

# **CONSENSUSDOCS 300 STANDARD FORM OF TRI-PARTY AGREEMENT FOR COLLABORATIVE PROJECT DELIVERY**

This document was developed through a collaborative effort of entities representing a wide cross-section of the construction industry. The organizations endorsing this document believe it represents a fair and reasonable consensus among the collaborating parties of allocation of risk and responsibilities in an effort to appropriately balance the critical interests and concerns of all project participants.

These endorsing organizations recognize and understand that users of this document must review and adapt this document to meet their particular needs, the specific requirements of the project, and applicable laws. Users are encouraged to consult legal, insurance and surety advisors before modifying or completing this document. Further information on this document and the perspectives of endorsing organizations is available in the ConsensusDOCS Guidebook.

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This Agreement has important legal and insurance consequences. Consultation(s) with an attorney and with insurance and surety consultants are encouraged with respect to its completion or modification.

## **ARTICLE 1 AGREEMENT**

This Agreement is made this \_\_\_\_\_ day of \_\_\_\_\_ in the year \_\_\_\_\_ by and between:

The OWNER (*Name and Address*)

and the DESIGNER (*Name and Address*)

and the CONSTRUCTOR (*Name and Address*)

for the following PROJECT (*Address and Brief Project Description*)

Notice to the parties shall be given at the above addresses.

## **ARTICLE 2 DEFINITIONS**

2.1 Agreement means this ConsensusDOCS 300 Standard Form of Agreement For Collaborative Project Delivery, as modified by the Parties, and Exhibits and Attachments made part of this Agreement upon its execution.

2.2 A Change Order is a written order approved by the Management Group after execution of this Agreement, indicating changes in the scope of the Work, the PTCE or Contract Time, including substitutions proposed to and accepted by the Management Group.

2.3 Collaborative Project Delivery Team (CPD) shall have the meaning ascribed in Paragraph 3.3.

2.4 The Construction Budget is the Owner's total cost of Project components and construction services. The Construction Budget does not include the Design Budget and other costs that make up the overall Project Target Cost Estimate.

2.5 The Construction Schedule is the document that specifies the dates on which the Constructor plans to begin and complete various parts of the Work, including dates on which information and approvals are required from the Management Group.

2.6 The Contract Documents consist of:

- a. Change Orders and written amendments to this Agreement including exhibits and appendices and amendments;

- b. this Agreement;
- c. the most current documents approved by the Management Group;
- d. the information provided by the Owner pursuant to Article 5;
- e. the Contract Documents in existence at the time of execution of this Agreement which are set forth in Article 25;
- f. the Owner's Program.

Except as specifically provided in this Agreement, in case of any inconsistency, conflict or ambiguity among the Contract Documents, the documents shall govern in the order in which they are listed above. Among all the Contract Documents, the term or provision that is most specific or includes the latest date shall control. Information identified in one Contract Document and not identified in another shall not be considered to be a conflict or inconsistency.

2.7 The Contract Time is the period between the Date of Commencement and Substantial Completion.

2.8 The Constructor is the person or entity identified in Article 1.

2.9 The term Day shall mean calendar day unless otherwise specifically defined.

2.10 The Design Budget is the Owner's total cost for design services required for the completion of the Project.

2.11 Designer means the Architect, Designer or Engineer identified in Article 1 and its consultants and includes the Designer's representative, licensed in the state where the Project is located. The use of the term Designer in this Agreement is for convenience and is not intended to imply or infer that the individual or entity named in Article 1 will provide design professional services in a discipline in which it is not licensed.

2.12 Final Completion occurs on the date when the Constructor's obligations under this Agreement are complete and accepted by the Owner and final payment becomes due and payable. This date shall be confirmed by a Certificate of Final Completion signed by the Owner and the Constructor.

2.13 A Material Supplier is a person or entity retained by the Constructor to provide material or equipment for the Work.

2.14 Others means other contractors, material suppliers and persons at the Worksite who are not employed by the Constructor or Subcontractors.

2.15 Owner is the person or entity identified in Article 1, and includes the Owner's Representative.

2.16 Owner's consultants means those consultants retained by Owner identified by attachment to this Agreement who will assist Owner in carrying out the Project.

2.17 The Owner's Program is an initial description of the Owner's objectives, that may include budget and time criteria, space requirements and relationships, flexibility and expandability requirements, special equipment and systems, and site requirements.

2.18 The Project, as identified in Article 1, is the building, facility or other improvements for which the Owner, Designer and Constructor have agreed to work collaboratively to achieve the design and construction under this Agreement.

2.19 Project Plan means the resource-loaded plan prepared by Designer and Designer's consultants (or any other party as requested by the Management Group) depicting the activities to be accomplished in each phase of the Project and the anticipated labor (and resulting personnel costs), together with anticipated Reimbursable Expenses.

2.20 The Project Schedule is the document that shows the timing and sequencing of the design and construction required to meet the time criteria set forth in the Owner's Program.

2.21 The Project Target Cost Estimate (PTCE) shall have the meaning ascribed in Paragraph 8.3.

2.22 Responsible Designer shall mean the person or entity that has responsibility for preparing the design, including drawings or specifications, for a particular portion of the Work.

2.23 Services means the services provided by the Designer or by consultants retained by the Designer for the Project.

2.24 A Subcontractor is a person or entity retained by the Constructor as an independent contractor to provide the labor, materials, equipment or services necessary to complete a specific portion of the Work. The term Subcontractor shall include Trade Contractors as defined in Paragraph 2.27. The term Subcontractor does not include the Designer or Others.

2.25 Substantial Completion of the Work, or of a designated portion, occurs on the date when the Work is sufficiently complete in accordance with the Contract Documents so that the Owner may occupy or utilize the Project, or a designated portion, for the use for which it is intended. The issuance of a certificate of occupancy is not a prerequisite for Substantial Completion if the certificate of occupancy cannot be obtained due to factors beyond the Constructor's control. This date shall be confirmed by a Certificate of Substantial Completion signed by the Owner and Constructor.

2.26 A Sub-subcontractor is a person or entity who has an agreement with a Subcontractor to perform any portion of the Subcontractor's Work.

2.27 A Trade Contractor is a person or entity retained by the Constructor to provide collaboration and services during the Preconstruction Phase of the Project. It is anticipated that a Trade Contractor will continue to serve as a Subcontractor during the Construction Phase provided that the Management Group determines that its performance merits continued participation and accepts its price proposal.

2.28 Work means the construction and services necessary or incidental to fulfill the Constructor's obligations for the Project in conformance with this Agreement and the other Contract Documents. The Work may refer to the whole Project or only a part of the Project if work is also being performed by the Owner or Others.

2.28.1 Changed Work means work that is different from the original scope of Work; or work that changes the PTCE or Contract Time.

2.28.2 Defective Work is any portion of the Work that is not in conformance with the Contract Documents.

2.29 Worksite means the geographical area at the location of the Project as identified in Article 1 where the Work is to be performed.

### **ARTICLE 3 COLLABORATIVE PRINCIPLES**

3.1 OBJECTIVES The Project consists of the design, construction and commissioning of the Project as more fully described in Exhibit A to this Agreement. The Project objectives are to design and construct the facilities called for in the Owner's Program, within the Project Target Cost Estimate and the Schedule developed under the Agreement.

3.2 COLLABORATIVE PROJECT DELIVERY The Parties agree that the Project objectives can be best achieved through a relational contract that promotes and facilitates strategic planning, design, construction and commissioning of the project, through the principles of collaboration and lean project delivery. This approach recognizes that each Party's success is tied directly to the success of all other members of the Collaborative Project

Team and encourages and requires the Parties to organize and integrate their respective roles, responsibilities and expertise, to identify and align their respective expectations and objectives, to commit to open communications, transparent decision-making, proactive and non-adversarial interaction, problem-solving, the sharing of ideas, to continuously seek to improve the Project planning, design, and construction processes, and to share both the risks and rewards associated with achieving the Project objectives.

**3.3 COLLABORATIVE PROJECT DELIVERY TEAM** The Parties shall perform as a Collaborative Project Delivery (CPD) Team to facilitate the design, construction and commissioning of the Project. CPD Team members shall share information and collaborate for the benefit of the Project. CPD Team members shall initially include the Owner, the Designer and the Constructor. In forming a Collaborative Project Team, the Parties expect that design consultants and Trade Contractors will be selected to provide preconstruction services early in the preconstruction phase. These parties shall sign Joining Agreements, as they become members of the Team, accepting the principles and methods of collaboration set forth in this Agreement. Ultimate Project decision-making authority shall rest with the Management Group defined in Paragraph 4.1.

**3.4 COLLABORATIVE RELATIONSHIP** The Parties each accept the relationship of mutual trust, good faith and fair dealing established by this Agreement and covenants with each other to cooperate and exercise their skill and judgment in furthering the interests of the Project. The Designer and Constructor each represents that it possesses the requisite skill, expertise, and, as applicable, licensing to perform the required services. The Owner, Constructor, Designer and all members of the CPD Team agree to adhere to principles of collaboration based on mutual trust, confidence, good faith and fair dealing. Within the scope of their respective expertise, the Parties shall together actively and continually pursue collaboration in the best interests of the Project. The Parties shall endeavor to promote harmony and collaboration among all Project participants.

**3.5 OWNER RESPONSIBILITIES** The Owner shall work with the Designer and Constructor to identify the Owner's Project objectives, including budget and time criteria, space requirements and relationships, flexibility and expandability requirements, special equipment and systems, and site requirements. The Owner shall provide full information in a timely manner regarding requirements for the Project, including the Owner's Program and other relevant information.

**3.6 DESIGNER'S RESPONSIBILITIES** The Designer shall furnish or provide all the design and engineering services necessary to design the Project in accordance with the Owner's objectives, as outlined in the Owner's Program and other relevant information defining the Project. Consistent with the collaborative approach set forth in this Agreement, the Designer shall draw upon the assistance of the Constructor and others in developing the Project design, but the Designer shall retain overall responsibility for all design decisions as required by applicable state laws. Cost and schedule are design criteria and the Designer, in collaboration with the CPD Team, shall ensure that design fully considers cost and schedule implications. The Designer represents that it is an independent contractor and that in its performance of the Services it shall act as an independent contractor. The Designer's duties, responsibilities and limitations of authority shall not be restricted, modified or extended without written consent of the Management Group.

**3.7 CONSTRUCTOR'S RESPONSIBILITIES** The Constructor shall furnish preconstruction and construction administration and management services, collaborate with the Designer in the Designer's development of the Project Plan and Project design and use the Constructor's diligent efforts to promote the delivery of the Project in an expeditious manner. Consistent with the collaborative approach set forth in this Agreement, the Constructor shall assist the Designer in the development of the Project design but shall not provide professional services which constitute the practice of architecture or engineering unless the Constructor needs to provide such services in order to carry out its responsibilities for construction means, methods, techniques, sequences and procedures, or unless such services are specifically called for by the Contract Documents. The Constructor shall provide all labor, materials, equipment and services necessary to complete the Work, all of which shall be provided in full accord with and reasonably inferable from the Contract Documents as being necessary to produce the indicated results. The Constructor shall be responsible for the supervision and coordination of the Work, including the construction means, methods, techniques, sequences and procedures utilized. The Constructor represents that it is an independent Contractor and that in its performance of the Work it shall act as an independent Constructor. The Constructor's

duties, responsibilities and limitations of authority shall not be restricted, modified or extended without written consent of the Management Group.

### 3.8 COLLABORATIVE RISK ALLOCATION

3.8.1 INTENT The purpose of the Collaborative Project Delivery approach, established by this tri-party relational contract, is to minimize the risk of delay, conflict and increased cost typically experienced by project participants in non-integrated project delivery. By committing to collaborative principles, the Parties affirm their commitment to endeavor to reduce overall risk to the Project and to each participant.

3.8.2 PROJECT RISK ALLOCATION Subject to Article 11, the Parties agree to allocate project risk as follows: (*Select One*):

\_\_\_ .1 SAFE HARBOR DECISIONS For those Project risks arising from collaboratively reached and mutually agreed-upon Project decisions made by the Management Group (Safe Harbor Decisions), the Parties agree to release each other from any liability at law or in equity for any non-negligent act, omission, mistake or error in judgment, whether negligent or not, acting in good faith, in performing its obligations under this Agreement except to the extent such act or omission amounts to a willful default of an obligation under this Agreement.

\_\_\_ .2 TRADITIONAL RISK ALLOCATION Each Party shall be fully liable for its own negligence and breaches of contract and warranty arising from the performance of this Agreement, to the extent provided for under the law of the jurisdiction in which the Project is located, except to the extent as otherwise limited as set forth below: (*Indicate Applicable Exception*):

a. Limitation on Designer's Liability To the fullest extent permitted by law, and notwithstanding any other provision of this Agreement, the total liability, in the aggregate, of Designer to Owner or Constructor or anyone claiming by, through or under the Owner or Constructor, for any and all claims, losses, costs or damages of whatsoever kind arising out of, resulting from or in any way related to the Project or the Agreement from any cause or causes including but not limited to the negligence or breach of contract of Designer shall not exceed an amount equal to \_\_\_\_\_ (\$\_\_\_\_), unless such claims, losses, costs or damages are reimbursed pursuant to a policy of professional liability insurance maintained by Designer or Designer's Consultants.

b. Limitation on Constructor's Liability To the fullest extent permitted by law, and notwithstanding any other provision of this Agreement, the total liability, in the aggregate, of Constructor to Owner or Designer or anyone claiming by, through or under the Owner or Designer, for any and all claims, losses, costs or damages of whatsoever kind arising out of, resulting from or in any way related to the Project or the Agreement from any cause or causes including but not limited to the negligence, breach of contract or warranty express or implied of Constructor, shall not exceed an amount equal to \_\_\_\_\_ (\$\_\_\_\_), unless such claims, losses, costs or damages are reimbursed pursuant to an insurance policy provided by the Constructor as required by this Agreement.

3.8.3 MUTUAL WAIVER OF CONSEQUENTIAL DAMAGES Regardless of the Project Risk Allocation approach selected by the Parties in Subparagraph 3.8.2, no Party to this Agreement shall be liable to any other Party to this Agreement for consequential damages arising from any cause. The Owner, Designer and Constructor waive Claims against each other for consequential damages arising out of or relating to this Agreement.

3.9 RELIABLE COMMITMENTS Fundamental to the success of Collaborative Project Delivery is the willingness and ability of all CPD Team members to make and secure reliable commitments as the basis for planning and executing the Project. A reliable commitment is one in which the conditions necessary for the satisfaction of the commitment are clear to all parties and the Party making the commitment:

3.9.1 Is competent and able to perform the task or has retained individuals or entities with the competence or ability to perform the task;

3.9.2 Has estimated the time to perform the task and has allocated adequate resources to perform the task and has properly scheduled time to perform the task;

3.9.3 Has no current basis for believing that the commitment cannot or will not be fulfilled.

3.9.4 Is prepared to be accountable if the commitment cannot be performed as promised and will promptly advise the CPD Team if it believes the task may not be performed as committed.

3.10 QUALITY The Parties acknowledge that quality assurance is critical to the success of Collaborative Project Delivery. Defects or deficiencies in Work or Services negatively impact cost, time, work flow and performance. Those performing the Work or providing the Services must assure quality in the first instance to avoid defects and deficiencies and, when they do occur, proactively and collaboratively mitigate their impact. All Project participants must understand the need to ensure quality at all times.

3.10.1 QUALITY PLAN The Designer and Constructor, in collaboration with the other CPD Team Members, shall develop a plan that, at a minimum, addresses the following issues:

3.10.1.1. Confirming that the Contract Documents clearly communicated to Project participants the conditions necessary for the satisfaction of the commitment

3.10.1.2. Training workers on the benefits of standardized work practices, the continuous improvement of work practices and the negative impact upon the Project of failing to achieve commitments

3.10.1.3 Using mockups, first run studies, early completion of standard work units, and similar efforts to demonstrate and document agreed-upon levels of quality

3.10.1.4 Using permit processes to identify and enhance quality initiatives

3.10.1.5 Providing task-based quality checklists for use by trade persons to self-evaluate quality performance, establish benchmarks and promote continuous improvement

3.10.1.6 Developing methods for onsite managers and others providing quality assurance to review early work product and assure quality performance

3.10.1.7 Integrating quality review and Project planning and scheduling pursuant to Article 7

3.10.1.8 Developing protocols for trade persons to discuss and assure quality when work is being handed off to another

3.10.1.9 Identifying procedures for immediately addressing quality failures by workers originally performing work, to assure minimum cost impact and continuous improvement

3.10.1.10 Developing procedures for recognizing outstanding performance and quality by individual trade persons and the Parties

3.10.1.11 Creating standards by which to measure and track quality performance.

## **ARTICLE 4 MANAGEMENT BY THE MANAGEMENT GROUP**

4.1 MANAGEMENT GROUP The delivery of the Project shall be managed by the Management Group, which shall serve as the decision-making body for the delivery of the Project and shall employ collaborative methods for achieving the highest quality and most efficient and economical delivery of the Project. The Management Group shall be comprised of an authorized representative of the Owner, the Designer and the Constructor. The original Management Group may invite other critical project participants to become members of the Management Group, for purposes of advancing the overall collaborative approach and the best interests of the Project. Any party added as an additional Management Group member shall be entitled to participate in all Management Group functions and shall have a right to vote on Management Group decisions that directly concern that party's work and area of expertise. The Management Group may also vote to remove non-original Management Group members from the Management Group.

