

June 7, 2006 update

AGREEMENT BETWEEN
OWNER and CONTRACTOR

Fixed Contract Price - Defined Scope of Work

Branch Banking and Trust Company

Contractor:

Project:

BB&T Project No.

Project Location

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OWNER - CONTRACTOR AGREEMENT

Fixed Contract Price – Defined Scope of Work

This Agreement between Owner and Contractor (“Agreement”) is entered this [] day of [], 200[] by and between:

the “Owner”:
and **Branch Banking and Trust Company**
200 West 2nd Street
Winston-Salem, NC 27101

the “Contractor”:
[] (*insert Contractor’s name*)
[] (*insert Contractor’s address*)
[] (*insert Contractor’s address*)
[], [] [] (*insert Contractor’s city, state, zip*)

involving the “Project” generally described as: **Project commonly referred to by the name [], consisting generally consisting of a [] (*insert basic description of the Project*) and related site improvements**

Owner’s Project Number: **BBT-0001-st-06-JS (*insert*)**

located at or near: [] (*insert address and/or legal description, and city, state, zip*)
in the county of [] ;

with Construction Drawings and Specifications by “Architect”: **Lambert Architecture, P.A.**
Suite 202, 2400 Reynolda Road
Winston-Salem, NC 27106

based upon a “Fixed Contract Price” of: \$ [] .00

For valuable consideration, the sufficiency of which is acknowledged by Owner and Contractor (“the Parties”), THE PARTIES AGREE AS FOLLOWS:

ARTICLE I – THE WORK

A. **The Work.** Contractor shall provide all labor, materials, equipment, administration, supervision, storage, and safety measures; scheduling and coordination of Work, trades, and Subcontracts; grading; environmental protection measures; transportation; shipping; temporary facilities; temporary and permanent utility services and connections; shop drawings and other submittals; procurement of governmental permits and inspections, insurance, and bonds; and all other measures needed for complete construction of the structure(s) and site improvements (“Work”) indicated in the Contract Documents listed in Supplement A (and in any duly executed Change Orders), and any other Work reasonably inferable from the Contract Documents in order to construct a complete Project that is fit for use as intended by the Owner.

- B. **Contractual Date of Substantial Completion.** Contractual Date of Substantial Completion is the date on which: (1) all Work must be complete; (2) a Certificate of Occupancy has been obtained from the governmental authority having jurisdiction over the Project; and (3) the Project is, in the good faith opinion of Owner, complete and useable in the manner intended by the Owner.
- C. **Contract Time.** Owner shall issue a Notice to Proceed after the later to occur of execution of this Agreement or issuance of the permits required to commence the Work. The Contract Time is the period between the day on which the Owner issues its Notice to Proceed and the Realized Date of Substantial Completion, which date shall be not more than [redacted] calendar days after the date on which Owner issues its Notice to Proceed.
- D. **Contract Price.** The Contract Price is the total amount to be paid by Owner as complete compensation for Contractor's full and timely performance of the Work.
1. **Reimbursable Expenses.** The Contract Price does not include Reimbursable Expenses (as established in Article V).
 2. **Consideration.** The Parties agree that the Contract Price stated above takes into account added distinct and separate elements of consideration, including: (a) \$10,000 (and other valuable promises and performance exchanged) pertaining to Contractor's acceptance of indemnity and insurance obligations set forth herein; (b) \$8,000 (and other valuable promises and performance exchanged) pertaining to Contractor's acceptance of the Owner's right to terminate for convenience set forth herein; (c) \$8,000 (and other exchanged consideration and promises) pertaining to no damage for delay clause, set forth herein; and (d) \$1,000 pertaining to Contractor's acceptance of distinct obligations and elements of performance for which separate consideration is appropriate, among which are those pertaining to intellectual property, insurance, Owner's right to elect arbitration, certifications, warranties, forum selection, duty to discharge liens, stabilization of unit prices, survival provisions herein, and other obligations accepted by Contractor for the benefit of Owner, all of which are deemed to be exchanged and given upon execution of this Agreement and credited from among the first amounts paid by Owner. By executing this Agreement, the Parties agree that these separate elements of consideration are individually and collectively adequate and sufficient to support Contractor's acceptance of obligations hereunder.
- E. **Agreed minimum damages for late completion.** As a liquidated amount for the minimum delay-related damages that Owner has reason to believe it will suffer if Contractor fails to complete the Work within the Contract Time (the actual sum of which damages is difficult to ascertain with precision in advance), Contractor will pay to Owner upon demand or (in the alternative, at Owner's election) the Contract Price shall be reduced by: \$500 per day for the first ten days beyond the Realized Date of Substantial Completion that the Work is not substantially complete; thereafter increasing to \$750 per day for the next twenty days beyond the Realized Date of Substantial Completion that the Work is not substantially complete; and, thereafter, by \$1,500 per day beyond the Realized Date of Substantial Completion that the Work is not substantially complete.
- F. **Scheduling method.** Scheduling method required: (check one):
- CPM method; or
 - Bar Graph method.
- G. **Specific Party-related information.** The following persons are authorized to represent their respective Party in accordance with Article XVI:
1. **Owner's designated representative for construction administration ("OCA") is:**
[redacted] (insert name of OCA) [redacted] (OCA's title)

 _____ (name of OCA's firm or company)
 _____ (OCA's address)
 _____, _____, _____ (OCA's city, state, and zip code)
 (____) ____ - _____ (OCA's office telephone no.)
 (____) ____ - _____ (OCA's office fax no.)
 _____@_____ (OCA's e-mail)

2. **Contractor's designated representative ("CDR") is:**

_____ (insert name of CDR) _____ (CDR's title)
 _____ (name of CDR's firm or company)
 _____ (CDR's address)
 _____, _____, _____ (CDR's city, state, and zip code)
 (____) ____ - _____ (CDR's office telephone no.)
 (____) ____ - _____ (CDR's office fax no.)
 (____) ____ - _____ (CDR's cell telephone no.)
 _____@_____ (CDR's e-mail)

H. **Contract Documents.** The "Contract Documents" include only: (1) this Agreement, Supplements to it, and duly executed Change Orders modifying it; (2) the Construction Drawings and Construction Specifications (collectively "Construction Documents") that are listed in Supplement A (or are referred to in Supplement A as being attached, dated, and initialed by OCA, or indexes thereof, similarly attached and noted); (3) specific documents, statutes, and regulations expressly incorporated by reference herein; and (4) other documents, statutes, or regulations expressly referred to in this Agreement or in the Contract Documents and expressly indicated in them to be controlling, authoritative, or limiting with respect to a specific element, category, or component of the Work.

I. **Project Meetings.**

1. **Mandatory pre-construction meeting.** A pre-construction meeting will be held at the Project site, at a time announced by the OCA, attended by Contractor, its Superintendent, the CDR, designated representatives from each major subcontractor, supplier, and others invited by the OCA. At least 3 work days before that meeting, Contractor must submit the original, and one complete copy (in both printed and digital form) of each of the following documents:
 - a. For each type of insurance required: certificate of insurance, together with a copy of all endorsements to each;
 - b. Executed copy of Contractor's Written Confidentiality Agreement, in the form provided as Supplement H (as amended consistent with this Agreement), or in another form approved by the Owner;
 - c. Proposed Baseline Project Schedule, with back-up data, as required under Article VI;
 - d. Proposed Schedule of Values, with back-up data, as required under Article III;
 - e. Documents demonstrating governmental approval of Contractor to transact business in the state in which the Project is being constructed, as well as those pertaining to state sales and use tax certificates, business licenses, franchise tax registrations and applications, and any required state and local tax, code-compliance bonds, and occupational bonds;
 - f. Project Roster and Directory as specified in Supplement B;

- g. Filed Notice of Commencement, land disturbance permits, building permits, health department permits, and any other governmentally issued permits needed to perform the Work;
 - h. Payment Bond, Performance Bond, and other bonds required herein; *and*
 - i. Contractor's manual of safety procedures, together with a statement identifying Contractor's officer chiefly responsible for safety training of workers on the Project.
2. **Periodic Project meetings.** Unless otherwise designated in writing by the OCA, Project meetings shall be held on the Project site at _____ o'clock, every _____ (*insert day of week*) on the _____ (*first, second, etc.*) and _____ (*first, second, etc.*) week(s) of each month.
- J. **Payment and Performance Bonds.** Payment and Performance Bonds, if required by this Article, shall be supplied to Owner upon or before execution of this Agreement, and shall be in accordance with Article XIII and in the form supplied as part of Supplement G2. (*check one*):
- Contractor *must* provide Payment and Performance Bond.
 - Contractor *not required to* provide Payment and Performance Bonds.
- K. **Waivers and releases to accompany Payment Applications.** Contractor shall submit lien waivers from each and every Subcontractor and material supplier performing mechanical, electrical, plumbing or site work and for which payment is sought in any monthly interim or final Payment Application.
- L. **Payment Applications.** Contractor shall submit Monthly Payment Applications on or before the _____ day of each month.
- M. **Supplements.** Unless otherwise limited herein, Supplements listed in the index on the page immediately preceding Article I are incorporated in this Agreement by reference as if set forth fully herein. Owner reserves the right to modify or replace forms contained in the Supplements during the course of the Work. Where changes are made in laws governing application and use of a form provided in a Supplement, that form shall thereafter be modified – or deemed to be modified – to conform to the change in the law. Certain Supplements limit the degree to which a specific Owner's Policies or other documents or standards bind Contractor. It is Contractor's obligation to obtain and review copies of Supplements that are not attached in full hereto.
- N. **Law governing.** Contractor's Confidentiality Agreement shall be governed by, and construed in accordance with, the laws of the State of North Carolina, except for that state's choice of law provisions. Unless the law of a different state is specified at the end of this paragraph, all other aspects of this Agreement, the Work, and the Parties' relationship shall be governed by, and interpreted and construed according to, the laws of the state in which the Project is located (except for that state's choice of law provisions). _____ (*insert alternative state law, if any*).
- O. **Where Agreement made.** This Agreement shall be deemed to be made in the state in which Owner is located, as noted on page 3 of this Agreement; and Owner's performance shall be deemed to take place in that state.
- P. **Administrative Cost Factor ("ACF").** The Parties agree that certain administrative costs will be involved in instances where Contractor's performance, failure to perform, misconduct, *etc.*, justifies Owner's issuance of a unilateral deductive Change Order to address minimum agreed damages. The Parties agree initially determined damages in each case may be increased by multiplying the damages by a factor that reasonably accounts for them ("Administrative Cost Factor" or "ACF"); and that, on this Project, the ACF to be applied is 115%.

- Q. **Geotechnical Report.** (check which **one** of the following applies, and supply the needed information).
- A Geotechnical Report has been prepared by _____ (insert), and dated _____ (insert), pages _____ to _____ (insert) of which are incorporated in this Agreement by reference, and are attached as Supplement G2.
 - A Geotechnical Report has been prepared by _____ (insert), and dated _____ (insert), pages _____ to _____ (insert) of which are incorporated in this Agreement by reference, and are available for Contractor's review and inspection, though they are not physically attached to this Agreement.
 - No geotechnical report is incorporated herein.
- R. **Insurance required.** In addition to Commercial General Liability, Business Auto Liability, Workers Compensation and Employers Liability, Builders Risk, and Umbrella Liability insurance required in all cases and under Article XII, the following types of insurance are also required: (check those of the following that apply)
- Mobile Equipment Liability;
 - Boiler and Machinery Insurance;
 - Environmental Insurance;
 - Professional Liability Insurance;
 - Flood and earthquake endorsements required for Builders Risk policy; and/or
 - _____ (list other types of policies or coverage required).
- S. **Owners Equipment.** For insurance purposes, unless otherwise notified by OCA, the estimated value of the equipment provided, stored, or installed by Owner, or for Owner, by Separate Contractors, including, but not limited to, banking equipment is \$ _____ (insert reasonable estimate of value of equipment).
- T. **Deductibles.** Maximum allowed builders risk deductible to be \$ _____ (insert) per occurrence – to be paid in each instance by Owner.
- U. **Progress Photos.** Contractor shall submit progress photos required under Article III in the form, and with the frequency indicated as follows: (check those of the following that apply)
- Progress Photos, covering applicable periods, to be submitted in printed form to OCA with Contractor's Monthly Payment Applications and again at Substantial Completion;
 - Progress Photos, covering applicable periods, to be submitted in printed and digital (.jpg Adobe) files form to OCA with Contractor's Monthly Payment Applications and again at Substantial Completion; or
 - Printed and digital Progress Photos to be submitted to OCA upon request.
- Nothing in this provision relieves Contractor of its obligation to produce, maintain, and timely submit progress photos pertaining to documentation of as-built conditions as required in Article III and weather delays and related adjustments to Contract Time as set forth in Article VIII.

ARTICLE II – GENERAL TERMS AND CONDITIONS

- A. **Entire agreement.** This Agreement contains the Parties' entire agreement with respect to the Project and the Work. Any and all earlier representations, statements, negotiations, proposals, or agreements are merged into this Agreement or otherwise extinguished by it.

- B. **No reliance.** Contractor enters this Agreement on the basis of its own investigation and information; and, in doing so, it does not rely on any statements or representations of Owner or others.
- C. **Agreement binding.** The Parties agree that this Agreement is binding upon each Party and upon its respective officers, directors, members, shareholders, owners, managers, employees, partners, limited partners, agents, attorneys, insurers, sureties, successors and predecessors in interest, and assigns (where permitted under Article XV), and any parent and subsidiary corporations, limited liability companies, or any other persons, organizations, or entities related to or affiliated with any of them.
- D. **No nonparty rights against Owner.** Nothing in this Agreement shall be deemed to create a right or cause of action in favor of any non-party against the Owner; nor are any other persons or entities third-party beneficiaries of this Agreement. Owner is, however, a third-party beneficiary of all Subcontracts, Payment and Performance Bonds, Contractor and Subcontractors' policies of insurance, waivers and releases, and other instruments and agreements related to this Project or the Work.
- E. **Independent contractor.** Contractor is an independent contractor. Contractor is not the employee of the Owner; nor is it an agent of Owner – except as expressly indicated and limited herein.
- F. **No waiver by Owner.** By declining or failing to exercise or assert any right or remedy it has or may have in one instance, Owner does not waive its ability to subsequently exercise that right or remedy in other instances.
- G. **No affirmative act required of Owner by implication.** The existence of Owner's right to elect or exercise a particular right or remedy under this Agreement shall *not* be deemed to impose on the Owner an obligation to exercise that right or remedy to take any affirmative actions with regard to it.
- H. **Contract interpretation and construction.**
1. **Order of precedence.** Conflicts or ambiguities among the Contract Documents shall be resolved by applying the following, in descending order of precedence: (a) this Agreement and duly executed Change Orders; (b) Supplements listed in the index that precedes Article I, (as further explained below in this sub-paragraph); (c) the Construction Drawings indexed and expressly identified in [Supplement A](#); (d) the Construction Specifications indexed and expressly identified in [Supplement A](#); (e) specific documents, statutes, and regulations incorporated by express reference in this Agreement; (f) other documents, statutes, and regulations expressly incorporated in this Agreement (or in the Contract Documents by specific reference) and expressly indicated in this Agreement (or in the Construction Documents) to be controlling with respect to specific elements or categories of the Work; (g) Subcontracts approved in advance by Owner (but only to the extent consistent with this Agreement and pertinent to express duties flowing from Subcontractor, through the Contractor, to the Owner); and (h) universally accepted industry meanings given a term (but only to the degree consistent with this Agreement). Where specific terms of a Supplement explicitly and directly indicate modification, limitation, or abrogation of terms of this Agreement, those specific terms in Supplement shall control.
 2. **Interpretation.** Conflicts and ambiguities not resolved by application of the foregoing order of precedence shall be resolved by the Project Architect, or if none, by Owner's binding decision made in good faith.
 3. **Reformation.** If a court or arbitrator construing this Agreement as to *these* Parties rules that one or more of its terms are unenforceable, the unenforceable term shall be deemed stricken, and the remaining terms construed to give maximum effect to each of them and to the Agreement as a whole.

4. **Headings and titles.** Headings and titles used in this Agreement are provided primarily for organizational reference, and shall not be construed to deviate from, or conflict with, the specific terms to which they refer.
5. **Inclusive terms.** When a singular term is used, its plural form is also implied, unless that implication substantively changes its application in context. Terms connected by “and/or” shall be applied conjunctively and disjunctively in the alternative. Unless accompanied in context by a limiting term (*e.g.*, “only”), the words “includes” and “including” are not intended to limit, but shall be deemed to imply as well “including but not limited to ...”
6. **Words of special meaning.** Words that are not otherwise expressly defined, but are set off by quotations or parentheses, shall be applied as defined by the phrase preceding the quote or parenthesis (for example, “Work” as seen above in part I(A)). Words that are exceptionally or unusually capitalized in context shall be applied as defined in that context, either before or after the proximate definitional clause (for example, “Resubmittals” in the discussion of Submittals in Article III below). To say that Work is “noncompliant” or that it is “Defective Work” is to say that it “fails to comply with requirements of the Contract Documents” or “...with applicable codes or other laws” (as the case may be). The term “site” shall mean on the Property on which the Project is being constructed.
7. **Approvals.** Unless otherwise indicated in context: (a) the term “approved” shall mean “approved by Owner”; (b) the term “proposed” shall mean “proposed for Owner approval”; and (c) the term “submitted” shall mean “submitted for Owner approval or review.”
8. **Laws.** Unless otherwise indicated in context, the term “laws” shall be deemed to include all federal, state, and local building, health, elevator safety, fire, life safety, sprinkler, energy, accessibility, environmental, development, zoning, and other building-related codes, statutes, regulations, executive orders, ordinances, and/or rules promulgated or enacted by any level of government, as duly amended, as well as the common law of the jurisdiction in which the Project is located applicable to the Project, the Work, and the Services – among them: the Occupational Safety and Health Act (“OSHA”); state and local call-before-you-dig laws and trench safety laws; the federal Clean Water Act and related state statutes; the Americans with Disabilities Act (“ADA”); the Copyright Act of 1976, as amended; the federal Bank Secrecy Act and other federal banking law; the Patriot Act; Immigration Reform and Control Act of 1986, as amended; state immigration and labor laws; state prompt payment laws; tax laws; laws governing formation and operations of business organizations; laws and regulations governing practice of architecture, engineering, and land surveying; and others as may be expressly noted in Supplement B (collectively “laws”).
9. **General references to Contractor.** Unless otherwise distinguishable in context: (a) Contractor’s obligations under this Agreement shall be deemed to apply as well to Contractor’s subcontractors, sub-subcontractors of any tier, fabricators, vendors, suppliers, laborers, *etc.* (collectively “Subcontractors”) as to their part of the Services, and shall bind the officers, managers, directors, shareholders, members, agents, sureties, insurers, employees, attorneys, and representatives, *etc.* of each of them; and (b) obligations and duties imposed herein without direct reference to a particular person or entity are deemed to be imposed upon the Contractor. For example, if something is to be “provided,” it is deemed to be “provided by the Contractor.”
10. **Conditions precedent.** The words “CONDITION PRECEDENT to Owner’s obligation to pay” shall mean that the non-satisfaction of the applicable condition precedent excuses Owner’s obligation to pay any and all amounts due to Contractor under this Agreement.

Express designation of a condition precedent in one instance does not foreclose application of conditions precedent in other instances by inference or implication in context.

11. **Transmittal of information.** The term “Overnight Delivery” means next work day delivery by a carrier statutorily regulated by government that provides technology to electronically track shipping, delivery, and receipt, including only: United Parcel Service (“UPS”) or Federal Express Corp. (“FedEx”) - unless another carrier is agreed to in writing by the Parties.
 12. **Internal cross-references and incorporations.** Unless otherwise expressly stated, references in this Agreement to certain articles, sections, parts, or paragraphs refer to those articles, sections, parts, and paragraphs in *this* Agreement. The term “herein” shall mean “in this Agreement.” The term “hereunder” shall mean “under this Agreement.” The term “hereto” shall mean “to this Agreement.”
 13. **Identification.** When a blank calls for provision of an “address,” it should be read to require street address, suite number, building number, or city, state, and zip code and any other identifying information; and blanks calling for provision of a “name,” should be deemed to call for the full legal name of the person or business organization indicated.
 14. **Days.** Unless otherwise specified in context, the word “days” shall mean calendar days. The term “work days” shall mean weekdays, not including Thanksgiving Day, Christmas Day, Memorial Day, New Years Day, Martin Luther King holiday, Fourth of July, and Labor Day.
 15. **Technical terms.** To the degree consistent with the express terms of this Agreement, technical terms that are universally accepted in the building construction industry shall be accorded the meaning commonly applied in that industry.
 16. **Express terms.** Unless otherwise provided in context, an “express” term or requirement in this Agreement means one that is literally stated or directly and specifically written in it.
- I. **Arms-length transaction.** This Agreement shall not be construed against either Party on the basis of authorship, drafting, or source because it is the product of arms-length bargaining by sophisticated Parties with substantial bargaining power, each of which either had the advice of an attorney or had the opportunity to obtain; and both influenced its final terms.
 - J. **Survival.** Contractor’s obligations that survive termination of this Agreement (and/or the completion of the Work) include: payments to Subcontractors; correction of Defective Work; payments and repayments to Owner; assignment of Subcontracts; audits, financial reporting, record keeping, and accounting; safety; stabilization of the Work; warranties; certifications; indemnities; insurance; Payment and Performance Bonds and other bond-related obligations; dispute resolution; duty to discharge liens; confidentiality; intellectual property; procurement, posting, and transmittal of notices, demands, and claims; hazardous material; environmental protection; payment of taxes; labor and employment obligations; and any other obligations and duties of the Contractor, the survival of which are needed to give effect to this Agreement.

