

Tony Baldwin, Ed.D., Superintendent

175 Bingham Road, Asheville, NC 28806  
P 828.255.5921 F 828.255.5923  
www.buncombe.k12.nc.us

MEMO TO: Dr. Tony Baldwin  
Superintendent

FROM: Tim Fierle, AIA  
Director of Facilities



DATE: April 24, 2019

**SUBJECT: Haw Creek Elementary School Additions and Renovations Project:  
Approval of Construction Manager At Risk Contract**

Hickory Construction was approved by the Board of Education as the selection for Construction Manager at Risk (CMAR) for the Haw Creek Elementary School Additions and Renovations Project. Subsequently negotiations for the contract for CMAR services have successfully concluded.

The contract will allow pre-construction cost estimating, analysis of constructability, and schedule preparation. The contract addresses two possible scenarios for construction phasing, dependent upon funding availability. If funding for both the addition and renovation work is not received at one time, then the project will become phased resulting in an extended construction duration, increased construction management costs and likely increased construction costs due to inflation.

Upon receipt of construction funding, pre-qualification of subcontractors will commence prior to bidding. Exhibits referenced in the contract are available upon request in the Facilities Office.

**RECOMMENDATION:** Authorize execution of the Construction Manager At Risk (CMAR) contract for the Haw Creek Elementary School Additions and Renovations Project with Hickory Construction limited to 75% of preconstruction services.

CC: Mr. Chris Campbell, Board Attorney  
Ms. Deborah Frisby, Chief Financial Officer  
Mr. Joe Hough, Assistant Superintendent  
Ms. Tiffany McCants, Purchasing & Risk Control Manager  
Mr. Dean Shatley, Board Attorney  
Ms. Tina Thorpe, Assistant Finance Officer/Capital Outlay Budget Facilitator  
Mr. Clark Wyatt, Director of Maintenance

Attachment: CMAR Contract

**AGREEMENT FOR CONSTRUCTION MANAGEMENT  
AT RISK SERVICES**

NOW COME the Parties, **THE BUNCOMBE COUNTY BOARD OF EDUCATION** (“Owner”), on the one hand, and **HICKORY CONSTRUCTION COMPANY** (“CM”), on the other hand, effective March 7, 2019, and enter into this **AGREEMENT FOR CONSTRUCTION MANAGEMENT AT RISK SERVICES** (“Agreement”) for Haw Creek Elementary School: Additions and Renovations (“Project”) for which Novus BEW Asheville, PLLC (“Designer”) is providing architectural and design services.

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**APPENDICES**

- A. DESIGNER’S CONTRACT
- B. PROGRAMMATIC PARAMETERS
- C. BOUNDARY SURVEY PLATS OF THE PROJECT SITE
- D. DESIGNER'S PROJECT SCHEDULE
- E. GENERAL CONDITIONS CATEGORIES
- F. DISPUTE RESOLUTION PROCEDURES
- G. REQUEST FOR QUALIFICATIONS
- H. MINORITY, HISTORICALLY UNDERUTILIZED, AND SMALL BUSINESSES

The Owner and CM, in consideration of their mutual covenants herein, agree as set forth below:

## **1. Authorization and Statement of Intent**

- 1.1. Statutory Authority: This Agreement is entered into in accordance with and shall be governed by N.C. Gen. Stat. § 143-128.1 and other sections of Chapter 143, Article 8 and Article 3D of the North Carolina General Statutes relating to construction management at risk contracts.
- 1.2. Management Services: The CM covenants with the Owner to furnish professional construction management services during the Project. In broad terms, the CM will perform preconstruction and construction services, which will include preparation and coordination of bid packages, scheduling, cost control, change order proposal and payment application reviews, efficient value engineering reviews and project management, business administration, field supervision and all other services required by this Agreement. The CM further covenants that it will strive to put the interests of the Project first and finish the Project on time and within budget. Reports and reviews required of the CM under this Agreement will be performed rigorously and will be presented in formats approved by and acceptable to the Owner.
- 1.3. Guaranteed Maximum Price (“GMP”): The CM shall, in accordance with law and this Agreement, guarantee the cost of the Project by giving a GMP on the terms and by the dates set forth in this Agreement. Once the GMP is fixed by the CM, the GMP may only be changed in accordance with the terms of this Agreement.
- 1.4. Codes and Standards: The CM shall use its best efforts to complete the Work of the Project in the best and most expeditious, economical manner consistent with the interests of the Owner, and in strict conformity with the Contract Documents, including all reasonable implications therein, and to furnish its skill and judgment with due care in accordance with applicable federal, state, and local laws, codes, and regulations that are in effect during the term of this Agreement and govern performance of the Work by the CM.
- 1.5. Licenses: The CM represents and warrants that it is qualified and in good standing to do business in the State of North Carolina and that it possesses all of the licenses and permits required to provide the services required by this Agreement, including without limitation an unlimited North Carolina General Contractors License that is either unclassified or is classified for the Work undertaken by the CM pursuant to this Agreement.

## **2. Definitions and General Requirements**

- 2.1. Terms used in this Agreement shall have the meanings given below, unless the context requires a different interpretation or meaning. Additional terms are defined elsewhere in the Agreement as they occur.
- 2.2. Agreement: This Agreement between the Owner and the CM, including all modifications and addenda to this Agreement during the course of the Project.
- 2.3. Divisions of Work: The Divisions of the Work will be determined by the Designer in the Project specifications. Each of the Divisions may contain multiple bid packages. Bid packages are documents prepared by the CM in cooperation with the Designer and the Owner for the purpose of accurately and completely defining and procuring the Work to be performed by Contractors. Such documents may include invitations to bid, instructions to bidders, forms of proposals, contract terms and conditions, forms of bonds, Drawings and Specifications that describe the scope of Work for a particular portion of the Work, plus any other documents that the CM believes are appropriate for a bid package.
- 2.4. Contract Documents: The Contract Documents include this Agreement, plus the drawings and specifications prepared by the Designer, plus allowable modifications to the Contract

Documents. The Contract Documents are complementary; what is called for by one is as binding as if called for by all. If the CM finds a conflict, error or discrepancy in the Contract Documents, the CM shall notify the Designer in writing before proceeding with the Work affected thereby. In resolving such conflicts, errors and discrepancies, the Contract Documents shall be given preference in the following order: modifications to the Agreement, the Agreement, addenda, Specifications and Drawings. Figure dimensions on drawings shall govern over scale dimensions, and detailed drawings shall govern over general drawings. Any Work that may reasonably be inferred from the Contract Documents as being required to produce the intended result shall be supplied whether or not it is specifically called for. Work, materials or equipment described in words which, so applied, have a well-known, technical trade meaning shall be deemed to refer to such meaning and to incorporate any recognized standards which are a part of such meaning.

- 2.5. Contractors: Contractors include all persons, including contractors, subcontractors, material suppliers and equipment lessors who enter into contracts with the CM to provide and perform portions of the Work.
- 2.6. Cost of the Work: shall include all amounts paid by the Owner to the CM to reimburse the CM for payment to Contractors for the Work of the Project as described in the Drawings and Specifications developed by the Designer. The Cost of the Work shall be adjusted for all discounts obtained on payments by the CM or any Contractor, which shall be for the benefit of the Project and the Owner. Trade discounts, rebates, refunds, and amounts received from sales of surplus or salvaged materials and equipment shall accrue to the Owner, and the CM shall make provisions so they can be secured and will reduce the GMP accordingly. Amounts which accrue to the Owner in accordance with this paragraph shall be accounted for and credited to the Owner as a deduction from the Cost of the Work. The Cost of the Work shall not include the following:
  - 2.6.1. The CM's Fixed Fee, the General Conditions, the bond cost for the CM and the Project Contingency;
  - 2.6.2. All professional fees paid by the Owner to the Designer or other consultants retained directly by the Owner; and
  - 2.6.3. All costs paid directly by the Owner to contractors or suppliers retained directly by the Owner and outside the scope of the GMP.
- 2.7. Designer: Designer refers to the prime architect for the Project, collectively with all sub-consultants retained by the Designer to perform the services required of the Designer under its contract with the Owner. The Designer for the Project is Novus BEW Asheville, PLLC. A copy of the Designer's contract with the Owner is attached to this Agreement as Appendix A.
- 2.8. Drawings and Specifications: Drawings and Specifications are the graphical and textual work product of the Designer that describes the Project and the Work of the Project. Unless the context clearly indicates that a reference to Drawings and Specifications means draft or preliminary Drawings and Specifications, the term shall refer to Drawings and Specifications that bear the seal of the Designer and have been released for permitting and construction. Drawings and Specifications includes all addenda and revised Drawings and Specifications issued during the course of the Project.
- 2.9. Final Completion: Final Completion refers to that stage in the Project when all Work has been completed, the Owner has taken beneficial occupancy, all punch lists have been completed, all as-built drawings, operations and maintenance manuals, warranties and other Project records have been delivered, all waivers and releases have been negotiated and executed, all

consents of surety to final payment have been delivered, and all other requirements of this Agreement relating to Final Completion have been met, so that Final Payment to the CM can be made by the Owner. Final Completion is a critical date for the determination of Liquidated Damages.

- 2.10. The GMP: The GMP is the sum of the Cost of the Work, the CM General Conditions, the Project Contingency and the CM Fixed Fee. The procedure for fixing the GMP shall be as set forth in this Agreement.
- 2.11. Program: The Program is the document entitled Programmatic Parameters for the Project, a copy of which is attached to this Agreement as Appendix B.
- 2.12. Project: The term "Project" when used in this Agreement shall mean the total design, development, renovation and construction of Haw Creek Elementary School, of which the Work is a part. The Project is defined in more detail in the Program.
- 2.13. Project Site: The Project Site consists of Haw Creek Elementary School. Boundary survey plats of the land are attached to this Agreement as Appendix C.
- 2.14. Substantial Completion: Substantial Completion is the point in time when the Work, as determined by the Designer and the Owner, is sufficiently complete in accordance with the Contract Documents that it can be utilized by the Owner for its intended use, and all necessary permits, certifications and permissions for beneficial occupancy and utilization having been obtained by the CM. Substantial Completion is a critical date of the determination of Liquidated Damages.
- 2.15. Value Engineering: Value Engineering is the process of reviewing the cost of major construction components of the Project and evaluating the cost savings that might be achieved by substituting alternative materials and systems while still achieving stated design, engineering, and functional objectives and requirements. Value engineering proposals and other substitution proposals are not a substitute for properly documented and executed change orders or other modifications of the Contract Documents.
- 2.16. Work: The term "Work" required for the Project used in this Agreement shall mean the various parts of total construction to be performed under this Agreement, generally including labor, materials, supplies equipment and related services provided by Contractors or, in appropriate circumstances as defined in this Agreement and N.C. Gen. Stat. § 143-128.1, by the CM.
- 2.17. Designer's Project Schedule: The Designer has prepared a preliminary schedule of events for the Project, a copy of which is attached to this Agreement as Appendix D.
- 2.18. General Conditions Costs: The CM's General Conditions Costs are those items and categories listed in Appendix E attached to this Agreement.
- 2.19. Attached to: Whenever a document, drawing, or other writing is attached to this Agreement or is referred to by reference in this Agreement, it is deemed to be incorporated into this Agreement as a part thereof.
- 2.20. Master Schedule: The scheduled provided to the Owner from the CM when the CM provides the GMP. The Master Schedule shall be the schedule for the Project and must align with the Designer's Project Schedule. See also Section 6.11.2.

### **3. Responsibilities of the Owner**

- 3.1. In addition to the other responsibilities assumed by the Owner under this Agreement, the Owner shall have the following responsibilities:

- 3.2. Program: The Owner shall provide to the CM complete information regarding the Owner's requirements for the Project as delineated in the Designer's Schematic Design and translation of Owner construction standards.
- 3.3. Decisions: The Owner shall examine information submitted by the CM and shall render decisions thereon so as not to delay the progress of the Work.
- 3.4. Approvals: The Owner shall furnish required information and approvals and perform its responsibilities and activities in a timely manner so as not to delay the progress of the Work and to facilitate orderly progress of the Work in cooperation with the CM, consistent with this Agreement, and in accordance with the planning and scheduling requirements and budgetary restraints of the Project.
- 3.5. Designer: The Owner has retained a Designer whose services, duties and responsibilities are described in a written agreement between the Owner and Designer (see Appendix A). The services, duties, and responsibilities of the Designer set out in the agreement between the Owner and Designer shall be compatible and consistent with this Agreement and the Contract Documents. The Owner shall, in its agreement with the Designer, require that the Designer perform its services in cooperation with the CM, consistent with this Agreement and in accordance with the planning, scheduling and budgetary requirements of the Project as determined by the Owner. The terms and conditions of the agreement between the Owner and the Designer shall not be changed or waived without written notice to the CM provided at the time of the change or revision.
- 3.6. This Project is contingent on funding from Buncombe County through the School Capital Fund Commission ("Commission"). At this stage, the Commission has funded appropriations through Stage One of the Pre-construction and Procurement Phase (see Section 7.2.1). All work beyond Stage One of the Pre-construction and Procurement Phase is conditioned on the receipt of further appropriations from the Commission. The CM shall not commence with any work beyond Stage One of the Pre-construction and Procurement Phase unless and until it receives a written notice to proceed from the Owner. If Owner does not receive any further appropriations from the Commission, Owner may terminate this Contract and the CM shall be entitled to compensation up to the date of termination.
- 3.7. Milestone Schedule: In addition to the Project Program and budget, the Owner will provide the CM with lists or schedules of any dates that are critical to the Owner, such as vacancy and occupancy dates, meeting dates and funding deadlines.
- 3.8. Permits and Approvals: Except as set forth in Article 13, with the cooperation and assistance of the CM and the Contractors as set forth in this Agreement, the Owner shall in a timely manner secure, submit and pay for necessary approvals, easements, assessments, permits and charges required for the construction, use or occupancy of permanent structures, or for permanent changes in existing facilities.
- 3.9. Communication with Contractors: The Owner, its representatives and consultants, including Designers, shall communicate with the Contractors only through the CM.
- 3.10. Copies of Notices and Communication: The Owner shall send to the CM and shall require the Designer to send to the CM copies of all notices and communications sent to or received by the Owner or Designer relating to the Project.
- 3.11. Owner's Representative: The Owner designates its Director of Facilities Planning to serve as the Owner's point of contact and to act on the Owner's behalf with respect to the Project. This representative shall be available during working hours and as often as may be required to render decisions and furnish information in a timely manner. The Owner's Representative

shall have access to the site of the Project at all times, subject only to any safety and security plan implemented by the CM with the approval of the Owner. The CM acknowledges that more than one individual might be designated as the Owner's Representative at different times and for different purposes. The CM also acknowledges that some changes to this Agreement and to the Project might require authorization by the County Commissioners and execution by the County Manager in addition to authorization by the Owner's Representative.

- 3.12. Payments to CM: The Owner shall make payments to the CM on the basis of the Contractor's payment applications that are certified by the Designer. The Owner shall not be bound by the payment certifications by the Designer and retains the right to make its own determinations as to whether payment is due and in what amount.

#### **4. Responsibilities of the Designer**

- 4.1. In providing construction management services described in this Agreement, the CM shall maintain a working relationship with the Designer and the CM shall cooperate with and assist the Designer in the performance of the Designer's duties relating to the Project. The written Agreement between the Owner and the Designer (see Appendix A and especially Articles 3.0.1 and 3.0.2 therein) likewise requires the Designer to cooperate with and assist the CM. The Designer is solely responsible for the Project design and shall perform in accordance with its agreement with the Owner. Nothing in this Agreement shall be construed to mean that the CM is responsible for the design of the Project or that the CM assumes any of the contractual or customary duties of the Designer or any other persons or parties not specified by this Agreement. The CM and the Designer shall each be provided with a copy of the other's contract with the Owner and the CM shall familiarize itself with the provisions of the Designer's contract to enable the CM to fulfill its obligation to cooperate with and assist the Designer.
- 4.2. Drawings and Specifications: The Designer shall prepare the overall Drawings and Specifications for the Project and the Work.
- 4.3. Specifications and Drawings for the Project: The Designer shall cooperate with the CM to divide the Drawing and Specifications for the CM's bid packages for the Contractors.
- 4.4. Minor Changes: The Designer shall have the authority to order minor changes in the Project consistent with the intent of the Drawings and Specifications and not involving an adjustment in the GMP or change of the construction completion date. Such changes may be effected by written order only.

#### **5. Separate Contracts by Owner**

- 5.1. Tests and Inspections: The Owner reserves the right to retain the services of geotechnical engineers, environmental engineers or geologists, testing and materials inspectors, special inspections inspectors, and commissioning agents (generally referred to in this Agreement as "Consultants") to help the Owner meet its responsibilities under the Agreement and to monitor the quality of construction by the CM and the Contractors.
- 5.2. Work of the Project: The Owner reserves the right to contract separately with other entities to complete portions of the Work of the Project, or to deploy its own employees to complete portions of the Work.
- 5.3. Furniture, Fixtures, Equipment and Signage: The Owner may elect to contract separately for furniture, fixtures, equipment, signage, and other similar building components. Plans and specifications for furniture, fixtures, equipment, signage and other such components shall be prepared by the Designer in conjunction with the Owner, and communicated to the CM.

- 5.4. If the Owner contracts separately with any other parties, the Owner shall cause all such agreements to be compatible and consistent with this Agreement. Each of the agreements shall include waiver of subrogation as required herein. The CM agrees to cooperate with the Owner and its separate contractors and coordinate the Work of all parties, including the Owner's forces or separate contractors. Provided the CM has reasonable advance notice of the identity and duties of separate contractors, the CM agrees to include coordination and support of the Owner's separate contractors in the Master Schedule and in its General Conditions costs. Disputes or conflicts between the CM, the Owner and any separate contractors shall be subject to dispute resolution in accordance with the dispute resolution provisions in Appendix F.

## 6. CM Services

- 6.1. The CM shall perform the services described in this Agreement. The sequence in which the services are provided shall be as set forth in the approved Construction Management Plan.
- 6.2. General Scope of Services: The general scope of services required of the CM is described in Request for Qualifications issued by the Owner and attached to this Agreement as Appendix G.
- 6.3. Duration: The commencement date for the CM's services shall be the date of execution of this Agreement by the Owner as stated herein or the date on which the Owner issues to the CM a written instruction to proceed with services, whichever is later. The duration of the CM's services under this Agreement shall be from the date of this Agreement through the issuance of the certificate of Final Completion, or to the end of the one-year CM warranty phase services, whichever is later.
- 6.4. CM Staffing: The services to be provided by the CM under this Agreement shall be performed by personnel identified by the CM, and approved by the Owner, before commencing services. The furnishing of services by such personnel throughout the duration of the Project, and any individuals approved by the Owner to replace them, is of the essence to this Agreement.
  - 6.4.1. Additions, Removals, Replacements: Except in cases of safety or critical scheduling issues, from time to time, supervisory personnel may be added or changed as necessary and appropriate to the stage of planning, programming, designing and constructing the Project. The CM shall anticipate the need for such personnel changes by submitting to the Owner, no later than seven (7) calendar days prior to the need for the personnel change, a list of the proposed additional/deletion of personnel, attaching the resumes of proposed additional personnel, and stating the reasons for such additions or changes. The Owner shall promptly review the proposed additions and changes and either approve or disapprove the personnel changes in writing. The CM shall not employ any individual to perform the functions of any approved personnel without the advance approval of the Owner, which approval may be granted or withheld in its sole discretion. The CM shall not, for so long as any approved person is employed by the CM, remove, substitute or reduce the time devoted to the Project by such person without the Owner's prior written approval, which may be granted or withheld in its sole discretion. If the Owner is for any reason dissatisfied with the services rendered by any approved person, the CM shall promptly remove such person and recommend a replacement. If any approved person ceases employment with the CM, or if the Owner requests the removal of any such person, then the CM shall promptly notify the Owner of a proposed substitute of at least equal qualifications to perform the same functions, and provide a resume for the substitute. Each substitute must be approved by the Owner prior to commencing performance of any services for the Project, which approval may be granted or withheld in the Owner's sole discretion. The CM shall bear, at its own expense and without

reimbursement by the Owner, all costs associated with replacing, for any reason, any approved personnel. The CM shall remain solely responsible to the Owner, notwithstanding the Owner's approval of any approved personnel, for the quality and performance of all services provided by such personnel.

