

**CITY OF EL PASO, TEXAS  
AGENDA ITEM  
DEPARTMENT HEAD'S SUMMARY FORM**

**DEPARTMENT:** Engineering and Construction Management

**AGENDA DATE:** January 8, 2013

**CONTACT PERSON NAME AND PHONE NUMBER:** R. Alan Shubert, P.E., Project Engineer – El Paso Ballpark (X4423)

**DISTRICT(S) AFFECTED:** All

**SUBJECT:**

Discussion and action to award Solicitation No. 2013-109R for El Paso Ballpark to Jordan / Hunt, a Texas Joint Venture for an estimated total construction amount not to exceed \$40,182,111.00.

Department: Engineering and Construction Management

Award to: Jordan / Hunt, a Texas Joint Venture

Preconstruction Phase Services: \$35,000.00  
(Lump Sum)

Contractor's Fee for Construction Phase Services: \$40,147,111.00

Total Estimated Construction

Budget: \$40,182,111.00

Construction Time for Completion: 3/1/2014 Substantial Completion  
5/1/2014 Final Completion

Accounts: 580270-190-4735-99998-PCP13STADIUM1

Funding Source: 2013 City Hall Relocation and Baseball Stadium Certificates of Obligation

**Districts: 8**

And that the City Manager be authorized to execute the modified AIA A133-2009 Standard Form of Agreement between Owner and Construction Manager as Contractor and any related contract documents and agreements necessary to effectuate this award, including the Guaranteed Maximum Price Amendment.

And that as a part of this award, upon the review by the City Attorney, the City Engineer may without further authorization from City Council approve contract changes which are necessary for proper execution of the work and carrying out the intent of the project, which are in accordance with applicable law, do not make changes to the prices and are within the appropriate budget.

And that the City Manager be authorized to establish the funding sources and make any necessary budget transfers and execute any and all documents necessary for execution of this award.

This Request for Proposals is the second step in the Construction Manager at Risk Two-Step Process. The Engineering and Construction Management Department recommends award as indicated to Jordan / Hunt, a Texas Joint Venture, the highest ranked proposer based on the evaluation criteria established for this procurement.

**BACKGROUND / DISCUSSION:**

On September 18, 2012, City Council acted to approve the Ballpark Development agreement between the City of El Paso (City) and Mountainstar Sports Group (Club). One of the requirements of the Development Agreement is that the City, with input and involvement of Club, select a Construction Manager at Risk firm in accordance with any requirements of applicable law. This action satisfies that condition. The firm was selected through the two-step Construction Manager at Risk selection process approved by City Council on September 18, which was structured based on Texas statute.

**PRIOR COUNCIL ACTION:**

City Council approved the Ballpark Development Agreement on September 18, 2012. City Council also approved the use of Construction Manager-at-Risk as an alternative project delivery method and approved the use of the two step process for this particular project on September 18, 2012. City Council approved the contract for design of the ballpark on November 27, 2012 and the contract for the owner’s representative on December 11, 2012.

**AMOUNT AND SOURCE OF FUNDING:**

Funding source: 2013 City Hall Relocation Certificates of Obligation

**BOARD / COMMISSION ACTION:**

N/A

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\*\*\*\*\*REQUIRED AUTHORIZATION\*\*\*\*\*

**DEPARTMENT HEAD:**

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(If Department Head Summary Form is initiated by Purchasing, client department should sign also)  
Information copy to appropriate Deputy City Manager

 **AIA**® Document A133™ – 2009

**Standard Form of Agreement Between Owner and Construction Manager as Constructor** where the basis of payment is the Cost of the Work Plus a Fee with a Guaranteed Maximum Price

**AGREEMENT** made as of the    day of    in the year  
*(In words, indicate day, month and year.)*

**BETWEEN** the Owner:  
*(Name, legal status and address)*

The City of El Paso  
2 Civic Center Plaza  
El Paso, TX 79901

and the Construction Manager:  
*(Name, legal status and address)*

Jordan-Hunt, a Texas Joint Venture  
Hunt Construction Group, Inc.  
4099 McEwen, Suite 400  
Dallas, TX 75244  
Attn: Mark LaVoy

Copy to: CF Jordan Construction, LLC  
7700 CF Jordan Drive  
El Paso, TX 79912  
Attn: Darren Woody

for the following Project:  
*(Name and address or location)*

El Paso Ballpark  
El Paso, Texas

The Architect:  
*(Name, legal status and address)*

Populous 300 Wyandotte, Suite 200  
Kansas City, Missouri 64105

The Owner's Designated Representative:  
*(Name, address and other information)*

Mr. R. Alan Shubert, P.E.  
City of El Paso  
Engineering & Construction Management  
2 Civic Center Plaza  
4<sup>th</sup> floor of City Hall  
El Paso, TX 79901

**ADDITIONS AND DELETIONS:**

The author of this document has added information needed for its completion. The author may also have revised the text of the original AIA standard form. An *Additions and Deletions Report* that notes added information as well as revisions to the standard form text is available from the author and should be reviewed. A vertical line in the left margin of this document indicates where the author has added necessary information and where the author has added to or deleted from the original AIA text.

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

AIA Document A201™–2007, General Conditions of the Contract for Construction, is adopted in this document by reference. Do not use with other general conditions unless this document is modified.

The Construction Manager's Designated Representative:  
*(Name, address and other information)*

Monte Thurmond  
Hunt Construction Group, Inc.  
4099 McEwen, Suite 400  
Dallas, TX 75244

The Architect's Designated Representative:  
*(Name, address and other information)*

David Bower, Principal  
Populous  
300 Wyandotte, Suite 200  
Kansas City, Missouri 64105  
The Owner and Construction Manager agree as follows.

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List of Exhibits

The following documents comprise the Agreement:

.1 AIA Document A133-2009, Standard Form of Agreement Between Owner and Construction Manager as Constructor where the basis of payment is the Cost of the Work Plus a Fee with a Guaranteed Maximum Price

.2 AIA Document A201-2007, General Conditions of the Contract for Construction

.3 Other documents:

Exhibits

- Exhibit A Construction Manager Scope of Services
- Exhibit B Cost Proposal Form and Allocation Summary
- Exhibit C Key Personnel and Staffing (Incorporated in RFP Response)
- Exhibit D Milestone Schedule (BY CM)
- Exhibit E Alta/ACSM Land Title Survey
- Exhibit F Geotechnical Investigations
- Exhibit G Environmental Exhibits
- Exhibit H Contracting and Construction Employment Opportunities (Provide with GMP)
- Exhibit I Insurance Requirements
- Exhibit J Tax Exempt Status (Provide with GMP)
- Exhibit K Testing and Inspection Matrix (Provide with GMP)
- Exhibit L City of El Paso or other Agency Special Requirements (Provide with GMP)
- Exhibit M Form of Certificate of Substantial Completion
- Exhibit N Waiver of Lien Forms (Provide with GMP)
- Exhibit O Contractor's Standard Form Subcontract (Provide prior to first subcontract)
- Exhibit Q Vibration Monitoring Plan (By CM)
- Exhibit R Waivers of City Permits and Fees

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Exhibit S      AIA Document E201™– 2007, Digital Data Protocol Exhibit (Inc. by Reference)  
Exhibit T      AIA Document E202™– 2008, Building Information Modeling Protocol Exhibit  
                    (Inc. by Reference)

## ARTICLE 1    GENERAL PROVISIONS

### § 1.1 The Contract Documents

The Contract Documents consist of this Agreement, Conditions of the Contract (General, Supplementary and other Conditions), Drawings, Specifications, Addenda issued prior to the execution of this Agreement, the Request for Proposals issued by the Owner in anticipation of receiving bids or proposals, the invitation to bid, and any Addenda to the Request for Proposals issued by Owner, the Construction Manager's bid or proposal, Addenda in relation to bidding requirements and other documents listed in this Agreement, and Modifications issued after execution of this Agreement, all of which form the Contract and are as fully a part of the Contract as if attached to this Agreement or repeated herein. Upon the Owner's acceptance of the Construction Manager's Guaranteed Maximum Price proposal, the Contract Documents will also include the documents described in Section 2.2.3 and identified in the Guaranteed Maximum Price Amendment and revisions prepared by the Architect and furnished by the Owner as described in Section 2.2.8. The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. If anything in the other Contract Documents, other than a Modification, is inconsistent with this Agreement, this Agreement shall govern.

### § 1.2 Relationship of the Parties

The Construction Manager accepts the relationship of trust and confidence established by this Agreement and covenants with the Owner to cooperate with the Architect and exercise the Construction Manager's skill and judgment in furthering the interests of the Owner; to furnish efficient construction administration, management services and supervision; to furnish at all times an adequate supply of workers and materials; and to perform the Work in an expeditious and economical manner consistent with the Owner's interests. The Owner agrees to furnish or approve, in a timely manner, information required by the Construction Manager and to make payments to the Construction Manager in accordance with the requirements of the Contract Documents.

### § 1.3 General Conditions

For the Preconstruction Phase, AIA Document A201™–2007, General Conditions of the Contract for Construction, shall apply only as specifically provided in this Agreement. For the Construction Phase, the general conditions of the contract shall be as set forth in A201–2007, which document is incorporated herein by reference. The term "Contractor" as used in A201–2007 shall mean the Construction Manager.

