner and Construction Manager agree with a determination concerning the adjustments in the Construction Manager's compensation for Pre-Construction Phase Services, the Final Guaranteed Maximum Price, and/or Contract Time, or otherwise reach agreement upon the adjustments, such agreement shall be effective immediately and shall be recorded by preparation and execution of an appropriate Change Order. Change Orders may be issued for all or any part of an Owner Change Directive.

§ 7.4 *[Intentionally deleted.]*

## ARTICLE 8 TIME

### § 8.1 Definitions

§ 8.1.1 Contract Time is defined in Article 1.1.

§ 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 and approved by Owner in accordance with Section 9.8.

§ 8.1.4 The term "Day" as used in the Contract Documents is defined in Article 1.1.

### § 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 Construction Manager confirms that the Contract Time is a reasonable period for performing the Work.

§ 8.2.2 The Construction Manager 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 and **Exhibit B** to be furnished by the Construction Manager to the Owner. The Contract Time shall not be adjusted as a result of the Construction Manager's failure to obtain insurance required under this Contract.

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

§ 8.2.4 Construction Manager shall perform the Work in accordance with the Project Schedule and the Required Dates of Substantial Completion and Final Completion and all Interim Milestone Dates contained therein, which shall not exceed the time required under Sections A.2.3 and A.2.4 of **Exhibit A**. The term "Float" as used in the Contract Documents shall mean "total float" and shall mean the difference between the time available to accomplish an activity and the estimated time required and is as determined by the most recently updated Construction Schedule. All Float contained in the Construction Schedule shall be considered a Project resource available to Owner or Contractor, on an as-needed basis, to achieve Construction Schedule milestones, Interim Milestone Dates, Substantial Completion, and/or Final Completion. All Float shall be shown in the Construction Schedule. Identification of (or failure to identify) Float on the Construction Schedule shall be evaluated by the Owner and Project Manager in determining

whether to approve the Construction Schedule. Once identified, Float shall be monitored, accounted for, and maintained in accordance with critical path methodology in the Construction Schedule.

### § 8.3 Delays and Extensions of Time

**§ 8.3.1 Weather Delays.** If adverse weather conditions are the basis for a Claim for additional time, Construction Manager shall demonstrate the manner in which the critical path of the Project Schedule is impacted by the alleged delay due to the adverse weather conditions. In addition, each such Claim for additional time related to adverse weather conditions shall be documented by data substantiating that weather conditions had adverse effect on the critical path of the Project Schedule and that conditions experienced fall outside of the extreme ranges of weather data published by the National Oceanic and Atmospheric Administration (NOAA) for the area in which the Project is located, during the **five (5)** year climactic average immediately preceding the date of the Agreement (a "Weather Delay"), provided however, that abnormally high temperatures will not be considered a basis for a request for an extension of the Contract Time. Regardless of actual weather conditions, any Day in which the Construction Manager is able to work sixty percent (60%) or more of its scheduled work force shall not be counted as an adverse weather condition for purposes of calculating weather related time extensions. In evaluation of the above, Saturdays will be considered as make-up days for time lost during the normal work week due to weather, and Saturdays which are considered as workable shall offset claims made by the Construction Manager for adverse weather conditions, unless Construction Manager had previously submitted a schedule to the Owner that reflected it would work on that Saturday.

**§ 8.3.1.1** Adverse weather conditions or precipitation events will be recorded at the Site. They also may include subsequent muck Days, dewatering, and ice/snow removal and other related effects of the weather event. Adverse weather conditions shall not be considered a basis for an extension of Contract Time unless the number of Days of adverse weather conditions experienced during that month fall outside of the NOAA **five (5)** year average set forth in Section 8.3.1 above. All adverse weather conditions will be logged by the Construction Manager daily in the construction Daily Logs and included a weather report which will be provided monthly to the Owner.

**§ 8.3.1.2.** Construction Manager represents and warrants to Owner, as a material inducement to the execution of this Contract, that Construction Manager has considered all risks and occurrences that could occur with respect to the timely completion of the Work. Without limiting the foregoing, Construction Manager warrants and represents that in establishing the Project Schedule, Construction Manager has given full consideration to and takes responsibility for the effect of inclement weather and adverse weather conditions during the construction period in accordance with the 5-year climactic averages for the location of the Project as determined by National Oceanic and Atmospheric Administration (NOAA) office nearest to the Project.

**§ 8.3.1.3 Extensions of time** shall be the Construction Manager's **sole remedy** for Weather Delay caused by adverse weather conditions over the NOAA **five (5)**-year average discussed in Section 8.3.1, but shall only be granted if (a) Construction Manager provides notice of the adverse weather condition to Owner and Project Manager within **forty-eight (48)** hours of experiencing such adverse weather condition; (b) such delay is beyond the NOAA 5-year average for adverse weather conditions and the Saturday make-up day required by Section 8.3.1; (c) the delay is substantiated to have affected the critical path of the Project Schedule; and (d) the Owner approves the extension of Contract Time in an approved Change Order.

**§ 8.3.2 Non-Weather Delay.** If the critical path of the Work of the Construction Manager is delayed at any time in the commencement or progress of the Work (1) by unanticipated physical conditions at the Project, other than adverse weather conditions (which shall be resolved pursuant to Section 8.3.1 above) fire, pandemics, epidemics, governmental orders or delays, unavoidable casualties, or other causes beyond the Construction Manager's control and not arising or resulting from the negligence, inattention or fault of Construction Manager or any of its Subcontractors ("Excusable Delay"); (2) by the acts or negligence of the Owner, Project Manager, or of an employee of Owner, or of a Separate Contractor employed by the Owner ("Owner-Caused Delay"); or (3) by changes ordered in the Work, and Construction Manager has provided a notice of potential delay within **forty-eight (48)** hours of Construction Manager becoming aware of such event or circumstance, the Contract Time may be extended by Change Order for such time as may be reasonably determined by the Project Manager and approved by Owner, and then only for the amount of time Construction Manager has been actually and directly delayed and only if allowed under Section 8.3.3 below. Notwithstanding the foregoing, the **Construction Manager acknowledges and agrees that neither adjustments in the Contract Time nor adjustments in the Final Guaranteed Maximum Price** will be permitted if (1) any delay is caused by the negligence or fault of the Construction Manager and/or its Subcontractors; or (2)

Construction Manager failed to provide a notice of potential delay. Construction Manager acknowledges the limitations of this provision and shall cooperate with Owner to at all times minimize and mitigate the impact of any delay to completion of the Work.

**§ 8.3.3 No Damage for Delay.** Notwithstanding any other provision in the Contract Documents, an extension of the Contract Time shall be the **sole remedy** of Construction Manager for Excusable Delay and Weather Delay. Any delay caused by or resulting from changes ordered in the Work shall be provided in the particular Change Order and no additional Contract Time or cost will be allowed except as agreed therein. As to Owner-Caused Delay or interference, extensions of time may be provided but no compensation for delay will be allowed except as set forth in Section 8.3.3.1 below. Construction Manager shall not be entitled to any compensation or recovery of any other damages including, without limitation, consequential damages, lost opportunity costs, impact damages, loss of productivity, or other similar damages.

**§ 8.3.3.1 Owner-Caused Delay.** Construction Manager shall provide notice of an Owner caused delay within **forty-eight (48)** hours of first experiencing such Owner-Caused Delay. The amount of any Claim for damages asserted by Construction Manager for an Owner-Caused Delay shall not exceed the Construction Manager's actual, direct General Conditions Costs incurred for that certain period of time of the delay. "Direct General Conditions Costs" shall mean, the allowable Costs of the Work designated as General Conditions Costs in Article 7 of the Agreement. Construction Manager shall not be entitled to (a) any indirect or consequential damages, (b) home office overhead, home office charges, or any damages based on Eichleay formula calculation; (c) recovery of any damages based on a comparison of planned expenditures to total actual expenditures, or on 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; (d) any profits or lost profits, except as expressly recoverable as Construction Manager's Fee on the Cost of the Work as set forth in the Agreement; (e) exemplary damages, or (f) unjust enrichment damages. All recoverable costs must be shown to have been *directly caused* by an Owner-Caused Delay. Excusable Delays or delays caused by Construction Manager or its forces occurring concurrently with Owner-Caused Delay shall exempt that Day from being counted as an Owner-Caused Delay.

**§ 8.3.3.2** The Owner's exercise of any of its rights or remedies under the Contract Documents (including, without limitation, ordering changes in the Work, or directing suspension, rescheduling, or correction of the Work), regardless of the extent or frequency of the Owner's exercise of such rights or remedies, shall not be construed as interference in the Construction Manager's performance of the Work or a wrongful act of Owner. Notwithstanding Section 8.3.3 or 8.3.3.1 above, no extension of Contract Time or any additional costs shall be granted or allowed unless the Construction Manager demonstrates that the delay in completion of the Work was caused by a delay in a portion of the Work that was on the critical path of the Project. Nothing contained herein shall prohibit recovery by Owner of liquidated damages for Construction Manager's delay pursuant to the Agreement. Construction Manager shall not be compensated nor given extensions of time for delays that are unexcused.

**§ 8.3.4** Construction Manager and all Subcontractors, consultants, and suppliers will comply with all orders, regulations, or requirements issued by any Authority Having Jurisdiction that may affect commercial construction in the county where the Project is located. Construction Manager and its Subcontractors and suppliers will employ commercially reasonable efforts to mitigate any delays and/or increased costs related to price escalations in the marketplace, tariffs, or labor or materials shortages. Notwithstanding the foregoing, Owner has requested that Construction Manager prepare the Project Schedule and all bids/proposals keeping in mind reasonably foreseeable delays in deliveries, workforce inefficiencies, price escalations, price fluctuations, and potential shortages of materials. The Owner shall not be required to make any adjustment in either the Contract Sum or Contract Time in connection with any failure by the Construction Manager or any contractors, Subcontractors, or suppliers to comply with the requirements of this Section or to include in the bids/proposals or Project Schedule sufficient time or amounts to address reasonably foreseeable delays in deliveries, workforce inefficiencies, price escalations or fluctuations, or shortages of materials.