ARTICLE III – CONTRACTOR’S OBLIGATIONS, DUTIES, AND WARRANTIES

- A. **Safety.** Contractor’s primary duty is to perform the Work safely, adhering to all laws, regulations, ordinances, and rules of governing authorities having jurisdiction over it. That duty is non-delegable; and it is not shared with Owner, the OCA, the Architect, or others – except that Contractor must, by written Subcontract, impose a similar and coextensive duty upon each Subcontractor with regard to its respective portion of the Work.

1. **Duty to stop Work for safety.** If Contractor observes an unsafe condition or activity on-site, property damage, or personal injury, it shall: (a) stop Work in areas potentially impacted or endangered by it; (b) remove workers from the affected area; (c) post and secure the unsafe area; (d) stabilize the condition; and (e) immediately notify the OCA by e-mail (and telephone if jeopardy to life or property is involved), detailing: (i) the unsafe condition; (ii) what Work was stopped; (iii) which workers were removed from the area and when; (iv) whether and how it is stabilized and secured; (v) known or suspected causes of the condition; and (vi) recommended alternative remedies or means to correct it. Contractor shall continually update OCA as to: (A) corrective measures taken; (B) which statutes, regulations, ordinances, rules, and contract provisions were affected (C) which emergency, health, medical, law enforcement, or other officials or facilities, if any, were notified, and how they responded; (D) whether citations were issued, fines imposed, or other governmental action was taken or threatened; (E) how and when correction will be completed and Work resumed; (F) how the condition was ultimately corrected or rendered safe; and (G) what measures, if any, are needed to conform to the Project Schedule in order to complete the Work within the Contract Time.
2. **Duty to report safety-related occurrences or criminal conduct.** In addition to taking any other steps required herein, Contractor shall adhere to all local, state, and federal laws requiring the reporting of accidents, death, personal injury, or property damage – or criminal conduct; and shall timely report all accidents, death, personal injury, property damage, and/or any other occurrences and incidents to applicable insurers so as to preserve rights of coverage for all concerned. Nothing in this Agreement shall be construed to relieve Contractor of duties imposed by law, regulation, or ordinances in this regard.
3. **Essential communications on-site.** Whenever persons are employed on-site who are not conversant and literate in English, Contractor shall provide a translator on-site. Contractor shall take all steps necessary to assure that every person on-site is able to communicate in English with Contractor's superintendent and the OCA and that each on-site employee of Contractor or Subcontractors has the ability to see, recognize, and understand: (a) the task assigned to them; (b) all hazard warnings and labels published in English; (c) restricted areas; and (d) audible or visual safety-related warning signals and announcements in English.
4. **Trenches.** Contractor shall adhere to all safety-related federal, state, and local laws and regulations pertaining to trenches and other excavations, including excavation safety standards published in the Code of Federal Regulations, 29 CFR 1926(P), as that standard may be amended from time to time. Contractor shall permit no person to work in or near a trench unless it is: (a) braced in compliance with the foregoing laws and regulations; and (b) Contractor's Superintendent or other specially trained safety supervisor is continually present at the excavation or trench, itself.
5. **Contractor's responsibility for site safety.** Safety is the exclusive responsibility of Contractor. Contractor's provision of safety-related information to Owner shall not be construed as Owner's approval or review of information provided; nor shall it impose any duty or obligation upon Owner for safety.
6. **Drug and alcohol-free Project site.** Any presence on-site of alcohol and illegal drugs, or of persons who are in any way under the influence of either, is, by definition, an unsafe condition that, in all cases, requires immediate correction and notification as stated herein.
 - a. **Background checks and testing.** In addition to other measures required by law and this Agreement, Contractor shall take all steps necessary to prevent the presence on the Project site of alcohol, perception-inhibiting drugs, illegal or improperly administered substances, drugs, or intoxicants of any kind (collectively "intoxicants")

and of persons under their influence, including random, verifiable drug testing, with results to be documented and certified by a laboratory licensed to do so.

- b. **Drug test results.** Contractor to provide to OCA, upon OCA's request, written evidence sufficient to demonstrate that drug tests are being performed by a qualified, licensed, independent testing laboratory pertaining to the requirements of this paragraph as to Contractor's on-site employees and those of Subcontractors on the Project. Persons whose tests indicate presence of intoxicants or perception-inhibiting drugs shall be immediately and permanently removed from the Project site, and not permitted to return until and unless immediate retesting of that person shows the first results to be in error.
- c. **Affect of conviction for certain offenses.** Contractor, and Subcontractors of any tier, shall obtain competent, verifiable criminal background checks on all persons employed by them on-site. No person may be employed on-site who has been convicted of a felony (except for a motor vehicle-related offense not involving fire arms, drugs, or alcohol) during the past fifteen years. Persons who have, at any time, been convicted of operating motor vehicles while intoxicated or under the influence of a narcotic or alcohol, or of any similar offense, shall not be permitted to operate heavy or self-propelled machinery and equipment on-site.

B. **Contractor's representations and warranties.** In addition to other warranties provided by Contractor, and as an inducement to Owner to enter this Agreement, Contractor warrants and represents the following:

- 1. **Licensing.** Contractor (as well as its Subcontractors of any tier) possesses, and will continually maintain, all licenses, registrations, certifications, tax bonds, code compliance bonds, other Work-specific bonds, and other approvals required by governmental authorities and agencies with jurisdiction over the Work, the Project, Contractor, and its Subcontractors.
- 2. **Standard of Care.** Contractor will perform the Work in compliance with the Contract Documents and in a workmanlike manner, applying a degree of care, diligence, workmanship, and skill that meets or exceeds that which is reasonably expected of a competent, qualified contractor on projects of similar scope and complexity in metropolitan areas of the state in which this Project is located; and Contractor warrants that the Work will be fit for the intended purpose and consistent with the Contract Documents, that materials delivered will be merchantable and fit for its intended purpose;
- 3. **Predominant purpose.** The Parties agree and acknowledge that predominant purpose of this Agreement is the performance of the Work by provision of labor and of administration, planning, and supervision services – and this Agreement is not predominantly one for provision of goods;
- 4. **Insurance.** Contractor has provided, and will continue to provide, insurance coverage as required in Articles I and XII and by law. Contractor shall provide documentary proof of insurance both: (a) upon execution of this Agreement; and (b) between 30 and 60 days in advance of each policy's renewal date;
- 5. **Acceptance of Project conditions.** Contractor: (a) has visited the site; (b) has thoroughly reviewed the Contract Documents and any other documents incorporated therein; (c) is aware of the conditions and limitations relevant to the Work and the site; and (d) has determined that the above-noted Contract Price and Contract Time are reasonable and sufficient to allow its safe, timely, and complete performance of the Work in accordance with the terms of this Agreement and consistent with the above-stated Standard of Care;

6. **Materials.** All materials and equipment provided will be new and of the quality specified in the Contract Documents. Title to all Work and materials shall pass to the Owner upon delivery to the site or, in the case of materials stored off-site in accordance with Article V, upon their delivery to the approved storage facility;
7. **Contractor in position of trust.** Owner may rely on truthfulness, accuracy, and completeness of Contractor's representations, warranties, certifications, notices, applications, and other communications. Contractor will pay all amounts due to Subcontractors as they become due and in accordance with Article V. Contractor acknowledges that it occupies a position of trust and confidence with regard to the Project, and that Owner depends upon Contractor's conscientious performance and care for Owner's interests, and upon Contractor's prompt payment to Subcontractors of all amounts as they become due and in accordance with Article V. Funds paid by Owner for Work performed by Subcontractors are accepted by Contractor in trust. While Contractor's express fiduciary obligations do not extend to require its segregation or investment of funds paid to it for Subcontractors' Work, Contractor agrees that its failure to timely pay Subcontractors in accordance with this Agreement would be an unlawful and material breach of this Agreement and of Contractor's fiduciary duties to Owner;
8. **Consequential damages.** Contractor and Owner waive claims against each other for consequential damages arising out of or relating to this Contract to the extent such damages exceed twenty-five per cent (25%) of the Fixed Contract Price; provided, however, that such limitation shall not apply to the extent that consequential damages are recoverable, available or covered under any insurance policy procured by Owner or applicable to the Work or applicable to the Parties' obligations under the Contract Documents;
9. **Competence.** Contractor: (a) is sufficiently qualified and experienced to competently and efficiently perform its obligations under this Agreement; (b) is a sophisticated business entity, experienced in the type of construction required for this Project; (c) will at all times provide an appropriate number of skilled and experienced personnel so as to efficiently, timely, and competently perform the Work (and do so in a manner that complies with the Contract Documents and all applicable laws); (d) will complete the Work on or before the Contractual Date of Substantial Completion; and (e) will impose these obligations upon its Subcontractors for respective portions of the Work (and enforce them); and no conduct or communication by Owner shall be construed to relieve Contractor of its obligation to fully perform hereunder.
10. **Financial solvency.** Contractor is financially solvent and able to pay its debts as they mature. It possesses sufficient working capital to complete the Work and perform its obligations under this Agreement. No fees paid by Owner on this Project will be applied to any use that is inconsistent with the terms of this Agreement;
11. **Verification of employment eligibility.** Contractor will take steps necessary to assure that all persons performing Work on-site are properly trained and legally eligible for employment within in the United States – and as otherwise required by laws, regulations, and ordinances applicable to the Work, the Project, the Parties, and the site. Contractor shall cooperate with and participate in all statutorily required worker identification and verification programs, including but not limited to the federal on-line worker verification programs and related programs mandated by state law; and Contractor shall, upon request of OCA, present documents demonstrating verification of eligibility of persons on-site and Contractor's compliance with these requirements;
12. **Lawful performance and conduct.** Contractor will perform its Work in strict adherence to all applicable laws. To the extent lawful performance of the Work requires monitoring,

measuring, reporting, notice, posting, or other quality control and accountability measures, Contractor shall provide them as part of the Contract Price; *and*

13. **Materiality of representations.** Contractor acknowledges and agrees that its satisfaction of each of the preceding representations and warranties is a material obligation of Contractor and a CONDITION PRECEDENT to Owner's obligation to pay.

C. **Means and methods of construction.** Means and methods of construction are the sole responsibility of the Contractor.

1. **Contractor's on-going duty of Due Diligence.** Contractor has an affirmative obligation to continually investigate, review, examine, and compare existing conditions, Work-in-Place, and the Contract Documents.
 - a. Before signing this Agreement, Contractor shall examine the site and compare it to the Contract Documents. If Contractor believes that additional information is needed to properly perform its obligations, Contractor shall, before signing this Agreement, request OCA to provide that information, using a form substantially similar to the RFI form attached as Supplement D1. Contractor's execution of this Agreement shall be deemed to be its representation that the Contract Documents contain sufficient information for Contractor to perform the Work.
 - b. Before signing this Agreement, Contractor shall review and compare the Contract Documents, and shall immediately inform Owner in writing of any inconsistencies, conflicts, omissions, or errors observed in them, as well as any aspects of them that Contractor believes may otherwise negatively affect Work to be performed. Contractor's execution of this Agreement shall be deemed to be its representation that Contractor has diligently reviewed the Contract Documents for these purposes.
 - c. During construction, Contractor shall continually examine the Contract Documents and shall observe, measure, analyze and compare them to existing conditions revealed (in the case of excavation and demolition of structures) and new Work-in-Place to ascertain whether the remaining Work can be performed as indicated in the Contract Documents; and, if Contractor has reason to believe that Work cannot be performed as so indicated, it shall promptly give written notice to OCA of that opinion, and the basis for it.
 - d. Nothing in this paragraph shall be construed to impose on Contractor an obligation to perform design services for which a professional license is required.
2. **Certified improvements survey.** After foundations are staked, but before concrete formwork is undertaken, Contractor shall provide a survey (prepared by a licensed surveyor), certifying that the building, as staked: (a) falls within the Property, and (b) is located as indicated in the Contract Documents.
3. **Public notices and filings.** As part of the Contract Price, Contractor shall, not later than five days after issuance of the building permit (and/or other initial permit issued by governmental authorities having jurisdiction over the Project), prepare and file a statutory Notice of Commencement, or other notices required to herein and by law to preserve the Owner's rights as to the Property – and shall immediately (and continually, until Final Completion) post in a protected and conspicuous place a copy of all notices, permits, proof of insurance, and/or other documents required by law or this Agreement to be filed and/or posted, including copies of Payment and Performance Bonds, the initial Notice of Commencement (and, where

applicable, each modification or renewal thereof), employment notices, and other documents for which posting is required by law or requested by OCA.

4. **Governmental permits and approvals.** Contractor shall timely obtain (and post as required) all land disturbance, demolition, health department, utility, building, subcontract and specialty trade permits, governmental inspections, bonds, notices, approvals, warnings, and certifications necessary to complete the Work. Where approved in advance and substantiated in accordance with Article V, fees paid by Contractor to government as filing fees and fees to obtain initial building, land disturbance, and health department permits may be applied for as Reimbursable Expenses.
5. **Licenses, certifications, and other legal authorities.** Contractor shall procure and maintain all business, trade, occupational, and/or professional licenses, permits, tax bonds, code-compliance bonds, approvals, and certificates of corporate authority required to perform the Work and to conduct business where the Project is located. Contractor will impose this obligation in writing upon Subcontractors of all tiers.
 - a. Where licensing is not required at the time of this Agreement, but becomes so during the course of the Work, Contractor shall obtain a license, without regard to whether the licensing statute would exempt projects already underway on the date that the license or certification became mandatory for new projects.
 - b. Contractor will provide insurance coverage and evidence of ongoing financial responsibility as required hereunder and/or by law.
 - c. Contractor's provision of documents demonstrating its satisfaction of these requirements is a CONDITION PRECEDENT to Owner's obligation to pay.
6. **Notices, claims, and demands by others.** Immediately upon Contractor's receipt of any document, notice to contractor, notice to owner, notice of contract, notice of subcontract, notice of nonpayment, claim of lien, and/or notice, claim, request, or demand of any kind, Contractor shall fax a copy to the OCA and send the document itself (together with all envelopes, shipping labels, *etc.* that accompanied it) to the OCA by Overnight Delivery.
7. **Obligation to call before digging.** Contractor has an affirmative, non-delegable obligation to contact all applicable agencies, authorities, governments, utilities, or other nonparties as necessary to coordinate the Work. Contractor is solely responsible for notifying utility protection services and other agencies and authorities who provide "call-before-digging" services – and it must do so sufficiently in advance of excavation or demolition to allow their investigation and marking of subsurface lines and objects. Contractor shall indemnify Owner for damages, costs, and losses incurred, fines imposed, and any other damages and fees incurred by Owner as a result of Contractor's failure to comply – in which case, Owner is entitled to issue, upon notice to Contractor, a Change Order reducing the Contract Price by an amount equal to the sum of the known damages, claims, costs, fines, and fees, the Owner reserving, in all cases, the right to recover from Contractor any additional amounts as they are later incurred, imposed, and/or discovered.
8. **Contractor's use of site.**
 - a. **Hours of operation.** Contractor shall adhere to all local laws and ordinances governing hours of construction operations and to further restrictions, if any, specified in [Supplement B](#). Owner may occasionally further restrict hours of operation.
 - b. **Noise.** No radios, music, or other audio devices shall be used on-site.

- c. **Work Area.** Contractor shall confine operations to Work Areas indicated in the Contract Documents. If none are indicated, confine Work to the degree possible to only those areas needed to perform the Work. Contractor shall mark wetlands as indicated on Contract Drawings, avoiding intrusion into them and sedimentary runoff or other impact of construction upon them.
 - d. **Conduct of Contractor or its Subcontractors.** Contractor shall maintain strict discipline and proper conduct on-site at all times. Contractor will permit no one to remain on-site to whom OCA objects. Contractor shall eject from the site any person who compromises safety or the Work; acts unlawfully or in a threatening manner; brings firearms, alcohol, or illicit drugs on-site; or who acts in any way that contravenes this Agreement. In addition to any other reporting requirement imposed by law or regulation, Contractor shall immediately report to the OCA all such incidents or those involving death, personal injury, and/or threats made on persons or the Work, as well as any communications with public safety or law enforcement officials involving the Project – detailing the incident and its status and/or outcome.
9. **Supervision, planning, and management of the Work.** Contractor's scheduling of the Work shall allow Owner adequate and reasonable time to make informed decisions and to meet its obligations under the Agreement.
10. **Real-time electronic notice to Owner as to weather.** In addition to the other notices required of Contractor herein, each work day on which Contractor's progress is slowed, impacted, or potentially delayed by weather or site conditions, Contractor shall, within 14 calendar days, send an e-mail or fax to the OCA identifying: weather and ground conditions at the site generally; the nature of the event or condition that affects the Work; what portions of the Work were affected; and what Work, if any, took place on-site that day.
 - a. Contractor hereby waives any and all claims for weather-related adjustment of Contract Time, Contract Price, or the Project Schedule, even where otherwise justified, if it fails to send the e-mail and fax notices specified in this paragraph to the OCA, each day, of a weather event or condition (whether or not the day of the occurrence will ultimately be the subject of a claim).
 - b. This e-mail or fax notice does not replace required Daily Reports. OCA's receipt of this e-mail or fax notice does not constitute acceptance of, or agreement with, the claims or statements in it.
11. **Continuous superintendence through Final Completion.** Contractor's primary Superintendent shall attend all Project site meetings and shall be present full-time on-site until Final Completion is achieved, which presence is a CONDITION PRECEDENT to Owner's obligation to pay.
12. **Periodic meetings at Project site.** Contractor shall conduct periodic on-site project meetings at the intervals established in Article I – and more frequently as needed to maintain progress of the Work and meet all Milestone Dates set forth in the Project Schedule.
 - a. **Persons required to attend.** Contractor shall attend each periodic on-site meeting. For each scheduled meeting from which Contractor is absent (unless excused by the OCA in writing at least three work days before), Contractor agrees to Owner's issuance of a unilateral deductive Change Order, reducing the Contract Price by \$500. This assessment is a minimum agreed damage, and is in addition to Owner's right to recover any other damages and costs it may incur as a result of the absence.

- b. **Agenda.** The agenda of every periodic on-site meeting shall include: (i) safety; (ii) past meeting minutes; (iii) sequence and timing of the Work, key deliveries, use of the site, storage, temporary facilities; (iv) outstanding RFI's, ITC's, PCO's, Change Orders, Payment Applications, *etc.*; (v) existing conditions and Work-in-Place; (vi) past and new action items; (vii) items that could affect Contract Price (viii) realized or anticipated problems or hazards; (ix) utilities and road and curb cuts; (x) scheduling of inspections and tests of all types, and reviewing results of those performed; (xi) weather-related issues; (xii) Separate Contractors and installation of Owner's Equipment; (xiii) payments to Subcontractors; (xiv) demands, claims, or disputes (if any); (xv) site maintenance; and (xvi) review of progress and how it comports with the then-current Project Schedule and Contractor's Progress and Completion Schedule.
 - c. **Meeting minutes.** Contractor shall record minutes for each periodic on-site meeting (and for other meetings attended by Owner or OCA) – detailing the discussion, who participated in it, what statements and decisions were made, and by whom, and what action or follow-up is planned. Contractor shall submit minutes to the OCA, who may, but is not required to, draft corrections or additions (or request that Contractor draft them). Contractor shall either adopt OCA's changes or object to them in writing to OCA (and with specificity) within three days. Contractor shall then distribute final copies of the minutes (as amended to reflect OCA's comments or with OCA's objections attached) to OCA, the Architect, and to affected Subcontractors.
- D. **Complete performance of the Work.** Contractor shall fully and timely perform the Work indicated in the Contract Documents.
- 1. **Contractor solely responsible for the Work.** No inspection, testing, job-site meeting, review of submittals, audit, review of schedules or Payment Applications, or any other decision, representation, or act of construction administration by Owner, OCA, the Architect, government, or others shall relieve Contractor of its obligations under the Contract Documents and under law.
 - 2. **Daily clean-up.** Each work day Contractor shall remove all loose waste, scrap, and trash from the Project site, placing it in a dedicated steel container designed for that purpose, and lawfully disposing of it weekly, or more often as needed, keeping records of the disposal. If Contractor fails to do so, Owner, with 24 hour advance notice to Contractor, may, but is not required to, do so itself, or using other forces, deducting from the Contract Price by unilateral Change Order an amount equal to Owner's costs to do so times the ACF specified in Article I, effective the day of Owner's substituted performance.
 - 3. **Timely performance required.** Contractor shall timely perform the Work in accordance with the obligations set forth in Article VI and elsewhere in the Contract Documents.
 - 4. **Submittals.** Contractor shall deliver all samples, shop drawings, and other submittals required by the Contract Documents ("Submittals") as directed in the Submittals provisions in Supplement B.
 - a. Upon issuance of Notice to Proceed by Owner, Contractor shall provide a list of items for which advance notice and procedure for procurement will be necessary to meet the Project Schedule ("Lead-Time Items"), as set forth in Article VI, and shall provide for them in its Project Schedule and in Progress and Completion Schedules.
 - b. Contractor shall deliver Submittals for approval by the OCA (and, where appropriate, the Architect) sufficiently in advance of need to allow a time for review and comment

without delaying progress of the Work. In no case shall less than 14 calendar days be allowed for that review; provided, however, that Owner shall use its best efforts on “fast track” or otherwise expedited projects to obtain review in 7 calendar days..