## ARTICLE 2    CONSTRUCTION MANAGER'S RESPONSIBILITIES

The Construction Manager's Preconstruction Phase responsibilities are set forth in Sections 2.1 and 2.2. The Construction Manager's Construction Phase responsibilities are set forth in Section 2.3. The Construction Manager's Preconstruction Phase and Construction Phase responsibilities are further delineated in Exhibit A - Construction Manager Scope of Services. Owner and Construction Manager may agree, in consultation with the Architect, for the Construction Phase to commence prior to completion of the Preconstruction Phase, in which case, both phases will proceed concurrently. The Construction Manager shall identify a representative authorized to act on behalf of the Construction Manager with respect to the Project.

### § 2.1 Preconstruction Phase

§ 2.1.1 The Construction Manager shall provide a preliminary evaluation of the Owner's program, schedule and construction budget requirements, each in terms of the other.

### § 2.1.2 Consultation

The Construction Manager shall schedule and conduct meetings with the Architect and Owner to discuss such matters as procedures, progress, coordination, and scheduling of the Work. The Construction Manager shall advise the Owner and the Architect on proposed site use and improvements, selection of materials, and building systems and equipment. The Construction Manager shall also provide recommendations consistent with the Project requirements to the Owner and Architect on constructability; availability of materials and labor; time requirements for procurement, installation and construction; and factors related to construction cost including, but not limited to, costs of alternative designs or materials, preliminary budgets, life-cycle data, and possible cost reductions.

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§ 2.1.3 When Project requirements in Section 3.1.1 have been sufficiently identified, the Construction Manager shall prepare and periodically update a Project schedule for the Architect's review and the Owner's acceptance. The Construction Manager shall obtain the Architect's approval for the portion of the Project schedule relating to the performance of the Architect's services. The Project schedule shall coordinate and integrate the Construction Manager's services, the Architect's services, other Owner consultants' services, and the Owner's responsibilities and identify items that could affect the Project's timely completion. The updated Project schedule shall include the following: submission of the Guaranteed Maximum Price proposal; components of the Work; times of commencement and completion required of each Subcontractor; ordering and delivery of products, including those that must be ordered well in advance of construction; and the occupancy requirements of the Owner.

#### § 2.1.4 Phased Construction

The Construction Manager acknowledges that the Project will be completed on a fast track basis. The Construction Manager shall provide recommendations with regard to accelerated or fast-track scheduling, procurement, or phased construction. The Construction Manager shall take into consideration cost reductions, cost information, constructability, provisions for temporary facilities and procurement and construction scheduling issues.

#### § 2.1.5 Preliminary Cost Estimates

§ 2.1.5.1 Based on the preliminary design and other design criteria prepared by the Architect, the Construction Manager shall prepare preliminary estimates of the Cost of the Work or the cost of program requirements using area, volume or similar conceptual estimating techniques for the Architect's review and Owner's approval. If the Architect or Construction Manager suggests alternative materials and systems, the Construction Manager shall provide cost evaluations of those alternative materials and systems.

§ 2.1.5.2 As the Architect progresses with the preparation of the Schematic Design, Design Development and Construction Documents, the Construction Manager shall prepare and update, at appropriate intervals determined by the Owner, estimates of the Cost of the Work of increasing detail and refinement and allowing for the further development of the design until such time as the Owner and Construction Manager agree on a Guaranteed Maximum Price for the Work. Such estimates shall be provided for the Architect's review and the Owner's approval. The Construction Manager shall inform the Owner and Architect when estimates of the Cost of the Work exceed the latest approved Project budget and make recommendations for corrective action. The Construction Manager will include a project schedule withal cost estimates.

#### § 2.1.6 Subcontractors and Suppliers

The Construction Manager shall develop bidders' interest in the Project.

§ 2.1.7 The Construction Manager shall prepare, for the Architect's review and the Owner's acceptance, a procurement schedule for items that must be ordered well in advance of construction. The Construction Manager shall expedite and coordinate the ordering and delivery of materials that must be ordered well in advance of construction. If the Owner agrees to procure any items prior to the establishment of the Guaranteed Maximum Price, the Owner shall procure the items on terms and conditions acceptable to the Construction Manager or the Construction Manager at the Owner's written direction will procure the items on the Owner's behalf. Upon the establishment of the Guaranteed Maximum Price, the Owner shall assign all contracts for these items to the Construction Manager and the Construction Manager shall thereafter accept responsibility for them.

#### § 2.1.8 Extent of Responsibility

The Construction Manager shall exercise reasonable care in preparing schedules and estimates. The Construction Manager is not required to ascertain that the Drawings and Specifications are in accordance with applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities, but the Construction Manager shall promptly report to the Architect and Owner any nonconformity discovered by or made known to the Construction Manager as a request for information in such form as the Architect may require.

#### § 2.1.9 Notices and Compliance with Laws

The Construction Manager shall comply with applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities applicable to its performance under this Contract, and with equal employment

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opportunity programs, and other programs as may be required by governmental and quasi governmental authorities for inclusion in the Contract Documents.

## § 2.2 Guaranteed Maximum Price Proposal and Contract Time

§ 2.2.1 At a time as indicated in the milestone schedule as April 5, 2013, the Construction Manager shall prepare a Guaranteed Maximum Price proposal for the Owner's review and acceptance. The Guaranteed Maximum Price in the proposal shall be the sum of the Construction Manager's estimate of the Cost of the Work, including contingencies described in Section 2.2.4, and the Construction Manager's Fee.

§ 2.2.2 To the extent that the Drawings and Specifications are anticipated to require further development by the Architect, the Construction Manager shall provide in the Guaranteed Maximum Price for such further development consistent with the Contract Documents and reasonably inferable therefrom. Such further development does not include such things as changes in scope, systems, kinds and quality of materials, finishes or equipment, all of which, if required, shall be incorporated by Change Order.

§ 2.2.3 The Construction Manager shall include with the Guaranteed Maximum Price proposal a written statement of its basis, which shall include the following:

- .1 A list of the Drawings and Specifications, including all Addenda thereto, and the Conditions of the Contract;
- .2 A list of the clarifications and assumptions made by the Construction Manager in the preparation of the Guaranteed Maximum Price proposal, including assumptions under Section 2.2.2, to supplement the information provided by the Owner and contained in the Drawings and Specifications;
- .3 A statement of the proposed Guaranteed Maximum Price, including a statement of the estimated Cost of the Work organized by trade categories or systems, allowances, contingency, and the Construction Manager's Fee;
- .4 The anticipated date of Substantial Completion upon which the proposed Guaranteed Maximum Price is based; and
- .5 A date by which the Owner must accept the Guaranteed Maximum Price no less than ten days from submission
- .6 Detailed plan and evidence of commitment to a local participation program as outlined in Exhibit H

§ 2.2.4 In preparing the Construction Manager's Guaranteed Maximum Price proposal, the Construction Manager shall include its contingency for the Construction Manager's exclusive use to cover those costs considered reimbursable as the Cost of the Work but not included in a Change Order. The contingency shall not be used by Construction Manager to fund deficiencies in the cost of the General Conditions Work, Staffing, Insurance, Bonds or the Construction Manager's Fee or Liquidated Damages. The Construction Manager will promptly notify the Owner of all uses of contingency and shall maintain complete records of fund status.

§ 2.2.5 The Construction Manager shall meet with the Owner and Architect to review the Guaranteed Maximum Price proposal. In the event that the Owner and Architect discover any inconsistencies or inaccuracies in the information presented, they shall promptly notify the Construction Manager, who shall make appropriate adjustments to the Guaranteed Maximum Price proposal, its basis, or both.

§ 2.2.6 If the Owner notifies the Construction Manager that the Owner has accepted the Guaranteed Maximum Price proposal in writing before the date specified in the Guaranteed Maximum Price proposal, the Guaranteed Maximum Price proposal shall be deemed effective without further acceptance from the Construction Manager. Following acceptance of a Guaranteed Maximum Price, the Owner and Construction Manager shall execute the Guaranteed Maximum Price Amendment amending this Agreement, a copy of which the Owner shall provide to the Architect. The Guaranteed Maximum Price Amendment shall set forth the agreed upon Guaranteed Maximum Price with the information and assumptions upon which it is based.

§ 2.2.7 The Construction Manager shall not incur any cost to be reimbursed as part of the Cost of the Work prior to the commencement of the Construction Phase, unless the Owner provides prior written authorization for such costs.

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§ 2.2.8 The Owner shall authorize the Architect to provide the revisions to the Drawings and Specifications to incorporate the agreed-upon assumptions and clarifications contained in the Guaranteed Maximum Price Amendment. The Owner shall promptly furnish those revised Drawings and Specifications to the Construction Manager as they are revised. The Construction Manager shall notify the Owner and Architect of any inconsistencies between the Guaranteed Maximum Price Amendment and the revised Drawings and Specifications.

§ 2.2.9 The Construction Manager shall include in the Guaranteed Maximum Price all sales, consumer, use and similar taxes for the Work provided by the Construction Manager that are legally enacted, whether or not yet effective, at the time the Guaranteed Maximum Price Amendment is executed. The Project has tax-exempt status as indicated in Exhibit J. Owner shall provide Construction Manager with the appropriate tax exemption documentation as required.