- 6.4.2. CM's Project Representative: The CM shall designate a Project Representative who has the authority to act on behalf of the CM in respect to all matters that are the subject of this Agreement, including without limitation, the power and authority to enter into agreements or modifications that contractually bind the CM. The Project Representative shall be available at all times during all phases of performance of services under this Agreement to consult with the Owner on matters pertinent to design and construction of the Project.
- 6.4.3. The CM shall be an independent contractor, not an employee, agent, joint venturer, or partner of the Owner, and shall not have authority to act on behalf of the Owner. The CM shall have complete and sole responsibility for and control over its employees, agents, representatives, and subcontractors, and the means and methods of providing the Work. The CM shall employ no person whose employment on or in connection with the Project may be objectionable to the Owner and shall remove any such person when objected to by the Owner; all upon reasonable grounds.
- 6.4.4. The Owner and the Owner's Representative shall not be responsible for the acts of the CM or the CM's representatives while performing under this Agreement, whether on the site or elsewhere, and the CM shall not have authority to speak for, represent, or obligate the Owner in any way without additional prior written authority.
- 6.4.5. CM's Employees: None of the persons employed by the CM shall be considered employees of the Owner. The CM shall be solely responsible for any workers' compensation obligations, withholding taxes, unemployment insurance, compliance with immigration and licensing laws, and any other employer obligations with respect to all of their employees.
- 6.5. Consultants to the Owner: If requested by the Owner, the CM shall assist the Owner in the selection of the Owner's Consultants by developing lists of potential firms, developing criteria for selection, preparing and transmitting the requests for proposal, assisting in reviewing written proposals, assisting in conducting interviews, evaluating candidates and making recommendations. If requested by the Owner, the CM shall conduct or assist the Owner in conducting orientation sessions during which the Consultants shall receive information regarding the Project scope, schedule, budget, and administrative requirements.
- 6.6. The CM shall assist the Owner in public relations activities and shall prepare information for and attend public meetings regarding the Project as reasonably required by the Owner.
- 6.7. Inspection of the Project Site and Site Logistics: The CM represents that it has examined the site of the Project, as well as the surrounding area, and is informed regarding all of the conditions affecting the services to be furnished under this Agreement, including the existence of all utilities and other structures of municipal and other public service corporations to the extent the information was provided by the Owner.
  - 6.7.1. The CM will develop a plan for site logistics, including plans for ingress and egress, street right-of-way encroachments (including lane and sidewalk closures), signage, storage of materials and equipment, site offices, temporary utilities, staging, hoists and cranes, waste disposal, security, and any other logistical issues that could affect performance of the Work to be provided by the CM. The plan shall be submitted to the Owner for approval to avoid conflicts with the Owner's operations.

- 6.7.2. The CM accepts a continuing duty during the course of the Project to make reasonable inquiry and inspection of information relevant to the site of the Project. The CM shall make reasonable inquiry, based on the CM's best knowledge and judgment as to the reasonableness of any data it is provided for its use in performing the services required by this Agreement. The CM shall be responsible for the accuracy of the data it generates and all interpretation and recommendations it makes, based on data the CM has generated or otherwise relied upon, no matter its source.
- 6.8. Design Support: The CM shall provide design support in accordance with Article 4.1 of this Agreement and Appendix A of this Agreement (i.e., the Designer's Contract).
- 6.9. Construction Management Plan: Within sixty (60) days after execution of this Agreement, the CM shall present to the Owner and the Designer a Construction Management Plan for the Project, including dates by which deliverables required by the Construction Management Plan will be completed. The CM shall make recommendations to the Owner and the Designer for revisions to the Construction Management Plan throughout the duration of the Project. In preparing the Construction Management Plan, the CM shall consider the Designer's Project Schedule (Appendix D to this Agreement) and the Owner's schedule, budget, and design requirements for the Project. The CM shall then develop various alternatives for the sequencing and management of the Project and shall make recommendations to the Owner. The Construction Management Plan shall also include a description of the various bid packages recommended for the Project. The Construction Management Plan shall be presented to the Owner for acceptance. Revisions approved by the Owner shall be incorporated into the Construction Management Plan.
- 6.10. Budgeting and Financial Forecasts
- 6.10.1. Project Funding: The CM shall assist the Owner in preparing documents concerning the Project and Construction Budget and for use in obtaining or reporting on Project funding. The documents shall be prepared in a form approved by the Owner.
- 6.10.2. Construction Market Survey: In accordance with the Construction Management Plan, the CM shall conduct a Construction Market Survey to provide current information regarding the general availability of local construction services, labor, materials and equipment cost and other economic factors related to the Project. A report of the Construction Market Survey shall be provided to the Owner and the Designer. The CM shall make recommendations for strategies related to design, advertising, schedule, phasing, bonding and any other actions that can effectively offset market conditions and benefit the Project.
- 6.10.3. Project and Construction Budget: Prior to soliciting bids for construction of each GMP Package, the CM shall update the Project and Construction Budget and prepare a detailed cost estimate based on separate divisions of the Work for each GMP Bid Package required for the Project and shall identify contingencies for design and construction. The CM shall submit the updated Project and Construction Budget and detailed cost estimate(s) to the Owner for acceptance. If the CM believes that additional surveys, geotechnical investigations, environmental assessments or other testing or investigation is necessary and reasonable to fashion a reliable Project and Construction Budget and cost estimate, the CM shall make recommendations to the Owner for such services, with an explanation of why the CM believes that the services are reasonable and necessary. The decision to procure such services shall be solely in the discretion of the Owner, and shall be at the Owner's expense.

- 6.10.4. Preliminary Estimate and Budget Analysis: The CM shall analyze and report to the Owner the cost of various design and construction alternatives, including the assumptions by the CM in preparing its analysis, a variance analysis between budget and preliminary estimate, and recommendations for any adjustments to the budget. As a part of the cost analysis, the CM shall consider costs relating to efficiency, usable life, maintenance, energy, and operation. The CM shall cooperate with the Designer and if employed, a third-party professional cost estimator to compare and reconcile disparate cost estimate proposed independently.
- 6.10.5. Cost Control: Following the completion of each design phase milestone, the CM shall prepare an estimate of the construction cost for the Drawings and Specifications furnished by the Designer. Each estimate shall be accompanied by a report to the Owner and Designer identifying variances from the Project and Construction Budget as well as the assumptions made by the CM in preparing the estimate. The CM shall reconcile its estimates with the Project and Construction Budget, and with any independent estimates obtained by the Owner and Designer. The CM shall coordinate the activities of the Owner and Designer and provide cost estimating and value engineering studies when changes to the design are required to remain within the Project and Construction Budget.
- 6.10.6. Project and Construction Budget Revision: The CM shall make recommendations to the Owner concerning design changes that may result in revisions to the Project and Construction Budget and divisions of the Work required for the Project.
- 6.10.7. Value Engineering Studies: The CM shall provide value engineering recommendations to the Owner and Designer at the Schematic Design, Design Development and 75% of the Construction Drawings Phases for major construction components, including cost evaluations of alternative materials and systems. The 75% Construction Drawings Phase set shall be the basis for the PMGP.
- 6.10.8. Budgets, budget revisions, financial forecasts, value engineering studies, GMP proposals and recommendations concerning design changes to maintain the budget shall not constitute binding changes to the Work of the Project. The scope of Work may only be changed by change orders or other approved modifications to this Agreement and the Drawings and Specifications. In the event the Owner intends to accept a value engineering proposal or other recommendation for a design change, the Owner shall direct the Designer to incorporate the recommended changes into Drawings and Specifications that the Designer is willing to issue and seal as part of a change order, addendum or other modification of the Contract Documents under the terms of this Agreement.
- 6.11. Management Information Control System (MICS): The CM shall develop a web-based MICS to establish communication between the Owner, CM, Designer, and other parties on the Project. The MICS proposed by the CM requires approval of the Owner prior to implementation. In developing the MICS, the CM shall interview the Owner's and the Designer's key personnel and others to determine the type of information for reporting, the reporting format, and the desired frequency for distribution of the various reports. At a minimum, the MICS shall include the elements described in this Section 6.11. The CM shall submit an acceptable MICS within forty-five (45) days after execution of this Agreement, designed to include the following elements:
  - 6.11.1. Pre-construction Procedures: As part of the MICS, the CM shall establish procedures for reporting, communication, and administration during the Design Phase and regulatory permitting.

- 6.11.2. Project Master Schedule (Master Schedule): A computer-generated schedule using the critical path method that is generated from the use of Primavera, or approved equal, scheduling software recommended by the CM, approved by the Owner, and specified in all contracts with Contractors. The updated Master Schedule must be presented to the Owner on the same date at the PMGP and the GMP.
- 6.11.3. Schedule Maintenance Reports: The CM shall prepare and distribute schedule maintenance reports on a monthly basis that shall contrast actual progress against scheduled progress for each phase of the Project and the overall Project and shall make recommendations to the Owner for corrective action to maintain the Master Schedule and all design and construction schedules. During the Construction Phase the reports shall compare the actual construction dates to scheduled construction dates of each separate construction contract and to the Master Schedule for the Project.
- 6.11.4. Project Cost Reports: The CM shall prepare and distribute project cost reports on a monthly basis that shall indicate estimated costs compared to the Project and Construction Budget and shall make recommendations to the Owner for corrective action to maintain all budgets and the GMP. During the Procurement Phase, the reports shall specify the actual award prices and construction costs for the Project, compared to the Project and Construction Budget. During the Construction Phase the reports shall specify actual Project and construction costs compared to the Project and Construction Budget.
- 6.11.5. Cash Flow Report: The CM shall periodically prepare and distribute a cash flow report. The reports shall be based on actual award contract prices and on actual design and construction costs for the Project. The reports shall specify the actual cash flow compared to the projected cash flow.
- 6.11.6. Change Order Report: The CM shall prepare and distribute Design Phase reports on a monthly basis that shall list all Owner-approved addenda, substitutions and change orders as of the date of the report and shall state the effect of the changes on the Project and Construction Budget and the Master Schedule. The CM shall continue to prepare and distribute monthly change order reports during the Construction Phase. The report shall include logs of all requests for information, requests for interpretation of the design documents, requests for proposals, and notices of events that might justify an adjustment in the GMP or Master Schedule, and status of critical decisions to be made by the Owner or the Designer. The report shall list all Owner-approved change orders by number, a brief description of the change order work, the cost established in the change order and percent of completion of the change order work. The report shall also include similar information for potential change orders or impact on the GMP of which the CM may be aware.
- 6.11.7. Project and Construction Budget Revisions: The CM shall make recommendations to the Owner concerning construction changes that may result in revisions to the Project and Construction Budget or GMP.
- 6.11.8. Progress Payment Reports (Each Contract): The CM shall prepare and distribute progress payment reports. The reports shall state the total construction contract price, payment to date, current payment requested, retainage, sales and use tax paid, and actual amounts owed for the period covered by the report. A portion of this report shall be a certificate of payment that shall be signed by the CM and delivered to the Designer and the Owner.

- 6.11.9. Contractor's Safety Program: On a monthly basis, the CM shall review the safety programs of each Contractor and confirm that each Contractor has established and implemented safety programs as required by the Contract Documents.
  - 6.11.10. Final Inspections and Commissioning: The CM shall schedule final inspections and, if required by the Contract Documents, commissioning of systems in the Project, and shall compile and organize all inspection reports for the Project records.
  - 6.11.11. Closeout Reports: At the conclusion of the Project, the CM shall prepare final project accounting and closeout reports.
  - 6.11.12. MICS Reports for Move-in and Occupancy: In consultation with the Owner, the Designer and appropriate regulatory agencies, the CM shall prepare and distribute reports associated with the Occupancy Plan.
- 6.12. The CM agrees to perform all tasks and functions reasonably necessary to complete the services described in the preceding paragraphs in this Article of the Agreement, even if not explicitly described herein, subject to its right to compensation in accordance with Articles 7 through 10. Without limiting the foregoing description of the services of the CM, it is reiterated and agreed that the following services are specifically required:
- 6.12.1. Except in the case of hidden or latent conditions, services related to a reasonable investigation or evaluation of existing conditions, facilities, or equipment or determinations of deviations from conditions shown on existing drawings or other information furnished by the Owner;
  - 6.12.2. Services related to coordination and scheduling of the procurement, storage, maintenance and installation of Owner-furnished equipment, materials, supplies and furnishings with the Work of the Contractors;
  - 6.12.3. Warranty inspections during the warranty period of the Project;
  - 6.12.4. Services made necessary by the failure to perform by, or bankruptcy of, a Contractor;
  - 6.12.5. Preparation for and serving as a witness in connection with any public or private hearing or arbitration, mediation or legal proceeding relating to the Project;
  - 6.12.6. Assisting the Owner in public relations activities and preparing information for and attending public meetings; and
  - 6.12.7. Services related to coordination of the Work of the Contractors with move-in by the Owner in accordance with the Master Schedule, including conducting pre-moving conferences and providing on-site personnel to oversee the relocation of furniture and equipment by the movers while actual move-in is in progress.

## **7. CM Compensation**

- 7.1. The CM shall be entitled to compensation for its services as set forth in this Section. During the construction and post-construction phases of the Project, the CM shall be entitled to reimbursement of defined direct costs and expenses, described in this Agreement as "General Conditions Costs", and in addition shall be entitled to fees for services rendered, described in this Agreement as "Fixed Fees". In addition to General Conditions Costs and Fixed Fees, the CM shall be entitled to reimbursement for the Cost of the Work, as set forth in this Agreement.
- 7.2. Pre-construction and Procurement Compensation: The CM shall be paid a lump sum fee of One Hundred Fifteen Thousand Dollars (\$115,000) for pre-construction and procurement phases of the Project. The Pre-construction and Procurement Phases shall be divided into two stages:

- 7.2.1 Stage One – all work through the delivery of the PGMP. This shall represent Seventy-Five percent (75%) of the Pre-construction and Procurement Phase and shall align with 75% of the construction documents produced by the Designer. Due to the funding of this Project, the CMAR is not authorized to commence to Stage Two until it has received written notification from the Owner. If this Contract is terminated prior to the commencement of Stage Two, the CMAR shall only be entitled for payment for the work completed up to the date of termination.
- 7.2.2 Stage Two – all work from the delivery of the PGMP up to the delivery of the GMP. This shall represent Twenty-Five percent (25%) of the Pre-construction and Procurement Phase. CMAR is not to begin any work for Stage Two until it receives written notification from the Owner. If this Contract is terminated after Stage Two, the CMAR shall only be entitled for payment for the work completed up to the date of termination.

In addition to this lump sum fee, the CM shall be reimbursed the actual direct cost of the following without markups:

- 7.2.3 Building information models, other models and mockups of building components or elements requested in writing by the Owner.
  - 7.2.4 All other expenses for the pre-construction and procurement phase of the Project are included in and covered by the lump sum fee.
- 7.3. Construction and General Conditions Compensation to the CM:
- 7.3.1. Fixed Fee: The Fixed Fee payable to the CM shall be Three Hundred Sixty Thousand Dollars (\$360,000). In the event the agreed GMP is adjusted between the time it is fixed and the end of the Project, the Fixed Fee adjustment to the CM compensation shall be in accordance with Section 7.4 of this Agreement.
  - 7.3.2. General Conditions: The General Conditions shall be payable as a fixed fee to the CM of Six Hundred Seventy-Five Thousand Dollars (\$675,000) (payable as \$33,750 per month for a period twenty (20) months commencing on the date the Owner provides the CM with a Notice to Proceed after acceptance of the GMP). General Conditions shall include the categories described in Appendix E. With the approval of the Owner, upon the recommendation of the CM, certain General Conditions cost elements may be included in the budget and in the GMP as allowances or as unit prices or rates. Bond costs shall be included in the GMP outside the General Conditions.
  - 7.3.3. Shared Contingency, if included in this Agreement, shall be a lump sum to be utilized for the benefit of the Project upon agreement of the Owner and CM. It shall be primarily used to provide work or materials not included in the Construction Documents but are required by the authorities having jurisdiction or deemed essential to the operation, function or efficient future maintenance of Project by Owner.
- 7.4. Adjustments to CM Compensation: The Owner, without invalidating this Agreement, may make changes in the CM's services specified in this Agreement. The CM shall within three (3) business days notify the Owner of any changes or other events which in the opinion of the CM entitle the CM to an increase or decrease in the GMP, the CM's compensation, the duration of the CM's services, or any of them, pursuant to the terms of this Agreement.
- 7.4.1. Changes in the CM's Services: Changes in the CM's services may be directed by the Owner in writing and, if so directed to provide different or additional services, the CM shall comply with the directions of the Owner. Additional compensation shall be settled by a written amendment to this Agreement executed by the Owner and the CM. If

possible, the amendment shall be executed by the Owner and the CM prior to the CM performing the services required by the amendment, but failure to agree on compensation for a change in services shall not be grounds for the CM to cease or refuse to provide the services reasonably requested by the Owner. The CM shall proceed to perform the services required by the amendment only after receiving notice directing the CM to proceed.

- 7.4.2. Additional Compensation and Extended Duration: The CM shall be entitled to receive additional compensation and additional time when the scope or planned duration of services is increased or extended through no fault of the CM or its Contractors. The CM shall notify the Owner within three (3) business days after changes to the scope of the Project or a part thereof or after delays caused in whole or in part by the Owner or Designer increase or extend the scope or duration of the CM's services.
- 7.4.3. Fixed Fee: The CM shall only be entitled to an increase in the Fixed Fee if the GMP is revised pursuant to Article 26. If an increase in the Fixed Fee is justified pursuant to Article 26, the CM shall be entitled to an increase in the Fixed Fee equal to three percent (3%) of the amount by which the final adjusted price of the Cost of the Work exceeds the approved Cost of the Work set forth in the original GMP; provided, however, that the CM is not entitled to such increase until the adjusted price of the Cost of the Work exceeds the approved Cost of the Work by two and one half percent (2.5%). The Owner may in its discretion approve adjustments to the Fixed Fee prior to the end of the Project.
- 7.4.4. General Conditions: Assuming the CM is entitled to additional General Conditions costs pursuant Section 7.4.2, the fixed rate shall be Thirty-Two Thousand Five Hundred Dollars (\$32,500) per month for each month in excess of twenty (20) months passed the date the Owner issues the Notice to Proceed after the acceptance of the GMP.
- 7.5. The CM understands and agrees that the Owner may require the Project be completed in two phases, the first for new construction and limited renovations and the second for renovation only, to meet requirements of the Owner's funding agency. Should the Owner determine to complete the Project in two phases, the Parties agree to increase the CM's compensation for Pre-Construction and Procurement, General Conditions and the Fixed Fee as set forth in Appendix I. In lieu of performing the work in two phases, the Parties may agree to amend the CM's compensation and create a payment schedule that coincides with completion of the Project.

## **8. The Preliminary GMP**

- 8.1 On or before the completion of the Design Development phase of the Designer's contract, the CM will prepare a Preliminary GMP ("PGMP") proposal for review by the Owner and the Designer and shall update that PGMP at the 75% completion of the Construction Documents.
- 8.2 The Owner may provide the Designer with a copy of the PGMP and request that the Designer assist the Owner in evaluating the PGMP and in negotiating with the CM in an effort to develop a final PGMP. The Owner may enlist a third-party cost estimator to independently prepare a cost estimate. The CM will cooperate with the Cost Estimator and Designer to reconcile their estimates.

- 8.3 The Owner may accept or reject the PGMP. If the Owner rejects the PGMP the CM shall participate with the Owner and the Designer in constructability reviews and document revisions in an effort to reach an agreed upon final PGMP.
- 8.4 If a final PGMP cannot be developed and accepted by the Owner, the Owner may terminate this Agreement as a termination for the convenience of the Owner as provided in Section 27 of this Agreement.