- c. Contractor shall date, consecutively number, and stamp (with its unconditional approval) each copy of each Submittal (and Resubmittal) before delivering them to the OCA (and others where directed) for review.
- d. On each Submittal, Contractor shall note graphically *and* textually any and all deviations between the components, products, and/or assemblies indicated in the Submittal and the correlative Construction Drawing or Specification section(s) from which they deviate. Contractor shall mark graphically *and* textually, noting on Resubmittals, all changes and updates from previous Submittals.
- e. Contractor shall maintain a Submittal Log, indicating each Submittal, Resubmittal, and relevant information regarding its status.
- f. OCA shall review and, if appropriate, comment on Submittals, and, where appropriate, obtain comments of the Architect, returning reviewed Submittals to Contractor for modification and Resubmittal or for installation consistent with the review and comments. Reviews by OCA, Architect, or others shall not be for correctness of dimensions, quantities, coordination with existing conditions or other Work, all of which remain the sole responsibility of Contractor.
- g. Submittals are not Contract Documents. Review and comment by the Owner, OCA, the Architect, or others does not relieve Contractor of its obligation to fully perform as required by the Contract Documents. Nothing noted in Submittals or on them shall modify the Contract Documents in the absence of a duly executed Change Order proposed in the manner set forth in Article VIII.
- h. By transmitting a Submittal or Resubmittal to OCA for review, Contractor represents that it has thoroughly reviewed it, and that the component, material, or assembly described in the Submittal or Resubmittal comports with the Contract Documents and can be installed as shown; and any disclaimers to the contrary shall be of no effect.
- i. To the extent the Contract Documents expressly permit or require professional architectural or engineering certification of drawings and other documents containing the design of a particular component, material, or assembly, each page of the Submittal (in the case of drawings) and the cover of each textual Submittal (*e.g.*, product information, specification, warranties, and other written text) shall bear the professional seal and signature of the licensed architect or engineer under whose personal, direct, and responsible supervision the document(s) was prepared.
- j. Contractor cannot, by stamp, cover letter or otherwise, limit, disclaim, or deny responsibility for content of the Submittals or professionally certified documents; and disclaimers to the contrary are of no effect.
- k. If Contractor believes that comments or notes by the OCA, Architect, or others on Submittals constitute a change from the Contract Documents that requires modification of the Project Schedule, Milestone Dates, Contract Time, or Contract Price, Contractor shall, within seven (7) calendar days of receiving the comment or note, submit a PCO documented in the manner prescribed in Article VIII – or waive any right Contractor might otherwise have to adjustment.

5. **As-Built Information.**
- a. **As-Built Drawings and Specifications.** Contractor will continually update a distinct, complete set of Construction Drawings and Specifications, documenting the Work as installed, indicating at the time of installation (in graphic and textual form) precisely what material or component was installed, when it was installed, at what location it was installed, at what elevation it was installed, what other Work or existing conditions were changed to permit installation, and noting in detail, by special markings, how installation in each case deviated from the Contract Documents; and
 - b. **Progress Photos.** Contractor shall digitally photograph: (i) each element of the Work as it is installed; (ii) daily construction activities or non-activity on site each weekday and on any other day that Work is performed; (iii) installed Work before it is covered or concealed by other Work; and (iv) any other condition requiring notice hereunder. Progress Photos shall bear digital time and date imprints. Progress Photos shall be transmitted to Owner as required in Article I, as part of Contractor's Closeout Materials, and otherwise as requested by OCA.
6. **Temporary facilities.** Contractor shall provide and maintain the following on-site:
- a. A current set of record Contract Documents, Change Orders, RFI's, PCO's, Payment Applications (for Contractor and Subcontractors), Subcontracts, purchase orders, delivery tickets – all of which shall be secured so as to allow access only by Owner, OCA, CDR, and Contractor's Superintendent;
 - b. A permit set of Construction Documents bearing the stamps and notes of governmental officials having jurisdiction over the Project or the Work; as well as current inspection sign-off sheets and other products of review by governmental inspectors, building officials, *etc.*;
 - c. As-Built Drawings, Specifications, and Progress Photographs as noted above;
 - d. An office on-site that is secure, heated, air conditioned, and supplied with a photocopier, fax machine, and an operational conventional telephone with 9-1-1 emergency calling capability;
 - e. All temporary excavation shoring, bracing, forms, underpinning, lateral support, enclosures, structures, and devices needed to perform the Work and to secure and protect the Work-in-Place, all materials stored on-site, adjacent property, and persons on-site or adjacent to the site from injury, damage, and harm of any kind, and in accordance with Contract Documents;
 - f. Temporary site and building lighting as needed for safety, security, and performance of the Work at all stages;
 - g. Adequate sanitary toilet facilities, regularly maintained;
 - h. If indicated in the Plans or Specifications, a secure metal braided fence at the perimeter of the Work Area to prevent intrusion into any area in which Work is being performed or hazards exist related to the Work; or as otherwise indicated in the Contract Documents, posting intermittently on the fence no trespassing signs and other signs noting potentially dangerous conditions within;
 - i. Project sign (if required by Owner's Signage Policy attached as part of Supplement B or by other Contract Documents);

- j. Temporary power, water, and other utilities;
 - k. First-aid kits and any other needed safety equipment, accessible and distributed as needed;
 - l. Temporary access roads, and off-street parking and loading areas;
 - m. Site grading, gravel, paving, soil stabilization, and other temporary measures needed to: (i) facilitate uninterrupted progress of the Work; (ii) avoid ponding of water and unlawful run-off of sediment at all stages of grading; and (iii) to lawfully observe best management practices with respect to protection of adjacent property, roads, streams, waterways, and persons;
 - n. Posted and protected notices, including notices of commencement, notice of bonds, permits, a directory indicating after-hours emergency telephone numbers for CDR, Superintendent, Project Manager, and the OCA, and any other postings required by the Contract Documents, the OCA, or by state, federal, or local laws, regulations, and ordinances – or as otherwise required by the terms stated in Supplement G2;
 - o. Shop drawings, samples, mock-ups, and other Submittals and Resubmittals; and
 - p. Project directory listing, for Contractor and for each Subcontractor, the name, trade, person-in-charge, that person's regular and after-hours telephone number(s).
7. **Mold, mildew, and other moisture-related contamination – precautions and testing.**
- a. Contractor shall permit no part of the Work of any part of any structure to contain or be contaminated to any degree whatsoever with mold, mildew, or any bacterial or fungal growth or infestation (collectively “contamination” or “moisture-related contamination”).
 - b. Before accepting delivery of materials for use in the Project, Contractor shall examine the material or assembly delivered for dryness in accordance with the requirements of the Construction Drawings and Specifications and other Contract Documents. The materials shall be tested for moisture content upon delivery, stored, secured, and protected as required by the Contract Documents and as needed to preserve them from the weather, theft, vandalism, moisture, and other destructive forces or conduct.
 - c. Contractor shall take all steps necessary to assure stored and installed materials and assemblies are stored in a way that prevents mold, mildew, bacterial and fungal infestation, and other forms of contamination.
 - d. The Work and stored materials shall be retested for moisture content at the time of installation.
 - e. Before any Work is covered, Contractor shall examine the materials and Work to be covered and the substrate on which it is installed or to which it is attach to assure that it is free of moisture-related contamination, and shall not permit Work to be covered if water or visible moisture, or other conditions contrary to the requirements of the Contract Documents are present.
 - f. Work installed or performed in contravention of this provision and related sub-provisions shall, by definition, be deemed Defective Work, and shall be abated and remediated at the Contractor's sole expense.
8. **Owner's Testing Consultants.** Owner shall provide the services of independent testing consultants and technicians (“Testing Consultants”) for testing of earthwork, welding and

other assembly of steel, and cast-in-place concrete, and other materials and assemblies for which independent testing is required under the Contract Documents.

- a. Contractor shall notify the Testing Consultant and the OCA at least 48 hours (or two work days, whichever is greater) in advance of any compaction tests, foundation inspections, concrete pour, or other testing, sampling, or observation required by the Contract Documents. Contractor shall prepare and store test cylinders as prescribed in the Contract Documents or as instructed by the Testing Consultant.
 - b. Although Owner shall pay for the costs of initial, routine tests performed by Testing Consultants, in cases where: (i) Contractor provided inadequate notice of the need for testing or collection; (ii) Contractor was inadequately prepared for testing after notice was provided; or (iii) retesting is required for any reason not caused solely by the negligence or misconduct of Owner, Contractor is liable for the costs of all subsequent testing, and retesting. Owner shall deduct from the Contract Price by unilateral Change Order an amount equal to the sum of all fees and costs incurred by Owner's for retests and related fees of Testing Consultants, multiplied times the ACF specified in Article I.
 - c. Owner shall notify Contractor within seven (7) calendar days of receipt of any test performed that does not meet Project specifications and shall provide Contractor with a copy of such test results.
9. **Defective Work.** Defective Work is Work that does not comply with the Contract Documents and/or with applicable law. Contractor shall notify OCA upon its discovery of Defective Work.
- a. **Removal and replacement.** Whether or not rejected or condemned by Owner or others, Contractor shall, at no cost to Owner, remove and replace Defective Work, resequencing or accelerating the Work as needed to comport with the Project Schedule and satisfaction of Milestone Due Dates in it.
 - b. **Repair.** Where, in the opinion of the OCA, Defective Work can be repaired in a way that is likely to result in compliance, Contractor may attempt repair. Consent by OCA to Contractor's attempt to repair, however, shall not waive Owner's right to demand removal and replacement of any and all Defective Work.
 - c. **Cost related to correction.** Contractor shall pay all costs and fees related to, or arising out of, removal, replacement, correction, repair, re-inspection and re-testing of the Work, as well as any and all related governmental fees, costs, penalties, and fines, including attorney's fees and other costs incurred by Owner related to the Defective Work.
 - d. **Owner's option to accept certain Defective Work.** Owner may, but is not required to, accept Defective Work. In that case, Owner will, in good faith, determine what reduction in value the Project will suffer due to the Defective Work, and will notify Contractor of its decision to issue a unilateral Change Order reducing the Contract Price by an amount equal to that value, plus Owner's costs in addressing the Defective Work, multiplied times the ACF specified in Article I. Owner's determination of the reduced value of the Work may reflect the estimated cost to remove and replace the Defective Work with Work that complies with the Contract Documents. Owner's election to accept an element of Defective Work does not excuse or release Contractor from its warranty obligations. If Contractor objects to the Owner's proposal,

Contractor must immediately remove and replace the Defective Work without increase in Contract Price or Contract Time.

- E. **Contractor's duty to discharge liens.** Contractor shall immediately cause any and all claims of lien filed against the Property, improvements to it, or materials stored for use in the Work by persons or entities who provided labor, services, or material at the instance of the Contractor or persons engaged directly or indirectly by Contractor to be dissolved, cancelled, vacated, or discharged by statutory bond. Contractor's satisfaction of this duty is a **CONDITION PRECEDENT** to Owner's obligation to pay.
- F. **Project information and accounting.**
1. **Duty to keep accurate business records.** For a period no less than three years after the Date of Final Completion or final resolution of any Project-related dispute, whichever is later – or a longer period if required by law, Contractor shall maintain a complete, intact set of Project-related business and financial records, kept in accordance with generally accepted accounting principles throughout the course of the Work and thereafter.
 2. **Nonparty communications.** Contractor shall deliver to OCA without delay copies of all communications it receives pertaining to: Owner's Testing Consultants; governmental inspectors and authorities; Sureties; testing consultant employed by Contractor; and other nonparties.
- G. **Owner's access to Project information upon occurrence of condition precedent.** In addition to any other statement of accounts or other information to which Owner is entitled by law, upon the occurrence of any condition precedent which justifies nonpayment by Owner under the terms of this Agreement and request by the OCA, Contractor shall provide Owner, OCA, and/or other representatives designated by Owner with immediate access during business hours (or any other time with cause) to all records related to the Work, including but not limited to: Contractor's costs, payments to (or made by) Contractor, proposals, estimates, bids, Schedules of all kinds, insurance, bonds, licenses, certifications, governmental reports, accident and safety reports, Project finances, general conditions expenses, Subcontracts, purchase orders, invoices, field reports, Daily Reports, RFI's and any other records, photographs, or other documents, information or data, including those in possession or control of Contractor, its Subcontractors of any tier, or any other person or entity related to any of them – regardless of where the document is stored, in what media it is stored, or whether the contents pertain to Reimbursable Expenses, pricing of adjustments to Contract Price, Contract Price, Schedules, or any other subject related directly or indirectly to Contractor or the Project.
1. **Audits.** Without limiting the foregoing inspection rights or any other rights of Owner under this Agreement, and independent of, and in addition to, Contractor's obligations to support Monthly Payment Applications with documentary back-up, as part of the Contract Price, Contractor shall facilitate a comprehensive audit of all Contractor's Project-related records once during each calendar year, and upon Contractor's Final Payment Application at the time of completion of the Work, and at any and all other times for reasonable cause.
 2. **Costs pertaining to Owner's right to obtain Project records.**
 - a. Contractor's costs in facilitating and assisting with one annual comprehensive audit and one completion-stage comprehensive audit ("routine audits") is included in the Contract Price.
 - b. Costs of making digital copies are, in all cases, included in the Contract Price.

- c. Costs of making paper copies of documents for non-routine audits conducted by Owner shall be reimbursed at not more than \$.10/page – subject to the provisions for excused payment set forth below in this paragraph.
 - d. No reimbursement of expenses or compensation for other costs shall be permitted in cases where: (i) Contractor has not provided necessary backup substantiation for applications for payments, PCO's, or other cost-related inquiries; (ii) audits or review of records reveal irregularities of any type in Contractor's documentation, record keeping, or payment application process; (iii) Contractor is found to have been overpaid; (iv) Contractor has applied for payment of amounts in excess of those justified by this Agreement; (v) Contractor has not timely paid one or more Subcontractors; (vi) Contractor is not able to meet its financial obligations in a way that comports with the terms of this Agreement; or (vii) any of the foregoing irregularities applies to one or more Subcontractor. In those cases, in addition to Owner's recovery of amounts owed as otherwise provided in this Agreement, Owner may deduct from the Contract Price by unilateral Change Order an amount equal to the sum of: (A) overpayments; (B) Owner's audit costs, fees, and expenses, including accounting and attorney's fees related to the audit, re-audit, and recovery of overpayments; plus (C) Owner's liability related to irregularities; plus (D) the sum of other losses suffered by Owner due irregularities; then multiplying that sum times the ACF specified in Article I.
3. **Waiver of objection to injunctive relief.** Contractor agrees that Owner's timely access to records is essential and that delay in permitting access or production of Contractor's records for review will necessarily cause Owner to be damaged. Contractor waives objection to any motion, petition, or request by Owner for injunctive relief to obtain access to any and all documents relevant to Contractor's performance of its obligation herein; and Owner does not waive its right to elect arbitration of any dispute by seeking that relief.
 4. **Assistance.** If particular software or equipment is necessary in order for the Owner to retrieve and review records, Contractor will provide it, along with the services of technicians to operate them.
 5. **Consent to Owner's access to financial information.** Contractor expressly consents to permit Owner to obtain, directly or indirectly, and upon request of OCA (without further consent of Contractor or its Subcontractors), all credit reports, individual background checks, and any other information that, in the Owner's opinion, or as a matter of law, will assist the Owner in determining the financial condition and circumstances or other information pertinent directly or indirectly to this Agreement of Contractor or its Subcontractors of any tier – or Contractor's performance of the Work. Contractor will include in all Subcontracts a provision affirming Subcontractors' similar consent to Owner's access to information. This provision survives the completion of the Work or expiration or termination of this Agreement
- H. **Separate Contractors and Owner's Equipment.** Owner will engage independent contractors, Testing Consultants, and others to perform work and provide services on-site ("Separate Contractors").
1. **Owner's Equipment.** Owner will engage Separate Contractors to perform services and work related to Owner-provided equipment, devices, furnishings, wiring, signage, electronics, security systems, voice and data systems, bank equipment, and other components ("Owner's Equipment") – where procurement and/or installation of Owner's Equipment is not included in the Work indicated in the Contract Documents.

- a. The Contract Price includes Contractor's entire compensation for its services and labor in scheduling, coordinating, and resequencing its Work and logistics at the Project site to accommodate the delivery, storage, installation, and protection of Owner's Equipment by Separate Contractors – and, to the extent indicated in the Contract Documents, it includes Contractor's installation of Owner's Equipment otherwise procured by Owner. In all cases, as part of its coordination of the Work, Contractor shall review the installation requirements of Owner's Equipment to be installed, and shall participate in meetings as needed to plan and coordinate the requisite scheduling and logistics pertaining to installation of Owner's Equipment.
- b. This Agreement contemplates that installation of Owner's Equipment will likely result in some incidental damage to the Work-in-Place by Separate Contractors. As part of the Contract Price, Contractor shall take the steps necessary to protect both the Work-in-Place and Owner's Equipment installed from incidental damage.
- c. Contractor shall not use the bank vault to secure construction materials. Contractor shall install a structural wood frame and sheathing to protect the vault and the vault door from scratches, scuffs, and other damage until Final Completion. Contractor shall, at no cost to Owner, and within the Contract Time, replace Owner's Equipment, if scratched, scuffed, marred or damaged in any way.

2. Coordination and cooperation.

- a. Contractor shall coordinate its Work, and that of its Subcontractors, with that of all Separate Contractors, Testing Consultants, and others employed on the Project by the Owner, taking into account the needs of each, and managing on-site storage, logistics, access, and scheduling of the Work for the benefit of all.
- b. If Contractor determines that the conduct or activities of Separate Contractors adversely impacts Contract Time or the Contract Price in ways not provided for herein or reasonably anticipated, Contractor must immediately notify Owner by submitting a Proposed Change Order ("PCO") in the form provided as [Supplement D2](#). Contractor waives any claim for equitable adjustment of the Contract Price or Contract Time if it fails to timely do so in strict conformity with Article VIII.

3. Owner's access to site and partial occupancy. Owner shall have unlimited use of, and access to, the Project site, the Work-in-Place, stored materials, and any temporary facilities. Should Owner accept partial use and occupancy of the Project, Contractor shall prepare for OCA's approval a Certificate of Substantial Completion limited to that portion of the Work completed and ready for occupancy. Contractor will not be responsible for normal wear and tear on the area of partial occupancy – only if Contractor is absolutely excluded from it. Otherwise, Owner's partial or intermittent use or access to one or more areas of the Project shall not be deemed to be acceptance of those areas and shall not begin warranty periods on equipment or components of the Work.

- I. **Testing.** As part of the Contract Price, Contractor shall coordinate the Work so as to facilitate testing services by Owner's Testing Consultants.
- J. **45-day priority period.** During a period beginning 45 days before the Contractual Date of Substantial Completion and continuing until Final Completion, Contractor shall, in coordinating the Work on-site, give deference at all times to the Owner's needs, including the need for continual and uninterrupted access by Separate Contractors and the Owner for their installation of Owner's Equipment – which deference may require Contractor to perform portions of the Work at night, on weekends, and holidays, or otherwise out-of-sequence. Costs incurred in satisfying this requirement, including costs

of any extraordinary measures needed to maintain Contractor's progress of the Work and the Project Schedule, are included in the Contract Price, and shall not be the subject of an adjustment to Contract Time or Contract Price.