## § 2.3 Construction Phase

### § 2.3.1 General

§ 2.3.1.1 For purposes of Section 8.1.2 of A201–2007, the date of commencement of the Work shall mean the date of commencement of the Construction Phase.

§ 2.3.1.2 The Construction Phase shall commence upon the Owner's acceptance of the Construction Manager's Guaranteed Maximum Price proposal or the Owner's issuance of a Notice to Proceed, whichever occurs earlier.

### § 2.3.2 Administration

2.3.2.1 Those portions of the Work that the Construction Manager does not customarily perform with the Construction Manager's own personnel shall be performed under subcontract or by other appropriate agreements with the Construction Manager. Pursuant to Texas Government Code Chapter 2267, the Construction Manager shall publicly advertise for bids or proposals and receive bids or proposals from trade contractors or subcontractors for the performance of all major elements of the work other than the minor work that may be included in the general conditions. The Construction Manager is required to publish notice in a newspaper of general circulation in El Paso County, once each week for at least two weeks before the deadline for receiving bids or proposals, of the time and place the bids or proposals will be received and opened. The Construction Manager shall review all trade contractor or subcontractor bids or proposals in a manner that does not disclose the contents of the bid or proposal during the selection process to a person not employed by the Construction Manager, Architect, Engineer, Owner or Owner's Representative. All bids or proposals shall be made available to the public after the later of the award of the contract or the seventh day after the date of final selection of bids or proposals. If a selected trade contractor or subcontractor defaults in the performance of its work or fails to execute a subcontract after being selected in accordance with this section, the Construction Manager may itself fulfill, without advertising, the contract requirements or select a replacement trade contractor or subcontractor to fulfill the contract requirements.

*(Paragraph deleted)*

§ 2.3.2.2 If the Construction Manager reviews, evaluates, and recommends to the Owner a bid or proposal from a trade contractor or subcontractor but the Owner requires another bid or proposal to be accepted, the Owner shall compensate the Construction Manager by a change in price, time, or guaranteed maximum cost for any additional cost and risk that the Construction Manager incurs because of the Owner's requirement that another bid or proposal be accepted. § 2.3.2.3 Subcontracts or other agreements shall conform to the applicable payment provisions of this Agreement, and shall not be awarded on the basis of cost plus a fee without the prior consent of the Owner. If the Subcontract is awarded on a cost-plus a fee basis, the Construction Manager shall provide in the Subcontract for the Owner to receive the same audit rights with regard to the Subcontractor as the Owner receives with regard to the Construction Manager in Section 6.11 below.

*(Paragraph deleted)*

§ 2.3.2.4 If the Construction Manager recommends a specific bidder that may be considered a "related party" according to Section 6.10, then the Construction Manager shall promptly notify the Owner in writing of such relationship and notify the Owner of the specific nature of the contemplated transaction, according to Section 6.10.2.

§ 2.3.2.5 The Construction Manager shall schedule and conduct meetings to discuss such matters as procedures, progress, coordination, scheduling, and status of the Work. The Construction Manager shall prepare and promptly distribute minutes to the Owner and Architect.

§ 2.3.2.6 Upon the execution of the Guaranteed Maximum Price Amendment, the Construction Manager shall prepare and submit to the Owner and Architect a construction schedule for the Work and submittal schedule in accordance with Section 3.10 of A201–2007.

§ 2.3.2.7 The Construction Manager shall record the progress of the Project. On a monthly basis, or otherwise as agreed to by the Owner, the Construction Manager shall submit written progress reports to the Owner and Architect, showing percentages of completion and other information required by the Owner. The Construction Manager shall also keep, and make available to the Owner and Architect, a daily log containing a record for each day of weather, portions of the Work in progress, number of workers on site, identification of equipment on site, problems that might affect progress of the work, accidents, injuries, and other information required by the Owner.

§ 2.3.2.8 The Construction Manager shall develop a system of cost control for the Work, including regular monitoring of actual costs for activities in progress and estimates for uncompleted tasks and proposed changes. The Construction Manager shall identify variances between actual and estimated costs and report the variances to the Owner and Architect and shall provide this information in its monthly reports to the Owner and Architect, in accordance with Section 2.3.2.7 above.

#### § 2.4 Professional Services

Section 3.12.10 of A201–2007 shall apply to both the Preconstruction and Construction Phases.

#### § 2.5 Hazardous Materials

Section 10.3 of A201–2007 shall apply to both the Preconstruction and Construction Phases.

#### § 2.6 Environmental Work

2.6.1 The Construction Manager acknowledges that the Project may be classified as a contaminated site by the U.S. Environmental Protection Agency and such condition including all activities, administration, coordination, procedures, scheduling and processes required to be performed by the Construction Manager or its subcontractors in connection therewith are reflected in the Guaranteed Maximum Price. In addition, the Construction Manager shall ensure that all Work performed under this Agreement, including Work performed by subcontractors or others at the site shall be in full compliance with all applicable laws, statutes, ordinances, rules and regulations related to environmental issues, including any specific environmental requirements disclosed in any of the Construction Documents (which are expressly incorporated herein by reference) or which may be reasonably inferable in connection therewith. Provided however, except as otherwise provided in the Construction Documents, nothing herein shall be deemed to require the Construction Manager to assume any responsibility for testing or otherwise verifying the presence or absence of any hazardous or unsafe material present or encountered but not created on the site or to perform the task of off-site removal or containment of any such material ("Environmental Work").

2.6.2 The Owner shall be responsible for obtaining the services of a licensed laboratory to perform environmental testing services, including verification of the presence or absence of any hazardous material or substance reported by the Construction Manager pursuant to Section 10.3 of the General Conditions. In the event offsite removal is required, such work shall be performed by subcontractors of the Owner. Notwithstanding the foregoing, the Construction Manager shall provide the overall coordination, administration, bidding, site supervision, scheduling, from the site and related services necessary to facilitate the Environmental Work. Any engineering work will be performed by licensed engineers and the Construction Manager shall have no liability for the work of such engineers.

2.6.3 In the event the Construction Manager, shall in their reasonable judgment determine that reasonable precautions, including the Construction Manager's full compliance with environmental requirements disclosed in the Construction Documents will be inadequate to prevent foreseeable bodily injury or death to persons resulting from a hazardous material or substance encountered at the site, the Construction Manager shall immediately, (i) stop Work in the affected area; (ii) notify the Owner and the Architect that the Work has been stopped including a detailed description of the condition encountered and the area affected; and (iii) proceed with Work in all unaffected areas taking all available precautions to avoid or minimize any adverse impact on the Project schedule or budget.

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## 2.8 Vibration Monitoring

The Construction Manager will oversee the preparation of a Vibration Monitoring Plan (VMP) in conjunction with the Project geotechnical and structural engineering consultants which shall be attached hereto as Exhibit Q and incorporated herein by reference. The Construction Manager shall have full responsibility to implement all provisions of the VMP at the site.

## ARTICLE 3 OWNER'S RESPONSIBILITIES

### § 3.1 Information and Services Required of the Owner

§ 3.1.1 The Owner shall provide information with reasonable promptness, regarding requirements for and limitations on the Project, including a written program which shall set forth the Owner's objectives, constraints, and criteria, including schedule, space requirements and relationships, flexibility and expandability, special equipment, systems sustainability and site requirements.

§ 3.1.2 Prior to the execution of the Guaranteed Maximum Price Amendment, the Construction Manager may request in writing that the Owner provide reasonable evidence that the Owner has made financial arrangements to fulfill the Owner's obligations under the Contract. After the Owner furnishes the evidence, the Owner shall not materially vary such financial arrangements without prior notice to the Construction Manager and Architect. The Construction Manager hereby agrees to fully cooperate and to provide such information and to perform such acts as may be reasonably requested by Owner's lender to comply with the terms of such financing, including but not limited to any specific escrow or disbursement provisions.

§ 3.1.3 The Owner shall establish and periodically update the Owner's budget for the Project, including (1) the budget for the Cost of the Work as defined in Section 6.1.1, (2) the Owner's other costs, and (3) reasonable contingencies related to all of these costs. If the Owner significantly increases or decreases the Owner's budget for the Cost of the Work, the Owner shall notify the Construction Manager and Architect. The Owner and the Architect, in consultation with the Construction Manager, shall thereafter agree to a corresponding change in the Project's scope and quality.

§ 3.1.4 **Structural and Environmental Tests, Surveys and Reports.** During the Preconstruction Phase, the Owner shall furnish the following information or services with reasonable promptness. The Owner shall also furnish any other information or services under the Owner's control and relevant to the Construction Manager's performance of the Work with reasonable promptness after receiving the Construction Manager's written request for such information or services. The Construction Manager shall be entitled to rely on the accuracy of information and services furnished by the Owner but shall exercise proper precautions relating to the safe performance of the Work.

§ 3.1.4.1 The Owner shall furnish tests, inspections and reports required by law and as otherwise agreed to by the parties, such as structural, mechanical, and chemical tests, tests for air and water pollution, and tests for hazardous materials.