## **9. The GMP**

- 9.1. The CM shall be required to give a GMP for major divisions of the Project. Each GMP shall be documented by the CM as defined in this section and, once established, the GMP shall be subject to modification only as defined in this Agreement.
- 9.2. Divisions of the Project: A GMP shall be provided for the major divisions of the Work of the Project described in the Designer's specifications, subject to amendments to this Agreement to vary the Work included in each GMP.
- 9.3. GMP Proposal: Each GMP shall be provided by the CM when requested by the Owner, but in general not before one hundred percent (100%) of construction documents with respect to the relevant division of the Project are released by the Designer for permitting and bidding, and no later than thirty (30) calendar days after receipt of all Contractor bids with respect to the relevant division of the Project. The Owner shall accept such GMP or negotiate and reach agreement with the CM on a different GMP within thirty (30) calendar days of the date of the receipt unless such time is mutually agreed to be extended. If the Owner does not accept a GMP within the time period herein provided, such price shall be presumed to be rejected by the Owner.
- 9.4. Acceptance of Drawings and Specifications: The CM understands, confirms and agrees that its responsibility hereunder is to construct the Project in accordance with the Drawings and Specifications. It is recognized that each GMP will be based on design documents specifically identified and accepted by the CM and certified by the CM to be sufficient in detail and clarity to calculate a binding GMP. The CM shall notify the Owner if the CM believes that it is being asked to fix the GMP on incomplete, ambiguous or under-developed drawings and specifications. In those instances in which the Drawings and Specifications are not fully developed at the time the GMP is established, the CM shall exercise reasonable care and judgment to determine the intent of the design and shall calculate the GMP on the basis of the quality of construction, materials, and finishes that can be reasonably inferred from the design documents or other specified sources.
- 9.5. Elements of the GMP: The GMP shall be the sum of the Cost of the Work, the CM Fixed Fee, the General Conditions provided by the CM, the bond costs and the Project Contingency, all as defined herein. The GMP includes the cost of all labor, equipment, supplies, materials, services and allowances to complete the Project. The GMP shall be directly correlated to the specific design Drawings and Specifications in existence and identified by the CM at the time the GMP is prepared. The assumptions used in the preparation of the GMP shall be identified by the CM in its GMP proposal. The CM shall determine unit prices and the Cost of the Work and shall make those reasonable assumptions regarding the project scope and the quality of the intended construction as may be necessary to fully document the GMP. The use of allowances and other estimates for the cost of specific components of the Work is discouraged and shall be kept to a minimum.
- 9.6. Consideration of Proposal: In the event the Owner does not accept the CM's proposed GMP, the Owner may terminate the Agreement in accordance with Section 27 of this Agreement. Alternatively, the Owner may require the CM to recalculate the GMP after making any

changes to the scope of the Work, accepting value engineering proposals, or obtaining further development of the drawings and specifications from the Designer.

9.7. Documentation

9.7.1. The GMP documentation shall be prepared by the CM and submitted to the Owner with the GMP Proposal. The documentation shall at a minimum describe the Contract Documents on which the GMP Proposal is based, and set forth the cost elements of the GMP in detail. The documentation may include drawings, sketches, specifications, calculations or other data used to identify the basis of the GMP. Documentation of the GMP shall be developed by the CM from the design Drawings and Specifications and such other documents as may be described in the Proposal, and shall include a Listing of the Key Divisions of the Work correlated with budget and cost estimate for the GMP on a line item basis in at least as much detail as is contained in Appendix D.

9.7.2. Summary Report of GMP: The documentation of the GMP shall be summarized in a report that contains, at a minimum, all of the items outlined in Appendix D.

9.8. The CM shall, as part of cost control, report the adjusted final actual price of each Division of the Work and the price which was based on estimated quantities, allowances or other conditional pricing.

9.9. Any cost overruns or underruns in any Divisions of the Work shall accrue to the Project. Only the final adjusted price of the Cost of the Work for the entire Project shall be considered in determining any saving or costs overruns. If the final adjusted price of the Cost of the Work is less than the final project GMP provided to the Owner, then the savings shall accrue for the Owner. Any GMP provide to the Owner for any individual item or division shall be for information purposes only.

9.10. If the final adjusted price of the Cost of the Work is greater than the amount reflected in the approved GMP, as determined in accordance with the terms of this Agreement, after exhaustion of all available allowances and credits, unless otherwise approved as specified in Article 26, the GMP shall not be increased to cover any cost overruns.

**10. Payment Provisions**

10.1. Review of Payment Applications by the Designer and Owner: After considering applications for payment submitted to the Designer by the CM and certificates for payment issued by the Designer, the Owner will make progress payments to the CM as provided below and elsewhere in the Contract Documents. The Designer shall take action on the CM's application for payment in accordance with the agreement between the Owner and Designer. The Designer's certification for payment shall be based upon the Designer's on-site observation and the documentation submitted in accordance with this Section 10 and the CM's application for payment.

10.2. Payments due to the CM that unjustifiably remain unpaid for more than thirty (30) calendar days from the date of receipt by the Owner and certification by the Designer of the CM's acceptable invoice shall bear simple interest at the rate of one percent (1%) per month or fraction thereof on the unpaid balance as may be due.

10.3. Fixed Fee and General Conditions Costs: The Owner shall compensate the CM for the CM's Fixed Fee and General Conditions Costs generally in accordance with the terms and conditions of this Agreement, including Appendix B, and specifically as follows:

10.3.1. Progress payments to the CM shall be made monthly, not later than thirty (30) calendar days after receipt of the CM's acceptable invoice by the Owner and the Designer.

- 10.3.2. Ninety percent (90%) of the Fixed Fee shall be paid monthly in amounts prorated equally over the scheduled duration of the CM's Services. The remaining ten percent (10%) of the Fixed Fee shall be payable in full upon Final Completion of the Project.
- 10.3.3. Payment of lump sum General Conditions Costs shall be based on the cash flow schedule of payments prepared by the CM and submitted with the General Conditions cost proposal, which shall be converted to a fixed schedule of payments when the total GMP is fixed. The cash flow schedule of payments for General Conditions Costs must be reviewed by the Designer and approved by the Owner prior to any payment for General Conditions under the GMP.
- 10.3.4. General Conditions Costs included in the budget and in the GMP as allowances, or at unit prices or rates, or as items to be reimbursed on a direct cost basis, shall be paid monthly based on receipt of documentation suitable to the Owner and the Designer evidencing the costs incurred or the quantity of services provided, without any hold back or retention from the amounts properly invoiced.
- 10.4. Cost of the Work: Payment for the Cost of the Work shall be by monthly periodic payments based on Work completed then to date and not previously invoiced and paid, less retainage withheld from the Contractors, in accordance with the following procedures:
  - 10.4.1. Schedule of Values: The CM shall, in participation with the Contractors, determine a Schedule of Values for each of the construction contracts. The Schedule of Values shall be used to determine the Work completed by the Contractors. Each Schedule of Values will be submitted to the Owner and the Designer within twenty (20) calendar days after execution of the contract by the Contractor and is subject to approval by the Owner. The CM's Schedule of Values will be based on the Trade Bid Packages/Contractors lump sum amount. The CM will obtain a schedule of values from each Contractor and attach the Contractor's Schedule of Values and payment application to the CM's monthly billing.
  - 10.4.2. Within seven (7) calendar days of receipt by the CM from the Owner of each periodic payment, the CM shall pay each Contractor based on work completed or service provided under the Contractor's contract. No payment to a Contractor shall be delayed because of the failure of another Contractor on the Project to complete its contract. If any periodic payment to a Contractor is delayed by more than seven days after receipt of periodic payment by the CM, the CM shall pay the Contractor simple interest, beginning on the eighth day, at the rate of one percent (1%) per month or fraction thereof on the unpaid balance as may be due.
  - 10.4.3. Except with the Owner's prior approval, periodic payments to the Contractors shall be subject to retainage of five percent (5%) of the value of Work completed then to date and not previously invoiced and paid. When a Contractor's contract is fifty percent (50%) complete, the CM, with written consent of the Contractor's surety if the Contractor's contract is bonded, shall not retain any further retainage from periodic payments due the Contractor if the Contractor continues to perform satisfactorily and any nonconforming work identified in writing prior to that time by the Designer or Owner has been corrected by the Contractor and accepted by the Owner. The Contractor shall be deemed fifty percent (50%) complete when the Contractor's gross project invoices, excluding the value of materials stored off-site, equal or exceed fifty percent (50%) of the value of the Contractor's contract, except the value of materials stored on-site shall not exceed twenty percent (20%) of the Contractor's gross project invoices for the purpose of determining whether the Project is fifty percent (50%) complete.

- 10.4.4. Notwithstanding Section 10.4.3 above, following fifty percent (50%) completion by a Contractor, the Owner may require the CM to withhold additional retainage from a subsequent periodic payment to a Contractor, not to exceed five percent (5%) of the Work completed then to date and not previously invoiced and paid, in order to protect the Owner from unsatisfactory job progress, defective construction not remedied, disputed work, or third-party claims filed or threatened to be filed against the Owner. The existence of any third-party claims against the CM or any additive change orders to a construction contract shall not be a basis for reinstating retainage or delaying the release of any retainage on payments to Contractors.
- 10.4.5. Nothing in this Section shall prevent the CM at the time of application and certification to the Owner from withholding application and certification to the Owner for payment to a Contractor for unsatisfactory job progress; defective construction not remedied; disputed work; third party claims filed or reasonable evidence that claim will be filed; failure of the Contractor to make timely payments for labor, equipment, and materials; damage to the CM or another Contractor; reasonable evidence that the Contractor's Contract cannot be completed for the unpaid balance of the contract sum; or a reasonable amount for retainage not to exceed the percentage that the CM is required to retain by the Owner.
- 10.4.6. No reduction in the amount of retainage on payments to Contractors shall affect any applicable warranties on work done by the CM or the Contractor, and the warranties shall not begin to run any earlier than either the Owner's receipt of a certificate of substantial completion from the Designer covering the entire Project, or the Owner receives beneficial occupancy of the entire Project.
- 10.4.6.1. Upon notice from the CM that the Work of a Contractor is substantially complete and ready for final inspections, the Designer shall inspect the Work and prepare lists describing Work that is absent, incomplete or otherwise not in compliance with the Construction Documents. The Designer shall determine independently whether the Work is substantially complete, and provide a certificate to the Owner and the CM that the Work is substantially complete and final determination of whether the Work is substantially complete will be made by the Owner. The Designer shall continue to inspect the Work until satisfied that all identified non-conforming Work has been completed, corrected or accepted by the Owner as is.
- 10.4.7. Once all of the Work by a Contractor is substantially complete, all remaining funds owed to that Contractor shall be paid in full, except that the Owner may retain sufficient funds from the CM to secure completion of the Work or to correct or complete any nonconforming or incomplete Work. If the Owner retains funds, the amount retained shall not exceed two and one-half (2.5) times the estimated value of the Work to be completed or corrected by the Contractor. Payment under this section shall be conditional upon receipt of a properly completed payment application from the CM, certification by the Designer that the Work of that Contractor is substantially complete, and consent of surety from each surety for each bonded Contractor and from the surety for the CM.
- 10.4.8. If the Work of a Contractor includes demolition, pilings, caissons or structural steel, once all of the Work by that Contractor is one hundred percent (100%) complete, the remaining unpaid balance of that Contractor's Contract Price, less a sum equal to five-tenths percent (0.5%) of the Contract Price, shall be paid within sixty days following receipt of a properly completed payment application from the CM, certification by the Designer that the Work of that Contractor is substantially complete, and consent of

surety from each surety for each bonded Contractor and from the surety for the CM.

- 10.4.9. Final Payment: Their remaining Contract Price, less authorized deductions, shall be made to all Contractors once the Project reaches Final Completion. Final payment to each Contractor is contingent upon consent by the Contractor's surety, if any, the Owner's receipt of a properly prepared payment application from the CM including final payment to the Contractor, and an approval or certification from the Designer that the work performed by the Contractor is acceptable and in accordance with the Contract Documents. Payments to which Contractors are entitled under this subsection shall be made no later than sixty (60) days following receipt of the Contractor's final payment request by the CM or immediately upon receipt of the surety's consent, whichever occurs later. Each Contractor's contract shall list the inspections required by the Owner before accepting the Work, and any submittals, manuals, warranties or financial information required by the Owner to release payment to the Contractor. The failure of the contracts to contain this information shall not obligate the Owner to release the retainage if the Owner has not received the required certification from the Designer. The Designer may withhold certification of final payment to a Contractor for unsatisfactory job progress by the Contractor, defective construction not remedied by the Contractor, disputed work by the Contractor, or third-party claims filed against the Owner or reasonable evidence that a third-party claim will be filed against the Owner because of a breach of duty by the Contractor.
- 10.4.10. Final Payment Audit: The Owner reserves the right, prior to making final payment to the CM, to conduct audits or a final audit of the expenditures by the CM on the Project for assurances that the final payment to the CM does not exceed the amounts properly payable to the CM for the Cost of the Work, General Conditions, any special allowances, and CM Contingency savings. If the Owner decides to exercise its right to a final payment audit, the Owner will notify the CM in writing of its decision to conduct the audit within thirty (30) days after issuance of the Certificate of Final Completion by the Project Designer. The CM shall then promptly provide all accounting records reasonably requested by the Owner that relate to the Cost of the Work, CM General Conditions and CM Contingency on the Project. Once the CM has provided all accounting records reasonably requested by the Owner to complete such an audit, the Owner agrees to complete the audit within ninety (90) calendar days. In the event an audit determines that the CM has been paid more than it is entitled to be paid under the Contract, the CM will refund the overpayment to the Owner. With the express written consent of the CM surety on the CM performance bond and the CM payment bond, the Owner may elect to make final payment to the CM prior to completion of the audit.
- 10.4.11. The making and acceptance of final payment shall constitute a waiver of all claims by the Owner except:
- 10.4.11.1. Claims arising from unsettled liens or claims against the CM.
  - 10.4.11.2. Faulty Work or materials appearing after final payment.
  - 10.4.11.3. Failure of the CM to perform the Work in accordance with Drawings and Specifications, such failure appearing after payment.
  - 10.4.11.4. Claims arising from express or implied warranties and guarantees.
  - 10.4.11.5. Claims for indemnity and contribution.
  - 10.4.11.6. Performance bond and payment bond claims.
- 10.4.12. Prior to submitting request for final payment to the Project Designer for approval, the

CM shall fully comply with all requirements specified in the "Project closeout" section of the Specifications. These requirements include but not limited to the following:

- 10.4.12.1. Submittal of Product and Operating Manuals, Warranties and Bonds, Guarantees, Maintenance Agreements, As-Built Drawings, Certificates of Inspection or Approval from agencies having jurisdiction. (The Project Designer must approve the Manuals prior to delivery to the Owner).
- 10.4.12.2. Transfer of required attic stock material and all keys in an organized manner.
- 10.4.12.3. Record of Owner's training.
- 10.4.12.4. Resolution of any final inspection discrepancies.
- 10.4.13. The CM shall forward to the Designer the final application for payment along with the following documents:
  - 10.4.13.1. List of minority, HUB, and small business Contractors showing breakdown of contracts amount.
  - 10.4.13.2. Affidavit of Release of Liens.
  - 10.4.13.3. Affidavit of Contractors of payment to material suppliers and subcontractors.
  - 10.4.13.4. Consent of Surety to Final Payment.
  - 10.4.13.5. Certificates of state agencies required by state law.
- 10.4.14. The Designer will not authorize final payment until the Work under this Agreement has been certified by the Designer, certificates of compliance issued, and the CM has complied with the closeout requirements. The Designer shall forward the CM's final application for payment to the Owner along with respective certificate(s) of compliance required by law.
- 10.5. Grounds for Withholding Payment: Notwithstanding anything to the contrary in this Section, the Designer may withhold a certificate for payment from the CM and the Owner may withhold payment from the CM, in whole or in part, to the extent reasonably necessary to protect the Owner. If the Designer is unable to certify payment in the amount of the application, the Designer will notify the CM and the Owner in writing. If the CM and Designer cannot agree on a revised payment amount, the Designer will promptly issue a certificate for payment for the amount for which the Designer is able to make such representations to the Owner. The Designer may also withhold a certificate for payment, in whole or in part, to such extent as may be necessary in the Designer's opinion to protect the Owner from loss for which the CM or the Contractor(s) is responsible, including loss resulting from acts and omissions, because of:
  - 10.5.1. Defective Work not remedied after notice in accordance with this Agreement;
  - 10.5.2. Third-party claims filed or reasonable evidence indicating probable filing of such claims unless security acceptable to the Owner is provided by the CM;
  - 10.5.3. Failure of the CM or Contractor(s) to make payments properly to subcontractors or sub-subcontractors or for labor, materials or equipment;
  - 10.5.4. Reasonable evidence that the Work cannot be completed for the unpaid balance of the GMP;
  - 10.5.5. Damage to the Owner or another Contractor;
  - 10.5.6. Reasonable evidence that the Work will not be completed within the contract time, and

- that the unpaid balance of the GMP would not be adequate to cover actual or liquidated damages for the anticipated delay;
- 10.5.7. Failure to carry out the Work in accordance with the Contract Documents;
  - 10.5.8. Failure to provide sales tax documentation as required by the Owner;
  - 10.5.9. Failure or refusal of the CM or Contractors to submit the required information on minority business enterprises;
  - 10.5.10. Any other reason deemed necessary by the Designer to protect the Owner unless arbitrary and unreasonable; or
  - 10.5.11. Subsequently discovered evidence that Work previously approved was not performed in accordance with the Contract Documents.
  - 10.5.12. When the above reasons for withholding certification are removed, certification will be made for amounts previously withheld.
- 10.6. The Owner's Representative may withhold a certificate for payment, in whole or in part, to the extent reasonably necessary to protect the Owner.
- 10.7. Sales and Use Taxes: Each Contract and each GMP shall include those sales and use taxes applicable to the Project that are legally enacted at the time the GMP is established. Sales and use taxes shall be accounted for separately in the GMP and in the payment applications submitted by the CM. Any increase or decrease in such taxes that affect the GMP and that are enacted after the GMP is submitted shall be incorporated into that price by change order. The CM shall maintain all tax records during the life of the Project and furnish the Owner with a complete listing of all taxes paid by taxing authority, invoice number, date, amount, etc. in a form acceptable to the Owner. The CM is required to maintain a file showing taxes paid on the Project for three (3) years after Final Payment or turn said documents over to the Owner for the Owner to maintain.
- 10.7.1. The following is a list of requirements to be followed by the CM in maintaining proper records and reporting the North Carolina Sales and Use Tax and Local Sales and Use Tax. The CM shall comply fully with the requirements outlined below, in order that the Owner may recover the amount of the tax permitted under the law.
    - 10.7.1.1. It shall be the CM's responsibility to furnish the Owner documentary evidence showing the materials used and sales and use tax paid by the Contractor and each of his Subcontractors. Such evidence shall be transmitted to the Owner with each pay request regardless of whether taxes were paid in that period.
    - 10.7.1.2. The documentary evidence shall consist of a certified statement by the CM and each of the Contractors individually, showing total purchases of materials from each separate vendor and total sales and use taxes paid to each vendor. Certified statements must show the invoice number, or numbers, covered, and inclusive dates of such invoices.
    - 10.7.1.3. Materials used from Contractors' warehouse stock shall be shown in a certified statement at warehouse stock prices.
  - 10.7.2. The CM shall not be required to certify the Contractors' statements.
- 10.8. CM Right to Stop Work or Terminate the Agreement: Should the Owner fail or refuse without good cause to make payment of a payment application certified by the Designer within thirty (30) days after receipt of same, then the CM, after fifteen (15) days' written notice sent by certified mail, return receipt requested, to the Owner and the Designer, may suspend

operations on the Work or terminate the Contract. The Owner shall be liable to the CM for the cost of the Work delivered and performed to the date of termination plus all General Conditions costs incurred to date plus its CM Fixed Fee earned to date, plus reasonable termination and demobilization costs, as if the Agreement were terminated for convenience by the Owner hereunder. The Designer shall review and certify the correctness of such payment.