4.2 OWNER'S MANAGEMENT REPRESENTATIVE The Owner's authorized Management Group representative is \_\_\_\_\_, who shall be fully acquainted with the Project, and shall have authority to bind the Owner in all matters requiring the Owner's approval, authorization or written notice. The Owner's alternative representative shall be \_\_\_\_\_.

4.3 DESIGNER'S MANAGEMENT REPRESENTATIVE The Designer's authorized Management Group representative is \_\_\_\_\_, who shall possess full authority to bind the Designer in all matters requiring the Designer's approval, authorization or written notice. The Designer's alternative representative shall be \_\_\_\_\_.

4.4 CONSTRUCTOR'S MANAGEMENT REPRESENTATIVE The Constructor's authorized Management Group representative is \_\_\_\_\_, who shall possess full authority to bind the Constructor in all matters requiring the Constructor's approval, authorization or written notice. The Constructor's alternative representative shall be \_\_\_\_\_.

4.5 REPLACEMENT OF MANAGEMENT GROUP MEMBERS Any Party may, upon seven (7) Days' written notice appoint a new authorized representative to the Management Group, provided no other Party has a reasonable objection to the proposed replacement.

4.6 DECISION-MAKING Consistent with the principles of collaboration, the actions and decisions of the Management Group shall, to the greatest extent possible, be by consensus, and the members of the Management Group shall endeavor to reach decisions by consensus. The Management Group shall act in the best interest of the Project as a whole without consideration to each member's own interest, and consistent with applicable laws, codes and regulations. To the extent consensus cannot be reached among the three original Management Group members, the Owner shall make a determination in the best interest of the Project as a whole subject to the dispute resolution process in Article 23. Decisions implicating life, health, property and public welfare and which are required to be made by a licensed design professional, shall be made by the Designer in accordance with Paragraph 3.6.

#### 4.7 MANAGEMENT GROUP MEETINGS

4.7.1 INITIAL MEETING Following execution of this Agreement, the Management Group shall have an initial meeting to review the Owner's Program and establish the Management Group's goals for the Project and to begin initial Project planning. If no Owner's Program has been established, the Management Group shall meet for the purpose of assisting the Owner in the development of an Owner's Program.

4.7.2 REGULAR MEETINGS The Management Group shall establish a schedule for regular meetings for the purpose of reviewing and discussing the Project status and any issues impacting the progress of the Project including conflicts, delays, and their causes and potential claims.

4.7.3 SPECIAL MEETINGS In the event a Project matter arises requiring immediate attention, any member of the Management Group may call for a meeting on one (1) Day's written notice. Such notice shall include a thorough description of the issues to be addressed. Special Meetings may be conducted through any medium the Management Group members mutually agree upon, including telephone, video or web-conferencing.



4.8 CPD TEAM MEETINGS The Management Group shall establish a matrix for regular meetings of the CPD Team. This matrix shall include meetings for overall Project planning and weekly project scheduling and coordination, variance meetings, as well as the record-keeping and reporting requirements for such meetings.

4.9 PRINCIPLES OF COMMUNICATIONS The Parties acknowledge that a truly collaborative relationship requires consistently open, honest and clear verbal and written communications that completely and accurately convey all Project issues, conflicts, deliverables and reliable commitments to perform obligations as promised, and the Parties shall endeavor at all times to so communicate.

4.9.1 COMMUNICATIONS PROTOCOL The Management Group shall meet, confer and agree upon a written protocol for all forms of Project communications, including Project meetings, written and electronic communications. The protocol shall:

4.9.1.1 Identify critical Project personnel and their contact information;

4.9.1.2 Provide a detailed project meeting matrix with attendance requirements;

4.9.1.3 With the goal that there be no offline Project-related discussions among Project participants, allow for direct communication between specialty subcontractors and design consultants and the Owner, Constructor or Designer, as necessary, with contemporaneous notification of the context of such communication to the other parties;

4.9.1.4 Establish a further protocol for the exchange of electronic Project documentation. The failure of a Party to adhere to the Project communications protocol shall be a breach of this Agreement, grounds for withholding payment and a basis for termination as provided elsewhere in this Agreement.

4.9.2 ELECTRONIC COMMUNICATION PROTOCOL The Parties may use electronic documentation transmitted or made available through various means including e-mail, a Project based website, FTP sites or other available methods. The Management Group shall develop a protocol for the exchange of electronic communications to be adhered to by all Project participants. The Electronic Communication Protocol shall at a minimum:

4.9.2.1 Identify one Party to manage the exchange process, including responsibility for providing and coordinating notifications;

4.9.2.2 Identify an individual or individuals within each firm or company responsible for compliance with document exchange protocols;

4.9.2.3 Define the documents to be accepted in electronic form or transmitted electronically, including a specific listing of such documents for the project (e.g., drawings, shop drawings, change orders, requests for information, etc);

4.9.2.4 Set forth the Parties' listing of, and responsibilities for compliance with, equipment, software and services impacting the transmission, receipt or utilization of electronic documents and data (including any prohibitions on or cautions as to utilization of different operating systems or translation programs and any equipment and software upgrading expectations);

4.9.2.5 Document transmission standards, such as acceptable formats, transmission methods and verification procedures;

4.9.2.6 Identify third-party providers, if any, with copies of governing agreements/licenses;

4.9.2.7 Identify methods for maintaining version control of electronic documents, including a depository of record copies of transmitted and received electronic documents;

4.9.2.8 Specify privacy and security requirements;

4.9.2.9 Set forth storage and retrieval requirements for electronic documents and data.

4.10 PROJECT PERSONNEL The Designer and Constructor have each designated as their key Project personnel those individuals identified in Exhibit B to this Agreement. Neither the Designer nor the Constructor shall remove or replace any of its key Project personnel without the Management Group's prior written consent. Any replacement personnel shall have substantially equivalent or better qualifications than the employee being replaced.

4.10.1 The Management Group shall not have any duties of supervision or control of any person employed or retained by the Designer, the Constructor, or their respective subconsultants, subcontractors and suppliers in connection with the Project.

4.10.2 The Designer and the Constructor shall remove from the Project any employee or person retained by it for the Project to which the Owner or Management Group has a reasonable objection.

## **ARTICLE 5 OWNER PROVIDED INFORMATION**

5.1 SITE INVESTIGATION PLAN The Management Group shall jointly develop a preconstruction site investigation plan identifying additional needed preconstruction information and investigations at or concerning the site. The Management Group shall also identify in writing any apparent deficiencies or discrepancies in the information Owner provides. As part of this process, the Designer and Constructor shall describe and advise Owner of additional investigations or information reasonably required to prepare the Construction Documents.

5.2 OWNER INFORMATION Preconstruction information to be provided by the Owner should include:

5.2.1 information describing the physical characteristics of the site, including surveys, site evaluations, legal descriptions, data or drawings depicting existing conditions, subsurface conditions and environmental studies, reports and investigations;

5.2.2 tests, inspections and other reports dealing with environmental matters, Hazardous Material and other existing conditions, including structural, mechanical and chemical tests, required by the Management Group or by law; and

5.2.3 any other information or services requested in writing by the Management Group which are relevant to the planning, design and construction of the Project.

5.2.4 Budget information regarding the Project for design, construction and Owner-provided items. The Management Group shall jointly manage the budget to further the Project objectives. The information required shall be provided in a timely manner and in reasonable detail. Legal descriptions shall include easements, title restrictions, boundaries, and zoning restrictions. Worksite descriptions shall include existing buildings and other construction and all other pertinent site conditions. Adjacent property descriptions shall include structures, streets, sidewalks, alleys, and other features relevant to the Work. Utility details shall include available services, lines at the Worksite and adjacent thereto and connection points. The information shall include public and private information, subsurface information, grades, contours, and elevations, drainage data, exact locations and dimensions, and benchmarks that can be used by the Constructor in laying out the Work.

5.3 ACCESS TO PRECONSTRUCTION INFORMATION To the extent that preconstruction information exists, the Management Group shall provide prospective Project participants access to the information with reasonable promptness, and without cost or expense. CPD Team members shall review the information furnished with reasonable care and advise the Management Group in writing of any errors, inconsistencies, inaccuracies, or

incompleteness which would prompt Constructor, Trade Contractors or Subcontractors to include additional contingency in their estimates or require a Responsible Designer to make a design assumption that might prove wasteful if additional investigation was performed. The CPD Team member shall also suggest options for additional preconstruction investigation of existing conditions for Management Group consideration, including the cost and potential benefit of the differing levels of potential preconstruction investigation.

5.3.1 A CPD Team member that has fulfilled its obligations under Paragraph 5.3 shall be entitled to rely upon the accuracy of the information provided to the extent that it is not contradicted by the Contract Documents.

5.4 Designer shall be responsible for coordinating the information provided by Owner, Owner's consultants and Designer's consultants to prepare coordinated design documents pursuant to this Agreement.

## **ARTICLE 6 DEVELOPMENT OF DESIGN AND COLLABORATIVE PRECONSTRUCTION SERVICES**

6.1 **COLLABORATIVE DESIGN PRINCIPLES** In order to achieve the Project objectives, the design process must occur in a collaborative manner, informed by a free-flow of accurate information concerning program, quality, cost and schedule. While retaining overall responsibility for the Project design, the Designer must work collaboratively with the other members of CPD Team, drawing on their respective expertise in order to achieve the Project objectives.

6.2 **SCOPE** A description of the scope of services to be provided by Designer and Designer's consultants and the documents to be developed during each phase or progression of the design is set forth in Exhibit C. The Management Group shall oversee development of the design documents for the Project and develop milestone schedules for the preconstruction phase.

6.3 **INFORMATION** In accordance with Article 5, Owner shall provide full information regarding requirements for the Project including a Program which shall set forth Owner's design objectives, constraints and criteria, including space requirements and relationships, flexibility and expandability, special equipment and systems and site requirements.

6.4 **LAWS AND REGULATIONS** Design Services shall comply with all applicable laws and requirements in effect during the preparation of the Contract Documents and any governmental authority from whom permits, approvals or other consents for the Project may be required. A Responsible Designer shall identify and determine the meaning and effect of all applicable building code provisions and other applicable laws, requirements and restrictions, whether or not listed in the Contract Documents, and take such measures as may be necessary to meet such laws or requirements, including filing or revising any required applications, drawings, specifications, calculations or other documents to the extent necessary to secure any required permits, approvals or other consents for construction of the Project at the Project site. Owner shall pay all costs and fees required to secure necessary permits, approvals and other consents.

6.5 **PULL BASED DESIGN** The Designer shall use "pull based" planning principles to develop the Design Documents. Pull based design advances the design only so far as has been anticipated and approved for any given time period by the Management Group, with the designers only performing services that are shown on the applicable Project plan as being performed in that week or that has been identified as "workable backlog." If rework is required as a result of failure to conform to the approved plan, the Party failing to adhere to that approved plan shall be responsible for all resulting costs associated with rework.

6.6 Consistent with the collaborative approach set forth in this Agreement, should the Constructor, Trade Contractors or Subcontractors in the course of the performance of obligations discover any errors, omissions or inconsistencies in the design documents prepared by the Designer or Responsible Designers, they shall promptly notify the Management Group, for action by the Designer. It is recognized that the Constructor, Trade Contractor and Subcontractor are not acting in the capacity of a licensed design professional.

6.7 DESIGN-BUILD WORK The Management Group shall specify all applicable performance and design criteria for any work that is performed on a design-build basis. The Constructor shall retain appropriately licensed design professionals to provide all design services related to the Design-Build Work. Limitations on Constructor's responsibility for design stated elsewhere in the Contract Documents shall be inapplicable to Design-Build Work.

6.8 DESIGN DOCUMENT STANDARDS The Management Group shall specify the standards to which all design documents shall comply.

6.9 BUILDING INFORMATION MODELING APPROACH The Parties may establish a building information modeling (BIM) approach to design and construction of the Project, providing continuous and immediate availability of reliable, integrated and coordinated design, scope, schedule and cost information. The use of a building modeling approach, and the processes and technologies necessary to fully utilize such an approach, shall be established as an addendum to this Agreement. If a BIM approach is elected, the Management Group shall establish the BIM parameters, standards and technological requirements.

#### 6.10 OWNERSHIP AND USE OF DOCUMENTS

6.10.1 All drawings, plans, specifications, calculations, notations and other documents prepared by Designer, Subconsultants, Constructor, Subcontractors or other CPD Team members in connection with the Project (and any electronic media upon which they were prepared or stored) (the "Project Documents"), including, without limitation, the Design Development Documents and the Construction Documents, are prepared for the Owner, and all title, ownership, and copyright privileges are and at all times shall be vested in Owner, subject only to the use provisions set forth below.

6.10.2. The originals of all Project Documents shall be held by CPD Team Members for the benefit of Owner. At Owner's request and cost, any or all Project Documents shall be immediately delivered to Owner in their original form, or in clear, reproducible form, regardless of whether this Agreement is completed, suspended or terminated.

6.10.3 OWNER'S USE Provided Owner has paid Designer in accordance with the terms of this Agreement, Owner shall have the right, regardless of whether this Agreement is completed, suspended or terminated, in whole or in part, to use and reuse the Project Documents for any purpose. In the event Owner uses or reuses the Project Documents to perform work or have work performed on its behalf for which a CPD Team Member who authored the documents is not retained, Owner shall indemnify, protect and hold that CPD Team Member free and harmless from liability, if any, arising from the use of any Project Documents by Owner, including, without limitation, any liability to third parties for personal injury, death, or property damage.

6.10.4 AUTHOR'S USE The author of a Project Document may reuse plans, drawings, specifications and other data prepared pursuant to this Agreement in its practice, but only in their separate constituent parts and not as a whole. In the event any Party uses any of the plans, drawings, specifications and other data in its practice, that Party shall indemnify, protect and hold Owner free and harmless from liability, if any, arising from the use of such plans, drawings, specifications and other data, including, without limitation, any liability to third parties for personal injury, death, or property damage.

6.10.5 LIMITED USE BY NON-AUTHOR Subject to Subparagraph 6.10.4, the Project Documents, together with submittals or other design documents prepared by Constructor, or any Subcontractor, Material Supplier, or Sub-subcontractor specifically for this Project, and copies thereof furnished to Constructor, are for use solely with respect to this Project. They are not to be used by Constructor, Subcontractors, Sub-subcontractors or Material Suppliers on other projects, outside the scope of the Work, without the specific written consent of Owner. Constructor, Subcontractors, Sub-subcontractors and Material Suppliers are granted a limited license to use and reproduce applicable portions of the Project Documents appropriate to and for use in the execution of their Work under the Contract Documents.

6.11 OWNER APPROVAL All approvals required from Owner shall be in writing. Owner approval shall not constitute a waiver by Owner of any of its rights under this Agreement, nor shall it relieve Designer or Designer's consultants from any of their obligations or liability for the technical or professional adequacy of their Services.

6.12 TEAM MEETING During the Preconstruction Phase, the Management Group shall meet every other week and shall schedule regular weekly meetings for the CPD Team, to facilitate collaboration regarding all project elements, including site use and improvements, the selection of materials, building systems, and equipment.

#### 6.13 TARGET VALUE DESIGN

6.13.1 TARGET VALUE DESIGN SUPPORT The Constructor and Trade Contractors shall provide Target Value Design support during the development of the Project design, as more fully discussed in Article 8. Target Value Design support is intended to inform the overall Project design with the critical criteria of quality, cost, schedule and constructability.

6.13.2 The Management Group shall develop Target Value Design methods for the Designer, Constructor and Trade Contractors, addressing the establishment of initial target costs for major Project components and systems; the selection of Trade Contractors; the formation and conduct of Project design, supply and construction teams for major Project components and systems; and cost analysis procedures.

6.14 VALUE IDENTIFICATION AND CREATION Throughout the development of the Project design, the Designer, its consultants, Constructor and its Subcontractors and Material Suppliers shall continually seek to create value by identifying options to improve constructability and functionality, reduce capital or life cycle cost, or provide operational flexibility consistent with the Owner's programmatic needs. As part of those efforts, the Designer, its consultants, Constructor, its Subcontractors and Material Suppliers shall identify and evaluate alternative systems, means, methods, configurations, finishes, equipment and approaches that will create a savings of time or money in constructing or operating and maintaining the Project, or increase quality, constructability, or other measures of value. As a result of these efforts, a CPD Team member may submit a Value Creation Proposal to the Management Group that details the proposed change, identify all aspects of the Project directly or indirectly affected by the change, specify the cost or time savings to be achieved if the proposal is accepted, and detail any anticipated effect on the Project's service life, economy of operation, ease of maintenance, appearance, design or safety standards. The Management Group shall determine whether to pursue a Value Creation Proposal. If a Value Creation Proposal is adopted, the Designer shall ascertain design feasibility, consistency with the Owner's programmatic needs, compatibility and compliance with building regulations, and professional standards of care and incorporate the proposed value creation into the Project design and Contract Documents.