*(Paragraph deleted)*

## **ARTICLE 9 PAYMENTS AND COMPLETION**

### **§ 9.1 Contract Sum**

**§ 9.1.1** The Contract Sum is defined in Section 6.1.1 of the Agreement.

*(Paragraph deleted)*

Init.

## § 9.2 Schedule of Values

Construction Manager shall include a /Schedule of Values in the Final Guaranteed Maximum Price Amendment (**Exhibit A**) as **Attachment 1**, allocating the entire Contract Sum to the various portions of the Work, by trade, with supporting data received from Subcontractors (including Subcontractor schedules of values), and shall incorporate costs for each Subcontractor for each portion of the Work and for General Condition Costs and the Construction Manager's Fee. The Schedule of Values shall be prepared in such a manner that each major item of Work and each contracted or subcontracted item of Work is shown as line items on AIA Document G702/703 or such other format required by Owner, Application and Certificate for Payment, Continuation Sheet or other form acceptable to Owner. The Schedule of Values shall follow the trade divisions of the Specifications so far as practicable and shall not overvalue early job activities. Except as otherwise agreed in writing by the parties, the Construction Manager's General Conditions Costs, Contingency, allowances and Construction Manager's Fee shall be included as separate line items. Any modifications or amendments to the Schedule of Values must be approved by the Owner. The Construction Manager shall provide an analysis of the Schedule of Values, showing actual performance as compared to the original projection, as part of its monthly progress report pursuant to Section 3.8.2.2.

## § 9.3 Applications for Payment

§ 9.3.1 Applications for Payment will be submitted in accordance with Article 11 of the Agreement.

§ 9.3.1.1 Construction Manager shall submit to the Owner and Project Manager an itemized Pencil Draw and Application for Payment for completed portions of the Work. The application shall be notarized and supported by data substantiating the Construction Manager's right to payment as required by this Agreement or as the Owner, Project Manager, 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 Owner shall have the right, but not the obligation, to make payments directly to Subcontractors and materialmen or to make payments jointly to Construction Manager and Subcontractor, laborer or materialman, as and when Owner deems appropriate.

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

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

§ 9.3.2 Unless otherwise provided in the Contract Documents, payments shall be made for services provided as well as 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. Notwithstanding anything herein to the contrary, if it is reasonably necessary for the Construction Manager to purchase materials or equipment and store them off-Site in order to maintain the Project Schedule, Owner shall not unreasonably withhold, condition or delay its approval of payment for such items. Payment for materials and equipment stored on or off the Site shall be conditioned upon compliance by the Construction Manager 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. Construction Manager shall also comply with the following requirements:

- .1 Materials shall be stored at a commercial warehouse meeting Owner's criteria as stated in this Section 9.3.2.
- .2 Title to such materials shall be vested in the Owner as evidenced by documentation satisfactory in form and substance to the Owner including, without limitation, recorded financing statements, UCC filings, and UCC searches.
- .3 With each Application for Payment, the Construction Manager shall submit to the Owner a written list identifying each location where materials are stored off the Site and the value of materials at each location. Timestamped photos of stored materials must be provided with each Application for Payment.
- .4 The Construction Manager shall procure insurance satisfactory to the Owner for materials stored off the Site in an amount not less than the total value thereof and insurance to cover materials in transit from the off-Site storage facility to the Site. Construction Manager shall provide necessary Certificates of Insurance to demonstrate compliance with the insurance requirements.

- .5 Owner and Project Manager shall have the right to make inspections of the storage areas at any time. Warehouse records, receipts and invoices shall be available to Owner upon request to verify the quantities of materials and their disposition. Warehouse and storage facilities must be insured and bonded in such amounts as to cover stored materials.
- .6 Such materials shall be (1) protected from diversion, destruction, theft, and damage to the satisfaction of the Owner; (2) specifically marked for use on the Project; and (3) segregated from other materials at the storage facility.

**§ 9.3.3** The Construction Manager warrants that title, but not the risk of loss or damage, to all Work covered by an Application for Payment will pass to the Owner no later than the earlier to occur of (i) incorporation into the Work, or (ii) the time of payment. The Construction Manager further warrants that upon submittal of an Application for Payment all Work for which Certificates for Payment have been previously issued and payments received from the Owner shall, to the best of the Construction Manager's knowledge, information and belief, be free and clear of liens, claims, security interests, or encumbrances in favor of the Construction Manager, Subcontractors, material suppliers, or other persons or entities entitled to make a claim by reason of having provided labor, materials and equipment relating to the Work.

**§ 9.3.4** The Construction Manager shall submit with each Application for Payment such releases and waivers of liens as required by Sections 11.1.6.1.4 and 11.1.6.1.5 of the Agreement, duly executed, from itself and each Subcontractor, material supplier, or other person or entity for Work covered by the Application for Payment, and any other items, documents and information required by the Owner to evidence that the Work covered by the Application for Payment has been performed in accordance with the Contract Documents and Applicable Laws. Construction Manager shall defend, indemnify and hold harmless Owner and any related entities from any liens or bond claims filed by any Subcontractor, laborer, materialman, or supplier claiming through Construction Manager. Such indemnification may be provided through the payment bond required for the Work. If the payment bond fails to satisfy, remove or discharge any such lien or claim, upon **five (5) Days'** notice from Owner that such failure has occurred, Construction Manager will defend, indemnify and hold harmless Owner from such claim and shall be responsible for all damages, losses, payments, costs and fees, including attorney's fees, incurred by Owner as a result of such claims.

**§ 9.3.5** In the event of termination for convenience or cause, or default by the Construction Manager, the items in storage upon which payment has been made, will be promptly turned over to Owner at a location designated by Owner. All surety bonds provided by Construction Manager for the Project shall cover any claim respecting materials stored off-Site.

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

**§ 9.4.1** If the Construction Manager has complied with Section 11.1.3.1 of the Agreement as it concerns submittal of the Pencil Draw and the subsequent review and submittal of the formal Application for Payment process, Project Manager in consultation with the Architect shall, within the time periods provided in such Section, certify the Application for Payment. Upon certification Project Manager shall issue to the Owner, with a copy to the Architect and Construction Manager, a Certificate for Payment for such amounts approved, which shall be reduced by retainage, as the Project Manager determines is proper. If the Certificate for Payment cannot be issued, Project Manager shall notify the Owner and Construction Manager of its reasons for withholding certification of the Application for Payment and issuance of a Certificate for Payment. All Certificates and payments, including those pursuant to a pending Claim, shall be subject to the Owner's approval.

**§ 9.4.2** The Architect and Project Manager shall, as appropriate to the type and stage of construction progress and as otherwise required by this Agreement, but not less than monthly, conduct on-Site inspections of the Work to review the progress and quality of the Work, to determine if the Work is proceeding in accordance with the Contract Documents, and to guard the Owner against defects and deficiencies in the Work. On the basis of such on-Site inspections, the Project Manager will work collaboratively with the Architect to certify and issue Certificates for Payment. After the Project Manager and Architect have performed their obligations under this Section 9.4.2, the Project Manager will issue a Certificate for Payment if it finds that all requirements have been met. The Architect's certification of an Application for Payment shall constitute a representation by the Architect to the Owner, based on the Architect's inspections at the Site, that the Work, as inspected by Architect, has progressed to the point indicated and that the quality of the Work is in accordance with the Contract Documents. Project Manager's certification and issuance of a Certificate for Payment shall constitute a representation by the Project Manager, based on its observations at the Site, that the Work has progressed to the point indicated and that the payment requested reasonably

corresponds to the quantity of the Work performed as observed by the Project Manager. The issuance of a Certificate for Payment by the Project Manager will not be a representation that the Project Manager has made any examination to ascertain how or for what purpose the Construction Manager has used money previously paid on account of the Final Guaranteed Maximum Price.

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

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

**§ 9.5.1** A Certificate for Payment may be withheld in whole or in part, to the extent reasonably necessary to protect the Owner due to (a) the inability to certify the Application for Payment as indicated in Section 9.4.2 above; or (b) the determination that the Work has not progressed to the point indicated in the Construction Manager's Application for Payment. If the Project Manager is unable issue a Certificate for Payment in the amount of the Application for Payment, the Project Manager will notify the Construction Manager, Architect, and Owner as provided in Section 9.4.1. If the Construction Manager, Architect, and Project Manager cannot agree on a revised amount, the Project Manager, performing its obligations under Section 9.4, will promptly issue a Certificate for Payment for the amount the Project Manager deems to be due and owing. The Owner, through Project Manager, 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 necessary to protect the Owner from loss for which the Construction Manager is responsible because of:

- .1 defective Work not remedied;
- .2 Construction Manager has been paid and labor, material or equipment claims are filed by any Subcontractor and the payment bond surety has not responded to the claim as required by the payment bond;
- .3 failure of the Construction Manager to make payments properly to Subcontractors or others for services, labor, materials or equipment;
- .4 reasonable evidence that the Work cannot be completed for the unpaid balance of the Final Guaranteed Maximum Price;
- .5 damage to the Owner or a Separate Contractor to the extent it is either not covered by Construction Manager's insurance or Construction Manager's insurer has not confirmed the existence or amount of coverage;
- .6 reasonable evidence that the Work will not be completed within the Contract Time, and that the unpaid balance would not be adequate to cover damages for the anticipated delay permitted under the Contract Documents;
- .7 failure to carry out the Work in accordance with the Contract Documents as advised by and with input from the Architect or Project Manager, as necessary to interpret or clarify the Contract Documents;
- .8 the assessment of any fines or penalties against Owner as a result of Construction Manager's failure to comply with Applicable Laws;
- .9 discovery that Work associated with a prior payment was not in fact achieved, or that Work associated with a prior payment contained defective Work;
- .10 Construction Manager owes Owner liquidated damages or other amounts under the terms of this Agreement;
- .11 failure of the Construction Manager or its Subcontractors or other personnel or entities under the control of Construction Manager to update the Project Schedule, Submittal Log, Daily Log, or to attend Project meetings as required by Owner and/or the Contract Documents;
- .12 Construction Manager has failed to provide any or keep in force or failed to cause a Subcontractor to provide or keep in force any insurance required by this Agreement; or
- .13 any material breach of the Agreement or any other reason for which Owner is entitled to withhold payment under this Agreement.