§ 3.1.4.2 The Owner shall furnish surveys describing physical characteristics, legal limitations and utility locations for the site of the Project, and a legal description of the site. The surveys and legal information shall include, as applicable, grades and lines of streets, alleys, pavements and adjoining property and structures; designated wetlands; adjacent drainage; rights-of-way, restrictions, easements, encroachments, zoning, deed restrictions, boundaries and contours of the site; locations, dimensions and necessary data with respect to existing buildings, other improvements and trees; and information concerning available utility services and lines, both public and private, above and below grade, including inverts and depths. All the information on the survey shall be referenced to a Project benchmark.

§ 3.1.4.3 The Owner, when such services are requested, shall furnish services of geotechnical engineers, which may include but are not limited to test borings, test pits, determinations of soil bearing values, percolation tests, evaluations of hazardous materials, seismic evaluation, ground corrosion tests and resistivity tests, including necessary operations for anticipating subsoil conditions, with written reports and appropriate recommendations.

§ 3.1.4.4 During the Construction Phase, the Owner shall furnish information or services required of the Owner by the Contract Documents with reasonable promptness. The Owner shall also furnish any other information or services

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under the Owner's control and relevant to the Construction Manager's performance of the Work with reasonable promptness after receiving the Construction Manager's written request for such information or services.

### § 3.2 Owner's Designated Representative

The Owner shall identify a representative authorized to act on behalf of the Owner with respect to the Project. The Owner's representative shall render decisions promptly and furnish information expeditiously, so as to avoid unreasonable delay in the services or Work of the Construction Manager. Except as otherwise provided in Section 4.2.1 of A201-2007, the Architect does not have such authority. The term "Owner" means the Owner or the Owner's authorized representative.

§ 3.2.1 Legal Requirements. The Owner shall furnish all legal, insurance and accounting services, including auditing services, that may be reasonably necessary at any time for the Project to meet the Owner's needs and interests.

### § 3.3 Architect

The Owner shall retain an Architect to provide services, including normal structural, mechanical and electrical engineering services. A copy of the executed agreement between the Owner and Architect is posted on the City of El Paso's website.

## ARTICLE 4 COMPENSATION AND PAYMENTS FOR PRECONSTRUCTION PHASE SERVICES

### § 4.1 Compensation

§ 4.1.1 For the Construction Manager's Preconstruction Phase services, the Owner shall compensate the Construction Manager as follows:

§ 4.1.2 For the Construction Manager's Preconstruction Phase services described in Sections 2.1 and 2.2:  
*(Insert amount of, or basis for, compensation and include a list of reimbursable cost items, as applicable.)*

Lump sum amount of \$ 35,000.00\_ for Preconstruction Phase services beginning at award of contract until acceptance of the Guaranteed Maximum Price Proposal.

§ 4.1.3 Compensation for Preconstruction Phase Services shall not be adjusted.

*(Paragraph deleted)*

### § 4.2 Payments

§ 4.2.1 Unless otherwise agreed, payments for services shall be made monthly in proportion to services performed.

§ 4.2.2 Payments are due and payable fifteen (15) days from the date the Construction Manager's invoice is received by the Owner. Amounts unpaid after thirty (30) days from receipt of the invoice shall bear interest at the rate set forth in Texas Government Code Chapter 2251.

*(Paragraph deleted)*

## ARTICLE 5 COMPENSATION FOR CONSTRUCTION PHASE SERVICES

§ 5.1 For the Construction Manager's performance of the Work as described in Section 2.3, the Owner shall pay the Construction Manager the Contract Sum in current funds. The Contract Sum is the Cost of the Work as defined in Section 6.1.1 plus the Construction Manager's Fee.

§ 5.1.1 The Construction Manager's Fee:

*(Paragraphs deleted)*

For the Construction Manager's performance of the Work as described in Section 2.3, (and Exhibit B from the Cost Proposal Form and Allocation Summary) the Owner shall pay the Construction Manager a fee calculated at 2.51% of the total cost of the work and converted to a fixed dollar amount at acceptance of the Guaranteed Maximum Price Proposal.

§ 5.1.2 The method of adjustment of the Construction Manager's Fee for changes in the Work:

As identified in Exhibit B- Cost Proposal Form and Allocation Summary

§ 5.1.2.1 Construction Manager's fee, general conditions and staffing shall not be increased until the GMP has been increased by change orders in a net amount in excess of One Million Dollars (\$1,000,000) of original agreed upon GMP Amendment. Adjustments in Construction Manager's fee for additional change orders that increase GMP beyond the first One Millions Dollars (\$1,000,000) threshold will be in accordance with Exhibit B from the Cost Proposal Form and Allocation Summary.

§ 5.1.3 Limitations, if any, on a Subcontractor's overhead and profit for increases in the cost of its portion of the Work:

TBD

§ 5.1.4 Rental rates for Construction Manager-owned equipment shall not exceed the standard rate paid at the place of the Project Construction Manager will provide competitive pricing if requested by the Owner.

§ 5.1.5 Unit prices, if any:

*(Identify and state the unit price; state the quantity limitations, if any, to which the unit price will be applicable.)*

As defined in the Guaranteed Price Amendment.

## § 5.2 Guaranteed Maximum Price

§ 5.2.1 The Construction Manager guarantees that the Contract Sum shall not exceed the Guaranteed Maximum Price set forth in the Guaranteed Maximum Price Amendment, as it is amended from time to time. To the extent the Cost of the Work exceeds the Guaranteed Maximum Price, the Construction Manager shall bear such costs in excess of the Guaranteed Maximum Price without reimbursement or additional compensation from the Owner.

5.2.1.1 It is mutually agreed by and between the Owner and the Construction Manager that time shall be an essential part of this Agreement. The Owner and Construction Manager have agreed that the Owner's actual damages, in the event of a failure by the Construction Manager to complete the Work within the times specified and agreed upon, would be extremely difficult or impracticable to determine. After negotiation, the Owner and the Construction Manager have agreed that, considering all the circumstances existing on the date of this Agreement, the amounts set forth below are a reasonable estimate of the damages that the Owner would incur for every day's delay in finishing the Work after the Substantial Completion Date. Liquidated damages shall be considered not as a penalty but as agreed monetary damage sustained by the Owner for loss of revenue, the cost of increased administration, and other expenses related to this Agreement because the Construction Manager failed to perform and complete the Work by the Substantial Completion Date.

5.2.1.2 In the event that the Work is not complete on or before the Substantial Completion Date as set forth in the GMP as it is amended from time to time, the Construction Manager hereby agrees that the following sums shall be deducted as liquidated damages from monies due the Construction Manager under this Agreement, and not by way of penalty, or if no money is due the Construction Manager, the Construction Manager hereby agrees to pay the Owner as liquidated damages, and not by way of penalty, such total sum as shall be due for such delay, in accordance with the following schedule:

- a. Three Thousand Dollars (\$3,000.00) per calendar day for the first fifteen (15) days;
- b. Five Thousand Dollars (\$5,000.00) per calendar day for the next fifteen (15) days thereafter;
- c. Ten Thousand Dollars (\$10,000.00) per calendar day thereafter, until Substantial Completion is achieved.

Liquidated damages shall be capped at a sum equal to fifty percent (50%) of the Construction Manager's fee plus one hundred percent (100%) of the Construction Manager's allocation of Shared Savings.

§ 5.2.1.3 Shared Savings - If upon final completion of the Work, the Cost of the Work plus the Construction Manager's Fee is less than the Guaranteed Maximum Price, the difference shall be deemed Savings. 70 % of the Savings shall be retained by the Owner and 30 % of the Savings shall be paid to the Construction Manager by the Owner in addition to the final payment at the time final payment to the Construction Manager is made. The Savings payable to Construction Manager shall not exceed the amount of \$ 300,000.00.

Init.

§ 5.2.2 The Guaranteed Maximum Price is subject to additions and deductions by Change Order as provided in the Contract Documents and the Date of Substantial Completion shall be subject to adjustment as provided in the Contract Documents.

### § 5.3 Changes in the Work

§ 5.3.1 The Owner may, without invalidating the Contract, order changes in the Work within the general scope of the Contract consisting of additions, deletions or other revisions. The Owner shall issue such changes in writing. The Architect may make minor changes in the Work as provided in Section 7.4 of AIA Document A201–2007, General Conditions of the Contract for Construction.

§ 5.3.2 Adjustments to the Guaranteed Maximum Price on account of changes in the Work subsequent to the execution of the Guaranteed Maximum Price Amendment may be determined by any of the methods listed in Section 7.3.3 of AIA Document A201–2007, General Conditions of the Contract for Construction.

§ 5.3.3 In calculating adjustments to subcontracts (except those awarded with the Owner's prior consent on the basis of cost plus a fee), the terms "cost" and "fee" as used in Section 7.3.3.3 of AIA Document A201–2007 and the term "costs" as used in Section 7.3.7 of AIA Document A201–2007 shall have the meanings assigned to them in AIA Document A201–2007 and shall not be modified by Sections 5.1 and 5.2, Sections 6.1 through 6.7, and Section 6.8 of this Agreement. Adjustments to subcontracts awarded with the Owner's prior consent on the basis of cost plus a fee shall be calculated in accordance with the terms of those subcontracts.