6.15 CONSTRUCTABILITY Throughout the development of the Project design, Constructor shall conduct constructability reviews in collaboration with the Designer, to determine that the design documents will result in construction drawings that are sufficiently complete, accurate and coordinated so as to reduce the risk of disruption, delay, change orders and potential claims. The findings of these reviews shall be recorded and distributed to all CPD Team Members. The Designer shall evaluate the findings of these reviews and as appropriate incorporate changes in the design documents, provide notations on the Construction Documents or explain why such action is unnecessary. In conducting constructability reviews, the Constructor shall not provide professional services which constitute the practice of architecture or engineering. Designer is responsible for the completeness and accuracy of the design. Notwithstanding the foregoing, consistent with the collaborative approach set forth in this Agreement, the Constructor shall advise the Designer if Constructor is actually aware that the design does not comply with codes, laws or requirements of government or public authorities having jurisdiction over the Project. Nothing in this section shall relieve any Party from their respective obligations to perform in accordance with the terms of their respective contract and the applicable standard of care.

6.16 REQUESTS FOR INFORMATION The CPD Team members shall have as their goal the elimination of the need for requests for information through effective collaboration and communication during preconstruction in order to maximize the Parties' understanding of the design requirements, including the design intent and all technical requirements of the Project, prior to construction. To the extent requests for information are necessary, the Party seeking clarification shall first address the issue through direct discussions among appropriate Project personnel, and thereafter as necessary through senior party representatives. The resolution of issues, or the failure to achieve

resolution, shall be documented and reported to the Management Group. Absent an agreement or direction to the contrary by the Management Group, clarifications shall be issued no more than five (5) business Days after receipt of a request for interpretation, including requests received via telephone. Interpretations and decisions of the Designer will be consistent with the intent of and reasonably inferable from the Contract Documents and will be in writing or in the form of drawings.

## **ARTICLE 7 PROJECT PLANNING AND SCHEDULE**

**7.1 PRELIMINARY PLANNING** The Designer and Constructor shall each review the Owner's Program to ascertain the requirements of the Project. The Designer and Constructor, together with any Trade Contractors then retained, shall meet to confer on and verify such requirements. The Designer and Constructor shall provide to the Management Group for its written approval a joint preliminary evaluation of the Owner's Program and the Project requirements, addressing all issues bearing upon the success of the Project including the need for additional study or of testing, the site with regard to access, traffic, drainage, parking, building placement and other considerations affecting the building, the environment and energy use, as well as information regarding applicable governmental laws, regulations and requirements. The joint preliminary evaluation shall also propose alternative architectural, civil, structural, mechanical, electrical and other systems for review by the Management Group, to determine the most desirable approach on the basis of cost, technology, quality and speed of delivery. The Designer and Constructor shall also review existing test reports but will not undertake any independent testing nor be required to furnish types of information derived from such testing in their joint preliminary evaluation. The joint preliminary evaluation shall specifically identify any deviations from the Owner's Program.

**7.2 PROJECT PLANNING SYSTEM** The CPD Team shall employ a system of project planning that includes the collaborative development of a milestone schedule, phase or progression schedules, "make-ready" look ahead plans, weekly work plans and methods for recording, measuring and improving the reliability of project planning.

**7.2.1 PULL PLANNING** The Project shall employ a pull scheduling approach to planning and scheduling, which provides that preceding activities are not started sooner than is needed to assure the continuous performance of subsequent activities. Where the work of one Team member is dependent upon the prior performance of another Team member, the Team member whose work follows shall request of and receive from the prior performer a commitment as to when the work to be handed-off will be finished and the Team members shall agree upon criteria for the hand-off of work.

**7.2.2 PHASE PLANNING** Project Planning shall be based on the collaborative efforts of all those performing work during a given period and shall indicate when work will be done to meet milestone dates.

**7.2.3 MAKE-READY LOOK AHEAD PLAN** Make-Ready Look Ahead plans shall be developed by the CPD Team, identifying each item of work to be performed and completed during the given planning period, whether factors exist that would impede performance and completion and the actions to be taken to negate any such impediments.

**7.2.4 WEEKLY CPD TEAM MEETINGS** The CPD Team shall conduct weekly meetings to review and evaluate work to be performed in the coming week and any factors that might impede the completion of work.

### **7.3 SCHEDULE**

**7.3.1 PROJECT SCHEDULE** The Designer and Constructor, based on input from other CPD Team members, shall jointly prepare for the Management Group's review and approval a Milestone Schedule that shall show the timing and sequencing of the design and construction required to meet the time criteria set forth in the Owner's Program. The Milestone Schedule shall be updated for the Management Group's review and approval at such intervals required by the Management Group as appropriate for a BIM approach, or in the absence of such, at the completion of Schematic Design Documents, Design

Development Documents and Construction Documents, except when construction commences before the completion of such documents. If any Milestone Schedule shows a deviation from previously approved Project Schedules, the Designer and Constructor shall make appropriate recommendations to the Management Group.

**7.3.2 CONSTRUCTION SCHEDULE** When Project requirements have been sufficiently identified, the Constructor shall prepare a preliminary Construction Schedule for the review and approval of the Management Group. The Construction Schedule shall coordinate and integrate the services and activities of the Owner, Constructor, Designer, Subcontractors and the requirements of governmental entities. As design proceeds and at appropriate intervals the Constructor shall update the Construction Schedule, for the Management Group's approval, to indicate proposed activity sequences, durations, or milestone dates for such activities as receipt and approval of pertinent information, issuance of the Construction Documents, the preparation and processing of shop drawings and samples, delivery of materials or equipment requiring long-lead time procurement, Owner's occupancy requirements and estimated date of Substantial Completion of the Project. If Construction Schedule updates indicate that milestone dates contained in prior Construction Schedules will not be met, the Constructor shall notify and make recommendations to the Management Group. If the Project is to be completed in phases, the Designer and the Constructor shall make recommendations to the Management Group regarding the phased issuance of Construction Documents.

**7.3.3** The Constructor Team shall monitor the performance of Subcontractors as it relates to the Construction Schedule; update the Construction Schedule and if required, recommend corrective alternatives or adjustments to the Management Group.

## **ARTICLE 8 CONSTRUCTION BUDGET AND COST MODELING AND CONSTRUCTION CONTROL ESTIMATE**

### **8.1 BUDGETS**

**8.1.1 OWNER'S PROJECT BUDGET** Based on the information then available to the Owner, at the beginning of the Project the Owner shall provide to the Management Group a Project Budget estimating the total cost to achieve the design and construction of the Owner's Program. The Project Budget cannot be revised without Owner approval, which approval may not be given.

**8.1.1.1** The Designer and Constructor shall review and critique the Project Budget. Based on such review, the Owner may revise the Project Budget.

**8.1.2 DESIGN BUDGET** At the beginning of the Project, the Designer, in collaboration with the Owner and Constructor, shall develop a Design Budget, which shall include an estimate of all design costs and design-related expenses and the Designer's Fee.

**8.1.3 CONSTRUCTION BUDGET** At the beginning of the Project, the Constructor shall, with the collaboration and assistance of the Management Group, establish a Construction Budget, which shall include:

**8.1.3.1** A preliminary estimate of the total cost for construction;

**8.1.3.2** A Design Contingency to cover increases in estimated construction costs as a result of the refinement or further development of the design, but not changes in the overall scope of the work;

**8.1.3.3** A Construction Contingency to cover costs which are properly reimbursable as a Cost of the Work but are not the basis for a Change Order.

8.1.3.4 Contingencies to cover costs for securing bids and material price escalations;

8.1.3.5 Allowances and a statement of their basis; and

8.1.3.6 The Constructor's Fee. Based on information provided by the Owner, the Construction Budget shall include the cost of labor, materials or equipment associated with Owner-supplied equipment for the Project, whether installed by the Constructor or others. The Construction Budget shall not include compensation for the Designer or the costs of land, rights of way, financing or other items for which Owner is responsible.

8.1.4 The CPD Team shall use diligent efforts to design the Project so that it may be constructed without exceeding the Construction Budget. The Construction Budget cannot be revised without Owner approval, which approval may not be given.

8.1.5 TARGET VALUE PRICING The Constructor and Trade Contractors shall provide Target Value Design support services to support the explicit premise that value, cost, schedule and constructability are basic components of the design criteria. Those efforts shall include Target Value Pricing, which involves ongoing cost information and estimates of portions of the Work, systems under consideration and such other cost information as required by the Management Group. Target Value Pricing shall include the development of the cost models described in Paragraph 8.2 but shall be on-going and not await the completion of the various stages of design development.

8.2 COST MODELING The Constructor shall provide on-going cost modeling to inform and promote its Target Value Design efforts and those of Trade Contractors, as described in this article and Article 6. The Constructor shall generate cost model reports at such times and in such manner as described herein, or as otherwise direct by the Management Group. If a BIM approach to design and construction of the Project is being utilized, then cost model reports shall be generated at appropriate milestones as designated by the Management Group.

8.2.1 PRELIMINARY COST MODEL When Project requirements and design concepts have been sufficiently developed, as determined by the Management Group, the Constructor, with the assistance of and in collaboration with Trade Contractors, the Owner and Designer, shall prepare a Preliminary Cost Model. The Preliminary Cost Model shall employ utilizing area, volume or similar conceptual estimating techniques, and shall identify all of the major building systems, the quantity and unit cost (or cost per square foot) of each work item, a summary of anticipated construction costs for each part of the Project, and all major assumptions underlying pricing. The Preliminary Cost Model shall be reviewed and approved by the Management Group, and thereafter provide the foundation for Target Value Design efforts.

8.2.2 SCHEMATIC DESIGN COST MODEL In the absence of a BIM approach, when the Designer has prepared and completed Schematic Design Documents, the Constructor, with the assistance of Trade Contractors, shall update the Preliminary Cost Model and submit a Schematic Design Cost Model to the Management Group for its review and approval.

8.2.3 DESIGN DEVELOPMENT COST MODEL In the absence of a BIM approach, when the Designer has prepared and completed Design Development Documents, the Constructor, with the assistance of Trade Contractors, shall update the Schematic Design Cost Model and submit a Design Development Cost Model to the Management Group for its review and approval.

8.2.4 CONSTRUCTION DOCUMENT COST MODEL In the absence of a BIM approach, when the Designer's completion of Construction Documents reaches approximately fifty percent (50%) the Constructor, with the assistance of Trade Contractors, shall update the Design Development Cost Model and submit a Construction Documents Cost Model to the Management Group for its review and approval.

8.2.5 ESTIMATED COST OF THE WORK When the Construction Documents reach one hundred percent (100%) completion, the Constructor shall, with the assistance of Trade Contractors, prepare an Estimate of the Cost of the Work in such detail and in such format as required by the Management Group. The Estimate of the Cost of the Work shall provide the basis for the development of the PTCE.



**8.2.6 CONTINGENCIES IN COST MODELS** Cost models prepared by the Constructor may contain Construction Phase, Escalation and Permitting contingencies as approved by the Management Group.

**8.2.7 COST MODEL RECONCILIATION** Cost models shall be reviewed on an ongoing basis to determine if the models conform to approved budgets and target costs developed as part of Target Value Design efforts. To the extent cost models do not conform with budgets and target costs, the Management Group shall give direction on what actions shall be taken by members of the CPD Team.

**8.2.8 ACCOUNTING RECORDS** The Constructor and Trade Contractors shall maintain cost accounting records on Work performed under unit costs, actual costs for labor and materials, or other similar methods; afford the Management Group access to these records; and preserve them for a period of three (3) years after final payment.

### 8.3 PROJECT TARGET COST ESTIMATE

**8.3.1 PROJECT TARGET COST ESTIMATE** At such time as the Management Group determines that the project design is sufficiently complete, the Owner, Designer and Constructor shall jointly develop a Project Target Cost Estimate (PTCE) in a format acceptable to the Management Group. Unless the Parties mutually agree otherwise, the Project Target Cost Estimate shall be the sum of:

8.3.1.1 The Owner's own Project design and construction-related costs, as agreed upon by the Parties;

8.3.1.2 The Designer's total costs for Project design and design implementation;

8.3.1.3 The Constructor's construction costs, including:

- .a the estimated Cost of the Work
- .b A Construction Phase Contingency to cover costs which are properly reimbursable as a Cost of the Work but are not the basis for a Change Order.
- .c A Design Contingency if the drawings and specifications are not complete;
- .d A Permitting contingency to address changes required by permitting agencies;
- .e Allowances and a statement of their basis;
- .f General Conditions; and
- .g The Constructor's Fee.

### 8.3.2 CONTINGENCIES

**8.3.2.1 FURTHER DESIGN DEVELOPMENT** If the drawings and specifications are not complete at the time the PTCE is developed and submitted to the Management Group, the PTCE shall provide for final development of the design documents. Such further development does not include changes in scope, systems, kinds and quality of materials, finishes or equipment, all of which if required, shall be incorporated by Change Order.

**8.3.2.2 PERMIT CONTINGENCY** Subject to the approval of the Management Group, the PTCE shall include a contingency to cover any changes in the requirements of permitting agencies as part of their approval of Construction Documents.

**8.3.2.3 CONSTRUCTION CONTINGENCY** The PTCE shall include a contingency for all additional Costs of the Work that may be incurred by Constructor, Trade Contractors or Subcontractors during construction that do not provide the basis for a Change Order. The Constructor's use of this contingency shall be subject to the prior approval of the Management Group. Unused contingency funds shall be used to fund the incentive programs described in Article 11.

**8.3.3 BASIS OF PROJECT TARGET COSTS ESTIMATE** The PTCE shall include a written statement of its basis, which shall include:

8.3.3.1 a list of the drawings and specifications, including all addenda, which were used in preparation of the PTCE;

8.3.3.2 a list of allowances and a statement of their basis;

8.3.3.3 a list of the assumptions and clarifications made in the preparation of the PTCE to supplement the information contained in the drawings and specifications;

8.3.3.4 the Date of Substantial Completion or the Date of Final Completion upon which the proposed PTCE is based, and the Schedule of Work upon which the Date of Substantial Completion or the Date of Final Completion is based;

8.3.3.5 a schedule of applicable alternate prices;

8.3.3.6 a schedule of applicable unit prices;

8.3.3.7 a statement of Additional Services included, if any;

8.3.3.8 the Constructor's Construction Contingency;

8.3.3.9 the Design Contingency;

8.3.3.10 a statement identifying any patented or copyrighted materials, methods or systems incorporated in the Work that are likely to require the payment of royalties or license fees;

8.3.3.11 a statement of the estimated cost and a schedule of values organized by trade categories, allowances, contingencies permitted by this Agreement, self-performed work, and other items and the fee that comprise the PTCE; and

8.3.3.12 A detailed budget and breakdown of all General Conditions and jobsite management expenses included within the PTCE.

8.3.4 REVIEW AND ADJUSTMENT TO PTCE The Management Group shall meet to review the PTCE. In the event that the Management Group has any comments relative to the PTCE Proposal, or finds any inconsistencies or inaccuracies in the information presented, it shall give prompt written notice of such comments or findings to the Parties, who shall make appropriate adjustments to the PTCE, its basis or both.

8.3.5 PTCE PROPOSAL EXCEEDS CONSTRUCTION BUDGET If the PTCE Proposal exceeds the Project Budget:

8.3.5.1 The Owner may give written approval to increase the Project Budget;

8.3.5.2 The Management Group may authorize rebidding or renegotiating all or any portion of the Project, within such time period as required by the Management Group;

8.3.5.3 The Management Group may direct the CPD Team to collaborate on revising the Project scope to bring it within the Project Budget, and the Designer, as necessary, shall revise the drawings and specifications to allow the PTCE to be reduced to one hundred percent (100%) of the Project Budget;

8.3.5.4 The Owner may elect to terminate the Project. If the Management Group determines that changes in market conditions or other conditions beyond the control of the CPD Team are the cause for the PTCE Proposal exceeding the Project Budget, the Management Group may authorize reimbursement for such services from applicable contingency funds.

8.3.6 ACCEPTANCE OF CONSTRUCTION CONTROL ESTIMATE PROPOSAL Upon acceptance by the Management Group of the PTCE, the PTCE and its basis shall be set forth in Amendment No. 1. The PTCE shall be subject to adjustment as provided in this Agreement.

8.3.7 LIMITATION ON CHANGES Subject to its right to access the contingencies, Constructor shall use its diligent efforts to complete the Project for the compensation stated in the PTCE. Based on its collaboration in the preconstruction phase of the Project, the Constructor agrees that it shall not be entitled to an increase in the PTCE for work that Constructor or any other CPD Team Member might otherwise claim as a Change Order or extra work unless the change is the result of: (a) material change in the scope of work; (b) a change required by regulatory authorities (including inspections) that was not reasonably ascertainable from the Contract Documents; (c) Differing Site Conditions; (d) a Compensable Delay; or (e) a claim for which the Owner is found liable. Nothing in this paragraph shall preclude Constructor from using the contingencies for properly incurred Costs of the Work that are attributable to causes for which a change order is prohibited by this paragraph.

## **ARTICLE 9 DESIGNER'S COMPENSATION**

### 9.1 COMPENSATION FOR BASIC SERVICES

9.1.1 For Basic Services, the Owner shall compensate the Designer on the following basis, including applicable sales taxes (indicate applicable options):

- \_\_\_ .1 The actual cost of the following:
  - a. Designer's personnel as listed in Exhibit B.
  - b. Services of consultants and subcontractors at a multiple of \_\_\_\_\_ (\_\_\_\_) times the amount billed to the Designer for such services.
  - c. Reimbursable Expenses incurred in connection with Basic Services, as described by exhibit to this Agreement, at their actual cost.