**§ 9.5.2** *[Intentionally deleted].*

**§ 9.5.3** When the reasons for withholding certification and/or payment are removed, certification and/or payment will be made for amounts previously withheld. If the Owner through Project Manager withholds certification for payment

under Section 9.5.1.3, or if Project Manager or Owner otherwise becomes aware that Construction Manager is not making proper payments to Subcontractors, the Owner may, at its sole option, issue joint checks to the Construction Manager and to any Subcontractor or material or equipment suppliers to whom the Construction Manager failed to make payment for Work properly performed or material or equipment suitably delivered; *provided, however*, nothing contained herein shall obligate Owner to issue such joint checks.

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

## **§ 9.6 Progress Payments**

**§ 9.6.1** After the Architect and Project Manager have each certified the Application for Payment and the Project Manager has issued a Certificate for Payment, the Owner shall make payments in the manner and within the time provided in the Contract Documents. Progress payments will be made as provided in Section 11.1 of the Agreement, assuming a complete Application for Payment package is received pursuant thereto and in conformance with Article 9.3 herein. Notwithstanding the foregoing, Owner may withhold payment as provided in Sections 9.4.3 and 9.5.1 herein.

**§ 9.6.2** The Construction Manager shall promptly pay each Subcontractor no later than **ten (10)** Days after receipt of payment from the Owner, out of the amount paid to the Construction Manager on account of such Subcontractor's portion of the Work, the amount to which the Subcontractor is entitled, reflecting percentages actually retained from payments to the Construction Manager on account of the Subcontractor's portion of the Work. The Construction Manager shall, by appropriate agreement with each Subcontractor, require each Subcontractor to make payments to Sub-subcontractors in a similar manner.

**§ 9.6.3** The Owner will, on request and if practicable, furnish to a Subcontractor information regarding percentages of completion or amounts applied for by the Construction Manager and action taken thereon by the Architect, Project Manager, and Owner on account of portions of the Work done by such Subcontractor.

**§ 9.6.4** Construction Manager shall use all sums advanced to it pursuant to this Agreement solely for the purpose of performance of the Work in accordance with the Contract Documents. Payments to all Subcontractors, suppliers, materialmen, and other parties furnishing labor and materials in connection with performance of the Work shall be accompanied by Conditional Waiver and Release on Progress/Final Payment documents in conformance with Texas law which shall be signed by the appropriate Subcontractor to release mechanic's and materialman's liens through the effective date of such previous Application for Payment pursuant to Section 11.1.6.1 of the Agreement. Final payment shall not be released to Construction Manager until Owner has received the information required by Section 11.2 of the Agreement. Without limiting the foregoing, the Owner shall have the right to contact Subcontractors and suppliers to ascertain whether they have been properly paid. Neither the Owner nor Architect shall have an obligation to pay or to see to the payment of money to a Subcontractor or supplier, except as may otherwise be required by Applicable Law.

**§ 9.6.5** Construction Manager 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 defective Work or Work that does not comply with the Contract Documents or industry standards.

**§ 9.6.7** Payments received by the Construction Manager for Work properly performed by Subcontractors and other persons or entities providing services or work for the Construction Manager, shall be held by the Construction Manager for the Subcontractors, for which payment was made by the Owner.

**§ 9.6.8** Construction Manager shall maintain a detailed and accurate accounting system that shall be necessary for the proper financial management of the Project. Construction Manager's records and receipts shall allow for ready identification of all charges included in contracts, subcontracts, purchase orders, Change Orders, invoices and Applications for Payment.

## § 9.7 Failure of Payment

§ 9.7.1 Subject to Owner's right to withhold sums from payment set forth in Section 9.4.3 and/or 9.5.1 above, if the Project Manager does not issue a Certificate for Payment, through no fault of the Construction Manager, within **ten (10)** Days after receipt of the Construction Manager's Application for Payment, or if the Owner does not pay the Construction Manager within the time required by the Contract Documents the amounts due to Construction Manager pursuant to the Contract Documents, then the Construction Manager may, upon **ten (10)** additional Days' written notice to the Owner and Architect, stop the Work until payment of the amount owing has been received. The Contract Time shall be extended appropriately and the Final Guaranteed Maximum Price shall be increased by the amount of the Construction Manager's reasonable costs of shut-down, delay and start-up, plus interest as provided for in the Contract Documents.

§ 9.7.2 If the Owner is entitled to reimbursement or payment from the Construction Manager 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 Construction Manager fails to promptly make any payment due the Owner within **thirty (30)** Days of notice of the amount due, or the Owner incurs any costs and expenses to cure any default of the Construction Manager or to correct defective Work, the Owner shall have an absolute right to offset such amount against the Contract Sum and may, in the Owner's sole discretion, elect either to: (1) deduct an amount equal to that which the Owner is entitled from any payment then or thereafter due the Construction Manager from the Owner; or (2) issue a written notice to the Construction Manager reducing the Final Guaranteed Maximum Price by an amount equal to that which the Owner is entitled.

## § 9.8 Substantial Completion

§ 9.8.1 In addition to such other requirements and conditions as set forth in the Agreement, Substantial Completion is the stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy and/or utilize the Work for its intended use; provided, however, as a condition precedent to Substantial Completion, in addition to such other requirements and conditions as set forth in this Agreement, the Texas Department of Health and Human Services ("TDHHS") and any other Authority Having Jurisdiction over the Project has certified that the Work is complete and can be occupied, all systems and facilities necessary for the Owner's occupancy of the premises have been installed and are in good operating order and condition, equipment has been fully tested, balanced, and commissioned, Owner's staff has been properly trained on all equipment, and Owner has received all certificates of occupancy or their equivalent (which may be temporary) and any other permits, approvals, licenses, and other documents from any Authorities Having Jurisdiction thereof necessary for the beneficial occupancy of the Project (or if the same cannot be delivered for reasons not the fault or responsibility of Construction Manager, nevertheless all Construction Manager's obligations necessary to the issuance of such certificates, permits, approvals, or licenses will have been performed); and the Construction Manager has certified that all remaining Punchlist items (as defined in Section 9.8.2) can be completed within **thirty (30)** Days. In general, the only remaining Work shall be minor in nature, so that the Owner could occupy and utilize the Project on that date and the completion of the Work by the Construction Manager would not materially interfere or hamper the normal business operations, and any Punchlist items may be completed within the time periods as established in the Agreement for Final Completion following Substantial Completion.

§ 9.8.1.1 Construction Manager shall achieve Substantial Completion of the Work no later than the date established in Section A.2.3.1 of **Exhibit A**, the Final Guaranteed Maximum Price Amendment. Construction Manager shall achieve completion of all Punchlist items no more than **thirty (30)** Days after Construction Manager reaches Substantial Completion. Final Completion of the Work, which without limitation shall include the delivery of all Close-out Documents, the completion of requirements of Section 9.8.1 above, and Construction Manager's submission of the final accounting, shall be achieved within the time period provided in Section A.2.4 of **Exhibit A** no more than **sixty (60)** Days after achieving Substantial Completion.

§ 9.8.2 When the Construction Manager considers that the Work, or a portion thereof which the Owner agrees to accept separately, is substantially complete, the Construction Manager shall prepare and submit to the Owner, Architect, and Project Manager a comprehensive Punchlist of items to be completed or corrected prior to Final Payment. Failure to include an item on such Punchlist does not alter the responsibility of the Construction Manager to complete all Work in accordance with the Contract Documents. The Construction Manager shall proceed promptly to complete and correct all items on the Punchlist. The Construction Manager shall not consider the Work to be substantially complete for purposes of providing a Punchlist to Owner until all Project systems included in the Work are operational as designed and scheduled, all designated or required inspections and certifications by Authorities

Having Jurisdiction have been made and posted, designated instruction of the Owner and Project Manager with respect to the operation of specific systems has been completed, and all final finishes required by the Contract Documents are in place.

**§ 9.8.3** Upon receipt of the Construction Manager's Punchlist, the Owner, Architect and Project Manager will make an inspection to determine whether the Work or designated portion thereof is substantially complete. If the inspection discloses any item, whether or not included on the Construction Manager's Punchlist, 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 Construction Manager shall, before issuance of the Certificate of Substantial Completion, complete or correct such item upon notification by the Architect or Owner. In such case, the Construction Manager shall then submit a request for another inspection by the Owner, Architect, and Project Manager to determine Substantial Completion.

**§ 9.8.4** When the Work or designated portion thereof is substantially complete, the Construction Manager will prepare for Owner's approval and signature a Certificate of Substantial Completion that shall, upon Owner's signature, establish the date of Substantial Completion; establish responsibilities of the Owner and Construction Manager for security, maintenance, heat, utilities, damage to the Work and insurance; and fix the time within which the Construction Manager 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.

**§ 9.8.5** The Certificate of Substantial Completion shall be submitted by the Construction Manager to the Owner for written acceptance of responsibilities assigned to it in the Certificate.

#### **§ 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 Construction Manager, provided such occupancy or use is consented to by the insurer and authorized by Authorities Having Jurisdiction. Such partial occupancy or use may commence whether or not the portion is substantially complete, provided the Owner and Construction Manager have accepted in writing the responsibilities assigned to each of them for payments, retainage, if any, security, maintenance, heat, utilities, damage to the Work and insurance, and have agreed in writing concerning the period for correction of the Work and commencement of warranties required by the Contract Documents. When the Construction Manager considers a portion substantially complete, the Construction Manager shall prepare and submit a Punchlist to the Owner, Architect, and Project Manager as provided under Section 9.8.2. Consent of the Construction Manager to partial occupancy or use shall not be unreasonably withheld. The stage of the progress of the Work shall be determined by written agreement between the Owner and Construction Manager.