§ 5.3.4 In calculating adjustments to the Guaranteed Maximum Price, the terms "cost" and "costs" as used in the above-referenced provisions of AIA Document A201–2007 shall mean the Cost of the Work as defined in Sections 6.1 to 6.7 of this Agreement and the term "fee" shall mean the Construction Manager's Fee as defined in Section 5.1 of this Agreement.

§ 5.3.5 Not used.

## ARTICLE 6 COST OF THE WORK FOR CONSTRUCTION PHASE

### § 6.1 Costs to Be Reimbursed

§ 6.1.1 The term Cost of the Work shall mean costs necessarily incurred by the Construction Manager in the proper performance of the Work. Such costs shall be at rates not higher than the standard paid at the place of the Project except with prior consent of the Owner. The Cost of the Work shall include only the items set forth in Sections 6.1 through 6.7 and as further defined by Exhibit B – Cost Proposal and Allocation Summary.

§ 6.1.2 Where any cost is subject to the Owner's prior approval, the Construction Manager shall obtain this approval prior to incurring the cost. The parties shall endeavor to identify any such costs prior to executing Guaranteed Maximum Price Amendment. Refer to Exhibit B- Cost Proposal and Allocation Summary.

### § 6.2 Labor Costs

§ 6.2.1 Wages of construction workers directly employed by the Construction Manager to perform the construction of the Work at the site or, with the Owner's prior approval, at off-site workshops.

§ 6.2.2 Wages or salaries of the Construction Manager's supervisory and administrative personnel when stationed at the site with the Owner's prior approval.

*(Paragraph deleted)*

§ 6.2.3 Wages and salaries of the Construction Manager's supervisory or administrative personnel engaged at factories, workshops or on the road, in expediting the production or transportation of materials or equipment required for the Work, but only for that portion of their time required for the Work.

§ 6.2.4 Costs paid or incurred by the Construction Manager for taxes, insurance, contributions, assessments and benefits required by law or collective bargaining agreements and, for personnel not covered by such agreements, customary benefits such as sick leave, medical and health benefits, holidays, vacations and pensions, provided such costs are based on wages and salaries included in the Cost of the Work under Sections 6.2.1 through 6.2.3.

Init.

Construction Manager shall apply a rate of 33% to the direct labor rates for all salaried personnel and 18% for all trade labor for all costs including but not limited to FICA, FUTA, SUTA, unemployment compensation, workmen's compensation, health insurance, pension, 401K retirement plan and payroll expense.

§ 6.2.5 Bonuses, profit sharing, incentive compensation and any other discretionary payments paid to anyone hired by the Construction Manager or paid to any Subcontractor or vendor shall not be made without the Owner's prior written consent.

### § 6.3 Subcontract Costs

Payments made by the Construction Manager to Subcontractors in accordance with the requirements of the subcontracts.

### § 6.4 Costs of Materials and Equipment Incorporated in the Completed Construction

§ 6.4.1 Costs, including transportation and storage, of materials and equipment incorporated or to be incorporated in the completed construction.

§ 6.4.2 Costs of materials described in the preceding Section 6.4.1 in excess of those actually installed to allow for reasonable waste and spoilage. Unused excess materials, if any, shall become the Owner's property at the completion of the Work or, at the Owner's option, shall be sold by the Construction Manager. Any amounts realized from such sales shall be credited to the Owner as a deduction from the Cost of the Work.

### § 6.5 Costs of Other Materials and Equipment, Temporary Facilities and Related Items

§ 6.5.1 Costs of transportation, storage, installation, maintenance, dismantling and removal of materials, supplies, temporary facilities, machinery, equipment and hand tools not customarily owned by construction workers that are provided by the Construction Manager at the site and fully consumed in the performance of the Work. Costs of materials, supplies, temporary facilities, machinery, equipment and tools that are not fully consumed shall be based on the cost or value of the item at the time it is first used on the Project site less the value of the item when it is no longer used at the Project site. Costs for items not fully consumed by the Construction Manager shall mean fair market value.

§ 6.5.2 Rental charges for temporary facilities, machinery, equipment and hand tools not customarily owned by construction workers that are provided by the Construction Manager at the site and costs of transportation, installation, minor repairs, dismantling and removal. The total rental cost of any Construction Manager-owned item may not exceed the purchase price of any comparable item. Rates of Construction Manager-owned equipment and quantities of equipment shall be subject to the Owner's prior approval.

§ 6.5.3 Costs of removal of debris from the site of the Work and its proper and legal disposal.

§ 6.5.4 Costs of document reproductions, facsimile transmissions and long-distance telephone calls, postage and parcel delivery charges, telephone service at the site and reasonable petty cash expenses of the site office.

§ 6.5.5 That portion of the reasonable expenses of the Construction Manager's supervisory or administrative personnel incurred while traveling in discharge of duties connected with the Work.

§ 6.5.6 Costs of materials and equipment suitably stored off the site at a mutually acceptable location, subject to the Owner's prior approval and in accordance with Owner's and Lender's requirements.

### § 6.6 Miscellaneous Costs

§ 6.6.1 Premiums for that portion of insurance and bonds required by the Contract Documents that can be directly attributed to this Contract. Self-insurance for either full or partial amounts of the coverages required by the Contract Documents, with the Owner's prior approval.

§ 6.6.2 Sales, use or similar taxes imposed by a governmental authority that are related to the Work and for which the Construction Manager is liable.

Init.

§ 6.6.3 Fees and assessments for the building permit and for other permits, licenses and inspections for which the Construction Manager is required by the Contract Documents to pay.

§ 6.6.4 Fees of laboratories for tests required by the Contract Documents, except those related to defective or nonconforming Work for which reimbursement is excluded by Section 13.5.3 of AIA Document A201-2007 or by other provisions of the Contract Documents, and which do not fall within the scope of Section 6.7.3.

§ 6.6.5 Royalties and license fees paid for the use of a particular design, process or product required by the Contract Documents; If such royalties, fees and costs are excluded by the last sentence of Section 3.17 of AIA Document A201-2007 or other provisions of the Contract Documents, then they shall not be included in the Cost of the Work.

§ 6.6.6 Costs for electronic equipment and software at the site, directly related to the Work with the Owner's prior approval. Corporate electronic and software cost allocations or charges are not allowed.

§ 6.6.7 Deposits lost for causes other than the Construction Manager's negligence or failure to fulfill a specific responsibility in the Contract Documents.

§ 6.6.8 Legal, mediation and arbitration costs, including attorneys' fees, other than those arising from disputes between the Owner and Construction Manager, reasonably incurred by the Construction Manager after the execution of this Agreement in the performance of the Work and with the Owner's prior approval, which shall not be unreasonably withheld.

§ 6.6.9 Subject to the Owner's prior written approval, expenses incurred in accordance with the Construction Manager's standard written personnel policy for relocation and temporary living allowances of the Construction Manager's personnel required for the Work.

#### § 6.7 Other Costs and Emergencies

§ 6.7.1 Other costs incurred in the performance of the Work if, and to the extent, approved in advance in writing by the Owner.

§ 6.7.2 Costs incurred in taking action to prevent threatened damage, injury or loss in case of an emergency affecting the safety of persons and property, as provided in Section 10.4 of AIA Document A201-2007.

§ 6.7.3 Costs of repairing or correcting damaged or nonconforming Work executed by the Construction Manager, Subcontractors or suppliers, provided that such damaged or nonconforming Work was not caused by negligence or failure to fulfill a specific responsibility of the Construction Manager and only to the extent that the cost of repair or correction is not recovered by the Construction Manager from insurance, sureties, Subcontractors, suppliers, or others.

§ 6.7.4 The costs described in Sections 6.1 through 6.7 shall be included in the Cost of the Work, notwithstanding any provision of AIA Document A201-2007 or other Conditions of the Contract which may require the Construction Manager to pay such costs, unless such costs are excluded by the provisions of Section 6.8.

#### § 6.8 Costs Not To Be Reimbursed

§ 6.8.1 The Cost of the Work shall not include the items listed below:

- .1 Salaries and other compensation of the Construction Manager's personnel stationed at the Construction Manager's principal office or offices other than the site office, except as specifically provided in Section 6.2, or as may be provided in Article 11;
- .2 Expenses of the Construction Manager's principal office and offices other than the site office;
- .3 Overhead and general expenses, except as may be expressly included in Sections 6.1 to 6.7;
- .4 The Construction Manager's capital expenses, including interest on the Construction Manager's capital employed for the Work;
- .5 Except as provided in Section 6.7.3 of this Agreement, costs due to the negligence or failure of the Construction Manager, Subcontractors and suppliers or anyone directly or indirectly employed by any of them or for whose acts any of them may be liable to fulfill a specific responsibility of the Contract;

Init.

- .6 Any cost not specifically and expressly described in Sections 6.1 to 6.7; on Exhibit B – Cost Proposal and allocation summary;
- .7 Costs, other than costs included in Change Orders approved by the Owner, that would cause the Guaranteed Maximum Price to be exceeded; and
- .8 Costs for services incurred during the Preconstruction Phase.

**§ 6.9 Discounts, Rebates and Refunds**

§ 6.9.1 Cash discounts obtained on payments made by the Construction Manager shall accrue to the Owner if (1) before making the payment, the Construction Manager included them in an Application for Payment and received payment from the Owner, or (2) the Owner has deposited funds with the Construction Manager with which to make payments; otherwise, cash discounts shall accrue to the Construction Manager. Trade discounts, rebates, refunds and amounts received from sales of surplus materials and equipment shall accrue to the Owner, and the Construction Manager shall make provisions so that they can be obtained. All discounts must be offered to the Owner prior to any other action related to cash discounts by the Construction Manager.