\_\_\_ .2 The Designer's Fee paid in proportion to the Services performed subject to adjustment as provided in Subparagraph 9.1.3. The Designer's Fee shall cover normal, non-Project overhead and normal profit. The Designer's compensation to be paid shall be limited by the PTCE established in Amendment No. 1, as the PTCE may be adjusted, and subject to the incentive and risk sharing provisions of Article 11.

9.1.2 DESIGNER'S FEE The Designer's Fee shall be comprised of normal, non-Project overhead and normal profit, and shall be as follows, subject to adjustment as provided in Subparagraph 9.1.1: (State whether a stipulated sum or other basis. If a stipulated sum, state what portion of the sum shall be payable each month.)

9.1.3 ADJUSTMENT IN THE DESIGNER'S FEE Adjustment in the Designer's Fee shall be made as follows:

9.1.3.1 for changes in the Designer's Services, the Designer's Fee shall be adjusted as follows:

9.1.3.2 for delays in the Project not caused by the Designer, there shall be an equitable adjustment in the Designer's Fee to compensate the Designer for increased expenses.

### 9.2 ADDITIONAL SERVICES AND REIMBURSABLE EXPENSES

9.2.1 The Designer shall be compensated for Additional Services as mutually agreed upon by the Designer and Management Group on the following basis:

## **ARTICLE 10 CONSTRUCTOR'S COMPENSATION**

10.1 The Owner shall compensate the Constructor for Work performed on the following basis:

10.1.1 for Preconstruction Services, as follows:

*(State whether a stipulated sum, actual cost, or other basis. If a stipulated sum, state what portion of the sum shall be payable each month).*

10.1.2 the Cost of the Work as allowed in Article 17; and

10.1.3 the Constructor's Fee paid in proportion to the Work performed subject to adjustment as provided in Paragraph 10.4.

10.2 The compensation to be paid shall be limited to the PTCE established in Amendment No. 1, as the PTCE may be adjusted and subject to the incentive and risk sharing provisions of Article 11.

10.3 CONSTRUCTOR'S FEE The Constructor's Fee shall be comprised of normal, non-Project overhead and normal profit, and shall be as follows, subject to adjustment as provided in Paragraph 10.4:

*(State whether a stipulated sum or other basis. If a stipulated sum, state what portion of the sum shall be payable each month.)*

10.4 ADJUSTMENT IN THE CONSTRUCTOR'S FEE Adjustment in the Constructor's Fee shall be made as follows:

10.4.1 for changes in the Work as provided in Article 20, the Constructor's Fee shall be adjusted as follows:

10.4.2 for delays in the Work not caused by the Constructor, provided in Paragraph 15.6, there shall be an equitable adjustment in the Constructor's Fee to compensate the Constructor for increased expenses; and

10.4.3 if the Constructor is placed in charge of managing the replacement of an insured or uninsured loss, the Constructor shall be paid an additional fee in the same proportion that the Constructor's Fee bears to the estimated Cost of the Work for the replacement.

## **ARTICLE 11 INCENTIVES AND RISK SHARING**

11.1 GOAL Owner, Designer and Constructor believe that by forming the CPD Team and implementing Collaborative Project Delivery, wasted cost and time will be eliminated from the design and construction process, the quality of the final product will be improved, and the project will be safer, all while increasing the return on investment for CPD Team Members.

11.2 FINANCIAL INCENTIVE PROGRAM In support of Collaborative Project Delivery, the Management Group shall develop a financial incentive program to encourage superior performance based upon Owner's Collaborative Project Delivery goals and to reward the CPD Team for successfully achieving superior performance and successfully exceeding the project expectations and benchmarks. The method, manner, amounts and timing of any payments made as a result of the financial incentives program shall be detailed and specified in an amendment to this Agreement.

11.3 Characteristics of Program Any incentive program should provide a basis for continually monitoring and reviewing the project team's performance, providing the team with periodic performance information to allow corrections or modifications during project performance to improve the quality of the services provided. The program should be funded with project savings as evidenced by contingency preservation and reduction in the

Project's Costs of the Work as compared to the amounts contained within the PTCE. The program should consider performance in the following areas: cost, quality, safety, schedule, planning system reliability, innovative design, construction processes and teamwork.

11.4 SAVINGS To the extent the actual cost of the Project is less than the PTCE, the Parties shall share in such savings on the following basis:  
(Indicate agreed upon percentages or other basis for sharing).

11.5 LOSSES In the event the actual cost of the Project exceeds the PTCE, such costs: (Indicate applicable Loss Allocation approach):

- .1 Shall be borne by the Owner.
- .2 Shall be shared by the Parties on the following basis (Indicate agreed upon percentages or other basis for sharing):

11.6 LOSS LIMITS To the extent the Parties elect to share costs in excess of the PTCE in accordance with Subparagraph 11.5.2, the Designer's and Constructor's Fees, as defined in Subparagraph 9.1.2 and Paragraph 10.3,

- are
- are not (select one)

at risk and the total amount of each Fee

- shall
- shall not (select one)

represent the Designer's and Constructor's limit of liability for losses apportioned pursuant to Paragraph 11.5.

## **ARTICLE 12 TRADE CONTRACTORS SUBCONTRACTORS, SUPPLIERS AND DESIGN CONSULTANTS**

12.1 PARTICIPATION IN COLLABORATION The Constructor may contract with key Trade Contractors and Suppliers during early Project design to provide preconstruction services and facilitate an integrated, collaborative design process, subject to the approval of the Management Group. Approved Trade Contractors and Suppliers shall sign Joining Agreements, as they become members of the CPD Team, accepting the principles and methods of collaboration set forth in this Agreement. A Trade Contractor may continue to serve as a Subcontractor during construction when the Management Group determines that its performance merits continued participation and accepts its price proposal. Approved Trade Contractors, Subcontractors and Suppliers shall contract directly with the Constructor.

12.2 SOLICITATION AND SELECTION The Constructor shall develop Trade Contractor, Subcontractor and Supplier interest in the Project and, in collaboration with the Management Group, develop a list of potential Trade Contractors, Subcontractors and Suppliers from whom proposals will be requested. Proposed Trade Contractors, Subcontractors and Suppliers must possess the qualifications, experience and financial resources to complete the work for which they are being proposed. The Management Group's approval of the inclusion of any Trade Contractor, Subcontractor or Supplier on the list of potential participants shall not constitute a waiver of the right of the Management Group later to object to or reject any proposed Trade Contractor, Subcontractor or Supplier.

12.3 SELF-PERFORMED WORK If Constructor proposes to self-perform a particular scope of work, it shall provide the Management Group with its qualifications to perform the work. If requested by the Management Group, Constructor may need to obtain at least two bona fide price proposals for work that is proposed to be self-performed.

12.4 REPLACEMENT The Constructor shall not remove or replace a Trade Contractor, Subcontractor or Supplier previously selected if any Management Group Member makes reasonable objection to the proposed substitution. The Management Group may direct Constructor to replace any Trade Contractor, Subcontractor or Supplier to whom the Management Group has reasonable objection.

12.5 TRADE CONTRACTOR COORDINATION DRAWINGS During the preconstruction phase, Trade Contractors shall participate in the preparation of coordination drawings to identify routing and eliminate conflicts among the work of various Trade Contractors, Subcontractors and Suppliers. Trade Contractor coordination drawings shall be provided to the Designer together with other information that should be included in the Design Documents, including the Contract Documents that are submitted for permitting.

12.6 DESIGN-BUILD WORK To the extent any of the Work is to be performed by the Constructor or a Trade Contractor on a Design-Build or Design-Assist basis, the Designer shall specify all applicable performance and design criteria. The Constructor and Trade Contractors shall retain appropriately licensed design professionals to provide design services related to the Design-Build Work. Work to be performed on a design-build or design-assist basis shall be fully designed during preconstruction and shall be fully integrated into the Construction Documents that are submitted for permit or other governmental approvals. Designer shall be responsible for coordinating the design of the Design-Build Work with the design being provided pursuant to the terms of this Agreement.

12.7 DESIGN CONSULTANTS Owner and Designer may propose to the Management Group consultants from whom proposals will be requested to serve the Project as Owner's consultants or Designer's consultants. Proposed consultants must possess the qualifications, experience and financial resources to complete the service for which they are being proposed. Final selection of consultants shall be made by the Management Group. Owner and Design consultants shall sign Joining Agreements, as they become members of the CPD Team, accepting the principles and methods of collaboration set forth in this Agreement. Owner consultants and Design consultants shall be retained by the Owner and Designer respectively, and all fees and other charges of Design consultants are included in Designer's compensation. The Management Group's approval of the inclusion of any consultant on the list of potential participants shall not constitute a waiver of the right of the Management Group later to object to or reject any proposed consultant.

12.8 REPLACEMENT OF CONSULTANTS The Owner and Designer shall not remove or replace a consultant previously selected if any Management Group Member makes reasonable objection to the proposed substitution. The Management Group may direct Designer to replace any consultant or employee(s) of any consultant to whom the Management Group has reasonable objection.

12.9 DESIGNER'S CONTINUING RESPONSIBILITY The Management Group's acceptance of any consultant's credentials shall not in any way relieve Designer of any duty, responsibility or liability to Owner for Services provided by Designer or any of Designer's consultants. The Designer shall coordinate and be responsible and liable for the services provided by its consultants.

12.10 BINDING OF SUBCONTRACTORS AND MATERIAL SUPPLIERS The Constructor agrees to bind every Trade Contractor, Subcontractor and Supplier (and require every Trade Contractor and Subcontractor to so bind its subcontractors and material suppliers) to all the provisions of this Agreement and the Contract Documents as they apply to the Trade Contractor's, Subcontractor's and Supplier's portions of the Work.

12.11 LABOR RELATIONS (Insert here any conditions, obligations or requirements relative to labor relations and their effect on the Project. Legal counsel is recommended.)

## **ARTICLE 13 CONSTRUCTION OPERATIONS**

13.1 CONSTRUCTION PERSONNEL AND SUPERVISION

13.1.1 The Constructor shall provide competent supervision for the performance of the Work. Before commencing the Work, Constructor shall notify Owner in writing of the name and qualifications of its proposed superintendent(s) and project manager so Owner may review the individual's qualifications. If, for reasonable cause, the Owner refuses to approve the individual, or withdraws its approval after once giving it, Constructor shall name a different superintendent or project manager for Owner's review. Any disapproved superintendent shall not perform in that capacity thereafter at the Worksite.

13.1.2 The Constructor shall be responsible to the Owner for acts or omissions of parties or entities performing portions of the Work for or on behalf of the Constructor or any of its Subcontractors.

13.1.3 The Constructor shall permit only skilled persons to perform the Work. The Constructor shall enforce safety procedures, strict discipline and good order among persons performing the Work. If the Owner determines that a particular person does not follow safety procedures, or is unfit or unskilled for the assigned work, the Constructor shall immediately reassign the person on receipt of the Owner's written notice to do so.

13.2 QUALITY PLAN The Constructor, Trade Contractors and Subcontractors shall submit to the Management Group for its approval a construction operations quality plan that addresses the following:

13.2.1 the removal of clutter and all unnecessary items from the work environment;

13.2.2 locating items that will be used during construction so as to facilitate their efficient and responsible use;

13.2.3 creating an orderly and clean workspace with continuous inspection and clean-up;

13.2.4 standardizing and constantly improving construction operation practices;

13.2.5 creating a culture of discipline and continuous improvement.

13.3 WORKMANSHIP The Work shall be executed in accordance with the Contract Documents in a workmanlike manner. All materials used in the Work shall be furnished in sufficient quantities to facilitate the proper and expeditious execution of the Work and shall be new except such materials as may be expressly provided in the Contract Documents to be otherwise.

13.4 MATERIALS FURNISHED BY THE OWNER OR OTHERS In the event the Work includes installation of materials or equipment furnished by the Owner or Others, it shall be the responsibility of the Constructor to examine the items so provided and thereupon handle, store and install the items, unless otherwise provided in the Contract Documents, with such skill and care as to provide a satisfactory and proper installation. Loss or damage due to acts or omissions of the Constructor shall be the responsibility of the Constructor and may be deducted from any amounts due or to become due the Constructor. Any defects discovered in such materials or equipment shall be reported at once to the Owner. Following receipt of written notice from the Constructor of defects, the Owner shall promptly inform the Constructor what action, if any, the Constructor shall take with regard to the defects.

### 13.5 TESTS AND INSPECTIONS

13.5.1 The Constructor shall schedule all required tests, approvals and inspections of the Work or portions thereof at appropriate times so as not to delay the progress of the Work or other work related to the Project. The Constructor shall give proper notice to all required Parties of such tests, approvals and inspections. If feasible, the Owner and Others may timely observe the tests at the normal place of testing. The Owner shall bear all expenses associated with tests, inspections and approvals required by the Contract Documents, except as provided in Subparagraph 13.6.3, and which, unless otherwise agreed to, shall be conducted by an independent testing laboratory or entity retained by the Owner. Unless otherwise required by the Contract Documents, required certificates of testing, approval or inspection shall be secured by the Constructor and promptly delivered to the Owner.

13.5.2 If the Owner or appropriate authorities determine that tests, inspections or approvals in addition to those required by the Contract Documents will be necessary, the Constructor shall arrange for the procedures and give timely notice to the Owner and Others who may observe the procedures. Costs of the additional tests, inspections or approvals are at the Owner's expense except as provided in Subparagraph 13.6.3.

13.5.3 If the procedures described in Paragraph 13.6 indicate that portions of the Work fail to comply with the Contract Documents, the Constructor shall be responsible for costs of correction and retesting.

## 13.6 WARRANTY

13.6.1 The Constructor warrants that all materials and equipment shall be new unless otherwise specified, of good quality, in conformance with the Contract Documents, and free from defective workmanship and materials. At the Owner's request, the Constructor shall furnish satisfactory evidence of the quality and type of materials and equipment furnished. The Constructor further warrants that the Work shall be free from material defects not intrinsic in the design or materials required in the Contract Documents. The Constructor's warranty does not include remedies for defects or damages caused by normal wear and tear during normal usage, use for a purpose for which the Project was not intended, improper or insufficient maintenance, modifications performed by the Owner or Others, or abuse. The Constructor's warranty pursuant to this Paragraph 13.6 shall commence on the Date of Substantial Completion.

13.6.2 With respect to any portion of Work first performed after Substantial Completion, the Constructor's warranty obligation shall be extended by the period of time between Substantial Completion and the actual performance of the later Work.

13.6.3 The Constructor shall obtain from its Subcontractors and Material Suppliers any special or extended warranties required by the Contract Documents. All such warranties shall be listed in an addendum to this Agreement. Constructor's liability for such warranties shall be limited to the one-year correction period referred to in Paragraph 13.7. After that period Constructor shall assign them to the Owner and provide reasonable assistance to the Owner in enforcing the obligations of Subcontractors or Material Suppliers.

## 13.7 CORRECTION OF WORK WITHIN ONE YEAR

13.7.1 If, prior to Substantial Completion and within one year after the date of Substantial Completion of the Work, any Defective Work is found, the Owner shall promptly notify the Constructor in writing. Unless the Owner provides written acceptance of the condition, the Constructor shall promptly correct the Defective Work at its own cost and time and bear the expense of additional services required for correction of any Defective Work for which it is responsible. If within the one-year correction period the Owner discovers and does not promptly notify the Constructor or give the Constructor an opportunity to test or correct Defective Work as reasonably requested by the Constructor, the Owner waives the Constructor's obligation to correct that Defective Work as well as the Owner's right to claim a breach of the warranty with respect to that Defective Work.

13.7.2 With respect to any portion of Work first performed after Substantial Completion, the one-year correction period shall be extended by the period of time between Substantial Completion and the actual performance of the later Work. Correction periods shall not be extended by corrective work performed by the Constructor.

13.7.3 If the Constructor fails to correct Defective Work within a reasonable time after receipt of written notice from the Owner prior to final payment, the Owner may correct it in accordance with the Owner's right to carry out the Work in Article 22. In such case, an appropriate Change Order shall be issued deducting the cost of correcting such deficiencies from payments then or thereafter due the Constructor. If payments then or thereafter due Constructor are not sufficient to cover such amounts, the Constructor shall pay the difference to the Owner.



13.7.4 If after the one-year correction period but before the applicable limitation period the Owner discovers any Defective Work, the Owner shall, unless the Defective Work requires emergency correction, promptly notify the Constructor. If the Constructor elects to correct the Work, it shall provide written notice of such intent within fourteen (14) Days of its receipt of notice from the Owner. The Constructor shall complete the correction of Work within a mutually agreed time frame. If the Constructor does not elect to correct the Work, the Owner may have the Work corrected by itself or Others and charge the Constructor for the reasonable cost of the correction. Owner shall provide Constructor with an accounting of correction costs it incurs.

13.7.5 If the Constructor's correction or removal of Defective Work causes damage to or destroys other completed or partially completed construction, the Constructor shall be responsible for the cost of correcting the destroyed or damaged construction.

13.7.6 The one-year period for correction of Defective Work does not constitute a limitation period with respect to the enforcement of the Constructor's other obligations under the Contract Documents.