**§ 9.9.2** Immediately prior to such partial occupancy or use, the Owner, Construction Manager, 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** At the point Construction Manager determines that all Punchlist items have been resolved, the Work has reached the stage of Final Completion, is in accordance with the Contract Documents, and that the Contract has been fully performed, Construction Manager shall notify Owner, Architect, and Project Manager. Upon Owner's receipt of (a) the Construction Manager's written notice that the requirements of this Section 9.10.1 and Section 9.10.2 have been met and the Work is ready for final inspection and acceptance, and (b) the final Application for Payment and other documentation required by the Contract Documents for Final Payment have been provided to Owner, the Owner, Architect, and Project Manager will inspect the Work for Final Payment. When the Owner, Architect, and Project Manager find the Work acceptable under the Contract Documents and the Work (including all Punchlist items, commissioning obligations, and training of Owner's staff) fully performed and all required documents delivered, the Project Manager will, subject to Section 9.10.2 and Section 11.2 of the Agreement, issue a final Certificate for Payment for acceptance by Owner.

§ 9.10.2 Neither Final Payment nor any remaining retained percentage shall become due, and the Project shall not be deemed to have reached Final Completion until the Construction Manager satisfies all of the requirements contained in Section 11.2.1 of the Agreement and elsewhere in the Contract Documents.

§ 9.10.3 If, after Substantial Completion of the Work, Final Completion thereof is materially delayed through no fault of the Construction Manager or by issuance of Change Orders affecting Final Completion, and the Architect and Project Manager so confirm, the Owner shall, upon application by the Construction Manager and certification by the Architect and Project Manager, 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 Construction Manager 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. Final Payment shall not be paid prior to **thirty (30)** Days following Final Completion of the Work, satisfaction of the requirements of Sections 9.10.1 and 9.10.2, and receipt of the required documents and performance of items listed in Section 11.2.1 of the Agreement.

#### § 9.10.4

*(Paragraphs deleted)*

No inspections of the Project conducted by Owner, Project Manager, or Architect during the course of construction, either singularly or in the aggregate, shall reduce the level or extent of Construction Manager's responsibilities arising pursuant to this Agreement. Neither the approval and/or final acceptance of the Project or any documents prepared by Construction Manager, the payment of any pay application, or the issuance of any Certificates of Final or Substantial Completion shall constitute, nor be deemed, a release of Construction Manager's obligation to perform and deliver the Work provided in the Agreement and hereunder in a manner consistent with: (i) industry standards; and (ii) as required by the Contract Documents. No approvals or acceptances by, or on behalf of, Owner shall be deemed to be a waiver of any of Owner's rights or claims or an assumption of any responsibility by Owner for any defect, error, or omission in the Work provided by Construction Manager under this Contract.

§ 9.10.5 Acceptance of Final Payment by the Construction Manager, a Subcontractor or material supplier shall constitute a waiver of claims by that payee except those previously made in writing and identified by that payee as unsettled at the time of final Application for Payment or those claims that would otherwise survive completion and acceptance of the Work and Final Payment as allowed under Texas law.

#### § 9.11 Record Retention

Construction Manager shall keep and maintain under generally accepted accounting principles full, true and complete lien waivers and releases, financial, and other records related to the Project for a minimum period of **five (5)** years after the date Final Completion or for such longer period as may be required by Applicable Law. Retention time shall be extended when an audit is scheduled or in progress for a period reasonably necessary to complete an audit and/or to complete any administrative or dispute resolution proceeding which may ensue.

§ 9.11.1 **Audit Rights.** Owner shall have the right, at any time and upon reasonable notice, to verify and audit the details of Construction Manager's billings, certificates, accountings, cost data, statements, and any other accounting data or data supporting Construction Manager's Applications for Payment, before or after any payment, by (1) inspecting the books and records of Construction Manager during normal business hours; (2) examining any reports with respect to this Project; (3) interviewing Construction Manager's employees; (4) visiting the Site; and (5) any other reasonable action. Construction Manager's records shall be organized and maintained in its files by each Application for Payment period and shall be kept on the basis of generally accepted accounting principles and in conformance with the Texas State Auditor's Office requirements. Construction Manager acknowledges that Owner will audit Construction Manager at the beginning of the Project to verify General Conditions Cost information, including labor burden, and will verify records before making Final Payment under this Agreement. Additional audits may be conducted throughout the Project as reasonably required by the Owner. This provision shall survive any termination of this Agreement.

### ARTICLE 10 PROTECTION OF PERSONS AND PROPERTY

#### § 10.1 Safety Precautions and Programs

§ 10.1.1 As between the Owner and Construction Manager, the Construction Manager shall be responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the performance of the

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Work and to prevent accidents or injury to any persons on, about or adjacent to the Site. Where consideration of labor, equipment or safety is involved, Construction Manager is solely responsible for all decisions, and Owner shall not incur any liability as a result of Construction Manager's decisions. Owner shall have the right, but not the obligation to request Construction Manager to stop Work in the event of Owner reasonably believes an unsafe condition exists. In such event, Construction Manager shall not resume Work until such unsafe condition is remedied, and shall not be entitled to any additional compensation or extension of the Contract Time resulting from such Work stoppage or unsafe condition.

**§ 10.1.2.** Construction Manager shall administer and manage the safety program for the Work. This will include, but not necessarily be limited to, review of the safety programs of each of Construction Manager's Subcontractors. Construction Manager shall monitor the establishment and execution of effective safety practices applicable to all Work and the compliance with all applicable regulatory and advisory agency construction safety standards.

**§ 10.1.3** Construction Manager shall, at all times, comply with Owner's Construction, Renovation, and Maintenance Activity Safety Policy (and all amendments thereto) included as a Contract Document pursuant to **Exhibit D**. Nothing contained in this Section 10.1 or elsewhere in the Contract Documents shall be construed as expanding or enlarging Owner's obligations, if any, with respect to safety issues or the Construction Manager's safety programs or protocol, it being understood that between Construction Manager and Owner, Construction Manager shall be solely responsible for proper precautions and implementation and management of safety programs on the Project.

**§ 10.1.4** Construction Manager shall designate a safety manager for the Project, which person shall not be the Construction Manager's Project superintendent. Construction Manager shall notify the Owner of the name of the safety manager within **ten (10)** Days of receipt of the Notice to Proceed for Preconstruction Services. Construction Manager's safety manager shall be adequately trained and possessing experience in the role proposed on projects of similar size and scope so as to properly and responsibly carry out the duties required of the role. Construction Manager shall not change the safety manager for the Project without Owner's written consent, which consent shall not be unreasonably withheld.

## **§ 10.2 Safety of Persons and Property**

**§ 10.2.1** The Construction Manager shall be responsible for 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 Construction Manager, a Subcontractor, or any lower tier 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 Construction Manager shall comply with and give notices required by Applicable Laws, statutes, ordinances, codes, rules and regulations, and lawful orders of Authorities Having Jurisdiction, bearing on safety of persons or property or their protection from damage, injury or loss, with respect to the means and methods of the performance of the Work. At all times, Construction Manager shall comply with all Applicable Law concerning safety and security of the Site, existing facilities and the Work, and all persons accessing the facilities at the Site, all as more particularly described in the Agreement and the Contract Documents. Construction Manager recognizes that the Site may include a functioning hospital, medical facilities, and/or buildings with administrative functions that requires all entrants comply with and preserve maximum security and sterility requirements within all areas of the Site, whether or not under construction. Construction Manager will, at all times, implement, comply with, and continue to monitor compliance with Owner's safety, security and sterility requirements and procedures.

**§ 10.2.2.1** The Construction Manager shall be responsible for any fines, penalties or charges by any regulatory body by reason of any violation of safety or health regulations by the Construction Manager or any Subcontractor or their forces. The Construction Manager shall also be responsible for reimbursement of any OSHA fines incurred by the Owner or Project Manager for Site safety conditions created or controlled by the Construction Manager that result in the Owner or Project Manager receiving a citation under the OSHA multi-employer citation provision. If the Construction Manager fails to pay or contest any such fines, penalties or charges, the Owner may, upon notice to the

Construction Manager, pay them and deduct such amount from monies due or to become due to the Construction Manager.

**§ 10.2.3** The Construction Manager shall implement, erect and maintain, as required by existing conditions and performance of the Contract, reasonable safeguards for safety and protection, including posting barricades, markings danger signs and other warnings against hazards, promulgating safety regulations and notifying owners and users of adjacent sites and utilities of dangers and hazards created by openings, stairways, falling materials, open excavations, impairments to life and fire barriers or systems, and all other hazardous conditions. The Construction Manager shall also be responsible for all measures reasonably necessary to protect the other buildings on the premises in which the improvements are being constructed. Any damage to such property or improvements shall be promptly repaired by the Construction Manager. If Construction Manager fails to repair the damage within **three (3) Days** of notification by Owner, the Owner may, without prejudice to other remedies the Owner may have repair the damage and deduct the cost of such repair from payments then or thereafter due the Construction Manager. All barricades shall comply with the Owner's requirements and the requirements of the Contract Documents.

**§ 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 Construction Manager shall give the Owner reasonable advance notice thereof and shall exercise utmost care and carry on such activities under supervision of properly qualified personnel. The Construction Manager shall also be responsible for all measures reasonably necessary to protect the other buildings on the premises in which the improvements are being constructed. Any damage to such property or improvements shall be promptly repaired by the Construction Manager.

**§ 10.2.5** The Construction Manager shall promptly remedy damage and loss to property referred to in Sections 10.2.1.2 and 10.2.1.3 caused in whole or in part by the Construction Manager, a 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 Construction Manager is responsible under Sections 10.2.1.2 and 10.2.1.3. The foregoing obligations of the Construction Manager are in addition to the Construction Manager's obligations under Section 3.18.

**§ 10.2.6** In addition to the appointment of the Construction Manager's safety manager, Construction Manager shall designate responsible representatives of its Subcontractors' staffs at the Site who all shall be responsible for the promotion of safety and prevention of accidents, and shall enforce all Applicable Laws pertaining to safety and prevention of accidents. The safety representatives shall hold meetings at least every **two (2) weeks** with representatives of the various trades employed at the Site in order to ensure that all workers understand and comply with the Applicable Laws and the Contract Documents related to safety. Construction Manager shall implement and lead a training program with all employees and Subcontractor employees that provides training on the proper conduct and safety at a hospital site. Construction Manager shall, at all times, comply with applicable construction safety program(s), insurance manuals, and any other construction safety requirements applicable to the Project.