## **11. Project Contingency**

- 11.1. The overall Project GMP shall include a contingency amount (the “Project Contingency”) for the use by the CM or Owner as allowed by this Agreement. The Project Contingency in the GMP for the Project is Two Hundred Seventy-Five Thousand Dollars (\$275,000).
- 11.2. The Project Contingency is not meant to add to the Fixed Fee of the CM. The Project Contingency may only be used to defray increases in the Cost of the Work caused by the following circumstances (but only after the CM has exhausted all credits, unused allowances and any and all other remedies the CM might have):
  - 11.2.1. After the CM has awarded contracts to its Contractors, to pay any costs incurred by the CM as a result of a Contractor default already under contract with the CM but only to the extent the CM is, after a reasonable effort, unable to recover the costs from the Contractor, Contractor’s surety (if any) or other guarantor or insurer; provided, however, that the Project Contingency may not be used to pay deductibles, retention or copayments incurred pursuant to a subcontractor default insurance policy;
  - 11.2.2. To pay for quality assurance testing, inspections or other investigations that the CM believes are necessary to substantiate that work of the Contractors meets the requirements of the Contract Documents, to the extent, after a reasonable effort, the CM is unable to recover the costs from Contractors, Contractors’ sureties or other guarantors or insurers;
  - 11.2.3. To pay for mediation and legal costs per Article 34 if a suit is initiated against the Owner by any of the CM’s Contractor, to the extent, after a reasonable effort, the CM is unable to recover those costs from the Contractor, the Contractor’s sureties or other guarantors or insurers.
  - 11.2.4. If, in the CM and Owner’s opinion, the use of the Project Contingency is advisable or necessary for the benefit of the Project but only after all possible remedies, aside from increase payment by Owner, have been exhausted. The written request from the CM or Owner must contain specific language as to why the use of the Project Contingency is necessary and beneficial to the Project. These include directives from the AHJ or improvements to the Project which are vital to the function, safety operation or maintenance of the project. The Owner may utilize his portion of the Project Contingency for other purposes with approval of the CM.
- 11.3. The CM shall consult with the Owner and provide the Owner with reasonable documentation justifying every request for payment of any of the Project Contingency. All expenditures of Project Contingency are conditional upon receipt of such documentation and approval of the expenditure by the Owner and only after available credits and unused allowances are first exhausted. Expenditures of Project Contingency may not be used to reimburse the CM for liquidated damages payable to the Owner, for overruns in agreed sums or rates payable for General Conditions, for costs incurred because of any default by the CM in the performance of its own management services, including unjustifiable overpayments to Contractors, or for any other circumstance not specifically covered in the preceding paragraphs.

- 11.3.1. If the Project Contingency is not exhausted during the Project, fifty percent (50%) of any unspent portion of the Project Contingency, less amounts of liquidated damages owed to the Owner, will be paid to the CM over and above the Cost of the Work, General Conditions and Fixed Fee otherwise due and payable the CM. The remaining fifty percent (50%) of any unspent portion of the Project Contingency will belong to and remain with the Owner.

## **12. Bonds Required from the CM**

- 12.1. In accordance with N.C. Gen. Stat. §143-128.1, the CM shall provide a performance bond with a penal sum equal to one hundred percent (100%) of the cumulative GMP for the Project to guarantee the faithful performance of the Work, in such form as may be required by law and approved by the Owner. Subject to prior approval by the Owner, the CM may provide a bond upon execution of this Agreement with a penal sum equal to the lump sum fee for the pre-construction and procurement phases of the Project, and then amend the bond to increase the penal sum of the bond as each GMP is approved and accepted by the Owner, so that at all times the penal sum of the bond equals the sum of the lump sum fee for the pre-construction and procurement phases of the Project plus all approved GMP.
- 12.2. In accordance with N.C. Gen. Stat. §143-128.1, the CM shall provide a payment bond with a penal sum equal to one hundred percent (100%) of the cumulative GMP for the Project to guarantee the payment of all labor and material costs or claims in connection with compliance with the Contract, in such form as may be required by law and approved by the Owner. Subject to prior approval by the Owner, the CM may provide a payment bond upon execution of this Agreement with a penal sum equal to the lump sum fee for the pre-construction and procurement phases of the Project, and then amend the bond to increase the penal sum of the bond as each GMP is approved and accepted by the Owner, so that at all times the penal sum of the bond equals the sum of the lump sum fee for the pre-construction and procurement phases of the Project plus all approved GMP.
- 12.3. These bonds and all amendments to the bonds shall be dated or made effective the same date as this Agreement and must be accompanied by a current copy of the power of attorney for the attorney-in-fact executing such bond on behalf of a surety company licensed to do business in the State of North Carolina and reasonably acceptable to the Owner.

## **13. Design Support by the CM**

- 13.1. Except for shop drawings and special systems calculations that are delegated to the CM and its Contractors by the Owner and the Designer, all Drawings and Specifications shall be prepared by the Designer and submitted to the Owner for review and authorization to proceed with procurement and construction. The CM shall provide the following services related to design of the Project.
- 13.2. Planning Conferences: In accordance with the approved Construction Management Plan and Master Schedule, the CM shall conduct planning conferences attended by the Designer, the Owner and others as necessary. During the planning conferences, the CM shall review the Construction Management Plan, the Master Schedule, the Design Phase Milestone Schedule, the Project and Construction Budget, and the MICS. The CM shall conduct and prepare minutes of these meetings.
- 13.3. Design Phase Information: The CM shall monitor the Designer's compliance with the Construction Management Plan and the MICS, and the CM shall coordinate and expedite the flow of information between the Owner, the Designer, the CM and others as necessary.

- 13.4. Design Progress Meetings: The CM shall participate in regularly scheduled progress meetings attended by the Owner, Designer and others as necessary. Such meetings shall serve as a forum for the exchange of information concerning the Project and the review of design progress. The Designer shall prepare and distribute minutes of these meetings to the Owner, CM and others.
- 13.5. Review of Design Documents: The CM shall thoroughly and completely review all design documents, including programming, drawings, specifications, addenda, and supplemental design information, for clarity, consistency, constructability and coordination among the Contractors. The results of the review shall be provided in writing as notations on the documents or in a written report. The CM is not responsible for providing, nor does the CM control, the Project design and contents of the design documents prepared by the Designer. By performing the reviews described herein, the CM is not acting in a manner so as to assume professional responsibility or liability, in whole or in part, for all or any part of the Project design and design documents prepared by the Designer or the Owner where insufficient care in review by the CM results in changes to the scope or materials that are necessary for the efficient function, safety, operation or maintenance of the Project, the Owner may authorize use of the Project Contingency to pay costs of the improvements.
- 13.6. Design Recommendations: The CM shall make recommendations to the Owner and Designer with respect to constructability, construction cost, sequence of construction, construction duration, possible means and methods of construction, time for construction, and separation of the Project contracts for various categories of Work. In addition, the CM shall give to the Designer all data of which it is aware concerning patents or copyrights for inclusion in the Contract Documents.
- 13.7. Life Cycle Cost and Value Analyses: In accordance with the Construction Management Plan, the CM agrees to provide cost estimates and other input to assist the Designer in the preparation of reliable and valid life cycle cost and value studies. The Owner's intent is to have an energy efficient facility with reasonable and sustainable long-term operating and maintenance costs. The CM agrees to cooperate with the Owner and the Designer to achieve these goals.
- 13.8. Owner Design Reviews: The CM shall expedite the Owner's design reviews by compiling and conveying the Owner's comments to the Designer.

#### **14. Permits and Approvals by Regulatory Agencies**

- 14.1. The CM shall give all notices and comply with all laws, ordinances, codes, rules and regulations bearing on the conduct of the Work under this Agreement. If the CM observes that the Drawings and Specifications are at variance with any law, ordinance, rule or regulation, it shall promptly notify the Designer and Owner in writing. Any necessary changes required after contract award shall be made by change order. If the CM performs any Work knowing it to be contrary to such laws, ordinances, codes, rules and regulations, and without such notice to the Designer and Owner, it shall bear all resulting costs of correction. If any laws, ordinances, codes, rules or regulations bearing on the conduct of the Work change after establishment of the GMP and the CM can demonstrate that such change will cause an increase in the GMP, such change will be grounds for equitable adjustments to the GMP.
- 14.2. All Work under this Agreement shall conform to the North Carolina State Building Code and other state, local and national codes as are applicable. The cost of all required regulatory agency inspections under state, local and national codes shall be paid by the Owner, except as follows:

- 14.2.1. Costs for re-inspections by the County of Buncombe or other regulatory agencies, to the extent attributable to the CM and its Contractors, shall be the responsibility of the CM.
- 14.2.2. Premium or additional fees or other costs paid to expedite or accelerate or otherwise alter the normal review process of authorities with jurisdiction to maintain the Project schedule or accommodate the wishes of Contractors shall be the responsibility of the CM.
- 14.3. The CM shall cooperate with the state, county and municipal authorities by applying for and obtaining all building and other required permits. The Owner shall pay for all applicable permits.
- 14.4. The CM shall assist the Designer with transmittal of documents to regulatory agencies for review and shall advise of potential problems in completing such reviews.

## **15. Procurement of Contracts with Contractors**

- 15.1. All construction contracts, labor, materials and services shall be procured in accordance with N.C. Gen. Stat. § 143-128.1 and other sections of Chapter 143 Article 8 of the North Carolina General Statutes relating to construction management at risk contracts. Construction contracts for the Work required for the Project shall be between the CM and Contractors. The CM shall request and receive bids for each contract and shall advise the Owner with respect to award of a contract to the lowest responsive and responsible bidder. The CM shall enter into a contract with that bidder after receipt of approval of award from the Owner. Bids shall be opened to the public and will become public records.
- 15.2. Establishment of Bid Packages and Contract Scope: The CM shall recommend for approval by the Owner the appropriate Contractor bid packages. The CM shall take into account the needs of the Project, the Master Schedule, risk management, and the available resources, and divide the Work for the best benefit of the Project. The CM and the Designer shall collaborate on the preparation of bid documents consistent with the bid packages identified by the CM and approved by the Owner. Consistent with state law, one or more bid packages shall be prepared for each of the general construction, electrical, mechanical, fire protection, and plumbing divisions of the Work of the Project. The CM shall prepare any other contract packages for other divisions or subdivisions of the Work as agreed with the Owner. The form of bonds, insurance requirements, form of agreement, general conditions, and supplementary general conditions for inclusion in all bid packages and use in the contracts between the CM and the Contractors for construction for the Project shall be prepared by the CM and submitted to the Owner and the Designer with adequate time for review and comment before inclusion in bid packages. The Designer and the CM will collaborate on the preparation of the general Division One requirements of the Specifications. Separate General Conditions for materials and equipment procurement shall be prepared by the CM to meet the specific requirements of the Project using forms approved by the Owner. The CM shall be afforded a reasonable opportunity to review and comment on all warranties and guarantees and other obligations imposed on the Contractors by the Specifications.
- 15.3. Bidder's Interest Campaign: The CM shall conduct a telephonic and correspondence campaign to attempt to create interest among qualified bidders, both to foster competition for the Work of the Project, and to satisfy the requirements of the Owner's Minority Business Enterprise Policy, attached to this Agreement as Appendix H and of N.C. Gen. Stat. § 143-128.2, 128.3, 128.4 and other sections of Chapter 143, Article 8 of the North Carolina General Statutes relating to recruitment and use of minority, HUB, and small business enterprises.
- 15.4. Prequalification of Contractors: The CM shall develop lists of possible bidders and shall prequalify bidders in accordance with N.C. Gen. Stat. § 143-128.1 and the Owner's

prequalification policy. The CM shall work with the Owner to develop the prequalification assessment tool and criteria specific to the Project and the first-tier subcontract divisions of the Work. This service shall include the following: preparation and transmission of questionnaires; receiving and analyzing completed questionnaires; interviewing possible bidders, bonding agents, and financial institutions; and preparing summary reports regarding this activity to the Owner. The CM shall also prepare and transmit to the Owner and Designer a bidders list for each bid package. The Owner shall notify the CM promptly of any reasonable objections to a proposed bidder, and the CM shall remove that bidder from the bidders list. The statutory requirements for prequalification of contractors (N.C. Gen. Stat. §§ 143-128.1(c), -135.8) and the resulting Owner policy regarding prequalification will change effective October 1, 2014. Any first-tier subcontractor awarded in August and September of 2014 must be prequalified and awarded in compliance with the statutes and Owner policy in effect during those months. First tier subcontractors awarded on or after October 1, 2014 must be prequalified and awarded in compliance with the statutes and Owner policy effective October 1, 2014.

- 15.5. Business Participation Goals, Standards, Forms and Reports: The CM shall comply with the Owner's Participation by Women and Minority-Owned Business policy attached hereto as Appendix H. The CM shall also comply with the standards, requirements, required forms and required reports which are required by N.C. Gen. Stat. § 143-128.2 regarding minority business participation, N.C. Gen. Stat. § 143-128.4 regarding historically underutilized business participation and N.C. Gen. Stat. § 143-128.1 regarding recruitment and selection of small businesses.
- 15.6. Notices and Advertisements: The CM shall prepare and place notices and advertisements to solicit competitive bids for the Project.
- 15.7. Delivery of Bid Documents: The CM shall expedite the delivery of bid packages to the bidders. The CM shall obtain a full set of documents from the Designer and arrange for printing, binding, wrapping and delivery to the bidders. The CM shall maintain a record of bidders receiving documents. The CM shall utilize electronic transmittal and availability of the bid documents to minimize excessive printing. The CM shall provide the Owner bid documents in digital form to post on the Purchasing website as information. The CM shall determine the official bid documents and site outside the Owner's website.
- 15.8. Pre-Bid Conference: In conjunction with the Designer, the CM shall conduct a Pre-Bid Conference. These conferences shall be forums for the CM and Designer to explain to the bidders the Project requirements, including information concerning schedule requirements, time and cost control requirements, access requirements, contractor interfaces, minority and women's business enterprise goals, the Project administrative requirements and technical information.
- 15.9. Information to Bidders: The CM shall develop and coordinate procedures to provide answers to bidders' questions.
- 15.10. Addenda: The CM shall receive from the Designer a copy of all addenda. The CM shall review addenda for clarity, consistency and coordination. By performing the reviews described herein, the CM is not acting in a manner so as to assume responsibility or liability, in whole or in part, for all or any part of the Project design or the content of the design documents. The CM shall also distribute a copy of all addenda to each bidder receiving documents.
- 15.11. Requests for Clarifications and Substitutions: The CM will be responsible for logging all clarification and substitution requests that it receives, and forwarding them to the Designer. It is to be noted that the Owner discourages substitutions. The Owner's approval will be granted

only upon the most persuasive arguments as to quality, function and financial merit regarding a substitution.

- 15.12. Bid Opening: The CM shall conduct bid openings in accordance with North Carolina General Statutes. The CM shall tabulate all bids received, provide a comparison of "budget to actual" amount for each trade package and evaluate the bids to determine the lowest responsive and responsible bidder for each trade package. The CM shall not award or enter into any contract for Work on the Project until the CM has provided the Owner with written notice of the intent to award the contract with reasons for awarding the contract to the successful bidder. This written notice shall also describe compliance by the bidder with the Owner's Minority Business Enterprise Policy. The Owner shall be given reasonable opportunity to consider the qualifications of the successful bidder and the impact of award of the contract on the Project and Construction Budget, and to object to the award of the contract to the low bidder.
- 15.13. Change of Contractor Ordered by Owner: If the Owner directs the CM to award a contract to a bidder other than the lowest responsible and responsive pre-qualified bidder for any portion of the Project, the GMP, if it has already been fixed, shall be increased by the amount of the difference between the award price and the price submitted by the lowest responsible and responsive bidder. The CM Contingency shall not be changed.
- 15.14. Construction Contracts: Upon approval by the Owner, the CM shall prepare, execute, and deliver the Contract Documents between the CM and the Contractors. The CM shall also issue the notices to proceed.
- 15.15. Permits, Insurance and Labor Affidavits: The CM shall verify that all required building permits, bonds, insurance, labor affidavits, and waivers required for the Project have been obtained.
- 15.16. Bonds and Other Security for Performance by Contractors: In its GMP Proposal, the CM shall recommend a program and costs for bonds or other security or insurance against default by Contractors as the CM deems appropriate to protect the CM and the Owner against such defaults. Such costs shall be included in the GMP if approved by the Owner.

## **16. Work by CM**

- 16.1. All of the labor and materials for the Work of the Project as described in the Drawings and Specifications developed by the Designer shall be performed by Contractors, except as specifically provided in this Article 16.
- 16.2. The CM may perform a portion of the Work only if (1) bidding produces no responsible, responsive bidder for that portion of the Work, no responsive, responsible bidder will execute a contract for the bid portion of the Work, or a Contractor defaults and a pre-qualified replacement cannot be obtained in a timely manner, and (2) the Owner approves performance of the Work by the CM.
- 16.3. In the event the CM performs a portion of the Work under this Article 16, the CM shall provide a lump sum price to the Owner or, in the event a lump sum price cannot be agreed upon by the CM and the Owner, the CM shall be entitled to its actual direct cost to perform the Work, which shall be limited to direct labor costs with reasonable burden, actual material costs without markup for overhead or profit, actual equipment costs without markup for overhead or profit, and actual subcontract payments without markup for overhead or profit. Any other direct costs of the Work performed by the CM will only be paid if approved by the Owner in advance of performing the Work.

## **17. Patents and Other Intellectual Property Rights**

- 17.1. The CM shall secure all rights and pay all license fees, royalties, and costs arising from patents, trade secrets, copyrights, or other intellectual property rights that are in any way involved with the services or involved with or required for the services performed by or on behalf of the CM. The CM shall defend, indemnify, and save harmless the Owner and its present and future officers, employees, and agents from and against any and all liabilities (foreseeable or unforeseeable), penalties, fines, forfeitures, demands, claims, causes of actions, suits, judgments, and costs and expenses incidental thereto (including, without limitation, amounts paid pursuant to investigations, defense or settlements, and reasonable attorney's fees), which any or all of them may hereafter suffer, incur, be responsible for, or pay out as a result of any violation or an alleged violation of any patent, trade secret, copyright, or other intellectual property right resulting, in whole or in part, from any act by the CM or anyone who performs work for the CM or for whose acts the CM may be liable in connection with the Project, regardless as to whether such violation or alleged violation occurs prior to, during or after the completion of the Project. The CM shall not be responsible for or be required to provide such indemnity or defense should such patent, trade secret, copyright, or other intellectual property right be called for by the Owner or the Designer in the Contract Documents, including any drawings or specifications.

## **18. Ownership of Documents**

- 18.1. The CM shall be entitled to maintain possession of a reasonable number of sets of Contract Documents and record documents during and after the completion of the Project for its records. After completion of the Project, the CM shall destroy or return to the Owner all other copies of such documents as requested by the Owner. The CM shall not reproduce or distribute such documents to any third person or for any purpose other than bidding, permitting and construction of the Project.
- 18.2. All significant new information and all documents and other materials furnished to the CM or any Contractor by the Owner, and all information and all documents and other materials which the CM or any Contractor acquires or generates in connection with the Project, shall be the sole property of the Owner, and, except as specified otherwise in the next Section, shall be returned or furnished by the CM to the Owner or its designee upon demand by the Owner.
- 18.3. The CM and any Contractor or other individual or entity performing or furnishing any of the Work under a direct or indirect contract with CM: (i) shall not have or acquire any copyright, title to or ownership rights in any Drawings, Specifications, or other documents (or copies thereof) prepared by or on behalf of the Owner, including electronic media editions; and (ii) shall not reuse any of such Drawings, Specifications, other documents, or copies thereof on extensions of the Project or any other project without prior written consent of the Owner and specific written verification or adaptation by the Owner. This prohibition shall survive final payment and completion of the Project, or termination or completion of the Agreement. Nothing herein shall preclude the CM from retaining copies of the Contract Documents for record purposes.
- 18.4. The Designer shall provide electronic drawing files to the CM upon request for use in preparing estimates, survey control of the site and building, preparation of coordination drawings, and preparation of shop drawings.
- 18.5. The CM shall ensure that all documents and materials coming within the possession, custody, or control of the CM or any representative in connection with the Project are retained to the extent and as required by the Contract Documents and any other applicable legal requirements. The CM grants to and otherwise shall obtain for the Owner an irrevocable, exclusive, royalty-

free right to copy, republish, distribute and use, in whole or in part, any material developed in connection with the Project, whether copyrighted or not, based on any information, conclusions, or developments resulting from or related to the services and Work performed for the Project.