- K. **Substantial Completion.** Upon completion of the Work, Contractor shall: (1) obtain all necessary final governmental inspections and approvals needed for occupancy and use of the Project in the manner intended by the Owner; (2) obtain and deliver to OCA a final Certificate of Occupancy issued by the governmental agency or official authorized to issue it; and (3) execute under oath a Certificate of Substantial Completion (consistent with the form of the Certificate supplied as [Supplement E2](#)), certifying various aspects of Contractor's completion of the Work.
- L. **Closeout Obligations.** Before submitting its proposed Certificate of Substantial Completion for OCA approval, Contractor shall submit, for Owner's review, documents in support of its complete satisfaction of the following Closeout Obligations:
1. **Testing.** Perform HVAC test and balance analysis and correct accordingly. Perform plumbing backflow tests and any other tests specified in the Construction Documents. Rigorously test all building systems, materials, and assemblies in accordance with the Contract Documents. Contractor shall keep complete records of the testing process and results to OCA's satisfaction;
 2. **Cleaning.** Remove all labels (except for those designated by OCA to remain) from materials; clean all materials and assemblies as required by the Contract Documents and OCA. Install all light bulbs. Remove and lawfully dispose of trash and other debris from the site. Maintain the Work and the site until Final Complete or as required by the Contract Documents;
 3. **Transfer of all utility accounts.** Pay all outstanding utility bills and pending bills, submitting proof that all utility balances have been paid; and take all steps necessary to transfer control of utility accounts to Owner;
 4. **Training.** Train OCA and Owner's staff to operate and maintain the Work-in-Place and any related equipment provided;
 5. **Attic stock.** Provide attic stock and usable-but-otherwise-uninstalled materials (delivered as instructed by OCA); and
 6. **Closeout Materials.** Assemble and submit for Owner's approval the Closeout Materials and other information required in this Article and otherwise in the Contract Documents, including:
 - a. **Punchlist.** Prepare a list of incomplete or Defective Work, of minor significance and magnitude, to be corrected before Final Completion ("Punchlist"). Punchlist shall not contain more than 20 items, none of which can be substantial enough to prevent use of the Project in the manner intended by the Owner;
 - b. **Submittals.** One complete set of all shop drawings, samples, and other submittals, including drafts, as mark-ups, as well as related transmittals, correspondence, and other documents – organized and bound consistent with the Submittal Log;
 - c. **As-Built Information and Progress Photos.** Contractor to deliver to OCA all As-Built Information (updated) and digital Progress Photos on compact disc or on other media if directed by OCA;
 - d. **Warranties and manuals.** Original and one digital copy of each operating manual, warranty (certified), product literature, and other information required by the Contract Documents, indicating, for each, the name, address, e-mail, and 24-hour telephone

- number of the person(s) to be contacted should problems occur with the product or system;
- e. **Project directory.** Updated to include persons and entities applicable to warranty period;
 - f. **Proof of payment of project-related taxes.** Contractor to provide in duplicate;
 - g. **Minority Vendor Survey.** Contractor to complete minority vendor survey, the form of which is supplied in [Supplement B](#), certifying its compliance with that policy, and providing sworn documentation thereof;
 - h. **Test and balance reports and other commissioning documents.** Original and one digital copy of all HVAC test and balance reports, plumbing back-flow tests, commissioning documents, and other reports and documents demonstrating completion of testing and compliant results;
 - i. **Mold certification.** Original and one copy of Contractor's certification that structures enclosed as part of the Work are free of mold, mildew, bacterial, and fungal infestation, and that no Work was covered unless the substrate or Work to be covered was examined for dryness, absence of water or visible moisture in cavities and on the Work to be covered, and that materials and assemblies delivered to the Project site were tested as required for adherence to standards of dryness set forth in the Plans and Specifications before acceptance and incorporation in the Work;
 - j. **Immigration Reform Act** – Provide original and one copy of completed Homeland Security Form I-9, a copy of which is supplied in [Supplement G2](#));
 - k. **Insurance.** Copies of each policy of insurance in place at Final Completion;
 - l. **Proof of costs.** Submit all documents not already submitted to substantiate Payment Applications and any other component of the cost of the Work;
 - m. **Waivers and releases and other backup.** Submit updated interim and final waivers and releases by Contractor and Subcontractors of any tier and other documents substantiating Payment Applications under Article V or satisfaction of Closeout Obligations;
 - n. **Consent of Surety.** If Bonds required under Article I, Consent of Surety to final release of retainage and final payment;
 - o. **Governmental approvals and certifications.** Contractor shall provide a copy of the building permit and other documents demonstrating that Contractor timely obtained all necessary governmental inspections and approvals. Contractor shall submit the original governmentally issued final Certificate of Occupancy to OCA.
 - p. **Other certifications.** Provide certifications requested by OCA in accordance with this Agreement, certifications reasonably requested by lenders (where authorized by Owner); and other certifications indicated in the form supplied as [Supplement E2](#) reasonably needed to complete the Project; *and*
 - q. **List of unpaid Subcontractors.** Certify under oath, and submit a detailed list of names, addresses, and telephone numbers of any and all Subcontractors of any tier, and any other persons or entities who have not been fully paid amounts earned with respect to the Work and the Project, specifying, in detail, the amount unpaid, the

justification or excuse for nonpayment, and when (and under what circumstance) Contractor will pay them.

- M. **Realized Date of Substantial Completion.** Upon Contractor's delivery of the final Certificate of Occupancy to OCA, the OCA shall designate that date on the Certificate of Substantial Completion.
- N. **Punchlist.** Within 14 days after submitted of its executed Certificate of Substantial Completion, Contractor shall complete all Punchlist Work and give notice thereof to OCA.
- O. **Final Payment Application.** Before submitting its Final Payment Application and its Certification of Final Completion, Contractor shall complete the following:
1. **Discharge liens by Subcontractors of any tier.** Contractor shall cause all claims of lien and claims against the Payment Bond (where applicable) to be discharged, satisfied, or otherwise cancelled; reserving only amounts due on Final Payment; *and*
 2. **Receipt of Closeout Materials not acceptance of Work by Owner.** Neither Owner's designation of Realized Date of Substantial Completion nor its receipt of the Certificate of Occupancy, partial and entire release of retainage, or other Closeout Materials, shall be construed as acceptance of the Work by Owner or justification for either release of retainage or Final Payment; nor shall it relieve Contractor of its obligation to full performance in accordance with the Contract Documents.
- P. **Final Completion.** After Contractor has satisfied all of its Closeout Obligations, it shall submit the following for Owner's approval:
1. **Contractor's Final Affidavit.** Contractor shall certify under oath, in content and form consistent with that supplied as [Supplement F1](#);
 2. **Final Payment Application.** In substantially similar form to that provided with respect to the progress provisions and itemized detail of back-up as required for Monthly Payment Applications at [Supplement C2](#);
 3. **Contractor's Waiver and Release Upon Final Payment.** In the form provided as [Supplement F2](#);
 4. **Return of Project-related documents.** Contractor shall deliver to a place designated by OCA all printed and electronic copies of Project-related documents and files, as required under Article XIV, except for the archival copy permitted under that Article.
 5. **Subcontractor's Waiver and Release Upon Final Payment and Waiver of Right to Claim Against Payment Bond upon Final Payment** (where applicable). In the forms provided as [Supplement F3 and F4](#) for each Subcontractor: (a) who was paid more than the amount specified as a threshold in Article I for performing Work on the Project; (b) who submitted a notice to owner during the course of the Work; or (c) who filed a claim of lien or other notice of claim of non-payment or other demand connected with the Project; as well as any other Subcontractor of any tier, testing company, or other person or entity who provided labor, materials, or services to the Project and identified by the Owner.
 6. **Conditions precedent to Final Payment.** Contractor's provision of the foregoing Final Completion documents, completion of Punchlist Work, correction of Defective Work, and Owner's approval thereof, are CONDITIONS PRECEDENT to Owner's obligation to pay.
- Q. **Owner's post-completion right to demand correction of Defective Work.** In addition to all its other obligations under this Agreement, Contractor warrants that, for a period of 12 months, beginning the Date of Final Completion, it shall, within five calendar days of issuance of a request by Owner, cure

and correct any and all Defective Work and perform as required hereunder. Owner's right to obtain Contractor's correction of Defective Work during this one-year period is in addition to, and not exclusive of, any other rights and remedies Owner has under law and/or this Agreement.

1. This one-year additional warranty period does not: (a) limit or reduce warranty periods of greater length required with respect to certain elements of the Work under the Contract Documents; (b) shorten or reduce any statutory periods of limitation or repose; or (c) shorten or limit any longer warranty period provided by manufacturers or suppliers of materials and systems.
2. For Work completed and accepted on or before the Realized Date of Substantial Completion, warranty periods shall begin on the realized Date of Substantial Completion.
3. For Work that is either incomplete or non-conforming on the realized Date of Substantial Completion or is discovered to be defective during the first year after Final Completion, warranty periods shall begin on the later of the following: (a) the actual Date of Final Completion; or (b) on the day on which the particular noncompliant, incomplete, or otherwise defective component of the Work is corrected.

R. **Incidental certifications.** In addition to other required certifications, Contractor agrees to provide additional certifications requested by the Owner pertaining to the Project, the Work, Contractor and/or its Subcontractors, upon which certifications Owner and nonparties may rely. Contractor will not be required to certify facts that are outside Contractor's knowledge or that could not be determined by Contractor in the course of its performance or upon diligent review of information available to it.

ARTICLE IV – OWNER'S OBLIGATIONS AND DUTIES

- A. **Payment.** Owner shall pay amounts due Contractor under the terms of this Agreement for timely performance of the Work, payments being limited in all cases by progress of the Work. Timing of Owner's obligation to pay is determined by this Agreement, not by statute. To the degree permitted by law, the terms set forth in this Agreement supercede conflicting statutory prompt pay provisions as to payments by Owner to Contractor; but statutory prompt pay obligations continue to apply to Contractor's payments to Subcontractors.
- B. **Governmental authority to use site as intended.** Owner will arrange for requisite zoning of the Property.
- C. **Owner-provided information.** Owner to provide Contractor with the following:
1. One complete set of Contract Documents;
 2. Five additional sets of Construction Drawings and two additional copies of Project Manual (which includes the Construction Specifications);
 3. Information necessary for filing a statutory Notice of Commencement, the form of which is attached as [Supplement G1](#);
 4. Access to those documents in Owner's possession that are incorporated, or referred to, in the Supplements, to the extent applicable to Contractor hereunder; and
 5. An initial site survey showing boundaries and topographic features, existing physical improvements to the site, known easements, setbacks and other restrictions, and any subsurface or utility information possessed by the Owner.

- D. **Testing.** Subject to Contractor's obligations for re-testing, correction of Defective Work, *etc.* under Article III, Owner will engage and pay for Testing Consultants to perform initial tests of cast-in-place concrete, paving, earthwork and compaction, structural steel, HVAC, and other systems and materials indicated in the Contract Documents to be tested by Owner.
- E. **Owner communications not limited.** Owner may communicate freely with any person or entity, including Subcontractors, Sureties, insurers, inspectors, or Contractor's employees on any subject related to Contractor, Subcontractors, the Work, or the Project, which communication shall not be deemed to be interfering or otherwise wrongful. Owner shall not give any construction directives to any Subcontractor without prior notice to Contractor.
- F. **Issuance of certain notices and certificates.** Upon Contractor's submission of Final Completion and Closeout Material, Owner shall either comment and specify information requiring change or accept the information provided.
- G. **Disclaimer of implied warranty.** Owner makes no warranties except for those express in this Agreement; and it disclaims all implied warranties not expressly established by its specific terms. Without limiting the foregoing disclaimer, Owner also disclaims any and all warranties and representations, implied or otherwise, of the constructability of the Work depicted in the Contract Documents. Nothing in this Agreement shall give rise to a claim against Owner or the Architect by Contractor or others on the basis of an implied warranty.

ARTICLE V – PAYMENT

- A. **Schedule of Values.** Before Contractor's execution of this Agreement, it shall submit for Owner's approval, a schedule of values showing a detailed Scope of Work and separately itemizing each component of the Work that has an installed value greater than one per cent of the Contract Price or that is the subject of a Section in the Project Specifications ("Schedule of Values"). Line items shall be categorized and grouped by trade, Scope of Work, and generally in accordance with the Divisions and Sections of Work established in the Construction Specifications.
1. Each line item shall show the maximum installed value, including Contractor's Fee, taxes, shipping, and all other costs to perform that Work that is related or attributable to the particular line item.
 2. The sum of the values of all line items in the initial Schedule of Values shall equal the Contract Price.
 3. Contractor shall substantiate its Schedule of Values by providing copies of bids, proposals, Subcontracts, back-up and other documents demonstrating distribution of actual costs. OCA may require Contractor to adjust distribution of line item values accordingly and commensurate with the actual costs anticipated in OCA's good faith opinion.
- B. **Work Progress Value Schedule.** The initial approved Schedule of Values shall be the basis for the Contractor's Progress Value Schedule that is to be submitted with each application for payment, the form of which is supplied as [Supplement C3](#). Upon advance written approval of OCA, Contractor may substitute American Institute of Architects ("AIA") Standard Forms G702 and G703, latest edition, for the Work Progress Value Schedule form supplied as [Supplement C3](#). In that case, however, the portion of G702 that shows certification of the Architect shall be deemed to be stricken and shall be of no effect. The Contractor's certification on G702 shall not relieve Contractor of the obligation to also provide a sworn Contractor's Affidavit to Accompany Monthly Payment Application substantively identical to that supplied in [Supplement C2](#).

- C. **Method of calculating amounts applied for in Monthly Payment Application.** The total payment applied for at any given time will not exceed the product obtained by multiplying the individual line items in the Work Progress Value Schedule times the percentage of completion of the Work described in that line item (as determined in good faith by the Owner), *then* adding amounts paid by Contractor for materials suitably stored (where approved in accordance with Article), *then* subtracting from that sum amounts to be withheld or deducted by Owner (as otherwise provided in this Agreement), *then* subtracting from that remainder an amount to be withheld as retainage (at the rate provided below in this Article), and *then* subtracting from that remainder amounts already paid by Owner (exclusive of Reimbursable Expenses paid); and *then* adding to that remainder an amount equal to the sum of otherwise-approved, but as yet unpaid, Reimbursable Expenses incurred, documented, applied for, and approved during the period covered by the subject Payment Application.
1. **Payments limited to progress.** The formula established in the preceding paragraph notwithstanding, Owner's obligation to pay is absolutely limited to actual progress of the Work – as determined by multiplying the Contract Price times the percentage of overall completion of the Work (as determined in good faith by the Owner), less retainage, backcharges, setoffs, and other withholding and deductions permitted hereunder. Owner is, at all times, permitted to withhold payment from Contractor in amounts sufficient for Owner to complete the Work (as determined in good faith by Owner) with other forces presuming Contractor's discontinuance of the Work.
 2. **Retainage.** Owner shall retain ten percent of amounts due for Work completed and materials stored from each progress payment.
 - a. Once the Work is at least 50% complete, Owner may, but is not required to, reduce the retainage withheld from future amounts applied for to 5% if: (i) the Work has progressed in accordance with the Project Schedule and will likely be completed within the Contract Time; (ii) the Work conforms with the Contract Documents.
 - b. Owner may revert to retaining 10% from amounts subsequently applied for – for any Project-related reason.
 - c. Owner may, but is not required to release part or all of retainage withheld after the realized Date of Substantial Completion and before Final Payment, if: (i) the Work has timely progressed to the satisfaction of the Owner and in accordance with the then-current approved Project Schedule; (ii) Punchlist Work is complete; (iii) Closeout Obligations have been satisfied; (iv) no claims of lien or claims have been filed; and (v) in cases in which Payment and Performance Bonds are required, no claims have been made against the Bonds; and Contractor has supplied written Consent of Surety to release of retainage.
 3. **Materials stored off-site.** Owner may, but is not required to, permit Contractor to apply for payment for materials securely stored off-site if Contractor provides advance written verification of the following: (a) the materials stored conform to the Contract Documents; (b) Contractor has provided photographs to OCA of materials stored; (c) the storage facility is within 5 miles of the Project site (or at another facility approved in advance in writing by the OCA); (d) both the storage facility and the materials to be stored are insured as required in Article XII; (e) the storage facility has 24-hour manned security; (f) Contractor has, at its own expense, pre-paid storage fees for at least two months in advance; (g) Contractor has paid for the materials stored and their shipping; (h) Contractor and storage facility operator have agreed in writing that Owner may take possession of the materials at-will and without consent of Contractor; (i) the materials stored are separately secured from other materials stored; (j) only the Contractor has access to the area where the materials are stored; (k) the storage

facility, if not owned by Contractor, is bonded by a surety authorized as such in the manner provided for Payment and Performance Bond Sureties in Article XIII; (l) the operator of the storage facility has executed a release of bailment in favor of Owner; and (m) all of the foregoing are provided by Contractor at no cost to Owner.

- D. **Monthly Payment Applications.** On or before the day of each month specified in Article I, Contractor shall submit to OCA a Monthly Payment Application (“Payment Application”) covering the Work performed during the previous month and materials suitably stored and secured off-site (where approved in advance in writing by OCA consistent with this Article) with reductions for retainage and other withholding as indicated in this Agreement. As a CONDITION PRECEDENT to Owner’s obligation to pay amounts applied for, Contractor shall provide the original and one complete copy of each of the following documents:
1. **Cover Sheet.** Cover sheet (in the form supplied as [Supplement C1](#)) to Contractor’s Payment Application;
 2. **Monthly Payment Application with Contractor’s Affidavit.** Completed, sworn, and submitted in the form provided as [Supplement C2](#), or, where approved in advance by OCA, using another approved form, that calls for Contractor’s certification under oath that: (a) Owner receives clear title to all Work performed and materials supplied which payment is applied for; (b) labor and materials provided are free of claims of liens, unsatisfied demands for payment related to the Project, or other encumbrances (*or, if that is not the case, a sworn list describing each such claim, its source, the amount involved, and the reason for it*); (c) funds previously received by Contractor for Subcontractor Work have been fully paid to the Subcontractors; (d) upon Contractor’s receipt of the payment applied for, Contractor will pay Subcontractors without delay to the extent their Work was the basis of the Application for amounts paid by Owner; (e) the Work that payment is applied for is complete and complies with the Contract Documents, subject only to confirmatory testing and minor corrections (and, in the case of Contractor, retainage withheld by Owner); and (f) the Contractor’s current licensing information and tax identification numbers are accurate and correct;
 3. **Updated Work Progress Value Schedule.** An updated detail of the value of the Work completed, in the form supplied as [Supplement C3](#) (or, where approved in advance, AIA G702 and G703 as modified according to this Article);
 4. **Contractor’s Interim Waiver and Release of Lien Upon Progress Payment.** Executed in the form provided as [Supplement C4](#);
 5. **Subcontractors’ Interim Waivers and Releases Upon Progress Payments.** Contractor shall provide with its Monthly Payment Application: (a) an interim waiver and release of lien upon progress payment, in the form supplied in [Supplement C5](#); an interim waiver of claim against Payment Bond, in the form supplied as [Supplement C6](#) – each of which shall be sworn and executed by all mechanical (including HVAC, and conditioned air), electrical, plumbing, and site work Subcontractors whose labor, materials, or other Work payment is applied for;
 6. **As-Built Documents and Progress Photos.** Provide up to five (5) digital copies of Progress Photos showing the Work and materials applied for and/or installed as well as any material delivered to off-site storage in accordance with this Article (copies provided and distributed as required in Article I above);
 7. **Updated master list of unpaid Subcontractors and suppliers.** List of each Subcontractor (of any tier) who has not been paid from funds received by Contractor for the Subcontractor’s Work, the amount unpaid and the reason for non-payment;

8. **Substantive support and backup information for Change Orders.** Back-up documents, including legible copies of all invoices, bills, delivery tickets, time and payroll records for all persons or entities who provided labor, materials, equipment, rental equipment, *etc.*, along with proof of payment, supporting any PCO, Change Order, claim for Reimbursable Expense, or other amount applied for which amount is not included in the Fixed Contract Price;
 9. **Proof of ongoing licensure.** Proof of Contractor's and Subcontractors' possession of current licenses, certificates, and authorities required to perform the Work, and submittal of proof of renewal thereof 30 to 60 days before applicable renewal dates;
 10. **Updated certificates of insurance and related endorsements.** Updated certificates of insurance and related endorsements for all new or renewed policies of insurance, updated 30 to 60 days following each policy's renewal date or change in insurer or policy;
 11. **Project Schedule, Progress and Completion Schedule, and Comparison Summary.** Updated, current digital and print copies of: (a) the then-current approved Project Schedule; (b) an updated proposed Progress and Completion Schedule, highlighting with specificity historic and future Milestone Dates missed and met, as well as progress of other Work; and (c) a Schedule Comparison Summary (as described in Article VI);
 12. **Weather information and back-up.** Copies of weather-related notices to OCA, PCO's (if any), and other back-up information pertaining to Bad Weather Days during the period for which payment is applied for and those before;
 13. **Special documentation required for Payment Application No. 1:** In addition to the other information required hereunder with respect to Payment Applications, the first Payment Application shall be accompanied by additional copies of the filed Notice of Commencement, all land disturbance permits, building permits, health department permits, and any other governmentally issued permits needed to perform the Work, Payment and Performance Bonds, an executed Confidentiality Agreement, and any other information requested by the OCA and/or as indicated in [Supplement C1](#); and
 14. **Other information.** Provide other information that OCA may request pertaining to the Project. In addition to the documentation and information required to accompany each Monthly Payment Application, nothing in this Agreement shall prevent the OCA from requesting and obtaining copies of any Project-related documents or information, including parts or all of that which is listed above, at any time, and at intervals more frequent than at submittal of Monthly Payment Applications.
- E. **Payment Applications to reflect executed Change Orders.** Payment Applications must reflect Change Orders executed at the time of the subject Application. For purposes of Payment Applications, unless otherwise requested by OCA, each duly executed Change Order and Unilateral Change Order issued during the period covered by the Payment Application shall be listed as a separate line item at the end of the Contractor's Work Progress Value Schedule (or, where applicable, AIA G702) – and a copy attached to the subject Payment Application.
- F. **Reimbursable Expenses.** Reimbursable Expenses are those incurred in performance of the Work that are expressly specified herein as being reimbursable, subject to limitations stated in this Article V.
1. **Nature of expenses to be reimbursed.** In the absence of express, specific provisions to the contrary, Reimbursable Expenses are limited to: (i) procurement and filing fees and costs actually paid by Contractor to government and utilities to obtain building permits, land disturbance permits, inspections, and permanent utility taps and connections; and (ii) Contractor's direct cost for procurement of Payment and Performance Bonds.