13.7.7 Prior to final payment, at the Owner's option and with the Constructor's agreement, the Owner may elect to accept Defective Work rather than require its removal and correction. In such case the PTCE shall be equitably adjusted.

### 13.8 CORRECTION OF COVERED WORK

13.8.1 On request of the Owner, Work that has been covered without a requirement that it be inspected prior to being covered may be uncovered for the Owner's inspection. The Owner shall pay for the costs of uncovering and replacement if the Work proves to be in conformance with the Contract Documents, or if the defective condition was caused by the Owner or Others. If the uncovered Work proves to be defective, the Constructor shall pay the costs of uncovering and replacement.

13.8.2 If contrary to specific requirements in the Contract Documents or contrary to a specific request from the Owner, a portion of the Work is covered, the Owner, by written request, may require the Constructor to uncover the Work for the Owner's observation. In this circumstance the Work shall be replaced at the Constructor's expense and with no adjustment to the Contract Time.

### 13.9 SAFETY OF PERSONS AND PROPERTY

13.9.1 SAFETY PRECAUTIONS AND PROGRAMS The Constructor shall have overall responsibility for safety precautions and programs in the performance of the Work. While this Paragraph 13.9 establishes the responsibility for safety between the Owner, Constructor and Designer, it does not relieve Subcontractors of their responsibility for the safety of persons or property in the performance of their work, nor for compliance with the provisions of applicable laws and regulations.

13.9.2 The Constructor shall seek to avoid injury, loss or damage to persons or property by taking reasonable steps to protect:

13.9.2.1 its employees and other persons at the Worksite;

13.9.2.2 materials and equipment stored at on-site or off-site locations for use in the Work; and

13.9.2.3 property located at the site and adjacent to Work areas, whether or not the property is part of the Work.

13.10 CONSTRUCTOR'S SAFETY REPRESENTATIVE The Constructor's Worksite Safety Representative is \_\_\_\_\_ who shall act as the Constructor's authorized safety representative with a duty to prevent accidents in accordance with Subparagraph 13.10.2. If no individual is identified in this Paragraph 13.10, the authorized safety representative shall be the Constructor's Representative. The Constructor shall report immediately in writing to the Owner all recordable accidents and injuries occurring at

the Worksite. When the Constructor is required to file an accident report with a public authority, the Constructor shall furnish a copy of the report to the Owner.

13.10.1 The Constructor shall provide the Owner with copies of all notices required of the Constructor by law or regulation. The Constructor's safety program shall comply with the requirements of governmental and quasi-governmental authorities having jurisdiction.

13.10.2 Damage or loss not insured under property insurance which may arise from the Work, to the extent of the negligence attributed to acts or omissions of the Constructor, or anyone for whose acts the Constructor may be liable, shall be promptly remedied by the Constructor.

13.10.3 If the Owner deems any part of the Work or Worksite unsafe, the Owner, without assuming responsibility for the Constructor's safety program, may require the Constructor to stop performance of the Work or take corrective measures satisfactory to the Owner, or both. If the Constructor does not adopt corrective measures, the Owner may perform them and deduct their cost from the PTCE. The Constructor agrees to make no claim for damages, for an increase in the PTCE or for a change in the Contract Time based on the Constructor's compliance with the Owner's reasonable request.

### 13.11 EMERGENCIES

13.11.1 In an emergency, the Constructor shall act in a reasonable manner to prevent personal injury or property damage. Any change in the PTCE or Contract Time resulting from the actions of the Constructor in an emergency situation shall be determined as provided in Article 20.

### 13.12 HAZARDOUS MATERIALS

13.12.1 A Hazardous Material is any substance or material identified now or in the future as hazardous under any federal, state or local law or regulation, or any other substance or material that may be considered hazardous or otherwise subject to statutory or regulatory requirement governing handling, disposal or cleanup. The Constructor shall not be obligated to commence or continue work until any Hazardous Material discovered at the Worksite has been removed, rendered or determined to be harmless by the Owner as certified by an independent testing laboratory and approved by the appropriate government agency.

13.12.2 If after the commencement of the Work Hazardous Material is discovered at the Worksite, the Constructor shall be entitled to immediately stop Work in the affected area. The Constructor shall report the condition to the Owner, the Designer, and, if required, the government agency with jurisdiction.

13.12.3 The Constructor shall not be required to perform any Work relating to or in the area of Hazardous Material without written mutual agreement.

13.12.4 The Owner shall be responsible for retaining an independent testing laboratory to determine the nature of the material encountered and whether the material requires corrective measures or remedial action. Such measures shall be the sole responsibility of the Owner, and shall be performed in a manner minimizing any adverse effects upon the Work. The Constructor shall resume Work in the area affected by any Hazardous Material only upon written agreement between the Parties after the Hazardous Material has been removed or rendered harmless and only after approval, if necessary, of the governmental agency with jurisdiction.

13.12.5 If the Constructor incurs additional costs or is delayed due to the presence or remediation of Hazardous Material, the Constructor shall be entitled to an equitable adjustment in the PTCE or the Contract Time.

13.12.6 To the extent not caused by the negligent acts or omissions of the Constructor, its Subcontractors and Sub-subcontractors, and the agents, officers, directors and employees of each of them, the Owner shall defend, indemnify and hold harmless the Constructor, its Subcontractors and Sub-subcontractors, and the

agents, officers, directors and employees of each of them, from and against any and all direct claims, damages, losses, costs and expenses, including but not limited to attorneys' fees, costs and expenses incurred in connection with any dispute resolution process, arising out of or relating to the performance of the Work in any area affected by Hazardous Material. To the fullest extent permitted by law, such indemnification shall apply regardless of the fault, negligence, breach of warranty or contract, or strict liability of the Owner.

### 13.12.7 MATERIALS BROUGHT TO THE WORKSITE

13.12.7.1 Material Safety Data (MSD) sheets as required by law and pertaining to materials or substances used or consumed in the performance of the Work, whether obtained by the Constructor, Subcontractors, the Owner or Others, shall be maintained at the Worksite by the Constructor and made available to the Owner, Subcontractors and Others.

13.12.7.2 The Constructor shall be responsible for the proper delivery, handling, application, storage, removal and disposal of all materials and substances brought to the Worksite by the Constructor in accordance with the Contract Documents and used or consumed in the performance of the Work.

13.12.7.3 To the extent not caused by the negligent acts or omissions of the Owner, its agents, officers, directors and employees, the Constructor shall indemnify and hold harmless the Owner, its agents, officers, directors and employees, from and against any and all direct claims, damages, losses, costs and expenses, including but not limited to attorneys' fees, costs and expenses incurred in connection with any dispute resolution procedure, arising out of or relating to the delivery, handling, application, storage, removal and disposal of all materials and substances brought to the Worksite by the Constructor in accordance with the Contract Documents. To the fullest extent permitted by law, such indemnification shall apply regardless of the fault, negligence, breach of warranty or contract, or strict liability of the Constructor.

13.12.8 The terms of this Paragraph 13.12 shall survive the completion of the Work or any termination of this Agreement.

### 13.13 SUBMITTALS

13.13.1 The Constructor shall submit to the Owner, and, if directed, to its Designer, for review and approval all shop drawings, samples, product data and similar submittals required by the Contract Documents. Submittals may be submitted in electronic form if required. The Constructor shall be responsible to the Owner and Designer for the accuracy and conformity of its submittals to the Contract Documents. The Constructor shall prepare and deliver its submittals to the Owner in a manner consistent with the Schedule of the Work and in such time and sequence so as not to delay the performance of the Work or the work of the Owner and Others. When the Constructor delivers its submittals to the Owner, the Constructor shall identify in writing for each submittal all changes, deviations or substitutions from the requirements of the Contract Documents. The review and approval of any Constructor submittal shall not be deemed to authorize changes, deviations or substitutions from the requirements of the Contract Documents unless express written approval is obtained from the Owner specifically authorizing such deviation, substitution or change. Such approval shall be promptly memorialized in a Change Order and, if applicable, provide for an equitable adjustment in the PTCE or Contract Time. Further, the Owner shall not make any change, deviation or substitution through the submittal process without specifically identifying and authorizing such deviation to the Constructor. In the event that the Contract Documents do not contain submittal requirements pertaining to the Work, the Constructor agrees upon request to submit in a timely fashion to the Owner for review and approval any shop drawings, samples, product data, manufacturers' literature or similar submittals as may reasonably be required by the Owner.

13.13.2 The Designer shall be responsible for review and approval of submittals with reasonable promptness to avoid causing delay.

13.13.3 The Constructor shall perform all Work strictly in accordance with approved submittals. Approval of shop drawings is not authorization to Constructor to perform Changed Work, unless the procedures of

Article 20 are followed. Approval does not relieve the Constructor from responsibility for Defective Work resulting from errors or omissions of any kind on the approved Shop Drawings.

13.13.4 Record copies of the following, incorporating field changes and selections made during construction, shall be maintained at the Project site and available to the Owner upon request: drawings, specifications, addenda, Change Order and other modifications, and required submittals including product data, samples and shop drawings.

13.13.5 No substitutions shall be made in the Work unless permitted in the Contract Documents and then only after the Constructor obtains approvals required under the Contract Documents for substitutions.

13.13.6 The Constructor shall prepare and submit to the Owner

*(Check one only)*

final marked up as-built drawings,

or

updated electronic data

or

such documentation as defined by the Parties by attachment to this Agreement, in general documenting how the various elements of the Work were actually constructed or installed.

13.14. CONCEALED OR UNKNOWN SITE CONDITIONS If the conditions at the Worksite are (a) subsurface or other physical conditions which are materially different from those indicated in the Contract Documents, or (b) unusual or unknown physical conditions which are materially different from conditions ordinarily encountered and generally recognized as inherent in Work provided for in the Contract Documents, the Constructor shall stop Work and give immediate written notice of the condition to the Owner and the Designer. The Constructor shall not be required to perform any work relating to the unknown condition without the written mutual agreement of the Parties. Any change in the PTCE or the Contract Time as a result of the unknown condition shall be determined as provided in this Article. The Constructor shall provide the Owner with written notice of any claim as a result of unknown conditions within the time period set forth in Paragraph 20.4.

#### 13.15 PERMITS AND TAXES

13.15.1 Constructor shall give public authorities all notices required by law and, except for permits and fees which are the responsibility of the Owner pursuant to Paragraph 6.4, shall obtain and pay for all necessary permits, licenses and renewals pertaining to the Work. Constructor shall provide to Owner copies of all notices, permits, licenses and renewals required under this Agreement.

13.15.2 Constructor shall pay all applicable taxes legally enacted when bids are received or negotiations concluded for the Work provided by the Constructor.

13.15.3 The PTCE or Contract Time shall be equitably adjusted by Change Order for additional costs resulting from any changes in laws, ordinances, rules and regulations enacted after the date of this Agreement, including increased taxes.

13.15.4 If in accordance with the Owner's direction, the Constructor claims an exemption for taxes, the Owner shall indemnify and hold the Constructor harmless from any liability, penalty, interest, fine, tax assessment, attorneys' fees or other expense or cost incurred by the Constructor as a result of any such action.

#### 13.16 CUTTING, FITTING AND PATCHING

13.16.1 The Constructor shall perform cutting, fitting and patching necessary to coordinate the various parts of the Work and to prepare its Work for the work of the Owner or Others.

13.16.2 Cutting, patching or altering the work of the Owner or Others shall be done with the prior written approval of the Owner. Such approval shall not be unreasonably withheld.

### 13.17 CLEANING UP

13.17.1 The Constructor shall regularly remove debris and waste materials at the Worksite resulting from the Work. Prior to discontinuing Work in an area, the Constructor shall clean the area and remove all rubbish and its construction equipment, tools, machinery, waste and surplus materials. The Constructor shall minimize and confine dust and debris resulting from construction activities. At the completion of the Work, the Constructor shall remove from the Worksite all construction equipment, tools, surplus materials, waste materials and debris.

13.17.2 If the Constructor fails to commence compliance with cleanup duties within two (2) business days after written notification from the Owner of non-compliance, the Owner may implement appropriate cleanup measures without further notice and the cost shall be deducted from any amounts due or to become due the Constructor.

13.18 ACCESS TO WORK The Constructor shall facilitate the access of the Owner, Designer and Others to Work in progress.

## **ARTICLE 14 DESIGNER'S CONSTRUCTION PHASE SERVICES**

14.1 CONSTRUCTION ADMINISTRATION The Designer shall provide Construction Administration until Final Payment is due and, thereafter during the one (1)-year warranty period as the Owner may reasonably request. Designer shall have authority to act on behalf of Owner only to the extent provided in the Contract Documents, unless otherwise modified in writing in accordance with other provisions of the Contract.

14.2 SITE VISITS Designer will visit the site at intervals appropriate to the stage of construction to become familiar with the progress and quality of the Work and to determine if the Work is proceeding in accordance with the Contract Documents. However, Designer shall not be required to make exhaustive or continuous on-site inspections to check quality or quantity of the Work. On the basis of such on-site observations as a designer, Designer shall report to the Management Group concerning the progress and quality of the Work, and promptly alert the Management Group of any nonconformance or condition observed which might adversely affect the Work or the Project budget. Designer shall submit a written report as required in the project communications protocol.

14.3 ON SITE REPRESENTATIVE As required by the Management Group, Designer shall provide on-site Project representatives to assist in carrying out Designer's responsibilities. The duties, responsibilities and limitations of authority of such project representatives shall be as set forth in an exhibit to be incorporated in the Contract Documents.

14.4 MEANS AND METHODS Designer shall have no control over nor charge of, nor be responsible for, the construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work. Designer shall not be responsible for Constructor's failure to perform the Work in accordance with the requirements of the Contract Documents, nor shall it have control over nor charge of, nor be responsible for, acts or omissions of Constructor, Trade Contractors, Subcontractors, or their agents or employees, or of any other persons performing portions of the Work. Notwithstanding the foregoing, if Designer observes any defect, deficiency or nonconformity in the Work, it shall immediately notify the Management Group.

## **ARTICLE 15 TIME**

15.1 CONTRACT TIME The Contract Time is the period of time, including authorized adjustments, allotted in the PTCE or elsewhere in the Contract Documents for Substantial Completion of the Work. Time limits stated in the Contract Documents are of the essence of this Agreement.

15.2 DATE OF COMMENCEMENT The Date of Commencement is the effective date of this Agreement as first written in Article 1 unless otherwise established in the Notice to Proceed. Unless instructed by the Management Group in writing, the Constructor shall not knowingly commence the Work before the effective date of insurance that is required to be provided for the benefit of the Project and the CPD Team members.

15.3 SUBSTANTIAL COMPLETION Unless the Management Group establishes otherwise, the Date of Substantial Completion shall be established in the PTCE Amendment to this Agreement subject to adjustments as provided for in the Contract Documents. The date shall be certified by the Management Group in the Certificate of Substantial Completion.

15.4 FINAL COMPLETION Unless the Management Group establishes otherwise, the Date of Final Completion shall be achieved within \_\_\_\_\_ (\_\_\_\_) Days after the date of Substantial Completion, subject to adjustments as provided for in the Contract Documents.

15.5 Time limits stated in the Contract Documents are of the essence.

#### 15.6 DELAYS IN THE WORK

15.6.1 If the Constructor is delayed at any time in the commencement or progress of the Work by any cause beyond the control of the Constructor, the Constructor shall be entitled to an equitable extension of the Contract Time. Examples of causes beyond the control of the Constructor include, but are not limited to, the following: acts or omissions of the Owner, the Designer or Others; changes in the Work or the sequencing of the Work ordered by the Owner, or arising from decisions of the Owner that impact the time of performance of the Work; transportation delays not reasonably foreseeable, labor disputes not involving the Constructor; general labor disputes impacting the Project but not specifically related to the Worksite, fire, terrorism, governmental agencies, unavoidable accidents or circumstances, adverse weather conditions not reasonably anticipated, encountering Hazardous Materials, concealed or unknown conditions, delay authorized by the Owner pending dispute resolution and suspension by the Owner. The Constructor shall process any requests for equitable extensions of Contract Time in accordance with the provisions of this Agreement.

15.6.2 In addition, if the Constructor incurs additional costs as a result of a delay that is caused by acts or omissions of the Owner, the Designer or Others, changes in the Work or the sequencing of the Work ordered by the Owner, or arising from decisions of the Owner that impact the time of performance of the Work, encountering Hazardous Materials, or concealed or unknown conditions, delay authorized by the Owner pending dispute resolution and suspension by the Owner, the Constructor shall be entitled to an equitable adjustment in the PTCE.

15.6.3 NOTICE OF DELAYS In the event delays to the Work are encountered for any reason, the Constructor shall provide prompt written notice to the Owner of the cause of such delays after Constructor first recognizes the delay. The Owner and Constructor agree to undertake reasonable steps to mitigate the effect of such delays.

15.7 NOTICE OF DELAY CLAIMS If the Constructor requests an equitable extension of Contract Time or an equitable adjustment in PTCE as a result of a delay described in Paragraph 15.6, the Constructor shall give the Owner written notice of the claim in accordance with Paragraph 20.4. If the Constructor causes delay in the completion of the Work, the Owner shall be entitled to recover its additional costs subject to Subparagraphs 3.8.2 and 3.8.3. The Owner shall process any such claim against the Constructor in accordance with Article 23.