## **19. Contractor Submittals and Requests for Information**

- 19.1. The CM shall establish and implement procedures for expediting, reviewing, and processing requests for information and proposed substitutions and changes to the Work received from Contractors. All requests for information, submittals, Contractor schedule adjustments, substitutes, change order requests and other Contractor requests shall be submitted to the CM. The CM shall keep a log of all such requests, and the responses to such requests by the CM, the Owner and the Designer.
- 19.2. The CM shall establish and implement procedures for expediting, reviewing, approving, and processing all required Contractor submittals, such as material and equipment samples, mock ups, special systems calculations, fabrication, erection and other shop drawings, and operating and maintenance manuals. The CM shall be responsible for tracking and monitoring all such submittals throughout construction until all such submittals have been reviewed and finally approved by the Designer and reported to the Owner.
- 19.3. The CM shall include the status of submittals and shop drawings as an agenda item at all Owner meetings and advise the Owner immediately of any delays in the shop drawing and submittal process.
- 19.4. The CM shall develop a shop drawing and submittal aging report which is to be submitted to the Owner at each weekly progress meeting. The report must include anticipated and actual submittal dates and must be coordinated with the Master Schedule.
- 19.5. The CM is to ensure that shop drawing/submittal packages are submitted in an appropriate manner and, if not, return them to the Contractor for proper submission. All Contractor submittals shall be submitted initially to the CM for review, approval and appropriate routing to the Designer and, if appropriate, the Owner. The CM shall provide additional copies of any submittals or shop drawings requested by the Owner.
- 19.6. The Master Schedule for the Project shall include timeframes and dates for delivery and approval of submittals. A separate submittal schedule shall also be maintained and coordinated with the Master Schedule for ease of reference by the Contractors, Owner, and the Designer, which shall be consistent with the Master Schedule. The specific format and information to be provided in the submittal schedule must be reviewed and approved by the Owner and Designer prior to its use on the Project.
- 19.7. Approval of submittals, shop drawings or special systems calculations by the Designer shall not be construed as relieving the CM from responsibility for compliance with the design or terms of the Contract Documents nor from responsibility of errors of any sort in the details or shop drawings, unless such error has been called to the attention of the Designer in separate writing by the CM.

## **20. Use of Premises, Site Conduct, and Safety and Protection of Property**

- 20.1. The CM shall be responsible for the entire site and shall provide all the necessary protections required by the Owner and by laws or ordinances governing safety and protection of property. Consistent with the indemnification provisions elsewhere in this Agreement, the CM shall be responsible for protecting the public and those on the site against all bodily injury or harm, and protecting against any damage to the Work, to adjacent property, and to property of others. The CM shall have access to the Project at all times. Subject to its ultimate contractual

responsibility for protection of the Work, property and the public under this Agreement, and subject to any non-delegable duties imposed by law, the CM may delegate to Contractors these obligations of the CM under this Agreement, and may obtain indemnification and insurance from Contractors as the CM deems reasonable and prudent.

- 20.2. The CM shall provide cover and protect all portions of the structure when the Work is not in progress, provide and set all temporary roofs, covers for doorways, sash and windows, barricades, and all other materials necessary to protect all the Work on the building, whether set by it, or any of the Contractors. Any completed Work or Work in progress damaged through the lack of proper protection or other act or omission of the CM or the Contractors shall be repaired or replaced without extra cost to the Owner.
- 20.3. No fires of any kind will be allowed inside or around the Project site during the course of construction without special written permission from the Owner.
- 20.4. In the event any artifacts or articles which appear to have archaeological or historical significance are discovered by the CM or any Contractors, the CM shall immediately provide Notice to the Owner before proceeding with any Work and before the conditions are further disturbed at the location of the discovery. Neither the CM nor any Contractor shall have any property rights to such artifacts or articles.
- 20.5. The CM shall protect all trees and shrubs designated to remain in the vicinity of the Project Site by building substantial protection around same. The CM shall barricade all walks, roads, etc., as authorized by the Owner to keep the public away from the construction. All trenches, excavations or other hazards in the vicinity of the Work shall be well barricaded and properly lighted at night.
- 20.6. The CM shall develop and implement a Project Safety Program. The CM shall report to the Owner, as part of the MICS, any safety violations and actions taken to protect the safety of persons and property engaged in the Project. The CM shall require that all Contractors meet or exceed the Project Safety Program requirements including where those requirements meet or exceed State or Federal requirements.
- 20.7. In the event the Owner implements an Owner Controlled Insurance Program ("OCIP"), the CM agrees to cooperate and coordinate with any safety plan or risk management plan implemented in connection with the OCIP.
- 20.8. The CM shall implement the Project Safety Program for the protection of all persons on the job, including the requirements of the current edition of A.G.C. Accident Prevention Manual in Construction, as amended, and shall fully comply with all state laws or regulations and North Carolina State Building Code requirements to prevent accident or injury to persons on or about the location of the Work. The CM shall clearly mark or post signs warning of hazards existing, and shall barricade excavations, elevator shafts, stairwells, floor and wall openings and similar hazards. The CM shall protect against damage or injury resulting from falling materials and shall maintain all protective devices and signs throughout the progress of the Work.
- 20.9. The CM shall, at a minimum, adhere to the rules, regulations and interpretations of the North Carolina Department of Labor relating to Occupational Safety and Health Standards for the Construction Industry.
- 20.10. As part of the Project Safety Program, the CM agrees to implement a Public Hazard Control Plan conforming to the standards set forth in ANSI A10.34-2005R. The Public Hazard Control Plan shall be submitted to the Owner for review and approval before construction begins on the Project.

- 20.11. The CM shall designate a responsible member of its organization as safety inspector, whose duties shall include accident prevention on the Project. The name of the onsite safety inspector shall be made known to the Designer and Owner at the time the Work is started. The CM will provide the Owner with the name of each Contractor's onsite safety officer.
- 20.12. In the event of emergency affecting the safety of life, the protection of Work, or the safety of adjoining properties, the CM is hereby authorized to act at its own discretion, without further authorization from anyone, to prevent such threatened injury or damage. Any compensation claimed by the CM on account of such action shall be determined as provided for herein.

## **21. Environmental Protection**

- 21.1. If demolition of existing structures is part of the scope of its Work on the Project, the CM acknowledges that the Project site may contain potentially hazardous substances and/or hazardous waste, including asbestos and lead paint, the exact extent, location and physical and chemical characteristics of which may be unknown or which may differ from the results of previous site investigations. The CM acknowledges that it has reviewed or had adequate opportunity to review various documents provided by the Owner concerning environmental investigations and hazardous substances, pollutants or contaminants, or solid wastes at the site. The CM has inspected the site and is fully aware of work, which has been performed at the site regarding hazardous substances, pollutants or contaminants, or solid wastes. The CM will develop a demolition and asbestos abatement plan with reasonable precautions to protect workers, visitors and the public from potentially hazardous substances and/or hazardous waste. This plan shall be part of the Construction Management Plan and shall be submitted to the Owner, the Designer and all necessary regulatory agencies before demolition begins.
- 21.2. If the demolition and asbestos abatement plan precautions are inadequate to prevent foreseeable bodily injury or death to persons resulting from an unforeseeable material or substance encountered but not created on the site by the CM or its Contractors, the CM shall, upon recognizing the condition, immediately stop Work in the affected area and report the condition to the Owner and Designer in writing. The CM shall revise its demolition and asbestos abatement plan to take into account the unforeseen material, substance or condition, and shall take responsibility for remediation of the material, substance or condition from the site in accordance with the revised plan.
- 21.3. The CM will take all measures necessary to prevent the release by the CM or any of its Contractors of any hazardous substances at the Project site or adjacent areas. The CM will immediately notify the Owner of any spills, emissions or other releases of hazardous or potentially hazardous substances at or adjacent to the Project site due to the CM or its Contractors. The CM will be responsible for removing from the Project site and areas adjacent thereto, and for properly disposing of, in compliance with the Contract Documents, all applicable laws and applicable permits, all hazardous or potentially hazardous substances generated or accumulated by the CM or any Contractor in the course of performing the Work.
- 21.4. Any land-disturbing activity performed by the CM in connection with the Project shall comply with all erosion control measures set forth in the Contract Documents and any additional measures which may be required in order to ensure that the Project is in full compliance with the Sedimentation Pollution Control Act of 1973, as implemented by Title 15, North Carolina Administrative Code, Chapter 4, Sedimentation Control, Subchapters 4A, 4B and 4C, as amended (15 N.C.A.C. 4A, 4B and 4C).
- 21.5. No Work or any other kind of construction activity for the Project shall take place within the floodway limits and the 100-year floodplain limits established by Buncombe County Ordinances for Hominy Creek and the Project Site.

## 22. Insurance and Indemnity

- 22.1. Insurance by Owner: The Owner shall not be required by this Agreement to procure or maintain any insurance for the Project or for the benefit of the Project participants. The only insurance maintained by the Owner will be such insurance as the Owner otherwise decides to carry to cover liabilities or losses of the Owner and its agents and separate contractors during the timeframe of the Project. It is the intent of this Agreement that the CM will implement insurance plans and purchase insurance policies to protect the Work and to insure against liabilities of the CM and the Contractors. Such insurance shall be of the kinds and have limits of liability and coverages not less than the minimum limits hereinafter specified or required by law, whichever is greater. Notwithstanding the foregoing conditions, the Owner reserves the right to implement an Owner-Controlled Insurance Program ("OCIP") to provide any or all of the coverages otherwise required of the CM. The terms and conditions of any OCIP will be in the discretion of the Owner, provided the Owner will give the CM at least sixty (60) days' notice of the intent to implement the OCIP with an opportunity to comment on its terms. The CM shall be given at least fourteen days to comment on the OCIP terms and conditions. After the CM reviews the proposed coverage terms and limits of such OCIP, the parties agree that provisions of Article 21, including, but not limited to, matters addressing insurance required to be provided by CM, coverages, limits and indemnification by CM and Contractors, will be modified such that they are consistent with the OCIP and are mutually agreeable to both the Owner and the CM.
- 22.2. Insurance by the CM: The CM shall purchase and maintain builder's risk insurance and liability insurance that shall protect the CM from the claims set forth below that may arise out of or result from the CM's performance of services pursuant to this Agreement:
- 22.2.1. Claims under Workers' Compensation, disability benefits and other similar employee benefits acts that are applicable to the Work performed;
  - 22.2.2. Claims for damages because of bodily injury, occupational sickness or disease or death of CM's employees under applicable employer's liability law;
  - 22.2.3. Claims for damages because of bodily injury or death of any person other than CM's employees;
  - 22.2.4. Claims for damages insured by usual personal injury liability coverage that are sustained by any person as a result of an offense directly related to the employment of such person by the CM or by any other person;
  - 22.2.5. Claims for damages, other than to the Work itself, because of injury to or destruction of tangible property, including loss of use therefrom;
  - 22.2.6. Claims for damages because of bodily injury or death of any person or property damage arising out of ownership, maintenance or use of any motor vehicle;
  - 22.2.7. Claims for damages because of bodily injury or property damage, including loss of use therefrom, arising out of consolidation, transfer, transport, disposal, storage or other handling of hazardous or toxic waste, material, chemicals, compounds or substances at any location; and
  - 22.2.8. Claims for professional liability against any design professional engaged by the CM or the Contractors as required by the Contract Documents for fabrication or installation of components of the Project.
- 22.3. The CM shall include similar requirements in all Contracts with Contractors, with limits and coverage terms acceptable to the Owner.

- 22.4. The Owner makes no representation as to the adequacy or sufficiency of any coverage required by this Agreement. Insurance coverage by the CM is subject to the following general requirements. The following requirements shall in no way be construed to limit or eliminate the liability of the CM that arises from performance of Work under the Agreement. The CM is strictly responsible for all deductibles, self-insured retention, co-pays, and any losses, claims, and costs of any kind which exceed the CM's limits of liability, or which may be outside the coverage scope of the policies. The insurance specified shall be effected with an insurer in which the CM holds or owns no direct or indirect financial interest approved by the Owner, authorized to do such business in the State of North Carolina, and on terms approved by the Owner. Insurance companies utilized shall have a minimum rating of A- and Class VII as evaluated by the most current A.M. Best Rating Guide. If the insurer has a Best Rating less than A- and Class VII, the CM must receive specific written approval from the Owner prior to proceeding with any Work under the Agreement. All agents and brokers shall hold valid licenses from the State of North Carolina. Before commencing mobilization to the Project site and not later than seven (7) days after the receipt of the Construction Agreement by the CM for signatures, the CM shall furnish to the Owner a certificate or certificates of insurance in a form satisfactory to the Owner. Upon request of the Owner, the CM shall provide the Owner with certified copies of the insurance policies required by this Article, including without limitation declaration pages, conditions, exclusions and endorsements, and confirmation that each policy premium has been paid for the required term of this Agreement. A copy of the umbrella policy shall be provided to the Owner. Certificates of insurance shall be signed by a person authorized by that insurer to bind coverage on its behalf. All insurance policies shall provide, as evidenced by Certificates of Insurance, that the insurance shall not expire, be canceled, reduced, restricted, or changed in any way without at least thirty (30) days prior written notice to the Owner. With regard to expiration, cancellation, reduction, restriction, or any other change, certificates shall state: "Should any of the following described policies be canceled before expiration date or be due to expire within thirty (30) days, the insurer shall mail thirty (30) days prior written notice to named certificate holder." In the event of any such cancellation, non-renewal, reduction, restriction, or change in any insurance, the CM is obligated to replace such insurance within seven (7) days without a gap in coverage and file accordingly such notice with the Owner, and other interested parties. Failing immediate receipt of evidence of such replacement of insurance, the Owner reserves the right to procure such insurance as the Owner considers desirable and the CM shall pay or reimburse the cost of the premium in respect thereof. It is expressly provided, however, that any action or inaction on the part of the Owner in this respect shall in no way change or reduce the CM's responsibilities and liabilities under this Agreement. Self-funded, policy fronting, or other non-risk transfer insurance mechanisms are not acceptable without prior written approval of the Owner. Full disclosure of such a program must be made prior to commencing mobilization to the Project site. Failure to make a full disclosure constitutes a material breach of the Agreement, justifying termination for default.
- 22.5. The CM shall name the Owner as a certificate holder and additional insured under all of its insurance contracts with respect to and including without limitation liability arising out of activities performed by or on behalf of the CM, products and completed operations of the CM, and automobiles owned, hired, leased, or borrowed by the CM. The coverages shall contain no special limitations on the scope of protection afforded to additional insureds.
- 22.6. For any claims related to this Project, the CM's insurance or self-insurance shall be primary and noncontributory with respect to the Owner's insurance. Any insurance or self-insurance maintained by the Owner shall be excess and noncontributory with respect to the CM's insurance.

- 22.7. All policies of insurance shall contain a clause waiving rights of subrogation against the Owner, unless the Owner approves otherwise in writing.
- 22.8. The CM's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.
- 22.9. The claim provisions in the CM's insurance policies must specifically state the insurance company has both the right and duty to adjust a claim and provide defense.
- 22.10. The policies shall not contain any provision or definition which would serve to exclude or eliminate from coverage third party claims, including exclusions of claims for bodily or other injury to shareholders, partners, officers, directors, or employees of the CM or the Owner.
- 22.11. If the policies contain any condition stating that coverage is null and void (or words to that effect) if the CM does not comply with the most stringent regulations governing the Work, it shall be modified so that coverage shall be afforded in all cases except for the CM's willful or intentional noncompliance with applicable government regulations.
- 22.12. Any failure by any person to comply with reporting or other provisions of any insurance policy, including breach of warranties, shall not affect coverage provided to the Owner and its representatives, officials, and employees.
- 22.13. The insolvency or bankruptcy of the insured or of the insured's estate shall not relieve the insurance companies of their obligations under these policies. Any clauses to the contrary are unacceptable and must be stricken.
- 22.14. Failure to comply with these requirements shall be a material breach of this Agreement justifying termination for default.
- 22.15. CM Insurance Coverage Limits
- 22.15.1. Workers' Compensation shall be maintained with at least the minimum statutory limits, and including Employer's Liability with limits of at least \$1,000,000.00. All Workers' Compensation policies provided by the CM and the Contractors shall contain a waiver of subrogation in favor of the Owner.
- 22.15.2. Commercial General Liability shall be maintained with at least the following minimum limits:
- 22.15.2.1. \$2,000,000 Bodily Injury and Property Damage for each occurrence
- 22.15.2.2. \$4,000,000 Products/Completed Operations Aggregate
- 22.15.2.3. \$4,000,000 General Aggregate
- 22.15.2.4. Coverage shall include, but not be limited to, the following supplementary coverages:
- Contractual Liability to cover liability assumed under this Agreement
- Product and Completed Operations Liability insurance
- Broad Form Property Damage Liability insurance
- Independent Contractors
- 22.15.2.5. Such policy shall include all of the coverages, which may be included in coverages A, B, and C contained in the Commercial General Liability Policy, without deletion. Such policy must be issued on an "occurrence" basis, as distinguished from a "claims made" basis.

- 22.15.2.6. Completed Operations shall extend six (6) years after final payment
- 22.15.2.7. If Contractors have design responsibility, endorsement CG22 80 and DIC for contractors' professional liability is required unless waived by the Owner.
- 22.15.3. Commercial Motor Vehicle Liability shall be maintained with at least the following minimum limits:
  - 22.15.3.1. Minimum Combined Single Limit that shall not be less than \$1,000,000 per occurrence
  - 22.15.3.2. Commercial Automobile Liability insurance shall cover all vehicles owned by, hired by, or used on behalf of the Contractor.
- 22.15.4. For Contractors with remediation or abatement responsibilities, Contractors shall carry Contractor's Pollution Liability Coverage. Coverage must be sudden and non-sudden, and include:
  - 22.15.4.1. Bodily injury, sickness, disease, mental anguish, or shock sustained by any person, including death;
  - 22.15.4.2. Property damage, including physical injury to or destruction of tangible property including the resulting loss of use thereof, cleanup costs, and the loss of use of tangible property that has not been physically injured or destroyed; and
  - 22.15.4.3. Defense, including costs, charges, and expenses incurred in the investigation, adjustment, or defense of claims for such compensatory damages.
  - 22.15.4.4. The Owner must be named as Additional Insured, and a Non-Owned Disposal Site Endorsement must be provided, scheduling the appropriate landfill.
  - 22.15.4.5. Minimum CPL limits of coverage shall be:
 

Per Loss	\$1,000,000
All Losses	\$2,000,000
- 22.15.5. Excess/Umbrella Liability shall be maintained with the following minimum limits:
  - 22.15.5.1. \$25,000,000.00 per Occurrence
  - 22.15.5.2. \$25,000,000.00 Aggregate
- 22.16. Policies: Commercial general liability insurance may be arranged under a single policy for the full limits required or by a combination of underlying policies with the balance provided by an excess or umbrella liability policy. The Owner shall be an additional insured on all commercial general liability policies and automobile liability policies submitted to comply with this Article. Commercial general liability and excess liability policies shall be endorsed with a schedule of underlying liability policies required and obtained from the Contractors. Coverage under the commercial general liability policies shall not be limited by any language in the contracts with the Contractors making the Contractors liable for losses in excess of the limits of coverage provided by the Contractors.
- 22.17. Cancellation: The foregoing policies shall contain a provision that coverages afforded under the policies shall not be cancelled or expire until at least thirty (30) days written notice has been given to the Owner and shall include an endorsement covering this Agreement. Certificates of Insurance showing such coverages to be in force shall be filed with the Owner contemporaneously with execution of this Agreement or any relevant Contractor contract.