2. **No mark-up.** Reimbursable Expenses are not subject to mark-up; and the Contract Price takes into account Contractor's supervision, administration, permits, insurance, taxes, overhead, and other direct and indirect costs related to Reimbursable Expenses and related items procured.
 3. **Reimbursement waived if not timely applied for.** Contractor waives any claim for reimbursement of otherwise reimbursable expenses if it fails to: (a) make the claim for a given expense within 45 days of its incurrence; or (b) provide with the Payment Application in which the cost or expense is claimed legible, verifiable documents issued by the utility, governmental authority or agency, or vendor showing their receipt of payment from Contractor (as opposed to mere invoices to Contractor) - the sole exception to the requirement of payment-before-reimbursement being where: (i) a particular Reimbursable Expense is substantial; (ii) Contractor has demonstrated to the OCA that Owner's advance payment is required to maintain the progress of the Work; and (iii) Contractor gave written notice to OCA of the need at least 30 days in advance of the request.
 4. **Avoidable costs, fees, and expenses not reimbursable.** Otherwise reimbursable costs, fees, and expenses are not reimbursable to the extent that they were avoidable by diligent, timely Contractor performance. Re-inspection fees and costs caused by failure of Work to pass initial inspection, lack of readiness by Contractor for inspections, or by other less-than-diligent and conscientious conduct, planning, or scheduling by Contractor are not Reimbursable Expenses.
 5. **No payment or reimbursement for correction of Defective Work.** No payment or reimbursement of any kind will be made for demolition, replacement, and/or repair of Defective Work or for costs resulting in whole or in part from failure by Contractor (and/or a Subcontractor) to perform as required by law or this Agreement.
 6. **Non-reimbursable sales and use taxes and other governmental fees and payments.** Contractor shall be solely responsible for payment of all governmental fees (except those that are expressly deemed in this Agreement to be "Reimbursable Expenses"), sales and use taxes, or other taxes and assessments in connection with performance of the Work, all of which are included in the basic Contract Price. The costs of such governmental fees, temporary utilities, sales and use taxes, or other taxes and assessments specific to scope items shall be included within the specific line item for each respective item in the Contractor's itemized Work Progress Value Schedule that accompanies Payment Applications.
- G. **Timing of progress payments.** Subject to other limitations and conditions established herein, Owner shall pay amounts due within 30 days after Owner's receipt of a timely and complete Monthly Payment Application.
1. **Date received.** Monthly Payments Applications shall be deemed to be submitted on the day they are received by OCA with: (a) an amount applied for that is justified by progress and consistent with this Agreement; and (b) the requisite affidavits, certifications, and back-up documentation. Applications not timely received will not be considered until the following month, without accrual of interest, and with Contractor bearing the risk of waiver of reimbursement due to lack of timely application for reimbursement. In no case shall more than one Payment Application be submitted per month.
 2. **Interest on amounts past due.** Amounts due and unpaid for more than 30 days after the due date shall bear simple interest at one-half percent per month on balances unpaid after the due date, to the degree payment is not otherwise excused. No interest shall accrue on amounts that are disputed by Owner or those amounts for which Contractor failed to adequately substantiate in the initial submittal of Payment Application covering the subject Work.

- H. **Proper disbursement and application of Owner's payments shall be first applied to payment of Subcontractors.** Payments made by Owner pursuant to a Monthly Payment Application shall in all cases be applied by Contractor solely to accounts pertaining to that Project. Before Contractor may allocate funds paid for its own use and purposes, it must *first* disburse amounts received from Owner to all Subcontractors and suppliers whose Work is included in amounts applied for by Contractor.
- I. **Payment not indicative of acceptance of Work.** Owner's payments to Contractor shall not be construed as Owner's acceptance of the Work.
- J. **Owner's right to withhold payment.** Owner may withhold from payments otherwise due Contractor the sum of amounts that Owner reasonably believes it might be exposed to, or liable for, due to: Work found to be defective or incomplete for which Contractor has already been paid; Contractor's untimely performance; claims by non-parties; liens filed by Subcontractors of any tier; notices and claims by Subcontractors asserting Contractor's failure to pay; Contractor's failure to certify where required; discovery of past overpayments to Contractor by Owner; overpayments resulting from incorrect Payment Applications; circumstances justifying Owner's declaration of Contractor's default; uncorrected damage to existing Work, structures, and/or the Property; damage to Owner's Equipment or the work of Separate Contractors; back-charges for costs incurred by Owner to correct Contractor's Work-in-Place; *etc.* or other amounts pertaining to Contractor's failure to satisfy CONDITIONS PRECEDENT to its obligation to pay, as set forth in this Agreement – multiplying that sum of those costs times the ACF specified in Article I.
1. **Notice of withholding.** Owner will give notice to Contractor in writing of its withholding of amounts applied for and its reason for it. If Contractor objects to the withholding, it shall within five days, respond in writing, providing facts that address Owner's reason for withholding payment, and citing specific Contract Document provisions, if any, that support Contractor's contention that the amount withheld should not be withheld.
 2. **Owner's recovery of overpayments and backcharges.** Should amounts otherwise due and owing to Contractor on this Project be insufficient to cover the withholding to which Owner is entitled under this Article, OCA shall issue a unilateral Change Order reducing the Contract Price by the amount required to correct overpayments or to cover the conditions justifying withholding; and Contractor shall immediately repay amounts required to conform therewith. Work will continue uninterrupted while the issue justifying Owner's claim for coverage of exposure is corrected by Contractor. In no case shall Owner's withholding of payment, or obtaining recovery of past overpayment, excuse Contractor's timely payment to its Subcontractors. Retainage shall not be considered when calculating repayment to Owner, and repayments shall not be deemed to reduce Owner's right to hold retainage.
 3. **Other projects involving the Parties.** Should Contractor be entitled to payment from Owner on other projects, and should amounts due to Contractor on this Project be insufficient to cover amounts due to Owner in repayments pertaining to this Project, Contractor hereby agrees to offset and reduce amounts due it on those other Projects as needed to satisfy the Owner's demand for coverage of exposure as provided in this paragraph; and Contractor waives any claim on this or the other project(s) pertaining to those offset amounts.
- K. **Contractor's payments to Subcontractors.** Contractor's timely payment of Subcontractors is a material performance obligation of Contractor and a CONDITION PRECEDENT to Owner's obligation to pay.
1. **No Payment Application to include amounts to be withheld from Subcontractors.** Contractor may not apply for payment for Subcontractor Work that is incomplete, defective, or for which a Subcontractor will not be paid by Contractor within 10 days of Contractor's

receipt of payment from Owner of some or all of the amount applied for, regardless of Contractor's basis for the proposed withholding from the Subcontractor.

2. **Repayment of Subcontractor-related overpayment by Owner.** Should Contractor become aware that it has applied for payment for Subcontract Work that is defective or incomplete, Contractor shall: (a) immediately notify OCA and Subcontractor of that fact by e-mail or fax; and (b) reduce accordingly amounts applied in Payment Applications that follow.
 3. **Owner's right to make payment directly to Subcontractors.** Should Owner have reason to believe that Contractor has not timely paid amounts due to one or more Subcontractors for Work performed, Owner may, but is not required to, upon e-mail or fax notice to Contractor, pay the Subcontractor(s) directly (or, in Owner's discretion, by joint check), thereupon unilaterally issuing a deductive Change Order, reducing the Contract Price by an amount equal to the sum of Owner's direct (or joint) payment(s) to the Subcontractor(s); plus Owner's related damages, costs, and attorney's fees incurred; and multiplying that sum times the ACF specified in Article I.
- L. **Final Payment.** Final Payment is due not more than 30 days after Owner has received, in the form and with the content required, the following:
1. Contractor's Final Payment Application, in a form consistent with those required for Monthly Payment Applications, adjusted to reflect the terms herein pertaining to Final Payment;
 2. A sworn Contractor's Final Affidavit (in the form supplied as [Supplement F1](#));
 3. A sworn Contractor's Waiver and Release of Lien Upon Final Payment (in the form supplied as [Supplement F2](#));
 4. Subcontractors' Waivers and Releases of Lien Upon Final Payment (in the form supplied as [Supplement F3](#)) sworn and executed by: (a) all mechanical (including HVAC, and conditioned air), electrical, plumbing, low voltage, earthwork, and structural steel Subcontractors; (b) all Subcontractors of any tier providing rental equipment used on the Project; (c) all Subcontractors of any tier from whom Owner has received a Notice to Owner or other statutory notice; (d) all other Subcontractors of any tier for whom OCA requests interim waivers; and (e) any and all other Subcontractors or vendors who were, or are to be, paid for labor, materials, or other Work in amounts exceeding the threshold established in Article I;
 5. Certified, filed documents demonstrating that all filed liens or other encumbrances on the Property or the improvements to it have been discharged, satisfied, or otherwise cancelled by Contractor;
 6. A Final Certificate of Occupancy issued by the governmental authority having jurisdiction over the Project;
 7. A sworn Minority Vendor Survey (in the form supplied as **Exhibit B-2** to [Supplement B](#)); *and*
 8. In cases where a Payment Bond is required under Article I:
 - a. Subcontractors' Waivers of Right to Claim Against Payment Bond (Final Payment) (in the form supplied as [Supplement F4](#)) sworn and executed by all mechanical (including HVAC, and conditioned air), electrical, plumbing, and site work Subcontractors; *and*
 - b. Consent of Surety to Final Payment and release of retainage.
 9. Satisfaction of each of the foregoing requirements is a CONDITION PRECEDENT to Owner's obligation to pay or release retainage.

10. Contractor's submittal of its Final Payment Application shall operate as an additional waiver and release by Contractor of all claims it has against Owner.
 11. Owner's issuance of Final Payment shall not relieve Contractor of its obligation to fully perform under this Agreement, nor shall it be construed as a waiver of any right Owner has under this Agreement or under law to obtain Contractor's full performance of the Work or its correction of non-conforming Work.
- M. **Unit Prices.** Unit Prices specified in the Contract Documents are the maximum price per unit of material that Owner will pay for Contractor's installation of the specified material above the quantity that was required within the original Scope of Work where the changed Scope of Work results in a Change Order.
1. As a CONDITION PRECEDENT to Owner's obligation to pay for materials provided on a Unit Price basis, Contractor shall keep detailed records of quantities of materials delivered and used as required under Article VIII to substantiate changes in Contract Price.
 2. Unit Prices specified shall not be subject to change due to unforeseen conditions, timing, delay, impact of hindrance or quantity, positive or negative, and they apply equally to deductive and additive changes.
 3. The Unit Price provisions in Supplement B are incorporated herein.
- N. **Allowances.** Where an Allowance is expressly designated and specified in Supplement B and/or in other Contract Documents, the amount of that Allowance is a discrete sum included within the Contract Price for Contractor's procurement of the specified material. Should Contractor's substantiated cost to purchase the Allowance material deviate from the Allowance sum specified, the Contract Price shall be adjusted accordingly. All delivery, storage, preparation of the Work-in-Place to accept the Allowance materials, and their installation are included within the Contract Price – and will not be the subject of a Change Order.

ARTICLE VI – TIME

- A. **Time is of the essence.** Time is of the essence in this Agreement.
- B. **Work Continuous.** Contractor shall begin Work within seven days after Owner issues the Notice to Proceed, and shall perform continually and expeditiously, and in accordance with the Project Schedule, until Final Completion.
- C. **Modification of Contract Time.** Contract Time can only be adjusted by duly executed Change Order proposed, prepared, and executed in accordance with this Article and Article VIII. Neither Contractor's submittal of a schedule, nor OCA's review of one, changes the then-current Project Schedule – or modifies Contractor obligations under this Agreement.

D. **Schedules.**

1. **Cost.** Contractor's costs in preparing and maintaining accurate schedules is included in the Contract Price.
2. **Scheduling Software.** Contractor shall employ scheduling software specified in Article XV.
3. **Accuracy of schedules.** Schedule accuracy is Contractor's sole responsibility, and Owner is entitled to rely on it. Owner's receipt of schedules, and any response (or lack of response) to them, shall not be construed as Owner's acknowledgement or consent to their basis or content.
4. **Media.** Contractor shall provide to OCA two printed copies and a digital copy of each schedule submitted.

E. **Schedule Data.** Both printed and digital schedules shall include the following "Schedule Data": (1) Project name, location, and Owner's Project Number; (2) Contractor's name; (3) the date prepared, the preparer, and the data date (on each page); (4) the type of Schedule, software used to produce it, and the version or edition of it; (5) actual dates on which Work-in-Place was installed; (6) planned activities of Contractor, Subcontractors, Separate Contractors, and others distinguishing periods during which subdivisions of Work (*e.g.*, installation periods for structural footings, walls, slabs, framing, enclosure dry-in, *etc.*); (7) anticipated deliveries and installation of Owner's Equipment; (8) interim Milestone Dates (achieved and anticipated); (9) Contractual Date of Substantial Completion; (10) planned key submittal dates and related review periods; (11) dates of utility tie-ins, start-ups, installation of temporary service, *etc.*; and (12) other schedule-related information that may be requested by OCA.

1. **Milestone Dates.** Schedules shall include interim milestone dates on which significant tasks, activities, events, and key progress points of the Work are to occur or be completed (or partially completed) – all of which are to be established by Owner and Contractor at the time of execution of this Agreement ("Milestone Dates").
2. **Schedules to account for weather.** Schedules shall allow for inclement weather and anticipated Bad Weather Days as defined herein.
3. **Resource-loaded schedule.** Schedules shall be resource-loaded to include manpower, key production equipment, Subcontract Work, and, to the extent known, the work of Separate Contractors. Contractor shall prepare and submit all Schedules after consulting with all relevant Subcontractors and Separate Contractors.

F. **Data preservation.** Contractor shall preserve intact (in printed and digital form) Schedule Data in succeeding versions, avoiding deletion or modification of historic data and other information contained in them.

G. **Scheduling methods.**

1. **CPM method.** Unless otherwise indicated in Article I, Contractor is required to employ Precedence Diagramming Critical Path Method (“CPM”), the Critical Path shall be shown on each schedule. A subject task or component of the Work is deemed to be “on the Critical Path” if subsequent Work must follow completion of the subject task or component, and that subsequent Work, in turn, controls the start of further subsequent Work in a way that, if the subject Work is delayed, Contractor will be unable to complete all the Work within the Contract Time. Float is time during which an activity is not on the Critical Path. Float is deemed to be for the benefit and use of Owner.
2. **Bar Graph method.** Where expressly permitted under Article I, Contractor may provide bar chart graphic schedules that indicate Milestone Dates, Critical Path elements of the Work, Contractual Date of Substantial Completion, and other Schedule Data required herein.

H. **Types of schedules.**

1. **Baseline Schedule.** At least three days in advance of the pre-construction meeting, Contractor shall, using CPM method (unless another scheduling method is allowed under Article I), provide for Owner’s approval an initial proposed schedule (“Baseline Schedule”) consistent with the foregoing.
 - a. Contractor shall attach to the proposed Baseline Schedule copies of all Subcontracts, Subcontract proposals, estimates, purchase orders, preliminary schedules, and other documents and information needed to substantiate the proposed schedule.
 - b. OCA’s written acceptance of a Baseline Schedule is a **CONDITION PRECEDENT** to:
(i) Contractor’s commencement of Work on-site; and (ii) Owner’s obligation to pay.
 - c. Upon OCA’s written acceptance, the Baseline Schedule shall thereafter remain unchanged as a record for comparison; although it will become the initial “Project Schedule.”
2. **Project Schedule.**
 - a. **Project Schedule determinative.** As a material obligation under this Agreement, and as independent **CONDITIONS PRECEDENT** to Owner’s obligation to pay, Contractor shall perform the Work: (i) in accordance with the Project Schedule; (ii) within the Contract Time; and (iii) so as to complete intermediate tasks, activities, and other Work on or before each respective Milestone Date set forth in it.
 - b. **Modifications.** Where possible, Scope of Work added by Change Order shall be treated as a separate activity on the Project Schedule. Revisions shall be designated as such, with previous Milestone Dates retained and marked. Modifications to Project Schedule must reflect the Contract Documents and duly executed ITC’s, Change Orders or other Owner-sanctioned modification of Contractor’s obligations in accordance with Article VIII and other parts of this Agreement, and the Project Schedule shall be updated monthly, consistent with them.
 - c. **Contractor’s obligation to accelerate Work.** Should Contractor fail to meet Milestone Dates, or should the rate of progress of the Work indicate likelihood of Contractor’s inability to complete the Work within the Contract Time, Contractor shall, at no expense to Owner, accelerate the Work as needed to resume performance according to the Project Schedule, meeting subsequent Milestone Dates, and completing the Work within the Contract Time

3. **Completion Schedules.** Contractor shall attach to each monthly Payment Application a schedule showing historic progress of the Work to-date, the timing and sequence of Work to be performed, future Milestone Dates, and other Schedule Data, all of which shall indicate Contractor's plan for completing the Work on or before the Contractual Date of Substantial Completion ("Completion Schedule").
 - a. **As-built and anticipated Work noted.** The Completion Schedule shall contain all the Schedule Data required in other schedules. The as-built portion of the Completion Schedule shall accurately reflect historic progress of the Work. The portion of it showing planned Work shall to be resource-loaded to indicate the performance required of the Contractor to complete the Work within the Contract Time.
 - b. **Contractual Project Schedule not affected.** Submittal of updated Completion Schedules shall not modify the then-current (and approved) Project Schedule, which can only be modified as provided above. Mere submittal of Completion Schedules does not: (i) satisfy Contractor's notice obligations set forth herein; (ii) modify Contract Time; or (iii) relieve Contractor of its obligation to meet Milestone Dates in the Project Schedule.
 - c. **Points of non-conformance with Project Schedule noted.** In each monthly Completion Schedule, Contractor shall note graphically key critical path activities and Milestone Dates that were not met historically and/or will not be met under the proposed Completion Schedule.
 - d. **Owner's right to order schedule modifications.** To the extent Owner determines in good faith that the proposed or submitted schedule (and/or subsequently proposed or updated schedules) does not reflect actual conditions, realistic projections of time needed to perform, the actual resources or funds allotted for performance, or the Owner's needs consistent with this Agreement, Owner may, but is not required to, require the Contractor to modify its proposed Completion Schedule and/or specific Milestone Dates and Schedule Data contained in it and to accelerate the Work as necessary to complete it within the Contract Time at no additional cost to Owner.
- I. **Summary Schedule Comparison.** Each month, with its Payment Application, Contractor shall submit a graphical comparison of the Baseline Schedule, the then-current Project Schedule, and an updated Completion Schedule ("the Summary Schedule Comparison"). The Summary Schedule Comparison shall condense key tasks, events, Work sequences, and Milestone Dates, vertically aligning a condensed graphical Baseline Schedule, the then-current Project Schedule, and the updated Completion Schedule on one document, employing identically time-scaled grids.

ARTICLE VII – SUBCONTRACTORS

- A. **Subcontractors.** Contractor must hire qualified Subcontractors with sufficient skill and in sufficient numbers to timely perform portions of the Work and to supply materials and equipment to perform the Work. Contractor shall not employ Subcontractors to which Owner has a reasonable objection. Owner retains the right to raise subsequent objections for cause, upon which Contractor shall replace Subcontractor. As soon as practicable, but in no case later than the date on which Contractor submits its Proposal, Contractor shall provide, for OCA's review, a list of proposed Subcontractors. Thereafter, before permitting any Subcontractor to provide labor or materials for the Project, Contractor shall give notice by fax or e-mail to OCA, identifying the Subcontractor, the scope and timing of the Subcontractor's Work.

- B. **Written Subcontracts required.** Contractor shall engage no Subcontractor in the absence of a written Subcontract.
1. **No cost-plus Subcontracts.** Contractor shall employ no Subcontractor on a cost-plus basis, unless the Subcontract specifies a distinct and limited Scope of Subcontract Work, and it includes a guaranteed maximum price for that Work.
 2. **Subcontract payment terms to be consistent with state prompt payment statutes.** Contractor shall not enter Subcontracts in which its payment of Subcontractors is excused for periods longer than: (a) those set forth in the subcontractor provisions of the prompt payment statutes, if any, applicable in the state where the Project is located; or (b) 7 days after receipt from Owner of the payment of amounts applied for the Subcontractor's Work (whichever is less). Contractor shall not enter Subcontracts that purport to state that laws or regulations governing prompt payment of Subcontractors are superseded or voided or diminished in effect and benefit to Subcontractors.
 3. **No "pay-when-paid" or "pay-if-paid" Subcontracts.** Contractor shall not enter Subcontracts containing contingent payment clauses, unless Contractor has provided Payment and Performance Bonds consistent with Article XIII and which comport with state statutes, where applicable, that require conditional Payment Bonds related to contingent payment.
- C. **Licensing and certifications.** Subcontractors must possess the occupational, trade, or professional licenses and/or certifications required by local and state governments having jurisdiction over the Work to perform their portion of the Work, as well as any insurance, bonds, and governmental certifications, authorities, business licenses, and permits required to conduct business in the state and locality of the Project. Upon request of the OCA, Contractor shall submit proof of the foregoing before Subcontractor can start Work, timely submittal of which is a CONDITION PRECEDENT to Owner's obligation to pay.
- D. **Delegated design services.** Where the Contract Documents expressly allow or require Contractor to provide the design services, qualified special installations (for example sprinkler system design), or certification of designs or documents by architects, engineers, or other licensed design professionals, *etc.*, upon request of the OCA Contractor shall also provide, as a CONDITION PRECEDENT to Owner's obligation to pay: (1) proof of requisite licensing or qualification of the Subcontractor or the professional who provides the services in its behalf or that of Contractor; and (2) proof of professional liability insurance coverage of that professional and his or her business organization in amounts specified in Article XII or greater amounts, if required by law, together with a copy of each policy of professional liability insurance, all to be updated at each renewal date.
- E. **Flow-through provisions.** Subcontracts shall contain express flow-through provisions that: (1) impose on Subcontractors of all tiers the same obligations and duties to the Owner with respect to their portion of the Work that this Agreement imposes upon the Contractor as to the Owner; and (2) grant to the Owner the same rights and benefits as to the Subcontractor that the Owner enjoys under this Agreement as to the Contractor.
- F. **Owner's right to accept assignment of Subcontracts.** Subcontracts shall contain a provision that permits Owner to receive assignment of Subcontracts upon notice to Subcontractor and Contractor in the event of Contractor's Default or Owner's termination of this Agreement. Owner may, in turn, reassign the Subcontract to a Separate Contractor or substitute contractor. Owner's exercise of its right of assignment or substituted payment shall not be deemed to excuse Contractor of its responsibility for performance of the Work and adherence to its lawful and contractual obligations with respect to Subcontractors and otherwise. Assignment of Subcontracts to Owner does not relieve Contractor of

its sole and exclusive obligation to pay Subcontractors of all tiers for all amounts earned by Subcontractor before the assignment. This provision survives termination of this Agreement.