15.8 MITIGATION In the event delays to the Project are encountered for any reason, the Parties agree to undertake reasonable steps to mitigate the effect of such delays.

**ARTICLE 16  
DESIGNER'S PAYMENT**

16.1 PAYMENTS

16.1.1 The Designer shall submit to the Owner for its approval monthly applications for payment for Basic and Additional Services and Reimbursable Expenses, if any, with reasonable supporting detail. The Owner shall pay approved amounts no later than thirty (30) Days after the Designer has submitted its applications for payment. No matter how computed in Article 16, payments for Basic Services (*indicate basis for payment*):

\_\_\_ .1 shall not exceed the following percentages of the total Fee for Basic Services at the completion of each phase or progression of the Designer's Services:

Schematic Design Documents \_\_\_%  
Design Development Documents \_\_\_%  
Construction Documents \_\_\_%  
Bidding or negotiation assistance \_\_\_%  
Construction \_\_\_%  
TOTAL 100%

or

\_\_\_ .2 shall not exceed the following lump sum amounts for each phase or progression of the Designer's Services:

Schematic Design Documents \_\_\_\_\_ dollars (\$ \_\_\_\_\_)  
Design Development Documents \_\_\_\_\_ dollars (\$ \_\_\_\_\_)  
Construction Documents \_\_\_\_\_ dollars (\$ \_\_\_\_\_)  
Bidding or negotiation assistance \_\_\_\_\_ dollars (\$ \_\_\_\_\_)  
Construction Phase \_\_\_\_\_ dollars (\$ \_\_\_\_\_)

Upon receipt of payment from the Owner, Designer shall promptly make payment to its consultants as appropriate.

16.2 Prior to final payment to the Designer, the Designer shall furnish evidence satisfactory to the Owner that there are no claims, obligations or liens outstanding in connection with its Services. Acceptance of final payment shall constitute a waiver of all claims by the Designer for compensation for its Services.

16.3 Should there be any claim, obligation or lien asserted before or after final payment is made that arises from the Designer's Services, the Designer shall reimburse the Owner for any costs and expenses, including attorneys' fees, costs and expenses, incurred by the Owner in satisfying, discharging or defending against any such claim, obligation or lien, including any action brought or judgment recovered, provided the Owner is making payments or has made payments to the Designer in accordance with the terms of this Agreement.

16.4 Should the Designer or its consultants cause damage to the Project, or fail to perform or otherwise be in default under the terms of this Agreement, the Owner shall have the right to withhold from any payment due or to become due, or otherwise be reimbursed for, an amount sufficient to protect the Owner from any loss that may result. Payment of the amount withheld shall be made when the grounds for the withholding have been removed.

16.5 The Designer's expense records shall be maintained in accordance with generally accepted accounting principles and shall be available to the Owner at mutually convenient times for all Services to be compensated on the basis of actual cost.

**ARTICLE 17**

## **COST OF WORK**

17.1 COST OF THE WORK The Owner agrees to pay the Constructor for the Cost of the Work as defined in this Article. This payment shall be in addition to the Constructor's Fee stipulated in Paragraph 10.3.

### **17.2 COST ITEMS**

17.2.1 Wages paid for labor in the direct employ of the Constructor in the performance of the Work.

17.2.2 Salaries of the Constructor's employees when stationed at the field office, in whatever capacity employed, employees engaged on the road expediting the production or transportation of material and equipment, and employees from the principal or branch office performing the functions listed below:

17.2.3 Cost of all employee benefits and taxes including but not limited to workers' compensation, unemployment compensation, Social Security, health, welfare, retirement and other fringe benefits as required by law, labor agreements, or paid under the Constructor's standard personnel policy, insofar as such costs are paid to employees of the Constructor who are included in the Cost of the Work under Subparagraphs 17.2.1 and 17.2.2.

17.2.4 Reasonable transportation, travel, hotel and moving expenses of the Constructor's personnel incurred in connection with the Work.

17.2.5 Cost of all materials, supplies and equipment incorporated in the Work, including costs of inspection and testing if not provided by the Owner, transportation, storage and handling.

17.2.6 Payments made by the Constructor to Subcontractors for work performed under this Agreement.

17.2.7 Cost, including transportation and maintenance of all materials, supplies, equipment, temporary facilities and hand tools not owned by the workers that are used or consumed in the performance of the Work, less salvage value or residual value; and cost less salvage value on such items used, but not consumed that remain the property of the Constructor.

17.2.8 Rental charges of all necessary machinery and equipment, exclusive of hand tools owned by workers, used at the Worksite, whether rented from the Constructor or Others, including installation, repair and replacement, dismantling, removal, maintenance, transportation and delivery costs. Rental from unrelated third parties shall be reimbursed at actual cost. Rentals from the Constructor or its affiliates, subsidiaries or related parties shall be reimbursed at the prevailing rates in the locality of the Worksite up to eighty-five percent (85%) of the value of the piece of equipment.

17.2.9 Cost of the premiums for all insurance and surety bonds which the Constructor is required to procure or deems necessary, and approved by the Owner.

17.2.10 Sales, use, gross receipts or other taxes, tariffs or duties related to the Work for which the Constructor is liable.

17.2.11 Permits, fees, licenses, tests, royalties, damages for infringement of patents or copyrights, including costs of defending related suits for which the Constructor is not responsible as set forth in Paragraph 21.6, and deposits lost for causes other than the Constructor's negligence.

17.2.12 Losses, expenses or damages to the extent not compensated by insurance or otherwise, and the cost of corrective work during the Construction Phase and for a period of one year following the Date of Substantial Completion, provided that such losses, expenses, damages or corrective work did not arise from the negligence of the Constructor.

17.2.13 All costs associated with establishing, equipping, operating, maintaining and demobilizing the field office.



17.2.14 All costs associated with demobilizing and remobilizing the field office and the Constructor's workforce, including Subcontractor workforces, as a result of a suspension of the Work by the Owner.

17.2.15 Reproduction costs, photographs, cost of telegrams, facsimile transmissions, long-distance telephone calls, data processing services, postage, express delivery charges, telephone service at the Worksite and reasonable petty cash expenses at the field office.

17.2.16 All costs associated with a BIM approach, as required by and approved by the Management Group.

17.2.17 All water, power and fuel costs necessary for the Work.

17.2.18 Cost of removal of all non-hazardous substances, debris and waste materials.

17.2.19 Costs incurred due to an emergency affecting the safety of persons or property.

17.2.20 Legal, mediation and arbitration fees and costs, other than those arising from disputes between the Owner and the Constructor, reasonably and properly resulting from the Constructor's performance of the Work.

17.2.21 Additional costs resulting from laws, ordinances, rules, regulations and taxes enacted after the date of this Agreement.

17.2.22 All costs directly incurred in the performance of the Work or in connection with the Project, and not included in the Constructor's Fee as set forth in Article 10, which are reasonably inferable from the Contract Documents as necessary to produce the intended results.

17.3 DISCOUNTS All discounts for prompt payment shall accrue to the Owner to the extent such payments are made directly by the Owner. To the extent payments are made with funds of the Constructor, all cash discounts shall accrue to the Constructor. All trade discounts, rebates and refunds, and all returns from sale of surplus materials and equipment, shall be credited to the Cost of the Work.

## **ARTICLE 18 CONSTRUCTOR'S PAYMENT**

### **18.1 SCHEDULE OF VALUES**

Before the first Payment Application for construction work and services, Constructor shall submit to the Management Group a schedule of values allocated to various portions of the Work, prepared in such form and supported by such data to substantiate its accuracy as the Management Group may require. This schedule, approved by the Management Group, shall be used as a basis for reviewing Constructor's Applications for Payment. Each Constructor Payment Application during construction shall be based on the most recent schedule of values submitted by Constructor in accordance with the Contract Documents. Payment Applications shall show the percentage of each portion of the Work as of the end of the period covered by the Payment Application completed in accordance with the planning documents approved by the Management Group.

### **18.2 PROGRESS PAYMENTS**

18.2.1 APPLICATIONS The Constructor shall submit to the Owner, and if directed, Designer a monthly application for payment no later than the \_\_\_\_\_ Day of the calendar month for the preceding thirty (30) Days; or Constructor's applications for payment shall be itemized and supported by the Constructor's schedule of values and any other substantiating data as required by this Agreement. Payment applications shall include payment requests on account of properly authorized Change Orders or Interim Directed Changes. The Owner shall pay the amount otherwise due on any payment application, no later than twenty

(20) Days after the Constructor has submitted a complete and accurate payment application. The Owner may deduct from any progress payment amounts as may be retained pursuant to Subparagraph 18.2.4.

**18.2.2 STORED MATERIALS AND EQUIPMENT** If approved by the Owner, applications for payment may include materials and equipment not yet incorporated into the Work but delivered to and suitably stored on-site or off-site including applicable insurance, storage and transportation costs to the Worksite. Approval of payment applications for off-site stored materials and equipment shall be conditioned on submission by the Constructor of bills of sale and proof of applicable insurance, or such other procedures satisfactory to the Owner to establish the proper valuation of the stored materials and equipment, the Owner's title to such materials and equipment, and to otherwise protect the Owner's interests therein, including transportation to the Worksite.

### 18.2.3 LIEN WAIVERS AND LIENS

**18.2.3.1 PARTIAL LIEN WAIVERS AND AFFIDAVITS** If requested by the Owner, as a prerequisite for payment, the Constructor shall provide partial lien and claim waivers in the amount of the application for payment and affidavits from Trade Contractors, Subcontractors, and Material Suppliers for the completed Work. Such waivers shall be conditional upon payment. In no event shall the Constructor be required to sign an unconditional waiver of lien or claim, either partial or final, prior to receiving payment or in an amount in excess of what it has been paid.

**18.2.3.2 RESPONSIBILITY FOR LIENS** If Owner has made payments in the time required by this Article 18, the Constructor shall, within thirty (30) Days after filing, cause the removal of any liens filed against the premises or public improvement fund by any Party or Parties performing labor or services or supplying materials in connection with the Work and covered by such payments. If the Constructor fails to take such action on a lien, the Owner may cause the lien to be removed at the Constructor's expense, including bond costs and reasonable attorneys' fees. This Paragraph shall not apply if there is a dispute pursuant to Article 23 relating to the subject matter of the lien.

**18.2.4 RETAINAGE** From each progress payment made prior to Substantial Completion, the Owner may retain \_\_\_\_\_ percent ( \_\_%), of the Constructor's Fee amount otherwise due after deduction of any amounts as provided in Paragraph 18.3, up to the time of final payment.

**18.2.4.1** At the discretion of the Management Group, retention may be withheld equal to ten percent (10%) on lump sum Subcontractors and one percent (1%) on Trade Contractors on payments to be made to subcontractors, Constructor self-performed work and Constructor's Fee. No retention shall be withheld on the Cost of the Work except as stated above. The Payment Application shall be reduced for amounts for which the Management Group has withheld or nullified a Certificate for Payment as provided in the Contract Documents.

**18.3 ADJUSTMENT OF CONSTRUCTOR'S PAYMENT APPLICATION** The Owner may adjust or reject a payment application or nullify a previously approved payment application, in whole or in part, as may reasonably be necessary to protect the Owner from loss or damage based upon the following, to the extent that the Constructor is responsible therefor under the Contract:

18.3.1 the Constructor's repeated failure to perform the Work as required by the Contract Documents;

18.3.2 loss or damage to the Owner, or Others arising out of or relating to this Contract and caused by Constructor;

18.3.3 the Constructor's failure to properly pay Subcontractors and Material Suppliers following receipt of such payment from the Owner;

18.3.4 Defective Work not corrected in a timely fashion;

18.3.5 reasonable evidence of delay in performance of the Work such that the Work will not be completed by the Dates of Substantial or Final Completion; and

18.3.6 reasonable evidence demonstrating that the unpaid balance of the PTCE is insufficient to fund the cost to complete the Work. The Owner shall give written notice to the Constructor at the time of disapproving or nullifying an application for payment of the specific reasons therefor. When the above reasons for disapproving or nullifying an application for payment are removed, payment will be made for the amounts previously withheld.

18.4 ACCEPTANCE OF WORK Neither the Owner's payment of progress payments nor its partial or full use or occupancy of the Project constitutes acceptance of Work not complying with the Contract Documents.

18.5 PAYMENT DELAY If for any reason not the fault of the Constructor the Constructor does not receive a progress payment from the Owner within seven (7) Days after the time such payment is due as defined in Subparagraph 18.2.1, then the Constructor, upon giving seven (7) Days' written notice to the Owner, and without prejudice to and in addition to any other legal remedies, may stop Work until payment of the full amount owing to the Constructor has been received, including interest from the date payment was due. The PTCE and Dates of Substantial or Final Completion shall be equitably adjusted by a Change Order for reasonable cost and delay resulting from shutdown, delay and start-up.

#### 18.6 SUBSTANTIAL COMPLETION

18.6.1 The Constructor shall notify the Management Group when it considers Substantial Completion of the Work or a designated portion to have been achieved. The Management Group shall promptly conduct an inspection to determine whether the Work or designated portion can be occupied or utilized for its intended use by the Owner without excessive interference by the Constructor in completing any remaining unfinished Work. If the Management Group determines that the Work or designated portion has not reached Substantial Completion, the Management Group shall promptly compile a list of items to be completed or corrected so the Owner may occupy or utilize the Work or designated portion for its intended use. The Constructor shall promptly complete all items on the list.

18.6.2 When Substantial Completion of the Work or a designated portion is achieved, the Constructor shall prepare a Certificate of Substantial Completion that shall establish the date of Substantial Completion, and the respective responsibilities of the Owner and Constructor for interim items such as security, maintenance, utilities, insurance and damage to the Work, and fixing the time for completion of all items on the list accompanying the Certificate. The Certificate of Substantial Completion shall be submitted by the Constructor to the Management Group and Owner for the Owner's written acceptance of responsibilities assigned in the Certificate.

18.6.3 Unless otherwise provided in the Certificate of Substantial Completion, warranties required by the Contract Documents shall commence on the date of Substantial Completion of the Work or a designated portion.

18.6.4 Upon acceptance by the Owner of the Certificate of Substantial Completion, the Owner shall pay to the Constructor the remaining retainage held by the Owner for the Work described in the Certificate of Substantial Completion less a sum equal to two hundred percent (200%) of the estimated cost of completing or correcting remaining items on that part of the Work, as agreed to by the Owner and Constructor as necessary to achieve Final Completion. Uncompleted items shall be completed by the Constructor in a mutually agreed time frame. The Owner shall pay the Constructor monthly the amount retained for unfinished items as each item is completed.

#### 18.7 PARTIAL OCCUPANCY OR USE

18.7.1 The Owner may occupy or use completed or partially completed portions of the Work when (a) the portion of the Work is designated in a Certificate of Substantial Completion, (b) appropriate insurer(s) consent to the occupancy or use, and (c) public authorities authorize the occupancy or use. The

Constructor shall not unreasonably withhold consent to partial occupancy or use. Owner shall not unreasonably refuse to accept partial occupancy.

## 18.8 FINAL COMPLETION AND FINAL PAYMENT

18.8.1 Upon notification from the Constructor that the Work is complete and ready for final inspection and acceptance, the Management Group shall promptly conduct an inspection to determine if the Work has been completed and is acceptable under the Contract Documents.

18.8.2 When the Work is complete, the Constructor shall prepare for the Owner's acceptance a final application for payment stating that to the best of the Constructor's knowledge, and based on the Owner's inspections, the Work has reached final completion in accordance with the Contract Documents.

18.8.3 Final payment of the balance of the Construction Control Estimate shall be made to the Constructor within twenty (20) Days after the Constructor has submitted an application for final payment, including submissions required under Subparagraph 18.8.4, and a Certificate of Final Completion has been executed by the Owner and Constructor.

18.8.4 Final payment shall be due on the Constructor's submission of the following to the Owner:

18.8.4.1 an affidavit declaring any indebtedness connected with the Work, e.g. payrolls or invoices for materials or equipment, to have been paid, satisfied or to be paid with the proceeds of final payment, so as not to encumber the Owner's property;

18.8.4.2 as-built drawings, manuals, copies of warranties and all other close-out documents required by the Contract Documents;

18.8.4.3 release of any liens, conditioned on final payment being received;

18.8.4.4 consent of any surety; and

18.8.4.5 any outstanding known and unreported accidents or injuries experienced by the Constructor, Trade Contractors or Subcontractors at the Worksite.

18.8.5 If, after Substantial Completion of the Work, the Final Completion of a portion of the Work is materially delayed through no fault of the Constructor, the Owner shall pay the balance due for portion(s) of the Work fully completed and accepted. If the remaining contract balance for Work not fully completed and accepted is less than the retained amount prior to payment, the Constructor shall submit to the Management Group the written consent of any surety to payment of the balance due for portions of the Work that are fully completed and accepted. Such payment shall not constitute a waiver of claims, but otherwise shall be governed by Paragraph 18.8.

18.8.6 Claims not reserved in writing with the making of final payment shall be waived except for claims relating to liens or similar encumbrances, warranties and Defective Work.

18.8.7 ACCEPTANCE OF FINAL PAYMENT Unless the Constructor provides written identification of unsettled claims with an application for final payment, its acceptance of final payment constitutes a waiver of such claims.