**§ 10.2.7** The Construction Manager shall not permit any part of the construction or Site to be loaded so as to cause damage or create an unsafe condition. The Construction Manager shall be responsible for all damage done by its Subcontractors' hauling of equipment and/or materials and shall correct such damage at its sole expense.

*(Paragraphs deleted)*

**§ 10.2.8** The Work shall be scheduled and performed to provide protection and temporary facilities necessary to permit pedestrians, vehicular traffic and parking areas to maintain their normal operations during the performance of the Agreement with a minimum of interference. Construction Manager shall protect and prevent damage to all unfinished phases of the Work, including but not limited to, the protection of such Work from damage by the elements, theft or vandalism.

**§ 10.2.9** Where required by Applicable Law or for the safety of the Work or of adjacent property and required by the Contract Documents or for the ongoing operations on property adjacent to the Project, the Construction Manager shall shore up, brace, underpin and protect foundations and other portions of existing structures which are in any way affected by the Work. Such costs shall be paid as a Cost of the Work with the prior written approval of Owner unless such costs are necessary due to the negligence or willful misconduct of Construction Manager or its Subcontractors. All parts of the Work shall be braced to resist wind or other loads. Construction Manager understands that some bracing and temporary items require the design of a licensed professional and Construction Manager's scope of Work hereunder includes employment of such professionals to comply with Applicable Law. Construction Manager shall

perform the Work with the explicit understanding that the design of the Project is based on all parts of the Work having been completed. Temporary items such as, but not limited to, scaffolding, staging, lifting and hoisting devices, shoring, excavation, barricades, and safety and construction procedures necessary in completion of the Project shall be the sole responsibility of the Construction Manager and its Subcontractors and shall comply with all Applicable Law. It shall not be the responsibility of Owner, Project Manager, Architect or their representatives to determine if Construction Manager, Subcontractors or their representatives are in compliance with Applicable Law.

**§ 10.2.10** Construction Manager shall cooperate with the owners of any public or private utility service that may be authorized by Owner to construct, reconstruct, or maintain utility services or facilities during the progress of the Work. Construction Manager shall protect existing utilities from damage and unscheduled interruption of service, and shall provide appropriate advance notices to such utility owners of Work to be conducted in the general vicinity of such services and facilities. Whenever it is necessary to connect the Work to existing facilities, Construction Manager shall not interrupt Owner's operations to make such connections. Such connections shall be done on a scheduled time basis convenient to Owner without interruptions to Owner's operations. No additional compensation for overtime Work related to such connections shall be permitted without the prior written approval of the Owner. Where Work cannot safely be performed without interruption to Owner's operation, procedures shall be established with Owner's approval that provide minimum interruption to operations including, but not limited to, the adjustment of work days, times, and hours, the provision of temporary utilities during any interrupted utility or service, and adjustments to the routing of utility or Work.

**§ 10.2.11** Construction Manager shall be responsible for the structural integrity of the building during and related to its construction operations. All structural modifications and concentrated loading of materials must be reviewed and approved by Architect. Construction Manager shall also be responsible for the security of the Work, the Site and all materials stored at the Site or at any other location by Construction Manager with the consent of Owner. Construction Manager shall be solely responsible for all losses and expenses incurred by reason of failure to maintain security at the Site or at the location where Materials are stored, and such expenses incurred shall not increase the Final Guaranteed Maximum Price.

**§ 10.2.12** Construction Manager acknowledges that the Work may be performed by Construction Manager on a hospital campus or other medical or administrative facilities that will be occupied and operating while the Work is in progress. Construction Manager shall conduct and schedule its operations to minimize noise and interference with such hospital operations and with Owner's employees, patients, guests, and invitees. The Work shall be scheduled and coordinated with Owner to limit disruptions to the hospital services, including, but not limited to, minimizing the vibrations associated with Construction Manager's Work and receiving Owner's written consent for all utility service disruptions at least **five (5)** Days prior to the scheduled disruption. Owner's employees, patients, guests, and invitees shall at all times have unobstructed ingress and egress to the operating hospital, medical and administrative facilities and no public parking facilities shall be blocked or hindered without Owner's prior written approval. The Work shall be scheduled and performed to provide protection and temporary facilities necessary to permit pedestrians, vehicular traffic and parking areas to maintain their normal operations during the performance of this Agreement with a minimum of interference. Construction Manager shall protect and prevent damage to all unfinished phases of the Work, including but not limited to, the protection of such Work from damage by the elements, theft or vandalism.

#### **§ 10.2.13 Injury or Damage to Person or Property**

If the Owner or Construction Manager suffers injury or damage to person or property because of an act or omission of the other, or of others for whose acts such party is legally responsible, written notice of the injury or damage, whether or not insured, shall be given to the other party within a reasonable time not exceeding **twenty-one (21)** Days after discovery. The notice shall provide sufficient detail to enable the other party to investigate the matter. Construction Manager shall provide at the Site, and make available to all workers, medical supplies and equipment necessary to supply first aid service to all persons injured in connection with the Work being performed at the Site, whether by Construction Manager, a Subcontractor, a Separate Contractor, or any other person at the Site. Construction Manager shall, within **twenty-four (24)** hours after the occurrence, report in writing to Owner and Project Manager all accidents whatsoever arising out of or in connection with the performance of the Work, whether on or off the Site, which cause death, personal injury, or property damage, giving full details and statements of any witnesses. In addition, if death or serious injuries or serious property damages occur, the accident shall be reported **immediately** by telephone or messenger to Owner and Project Manager. If any claim is made by anyone against Construction Manager, any Subcontractor, or any party for whom either is responsible on account of any accident, Construction Manager shall promptly report the facts in writing to Owner and Project Manager, giving full details of the claim.

§ 10.2.14 Construction Manager shall be responsible for any of its fines, penalties or charges by any regulatory body by reason of any violation of safety or health regulations in the performance of the Work.

§ 10.2.15 Construction Manager shall employ such practices as are necessary to protect all completed and partially completed Work and all existing improvements located on the Site from loss and damage, including theft or damage by weather and, if necessary, shall provide suitable shelter therefor. Construction Manager shall correct at its own expense any damage or disfigurement to Work or property (whether or not located on the Site) resulting from the fault, neglect or omission of Construction Manager, any Subcontractor, any Sub-subcontractor or any other person or entity for whom any of them is legally responsible.

### § 10.3 Hazardous Materials and Substances

§ 10.3.1 The Construction Manager is responsible for compliance with any requirements included in the Contract Documents regarding Hazardous Materials. If the Construction Manager encounters Hazardous Materials not addressed in the Contract Documents or not brought to the Site by the Construction Manager or its Subcontractors and if reasonable precautions will be inadequate to prevent foreseeable bodily injury or death to persons resulting from a Hazardous Material, including but not limited to asbestos, radon, or polychlorinated biphenyl (PCB), encountered on the Site by the Construction Manager, the Construction Manager shall, upon recognizing the condition, immediately stop Work in the affected area and report the condition to the Owner, Project Manager, and Architect in writing.

§ 10.3.2 Upon receipt of the Construction Manager's written notice, the Owner shall obtain the services of a licensed laboratory or qualified environment consultant to verify the presence or absence of the Hazardous Material reported by the Construction Manager and, in the event such Hazardous Material is found to be present, to cause it to be rendered harmless. When the Hazardous Material has been rendered harmless, Work in the affected area shall resume upon written agreement of the Owner and Construction Manager. In the event the Work on the critical path is delayed and the other requirements for an extension of time set forth in this Agreement are satisfied, the Contract Time shall be extended appropriately via Change Order and the Final Guaranteed Maximum Price increased in the amount of the Construction Manager's reasonable additional costs of such delay, which adjustments shall be accomplished as provided in Article 7. Notwithstanding the foregoing, in those instances in which Construction Manager had notice of the presence of such materials through information reviewed by Construction Manager or in those instances where the presence of those materials is caused by Construction Manager or its agents, Construction Manager shall not be entitled to a Claim for any delays, disruption or interference it encounters.

§ 10.3.3 *[Intentionally deleted]*.

§ 10.3.4 The Owner shall not be responsible under this Section 10.3 for Hazardous Materials brought to the Site by the Construction Manager. The Construction Manager shall be responsible for materials or substances required by the Contract Documents. Construction Manager shall be responsible for identification, abatement, cleanup, control, removal, remediation and/or disposal of any Hazardous Material in or on the Site brought to the Site by the Construction Manager or any Subcontractor under this Contract. Construction Manager shall comply with all Specifications respecting, and shall obtain any and all permits necessary for, the legal and proper handling, transportation, and disposal of such Hazardous Materials.

§ 10.3.5 Construction Manager agrees that it shall not transport to, use, generate, dispose of, or install at the Site any Hazardous Materials, except in accordance with Applicable Law. Further, in performing the Work, Construction Manager shall not cause any release of Hazardous Materials into, or contamination of, the environment, including the soil, the atmosphere, any water course or ground water unless required by the Contract Documents. In the event Construction Manager engages in any of the activities prohibited in this Section 10.3 or fails to stop Work as provided in Section 10.3, to the fullest extent permitted by law, and except as provided otherwise in Section 3.18 above, Construction Manager hereby indemnifies, defends, and holds harmless the Indemnitees and their respective officers, agents, employees, and tenants from and against any and all claims, damages, losses, causes of action, suits and liabilities of every kind, including, but not limited to, expenses of litigation, court costs, punitive damages and attorneys' fees, arising out of, incident to or resulting from the activities prohibited in this Section 10.3 or Construction Manager's failure to stop Work as required, except to the extent that such damage, loss or expense is due to the sole, joint, or concurrent fault or negligence of the Indemnitee seeking indemnity.

*(Paragraph deleted)*

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## § 10.4 Emergencies

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

## ARTICLE 11 INSURANCE AND BONDS

### § 11.1 Construction Manager's Insurance and Bonds

§ 11.1.1 Construction Manager shall purchase and maintain insurance and provide bonds as set forth in **Exhibit B**. Construction Manager will comply, at all times, with all insurance requirements of Owner. In the event of any failure by Construction Manager to comply with the provisions of **Exhibit B**, Owner may, at its option, on notice to Construction Manager, suspend or terminate the Agreement for cause. Alternatively, Owner may purchase such insurance at Construction Manager's expense.