- 22.18. **Builder's Risk Insurance:** The CM shall be responsible for purchasing and maintaining insurance satisfactory to the Owner to protect the Project from perils of physical loss.
- 22.18.1. The Owner shall receive copies of the builder's risk insurance policies that satisfy this Article. The CM shall be responsible for any deductibles associated with this coverage.
- 22.18.2. The builder's risk insurance shall provide for the cost of replacement of the Work, including materials stored off site, at the time of any loss. The insurance shall include as additional insureds the Owner, the CM, the Contractors and their subcontractors and shall insure against the loss from the perils of fire and all risk coverage for physical loss or damage due to theft, vandalism, collapse, malicious mischief, terrorism, transit, flood, mold, earthquake, testing, or damages resulting from defective design, negligent workmanship or defective material. The CM shall obtain approval from the Owner before increasing any coverage due to increases in construction costs.
- 22.19. **Other Property Insurance:** The CM and each Contractor shall purchase and maintain contractor's property insurance covering construction machinery, equipment, tools, construction trailers and their contents, and temporary scaffolding, whether owned, leased, rented, or borrowed and used by the CM or Contractor respectively in the performance of the Project Work. The CM and its Contractors shall be responsible for any deductibles associated with this coverage. The Owner will not be responsible for any loss or damage to tools and equipment belonging to the CM or its Contractors. Each insurance policy covering such tools and equipment will include a waiver of subrogation in favor of the Owner, Designer, engineers and other enrolled parties. Such coverage shall be written on a policy form at least equivalent to that provided by a "Contractor's Equipment Floater" as customarily defined within the insurance industry. The CM and Contractors also agree to notify all tiers of Contractors of their obligation to insure any machinery, equipment, and tools used by the Contractors in the performance of the Project Work.
- 22.20. The CM may, with the prior approval of the Owner, provide the insurance coverages required herein through either its enterprise insurance program or a Contractor Controlled Insurance Program (a "CCIP"), both meeting the coverages and limits described herein.
- 22.21. **Partial Occupancy:** If the Owner occupies or uses a part or parts of the Project prior to substantial completion thereof, such occupancy shall not occur until the Owner obtains property insurance for the part or parts of the structure occupied by the Owner.
- 22.22. **Notices and Recovery:** If requested by the Owner, the CM shall provide the Owner with copies of all policies thus obtained for the Project. The CM shall provide the Owner with thirty (30) days advance notice of expiration, cancellation, non-renewal or endorsement reducing or restricting coverage.
- 22.23. **Waiver of Subrogation:** The Owner and the CM waive all rights against each other and against the Contractors, consultants, agents and employees of the other for damages occurring during construction and covered by builder's risk and any property insurance required for this Project, excluding the Owner's property insurance. The Owner and the CM shall each require appropriate similar waivers from their contractors, consultants and agents. This waiver does not apply to any design liability, or to manufacturer's or installer's warranties.
- 22.24. **CM As Joint Venture:** If the CM is completing this Project on a joint venture basis, whether as a partnership, limited liability company, or any other form of business association or entity, the CM joint venture and each member of the joint venture retains all liabilities assumed by this Agreement, jointly and severally. This may include, but is not limited to, all premiums due, deductibles/self-insured retentions, coinsurance provisions, claim provisions, insurance policy conditions, and indemnification provisions hereunder. For CM provided insurance,

evidence of a blanket joint venture endorsement substantially similar to the following must be obtained from the general liability and pollution liability carriers of each joint venture partner and maintained for a period of six (6) years after completion of the Project: *"With respect to "your work", and the "products-completed operations hazard", you are an insured for your liability arising out of the conduct of any partnership or joint venture of which you were a partner or member, even though this partnership or joint venture is not shown as a Named Insured in the Declarations. This coverage is excess over any available liability purchased specifically to insure the partnership or joint venture. This coverage will not inure to the benefit of any other party except you."*

- 22.25. Indemnity: To the fullest extent permitted by law, the CM shall indemnify and hold harmless the Owner from and against claims, demands, suits, damages, losses, costs and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, but only to the extent caused by the negligent acts or omissions of the CM, a Contractor, or anyone directly or indirectly employed by them or anyone for whose acts they may be liable. The CM shall not be required to indemnify any person against losses resulting from a breach of contract or resulting from negligence, misconduct or violation of laws on the part of any person indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Section. In claims against any person or entity indemnified under this Section by an employee of the CM, a Contractor, or anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under this Section shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for the CM or a Contractor under workers' compensation acts, disability benefit acts or other employee benefit acts.
- 22.26. Indemnification by Designer: The Owner shall cause the Designer to indemnify and hold harmless the Owner to the same extent and in the same manner that the CM has provided indemnification for the Owner under this Agreement.
- 22.27. Indemnification by Contractors: The CM shall cause each Contractor to indemnify and hold harmless the Owner, CM and Designer from and against any and all claims, demands, suits, damages, costs, expenses and fees that are asserted against the Owner, CM or the Designer and that arise out of or result solely from negligent acts or omissions or the breach of the Contractor's Contract by the Contractor, its employees, agents and representatives in performing the Work.

### **23. Time for Performance, Scheduling and Progress Maintenance**

- 23.1. The CM shall be responsible for Project scheduling and efficient and timely prosecution and completion of the Work. The obligations and duties of the CM with regard to scheduling and progress maintenance shall be as follows:
- 23.2. Master Schedule: In accordance with the Construction Management Plan, the CM shall prepare a Master Schedule for the Project. The Master Schedule shall specify milestone dates and the proposed start and finish dates for each major project activity including all design and construction activities for each GMP. The Master Schedule shall consist of a critical path method (CPM) schedule utilizing accepted standard computer-based software. The scheduling software shall allow for integration of all aspects of the Project and provide for coordination of all Work to be performed. The scheduling software used by the CM shall be capable of producing and coordinating logic developed network diagrams, and tabular format reports. The CM shall submit the Master Schedule to the Owner for acceptance.

- 23.3. Design Phase Milestone Schedule: In accordance with the Construction Management Plan, after the Owner accepts the Master Schedule the CM shall prepare a Milestone Schedule for the Design Phase. The Design Phase Milestone Schedule shall be used for judging progress during the Design Phase. The Design Phase Milestone Schedule activities shall include schematic design documents, design development documents, construction documents, permitting, creation of separate specifications and bid packages, and selection and approval of long-lead-time components of the Project. The CM shall monitor compliance with the Design Phase Milestone Schedule, and promptly notify the Owner and Designer of any delay or change in the Design Phase Milestone Schedule.
- 23.4. Pre-Bid Construction Schedules: Prior to transmitting Contract Documents to bidders, the CM shall prepare a Pre-Bid Construction Schedule for each part of the Project and make the schedule available to the bidders during the Procurement Phase. The CM shall inform the bidders of their responsibilities regarding the Pre-Bid Construction Schedule specified in the Instructions to Bidders or Contract Documents.
- 23.5. Contractors' Construction Schedules: The CM shall provide a copy of the Master Schedule to the bidders. As part of the notice of award of each contract, the CM shall inform each Contractor of the requirements for the preparation of a construction schedule. The Contractor shall prepare its own construction schedule in accordance with the requirements of the Contract Documents. The Contractor's Construction Schedule shall establish completion dates that comply with the requirements of the Master Schedule. The CM shall review each Contractor's Construction Schedule and shall verify that the schedule is prepared in accordance with the requirements of the Contract Documents and that it establishes completion dates that comply with the requirements of the Master Schedule.
- 23.6. Master Schedule with Fixed Completion Dates: Substantial Completion and Final Completion shall be achieved by the dates listed in the Master Schedule. The CM agrees that all of the activities which impact, limit, or otherwise affect the time of completion of the Work will be shown in the Mater Schedule and that all of the activities of others that impact, limit, or otherwise affect the start, duration, or completion of the CM's activities will also be shown. The CM further represents that the CM can and will complete each activity within the time shown for that activity. Liquidated Damages shall be assessed based on the Master Schedule with Fixed Completion Dates. The CM shall develop the complete and final CPM schedule in the form of a CPM network arrow diagram using the CM's logic and time estimates for each segment of the Work. The CM scheduling obligation shall include tracking the progress of the Owner's and the Designer's tasks and activities in relation to the Master Schedule and promptly notifying the Owner of any delay that might impact construction. The arrow network diagram will be drawn in a level of detail suitable for display of salient features of the Work, including but not limited to the placing of orders for materials, submission of shop drawings for approval, approval of shop drawings by the CM, Designer and the Owner, delivery of material, and all Work activities inclusive of punch list agreed to by the Owner. Each Work activity shall be assigned a time estimate by the CM. One day shall be the smallest time unit used. Data shall also be provided in Gantt form. Time is of the essence with respect to the Substantial Completion Date, punch list date, and Final Completion date for the Project.
- 23.7. Schedule Monitoring: The Designer and the Owner shall monitor progress of the Work and the CM shall cooperate with such monitoring and provide any and all information with respect to the progress of the Work and scheduling as the Owner or the Designer may reasonably require. The CM shall identify potential variances between scheduled and desired completion dates, review the schedule for Work not started or incomplete, review the status of submittals and delivery of long-lead-time deliveries, review the Owner's occupancy priorities, and take the action necessary to meet the required completion date. The CM shall furnish to the Owner

various schedules and updates setting forth planned and completed progress of the Project broken down by the various divisions or parts of the Work and by calendar days. The CM shall ensure that all schedules are prepared and updated in strict conformance with the Owner's requirements for formatting of reports for the Owner. The CM shall keep the Owner, the Designer and all Contractors fully informed as to all changes and updates to the schedule. The CM shall ensure that all schedules incorporate necessary lead times for actions required by the Owner and regulatory agencies, by the Consultants, by the CM, by utility companies providing services or relocating service lines and facilities, by all Contractors, and for significant General Conditions events, including but not limited to submittals, permit and approvals applications and review of interim and final plans, specifications and bid packages.

- 23.8. Construction Schedule Report: The CM shall review the progress of construction of each Contractor on a weekly basis, shall evaluate the percentage complete of each construction activity as indicated in the Contractor's Construction Schedule and shall review such percentages with the Contractor. The weekly status report shall show the actual Work completed to date in comparison with the original amount of Work scheduled, inclusive of information on the Contractors' Work and the percentage of completion for the Project. The report shall describe major milestones achieved and slipped, including a discussion of each slippage. In addition to schedule information, the report shall contain an overall summary of the financial status of the Project with a cost control report with proposed solutions for resolution of any cost concerns or issues. The report shall contain a summary statement on the status of change orders for the Project inclusive of potential change orders, approved change orders and rejected/voided change orders as well as change orders that require the Owner's immediate attention. The report shall contain a summary statement as to the status of shop drawings, submittals and RFI's for the Project inclusive of items requiring the Owner, the CM or the Designer's immediate attention. The report shall contain a summary statement as to the status of quality control/inspections for the Project including, but not limited to, number and type of inspections made, overall Project quality to date, and recommendations. This evaluation shall serve as data for input to a monthly Construction Schedule Report that shall be prepared and distributed to the Owner and the Designer. The Construction Schedule Report shall indicate the actual progress compared to scheduled progress and shall serve as the basis for the progress payment to the CM.
- 23.9. Progress Records: The CM shall keep accurate and detailed written records of Project progress during all stages of construction. The CM shall maintain a detailed daily diary of all events, which occur at the jobsite or elsewhere, and which affect, or may be expected to affect, Project progress. The diary shall record weather data, including minimum and maximum temperatures, precipitation type and amount, sky conditions, and wind velocities. The diary shall also record all visitors, number of on-site workers for each contract and include a detailed list of all material deliveries to the site. The diary shall be available to the Owner at all times and shall be turned over to the Owner upon completion of the Project. The CM shall compile and submit to the Owner daily a summary report consisting of the CM's daily diary entry and each Contractor's daily report describing the construction activities of the day along with manpower and equipment usage, including that of the Contractors.
- 23.10. Project Site Meetings: The CM shall conduct weekly coordination meetings at the site with all Contractors at which the Owner, the Designer, other designated representatives, and the CM can discuss jointly such matters as progress, scheduling, and construction-related problems. All Contractors shall be represented at these coordination meetings by both home office and Project personnel, unless specifically excused by both the CM and the Owner. The CM shall require attendance from other subcontractors and material suppliers who can contribute toward maintaining required job progress. It shall be the principal purpose of these meetings to effect

coordination, cooperation and assistance in every practical way toward the end of maintaining progress of the Project on schedule and to complete the Project within the specified contract time. The CM shall be prepared to assess progress of the Work and to recommend remedial measures for correction of progress as may be appropriate. The CM, with assistance from the Designer, shall be the coordinator of the conferences and shall lead the meeting. The CM shall take and distribute complete minutes of meetings to all attendees and others as directed by the Owner within three (3) days of such meetings. Representatives of the Owner may attend any or all meetings and shall in any case receive all notices and minutes of meetings. As set forth in the Master Schedule and the Contract Documents, the CM shall also conduct pre-installation and pre-construction meetings for key components of the Work. The CM shall conduct a separate monthly meeting with the Owner and the Designer to update them on progress of the Work.

- 23.11. Recovery Schedules: Should the CM fail to start a critical activity on the start date shown in the Master Schedule or otherwise become delayed, the CM and its Contractors shall, without being entitled to any increase in the GMP or other compensation, work overtime, increase labor forces or take such other action as may be necessary or appropriate to complete the activity by the adjusted Completion Dates shown on the Master Schedule, unless the CM is entitled to an extension of the Completion Dates under this Agreement. The CM shall require each Contractor to prepare and submit a recovery schedule as specified in the Contract Documents. The CM shall review and ascertain that each Contractor is providing sufficient resources to regain lost time. In no event will the GMP be increased or any expenses be paid to the CM or its Contractors for delays caused by the CM or any Contractor, even if there is a concurrent delay or suspension by the Owner, it being understood that the CM bears the risk of delays caused by its Contractors.
- 23.12. Updates and Revisions to Master Schedule: As necessary throughout the Project, the CM may make revisions to the Master Schedule so long as such revisions do not alter agreed milestone dates. All adjustments to the Master Schedule shall be for the benefit of the Project. The Owner shall issue change orders to the appropriate parties as required by this Agreement to implement justified revisions to the agreed milestone dates in the Master Schedule. During the construction phase, the CM shall update the Master Schedule and distribute copies to the Owner and the Designer on a monthly basis, showing any adjustments made by any change order, and showing any days gained or days lost with respect to any activity. An updated cost-loaded Project schedule shall be furnished showing actual completed Work at the end of each month in respect to the entire Project. The form used shall be approved by the Owner and shall be submitted with the monthly invoice. The CM shall also develop and submit a Work plan for a two week, thirty day and sixty day look ahead.
- 23.13. Non-waiver: If the CM submits a construction schedule, progress report, or any other document that indicates or otherwise expresses an intention to achieve completion of the Work prior to any established completion date, no liability of the Owner to the CM for any failure of the CM to so complete the Work shall be created or implied.
- 23.14. Schedule Adjustment: If the CM and its Contractors, for reasons beyond their control, are delayed in beginning any activity, the CM shall, nevertheless, have the same number of days as is shown in the Master Schedule for the activity, and the completion date of the affected activity and any succeeding activity that is dependent upon that activity shall be adjusted accordingly; provided that at any time the Owner, by means of a change order, may require the CM to work overtime, to increase labor forces or to take any necessary or appropriate action to decrease the time required for any activity, and the CM shall be entitled to an adjustment in the GMP computed in accordance with this Agreement. The CM shall review the contents of a request for changes to the construction contract time or price submitted by a

Contractor, assemble information concerning the request and endeavor to determine the cause of the request. In instances where the CM's analysis reveals that the request is valid, the CM shall prepare a detailed report to the Designer and the Owner for review, consideration and approval. The CM shall, prior to the issuance of a change order, determine the effect on the Master Schedule of time extensions requested by the Contractor. The Designer shall prepare the necessary change order documents for signing by the CM, Designer and Owner. The CM shall then prepare the necessary documents to effect a change to the contract with the Contractor.

- 23.15. Withholding Payment from CM: Should any monthly revision of any Master Schedule show that the CM is behind on any critical activity, the late completion of which could delay Substantial Completion of the Work, the Owner shall be entitled to withhold from the next Progress Payment due the CM an amount not exceeding the amount the Owner would be entitled to in Liquidated Damages, should Substantial Completion be delayed by the same number of days that the CM is currently behind schedule. If, subsequently, the Project progress, as shown by any succeeding monthly revision to the Master Schedule, is such that the anticipated delay no longer exists, the Owner shall pay with the Progress Payment next due to the CM such amounts as have been withheld in accordance with this section 23.15.
- 23.16. Work by Owner: If the CM, within a period of three (3) business days after written notice that it is behind in a critical activity or is otherwise in default under this Agreement, shall not proceed in good faith and with reasonable speed to correct such delay or default in accordance with such notice, the Owner shall have full power and authority to take the prosecution of the Work out of the hands of the CM, to appropriate or use any or all materials and equipment at the Project as may be suitable and acceptable, and to enter into other agreements for the completion of the Work or pursue such other methods as in the Owner's sole discretion and opinion shall be necessary or appropriate for the completion of the Work in an acceptable manner. The Owner shall have the right to perform Work, hire and employ labor and craftsmen, rent equipment, subcontract with other parties, or do anything that the Owner deems necessary or appropriate to remedy or cure any delay or default by the CM in the progress of the Work. Such action by the Owner shall not, in any way, affect, void or limit any warranty, guaranty or other responsibility of the CM under the Contract Documents. All costs incurred by the Owner in taking any such action shall be charged to the CM and deducted from any amounts remaining due under the Agreement.
- 23.17. Force Majeure: The CM may be entitled to an extension of the time for completion (and a possible increase in the GMP) for delays arising from unforeseen causes beyond the control and without the fault or negligence of the Owner, the CM or the CM's Contractors as follows:
- 23.17.1. Acts of God, tornado, fire, hurricane or earthquake that damage completed Work or stored materials.
  - 23.17.2. Acts of the public enemy; acts of the State, Federal, or local government in their sovereign capacities.
  - 23.17.3. Abnormal inclement weather as defined in Section 23.19.
- 23.18. Notice: The CM and the Contractors shall not be entitled to and hereby expressly waive any extension of time resulting from any condition or cause unless a claim for extension of time is made in writing to the Owner within three (3) business days of the first instance of delay for all delays, except abnormal inclement weather which shall be made in accordance with section 23.19. All claims not filed in accordance with this Article shall be waived by the CM. Circumstances and activities leading to such claim shall be indicated or referenced in a daily

field inspection report for the day(s) affected. In every such written claim, the CM shall provide the following information:

- 23.18.1. Nature of the Delay;
  - 23.18.2. Date (or anticipated date) of inception of delay;
  - 23.18.3. Activities on the Master Schedule affected by the delay, and/or new activities created by the delay and their relationship with existing activities;
  - 23.18.4. Identification of person(s) or organization(s) or events(s) responsible for the delay;
  - 23.18.5. Anticipated extent of the delay; and
  - 23.18.6. Recommended action to avoid or minimize the delay.
- 23.19. Weather Delays: On any day the CM considers that the Project is delayed by adverse weather conditions, the CM shall identify in writing to the Designer and the Owner the adverse weather conditions affecting each activity, the specific nature of the activity affected, the number of hours lost, and the number of and identity (by responsibility or trade) of workers affected. The Designer shall subsequently provide written recognition of the delay. The time for performance of this Agreement includes an allowance for a number of calendar days which may not be suitable for construction Work by reason of adverse weather. The contract time will be extended only if the number of calendar days of adverse weather recognized by the Designer in a given month exceeds the number of inclement weather days set forth below, and the CM clearly demonstrates how this adverse weather negatively impacts activities on the critical path of the Master Schedule:

<b>Month</b>	<b>Number of Inclement Weather Days</b>
January	7
February	6
March	7
April	6
May	7
June	6
July	8
August	6
September	5
October	5
November	5
December	9

- 23.19.1. If the CM believes that the progress of the Work has been adversely affected by adverse weather recognized by the Designer during a particular month, the CM shall submit a written request for extension of time to the Designer. Such a request for an extension of the contract time shall be submitted by the tenth (10th) day of the month following that month in which the adverse weather is encountered. The request shall include, but is not limited to, the following information:

- 23.19.1.1. Detailed description of weather's effect on scheduled activities and its net effect on the critical path of the Project, and
- 23.19.1.2. Weather records from the official weather station nearest the Project Site and records of actual observation as contained in daily reports, correspondence, or other contemporaneously prepared documentation.
- 23.20. Damages for Delay: The CM may be entitled to an adjustment in the GMP or other compensation from the Owner for any delay in the completion of or progress on the Work that is caused by a force majeure condition or is otherwise not caused by the sole and direct act or omission of the Owner or the Owner's employees or agents.
- 23.21. Liquidated Damages for Delay: The CM specifically recognizes that a delay by the CM in achieving the Completion of the Project will necessarily cause damages, losses, and expenses to the Owner, including, but not limited to and by way of illustration only, increased capitalized costs and interests for the Project, increased and extended Project overhead, Designer's and Consultant's fees, increased costs of construction, increased and extended operation costs of other facilities, and inefficiency and loss of productivity, and that such damages, losses, and expenses may not be readily identifiable or ascertainable at the time they are incurred or at any later time. Therefore, and in recognition of these factors and the likelihood that actual damages from a delay will not be readily ascertainable, the CM agrees to pay to the Owner, as Step One Liquidated Damages and not as a penalty, the sum of Seven Hundred Fifty Dollars (\$750.00) as the Liquidated Damages per day, for each day by which a failure by the CM to meet the Substantial Completion Date established in Section 23.6, adjusted in accordance with this Article, delays the Substantial Completion of the Project. Furthermore, the CM agrees to pay to the Owner, as Step Two Liquidated Damages and not as a penalty, the sum of Seven Hundred Fifty Dollars (\$750.00) as Liquidated Damages per day, for each day by which the CM fails to achieve the Final Completion date established in Section 23.6, adjusted in accordance with this Article; provided, however, that no Step Two Liquidated Damages shall be assessed against the CM so long as Step One Liquidated Damages are being assessed. The sum for Liquidated Damages is the amount reasonably estimated in advance to cover the losses to be incurred by the Owner by reason of failure of the CM to complete the Project within the time specified, such time being in the essence of this Agreement and a material consideration thereof. This provision for liquidated damages does not bar the Owner's right to enforce its other rights and remedies under this Agreement, including without limitation the right to order the CM to accelerate the Work or the right to terminate the Agreement. Liquidated damages represent the Owner's best effort at the commencement of the Agreement to estimate its reasonable anticipated damages for delay, and should not be construed as a penalty. Step One and Step Two Liquidated Damages may overlap for a total of fifteen hundred dollars (\$1,500) per day.

#### **24. Suspension of the Work by the Owner**

- 24.1. The Owner may order, in writing, the CM to suspend all or any part of the CM's services for the Project for the convenience of the Owner or for work stoppage beyond the control of the Owner or the CM. If the performance of all or any part of the services for the Project is suspended, an equitable adjustment in the CM's compensation shall be made and this Agreement shall be modified in writing accordingly.
- 24.2. Pre-construction and procurement phases: If the services for the Project are suspended during the pre-construction or procurement phases of the Project, the CM's lump-sum fee shall be equitably adjusted based on the length of the suspension, the ability of the CM to reasonably reallocate personnel and resources to other projects during the period of suspension, costs of

remobilizing to the Project after suspension, and other similar factors affecting the cost of performance of the services by the CM.

- 24.3. Construction and Post-construction Phase Fixed Fees: If the services for the Project are suspended during the construction or post-construction phases of the Project, the CM's Fixed Fee shall be equitably adjusted based on the actual costs incurred by the CM for the Work and General Conditions during the period of the suspension.
- 24.4. Construction and Post-construction Phase General Conditions: In the event the CM's construction and post-construction phase services on the Project are suspended by the Owner, the Owner shall reimburse the CM for all of the General Conditions allowed for by this Agreement for the first thirty (30) days of such suspension. The CM shall reduce the size of its staff for the remainder of the suspension period as directed by the Owner and during such period, the Owner shall reimburse the CM for all costs of reduced General Conditions. Upon cessation of the suspension, the CM shall restore the construction site and home office staff to its former size.
- 24.5. Reassignment of Personnel: Persons assigned to another project during such suspension and not available to return to this Project upon cessation of the suspension shall be replaced. The Owner shall reimburse the CM for reasonable costs incurred in relocating staff persons returning to the Project or new persons assigned to the Project.
- 24.6. Protracted Suspension: If the Project is suspended by the Owner for more than one hundred twenty (120) consecutive days, the CM shall have the option of requiring that its compensation, including rates and fees, be renegotiated. Subject to the provisions of this Agreement relating to termination, a delay or suspension of the Project does not void this Agreement.
- 24.7. Additional Compensation to Contractors: The CM shall include provisions in its contracts with Contractors substantially the same as this Article 24, allowing for suspension of the Project by the Owner, and providing that suspension shall not be grounds for termination of the contracts except on the terms set forth in this Agreement. If the Owner suspends the Project for reasons other than default by the CM or any of its Contractors, the GMP will be adjusted by an amount sufficient to reimburse the reasonable and provable expenses incurred by the Contractors as a result of the suspension.

## **25. Cost Control**

- 25.1. Cost Management: The CM shall be responsible for implementing a system of cost control, and for the completion of the Project within the GMP agreed to by the CM and the Owner as set forth herein.
- 25.2. Budgets: The CM represents that before executing this Agreement it reviewed the Owner's funding plan for the Project and considers it reasonable given the planned scope and timeframe for the Project. The CM agrees to develop more detailed Project budgets on the following schedule:
  - 25.2.1. Schematic Design Phase: At the completion of schematic design of each major division of the Work, the CM shall prepare and submit to the Owner and the Designer a budget based on the CM's best estimate of the Cost of the Work, without excessive or unnecessary contingencies or allowances. This budget shall take into account the Master Project Schedule, and the CM's studies of market conditions in the vicinity of the Project. This budget shall be in a format reasonably required by the Owner and shall be compared and reconciled with the Designer's cost estimate.

- 25.2.2. Design Development Phase: At the completion of the design development phase of each major division of the Work, the CM shall prepare and submit to the Owner and the Designer a revised budget based on the CM's best estimate of the Cost of the Work, again without excessive or unnecessary contingencies or allowances. This budget shall take into account the Master Project Schedule and the CM's studies of market conditions in the vicinity of the Project. This budget shall be in a format reasonably required by the Owner. This revised budget shall be compared and reconciled with the budget or budgets prepared at the conclusion of the schematic design phase and with the Designer's cost estimate.
- 25.2.3. Construction Documents Phase: When the Drawings and Specifications for each major division of the Work reach 90% complete for permitting and construction, the CM shall prepare another revised budget, except to the extent the GMP has been fixed. All assumptions, allowances and contingencies in this revised budget shall be noted and explained. The budget shall be compared with and reconciled to the budget created at the conclusion of the design development phase. The cost elements shall be based on recommendations by the CM, shall be explained to the Owner and the Designer, and shall be subject to approval and acceptance by the Owner.
- 25.2.4. Special Budgets: Upon reasonable request by the Owner, the CM shall prepare estimates and budgets for designated components or features of the Project to allow the Owner to compare systems or alternatives, to make life cycle cost choices, and to discuss bid packages and other project delivery issues.
- 25.3. Analyzing Bids: Upon receipt of bids, the CM shall evaluate the bids, including alternate prices and unit prices, and before award of any construction contract shall provide the Owner and the Designer with a report summarizing the effect of the bids on the Project and Construction Budget.
- 25.4. Change Order Control: The CM shall establish and implement a change order control system.
  - 25.4.1. All proposed Owner-initiated change orders shall first be described in detail in writing by the Owner, or the Designer if so requested by the Owner, and forwarded to the CM. The CM shall then forward a request for proposal to the appropriate Contractor (or Contractors), accompanied by technical Drawings and Specifications prepared by the Designer. In response to the request for a proposal, the Contractor shall submit to the CM for evaluation detailed information concerning the costs and time adjustments, if any, necessary to perform the proposed change order work. Pricing for the proposal shall be in accordance with the requirements for changes to the GMP set forth in Article 26. The CM shall thoroughly, completely and critically review the Contractor's proposal, shall discuss the proposed change order with the Contractor and determine the Contractor's basis for the cost and time to perform the Work and, as applicable, the effect, if any, on the GMP. The CM shall present its findings to the Owner and the Designer in writing with a detailed explanation of why the CM believes the Contractor proposal or proposals should be accepted or rejected and explaining what the CM did to substantiate the pricing by the Contractor. Following acceptance of the proposal by the Owner, the Designer shall prepare the change order documents for signature by the CM and the Owner. Upon execution of the change order documents by the CM and the Owner, the CM shall prepare change order documents for signature by the affected Contractor(s). The CM shall verify that any adjustment of time required by approved change orders has been incorporated into the Contractor's Construction Schedule.
  - 25.4.2. The CM shall thoroughly, completely and critically review the contents of all Contractor-requested changes to the contract time or price, determine whether an

adjustment to the GMP or the Master Schedule is warranted under the Agreement, and determine the amount or length, if any, of the allowable adjustment to the GMP and the Master Schedule. If the CM believes that an adjustment to this Agreement might be warranted by a Contractor change request, the CM shall provide the Designer with a copy of the change request, and the CM shall, in its evaluations of the Contractor's request, consider the Designer's comments regarding the proposed changes. The CM shall present its findings to the Owner and the Designer in writing with a detailed explanation of why the CM believes the Contractor proposal regarding the proposed changes should be accepted or rejected and explaining what the CM did to substantiate the pricing by the Contractor. If, after review by the Owner and the Designer, the Owner determines that an adjustment to the GMP or Master Schedule is warranted, the Designer shall prepare the change order documents for signature by the CM, the Owner and the Designer. Upon execution of the change order documents by the CM and the Owner, the CM shall prepare change order documents for signature by each affected Contractor.

- 25.4.3. In instances where a lump sum or unit price is not authorized by the Owner in a change order prior to performing Work described in a request for proposal as provided in Section 26.1.3, the CM shall request from the Contractor records of the cost of payroll, materials and equipment and the amount of payments to subcontractors incurred by the Contractor in performing the Work. These cost records will be available to determine equitable compensation to the Contractor for the change order Work.
- 25.4.4. Trade-Off Studies: The CM shall provide trade-off studies for various minor construction components. The results of the trade-off studies shall be in report form and distributed to the Owner and Designer.
- 25.4.5. Progress Payments: In consultation with the Designer, the CM shall inspect the Work to determine compliance with the Contract Documents, review the monthly payment applications submitted by each Contractor and determine whether the amount requested reflects the progress of the Contractor's Work. The CM shall make appropriate adjustments to each payment application and shall prepare and forward to the Designer and the Owner a progress payment report. The report shall state the total contract price, payments to date, current payment requested, retainage and actual amounts owed for the current period. Included in this report shall be a certificate of payment that shall be signed by the CM and delivered to the Owner.
- 25.5. Costs in Excess of GMP: In the event that the sum of the Cost of the Work, the CM Fixed Fee, the reimbursable costs for General Conditions provided by the CM, and the Project Contingency exceeds the GMP and any adjustments therein as may be due pursuant to the terms hereof, the CM shall continue to perform at no additional cost to the Owner until the Project, defined by this Agreement and all Attachments hereto, is complete. The CM shall be responsible for paying all costs in accordance with the terms of this Agreement that may be necessary to complete the Project, even if such amounts are in aggregate in excess of the GMP.
- 25.6. Change Order Mark-Up. In the event that a change order is accepted that does not otherwise increase the GMP and after utilization of all credits and unused allowances, the CM's mark-up shall be: ten percent (10%) for less than \$10,000; seven percent for \$10,000 to \$49,999; and five percent for \$50,000 or more.

## **26. Changes to the GMP**

- 26.1. Changes to the GMP will only be allowed as described hereunder and only after all credits, unused allowances and contingency, if applicable as per Article 11, have been fully exhausted.

- 26.2. Changes Initiated or Approved by the Owner: The Owner may, at any time and for any reason, by written notice or order, make changes or modifications to the Work or add Work within the general scope of the Project, including without limitation changes to the Drawings and Specifications, the Master Schedule, the sequence, manner or method of performing the Work, or the work being provided by the Owner or its separate contractors. The CM may propose changes to the Work, but no change to the Work shall be allowed unless and until the Owner by written notice or order authorizes the change. If at the time of a change to the scope of the Project the GMP has been fixed, the CM shall be entitled to seek an adjustment in the GMP. The amount of adjustment to increase or decrease the Cost of the Work resulting from a change in the Project shall be determined in one or more of the following ways:
- 26.2.1. By mutual acceptance of a lump sum, properly itemized and supported by cost data; or
  - 26.2.2. By unit prices defined in a contract with a Contractor; or
  - 26.2.3. By the cost of such Work determined on the basis of the cost records for the changed work. In the event actual costs are to be reimbursed, the CM shall keep and present in such form as may be agreeable to the Owner and the Designer an itemized accounting together with appropriate supporting data of the actual Cost of the Work.
- 26.3. Requests for Adjustment of the GMP by the CM: If the CM believes that the following grounds exist for an adjustment in the GMP, the CM shall promptly notify the Owner and the Designer.
- 26.3.1. Unforeseen Conditions: Should the CM encounter unforeseen conditions at the Project site materially differing from those shown on the Drawings or indicated in the Specifications or differing materially from those that are reasonably foreseeable or ordinarily encountered and generally recognized as inherent in work of the character provided for in this Agreement, the CM shall immediately, and in no event more than three (3) days later, give notice to the Owner of such conditions before they are disturbed. The Owner and the Designer shall thereupon promptly investigate the conditions and if they find that they materially differ from those shown on the Drawings or indicated in the Specifications, they shall at once make such changes in the Drawings and/or Specifications as they may find necessary. Any increase or decrease in the GMP resulting from such changes shall be adjusted in the manner provided herein for adjustments as to extra and/or additional Work and changes. However, neither the Owner nor the Designer shall be liable or responsible for additional work, costs, or changes to the Work that could have been reasonably determined from any reports, surveys, and analyses made by the CM or made available for the CM's review or that could have been discovered by the CM through the performance of its obligations pursuant to the Contract Documents.
  - 26.3.2. Design Errors, Omissions and Ambiguities: It is expected that all final Construction Documents prepared or signed by the Designer and submitted to governmental authorities and code officials shall be complete, coordinated and contain directions as will: (i) enable a competent Contractor to carry them out; (ii) meet the requirements of governmental authorities and code officials; and (iii) be sufficiently complete and sufficiently free of conflicts so as to be capable of definitive pricing by the Contractors with a minimum of further clarifications or detailing by the Designer. It is also expected that the CM will perform its obligations under this Agreement, including its obligations to review the design documents, diligently and with reasonable care. Design errors, ambiguities, inconsistencies, or omissions that the CM could not in the exercise of reasonable prudence have detected during the discharge of the CM's pre-construction duties will entitle the CM to seek an increase in the GMP.

- 26.4. Unit Prices: If unit prices are utilized in the GMP, the GMP Proposal shall document the estimates on which the unit prices are based. If the CM later determines that the quantities on which unit prices are based will vary from the quantities utilized by the CM to fix the unit prices and calculate the GMP, the CM shall within three (3) days after determining that the quantities will vary from the estimates notify the Designer and the Owner in writing and forecast the amount of the variance. If the estimated quantities available to and used by the CM to establish the unit prices are so changed that application of the agreed unit prices to the quantities or Work proposed cause substantial inequity to the Owner or the CM, the applicable unit prices and GMP shall be adjusted.
- 26.5. Directive to Proceed: In the event the CM and the Owner cannot agree that an adjustment to the GMP or the Master Schedule is warranted, or cannot agree on the compensation for a change in the Work or on an increase in the GMP, the CM shall, if so directed by the Owner in writing, nevertheless proceed with the Work, and maintain cost-segregated cost records for all work for which the CM believes an adjustment might be warranted. Such cost records shall be provided to the Owner at least monthly. Any adjustment to the GMP shall be negotiated by the parties at a later date utilizing the dispute resolution procedures under this Agreement if necessary.

## **27. Termination of the Work for the Convenience of the Owner**

- 27.1. This Agreement may be terminated in whole or in part by the Owner for convenience after seven (7) days written notice to the CM.
- 27.2. In the event of termination for convenience of the CM's pre-construction and procurement phase services under Paragraph 27.1, the CM shall be entitled to be paid a reasonable pro-rata portion of its pre-construction and procurement phase services fee, with no additional compensation for termination expenses or post-termination expenses.
- 27.3. In the event of termination for convenience during the CM's construction and post-construction phase services by the Owner, the CM shall either cancel or assign to the Owner all contracts with Contractors and other suppliers at the sole option of the Owner. The CM shall be paid for the Cost of the Work performed to the date of termination, plus reasonable termination expenses paid to Contractors under their respective contracts, which shall each contain a termination for convenience clause that limits the recovery of the Contractors in the event of a termination for convenience to the value of the work actually completed by the Contractor to the date of termination, with no recovery of lost profit or other damages for wrongful termination of contract. In addition, the CM shall be paid all of its allowable General Conditions costs to the date of termination, including all termination expenses. Termination expenses are defined as those expenses arising prior, during, and subsequent to termination that are directly attributable to the termination. In addition, the CM shall be entitled to its full Fixed Fee for any phase of services completed prior to termination, plus a reasonable pro-rata portion of its Fixed Fee for any phase of services not completed at the time of termination, based on the percentage of such incomplete services actually completed prior to the date of termination; provided, however, that if it reasonably appears that the General Conditions costs being incurred by the CM would have exceeded the not-to-exceed limit on General Conditions costs, then the Owner shall be entitled to reduce the amount of the Fixed Fee payable to the CM upon termination by the amount by which the General Conditions would have exceeded the limit on General Conditions costs. After receipt of a notice of termination under this Article, the CM shall submit a claim for termination fees and expenses in a form and with certifications as are reasonably required by the Owner. The termination claim shall be submitted promptly, but in any event within sixty (60) days of receipt of a notice of termination

unless extended by the Owner. The claim shall be subject to reasonable audit to the same extent as any other request for payment of General Conditions.