18.9 LATE PAYMENT Payments due but unpaid shall bear interest from the date payment is due at the prime rate prevailing at the place of the Project.

## ARTICLE 19 RIGHT TO AUDIT

19.1 RECORDS The Designer and Constructor shall keep such full and detailed accounts as are necessary for proper financial management under this Agreement. Designer and Constructor shall maintain a complete set of all books and records prepared or used by them with respect to the Project. The Designer and Constructor's records supporting its performance and billings under this Agreement shall be current, complete and accurate and maintained according to Generally Accepted Accounting Principles. The Owner shall be afforded access to all records, books, correspondence, instructions, drawings, receipts, vouchers, memoranda and similar data relating to this Agreement. The Designer and Constructor shall preserve all such records for a period of three years after the final payment or longer where required by law.

19.2 Owner may also conduct verifications such as counting employees at the Project Site, witnessing the distribution of payroll, verifying information and amounts through interviews and written confirmations with employees, subcontractors, and material suppliers.

19.3 Designer and Constructor shall require consultants, Trade Contractors, Subcontractors, Sub-subcontractors and Material Suppliers to comply with these record-keeping and auditing requirements.

19.4 FINAL ACCOUNTING Owner's accountants or other representatives will endeavor to review and report in writing on Constructor's final accounting within fifteen (15) Days after Constructor's delivery of the final accounting to the Management Group. Based upon such Cost of the Work as Owner's accountants report to be substantiated by Constructor's final accounting, and provided the other conditions of this Section have been met, the Management Group will, within seven (7) Days after receipt of the written report of Owner's accountants, either issue a Final Certificate for Payment, or notify the Constructor in writing of the reasons for withholding a certificate. If Owner's accountants report the Cost of the Work as substantiated by Constructor's final accounting to be less than claimed by Constructor, Constructor shall be entitled to proceed in accordance with the dispute resolution provisions. Pending a final resolution of the disputed amount, Owner shall pay Constructor the amount certified as indicated in the Final Certificate for Payment.

## **ARTICLE 20 CHANGES**

20.1 CHANGES Changes in the Work that are within the general scope of this Agreement shall be accomplished, without invalidating this Agreement, by Change Order, or Interim Directed Change, subject to the limitations stated in the Contract Documents.

### **20.2 CHANGE ORDER**

20.2.1 The Constructor may request or the Owner may order changes in the Work or the timing or sequencing of performance of the Work that impact the PTCE or the Contract Time. All such changes in the Work that affect Contract Time or PTCE shall be formalized in a Change Order. Any such requests for a change in the PTCE or the Contract Time shall be processed in accordance with this Article.

20.2.2 The Owner and the Constructor shall negotiate in good faith an appropriate adjustment to the Construction Control Estimate or the Date of Substantial Completion or Date of Final Completion and shall conclude these negotiations as expeditiously as possible. Acceptance of the Change Order and any adjustment in the PTCE or Date of Substantial Completion or Date of Final Completion shall not be unreasonably withheld.

### **20.3 INTERIM DIRECTED CHANGES**

20.3.1 The Owner may issue a written Interim Directed Change directing a change in the Work prior to reaching agreement with the Constructor on the adjustment, if any, in the PTCE or the Date of Substantial Completion or Date of Final Completion.

20.3.2 The Owner and the Constructor shall negotiate expeditiously and in good faith for appropriate adjustments, as applicable, to the PTCE or the Date of Substantial Completion or Date of Final Completion arising out of Interim Directed Changes. As the changed Work is performed, the Constructor shall submit its costs for such Work with its application for payment beginning with the next application for payment within thirty (30) Days of the issuance of the Interim Directed Change. If there is a dispute as to the cost to the Owner, the Owner shall pay the Constructor fifty percent (50%) of Constructor's estimated cost to perform the work. In such event, the Parties reserve their rights as to the disputed amount, subject to the requirements of Article 23.

20.3.3 When the Owner and the Constructor agree upon the adjustments in the PTCE or the Date of Substantial Completion or Date of Final Completion, for a change in the Work directed by an Interim Directed Change, such agreement shall be the subject of an appropriate Change Order. The Change Order shall include all outstanding Interim Directed Changes issued since the last Change Order.

## 20.4 DETERMINATION OF COST

20.4.1 An increase or decrease in the PTCE or the Date of Substantial Completion or Date of Final Completion resulting from a change in the Work shall be determined by one or more of the following methods:

20.4.1.1 unit prices set forth in this Agreement or as subsequently agreed;

20.4.1.2 a mutually accepted, itemized lump sum;

20.4.1.3 costs calculated on a basis agreed upon by the Owner and Constructor plus a Fee (either a lump sum or a fee based on a percentage of cost) to which they agree; or

20.4.1.4 if an increase or decrease cannot be agreed to as set forth in Subparagraphs .1 through .3 above, and the Owner issues an Interim Directed Change, the cost of the change in the Work shall be determined by the reasonable actual expense and savings of the performance of the Work resulting from the change. If there is a net increase in the PTCE, the Constructor's Fee shall be adjusted accordingly. In case of a net decrease in the PTCE, the Constructor's Fee shall not be adjusted unless ten percent (10%) or more of the Project is deleted. The Constructor shall maintain a documented, itemized accounting evidencing the expenses and savings.

20.4.2 If unit prices are set forth in the Contract Documents or are subsequently agreed to by the Parties, but the character or quantity of such unit items as originally contemplated is so different in a proposed Change Order that the original unit prices will cause substantial inequity to the Owner or the Constructor, such unit prices shall be equitably adjusted.

20.4.3 If the Owner and the Constructor disagree as to whether work required by the Owner is within the scope of the Work, the Constructor shall furnish the Owner with an estimate of the costs to perform the disputed work in accordance with the Owner's interpretations.

20.4.4 If the Owner issues a written order for the Constructor to proceed, the Constructor shall perform the disputed work and the Owner shall pay the Constructor fifty percent (50%) of Constructor's estimated cost to perform the work. In such event, both Parties reserve their rights as to whether the work was within the scope of the Work. The Owner's payment does not prejudice its right to be reimbursed should it be determined that the disputed work was within the scope of Work. The Constructor's receipt of payment for the disputed work does not prejudice its right to receive full payment for the disputed work should it be determined that the disputed work is not within the scope of the Work.

20.5 CLAIMS FOR ADDITIONAL COST OR TIME Except as otherwise provided in the Contract Documents for any claim for an increase in the PTCE or the Date of Substantial Completion or Date of Final Completion, the Constructor shall give the Owner written notice of the claim within fourteen (14) Days after the occurrence giving rise to the claim or within fourteen (14) Days after the Constructor first recognizes the condition giving rise to the

claim, whichever is later. Except in an emergency, notice shall be given before proceeding with the Work. Any change in the PTCE or the Date of Substantial Completion or Date of Final Completion resulting from such claim shall be authorized by Change Order.

**20.6 MANAGEMENT GROUP ROOT-CAUSE ASSESSMENT** The Management Group shall meet at least monthly, beginning with the commencement of construction to assign Change Orders to specific categories as defined by the Management Group, and determine if a Change Order should result in an adjustment to the PTCE. Depending on the causes of a particular change, there may be an apportionment between or among the multiple causes or categories identified.

## **ARTICLE 21 INDEMNITY, INSURANCE, WAIVERS AND BONDS**

### **21.1 INDEMNITY**

**21.1.1 OWNER'S INDEMNITY** To the fullest extent permitted by law, the Owner shall indemnify and hold the Constructor and Designer harmless from all claims for bodily injury and property damage other than to the Work itself and other property insured under Paragraph 21.4, that may arise in connection with the Project, but only to the extent caused by the negligent acts or omissions of the Owner or anyone for whose acts or omissions Owner may be liable. The Owner shall be entitled to reimbursement of any defense costs paid above Owner's percentage of liability for the underlying claim to the extent provided for under Subparagraphs 21.1.2 and 21.1.3.

**21.1.2 CONSTRUCTOR'S INDEMNITY** To the fullest extent permitted by law, the Constructor shall indemnify and hold the Owner and the Designer harmless from all claims for bodily injury and property damage, other than to the Work itself and other property insured under Paragraph 21.4 that may arise from the performance of or the failure to perform the Services, but only to the extent caused by the negligent acts or omissions of the Constructor or anyone for whose acts or omissions the Constructor may be liable. The Constructor shall be entitled to reimbursement of any defense costs paid above Constructor's percentage of liability for the underlying claim to the extent provided for under Subparagraphs 21.1.1 and 21.1.3.

**21.1.3 DESIGNER'S INDEMNITY** To the fullest extent permitted by law, the Designer shall indemnify and hold the Owner, the Constructor harmless from all claims for bodily injury and property damage, except property insured under the Owner's property insurance, that may arise from the performance of or the failure to perform Services under this Agreement, but only to the extent of the negligent acts or omissions of the Designer, or anyone for whose acts or omissions any of them may be liable. The Designer shall be entitled to reimbursement of any defense costs paid above Designer's percentage of liability for the underlying claim to the extent provided for under Subparagraphs 21.1.1 and 21.1.2.

### **21.2 INSURANCE**

**21.2.1 CONSTRUCTOR'S INSURANCE** Prior to the start of the Work, the Constructor shall procure and maintain in force Workers Compensation Insurance, Employers' Liability Insurance, Business Automobile Liability Insurance, and Commercial General Liability Insurance (CGL). The CGL policy shall include coverage for liability arising from premises, operations, independent contractors, products-completed operations, personal injury and advertising injury, contractual liability, and broad form property damage. If requested, the Constructor shall provide the Owner with certificates of the insurance coverages required.

**21.2.1.1** The Constructor shall maintain at least the limits of liability in a company satisfactory to the Management Group as set forth in Exhibit D.

**21.2.2 DESIGNER'S INSURANCE** Before commencing its Services and as a condition of payment, the Designer shall purchase and maintain such insurance as will protect it from claims arising out of the performance of its Services under this Agreement, whether such services are provided by the

Designer or by any of its consultants or anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable.

21.2.2.1 The Designer shall maintain at least the limits of liability in a company satisfactory to the Management Group as set forth in Exhibit E.

### 21.3 PROFESSIONAL LIABILITY INSURANCE

21.3.1 DESIGNER'S PROFESSIONAL LIABILITY INSURANCE The Designer shall maintain Professional Liability Insurance with a company satisfactory to the Management Group for claims arising from the negligent performance of professional services under this Agreement, which shall be either (*select only one*):

General Office Coverage

Project Specific Professional Liability Insurance written for not less than \$ \_\_\_\_\_ per claim and in the aggregate with a deductible not to exceed \$ \_\_\_\_\_. The Professional Liability Insurance shall contain prior acts coverage sufficient to cover all Services performed by the Designer for this Project. If Project Specific Professional Liability Coverage is used, these requirements shall be continued in effect for \_\_\_\_\_ year(s) following final payment to the Designer. The deductible shall be paid by the Designer.

21.3.2 CONSTRUCTOR'S PROFESSIONAL LIABILITY INSURANCE The Constructor \_\_\_\_\_ shall/\_\_\_\_\_ shall not (*select one*) obtain professional liability insurance for claims arising from the negligent performance of services under this Agreement, which if required shall be for such limits, deductible and terms as required by the Management Group and set forth in Exhibit D.

### 21.4 PROPERTY INSURANCE

21.4.1 Before the start of Work, the Owner shall obtain and maintain a Builder's Risk Policy upon the entire Project for the full cost of replacement at the time of loss. This insurance shall also name the Constructor, Subcontractors, Sub-subcontractors, Material Suppliers and Designer as named insureds. This insurance shall be written as a Builder's Risk Policy or equivalent form to cover all risks of physical loss except those specifically excluded by the policy, and shall insure at least against the perils of fire, lightning, explosion, windstorm, and hail, smoke, aircraft (except aircraft, including helicopter, operated by or on behalf of Constructor) and vehicles, riot and civil commotion, theft, vandalism, malicious mischief, debris removal, flood, earthquake, earth movement, water damage, wind, terrorism, testing if applicable, collapse however caused, and damage resulting from defective design, workmanship or material. The Owner shall be solely responsible for any deductible amounts or coinsurance penalties. This policy shall provide for a waiver of subrogation in favor of the Constructor, Subcontractors, Sub-subcontractors, Material Suppliers and Designer. This insurance shall remain in effect until final payment has been made or until no person or entity other than the Owner has an insurable interest in the property to be covered by this insurance, whichever is sooner. Partial occupancy or use of the Work shall not commence until the Owner has secured the consent of the insurance company or companies providing the coverage required in this Subparagraph 21.4.1. Prior to commencement of the Work, the Owner shall provide a copy of the property policy or policies obtained in compliance with this Subparagraph 21.4.1.

21.4.2 If the Owner does not intend to purchase the property insurance required by this Agreement, including all of the coverages and deductibles described herein, the Owner shall give written notice to the Constructor before the Work is commenced. The Constructor may then provide insurance to protect its interests and the interests of the Subcontractors and Sub-subcontractors, including the coverage of deductibles. The cost of this insurance shall be charged to the Owner in a Change Order. The Owner shall be responsible for all of Constructor's costs reasonably attributed to the Owner's failure or neglect in purchasing or maintaining the coverage described above.

21.4.3 Owner and Constructor waive all rights against each other and their respective employees, agents, contractors, subcontractors and Sub-subcontractors for damages caused by risks covered by the property insurance except such rights as they may have to the proceeds of the insurance and such rights as the



Constructor may have for the failure of the Owner to obtain and maintain property insurance in compliance with Subparagraph 21.4.1.

21.4.4 To the extent of the limits of Constructor's Commercial General Liability Insurance specified in Exhibit D or \_\_\_\_\_ Dollars (\$\_\_\_\_\_) whichever is more, the Constructor shall indemnify and hold harmless the Owner against any and all liability, claims, demands, damages, losses and expenses, including attorneys' fees, in connection with or arising out of any damage or alleged damage to any of Owner's existing adjacent property that may arise from the performance of the Work, to the extent of the negligent acts or omissions of the Constructor, Subcontractor or anyone employed directly or indirectly by any of them or by anyone for whose acts any of them may be liable.

## 21.5 OWNER'S INSURANCE

21.5.1 BUSINESS INCOME INSURANCE The Owner may procure and maintain insurance against loss of use of the Owner's property caused by fire or other casualty loss.

21.5.2 OWNER'S LIABILITY INSURANCE The Owner shall obtain and maintain its own liability insurance for protection against claims arising out of the performance of this Agreement, including without limitation, loss of use and claims, losses and expenses arising out of the Owner's errors or omissions.

## 21.6 ADDITIONAL LIABILITY COVERAGE

21.6.1 The Owner \_\_\_ shall/\_\_\_ shall not (indicate one) require Constructor to purchase and maintain liability coverage, primary to Owner's coverage under Paragraph 21.5.

21.6.2 If required by Subparagraph 21.6.1, the additional liability coverage required of the Constructor shall be: (Designate Required Coverage(s))

\_\_\_ .1 Additional Insured. Owner shall be named as an additional insured on Constructor's Commercial General Liability Insurance specified in Subparagraph 21.2.1, for operations and completed operations, but only with respect to liability for bodily injury, property damage or personal and advertising injury to the extent caused by the negligent acts or omissions of Constructor, or those acting on Constructor's behalf, in the performance of Constructor's Work for Owner at the Worksite.

\_\_\_ .2 OCP. Constructor shall provide an Owners' and Contractors' Protective Liability Insurance ("OCP") policy with limits equal to the limits on Commercial General Liability Insurance required by Exhibit D, or limits as otherwise required by Owner. Any documented additional cost in the form of a surcharge associated with procuring the additional liability coverage in accordance with this Subparagraph shall be paid by the Owner directly or the costs may be reimbursed by Owner to Constructor by increasing the contract price to correspond to the actual cost required to purchase and maintain the additional liability coverage. Prior to commencement of the Work, Constructor shall obtain and furnish to the Owner a certificate evidencing that the additional liability coverages have been procured.

21.7 ROYALTIES, PATENTS AND COPYRIGHTS The Constructor shall pay all royalties and license fees which may be due on the inclusion of any patented or copyrighted materials, methods or systems selected by the Constructor and incorporated in the Work. The Constructor shall indemnify and hold the Owner harmless from all suits or claims for infringement of any patent rights or copyrights arising out of such selection. The Owner agrees to indemnify and hold the Constructor harmless from any suits or claims of infringement of any patent rights or copyrights arising out of any patented or copyrighted materials, methods or systems specified by the Owner and Designer.

## 21.8 BONDS

21.8.1 Performance and Payment Bonds (*Select one only*) \_\_\_ are/ \_\_\_ are not required of the Constructor. Such bonds shall be issued by a surety admitted in the State in which the Project is located and must be

acceptable to the Owner. The penal sum of the Payment Bond shall equal the penal sum of the Performance Bond. Any increase in the Constructor's construction costs as defined in Paragraph 8.3.1.3 that exceeds 10% in the aggregate shall require a rider to the Bonds increasing penal sums accordingly. Up to such 10% amount, the penal sum of the bond shall remain equal to 100% of Constructor's construction costs as defined in Paragraph 8.3.1.3. The Constructor shall endeavor to keep its surety advised of changes potentially impacting the Contract Time and Constructor's construction costs as defined in Paragraph 8.3.1.3, though the Constructor shall require that its surety waives any requirement to be notified of any alteration or extension of time. The Payment Bond for the Project, if any, shall be made available by the Owner for review and copying by the Subcontractor. The Owner's acceptance of bonds shall not be unreasonably withheld.