§ 11.1.2 **PERFORMANCE BOND AND PAYMENT BOND.** Construction Manager will comply, at all times, with all bonding requirements of Owner and as required by Applicable Law. Payment and Performance Bond requirements are set forth in **Exhibit B**.

§ 11.1.3 *[Intentionally Deleted.]*

§ 11.1.4 *[Intentionally Deleted.]*

*(Paragraphs deleted)*

§ 11.2 **Owner's Insurance**  
*[Intentionally Deleted.]*

§ 11.3 **Waivers of Subrogation**  
*[Intentionally Deleted.]*

*(Paragraph deleted)*

§ 11.4 **Loss of Use, Business Interruption, and Delay in Completion Insurance**  
*[Intentionally Deleted.]*

§ 11.5 **Adjustment and Settlement of Insured Loss**  
*[Intentionally Deleted.]*

*(Paragraphs deleted)*

## ARTICLE 12 UNCOVERING AND CORRECTION OF WORK

### § 12.1 Uncovering of Work

The Owner may request to examine a portion of the Work that the Construction Manager has covered to determine if the Work has been performed in accordance with the Contract Documents.

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

§ 12.1.2 If a portion of the Work has been covered that the Architect or Owner has not specifically requested to examine prior to its being covered, the Architect or Owner may request to see such Work and it shall be uncovered by the Construction Manager. 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 Construction Manager's expense unless

the condition was caused by the Owner or a Separate Construction Manager 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

§ 12.2.1.1 The Construction Manager shall promptly correct Work that is incomplete, defective or rejected by the Architect or Owner or failing to conform to the requirements of the Contract Documents, whether discovered before or after Substantial Completion and whether or not fabricated, installed or completed. Costs of correcting such Work, including additional testing and inspections, the cost of uncovering and replacement, and compensation for the Architect's and Project Manager's services and expenses made necessary thereby, shall be without change in the Contract Time or Final Guaranteed Maximum Price (subject to applicable limitations in the Agreement on reimbursement for Cost of the Work) to the extent incurred prior to Final Payment and at the Construction Manager's expense (not chargeable to the Contract Sum or otherwise reimbursable from Owner) after Final Payment. If prior to the date of Substantial Completion, the Construction Manager, a Subcontractor, or anyone for whom either is responsible uses or damages any portion of the Work, including, without limitation, mechanical, electrical, plumbing and other building systems, machinery, equipment or other mechanical device, the Construction Manager shall cause such item to be restored to "like new" condition at no expense to the Owner.

§ 12.2.1.2 Construction Manager shall correct any defects in the Work or damage to other property caused by defects in the Work or the repairing of such defects with a minimum of inconvenience to Owner and at times least disruptive to the Owner's operations. The Construction Manager will have the right to access the Site to perform warranty Work. This right survives the completion of the Project. Any Construction Manager requests for Project access will require a minimum of **forty-eight (48)** hours' written notice to Owner for inspections, Site visits, and investigations. Work required to correct any deficiencies will be coordinated with the Owner to be performed at a time and in a manner that does not impact Owner's operations. Proper safety and infection control measures shall be obtained and adhered to during the commencement of the corrected Work.

### § 12.2.2 After Substantial Completion

§ 12.2.2.1 In addition to the Construction Manager's obligations under Section 3.5, if, within **two (2)** years after the date of Substantial Completion of the Work or designated portion thereof 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 Construction Manager shall correct it promptly after receipt of written notice from the Owner to do so unless the Owner has previously given the Construction Manager a written acceptance of such condition. The Owner shall give such notice promptly after discovery of the condition. If the Construction Manager fails to correct nonconforming Work within a reasonable time during that period after receipt of notice from the Owner, the Owner may correct it and seek reimbursement from Construction Manager. Nothing herein shall be construed to negate or limit Construction Manager's obligations set forth in any Warranty or Section 3.18 above, including without limitation, Construction Manager's duties to defend and indemnify the Owner and all Indemnitees. Construction Manager acknowledges that Construction Manager's **two-(2)** year warranty/corrective period and any special warranties provided by Construction Manager are in addition to and not in lieu of any warranties, indemnities, claims, rights, actions or remedies that Owner may have in the Contract Documents, or pursuant to Applicable Law, or in equity, for defective Work or breach of the Contract Documents. Owner expressly reserves all rights and remedies available under Applicable Law for and during the full period of time allowed under any statutes of repose and statutes of limitations under Texas law. All obligations under this Section 12.2.2 shall survive acceptance of the Work under the Contract.

§ 12.2.2.2 Construction Manager shall maintain a complete and accurate schedule of the dates upon which the corrective periods or express warranties will expire. Construction Manager agrees to provide notice of the warranty expiration date to Owner and Architect at least **one (1)** month prior to the expiration of each such applicable corrective / warranty period. Prior to expiration of **one (1)** year from the date of Substantial Completion, Construction Manager shall accompany the Owner, Project Manager, and Architect (if requested by Owner) on re-inspection of the improvements or building(s) covered thereby and shall be responsible for correcting any reasonable additional deficiencies not caused by the Owner or by the use of the respective improvements or building which are observed or reported during the re-inspection. For extended warranties expressly required by the Contract Documents (i.e., roofing, compressors, mechanical equipment), Owner will notify the Construction Manager of deficiencies and Construction Manager shall start remedying these defects within **five (5)** Days of initial notification from Owner. Construction Manager shall prosecute the Work without interruption until accepted by the Owner and the Architect (if

retained by the Owner for such purpose), even though such prosecution should extend beyond the limit of the warranty period. The **one (1)** year reinspection by Owner, Project Manager and Construction Manager shall in no way waive or release Construction Manager from the **two (2)** year corrective/warranty period required in Section 12.2.2.1 above.

§ 12.2.2.3 The **two (2)** year period for correction of Work shall be extended with respect to portions of Work first performed after Substantial Completion by the period of time between Substantial Completion and the actual completion of that portion of the Work. Any corrective Work performed or to be performed under or pursuant to Section 12.2 shall be warranted to the same extent as the Work is warranted hereunder or under the applicable warranty period stated in any separate warranty.

§ 12.2.2.4 If during the **two (2)** year period for correction of the Work the Construction Manager fails to correct nonconforming Work within a reasonable time, the Owner may correct it in accordance with Section 2.5. If the Construction Manager does not proceed with correction of such nonconforming Work, Owner may remove such nonconforming Work and store the salvageable materials or equipment and charge the cost thereof to the Construction Manager. If the Construction Manager does not pay costs of such removal and storage within **ten (10)** Days after written notice, Owner may upon **ten (10)** additional Days' written notice sell such materials and equipment at auction or at private sale, and shall account for the proceeds thereof, after deducting costs and damages that should have been borne by the Construction Manager, including compensation for the Architect's services and expenses made necessary thereby. If such proceeds of sale do not cover costs which the Construction Manager should have borne, the Final Guaranteed Maximum Price shall be reduced by the deficiency. If payments then or thereafter due the Construction Manager are not sufficient to cover such amount, Construction Manager shall pay the difference to the Owner upon demand.

§ 12.2.3 The Construction Manager 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 Construction Manager nor accepted by the Owner. When the nonconforming Work is found, the entire area of Work involved shall be corrected unless the Construction Manager can completely define the limits to the Architect's and Owner's satisfaction. Additional testing, sampling or inspecting needed to define nonconforming Work and retesting corrected Work shall be at the Construction Manager's expense, including the additional cost of employment of the Owner's independent testing laboratory, if such services are required. Additional architectural or engineering service required to analyze nonconforming Work shall be paid for by the Construction Manager.

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

§ 12.2.5 Nothing contained in this Section 12.2 shall be construed to establish a period of limitation with respect to other obligations the Construction Manager has under the Contract Documents. Establishment of the **two (2)** year period for correction of Work as described in Section 12.2.2 relates only to the specific obligation of the Construction Manager to correct the Work, and has no relationship to the time within which the obligation to comply with the Contract Documents may be sought to be enforced, nor to the time within which proceedings may be commenced to establish the Construction Manager's liability with respect to the Construction Manager's obligations other than specifically to correct the Work. Nothing contained herein or in the Contract Documents shall waive or limit any of Owner's rights under *Tex. Civ. Prac. & Rem. Code § 16.009* or other Applicable Law. The obligations under Section 12.2 shall survive acceptance of the Work and termination of the Contract and Final Payment by the Owner.

### § 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 Final Guaranteed Maximum Price 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 The Contract shall be governed by the law of the State of Texas without regard to its conflicts of laws principles. Venue is proper only in the district courts of Tarrant County, Texas.

## **§ 13.2 Successors and Assigns**

The Owner and Construction Manager, respectively, bind themselves, their partners, successors, assigns and legal representatives to the covenants, agreements and obligations contained in the Contract Documents. Construction Manager shall not assign the Contract without written consent of the Owner, nor shall Construction Manager assign any monies due or to become due to it hereunder without the written consent of the Owner. If Construction Manager attempts to make such an assignment without such consent, Construction Manager shall nevertheless remain legally responsible for all obligations under the Contract.

*(Paragraphs deleted)*

## **§ 13.3 Rights and Remedies**

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

**§ 13.3.2** No action or failure to act by the Owner, Architect, Project Manager, or Construction Manager 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. No waiver of any provision of the Contract shall be of any force or effect, unless such waiver is in writing, expressly stating to be a waiver of a specified provision of the Contract and is signed by the party to be bound thereby. Either party's waiver of any breach or failure to enforce any of the provisions of the Contract at any time, shall not in any way limit or waive that party's right thereafter to enforce or compel strict compliance with the Contract or any portion or provision or right under the Contract.