§ 6.9.2 Amounts that accrue to the Owner in accordance with the provisions of Section 6.9.1 shall be credited to the Owner as a deduction from the Cost of the Work.

**§ 6.10 Related Party Transactions**

§ 6.10.1 For purposes of Section 6.10, the term "related party" shall mean a parent, subsidiary, affiliate or other entity having common ownership or management with the Construction Manager; any entity in which any stockholder in, or management employee of, the Construction Manager owns any interest in excess of ten percent in the aggregate; or any person or entity which has the right to control the business or affairs of the Construction Manager. The term "related party" includes any member of the immediate family of any person identified above.

§ 6.10.2 If any of the costs to be reimbursed arise from a transaction between the Construction Manager and a related party, the Construction Manager shall notify the Owner of the specific nature of the contemplated transaction, including the identity of the related party and the anticipated cost to be incurred, before any such transaction is consummated or cost incurred. If the Owner, after such notification, authorizes the proposed transaction, then the cost incurred shall be included as a cost to be reimbursed, and the Construction Manager shall procure the Work, equipment, goods or service from the related party, as a Subcontractor, according to the terms of Sections 2.3.2.1, 2.3.2.2 and 2.3.2.3. If the Owner fails to authorize the transaction, the Construction Manager shall procure the Work, equipment, goods or service from some person or entity other than a related party according to the terms of Sections 2.3.2.1, 2.3.2.2 and 2.3.2.3 at no increase to the Guaranteed Maximum Price.

**§ 6.11 Accounting Records**

The Construction Manager shall keep full and detailed records and accounts related to the cost of the Work and exercise such controls as may be necessary for proper financial management under this Contract and to substantiate all costs incurred. The accounting and control systems shall be satisfactory to the Owner. The Owner and the Owner's auditors shall, during regular business hours and upon reasonable notice, be afforded access to, and shall be permitted to audit and copy, the Construction Manager's records and accounts, including complete documentation supporting accounting entries, books, correspondence, instructions, drawings, receipts, subcontracts, Subcontractor's proposals, purchase orders, vouchers, memoranda and other data relating to this Contract. The Construction Manager shall preserve these records for a period of five years after final payment, or for such longer period as may be required by law.

**ARTICLE 7 PAYMENTS FOR CONSTRUCTION PHASE SERVICES**

**§ 7.1 Progress Payments**

§ 7.1.1 Based upon Applications for Payment submitted to the Architect by the Construction Manager and Certificates for Payment issued by the Architect, the Owner shall make progress payments on account of the Contract Sum to the Construction Manager as provided below and elsewhere in the Contract Documents.

§ 7.1.2 The period covered by each Application for Payment shall be one calendar month ending on the last day of the month,

Init.

7.1.3 Payment shall be made by the Owner not later than Fifteen ( 15 ) days after the Architect receives the Application for Payment.

*(Federal, state or local laws may require payment within a certain period of time.)*

*(Paragraphs deleted)*

§ 7.1.4 With each Application for Payment, the Construction Manager shall submit payrolls, petty cash accounts, receipted invoices or invoices with check vouchers attached, and any other evidence required by the Owner or Architect to demonstrate that cash disbursements already made by the Construction Manager on account of the Cost of the Work equal or exceed progress payments already received by the Construction Manager, less that portion of those payments attributable to the Construction Manager's Fee, plus payrolls for the period covered by the present Application for Payment.

§ 7.1.5 Each Application for Payment shall be based on the most recent schedule of values submitted by the Construction Manager in accordance with the Contract Documents. The schedule of values shall allocate the entire Guaranteed Maximum Price among the various portions of the Work, except that the Construction Manager's Fee shall be shown as a single separate item. The schedule of values shall be prepared in such form and supported by such data to substantiate its accuracy as the Architect may require. This schedule, unless objected to by the Architect, shall be used as a basis for reviewing the Construction Manager's Applications for Payment.

§ 7.1.6 Applications for Payment shall show the percentage of completion of each portion of the Work as of the end of the period covered by the Application for Payment. The percentage of completion shall be the lesser of (1) the percentage of that portion of the Work which has actually been completed, or (2) the percentage obtained by dividing (a) the expense that has actually been incurred by the Construction Manager on account of that portion of the Work for which the Construction Manager has made or intends to make actual payment prior to the next Application for Payment by (b) the share of the Guaranteed Maximum Price allocated to that portion of the Work in the schedule of values.

§ 7.1.7 Subject to other provisions of the Contract Documents, the amount of each progress payment shall be computed as follows:

- .1 Take that portion of the Guaranteed Maximum Price properly allocable to completed Work as determined by multiplying the percentage of completion of each portion of the Work by the share of the Guaranteed Maximum Price allocated to that portion of the Work in the schedule of values. Pending final determination of cost to the Owner of changes in the Work, amounts not in dispute shall be included as provided in Section 7.3.9 of AIA Document A201-2007;
- .2 Add that portion of the Guaranteed Maximum Price properly allocable to materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work, or if approved in advance by the Owner, suitably stored off the site at a location agreed upon in writing;
- .3 Add the Construction Manager's Fee, less retainage of five percent (5%). The Construction Manager's Fee shall be computed upon the Cost of the Work at the rate stated in Section 5.1 or, if the Construction Manager's Fee is stated as a fixed sum in that Section, shall be an amount that bears the same ratio to that fixed-sum fee as the Cost of the Work bears to a reasonable estimate of the probable Cost of the Work upon its completion;
- .4 Subtract retainage of Five percent (5% from that portion of the Work that the Construction Manager self-performs;
- .5 Subtract the aggregate of previous payments made by the Owner;
- .6 Subtract the shortfall, if any, indicated by the Construction Manager in the documentation required by Section 7.1.4 to substantiate prior Applications for Payment, or resulting from errors subsequently discovered by the Owner's auditors in such documentation; and
- .7 Subtract amounts, if any, for which the Architect has withheld or nullified a Certificate for Payment as provided in Section 9.5 of AIA Document A201-2007.

§ 7.1.8 Except with the Owner's prior approval, payments to Subcontractors shall be subject to retention of not less than five percent (5%). The Owner and the Construction Manager shall agree upon a mutually acceptable procedure for review and approval of payments and retention for subcontracts.

Init.

§ 7.1.9 Except with the Owner's prior approval, the Construction Manager shall not make advance payments to suppliers for materials or equipment which have not been delivered and stored at the site.

§ 7.1.10 In taking action on the Construction Manager's Applications for Payment, the Architect shall be entitled to rely on the accuracy and completeness of the information furnished by the Construction Manager and shall not be deemed to represent that the Architect has made a detailed examination, audit or arithmetic verification of the documentation submitted in accordance with Section 7.1.4 or other supporting data; that the Architect has made exhaustive or continuous on-site inspections; or that the Architect has made examinations to ascertain how or for what purposes the Construction Manager has used amounts previously paid on account of the Contract. Such examinations, audits and verifications, if required by the Owner, will be performed by the Owner's auditors acting in the sole interest of the Owner.

## § 7.2 Final Payment

§ 7.2.1 Final payment, constituting the entire unpaid balance of the Contract Sum, shall be made by the Owner to the Construction Manager when

- .1 the Construction Manager has fully performed the Contract except for the Construction Manager's responsibility to correct Work as provided in Section 12.2.2 of AIA Document A201-2007, and to satisfy other requirements, if any, which extend beyond final payment;
- .2 the Construction Manager has submitted a final accounting for the Cost of the Work and a final Application for Payment; and
- .3 a final Certificate for Payment has been issued by the Architect.

The Owner's final payment to the Construction Manager shall be made no later than 30 days after the issuance of the Architect's final Certificate for Payment, or as follows:

§ 7.2.2 The Owner's auditors will review and report in writing on the Construction Manager's final accounting within 30 days after delivery of the final accounting to the Architect by the Construction Manager. Based upon such Cost of the Work as the Owner's auditors report to be substantiated by the Construction Manager's final accounting, and provided the other conditions of Section 7.2.1 have been met, the Architect will, within seven days after receipt of the written report of the Owner's auditors, either issue to the Owner a final Certificate for Payment with a copy to the Construction Manager, or notify the Construction Manager and Owner in writing of the Architect's reasons for withholding a certificate as provided in Section 9.5.1 of the AIA Document A201-2007. The time periods stated in this Section supersede those stated in Section 9.4.1 of the AIA Document A201-2007. The Architect is not responsible for verifying the accuracy of the Construction Manager's final accounting.

§ 7.2.3 If the Owner's auditors report the Cost of the Work as substantiated by the Construction Manager's final accounting to be less than claimed by the Construction Manager, the Construction Manager shall be entitled to request mediation of the disputed amount without seeking an initial decision pursuant to Section 15.2 of A201-2007. A request for mediation shall be made by the Construction Manager within 30 days after the Construction Manager's receipt of a copy of the Architect's final Certificate for Payment. Failure to request mediation within this 30-day period shall result in the substantiated amount reported by the Owner's auditors becoming binding on the Construction Manager. Pending a final resolution of the disputed amount, the Owner shall pay the Construction Manager the amount certified in the Architect's final Certificate for Payment.