## **ARTICLE 22**

### **SUSPENSION, NOTICE TO CURE AND TERMINATION OF THE AGREEMENT**

#### **22.1 SUSPENSION BY OWNER FOR CONVENIENCE**

22.1.1 OWNER SUSPENSION Should the Owner order the Constructor or Designer in writing to suspend, delay, or interrupt the performance of the Work for such period of time as may be determined to be appropriate for the convenience of the Owner and not due to any act or omission of the Constructor or Designer or any person or entity for whose acts or omissions the Constructor or Designer may be liable, then the Constructor or Designer shall immediately suspend, delay or interrupt that portion of the Work as ordered by the Owner. The PTCE and the Contract Time shall be equitably adjusted by Change Order for the cost and delay resulting from any such suspension.

22.1.2 Any action taken by the Owner that is permitted by any other provision of the Contract Documents and that results in a suspension of part or all of the Work does not constitute a suspension of Work under this Subparagraph 22.1.1.

22.2 NOTICE TO CURE A DEFAULT If the Constructor or Designer persistently refuses or fails to supply enough properly skilled workers, proper materials, or equipment, to maintain the approved schedule in accordance with Articles 7 and 15, or fails to make prompt payment to its workers, Subcontractors or Material Suppliers, subconsultants, disregards laws, ordinances, rules, regulations or orders of any public authority having jurisdiction, or is otherwise guilty of a material breach of a provision of this Agreement, the Constructor or Designer, as applicable, may be deemed in default. If the Constructor or Designer fails within seven (7) business Days after written notification to commence and continue satisfactory correction of such default with diligence and promptness, then the Owner without prejudice to any other rights or remedies may:

22.2.1 supply workers and materials, equipment and other facilities as the Owner deems necessary for the satisfactory correction of the default, and charge the cost to the Constructor or Designer, who shall be liable for the payment of same including reasonable overhead, profit and attorneys' fees;

22.2.2 contract with Others to perform such part of the Work as the Owner determines shall provide the most expeditious correction of the default, and charge the cost to the Constructor or Designer;

22.2.3 withhold payment due the Constructor or Designer in accordance with Articles 16 and 18; and

22.2.4 in the event of an emergency affecting the safety of persons or property, immediately commence and continue satisfactory correction of such default as provided in Subparagraphs 22.2.1 and 22.2.2 without first giving written notice to the Constructor, but shall give prompt written notice of such action to the Constructor following commencement of the action.

#### **22.3 OWNER'S RIGHT TO TERMINATE FOR DEFAULT**

22.3.1 TERMINATION BY OWNER FOR DEFAULT If, within seven (7) Days of receipt of a notice to cure pursuant to Paragraph 22.2, the Constructor or Designer fails to commence and satisfactorily continue correction of the default set forth in the notice to cure, the Owner may notify the Constructor or Designer that it intends to terminate this Agreement for default absent appropriate corrective action within fourteen additional Days. After the expiration of the additional fourteen (14) Day period, the Owner may terminate this Agreement by written notice absent appropriate corrective action. Termination for default is in addition to any other remedies available to Owner under Paragraph 22.2. If the Owner's cost arising out of the Constructor's or Designer's failure to cure, including the cost of completing the Work and reasonable attorneys' fees, exceeds the unpaid compensation, the Constructor or Designer shall be liable to the Owner for such excess costs. If the Owner's costs are less than the unpaid compensation, the Owner shall pay the difference to the Constructor or Designer. In the event the Owner exercises its rights under this Paragraph 22.3, upon the request of the Constructor or Designer, the Owner shall furnish to the Constructor or Designer a detailed accounting of the cost incurred by the Owner.

22.3.2 USE OF CONSTRUCTOR'S MATERIALS, SUPPLIES AND EQUIPMENT If the Owner or Others perform work under this Paragraph 22.3, the Owner shall have the right to take and use any materials, supplies and equipment belonging to the Constructor and located at the Worksite for the purpose of completing any remaining Work. Immediately upon completion of the Work, any remaining materials, supplies or equipment not consumed or incorporated in the Work shall be returned to the Constructor in substantially the same condition as when they were taken, reasonable wear and tear excepted.

22.3.3 If the Constructor or Designer files a petition under the Bankruptcy Code, this Agreement shall terminate if the Constructor or Designer or the trustee of same rejects the Agreement or, if there has been a default, the Constructor or Designer is unable to give adequate assurance that the Constructor or Designer will perform as required by this Agreement or otherwise is unable to comply with the requirements for assuming this Agreement under the applicable provisions of the Bankruptcy Code.

#### 22.4 TERMINATION BY OWNER FOR CONVENIENCE

22.4.1 Upon written notice to the Constructor or Designer, as applicable, the Owner may, without cause, terminate this Agreement. The Constructor or Designer, as applicable, shall immediately stop the Work, follow the Owner's instructions regarding shutdown and termination procedures, and strive to minimize any further costs.

22.4.2 If the Owner terminates this Agreement pursuant to this Paragraph 22.4, the Constructor or Designer shall be paid for the Work performed to date and any proven loss, cost or expense in connection with the Work, including all demobilization costs and a premium as set forth below:  
*(Insert here the amount agreed to by the Parties.)*

22.4.3 If the Owner terminates this Agreement pursuant to Paragraphs 22.3 or 22.4, the Constructor shall:

22.4.3.1 execute and deliver to the Owner all papers and take all action required to assign, transfer and vest in the Owner the rights of the Constructor to all materials, supplies and equipment for which payment has or will be made in accordance with the Contract Documents and all subcontracts, orders and commitments which have been made in accordance with the Contract Documents;

22.4.3.2 exert reasonable effort to reduce to a minimum the Owner's liability for subcontracts, orders and commitments that have not been fulfilled at the time of the termination;

22.4.3.3 cancel any subcontracts, orders and commitments as the Owner directs; and

22.4.3.4 sell at prices approved by the Owner any materials, supplies and equipment as the Owner directs, with all proceeds paid or credited to the Owner.

#### 22.5 CONSTRUCTOR'S/DESIGNER'S RIGHT TO TERMINATE

22.5.1 Upon seven (7) Days' written notice to the Owner, the Constructor or Designer may terminate this Agreement if the Work has been stopped for a thirty (30) Day period through no fault of the Constructor or Designer for any of the following reasons:

22.5.1.1 under court order or order of other governmental authorities having jurisdiction;

22.5.1.2 as a result of the declaration of a national emergency or other governmental act during which, through no act or fault of the Constructor or Designer, materials are not available; or

22.5.1.3 suspension by Owner for convenience pursuant to Paragraph 22.1

22.5.2 In addition, upon seven (7) Days' written notice to the Owner, the Constructor or Designer may terminate the Agreement if the Owner:

22.5.2.1 assigns this Agreement over the Constructor's or Designer's reasonable objection, or

22.5.2.2 fails to pay the Constructor or Designer in accordance with this Agreement, or

22.5.2.3 otherwise materially breaches this Agreement.

22.5.3 Upon termination by the Constructor or Designer in accordance with Paragraph 22.5, the Constructor or Designer shall be entitled to recover from the Owner payment for all Work executed and for any proven loss, cost or expense in connection with the Work, including all demobilization costs plus reasonable overhead and profit on Work not performed.

22.6 OBLIGATIONS ARISING BEFORE TERMINATION Even after termination pursuant to Article 22, the provisions of this Agreement still apply to any Work performed, payments made, events occurring, costs charged or incurred or obligations arising before the termination date.

## **ARTICLE 23 DISPUTE RESOLUTION**

23.1 WORK CONTINUANCE AND PAYMENT Unless otherwise agreed in writing, the Constructor or Designer shall continue the Work or Services and maintain the Schedule of the Work during any dispute resolution proceedings. If the Constructor or Designer continues to perform, the Owner shall continue to make payments in accordance with this Agreement.

23.2 DIRECT DISCUSSIONS If the Parties cannot reach resolution on a matter relating to or arising out of the Agreement, the Parties shall endeavor to reach resolution through good faith direct discussions between the Parties' representatives, who shall possess the necessary authority to resolve such matter and who shall record the date of first discussions. If the Parties' representatives are not able to resolve such matter within five (5) business Days of the date of first discussion, the dispute shall be submitted to the Management Group at its next meeting or at a special meeting requested by any Party. The Management Group shall review the dispute and take one or more of the following actions: (1) request additional supporting data from the claimant or a response with supporting data from the other Party, (2) request a technical analysis of the dispute from any CPD Team member; (3) proceed in an effort to achieve a negotiated resolution of the dispute. The Management Group may, but shall not be obligated to, consult with or seek information from either Party or from persons with special knowledge or expertise who may assist the Management Group in issuing a technical interpretation or recommendation, or in providing a root cause assessment, the cost of which shall be allocated by the Management Group. If the dispute remains unresolved after submission to the Management Group, the Parties shall submit such matter to the dispute mitigation and dispute resolution procedures selected herein.

23.3 MITIGATION If the Parties select one of the dispute mitigation procedures provided in this Paragraph 23.3, disputes remaining unresolved after direct discussions shall be directed to the selected mitigation procedure. The

dispute mitigation procedure shall result in a nonbinding finding on the matter, which may be introduced as evidence at a subsequent binding adjudication of the matter, as designated in Paragraph 23.5. The Parties agree that the dispute mitigation procedure shall be: *(Select only one)*

Project Neutral, or

Dispute Review Board

**23.3.1 MITIGATION PROCEDURES** The Project Neutral/Dispute Review Board shall be mutually selected and appointed by the Parties and shall execute a retainer agreement with the Parties establishing the scope of the Project Neutral's/Dispute Review Board's responsibilities. The costs and expenses of the Project Neutral/Dispute Review Board shall be shared equally by the Parties. The Project Neutral/Dispute Review Board shall be available to either Party, upon request, throughout the course of the Project, and shall make regular visits to the Project so as to maintain an up-to-date understanding of the Project progress and issues and to enable the Project Neutral/Dispute Review Board to address matters in dispute between the Parties promptly and knowledgeably. The Project Neutral/Dispute Review Board shall issue nonbinding findings within five (5) business Days of referral of the matter to the Project Neutral/Dispute Review Board, unless good cause is shown.

**23.3.2** If the matter remains unresolved following the issuance of the nonbinding finding by the mitigation procedure or if the Project Neutral/Dispute Review Board fails to issue nonbinding findings within five (5) business Days of the referral, the Parties shall submit the matter to the binding dispute resolution procedure designated in Paragraph 23.5.

**23.4 MEDIATION** If direct discussions pursuant to Paragraph 23.2 do not result in resolution of the matter and no dispute mitigation procedure is selected under Paragraph 23.3, the Parties shall endeavor to resolve the matter by mediation through the current Construction Industry Mediation Rules of the American Arbitration Association, or the Parties may mutually agree to select another set of mediation rules. The administration of the mediation shall be as mutually agreed by the Parties. The mediation shall be convened within thirty (30) business Days of the matter first being discussed and shall conclude within forty-five (45) business Days of the matter being first discussed. Either Party may terminate the mediation at any time after the first session, but the decision to terminate shall be delivered in person by the terminating Party to the non-terminating Party and to the mediator. The costs of the mediation shall be shared equally by the Parties.

**23.5 BINDING DISPUTE RESOLUTION** If the matter is unresolved after submission of the matter to a mitigation procedure or to mediation, the Parties shall submit the matter to the binding dispute resolution procedure designated herein: *(Designate only one)*

Arbitration using the current Construction Industry Arbitration Rules of the American Arbitration Association or the Parties may mutually agree to select another set of arbitration rules. The administration of the arbitration shall be as mutually agreed by the Parties.

Litigation in either the state or federal court having jurisdiction of the matter in the location of the Project.

**23.5.1** The costs of any binding dispute resolution procedures shall be borne by the non-prevailing Party.

**23.5.2 VENUE** The venue of any binding dispute resolution procedure shall be the location of the Project, unless the Parties agree on a mutually convenient location.

**23.6 LIEN RIGHTS** Nothing in this Article 23 shall limit any rights or remedies not expressly waived by the Constructor that the Constructor may have under lien laws.

## **ARTICLE 24 MISCELLANEOUS PROVISIONS**

**24.1 ASSIGNMENT** Neither the Owner nor Designer nor the Constructor shall assign their interest in this Agreement without the written consent of the other except as to the assignment of proceeds. The terms and conditions of this Agreement shall be binding upon both Parties, their partners, successors, assigns and legal representatives. Neither Party to this Agreement shall assign the Agreement as a whole without written consent of the other except that the Owner may assign the Agreement to a wholly owned subsidiary of Owner when Owner has fully indemnified Constructor or to an institutional lender providing construction financing for the Project as long as the assignment is no less favorable to the Constructor than this Agreement. In the event of such assignment, the Constructor shall execute any consents reasonably required. In such event, the wholly-owned subsidiary or lender shall assume the Owner's rights and obligations under the Contract Documents. If either Party attempts to make such an assignment, that Party shall nevertheless remain legally responsible for all obligations under this Agreement, unless otherwise agreed by the other Party.

**24.2 GOVERNING LAW** This Agreement shall be governed by the law in effect at the location of the Project.

**24.3 SEVERABILITY** The partial or complete invalidity of any one or more provisions of this Agreement shall not affect the validity or continuing force and effect of any other provision.

**24.4 NO WAIVER OF PERFORMANCE** The failure of either Party to insist, in any one or more instances, on the performance of any of the terms, covenants or conditions of this Agreement, or to exercise any of its rights, shall not be construed as a waiver or relinquishment of such term, covenant, condition or right with respect to further performance or any other term, covenant, condition or right.

**24.5 NO PARTNERSHIP OR JOINT VENTURE** This Agreement shall not be construed to constitute the Parties as a partnership or joint venture and no Party shall conduct itself in any way to suggest that a partnership or joint venture exists.

**24.6** The Owner, Constructor and Designer shall perform their obligations with integrity, ensuring at a minimum that

**24.6.1** conflicts of interest shall be avoided or disclosed promptly to the other Parties; and

**24.6.2** The Owner, Constructor and Designer warrant that they have not and shall not pay nor receive any contingent fees or gratuities to or from the other Party, including agents, officers and employees, Subcontractors or others for whom they may be liable, to secure preferential treatment.

**24.7 EXTENT OF AGREEMENT** This Agreement is solely for the benefit of the Parties, represents the entire and integrated agreement between the Parties, and supersedes all prior negotiations, representations or agreements, either written or oral. This Agreement and each and every provision is for the exclusive benefit of the Parties and not for the benefit of any third party except to the extent expressly provided in this Agreement.

**24.8 TITLES AND GROUPINGS** The titles given to the articles of this Agreement are for ease of reference only and shall not be relied upon or cited for any other purpose. The grouping of the articles in this Agreement and of the Owner's specifications under the various headings is solely for the purpose of convenient organization and in no event shall the grouping of provisions, the use of paragraphs or the use of headings be construed to limit or alter the meaning of any provisions.

**24.9 JOINT DRAFTING** The Parties expressly agree that this Agreement was jointly drafted, and that both had opportunity to negotiate its terms and to obtain the assistance of counsel in reviewing its terms prior to execution. Therefore, this Agreement shall be construed neither against nor in favor of either Party, but shall be construed in a neutral manner.

24.10 RIGHTS AND REMEDIES The Parties' rights, liabilities, responsibilities and remedies with respect to this Agreement, whether in contract, tort, negligence or otherwise, shall be exclusively those expressly set forth in this Agreement.

24.11 CONFIDENTIALITY All CPD Team members shall treat as confidential and not disclose to third persons, except as is necessary for the performance of the Work, or use for its own benefit, any of each other's confidential information, know-how, discoveries, production methods and the like that may be disclosed or which is acquired in connection with the Work. The CPD Team members shall each specify those items to be treated as confidential and shall mark them as "Confidential".

24.12 PRECEDENCE Among all the Contract Documents, the term or provision that is most specific or includes the latest date shall control. Information identified in one Contract Document and not identified in another shall not be considered to be a conflict or inconsistency.

24.13 OTHER PROVISIONS  
*(Insert here other provisions, if any, that pertain to this Agreement)*

## **ARTICLE 25 CONTRACT DOCUMENTS**

25.1 The Contract Documents in existence at the time of execution of this Agreement are as follows:

### 25.2 INTERPRETATION OF CONTRACT DOCUMENTS

25.2.1 The drawings and specifications are complementary. If Work is shown only on one but not on the other, the Constructor shall perform the Work as though fully described on both consistent with the Contract Documents and reasonably inferable from them as being necessary to produce the indicated results.

25.2.2 In case of conflicts between the drawings and specifications, the specifications shall govern. In any case of omissions or errors in figures, drawings or specifications, the Constructor shall immediately submit the matter to the Management Group for clarification. The Management Group's clarifications are final and binding on all Parties, subject to an equitable adjustment in Time or compensation or dispute resolution in accordance with Article 23.

25.2.3 Where figures are given, they shall be preferred to scaled dimensions.

25.2.4 Any terms that have well-known technical or trade meanings, unless otherwise specifically defined in this Agreement, shall be interpreted in accordance with their well-known meanings.

**This Agreement is entered into as of the date entered in Article 1.**