- G. **No contractual relationship between Owner and Subcontractors.** Contractor is solely responsible for payments to Subcontractors, and Owner has no obligation to pay Subcontractors for Work performed or labor, material, or services furnished to the Project. Although Contractor shall expressly incorporate this Agreement by reference in each Subcontract, that incorporation does not create any obligation or duty on the part of the Owner in favor of any Subcontractor (or any other person or entity).
- H. **Subcontractor claims and notices.** In the event any Subcontractor, or anyone providing labor, materials, services, or Work at the instance of Contractor or its Subcontractors, asserts a claim against Owner, Contractor, or the Property, Contractor shall defend, hold harmless, and indemnify Owner as to that claim in accordance with Article XI, and shall, immediately upon receipt of notice of any notice, claim, or demand, transmit a copy (together with all related documents, shipping and delivery containers, *etc.*) to the OCA by Overnight Delivery.
1. **Dual notice requirements.** In addition to any other notice-related requirements contained in this Agreement or required by law, Subcontractors of any tier shall send to OCA, by Overnight Delivery, a copy of any and all Project-related notices to contractor, notices of subcontract, notices of non-payment, claims of lien, and claims, notices, or demands of any kind that are either received by the Subcontractor and/or send, asserts, filed, or delivered by Subcontractor; and
 2. **Required incorporation into Subcontracts.** Contractor shall expressly incorporate the provisions in this paragraph in each Subcontract entered on this Project; proof of compliance with this requirement being a CONDITION PRECEDENT to Owner's obligation to pay.

ARTICLE VIII – CHANGES

- A. **Request for Information (“RFI’s”).** If Contractor believes that it cannot perform part or all of the Work because the Contract Documents are incomplete or ambiguous, or for any other reason Contractor determines that it lacks information necessary to perform the Work, Contractor shall prepare a Request for Information (“RFI”) and submit it to the OCA in accordance with the following:
1. **Informal request to precede written RFI’s.** Before submitting a written RFI, Contractor must request the information from the OCA, who may ask Contractor to seek the information from the Architect. In the absence of an RFI, informal requests for information are presumed to have been answered.
 2. **Form of request.** RFI’s shall be consecutively numbered, dated, and submitted in a form substantially similar to the one supplied in [Supplement D1](#). Each shall indicate: (a) the precise nature of the information requested; (b) when and from whom the Contractor informally requested it; (c) the source and content of the response to Contractor’s informal request; (d) which Contract Documents pertain to the issue involved; (e) when the information requested is needed; and (f) what element(s) of the Project Schedule and the most recent Completion Schedule will be first impacted, or critically impacted, by Contractor’s need for the information requested.
 3. **Tracking of RFI’s.** Contractor shall continually update the RFI log, indicating with respect to each RFI: the subject; the date submitted; specific action taken or other resolution proposed or effected; the Contract Document provision(s) pertinent to the RFI and its resolution; and the number and date of any PCO’s and Change Orders to which the RFI relates.

B. Changes in Scope of Work.

1. **Owner's Instructions to Change ("ITC").** Without invalidating this Agreement, Owner may order changes in the Work by issuing a written ITC to Contractor. Upon Contractor's receipt of an ITC, it shall immediately review the ordered change and determine its impact, if any, on Contract Price or Contract Time. Absence of a follow-up PCO from Contractor shall indicate that it agrees to perform the Work in accordance with the ITC without adjustment of Contract Price or Contract Time, that it waives claims related to the change, and that it will reflect the change in subsequent Project and Completion Schedules.
2. **Contractor's suggested changes or substitutions.** With advance permission of OCA, Contractor may propose substitutions or other changes in the Work by issuing a PCO containing specific information regarding cost, performance, impact on Project Schedule, ongoing operations and maintenance comparisons, and any other information relevant to the change proposed – and shall issue the PCO sufficiently in advance of the need so that the Owner has time to make a considered, informed, and reasoned decision without impact to the Project Schedule. If Contractor does not follow its suggested request for change or substitution with a PCO, Owner will assume that Contractor has abandoned the suggestion.
3. **Proposed Change Orders ("PCO's").** If an ITC, other direction by Owner, or any other event, circumstance, or differing site condition has, or is likely to, in Contractor's judgment, result in a change of Scope of Work that materially increases Contractor's cost to perform or time needed to perform, or will otherwise impact Contract Price, Contract Time, or the Project Schedule, Contractor shall, before performing the changed Work involved, and in no case more than five days after issuance of the ITC or other direction by Owner, or the occurrence of any event, circumstance, or condition on which that judgment is based, deliver to OCA a detailed PCO (in a form supplied as [Supplement D2](#)).
 - a. **Content.** Each PCO shall compare the then applicable Scope of Work to the proposed Scope of Work, detailing, with documents and other support data: (i) the Plan sheet, drawing number, Specification section, and/or other Contract Document affected or involved; (ii) the reasons for the suggested impact; (iii) the affect of the proposed change on Contractor's cost to perform and the Project Schedule; and (iv) the precise adjustment proposed to Contract Price and/or Contract Time.
 - b. **PCO's pertaining to differing site conditions.** The conditions reported in any Geotechnical Report constituting part of the Contract Documents shall be deemed to generally establish the soil and subsurface conditions anticipated. If Contractor encounters concealed or subsurface conditions that it contends differ materially and substantially from those expected conditions, Contractor shall immediately: (i) notify the OCA; and (ii) submit a PCO that, in addition to the other information required in PCO's: (A) details the depths, character, and quantities of the conditions encountered; (B) describes how and to what degree the conditions encountered differ from those anticipated; (C) indicates the steps taken by Contractor to inform Owner and Owner's Testing Consultants of the conditions encountered; and (D) specifies to the degree known, the changes in the Work required to adapt to those conditions. Contractor shall continually update this PCO until resolution is complete contractually and in terms of the Work.
4. **ITC and PCO Tracking.** Contractor shall consecutively number the ITC's and PCO's, and shall keep current a log showing the disposition of each.

- C. **Change Orders.** Adjustments to the Contract Price, Contract Time, or Project Schedule shall only be by duly executed written Change Order, signed by the undersigned representative of Owner, the form of which shall be that supplied as Supplement E1.
1. Contractor's untimely, inadequate, unlawful, defective or otherwise non-compliant performance shall not give rise to a Change Order increasing the Contract Price or Contract Time.
 2. Minor changes in the Scope of Work that do not substantially and unavoidably affect the time required to perform, or Contractor's cost to perform shall not give rise to a Change Order.
 3. OCA may issue unilateral Change Orders as provided in this Agreement and where otherwise needed and justified to protect legitimate interests of the Owner and to maintain progress of the Work. Unless otherwise stated in context, unilateral Change Orders are effective upon issuance by OCA.
 4. Payment Applications shall not include amounts proposed in PCO's or amounts stated in unexecuted bilateral Change Orders.
- D. **Pricing of adjustments to Contract Price.** Where otherwise justified by material change in Scope of Work or material increase in time required to perform (and except in cases of Owner's unilateral Change Orders), the specific amount of the adjustment of the Contract Price shall be agreed in writing by the Parties before the changed Work is performed.
1. If the Parties cannot agree as to the appropriate change to Contract Price, Owner may issue an ITC, instructing Contractor to perform the changed Work on a time and materials ("T&M") basis. In that case, Contractor shall keep separate and discrete records of time and costs estimated and incurred pertaining to each discrete element of the changed Work; and shall provide copies of all backup and support documents pertaining to each T&M item with the *next* Payment Application – without regard to whether the T&M costs will be compensated in whole or in part by Owner then or later.
 2. Work shall be expeditious and continuous during the time that T&M is being performed, and thereafter, provided, however, that Owner will pay Contractor for those portions of the T&M costs that Owner, in good faith, determines are not reasonably subject to dispute – those amounts shall be shown as line items in each successive monthly Work Progress Value Schedule.
 3. In no case shall Owner be required to pay Contractor (for T&M compensation otherwise justified hereunder) more than the lesser of: (a) the reasonable value of the changes requested; or (b) the sum of substantiated and valid T&M costs, calculated in accordance with the following:
 - i. *For Work performed by the Contractor:* Adjustment to Contract Price limited to 110% of Contractor's substantiated direct costs to perform the changed Work;
 - ii. *For Work performed by a Subcontractor:* Adjustment to Contract Price limited to 110% of Subcontractor's substantiated direct costs to perform the changed Subcontract Work, plus not more than another 5% markup applied for Contractor's administration, coordination, and management of the adjusted Subcontract Work;
 4. The amounts determined in accordance with the immediately preceding sub-subparagraphs are deemed to include all compensation for any and all direct and indirect costs, overhead, profit,

insurance, labor, materials, bond premiums, and time related to the change requested or ordered.

E. **Contractor's duty to obtain competitive pricing.** With respect to any PCO, if requested by Owner or the OCA Contractor shall obtain competitive pricing from potential Subcontractors and suppliers, as to both pricing of adjustments to Contract Price and payment for Work under any circumstances in which Subcontract costs affects payments to Contractor. Satisfaction of this obligation requires Contractor to obtain by fair and competitive means at least two written proposals for each element of the changed Work that affects payments to Contractor of any kind. Self-performance of the affected Work by Contractor will not satisfy this requirement unless the maximum cost of the self-performance is approved in writing in advance by OCA. The contract term shall be extended for the reasonable period of time required for Contractor to obtain and Owner to approve such bids.

F. **Changes to Contract Time.**

1. **Time-related PCO's.** PCO's pertaining to extension of Contract Time must also be accompanied by the Project Schedules, proposed Completion Schedules, and related support documents.
2. **No damage for delay.** Notwithstanding anything to the contrary in the Contract Documents, the Contractor's sole remedy for any (i) delay in the commencement, prosecution or completion of the Work, (ii) hindrance or obstruction in the performance of the Work, (iii) loss of productivity, or (iv) other similar claims (collectively referred to as "Delay") whether or not such Delay is foreseeable, shall be an extension of time in which to complete the Work if permitted under the Contract Documents and, to the extent permitted under the Contract Documents and sub-subparagraphs, an adjustment in the Fixed Contract Price. Except as provided below, Contractor shall not be entitled to any other compensation or recovery of any damages of any kind due to a Delay, including, without limitation, consequential damages, lost, opportunity costs, impact damages or other similar remuneration.
 - a. The Contractor shall be permitted an adjustment in the Fixed Contract Price if any Delays, either individually or taken in the aggregate, cause the Contract Time to be increased by more than fourteen (14) calendar days (the "Grace Period"). Any adjustment in the Fixed Contract Price under this Subparagraph shall be limited to the increase, if any, of direct costs. Notice of such delay and costs shall be given by Contractor to Owner by execution and delivery of a PCO.
3. **Weather-related requests for extension of Contract Time.** This Agreement contemplates routine-but-significant periods in which bad weather affects or impedes progress.
 - a. **Bad Weather Days.** For purposes of this Agreement, Bad Weather Days are work days on which Work is halted due to: (i) excess precipitation [as evidenced when the number of days during which there was in excess of .10 inches of rain per day, exceeds by 105% the average number of days during which there was in excess of .10 inches of rain per day for that same month for the immediately preceding five years; (ii) extreme low temperatures [as evidenced when the number of days in a month during which the temperature did not exceed 40 degrees Fahrenheit in the period from 7:00 a.m. to 5:00 p.m., exceeds by 105% the average number of days during which the temperature did not exceed 40 degrees Fahrenheit in the period from 7:00 a.m. to 5:00 p.m. for that same month for the immediately preceding five years] – as verified by locality-specific weather data recorded by the National Oceanographic and Atmospheric Administration (“NOAA”) (or another mutually agreed-upon agency of federal government); or (iii) site conditions lingering after either of the foregoing

prevent Work in a way so as to unavoidably impact the Critical Path and extend the time needed by the Contractor to complete the Work.

- b. **Weather-based claims for extension of time.** No extension of Contract Time will be permitted for Bad Weather Days unless progress on Critical Path Work is prevented by the weather *and* Contractor has met the following conditions: (i) Contractor has contemporaneously reported inclement weather as required in Article III and other conditions or events impacting the Work; (ii) weather-related conditions and events are corroborated by NOAA records; (iii) the data contained in a PCO affirmatively links the weather event and impact on the Project Schedule and the most recently submitted Completion Schedule, including contemporaneous digital progress photos; (iv) Contractor provided adequate documentary backup supporting each of these elements; (v) Contractor timely satisfied its obligation under Article III to e-mail and fax notice of weather-related events to OCA as they occurred; and (vi) Contractor could not have avoided the weather-related impact claimed by its expeditious and diligent performance of Work at all times preceding the occurrence of the Bad Weather that Contractor claims to justify an extension of Contract Time.
 - c. **Burden on Contractor to monitor and report Critical Path.** To obtain an extension of Contract Time, Contractor must demonstrate that the event that it claims justifies the extension of time or the PCO, in fact, impacted the Critical Path of the Work; and that burden is not relieved by Owner's election to allow Contractor to submit Schedules in Bar Chart form, in lieu of Critical Path form.
- G. **Deductive changes.** Owner to receive full value, including rebate of markups, overhead and profit, when calculating amounts of deductive Change Orders. Owner may refer to the Schedule of Values and the Work Progress Value Schedule for guidance in its determination of adjustments in this regard.
- H. **Administration of the change process included in the initial Contract Price.** Contractor's costs in preparing and responding to RFI's, ITC's, PCO's, and Change Orders are included in the base Contract Price, and shall not be included in PCO's or Change Orders.
- I. **Waiver.** Contractor waives any right to adjustment of Contract Price, Contract Time, or Project Schedule, or to payment of any kind for changed Work, if it fails to timely satisfy the notice, analysis, and other requirements pertaining to RFI's, ITC's, PCO's, and Change Order set forth in this Article.
- J. **Owner's substituted performance of the Work.** In the event of Contractor's whole or partial failure to perform, upon notice to Contractor, Owner may, but is not required to, perform the Work itself or engage one or more Separate Contractors (or replacement contractors) to perform it – in which case, Owner is entitled to issue a unilateral Change Order reducing the Contract Price by an amount equal to the sum of Owner's direct costs to secure substituted performance; plus the sum of other related damages, costs, losses and fees incurred by Owner; multiplying that sum times the ACF specified in Article I.
- K. **Owner's acceptance of Defective Work.** Should Owner choose to accept Defective Work, rather than insist on Contractor's correction of it, Owner is entitled to issue a unilateral Change Order, reducing the Contract Price by an amount (determined by the Owner in good faith) to approximate the reduction in value of the completed Work to the Owner or the cost that Contractor would have incurred to correct the Defective Work – whichever, in the good faith opinion of the Owner, is greater. Acceptance of Defective Work must be in writing, and is effective upon issuance of a Change Order to reflect the change. Acceptance of Defective Work does not relieve Contractor of any other obligations or liability pertaining to or arising out of defective performance.

- L. **Subcontractor communications on-site.** Contractor shall include in all Subcontracts a written provision requiring Subcontractors to satisfy the requirements of essential communications on-site in Article III above. Satisfaction of that obligation is a **CONDITION PRECEDENT** to Owner's obligation to pay for Subcontract Work.
- M. **Ongoing rights related to events prompting unilateral Change Orders.** Owner's issuance of a unilateral Change Order, as provided elsewhere in this Agreement, shall not deprive Owner of right to issue subsequent unilateral Change Orders pertaining to the same subject matter as Owner's damages or costs incurred continue to accrue; nor does its issuance of unilateral Change Order deprive it of right, under this Agreement or under law, to fully recover for damages, litigation costs, attorney's fees, and other losses suffered as a result of Contractor's performance or failure to perform.

ARTICLE IX – DISPUTES

- A. **Jurisdiction and venue.** Unless Owner elects to arbitrate disputes, as provided below, disputes not resolved by the Parties shall be litigated in a court of competent jurisdiction within the jurisdictional area governed by the United States District Court having jurisdiction over the county in which Owner's principal place of business (as the address indicated on page 3) is located; and Contractor hereby waives objection to that venue.
- B. **Work continuous during disputes.** Contractor shall continue to perform expeditiously and without interruption or diminution of progress despite the existence of a dispute or the pendency of its resolution; provided, however, that Owner continues to pay Contractor amounts otherwise due under this Agreement to the extent that are, in the Owner's good faith judgment, not subject of a *bona fide* dispute.
- C. **Joinder.** Contractor waives objection to it being joined in any arbitration or litigation in which its performance, or failure to perform, is material to the source or resolution of the dispute. Contractor agrees to include in all Subcontracts a written waiver by Subcontractor of objection to joinder in any litigation or arbitration arising out of or related to the Project. Should Contractor fail to do so, Contractor shall indemnify, hold harmless, defend, and pay all costs incurred by Owner related to arbitration or litigation involving any Subcontractor who resists or refuses joinder, including attorney's fees, regardless of outcome, and regardless of the number of arbitrations or litigation actions involved.
- D. **Attorney's fees.** Should arbitration or litigation be required to resolve disputes, the Prevailing Party (and only the Prevailing Party) shall be entitled to an award of its reasonable costs and attorney's fees and the Parties hereby waive any right created by operation of a confession of judgment statutes that would allow an award of attorney's fees to a non-prevailing party. For purposes of determining the award of attorney's fees, a complaining party is the "Prevailing Party" if it recovers on its claim; or, where the defending Party also brings a counterclaim, where the original complaining Party recovers more than the defending Party. An originally defending Party is deemed a "Prevailing Party: if the originally complaining Party does not recover on its claim; or, where the defending Party brings a counterclaim, the defending Party recovers more on the counterclaim than the originally recovered on the complaint – in all cases the attorney's fees themselves shall not be considered in deciding who prevails.
- E. **Owner's unilateral right to elect arbitration.** Owner may, when or before it answers a complaint or files one, unilaterally elect arbitration as the exclusive means to resolve any and all disputes relating to or arising out of this Agreement. Election is effective upon Owner's giving notice of it to Contractor. Pre-arbitration petition by Owner to a court in order to quiet title or discharge a lien shall not be deemed a waiver of Owner's ability to exercise this right.

1. **Effect of arbitration on litigation.** If Contractor files a complaint, and Owner then exercises its right to resolve disputes by arbitration, Contractor will move the court to stay the litigation must be stayed during pendency of arbitration – in which case, Owner’s answering the complaint or moving the Court to stay the action shall not be deemed a waiver of Owner’s right to elect arbitration.
2. **Rules governing.** Arbitration shall be governed by rules consistent with the Construction Industry Arbitration Rules (“CIAR’s”) of the American Arbitration Association (“AAA”) current at the time arbitration is demanded, to the extent that those rules do not conflict with the express terms of this Agreement – except that Owner may choose an arbitral institution other than AAA, thereby nullifying the CIAR’s to the extent they require AAA’s involvement, filing with AAA, or other activity directly involving AAA, itself; and the arbitrator shall apply the CIAR’s, adjusting accordingly for the change.
3. **Qualifications of the arbitrator.** Parties will select a neutral arbitrator who is either: (a) an attorney who practices predominantly in the area of construction law; or (b) a former judge or attorney experienced in the resolution of construction disputes. If substantial claims involving intellectual property are to be arbitrated, the Parties will designate a neutral attorney experienced in the area of intellectual property to advise the arbitrator with respect to that portion of the claim.
4. **Arbitration Hearings.** Arbitration hearings shall be held within the jurisdictional area established in the venue provision of this Article, this provision being nonarbitrable.
 - a. Arbitration statutes and CIAR’s to the contrary notwithstanding, the Arbitrator shall permit, but not require, the Parties to submit:
 - i. A pre-hearing brief (outlining the facts and law to be applied);
 - ii. A proposed form of award for the Arbitrator’s consideration (to be submitted, if at all, not more than 10 days after the close of hearings); and
 - iii. A post-hearing brief (to be submitted, if at all, not more than 10 days after the close of hearings).
 - b. A Party’s election not to submit one or more of the foregoing shall not be deemed by the arbitrator to be an admission or concession by that Party with regard to the merits; nor shall lack of submittal, alone, be considered negatively by the arbitrator in deciding the merits.
5. **Arbitrator to apply substantive law.** The Arbitrator shall apply the terms of the Agreement and substantive law of the jurisdiction specified in the “Law Governing” clause in Article I, except for that state’s choice of law provisions. In no case, however, can punitive damages awarded; and the Parties waive any rights they have to punitive damages if arbitration is used to resolve dispute(s).
6. **Award.** Within 30 days after the close of hearings, the arbitrator shall issue an award to the Parties (by Overnight Delivery), and shall provide with the award a brief explanation of its legal and factual basis.
 - a. **Modification of award.** Either Party may, within 10 days after the arbitrator’s issuance of an award, request that the arbitrator: (i) clarify ambiguities or vagueness in an award; (ii) correct calculation errors evident in the award; or (iii) rule on arbitrated issues omitted from the award as stated, none of which shall be judicially construed to be “revisiting the merits of the dispute.” A Party’s request to the arbitrator for

correction shall be concurrently served on the opposing Parties. The Arbitrator will either deny the request in writing or issue a modified ruling within 14 days of receiving the request.