§ 7.2.4 If, subsequent to final payment and at the Owner's request, the Construction Manager incurs costs described in Section 6.1.1 and not excluded by Section 6.8 to correct defective or nonconforming Work, the Owner shall reimburse the Construction Manager such costs and the Construction Manager's Fee applicable thereto on the same basis as if such costs had been incurred prior to final payment, but not in excess of the Guaranteed Maximum Price. If the Construction Manager has participated in savings as provided in Section 5.2.1, the amount of such savings shall be recalculated and appropriate credit given to the Owner in determining the net amount to be paid by the Owner to the Construction Manager.

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## ARTICLE 8 INSURANCE AND BONDS

For all phases of the Project, the Construction Manager shall purchase and maintain insurance, and the Construction Manager shall provide bonds as set forth in Article 11 of AIA Document A201-2007.

*(Paragraphs deleted)*

During both phases of the Project, the Construction Manager shall purchase and maintain insurance as set forth in the General Conditions AIA Document A201-2007 and as further set forth on Exhibit I attached hereto. The insurance required hereunder shall be at rates no greater than that currently available to the Construction Manager in the amount as set forth in Exhibit I attached hereto.

## ARTICLE 9 DISPUTE RESOLUTION

§ 9.1 Any Claim between the Owner and Construction Manager shall be resolved in accordance with the provisions set forth in this Article 9 and Article 15 of A201-2007. However, for Claims arising from or relating to the Construction Manager's Preconstruction Phase services, no decision by the Initial Decision Maker shall be required as a condition precedent to mediation or binding dispute resolution, and Section 9.3 of this Agreement shall not apply.

### 9.1.1 Dispute Resolution for Preconstruction Phase

Claims, disputes or other matters in question between the Owner and Construction Manager which relate to Preconstruction Phase services and arise prior to the commencement of the Construction Phase, shall be resolved by mediation or binding arbitration on a fast track schedule, as follows:

9.1.2 Claims by either the Owner or Contractor must be initiated by written notice to the other party, with a copy to the Architect, within 5 days after occurrence of the event giving rise to such Claim or within 5 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later. Any claim not raised within 5 days is waived.

9.1.3 If the parties cannot resolve the Claim within 5 days of receiving written notice of the Claim, then either party has 5 additional days to request the Claim be resolved through mediation. Any request for mediation shall be made in writing, delivered to the other party, with a copy to the Architect, and a copy to the mediator. Any request for mediation that has not been submitted to a mediator within 15 days from the date of occurrence of the event giving rise to such Claim or within 15 days after the claimant first recognized the condition giving rise to the Claim, whichever is later, is waived.

9.1.4 The mediator shall make a final decision within 15 days.

9.1.5 If the Claim has not been resolved by the parties or through mediation within 30 days of the occurrence of the event giving rise to such Claim or within 30 days after the claimant first recognized the condition giving rise to the Claim, whichever is later, then either party has 30 days from the conclusion of the mediation to request the Claim be resolved through binding arbitration. Any request for arbitration shall be made in writing delivered to the other party, with a copy to the Architect and a copy to one of the arbitrators designated below. Any request for arbitration not made within 30 days from the conclusion of mediation is waived.

9.1.6 The designated arbitrator for resolution of Preconstruction Phase disputes arising prior to the commencement of the Construction Phase is Link Beck, and if he is unavailable, Bill Hardie, each of whom are experienced construction lawyers/arbitrators in the City of El Paso.

9.1.7 There shall be no discovery allowed in preparation for the arbitration and the arbitrator shall make a final decision within 30 days of initiation of arbitration.

9.1.8 The award rendered by the arbitrator shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

9.1.9 Pending resolution of any Claim, dispute or other matter in question, the Construction Manager shall proceed diligently with the performance of the Work under this agreement.

Init.

9.1.10 All Claims, disputes or other matters in question between the Owner and Construction Manager which relate to Preconstruction Phase services and arise prior to the commencement of the Construction Phase, shall be resolved prior to the commencement of the Construction Phase.

**§ 9.2**

*(Paragraphs deleted)*

Claims, disputes or other matters in question between the Owner and Construction Manager which arise subsequent to the commencement of the Construction Phase shall be resolved pursuant to Article 15 of AIA Document A201-2007.

**§ 9.3 Initial Decision Maker**

The Architect will serve as the Initial Decision Maker pursuant to Section 15.2 of AIA Document A201-2007 for Claims arising from or relating to the Construction Manager's Construction Phase services, unless the parties appoint below another individual, not a party to the Agreement, to serve as the Initial Decision Maker.

*(If the parties mutually agree, insert the name, address and other contact information of the Initial Decision Maker, if other than the Architect.)*

**ARTICLE 10 TERMINATION OR SUSPENSION**

**§ 10.1 Termination Prior to Establishment of the Guaranteed Maximum Price**

**§ 10.1.1** Prior to the execution of the Guaranteed Maximum Price Amendment, the Owner may terminate this Agreement upon not less than seven days' written notice to the Construction Manager for the Owner's convenience and without cause, and the Construction Manager may terminate this Agreement, upon not less than seven days' written notice to the Owner, for the reasons set forth in Section 14.1.1 of A201-2007. **§ 10.1.2** In the event of termination of this Agreement pursuant to Section 10.1.1, the Construction Manager shall be equitably compensated for Preconstruction Phase services performed prior to receipt of a notice of termination. In no event shall the Construction Manager's compensation under this Section exceed the compensation set forth in Section 4.1.

**§ 10.1.3** If the Owner terminates the Contract pursuant to Section 10.1.1 after the commencement of the Construction Phase but prior to the execution of the Guaranteed Maximum Price Amendment, the Owner shall pay to the Construction Manager an amount calculated as follows, which amount shall be in addition to any compensation paid to the Construction Manager under Section 10.1.2:

- .1 Take the Cost of the Work incurred by the Construction Manager to the date of termination;
- .2 Add the Construction Manager's Fee computed upon the Cost of the Work to the date of termination at the rate stated in Section 5.1 or, if the Construction Manager's Fee is stated as a fixed sum in that Section, an amount that bears the same ratio to that fixed-sum Fee as the Cost of the Work at the time of termination bears to a reasonable estimate of the probable Cost of the Work upon its completion; and
- .3 Subtract the aggregate of previous payments made by the Owner for Construction Phase services.

The Owner shall also pay the Construction Manager fair compensation, either by purchase or rental at the election of the Owner, for any equipment owned by the Construction Manager which the Owner elects to retain and which is not otherwise included in the Cost of the Work under Section 10.1.3.1. To the extent that the Owner elects to take legal assignment of subcontracts and purchase orders (including rental agreements), the Construction Manager shall, as a condition of receiving the payments referred to in this Article 10, execute and deliver all such papers and take all such steps, including the legal assignment of such subcontracts and other contractual rights of the Construction Manager, as the Owner may require for the purpose of fully vesting in the Owner the rights and benefits of the Construction Manager under such subcontracts or purchase orders. All Subcontracts, purchase orders and rental agreements entered into by the Construction Manager will contain provisions allowing for assignment to the Owner as described above.

Init.

If the Owner accepts assignment of subcontracts, purchase orders or rental agreements as described above, the Owner will reimburse or indemnify the Construction Manager for all costs arising under the subcontract, purchase order or rental agreement, if those costs would have been reimbursable as Cost of the Work if the contract had not been terminated. If the Owner chooses not to accept assignment of any subcontract, purchase order or rental agreement that would have constituted a Cost of the Work had this agreement not been terminated, the Construction Manager will terminate the subcontract, purchase order or rental agreement and the Owner will pay the Construction Manager the costs necessarily incurred by the Construction Manager because of such termination.

#### § 10.2 Termination Subsequent to Establishing Guaranteed Maximum Price

Following execution of the Guaranteed Maximum Price Amendment and subject to the provisions of Section 10.2.1 and 10.2.2 below, the Contract may be terminated as provided in Article 14 of AIA Document A201-2007.

§ 10.2.1 If the Owner terminates the Contract after execution of the Guaranteed Maximum Price Amendment, the amount payable to the Construction Manager pursuant to Sections 14.2 and 14.4 of A201-2007 shall not exceed the amount the Construction Manager would otherwise have received pursuant to Sections 10.1.2 and 10.1.3 of this Agreement.

§ 10.2.2 If the Construction Manager terminates the Contract after execution of the Guaranteed Maximum Price Amendment, the amount payable to the Construction Manager under Section 14.1.3 of A201-2007 shall not exceed the amount the Construction Manager would otherwise have received under Sections 10.1.2 and 10.1.3 of this Agreement.

#### § 10.3 Suspension

The Work may be suspended by the Owner as provided in Article 14 of AIA Document A201-2007. In such case, the Guaranteed Maximum Price and Contract Time shall be increased as provided in Section 14.3.2 of AIA Document A201-2007, except that the term "profit" shall be understood to mean the Construction Manager's Fee as described in Sections 5.1 and 5.3.5 of this Agreement.

### ARTICLE 11 MISCELLANEOUS PROVISIONS

§ 11.1 Terms in this Agreement shall have the same meaning as those in A201-2007.