## **28. Termination of the Agreement Due to Default**

- 28.1. This Agreement may be terminated by either party hereto upon fifteen (15) days prior written notice should the other party fail substantially to perform in accordance with the terms hereof through no fault of the terminating party or if the Project, in whole or substantial part, is stopped for a period of one hundred twenty (120) consecutive days under an order of any court or other public authority having jurisdiction or as a result of an act of government. Without in any way limiting the scope of this Article, the Owner may terminate this Agreement if the CM fails to begin or complete the Work within the time specified for completion in this Agreement, or shall perform the Work unsuitably or shall discontinue the prosecution of the Work for three (3) consecutive days, or if the CM shall become insolvent, be declared bankrupt, commit any act of bankruptcy or insolvency, allow any final judgment to stand against the CM or its affiliated companies unsatisfied for a period of forty-eight (48) hours, make an assignment for the benefit of creditors, or for any other cause whatsoever shall not carry on the Work in an acceptable manner. Termination under this Article for failure substantially to perform in accordance with the terms of this Agreement shall be without prejudice to any other right or remedy that the terminating party has under the Agreement or at law. If the Owner terminates the Agreement pursuant to this Article and later it is determined that the CM had not substantially failed to perform in accordance with the terms hereof, then the termination will be considered a Termination for Convenience.
- 28.2. Notice and Time for Cure: Neither party to this Agreement may terminate this Agreement without first giving the other party fifteen (15) business days notice of the intent to terminate the Agreement, measured from actual receipt of the notice. If the grounds for termination stated in the written notice are removed or cured within fifteen (15) business days after receipt of notice, this Agreement may not be terminated for default.
- 28.3. Payment to the CM: In the event of termination pursuant to this Article, the CM shall be paid the Cost of the Work performed through the date of termination, plus allowable General Conditions costs incurred through the date of termination, plus its full Fixed Fee for any phase of services completed prior to termination, plus a reasonable pro-rata portion of its Fixed Fee for any phase of services not completed at the time of termination, based on the percentage of such incomplete services actually completed through the date of termination, less any amount by which the total cost paid by the Owner to complete the Work for which the CM is responsible, including General Conditions, exceeds the GMP. In addition, the Owner may deduct from the final payment to the CM any liquidated damages or other damages for which the CM is liable under this Agreement. No payment shall be due under this Article until the Project is finally complete and all rights and claims by Contractors for work on the Project have been settled and paid.
- 28.4. Assignment of Contracts: In the event of termination pursuant to this Article, all construction and supply contracts between the CM and all Contractors and other suppliers for the Project shall be immediately assignable to the Owner, at the option of the Owner, on the same terms and conditions applicable to the CM under those contracts. The CM shall obtain the consent of each Contractor and supplier, in their respective contracts with the CM, to this assignment.

## **29. Additional Termination Provisions**

- 29.1. In the event of any termination under this Agreement, the CM agrees to:
  - 29.1.1. deliver to the Owner all Project as-built records, operation and maintenance manuals, warranties and other Project information generated to date;

- 29.1.2. deliver to the Owner copies of all shop drawings and other submittals received to date;
- 29.1.3. convey to the Owner or its designees title to all materials, supplies, partially or wholly fabricated parts and components, and any other property acquired by the CM for the Project; and
- 29.1.4. provide the Owner with copies of all pending claims under the CM builder's risk policy.

### **30. Occupancy and Use by the Owner; Substantial Completion**

- 30.1. Occupancy Planning and Support: The CM, in consultation with the Owner, the Designer and appropriate regulatory agencies, shall prepare an occupancy plan for the Project. This plan shall be provided to the Owner at least ninety (90) days prior to Substantial Completion.
- 30.2. The Owner may desire to occupy or utilize all or a portion of the Project when the Work for that portion is substantially complete. If so, the Owner shall make a written request to the CM in writing, through the Designer if applicable, to permit the Owner to use a specified part of the Project that the Owner believes it may use without significant interference with construction of the other parts of the Project. If the CM agrees, the Designer will schedule a beneficial occupancy inspection after which the Designer may issue a partial certificate of substantial completion. The certificate shall include the following documentation:
  - 30.2.1. Date of substantial completion.
  - 30.2.2. A tentative list of items to be completed or corrected before final payment.
  - 30.2.3. Establishing responsibility between the CM and the Owner for maintenance, heat, utilities and insurance.
  - 30.2.4. Establishing the date for guarantees and warranties under the terms of the Agreement.
  - 30.2.5. Consent of surety.
  - 30.2.6. Endorsement from the CM's insurance company permitting occupancy shall not be a condition precedent to the Owner's occupancy of a part or parts of the Project, but may be requested by the Owner in its discretion.
- 30.3. The Owner shall have the right to exclude the CM from any part of the Project that the Designer has so certified to be substantially complete, but the Owner will allow the CM reasonable access to complete or correct Work to bring it into compliance with the Agreement. Contractors allowed to Work in substantially complete or occupied areas shall clean up after their operations daily or be subject to back charges for cleaning. Occupancy by the Owner under this Article will in no way relieve the CM from its contractual requirement to complete the Project within the specified time.
- 30.4. Operation and Maintenance Materials: The CM shall obtain from the Contractors and review, assemble, organize and index all operation and maintenance manuals, warranties and guarantees for materials and equipment installed in the Project, in accordance with the Contract Documents and the Master Schedule. It is expected that all operation and maintenance manuals will be compiled and delivered to the Owner before the Project is substantially complete, and generally when the Work is eighty percent (80%) complete.
- 30.5. Record Documents: The CM shall coordinate and expedite submittals of information from the Contractors for preparation of record Drawings and Specifications, and shall coordinate and expedite the transmittal of such record documents to the Owner.
- 30.6. The CM shall, prior to requesting a Certificate of Substantial Completion, prepare and submit to the Contractors lists identifying Work that does not conform to the Contract Documents. The CM shall not request a Certificate of Substantial Completion from the Designer until the

CM believes that the Project is substantially complete and certifies to the Designer that all of the Work is substantially complete. The Designer shall then determine whether the Project is substantially complete. Should the Designer and the Owner determine that the Work or a designated portion thereof is not substantially complete, they shall provide the CM with written notice stating why the Work or designated portion is not substantially complete. The CM shall expeditiously complete the Work and shall re-request in writing that the Designer perform another substantial completion inspection. Costs, if any, associated with such re-inspection shall be assessed to the CM at the rates specified in the contract between the Owner and the Designer. Upon Substantial Completion, the Designer shall prepare and submit to the CM a deficiency list identifying all portions of the Work which are known by the Designer at that time to be incomplete or defective. The deficiency list shall be sufficiently detailed to describe deficiencies by floor, by occupancy departments, by building system, or by elevation for all rough-ins and finishes. Within thirty (30) days of receipt of this deficiency list, the CM shall complete and correct all items on that list along with all other Work required to achieve Final Completion of the Work.

- 30.7. At any time prior to completion of the one-year period of warranty, the Designer may submit to the CM a supplemental deficiency list, in which case the CM shall complete or correct any and all new items identified on the supplemental deficiency list.
- 30.8. Occupancy Permit: The CM shall assist the Owner and the Designer in obtaining an occupancy permit by accompanying governmental officials during inspections of the Project, preparing and submitting documentation to governmental agencies and coordinating final testing and other activities. Receiving an occupancy permit is a condition precedent to substantial completion.

### **31. Final Inspection and Acceptance**

- 31.1. In consultation with the CM, the Designer shall determine when the Project and the CM's and Contractor's Work are finally completed and, following completion of corrections, shall issue a Certificate of Final Completion to the Owner. The Owner shall make the final determination of whether Final Completion has been achieved. Following the receipt of payment from the Owner, the CM shall make all remaining payments due to Contractors.

### **32. Quality Assurance, Warranties and Guarantees**

- 32.1. The CM unconditionally warrants and guarantees all materials and workmanship against all defects arising from faulty materials, faulty workmanship or the negligence of the CM or the Contractors for a period of twelve (12) months following the date of substantial completion of the Work and shall replace such defective materials or workmanship without cost to the Owner.
- 32.2. In addition to the foregoing general warranty, the Contract Documents may require extended warranties for specified building components, including without limitation mechanical and electrical equipment, elevators and escalators, security equipment, roof, curtain walls, doors and waterproofing. Extended warranties shall be specified in the Contract Documents. All such extended warranties shall either be provided by the CM or by a Contractor or manufacturer as provided in the Contract Documents. Such warranties shall provide, at a minimum, for the repair or replacement of defective or non-conforming components within the warranty period. The CM agrees to execute such documents as may be necessary to ensure that any warranty given by any Contractor will inure to the benefit of the Owner.
- 32.3. The CM shall establish and implement a program to monitor the quality of construction. The purpose of the program shall be to guard the Owner against defects and deficiency in the Work of the Contractors. The CM shall transmit to the Designer and the Contractor a notice of

nonconforming work and may require that the Contractors correct Work at no expense to the Owner when it is the opinion of the CM that the Work does not conform to the requirements of the Contract Documents. Except for minor variations as stated herein, the CM is not authorized as part of this service to change, evoke, enlarge, relax, alter, or waive any requirement of the Contract Documents or to approve or accept any portion of the Work not performed in accordance with the Contract Documents.

- 32.4. Testing by the CM: The CM may recommend to the Owner tests and inspections beyond those required by this Agreement that the CM believes should be conducted to monitor the quality of construction and compliance with the Contract Documents. If the Owner declines to conduct the test or defray the costs of the test, the CM may nonetheless conduct the test, in which case the cost of such tests shall be borne by the CM. Notice of all such tests and inspections shall be provided to the Owner and the Designer, and copies of the results and reports of all such tests and inspections shall be provided to the Owner and the Designer.

### **33. Testing and Inspections**

- 33.1. The Owner shall employ and pay for the services of independent testing firms to perform all inspections, tests, or approvals required by the Contract Documents except as otherwise specifically provided in the Contract Documents.
- 33.2. The Owner, other representatives and personnel of the Owner, independent testing laboratories, and governmental agencies with jurisdictional interests shall have access to the Project at all reasonable times for their observation, inspecting, and testing. The CM shall provide all such persons proper and safe conditions for such access and advise them of the CM's Project safety procedures and programs so that they may comply therewith as applicable.
- 33.3. The Owner, other representatives and personnel of the Owner and independent testing laboratories may at all reasonable times visit, enter, and make inspections at any building, factory, workshop, work, or site where materials are being prepared, made, or treated, or where work is being done in connection with the Project.
- 33.4. Technical inspection and testing shall be coordinated by the CM. The CM shall be provided with a copy of all inspection and testing reports on the day of the inspection or test or when issued.
- 33.5. The CM shall give timely notice of readiness for all required inspections, tests, or approvals, and shall cooperate with inspection and testing personnel to facilitate required inspections or tests.
- 33.6. If laws or regulations of any public body having jurisdiction require any specific or regular inspection, test or approval by an employee or other representative of such public body, the CM shall assume full responsibility for arranging and obtaining such inspections, tests, or approvals, and furnish the Owner the required certificates of inspection or approval.
- 33.7. If any inspection or test must be repeated through no fault of the Owner, all fees and charges incurred by the Owner for repeating such tests or inspections will be charged against the CM, and deducted from any monies due or to become due the CM or, at the Owner's option, the CM shall promptly reimburse the Owner for such fees and charges (or such remaining fees and charges after such deduction).
- 33.8. No review or inspection by the Owner shall relieve the CM of its obligations under the Contract Documents. The Owner does not have a duty to the CM to perform reviews or inspections, and the Owner shall not be deemed responsible for the CM'S failure to perform in accordance with the Contract Documents based on any failure of the Owner to conduct tests or inspections. Rights hereunder of the Owner, other representatives and personnel of the Owner and

independent testing laboratories to make inspections, conduct tests or reviews, take samples, give instructions, raise objections, or the like shall not give rise to any duty to do so for the benefit of the CM or any other person or entity.

### **34. Correction and Completion of Work by the Owner**

- 34.1. **Owner May Stop the Work:** If the CM fails to perform the Work or its services in conformity to the Contract Documents, the Owner may order the CM to stop the Work, or any portion thereof, until the cause for such order has been eliminated; however, this right of the Owner to stop the Work shall not give rise to any duty on the part of the Owner to exercise this right for the benefit of the CM, any Contractor, any other individual or entity, or any surety for, or employee or agent of any of them.
- 34.2. **The Owner May Perform Services:** If the CM fails within a reasonable time after written notice from the Owner to perform the Work in accordance with the Contract Documents, or if the CM fails to comply with any other provision of the Contract Documents, the Owner may, after seven (7) days written notice to the CM, correct and remedy any such deficiency. In connection with such corrective and remedial action, the Owner may exclude the CM from all or part of the Project, take possession of all or part of the Project and suspend the CM's services related thereto, take possession of the CM's offices, facilities and equipment at the Project, and incorporate into the Project all materials and equipment stored at the Project or for which the Owner has paid the CM but which are stored elsewhere. The CM shall allow the Owner, the Owner's representatives, agents, and employees, other Contractors, and other representatives access to the Project to enable the Owner to exercise the rights and remedies under this Article.
- 34.3. **All claims, costs, losses, and damages (including, but not limited to, all fees and charges of engineers, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) incurred or sustained by the Owner in exercising the rights and remedies under this Article will be charged against the CM, and deducted from any monies due or to become due the CM or otherwise available to pay such claims, costs, losses, or damages or, at the Owner's option, the CM shall promptly reimburse the Owner for such claims, costs, losses, or damages (or such remaining claims, costs, losses, or damages after such deduction).**
- 34.4. **The Owner shall have no duty to undertake any such action, and no such action taken by the Owner shall relieve the CM from any obligations under the Contract Documents or otherwise. Failure or omission on the part of the Owner or its agents to reject nonconforming Work shall not release the CM from the obligations of correcting same, as directed by the Owner at the CM's expense and at no additional cost to the Owner, at any time, notwithstanding that such services may have been estimated for payment or that payments may have been made on the same.**

### **35. Dispute Resolution**

- 35.1. **Governing Law:** The laws of the State of North Carolina shall apply to the formation, interpretation and enforcement of this Agreement.
- 35.2. **Mediation:** Appendix F to this Agreement shall be a part of the Contract Documents. As a condition precedent to initiating a civil action under this Agreement, any party to this Agreement shall initiate the mediation process as provided in Appendix F to this Agreement. Any person or firm that expressly or impliedly agrees to perform labor or services or to provide material, supplies, equipment, work, performance or payment bonds, insurance or indemnification for the construction of the Project or the Work shall be deemed a party to this Agreement solely for the purpose of this Article 35. The CM, by means of its Contracts, shall specifically require its Contractors to be bound by this Article.

- 35.3. Jurisdiction and Venue: Any and all suits or actions to enforce, interpret, or seek damages with respect to any provision of, or the performance or nonperformance of, this Agreement shall be brought in the General Court of Justice of North Carolina sitting in Buncombe County, North Carolina, and it is agreed by the parties that no other court shall have jurisdiction or venue with respect to such suits or actions.

### **36. Miscellaneous Provisions**

- 36.1. Confidentiality: The CM will keep confidential and not disclose to any third party all information designated and marked by the Owner as "Confidential" unless required to disclose the information by law as public records. Furthermore, the CM shall not disclose publicly information concerning the Project, except for communications incident to completion of the Project between and among the Owner, CM, Designer, and Contractors, and their independent professional engineers, architects and other consultants and subcontractors, and except for information specifically approved by the Owner and communications in connection with filings with governmental bodies having jurisdiction over the design or construction of the Project.
- 36.2. Signs: The CM shall be permitted to erect signs to identify the CM and other Project participants. The identification sign shall be of sound construction, shall be neatly lettered, and shall be subject to approval by the Owner. The CM may only erect other identification signs if approved by the Owner. In addition to the identification sign, directional signs may be erected on the property to facilitate deliveries and the movement of personnel and materials about the site. Any directional signs shall be subject to approval of the Owner with respect to size, style and location of such directional signs, which approval shall not be unreasonably withheld. Such signs may bear the name of the CM and a directional symbol. All signs must comply with local sign, appearance and traffic ordinances. No other signs will be permitted except by permission of the Owner.
- 36.3. Limitation and Assignment: The Owner and the CM each bind itself, its successors, assigns, insurers, and legal representatives to the terms of this Agreement. Neither the Owner nor the CM shall assign or transfer its rights or interest in this Agreement without the written consent of the other, except as provided in Section 3.6 and except that the CM may assign accounts receivable to a commercial bank for securing loans without approval of the Owner. However, nothing contained in this Section will prevent the CM from employing Contractors or such consultants, associates or subcontractors as the CM may deem appropriate to assist in performance of the services and of the Work hereunder in accordance with this Agreement.
- 36.4. Joint Ventures: If the CM is completing this Project on a joint venture basis, whether as a partnership, limited liability company or any other form of business association or entity, the CM joint venture and each member of the joint venture retains all liabilities assumed by this Agreement, jointly and severally. If the CM is a single purpose joint venture partnership or a single purpose limited liability company, each member of the joint venture shall execute and agree to be bound by this Agreement jointly and severally with the joint venture entity. If requested by the Owner, each member of a single purpose joint venture partnership or single purpose limited liability company agrees to sign such reasonable guarantees of performance of this Agreement as Owner requires.
- 36.5. Minority Business Enterprise Program: The CM shall at all times comply with the latest edition of the Owner's Minority Business Enterprise Policy. All documentation substantiating compliance with the requirements of this program shall be delivered to the Owner as stipulated in the Contract Documents. A copy of the Owner's Minority Business Enterprise Policy is attached to this Agreement as Appendix H and shall be included in the bid documents submitted to potential Contractors for bids.

- 36.6. Extent of Agreement: This Agreement represents the entire and integrated agreement between the Owner and the CM and supersedes all prior negotiations, representations or agreements, either written or oral. This Agreement may be modified or amended only by written directives, change orders and other instruments signed by the Owner and the CM as expressly set forth in this Agreement. Nothing contained in this Agreement is intended to benefit any third party. The Contractors and Designer are not intended third-party beneficiaries of this Agreement.
- 36.7. Severability: If any provision of this Agreement is held as a matter of law to be unenforceable, the remainder of this Agreement shall be enforceable without such provision.
- 36.8. Meaning of Terms: References made in the singular shall include the plural and the masculine shall include the feminine or neuter. To the greatest extent possible, the meaning of terms used herein shall be consistent with the definitions expressed in the Contract Documents, the contract between the Owner and the Designer, and the Contractor contracts.
- 36.9. Authority: The persons who execute this Agreement on behalf of the CM and its partners or members represent that they have full authority to bind the CM and their respective companies, and they agree to provide such proof of authority as the Owner may reasonably require.
- 36.10. Notices: Whenever any provision of the Contract Documents requires the giving of written notice, it shall be deemed to have been validly given if delivered in person to the individual or to a member of the firm or to an officer of the corporation for whom it is intended or if delivered or sent by registered or certified mail, postage prepaid, addressed as follows:

To the Owner:

By Mail:

The Buncombe County Board of Education  
 Attention: Mr. Tim Fierle  
 175 Bingham Road  
 Asheville, NC 28806

By Delivery:

Mr. Tim Fierle, AIA  
 Director of Facilities  
 Buncombe County Schools  
 175 Bingham Road  
 Asheville, NC 28806

To the CM:

By Mail:

Hickory Construction Company  
 Attention: Mr. Scott Flowers  
 P.O. Box 1769  
 Hickory, NC 28603

By Delivery:

Hickory Construction Company  
 Attention: Mr. Scott Flowers  
 1728 9<sup>th</sup> Ave., NW  
 Hickory, NC 28603

- 36.11. The CM shall comply with the requirements of G.S. Chapter 64, Article 2 (the “E-Verify Requirements”). The CM shall require any and all Contractors to comply with the E-Verify Requirements.
- 36.12. This Agreement may be executed in multiple counterparts, each of which may contain the signatures of one or more parties, all or which, taken together, shall constitute one and the same instrument. Facsimile and/or scanned signatures shall be treated as an original.
- 36.13. Jessica Lunsford Act. Under North Carolina law, certain sex offenders are prohibited from coming onto school campuses. The CM agrees to conduct a check of all its employees, and require its subcontractors to conduct checks of its employees, working at the Project site on

the N.C. Sex Offender and Public Protection Registration Program, the N.C. Sexually Violent Predator Registration Program and the National Sex Offender Registry.

This Agreement is executed the day and year first above written.

**CM: Hickory Construction Company**

By: \_\_\_\_\_  
C. Mark Baucom  
President

Attest:

By: \_\_\_\_\_  
Jeanna C. Flowers  
Corporate Secretary

**Owner: The Buncombe County Board of Education**

By: \_\_\_\_\_  
Ann B. Franklin  
Chair

Attest:

By: \_\_\_\_\_  
Dr. Tony Baldwin  
Superintendent and Secretary to the Board

This instrument has been pre-audited in the manner required by the Local Government Budget and Fiscal Control Act.

\_\_\_\_\_  
Deborah Frisby  
The Buncombe County Board of Education Finance Officer