- b. **Entry of judgment.** The award of the arbitrator may be confirmed by a court of competent subject matter jurisdiction where venue is proper with respect to the Owner.
7. **Enforcement of Owner's unilateral right to elect arbitration.** Owner's consent to arbitration at the time of the dispute is an absolute **CONDITION PRECEDENT** to arbitration. Owner's unilateral right to elect arbitration shall apply as well to Subcontractors. Should this provision be deemed unenforceable by a Court construing this Agreement, or should Owner elect to resolve disputes by litigation, all arbitration provisions in this Agreement shall then be deemed to be of no effect. Owner's right to elect arbitration is unilateral, and its unilateral nature is supported by consideration, and no right to elect arbitration may be created by implication. This provision itself is not subject to arbitration, except at the request of Owner at the time of the dispute.

ARTICLE X – DEFAULT AND TERMINATION

- A. **Contractor default.** Owner may declare Contractor to be in default of its obligations under this Agreement upon the occurrence of one or more of the following events or circumstances or upon Contractor's failure to perform any of its other material obligations under this Agreement:
1. Contractor's failure to correct Defective Work – or to correct failures to perform in accordance with this Agreement – immediately upon receiving notice or any other form of request to do so, or upon Contractor's learning of the defect or discovering (by whatever means);
 2. Multiple and continuing occasions of Contractor's provision of Defective Work or its non-compliance with this Agreement;
 3. Contractor's failure to achieve progress: (a) required on Milestone Dates; (b) consistent with the Project Schedule; or (c) to the degree that Owner may reasonably apprehend Contractor's inability to complete the Work on or before the contractual Date of Substantial Completion;
 4. Contractor's failure to pay Subcontractors (or failure to cause prompt payment of any lower-tier sub-subcontractor, materialman, supplier, or fabricator);
 5. Contractor's failure to manage the Work or to supply the Project at all times with an adequate number of appropriately skilled workers, each of which must satisfy Contractor's obligations set forth in Articles III and VII pertaining to essential on-site communications;
 6. Contractor's failure to provide required Payment and Performance Bonds;
 7. Contractor's failure to provide and maintain required insurance coverage, and/or to provide verifiable proof thereof, as required in this Agreement;
 8. Contractor's violation of, or failure to abide by, any governmental statutes, ordinances, regulations or other laws pertaining to the Work and to those providing labor, materials, or services of any kind on-site, or its participation in any other unlawful conduct;
 9. Contractor's financial insolvency, inability to meet financial obligations as they become due, or its filing for protection under bankruptcy laws;

10. Contractor's failure to obtain cancellation or discharge of liens as required herein;
 11. Dissolution or other degrading of Contractor's business organization;
 12. Contractor's failure to timely provide, upon request, substantiation and documentary proof of costs, financial records, or its failure to timely satisfy other reporting obligations hereunder;
 13. Contractor's disregard of Project safety;
 14. Contractor's breach of its Confidentiality Agreement with Owner or its obligations under Article XIV; or
 15. Any other material breach of this Agreement.
- B. **Opportunity to cure.** As a material obligation of this Agreement, Contractor shall cure any and all conditions of default within seven days after OCA requests correction, rejects defective performance or Defective Work, objects to Contractor's untimely performance, or gives notice to Contractor that one or more conditions of default exist.
1. If it contends that it is not in default and that its performance complies with this Agreement, Contractor shall, within the cure period, deliver to OCA a detailed written report, specifying the precise basis for Contractor's contention, and the particular provisions of this Agreement that it contends prevents a declaration of default.
 2. If Contractor begins substantial, corrective measures to cure its default within the seven-day cure period, it shall deliver to OCA a detailed written plan for curing the conditions of default, indicating the specific means to be used, and dates on which each specific cure will be begun and completed.
 3. Contractor's consent to Owner's declaration of default is presumed, unless Contractor timely delivers one of the two foregoing responses to Owner's notice of default.
- C. **Termination for cause.** Upon Contractor's failure to timely cure conditions of default, Owner may terminate this Agreement for cause, issuing notice thereof to Contractor.
1. Upon issuance of notice of termination, Owner may take one or more of the following courses of action:
 - a. Order Contractor to stop Work (except for post-termination stabilization);
 - b. Suspend all payments to Contractor until the Project is complete and Owner has determined what amounts, if any, may be due Contractor;
 - c. Exclude Contractor from the Project site, Owner assuming possession and use at-will, as long as needed, of all tools, property and equipment on-site and permanent possession and use of materials for which Owner paid Contractor;
 - d. Perform the Work itself, or engage others to perform it, deducting the cost of substitute performance (and all other costs incurred by Owner related thereto, including security and legal fees) from amounts owed to Contractor, and, where those amounts are insufficient to cover the cost incurred by Owner, obtain immediate reimbursement from Contractor of those costs;
 - e. Exercise Owner's right to assignment of Subcontracts; and/or
 - f. If Payment and Performance Bonds are required hereunder, notify Contractor's sureties (and those of its Subcontractors) of the conditions, events, and circumstances surrounding the Project and the Contractor's performance or default.

2. In no case shall Contractor be entitled to payment of lost or anticipated profits, consequential damages, and indirect costs.
 3. In no case shall Contractor be entitled to payment of overhead and direct costs not already incurred at the time of termination. Any rebates or refunds of pre-paid costs shall be remitted by Contractor to Owner.
- D. **Force Majeure.** Owner may at any time suspend or terminate this Agreement as a consequence of circumstances or events related to acts of God, national emergency, war or terrorism, acts or omissions of government, environmental calamity, or any reasons beyond the control of Owner, with amounts owing to Contractor limited to payment for compliant Work-in-Place on the date of the precipitating act or event (in the case of an act of God, war or terrorism, or government) or, in other cases involving circumstances beyond Owner's control, on the date that Owner's notice of invocation of *force majeure* termination or suspension notice is delivered to Contractor. In either case, amounts due will not include lost profits or any compensation for overhead, indirect, or consequential costs not actually expended on the day *force majeure* became effective.
- E. **Labor-related schedule impacts.** Contractor shall exercise all lawful means to avoid disruption or interference with the Work or the Project Schedule due to actions by labor unions or their members. If Contractor becomes aware of the possibility or occurrence that labor unrest or actions by organized labor unions or their members have, are, or will likely impact the Work or the Project Schedule, Contractor shall immediately: (1) notify OCA of it; (2) prepare a PCO, where applicable; and (3) cooperate with Owner in resequencing or otherwise modifying the Work and/or the Project Schedule to minimize the impact to the degree possible.
- F. **Termination for convenience.** Owner may at any time terminate this Agreement for its own convenience, with amounts owing to Contractor being limited to payment for compliant and completed Work-in-Place on the date of termination, which amounts will not include lost or anticipated profits or any other overhead or indirect costs not actually expended on the date notice of termination is issued by Owner. Should Owner terminate this Agreement for cause, but that cause later be deemed by a court or arbitrator to be insufficient or wrongful, then termination shall be deemed to be converted to termination for convenience.
- G. **Termination by Contractor.** Contractor may terminate this Agreement upon 30 days notice only if: (1) Owner suspends the Work for more than 60 consecutive days without cause and for reasons within Owner's control; or (2) amounts due and owing to Contractor remain unexcused and unpaid 45 days after the due date for payment (subject to Owner's right to legitimately withhold payment as otherwise provided herein).
- H. **Post-termination protection of Work.** Immediately upon receipt of notice of termination or suspension, Contractor shall: (1) discontinue installation of new Work; (2) install protective devices, covers, *etc.* so as to stabilize and protect the Work-in-Place structurally and otherwise; (3) notify Sureties and insurers of termination or suspension; (4) notify Subcontractors of the termination or suspension; and, where appropriate, (5) facilitate assignment of Subcontract as directed by Owner.
- I. **Remedies cumulative.** Owner's remedies set forth in this Agreement are cumulative and not exclusive or exhaustive. Owner's remedies are not limited to those express in this Agreement; and Owner may avail itself of one or more of the remedies as its interest may require, without waiving its right to subsequently invoke any other right or remedy to which it is entitled. Formal notice of Contractor's default is not a condition precedent to Owner's exercise of any right or remedy.
- J. **Return of Project-related documents.** Upon termination of this Agreement or completion of the Services, Contractor shall deliver to a place designated by OCA all printed and electronic copies of all

Project-related documents and files, as required under Article XIV, except for the archival copy permitted under that Article.

ARTICLE XI – INDEMNITY

- A. **Indemnity.** Contractor shall indemnify, hold harmless, and defend Owner and other indemnitees under this Article against any and all damages, liability, actions, judgments, claims, demands, charges, expenses, costs, fines, interest, and attorney’s fees incurred by Owner related to, in connection with, or arising out of Contractor’s performance, its failure to perform, its conduct, the Work, the Project, or this Agreement, including but not limited to those directly or indirectly resulting, in whole or in part, from Contractor’s performance pertaining to or actions concerning: (1) personal injury and property damage; (2) environmental damage, harms, or demands pertaining to, or involving, the introduction, installation, or abatement of hazardous materials; (3) infringement of copyright, trademark, or patent (collectively “intellectual property”) rights; (4) tortious conduct; (5) failure to timely pay Subcontractors or to cause others to pay Subcontractors of any tier; (6) liens filed against the Owner, the Project, or the Property; (7) failure to provide insurance coverage required under this Agreement or under law; (8) failure to provide Payment and Performance Bonds if required under this Agreement; (9) failure to honor warranty obligations; (10) economic loss suffered by Owner (or other non-parties to this Agreement if Owner’s rights or interests are at issue); (11) failure to abide by laws and provisions in this Agreement pertaining to Hazardous Materials; (12) Contractor’s unlawful conduct of any kind; (13) failure to post or provide copies of notices required under this Agreement or by law; (14) failure to forward to Owner original notices, demands, and notices received from nonparties; (15) Contractor’s failure to timely give written notice to Owner of claims, demands, Defective Work, failed inspections, inability to complete the Work within the Contract Time; (16) Contractor’s failure to timely comply with its financial, accounting, and other reporting obligations hereunder; or (17) any economic or other loss suffered by Owner or those affiliated with or related to Owner due in whole or in part to Contractor’s breach of this Agreement.
- B. **Effect of Owner’s sole active negligence.** Except for losses covered by a policy of insurance, the proceeds of which policy are obtained by Owner upon a loss, nothing in this Article requires Contractor to indemnify Owner for damages suffered by Owner that are proximately caused by Owner’s sole active negligence.
- C. **Attorney’s fees and costs.** Contractor’s duty to defend and indemnify shall apply whether or not disputes are settled before formal arbitration or litigation proceedings; and it applies to Owner’s first costs in defense. Owner may, in all cases, select legal counsel of its choice; and Contractor shall pay the reasonable fees and costs incurred by Owner related thereto. Owner is entitled to recovery of attorney’s fees, including applicable fees incurred in exercise of its right to indemnity and establishing or enforcing it.
- D. **Other obligations not released.** Contractor’s indemnification of Owner shall not be construed to reduce Contractor’s obligations or liability to Owner or nonparties; nor does it relieve Contractor of its other obligations under this Agreement or under law.
- E. **Insurance coverage not determinative of indemnity obligations.** Contractor’s indemnity obligation is not restricted by limits of insurance coverage.
- F. **Co-indemnitees.** Subject to the foregoing, co-indemnitees shall include: (1) Owner; (2) the OCA; (3) the Architect; (4) any persons or entities with interests in the Property on which the Project is being constructed other than lien claimants and claimants against a Bond; and (5) any other person or entity for whose loss or damages Owner is or allegedly is liable as a result of conduct or performance that invokes indemnity of Owner.

- G. **Supplemental indemnity provisions.** To the extent that Supplements to this Agreement contain express clauses that specifically limit and modify this Article XI, and the express terms of that clause are irreconcilably inconsistent and conflicting with those stated in this Article XI, the express modifying term in the Supplement shall be applied with respect only to the term that is expressly modified or limited, and the remaining provisions of this Article XI remaining fully enforceable and dominant. Determination of consistency or conflict shall be by OCA, made in good faith.

ARTICLE XII – INSURANCE

- A. **Insurance required.** As part of the Contract Price, Contractor shall procure and maintain the insurance coverage specified below and in accordance with the terms of Article I or coverage otherwise required by law (whichever is greater).
1. **Commercial General Liability (“CGL”) Insurance.**
 - a. Contractor shall have and maintain during the term of this Agreement, and for three years after Final Completion of the Work, commercial general liability insurance written on an “occurrence” basis, with limits of liability not less than:
 - i. \$1,000,000 each occurrence;
 - ii. \$2,000,000 annual aggregate; and
 - iii. \$1,000,000 separate aggregate for the products and completed operations coverage.
 - b. Owner is to be an “additional insured” on the Commercial General Liability policy for all liability arising from or related to or connected with the acts or omissions of the Contractor in connection with Contractor’s performance of this Agreement.
 - c. Contractor’s insurance is primary; and Owner’s insurance is excess and non-contributing.
 - d. Policy to include “tear out” endorsement with limits of \$1 million.
 2. **Business Auto Liability.** Contractor shall obtain and maintain during the period of this Agreement, business auto liability insurance with limits of liability in an amount no less than \$1,000,000 each person; and \$1,000,000 each accident – or greater amounts if required by law.
 - a. Policy to include both Uninsured Motorist Coverage and Underinsured Motorist Coverage; and shall cover all owned, non-owned, hired and borrowed vehicles.
 - b. Owner is to be an “additional insured” on the Business Auto Liability policy for all liability arising from or related to or connected with the acts or omissions of the Contractor in connection with Contractor’s performance of this Agreement. Contractor’s insurance shall be primary to any insurance available to Owner, and Owner’s insurance is excess and non-contributing.
 3. **Mobile equipment liability Insurance.** If mobile equipment is to be used by Contractor in the performance of this contract, Contractor shall obtain and maintain insurance for such equipment in an amount not less than \$1,000,000 each person, \$1,000,000 each accident – or greater amounts if required by law. Owner is to be an “additional insured” on the policy for all liability arising from or related to or connected with use of mobile equipment in construction in connection with Contractor’s performance of this Agreement. Contractor’s insurance shall

be primary to any insurance available to Owner, and Owner's insurance is excess and non-contributing.

4. **Workers Compensation and Employers Liability Insurance.** Contractor to provide workers compensation insurance for itself and its Subcontractors, with coverage as required by statute; and Employers Liability Insurance with limits of liability in an amount not less than \$1,000,000.
5. **Builders Risk Insurance.** Contractor shall purchase and maintain Builders Risk Insurance upon the entire Work and property at the site including bank equipment and other Owner's Equipment to the full insurable value thereof.
 - a. Contractor is responsible for obtaining accurate value information for all work and equipment provided, stored, or installed by Owner, or for Owner by Separate Contractors, but in no case will the estimated value be less than the amount indicated in Article I.
 - b. Owner shall be an "additional insured" on the policy, and the insurance shall be on an "all risk" basis, including, without limitation, the risk of fire, smoke, hail, theft, vandalism and malicious mischief, riots, moisture, mold, fungus, wind – or any combination thereof – with endorsements for flood or earthquake, if required under Article I.
 - c. If not covered under the all risk insurance or otherwise provided in the Contract Documents, the Contractor shall effect and maintain similar property insurance on portions of the Work stored off the site or in transit when such portions of the Work are to be included in a Payment Application, where otherwise approved.
 - d. The maximum deductible per occurrence on the policy shall not exceed that which is specified in Article I; and shall be paid by Owner in each instance.
6. **Environmental Insurance.** Contractor shall provide insurance for investigation, repair, and remediation of any pollution or contamination at or arising from the site, including any failure to abide by statutory and regulatory rules pertaining to erosion control, protection of waterways and other environmental concerns, with limits of liability of not less than \$1,000,000 per incident. Contractor shall also procure and maintain environmental impairment liability insurance for any and all claims relating to, arising from, or connected with impairment of the environment by any pollutants, contaminants, irritants, vapor, smoke, fumes, or fungus, with limits of liability of not less than \$1,000,000 per occurrence, claim or incident. Contractor's insurance shall be primary to any insurance available to Owner, and Owner's insurance is excess and non-contributing.
7. **Umbrella Liability Insurance.** Contractor shall have and maintain during the term of this Agreement, and for three years after Final Completion of the Work, \$5,000,000 annual aggregate umbrella liability coverage for Commercial General Liability, Business Auto Liability, Mobile Equipment and Employers Liability.
8. **Professional Liability Insurance.** To the extent that Contractor is required by the Contract Documents to provide services of licensed professional architects, engineers, surveyors, *etc.*, Contractor shall provide (or require those professionals to provide) professional liability insurance coverage for those services, on a claims-made basis, with limits of liability not less than \$1,000,000 per claim. Contractor's insurance shall be primary to any insurance available to Owner, and Owner's insurance is excess and non-contributing.

- B. **Proceeds of policies of insurance.** Except for those directly payable under the terms of the policy to nonparties whose personal property was damaged or nonparties who were personally injured by a covered event, insurer shall pay all proceeds of policies of insurance directly to Owner, who shall administer and distribute the funds in accordance with this Agreement. Contractor hereby consents to, and waives objection to, insurers' payment of policy proceeds to Owner.
- C. **Proof of insurance.** Before execution of this Agreement and before Work begins, Owner is to receive complete copies of certificates of insurance; and related endorsements to those policies.
1. **Coverage uninterrupted and continuing.** Upon any change of coverage or carrier, and between 30 to 60 days following the renewal date of each policy, Contractor shall provide updated Certificates of Insurance (and of all related endorsements) – timely submittal being a CONDITION PRECEDENT to Owner's obligation to pay.
 2. **Notice of cancellation or expiration of coverage.** Contractor shall, itself, send, and shall also cause its insurance agent to send, notice to Owner both: (1) 30 to 60 days before coverage lapses or expires or will be canceled or renewed; *and* (2) upon lapse, expiration, or cancellation of insurance coverage.
 3. **Coverage continuing.** The obligations under this paragraph shall continue for three years after the date of Final Completion for the following required insurance: commercial general liability, professional liability, and umbrella liability. For any other policies for which coverage is on a claims-made basis, the obligations under this paragraph shall continue for a period not less than eight years after the realized Date of Substantial Completion.
- D. **Insurers.** Insurance coverage required in this Article shall be provided by carriers with a minimum rating of "A-" by A.M. Best. Insurers to be licensed to provide the foregoing insurance in the state where the Project is located.
- E. **Subcontractors.** Subcontractors shall provide commercial general liability insurance, Business Auto Liability, and Workers Compensation Insurance, professional liability insurance (where applicable) and any other insurance coverage required by law. Before Subcontractor begins operations on the Project, Contractor shall obtain from each Subcontractor complete certificates of insurance (and all endorsements and riders thereto).
- F. **No waiver by Owner.** Should Work begin or continue in the absence of complete compliance with the requirements in this Article, Owner does not waive its right to subsequently enforce those requirements; and Contractor is not relieved of its indemnity and insurance-related obligations thereby.
- G. **Survival.** All Contractor's insurance-related obligations and Owner's rights under this Article, including obligation to give notice of lapse, expiration, and renewal, non-diminishing coverage amounts, and Owner's right to provide insurance, shall survive termination and completion of this Agreement.
- H. **Waiver of subrogation.** To the extent a Party to this Agreement suffers a loss, and has, in fact, recovered for that loss by receipt of proceeds of an above-required policy of insurance, that Party, and that Party's insurer, waive their right to subrogate their claims against the other Party or the other Party's officers, directors, members, managers, employees, partners, limited partners, shareholders, agents, attorneys, insurers, Sureties, assigns, successors and predecessors in interest, and any parent and subsidiary organizations related to any of them, whether or not the loss suffered was caused solely by the negligence of the recovering Party. This waiver of subrogation does not reduce or limit Owner's right to indemnification by Contractor, or otherwise, provided hereunder or under law.

- I. **Owner's right to provide coverage.** In addition to any other remedies Owner may have, should Contractor fail to provide insurance policies and coverage as required herein (or renewals thereof), Owner may, but is not required to, obtain insurance – Owner recovering the cost by issuing a unilateral Change Order reducing the Contract Price by an amount equal to the sum of the premiums paid by Owner and other costs incurred by Owner related to or arising out of Contractor's failure to provide coverage multiplied by the ACF specified in Article I.
- J. **Contractor assumes risk for lack of coverage.** In addition to, and not in lieu of, any other indemnification provided by Contractor hereunder, should Contractor fail to provide and maintain the coverage required hereunder or by law, Contractor is deemed to assume all risk of loss by Owner or Contractor and shall indemnify, defend, and hold Owner harmless for all Project-related losses, damages, costs, and attorney's fees, that are incurred.
- K. **Attorney's fees.** In addition to other indemnities provided by Contractor under this Agreement, Contractor agrees to indemnify Owner for all losses, costs, damages, and liability, including attorney's fees related to or arising out of Contractor's failure to provide insurance coverage as required herein.
- L. **No representation of adequacy.** By requiring the above-stated amounts of coverage, Owner is not representing that the limits of coverage specified are adequate to protect against loss or claims – and nothing in this Agreement limits Contractor's liability or its obligation to indemnify Owner for all damages, losses, or claims under Article XI.