*(Paragraphs deleted)*

## **§ 13.4 Tests and Inspections**

**§ 13.4.1** Tests, inspections, and approvals of portions of the Work shall be made as required by the Contract Documents and by Applicable Law, statutes, ordinances, codes, rules, and regulations or lawful orders of Authorities Having Jurisdiction. Unless otherwise provided, the Construction Manager shall make arrangements for such tests, inspections, and approvals with an independent testing laboratory or entity acceptable to the Owner, or with the appropriate Authorities Having Jurisdiction, and shall bear all related costs of tests, inspections, and approvals. The Construction Manager shall give the Architect, Project Manager, and Owner timely notice of when and where tests and inspections are to be made so that the Owner and Project Manager may be present for such procedures. The Owner shall bear costs of (1) tests, inspections or approvals that do not become requirements until after bids are received or negotiations concluded, and (2) tests, inspections or approvals where building codes or Applicable Law or regulations prohibit the Owner from delegating their cost to the Construction Manager; provided, however, that all costs and expenses incurred following a failed test, inspection, or approval (including costs of repeated testing and compensation for the services of Architect and other Owner expenses) shall be at the sole cost and expense of Construction Manager, and such costs and expenses shall not be a permitted Cost of the Work under Article 7 of the Agreement. No inspection performed or failed to be performed shall constitute a waiver of any of the Construction Manager's obligations or be construed as an approval or acceptance of any nonconforming or defective Work.

**§ 13.4.2** If the Architect, Owner, or Authorities Having Jurisdiction determine that portions of the Work require additional testing, inspection, or approval not included under Section 13.4.1, the Project Manager will, upon written authorization from the Owner, instruct the Construction Manager to make arrangements for such additional testing, inspection, or approval, by an entity acceptable to the Owner and Project Manager, and the Construction Manager shall give timely notice to the Owner and Project Manager of when and where tests and inspections are to be made so that the Architect, Owner, and Project Manager may be present for such procedures. Construction Manager shall be responsible for the planning, scheduling, coordination, access, and performing any corrections required to bring the Work in compliance with the Contract Documents. Such costs, (including costs of repeated testing and compensation for the services of Architect and other Owner expenses) shall be at the sole cost and expense of Construction Manager, and such costs and expenses shall not be a permitted Cost of the Work under Article 7 of the Agreement.

**§ 13.4.3** If such procedures for testing, inspection, or approval under Sections 13.4.1 and 13.4.2 reveal failure of the portions of the Work to comply with requirements established by the Contract Documents, all costs made necessary by such failure, including those of repeated procedures and compensation for the Architect's services and expenses, shall be at the Construction Manager's expense, and such costs and expenses shall not be a permitted Cost of the Work under Article 7 of the Agreement.

§ 13.4.4 Required certificates of testing, inspection, or approval shall, unless otherwise required by the Contract Documents, be secured by the Construction Manager and promptly delivered to the Architect and Project Manager.

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

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

§ 13.4.7 In the event Construction Manager fails or refuses to provide for testing and inspection services as required by Owner or Project Manager and it becomes necessary for Owner to provide a Separate Contractor for testing and inspection services, all costs and expenses associated with retaining the services of the Separate Contractor for testing and inspection services shall be borne by Construction Manager and Owner shall be entitled to deduct the cost of such services from such amounts as may be due Construction Manager. Owner will provide notification of such costs to Construction Manager within **ten (10)** Days of receipt of an invoice for such services.

§ 13.4.8 If the Owner requests the Construction Manager or Subcontractors to execute certificates, other than those required by Section 13.4.4, the Owner shall submit the proposed language of such certificates for review at least **fourteen (14)** Days prior to the requested dates of execution. If the Owner requests the Construction Manager or Subcontractors to execute consents reasonably required to facilitate assignment to a lender, the Construction Manager or Subcontractors shall execute all such consents that are consistent with this Agreement, provided the proposed consent is submitted to them for review at least **fourteen (14)** Days prior to execution. The Construction Manager and Subcontractors shall not be required to execute certificates or consents that would require knowledge, services or responsibilities beyond the scope of their services.

#### § 13.5 Interest

Payments due and unpaid under the Contract Documents shall bear interest from the date payment is due at the rate set forth in Section 11.3 of the Agreement.

#### § 13.6 Written Notice

Written notice shall be deemed to have been duly served if delivered in conformance with Section 14.4 of the Agreement.

### ARTICLE 14 TERMINATION OR SUSPENSION OF THE CONTRACT FOLLOWING EXECUTION OF THE FINAL GUARANTEED MAXIMUM PRICE AMENDMENT

#### § 14.1 Termination by the Construction Manager

§ 14.1.1 The Construction Manager may terminate the Contract if the Work is stopped for a period of **one hundred twenty (120)** consecutive Days in any **three hundred sixty-five (365)** Day period through no act or fault of the Construction Manager or a Subcontractor, or their agents or employees or any other persons or entities performing portions of the Work under direct or indirect contract with the Construction Manager, for any of the following reasons:

- .1 Issuance of an order of a court or other Authorities 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 certified an Application for Payment and has not notified the Construction Manager of the reason for withholding certification as provided in Section 9.5.1, or because the Owner has not made payment on a Certificate for Payment as to which there is no good faith dispute within the time stated in the Contract Documents.
- .4 *[Intentionally deleted]*.

§ 14.1.2 The Construction Manager may terminate the Contract if, through no act or fault of the Construction Manager or any Subcontractor, or their agents or employees or any other persons or entities performing portions of the Work under direct or indirect contract with the Construction Manager, repeated suspensions, delays or interruptions of the entire Work by the Owner as described in Section 14.3 constitute in the aggregate more than one hundred percent

(100%) of the total number of Days scheduled for completion, or **one hundred twenty (120)** consecutive Days in any **three hundred sixty-five (365)** Day period, whichever is less.

§ 14.1.3 If one of the reasons described in Section 14.1.1 or 14.1.2 exists, the Construction Manager shall provide written notice to Owner of the Construction Manager's intention to terminate, setting forth in detail the reason therefore. If the Owner fails to commence correction of any of the reasons stated in such notice within **ten (10)** Days of receipt of such notice, the Construction Manager may, upon **ten (10)** additional Days' written notice to the Owner, terminate the Contract and recover from the Owner damages incurred as a result of the termination as allowed by Applicable Law. Notwithstanding the foregoing, the Owner shall not be responsible for damages for unincurred overhead, unabsorbed home office overhead, anticipated profit on Work not performed, unjust enrichment damages, or other damages disallowed under Texas law.

§ 14.1.4 If the Work is stopped for a period of **one hundred twenty (120)** consecutive Days in any **three hundred sixty-five (365)** Day period through no act or fault of the Construction Manager or a Subcontractor or their agents or employees or any other persons performing portions of the Work under direct or indirect contract with the Construction Manager because the Owner has otherwise repeatedly failed to fulfill the Owner's obligations under the Contract Documents with respect to matters important to the progress of the Work (other than Owner's failure to make payment under Article 9 above), the Construction Manager may, upon **ten (10)** additional Days' written notice to the Owner and the Architect, terminate the Contract and recover from the Owner as provided in Section 14.1.3 to the extent allowed under *Tex. Local Gov't. Code § 271.153(b)* and only if the basis for such termination has not been removed or cured prior to the effective date of termination.

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

§ 14.2.1 The Owner may terminate the Contract if the Construction Manager:

- .1 fails to submit the Final Guaranteed Maximum Price Proposal by the date required by the Agreement or if no date is indicated, within a reasonable time consistent with the date of Substantial Completion;
- .2 refuses or fails to supply enough properly skilled workers or proper materials and/or equipment;
- .3 fails to make payment to Subcontractors for materials or labor in accordance with the respective agreements between the Construction Manager and the Subcontractors;
- .4 disregards Applicable Laws;
- .5 assigns the Contract or any part thereof in violation of the Contract Documents;
- .6 sublets Work in violation of the Contract Documents;
- .7 becomes insolvent or makes a general assignment for the benefit of Construction Manager's creditors, or a trustee or receiver is appointed for Construction Manager or for any of its property;
- .8 fails to commence the Work in accordance with the provisions of this Agreement;
- .9 fails to diligently prosecute the Work to completion thereof in an efficient, timely workmanlike, skillful and careful manner and in strict accordance with the provisions of the Contract Documents (including the Required Dates for Interim Milestones, Date of Substantial Completion, and date of Final Completion, and other dates set forth in this Agreement);
- .10 abandons any or all of the Work to be performed under the Contract; or
- .11 otherwise does not fully comply with the Contract Documents or otherwise materially breaches the Agreement.

§ 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 Construction Manager and the Construction Manager's surety, if any, **ten (10)** Days' written notice, terminate employment of the Construction Manager and may, subject to any prior rights of the surety:

- .1 Exclude the Construction Manager from the Site and take possession of all materials, equipment, tools, and construction equipment and machinery thereon owned by the Construction Manager;
- .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 Construction Manager, the Owner shall furnish to the Construction Manager a detailed accounting of the costs incurred by the Owner in finishing the Work.

Notwithstanding the foregoing, if Owner reasonably determines that Construction Manager's acts or omissions pose an immediate and substantial threat or danger of injury to persons or damage to the Work or other property, Owner may, without prejudice to any other rights or remedies granted by this Contract or by Applicable Law, immediately suspend Construction Manager's performance of the Work, take immediate possession of the Site, take such further

action reasonably necessary to prevent, mitigate against, remove, or repair such threat or damage, and deduct such costs and expenses it reasonably incurs from any sums due and owing to the Construction Manager or, in the absence thereof, to recover such costs and expenses from the Construction Manager.

**§ 14.2.3** When the Owner terminates the Contract for one of the reasons stated in Section 14.2.1, Construction Manager shall not be entitled to receive any further payment until the Work is finally completed. It is expressly agreed that pursuit by Owner of any one or more of the remedies provided herein or otherwise available under Applicable Law or in equity shall not constitute an election of remedies by Owner, nor shall forbearance by Owner to enforce one or more of the remedies provided herein upon an event of default by Construction Manager be deemed or construed to constitute a waiver of such default. Upon receipt of any such written notice of termination of right to proceed, the Construction Manager shall, at its expense, for that Work affected by any such termination:

- .1 Make an inventory of all materials and equipment in storage at the Site, in route to the Site, in storage or manufacture away from the Site, and on order from suppliers;
- .2 Assign to the Owner contracts, subcontracts, supply contracts, and equipment rental agreements all as designated by the Owner; and
- .3 Remove from the Site all construction materials and equipment listed in said inventory other than such construction materials and equipment designated in writing by the Owner to be used by the Owner in completing such Work.