ARTICLE XIII - PAYMENT AND PERFORMANCE BONDS

- A. **Payment and Performance Bonds.** Where required by designation in Article I, Contractor shall provide Payment and Performance Bonds (collectively "Bonds"), in a form provided by Owner substantially similar to the one supplied as part of Supplement G2, naming Owner as obligee, Contractor as Principal, and in a penal of sum equal to the Contract Price. Payment Bond shall secure payment of all Contractor's obligations related to or arising out of the Work. Performance Bond shall secure, for the benefit of the Owner, Contractor's complete and timely performance of the Work.
- B. **Surety.** Bonds shall be provided by Contractor and a construction surety ("Surety") that is licensed, recognized, and accepted as surety by agencies and authorities of the government of the state in which the Project is located and on the list of Sureties approved by the United States Treasury for issuance of bonds under the Miller Act or by the state in which the Project is located under its equivalent state statute, or Little Miller Act. Additional Surety-related requirements, where set forth in Supplement G2, are incorporated herein.
- C. **Changes.** Obligations of the Surety may change as Contractor's obligations change during the course of the Project in the manner established in this Agreement. It is solely the obligation of the Surety to continually apprise itself of the state of the Project, progress payments, ITC's, Change Orders, and other events, occurrences, *etc.* that affect its obligations to Owner; and Owner has no obligation to inform Surety of changes or Project status.
- D. **Owner communications with Surety.** Owner may, but is not required to, communicate directly with Sureties. Surety must make its own investigations with Contractor and others as needed to confirm and verify matters so communicated.
- E. **Consent of Surety to release of retainage presumed.** Unless Surety has given written notice to Owner of Contractor's default or has actually assumed performance of the Work on behalf of Contractor (upon notice given in advance to Owner and with Owner's consent) pursuant to the Performance Bond or otherwise, Surety shall, upon Contractor's Substantial Completion of the Work, promptly issue its consent without reservation to Owner's release of retainage as provided herein. In

the absence of the foregoing notice by Surety to Owner of Contractor's default, Surety's consent to partial releases of retainage is presumed.

- F. **No payments by Owner to Surety.** Owner shall not be required to make payments to, or give notice on behalf of, any claimant; nor shall Owner be liable for costs or expenses of any claimant; nor shall Owner be required to pay any amounts whatsoever to Surety, except for amounts remaining unpaid to Principal that remain unpaid within the Contract Price after Principal's Default and after Surety's approved assumption of performance of the Work pursuant to Surety's obligations under the Performance Bond.
- G. **Statutory Bonds.** The Bonds contemplated hereunder are statutory, and terms to the contrary in this Article XIII shall be reformed so as not conflicts with statutory requirements.
- H. **Surety(ies)'s duty to timely perform under Performance Bond.** Within 10 days after Surety's receipt of Owner's notice of default of Principal, Surety shall: (1) arrange, with the express written consent of the Owner, for Principal to immediately undertake and complete the Work; (2) obtain, with advance written approval of Owner, substitute performance by another contractor – in either case Surety shall indemnify Owner and pay Owner for all of Owner's costs and damages related to or arising out Principal's default, breach, or failure to perform; or (3) tender immediate payment to Owner of funds sufficient to compensate Owner for: (a) obtaining substitute performance of another contractor; and (b) all of Owner's costs, damages, and fees, expended in completing the Work. If Surety, after thorough investigation, determines that its performance is excused, it shall, not later than 10 days after receipt of Owner's notice of default of Contractor, deliver to Owner a written denial of liability, and shall provide to Owner copies of all documents, contracts, and other information upon which Surety bases its denial. Denial does not excuse Surety for any liability it may have; and, to the extent that the denial is wrongful or in error, Surety shall be deemed liable for all Owner's costs to complete the Work, Owner's damages resulting from Principal's default and from Surety's denial, and all attorney's fees related thereto. To the extent that state statutes and regulations governing performance of Surety(ies) is more rigorous and protective of Obligees, the more rigorous performance is required.

ARTICLE XIV – INTELLECTUAL PROPERTY AND CONFIDENTIALITY

- A. **Transfer of Contractor's Project-related intellectual property rights.** Contractor hereby transfers to Owner, upon their creation, all copyrights and other intellectual property rights in all drawings, shop drawings, submittals, designs, schedules, or in any other document or expression, whether fixed electronically or in print, that has been created, or will be created, for the Project by Contractor, or by Contractor's agents, employees, Subcontractors of any tier, and others employed directly or indirectly by Contractor.
- B. **Contractor's assurance of transfer of Subcontractor's rights to Owner.** Contractor shall obtain written transfers and assignments of copyrights and other intellectual property rights to Owner from each Subcontractor, and shall supply adequate and legally sufficient separate consideration for these transfers, to be given upon Subcontract execution.
- C. **Royalties, fees, and licenses.** Contractor shall pay all royalties, license fees, and other costs to obtain the necessary licenses, copyrights, patent rights, and other instruments of authority necessary to perform the Work and to procure and use all materials, equipment, and assemblies in it.
- D. **Indemnity.** To the extent that Contractor fails to obtain and provide copyright and other intellectual property rights as required in this Agreement, Contractor shall indemnify, hold harmless, and defend Owner for any and all demands, damages, claims, costs, and attorney's fees resulting from the failure

to obtain intellectual property rights, claims of infringement of intellectual property rights, third-party demands for royalties, *etc.*, regardless of whether litigation or arbitration are involved.

E. **Terminable license-back to Contractor.** Upon execution of this Agreement, and during the term of this Agreement, Owner grants to Contractor a terminable non-exclusive license to those Project-related copyrights or other intellectual property rights held by Owner or otherwise obtained by Owner during the course of the Project, subject to the following:

1. The license granted is strictly limited to permit reproduction, modification, and distribution of Project-related documents by Contractor and Subcontractors – but only to the degree necessary and required for them to perform the Work under this Agreement for this Project, and for no other;
2. Contractor and Subcontractors shall not further reproduce, modify, or distribute Project-related documents, except that they may provide copies of Construction Documents to lower-tier subcontractors for use on this Project only, if the terms of this license are imposed upon them by written agreement;
3. All printed and electronic copies of Project-related documents shall be delivered to Owner upon the termination of this Agreement or the Final Completion of this Work, whichever comes first, except that Contractor may keep one record set of printed documents for its records (but not for reproduction or distribution);
4. No other licenses are expressly or impliedly granted by Owner;
5. Nothing in this Agreement shall be construed as a transfer or assignment by Owner of its exclusive copyrights or other intellectual property rights;
6. Copyrights licensed hereby shall not be sub-licensed or transferred; and attempts to do so shall, in and of itself, immediately terminate the license granted; and
7. License granted to Contractor is terminable by Owner without notice upon Contractor's breach of this Agreement; and, in all other cases, it is terminable by Owner immediately upon notice to Contractor thereof.
8. Contractor may not further license or sublicense copyrights or other intellectual property rights licensed to it by Owner; and attempts to do so shall operate as a termination of all licenses granted to Contractor, effective upon the attempt.

ARTICLE XV - SPECIAL CLAUSES

A. **Limitations and prohibitions on assignment.** Contractor's Work is personal in nature. Except as expressly provided in Article VII and in this Article, Contractor shall not assign or delegate its Project-related obligations, duties, and rights under this Agreement.

1. Nothing in this Agreement shall prevent Contractor from pledging otherwise due and payable funds earned (exclusive of funds earned for Work by Subcontractors or others) as collateral to commercial lenders, provided, however, that neither that pledge, nor any other action or commitment by Contractor, shall create a right of action by a commercial lender (or any other non-party to this Agreement) against Owner.
2. Contractor may request the consent of Owner to assignment of this Agreement to a bona fide successor in the interest to Contractor's business organization ("Successor") – but only if: (a) Contractor's entire business organization is transferred to Successor; (b) Owner's interests are preserved and undiminished as a result; (c) Successor fully accepts the obligations and duties

of Contractor hereunder; (d) Contractor remains fully liable and responsible with the Successor for all duties and obligations under this Agreement; (e) all right and title in the Work-in-Place is vested in the Owner; (f) the property on which the Project is built (the "Property") and the improvements to it are free and clear of claims of lien, notices of *lis pendens*, or any legal burden or encumbrance related directly or indirectly to Contractor or Successor; (g) Owner's continued and uninterrupted enjoyment of rights and benefits related to Contractor's Bonds, guarantees, policies of insurance, licenses, indemnity obligations, *etc.*, is agreed and affirmed in writing by the respective Sureties, guarantors, insurers, licensors, indemnitors, *etc.* in advance of the assignment, and Owner has received bona fide copies of all instruments effecting those Bonds, guarantees, policies of insurance, licenses, and indemnity agreements pertaining to Successor; (h) any lenders involved in the Project have approved and affirmed the assignment, the terms stated in this paragraph, in writing; (i) Contractor has fully paid all Subcontractors from funds already received and there are no outstanding unpaid claims against the Property, the Project, the Owner, or the Contractor; and (j) the Work is progressing according to the Project Schedule, and Milestone Dates have been met. Notwithstanding the foregoing, Owner may, in its sole discretion and for any reason whatsoever, withhold consent.

3. Contractor's attempted assignment of this Agreement, except as expressly permitted herein, shall constitute its material breach of this Agreement.

B. **Environmental protection.** Contractor shall perform the Work in accordance with all laws, ordinances, and regulations pertaining to the Project and protection of the environment; and shall employ best practices and other necessary means to prevent unlawful release of sediments and uncontrolled runoff from the Project site.

1. Contractor to provide all necessary monitoring, testing, and reporting services with respect to soil erosion, runoff, and environmental protection.
2. All required environmental testing and prevention measures are included within the Contract Price; except that, where the Owner incurs retesting, abatement, or remediation costs or fines or penalties as a result of Contractor's breach of this Agreement or violation of applicable laws and regulations, cost incurred by Owner for retesting and remediation shall be deducted by unilateral Change Order from the Contract Price, with the amount to be deducted equal to the sum of the costs incurred by Owner related to the breach or violation times the ACF specified in Article I.

C. **Hazardous materials.** Hazardous materials are those defined as such by law and in regulations of the U.S. Environmental Protection Agency or equivalent state authorities, as well as other materials that are known to potentially cause sickness, injury, or other dangerous conditions when brought within proximate contact with human beings ("Hazardous Materials"). Among materials considered Hazardous materials hereunder, are polychlorinated biphenyl materials ("PCB's") and asbestos. Contractor shall perform the Work in accordance with all laws, ordinances, and regulations pertaining to environmental protection and Hazardous Materials.

1. **Lawful introduction.** Contractor shall not introduce Hazardous Materials onto the Project site, unless: (a) the Hazardous Materials are expressly specified in the Contract Documents; and (b) Contractor has posted and filed all related documents, notices, materials information sheets, *etc.* required by law or the Contract Documents, and adhered to all product safety measures required or recommended by the manufacturer or by law.
2. **Identification, precaution, and notice.** Should Contractor encounter (a) non-water liquids, semi-solids, or solid materials in or above the ground, whether or not those materials are in

containers; (b) foul-smelling deposits; (c) buried human or animal remains or refuse containing manufactured materials or building debris; (d) fibrous or fuzzy materials applied to existing surfaces; (e) non-ceramic flooring tile appearing to have been installed more than 10 years earlier; (f) mold, bacteria, fungus, mildew, moisture and water vapor in unventilated cavities and spaces, and any discoloration, odor, or other indication of the presence of moisture-related contamination; (g) any other circumstance out of the ordinary involving covered, hidden, or buried debris; or (h) any other known or suspected Hazardous Materials; it should exercise heightened caution and shall immediately:

- a. Stop Work in the affected area, removing people from it, and taking necessary steps to avoid inadvertent entry into the area;
- b. Notify the OCA by telephone, fax, and e-mail;
- c. Photograph the material or condition suspected to be hazardous, and record the circumstances, location, and date of the discovery, noting those who were present at the discovery;
- d. Cooperate with OCA's procurement of the services of persons qualified to assess the discovery or abate the condition; and
- e. Cooperate as necessary and requested by OCA with public safety and health officials having jurisdiction over the Project.

3. **Abatement.** In instances where abatement of hazardous materials is a result of Contractor's introduction of hazardous materials to the Project site in contravention of this Agreement or applicable law, Owner may elect to engage a Separate Contractor to abate the hazardous materials, and to issue a unilateral Change Order reducing the Contract Price by an amount equal to the sum of the cost of remediation, plus all others fees, damages, losses incurred by Owner as a result of Contractor's unauthorized introduction of Hazardous Materials, paid by Owner, multiplied times the ACF specified in Article I. Contractor shall cooperate with Separate Contractors or others engaged by Owner to perform abatement and disposal, and resequence the Work accordingly.
4. **Equitable adjustment.** As an express exception to contrary terms in this Agreement, if Work must be suspended or resequenced as a result of discovery of Hazardous Materials requiring abatement, to the extent that Contractor's cost or the time to perform are materially increased due to their discovery, Owner may adjust the Contract Price, Contract Time and Project Schedule. This provision shall not apply if Contractor has: (a) failed to give immediate notice to OCA upon its discovery of probable hazardous materials; (b) unlawfully introduced hazardous materials to the Project site; (c) failed to adhere to the safety provisions required in this Article; (d) improperly or unlawfully disturbed or disposed of the hazardous materials; or (e) worsened, aggravated, or otherwise contributed to the problem or the cost of its abatement or remediation by negligence, lack of adherence to statutes or regulations, or failure to apply due diligence.

D. **Electronic Communications and Software.** Documents to be submitted digitally must be provided to Owner in a format readable using software designated by Owner ("Software"). Contractor's cost to procure, license, maintain, use, and update Software is included in the Contract Price.

1. Unless another Software is approved by OCA, textual, narrative documents (*e.g.*, specifications, correspondence, RFI's, *etc.*) are to be digitally submitted using MS Word or MS Excel software by MicroSoft.

2. Unless another Software is approved by OCA, Scheduling Software shall be Primavera, latest version.
3. Communications Software: *reserved*

E. **Employment policies.** Contractor shall maintain policies of employment as follows:

1. Neither Contractor nor any Subcontractor of any tier shall discriminate against any employee or applicant for employment because of race, religion, color, sex, national origin or age. Contractor shall take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, religion, color, sex, national origin or age. Such action shall include, but not be limited to, the following: Employment, upgrading, demotion, or transfer, recruitment or recruitment advertising, layoffs, selection for training, including apprenticeship. Contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth the policies of non-discrimination.
2. Contractor and Subcontractors of any tier shall, in all solicitations or advertisements for employees placed by them or on their behalf, state that all qualified applicants will receive consideration for employment without regard to race, religion, color, sex, national origin, or age.
3. It is the policy of Owner to promote and increase the participation of minority and women's business enterprises in its purchasing and contractual business. Any subcontracting activity associated with this Agreement will be reported to Owner as required in hereunder, specifying dollars spent, MBE/WBE firm and description of product/service, using the form supplied as part of Supplement B.
4. By Contractor's representing itself or one or more of its Subcontractor(s) as a minority - or woman-owned business, Contractor agrees that classification or misrepresentation of, or failure to report a disqualifying change in, the MBE/WBE status of Contractor or any Subcontractor utilized by Contractor; or Contractor's failure to comply in good faith with any MBE/WBE utilization goals established by Contractor's Subcontracting Plan, or Contractor's failure to cooperate in any investigation conducted by Owner or by Owner's agent, to determine Contractor's compliance with this section will constitute a material breach of this Agreement. In the event of any such breach, Owner may, at its option, terminate this Agreement; and Contractor waives all claims related to such termination.
5. As used in this section, MBE is defined as a business that is at least 51% owned by one or more minority (Black, Hispanic, Native American, Asian, Filipino, and Polynesian) U.S. Citizens or permanent residents. WBE is defined as a business that is at least 51% owned by one or more non-minority women who are U.S. citizens or permanent residents. In the base of any publicly-owned business, at least 51% of the stock must be owned by one or more minorities or non-minority women. In each case, the management and daily operations must be controlled by one or more minorities or non-minority women. Foreign-owned firms operating in the United States are not included in these definitions.
6. Owner supports the use of minority vendors as Subcontractors and vendors whenever prudent and practical. Contractor to report to Owner on a quarterly basis all cost to minority vendors (known to Contractor) that are related to transactions between Owner and Contractor.

F. **Contractor's Confidentiality Agreement.** Contractor warrants and that it will be bound by Contractor's Confidentiality Agreement, the form of which is provided by Owner, and is attached as Supplement H. The remedies provided to Owner in the Confidentiality Agreement are not exclusive,

nor do they diminish the rights and remedies available to Owner in this Agreement. Nothing in the Confidentiality Agreement or this Agreement shall be construed to create a license in favor of Contractor or enlarge Contractor's rights hereunder. Contractor agrees to treat all Project-related information and documents as Owner's Confidential Information.

1. Contractor's Confidentiality Agreement binds Contractor, its Subcontractors, and all lower-tier sub-subcontractors, and it shall survive the termination of this Agreement or completion of the Work.
2. Law governing application and interpretation of the Contractor's Confidentiality Agreement shall be as provided in the Law Governing provision in Article I.
3. Contractor agrees that Owner will be irreparably harmed by breach of the Confidentiality Agreement; and Contractor hereby waives any future objection to Owner's requests for judicial injunctive relief due in the event of breach, invocation of which will not subsequently deprive Owner of its unilateral right to elect arbitration in accordance with Article IX.
4. To the extent that Contractor's Confidentiality Agreement provides for heightened confidentiality of Owner's Confidential Information or enlargement of remedies or rights in favor of Owner, they shall apply in addition to any protective provisions or more limited rights and remedies the Owner may have.
5. Contractor shall avoid contact and communications with news media or other sources of mass publication or information distribution with respect to the Project.
6. Contractor shall not include in its sales brochures, websites, or other publication information with respect to the Project; except that Contractor may show an exterior picture of the Project, indicating that it was constructed for Owner, and when it was constructed. No other Project-related information may be published, reproduced, or distributed by Contractor.

ARTICLE XVI – NOTICES AND REPRESENTATIVES

- A. **Notices.** Notices and demands required under this Agreement shall be delivered to the persons undersigned for their respective Party by statutory Overnight Delivery. Electronic delivery alone of required notices that potentially affect Contract Price, Contract Time, or Project Schedule is insufficient to satisfy this requirement.
1. **Duplicate delivery.** Where two means of delivery are specified conjunctively (*e.g.*, where documents are required to be send by fax *and* by Overnight Delivery), both modes are required.
 2. **Duty to promptly forward original notice documents.** Contractor shall, by Overnight Delivery, forward to OCA all original copies of any notices, demands, or claims of any kind that it receives from Subcontractors and other nonparties, including all shipping packages, envelopes, delivery receipts, attachments and any other document received with the notice, demand, or claim, providing with those documents a description of how the notice, demand, or claim was received, when, and from whom.
 3. **Timely delivery of printed sworn documents.** Payment Applications, certifications, waivers, releases, and other documents that must be sworn or notarized must be submitted in both printed and digital form, and both delivered within the time permitted.
 4. **Statutory notice provisions control.** The alternative means of contractual notice provided for in this paragraph shall not apply in instances in which statutes or other laws of a particular jurisdiction require notice by Certified US Mail, Registered US Mail, filing and recording

with a court clerk, or some other means specified by statute in order to record, preserve, perfect, validate, or maintain a claim of lien or a claim on a bond. Nothing in this Agreement shall be construed to enlarge the means by which service of notice must be achieved from that specified by law; and Owner does not waive service-related defenses to claims, including but not limited to those that require strict construction of service requirements pertaining to liens and Bonds.

- B. **Authority of OCA.** OCA is authorized to act in behalf of Owner with respect to day-to-day Project matters. Only the undersigned (or someone else expressly appointed by Owner in writing as authorized designee) shall have the authority to modify this Agreement by signing Change Orders – except that OCA may issue unilateral Change Orders as provided herein. No other person or entity is authorized to bind Owner or act in Owner’s behalf.
- C. **Authority of CDR.** Both the Contractor’s Superintendent and the CDR are authorized to act in behalf of Contractor with respect to day-to-day matters relating to this Agreement and Project. Change Orders modifying Contract Time, Contract Price, or Project Schedule must be signed in writing by the person signing below in behalf of Contractor (or someone expressly appointed by that person in writing as its authorized designee of Contractor).
- D. **Authority to execute this Agreement.** The persons signing below represent that they are authorized to represent and bind their respective Party to this Agreement, and that their doing so will not breach any law, regulation, by-law, or obligation of corporate governance.

—
SO AGREED by the Parties:

<p>_____ (<i>insert Contractor's name</i>)</p> <p>_____</p> <p><i>signature of authorized representative</i></p> <p>_____, _____</p> <p><i>representative's printed name title</i></p> <p>_____</p> <p><i>Contractor's federal tax identification number</i></p> <p>_____</p> <p><i>date signed</i></p>	<p style="text-align: center;">Branch Banking and Trust Company</p> <p>_____</p> <p><i>signature of authorized representative</i></p> <p>_____, _____</p> <p><i>representative's printed name title</i></p> <p>_____</p> <p><i>date signed</i></p>
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