**§ 14.2.4** Owner retains the right to pursue Construction Manager for any and all damages and/or costs incurred by Owner in completing the Contract. This right shall survive the termination of the Contract.

**§ 14.2.5** If, after termination of this Contract under this Section 14.2, it is determined that the Construction Manager was not in default or that sufficient cause to terminate hereunder did not exist, the rights and obligations of the parties shall be determined as if the termination had been issued for the convenience of the Owner as provided in Section 14.4 below.

#### **§ 14.3 Suspension by the Owner for Convenience**

**§ 14.3.1** The Owner may, without cause, order the Construction Manager in writing to suspend, delay or interrupt the Work in whole or in part for such period of time as the Owner may determine. Upon receipt of such notice, the Construction Manager shall, unless the notice required otherwise:

- .1 Immediately discontinue Work on the date and to the extent specified in the notice;
- .2 Place no further orders, contracts or subcontracts for material, services, or facilities with respect to suspended Work other than to the extent required in the notice;
- .3 Promptly make every reasonable effort to obtain suspension upon terms satisfactory to the Owner of all contracts, orders, subcontracts, and rental agreements to the extent that they relate to performance of Work suspended; and
- .4 Unless otherwise specifically stated in the notice, continue to protect and maintain the Project, including those portions on which Work has been suspended.

**§ 14.3.2** The Final Guaranteed Maximum Price and Contract Time shall be adjusted for increases in the cost and time caused by suspension, delay, or interruption as described in Section 14.3.1 to the extent allowed under Section 8.3 (including subsections therein), or Section 15.1.5.1, but in no case in excess of any amounts allowed under Texas Law and Section 8.3.3.1. No adjustment shall be made to the extent.

- .1 that performance is, was or would have been, so suspended, delayed, or interrupted, by another cause for which the Construction Manager is responsible; or
- .2 that an equitable adjustment is made or denied under another provision of the Contract.

**§ 14.3.3** Adjustments made in the cost of performance shall be limited to the increase or decrease in the cost of performance directly attributable to such suspension.

**§ 14.3.4** When all or a portion of the Work is suspended for any reason, as part of the scope of Work, the Construction Manager shall securely fasten down all coverings and protect the Work, as necessary. Costs for doing so shall be compensable pursuant to Section 14.3.2 but only to the extent not otherwise provided for in the Final Guaranteed Maximum Price.

## § 14.4 Termination by the Owner for Convenience

§ 14.4.1 The Owner may, at any time, terminate the Contract for the Owner's convenience and without cause.

§ 14.4.2 Upon receipt of written notice from the Owner of such termination for the Owner's convenience, the Construction Manager shall immediately;

- .1 cease operations as directed by the Owner in the notice;
- .2 take actions necessary for the protection and preservation of the Work;
- .3 except for Work directed to be performed prior to the effective date of termination stated in the notice and subcontracts, supply contracts, and rental agreements owner accepts pursuant to Section 5.4 and terminate any remaining subcontracts, purchase orders and rental agreements and enter into no further Project agreements and purchase orders;
- .4 place no further contracts, orders or subcontracts for material, services, or facilities except as may be necessary or required for completion of such portion of the Work under the Agreement that is not terminated;
- .5 assist the Owner as specifically requested, in writing, in the maintenance, protection, and disposition of property acquired by the Owner under the Contract; and
- .6 transfer to the Owner title to Work completed for which payment is made to the Construction Manager.

§ 14.4.3 In case of such termination for the Owner's convenience, the Construction Manager shall be entitled to receive payment for (a) Work properly executed in accordance with the Contract Documents prior to the effective date of termination, including any General Conditions Costs and Fee on Work completed, as measured by the Contract Sum allocated by the Schedule of Values, and (b) the direct, actual and unavoidable (by the exercise of reasonable care) costs incurred by Construction Manager in terminating the Work and demobilizing the Site, Construction Manager shall also be entitled to payment for materials timely fabricated off the Site and delivered and stored in accordance with the Owner's instructions. Owner shall not be liable for and Construction Manager shall not be entitled to payment for Work not performed, overhead or profit on Work not performed, or any other amount disallowed under *Tex. Local Gov't. Code § 271.153(b)*. The amounts owing by the Owner to Construction Manager pursuant to this Section shall be specified in Construction Manager's Final Application for Payment approved by Owner, which Application is subject to all requirements set forth in Article 9 and Section 11.2 of the Agreement, to the extent applicable. Construction Manager's entitlement to receive its final termination payment under this provision shall require a final lien waiver from Construction Manager and from Subcontractors whose subcontracts are not being continued by Owner, such documents to be the same form and delivered under the same conditions as required for Final Payment absent a termination under this provision. Owner shall be entitled to take possession of the Work and use copies of all files relating to performance of the Work of Construction Manager in completing the Work, except for confidential or proprietary information regarding Construction Manager.

## ARTICLE 15 CLAIMS AND DISPUTES

### § 15.1 Claims

#### § 15.1.1 Definition

A Claim is a demand or assertion by one of the parties seeking, as a matter of right, payment of money, a change in the Contract Time, or other relief with respect to the terms of the Contract. The term "Claim" also includes other disputes and matters in question between the Owner and Construction Manager arising out of or relating to the Contract. The responsibility to substantiate Claims shall rest with the party making the Claim. This Section 15.1.1 does not require the Owner to file a Claim in order to impose liquidated damages in accordance with the Contract Documents.

#### § 15.1.2 Time Limits on Claims

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

#### § 15.1.3 Notice of Claims

Unless otherwise prescribed elsewhere in the Contract Documents, Claims by the Construction Manager must be initiated by written notice (the "Notice of Potential Claim") to Owner, with a copy sent to the Project Manager, within **twenty-one (21) Days** after occurrence of the event giving rise to such Claim or within **twenty-one (21) Days** after the Construction Manager first recognizes the condition giving rise to the Claim, whichever is later.

(Paragraphs deleted)

#### **§ 15.1.4 Continuing Contract Performance**

Notwithstanding any Claim, dispute, controversy, or question that might arise in the interpretation of any provision of the Contract Documents, the performance of any Work, the delivery of any material, the payment of any monies to Construction Manager, or otherwise, Construction Manager agrees that it will not directly or indirectly stop or delay any Work or part thereof on its part required to be performed, nor will it stop or delay the delivery of any materials on its part required to be furnished for the Work, pending the determination of such Claim, dispute, or controversy so long as Owner pays Construction Manager for undisputed amounts in accordance with the Agreement.

(Paragraphs deleted)

#### **§ 15.1.5 Claims for Additional Cost**

If the Construction Manager wishes to make a Claim for an increase in the Final Guaranteed Maximum Price (and such increase is recoverable under the Contract Documents and allowed under Section 8.3. herein), written notice as provided herein shall be given to Owner and written approval by Owner through an authorized Change Order in accordance with the provisions of Section 7.2 shall be required before Construction Manager proceeds to execute the Work. Without limiting the requirements of Section 15.1.2, such notice shall include, to the extent then-known by the Construction Manager, full details and substantiating data to permit evaluation by Owner and the Architect. If further or other information subsequently becomes known to the Construction Manager, it shall be promptly furnished to the Owner, Architect, and Project Manager, in writing. Prior notice is not required for Claims relating to an emergency endangering life or property arising under Section 10.4.

**§ 15.1.5.1** Construction Manager shall not be entitled to recover damages in excess of those allowed under the Agreement, Section 8.3.3.1 herein, or under Applicable Law.

**§ 15.1.5.2** All Claim notices shall itemize the Claim and shall contain sufficient detail and supporting data to permit evaluation of the same by Owner, Architect, and Project Manager. No Claim shall be valid unless the requirements set forth in this Section 15.1.5 are followed.

**§ 15.1.5.3** Any change in the Agreement resulting from such Claim shall only be valid if included as a Change Order.

#### **§ 15.1.6 Claims for Additional Time**

**§ 15.1.6.1** If the Construction Manager intends to make a Claim for an increase in the Contract Time, written notice as provided herein shall be given. The Construction Manager's notice shall include the probable effect of delay on progress of the Work. In the case of a continuing delay, only one Claim is necessary; provided, however, that the Construction Manager shall provide to the Owner and Project Manager promptly upon request, additional information regarding the status of such delay. Any change in the Contract Time resulting from such Claim and approved by Owner shall be authorized by a Change Order in accordance with the provisions of Section 7.2. In any Claim by Construction Manager for any increase in the Contract Time or the Final Guaranteed Maximum Price, if permitted in the Contract Documents, Construction Manager shall demonstrate that the event giving rise to the Claim was beyond the Construction Manager's control, delayed the critical path of the Project and that Construction Manager has provided Owner with such notice as required herein. Construction Manager shall provide notice of a potential delay even if Construction Manager is uncertain the event or circumstance will actually cause a delay in performance of the Work.

**§ 15.1.6.2** If adverse weather conditions are the basis for a Claim for additional time, such Claim shall be documented by data substantiating that adverse weather conditions exceeded the number of Days calculated as provided at Section 8.3.1 and had an adverse effect on the critical path of the scheduled construction. The Construction Manager shall document such Claim in writing to the Owner, Architect, and Project Manager, within the time period set forth in Section 15.1.2. Notice of a potential delay must also have been provided within **forty-eight (48)** hours of Construction Manager becoming aware of such event or circumstance.

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

(Paragraphs deleted)

*[Intentionally deleted. Construction Manager may not recover consequential damages. Owner reserves all rights, remedies and defenses available to it under Texas law as a hospital district and political subdivision of the State of Texas.]*

**§ 15.2 Initial Decision**

*[Intentionally deleted].*

*(Paragraphs deleted)*

**§ 15.3 Mediation**

*[Intentionally deleted].*

*(Paragraphs deleted)*

**§ 15.4 Arbitration**

*[Intentionally deleted. The Parties shall litigate all disputes].*

*(Paragraphs deleted)*