#### § 11.2 Ownership and Use of Documents

Section 1.5 of A201-2007 shall apply to both the Preconstruction and Construction Phases.

#### § 11.3 Governing Law

Section 13.1 of A201-2007 shall apply to both the Preconstruction and Construction Phases.

#### § 11.4 Assignment

The Owner and Construction Manager, respectively, bind themselves, their agents, successors, assigns and legal representatives to this Agreement. Neither the Owner nor the Construction Manager shall assign this Agreement without the written consent of the other, except that the Owner may assign this Agreement to a lender providing financing for the Project if the lender agrees to assume the Owner's rights and obligations under this Agreement. Except as provided in Section 13.2.2 of A201-2007, neither party to the Contract shall assign the Contract as a whole without written consent of the other. If either party attempts to make such an assignment without such consent, that party shall nevertheless remain legally responsible for all obligations under the Contract.

§ 11.5 Other provisions:

### ARTICLE 12 SCOPE OF THE AGREEMENT

§ 12.1 This Agreement represents the entire and integrated agreement between the Owner and the Construction Manager and supersedes all prior negotiations, representations or agreements, either written or oral. This Agreement may be amended only by written instrument signed by both Owner and Construction Manager.

§ 12.2 The following documents comprise the Agreement:

*(Paragraphs deleted)*

The Documents and Exhibits that comprise this Agreement are listed in Section 1.1 of this Agreement and in the list of Exhibits following the Table of Articles.

This Agreement is entered into as of the day and year first written above.

\_\_\_\_\_  
OWNER (Signature)

\_\_\_\_\_  
*ed name and title)*

(Row deleted)  
Joyce A. Wilson  
City Manager

  
\_\_\_\_\_  
CONSTRUCTION MANAGER (Signature)

~~Mike Frantz~~ Robert G. Hunt  
Authorized Representative of  
Jordan-Hunt, a Texas Joint Venture

\_\_\_\_\_  
Hunt Construction Group, Inc.  
6720 North Scottsdale Rd., Suite 300  
Scottsdale, AZ 85253  
(Printed name and title)

APPROVED AS TO CONTENT:

  
\_\_\_\_\_  
R. Alan Shubert, P.E.  
Project Engineer - El Paso Ballpark

APPROVED AS TO CONTENT:

Mountain Star Sports Group, LLC  
El Paso Baseball Series,  
A Texas Limited Liability Company

By:   
\_\_\_\_\_  
Title: Manager

APPROVED AS TO FORM:

  
\_\_\_\_\_  
Cynthia Osborn  
Assistant City Attorney

Init.

## Additions and Deletions Report for

AIA<sup>®</sup> Document A133<sup>™</sup> – 2009

This Additions and Deletions Report, as defined on page 1 of the associated document, reproduces below all text the author has added to the standard form AIA document in order to complete it, as well as any text the author may have added to or deleted from the original AIA text. Added text is shown underlined. Deleted text is indicated with a horizontal line through the original AIA text.

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### PAGE 1

The City of El Paso  
2 Civic Center Plaza  
El Paso, TX 79901

...

*(Name, legal status and address)*

Jordan-Hunt, a Texas Joint Venture  
Hunt Construction Group, Inc.  
4099 McEwen, Suite 400  
Dallas, TX 75244  
Attn: Mark LaVoy

Copy to: CF Jordan Construction, LLC  
7700 CF Jordan Drive  
El Paso, TX 79912  
Attn: Darren Woody

...

El Paso Ballpark  
El Paso, Texas

...

Populous 300 Wyandotte, Suite 200  
Kansas City, Missouri 64105

...

Mr. R. Alan Shubert, P.E.  
City of El Paso  
Engineering & Construction Management  
2 Civic Center Plaza  
4<sup>th</sup> floor of City Hall  
El Paso, TX 79901

### PAGE 2

*(Name, address and other information)*

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User Notes:

(1398233159)

Monte Thurmond  
Hunt Construction Group, Inc.  
4099 McEwen, Suite 400  
Dallas, TX 75244

...

David Bower, Principal  
Populous  
300 Wyandotte, Suite 200  
Kansas City, Missouri 64105

PAGE 3

## 12 SCOPE OF THE AGREEMENT

### List of Exhibits

The following documents comprise the Agreement:

.1 AIA Document A133–2009, Standard Form of Agreement Between Owner and Construction Manager as Constructor where the basis of payment is the Cost of the Work Plus a Fee with a Guaranteed Maximum Price

.2 AIA Document A201– 2007, General Conditions of the Contract for Construction

.3 Other documents:

### Exhibits

<u>Exhibit A</u>	<u>Construction Manager Scope of Services</u>
<u>Exhibit B</u>	<u>Cost Proposal Form and Allocation Summary</u>
<u>Exhibit C</u>	<u>Key Personnel and Staffing (Incorporated in RFP Response)</u>
<u>Exhibit D</u>	<u>Milestone Schedule (BY CM)</u>
<u>Exhibit E</u>	<u>Alta/ACSM Land Title Survey</u>
<u>Exhibit F</u>	<u>Geotechnical Investigations</u>
<u>Exhibit G</u>	<u>Environmental Exhibits</u>
<u>Exhibit H</u>	<u>Contracting and Construction Employment Opportunities (Provide with GMP)</u>
<u>Exhibit I</u>	<u>Insurance Requirements</u>
<u>Exhibit J</u>	<u>Tax Exempt Status (Provide with GMP)</u>
<u>Exhibit K</u>	<u>Testing and Inspection Matrix (Provide with GMP)</u>
<u>Exhibit L</u>	<u>City of El Paso or other Agency Special Requirements (Provide with GMP)</u>
<u>Exhibit M</u>	<u>Form of Certificate of Substantial Completion</u>
<u>Exhibit N</u>	<u>Waiver of Lien Forms (Provide with GMP)</u>
<u>Exhibit O</u>	<u>Contractor's Standard Form Subcontract (Provide prior to first subcontract)</u>
<u>Exhibit Q</u>	<u>Vibration Monitoring Plan (By CM)</u>
<u>Exhibit R</u>	<u>Waivers of City Permits and Fees</u>
<u>Exhibit S</u>	<u>AIA Document E201™– 2007, Digital Data Protocol Exhibit (Inc. by Reference)</u>
<u>Exhibit T</u>	<u>AIA Document E202™– 2008, Building Information Modeling Protocol Exhibit (Inc. by Reference)</u>

PAGE 4

The Contract Documents consist of this Agreement, Conditions of the Contract (General, Supplementary and other Conditions), Drawings, Specifications, Addenda issued prior to the execution of this Agreement, the Request for Proposals issued by the Owner in anticipation of receiving bids or proposals, the invitation to bid, and any Addenda to the Request for Proposals issued by Owner, the Construction Manager's bid or proposal, Addenda in relation to bidding requirements and other documents listed in this Agreement, and Modifications issued after execution of this

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User Notes:

(1398233159)

Agreement, all of which form the Contract and are as fully a part of the Contract as if attached to this Agreement or repeated herein. Upon the Owner's acceptance of the Construction Manager's Guaranteed Maximum Price proposal, the Contract Documents will also include the documents described in Section 2.2.3 and identified in the Guaranteed Maximum Price Amendment and revisions prepared by the Architect and furnished by the Owner as described in Section 2.2.8. The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. If anything in the other Contract Documents, other than a Modification, is inconsistent with this Agreement, this Agreement shall govern.

...

The Construction Manager's Preconstruction Phase responsibilities are set forth in Sections 2.1 and 2.2. The Construction Manager's Construction Phase responsibilities are set forth in Section 2.3. The Construction Manager's Preconstruction Phase and Construction Phase responsibilities are further delineated in Exhibit A - Construction Manager Scope of Services. Owner and Construction Manager may agree, in consultation with the Architect, for the Construction Phase to commence prior to completion of the Preconstruction Phase, in which case, both phases will proceed concurrently. The Construction Manager shall identify a representative authorized to act on behalf of the Construction Manager with respect to the Project.

#### PAGE 5

The Construction Manager acknowledges that the Project will be completed on a fast track basis. The Construction Manager shall provide recommendations with regard to accelerated or fast-track scheduling, procurement, or phased construction. The Construction Manager shall take into consideration cost reductions, cost information, constructability, provisions for temporary facilities and procurement and construction scheduling issues.

...

§ 2.1.5.2 As the Architect progresses with the preparation of the Schematic Design, Design Development and Construction Documents, the Construction Manager shall prepare and update, at appropriate intervals agreed to determined by the Owner, ~~Construction Manager and Architect,~~ estimates of the Cost of the Work of increasing detail and refinement and allowing for the further development of the design until such time as the Owner and Construction Manager agree on a Guaranteed Maximum Price for the Work. Such estimates shall be provided for the Architect's review and the Owner's approval. The Construction Manager shall inform the Owner and Architect when estimates of the Cost of the Work exceed the latest approved Project budget and make recommendations for corrective action. The Construction Manager will include a project schedule withal cost estimates.

...

§ 2.1.7 The Construction Manager shall prepare, for the Architect's review and the Owner's acceptance, a procurement schedule for items that must be ordered well in advance of construction. The Construction Manager shall expedite and coordinate the ordering and delivery of materials that must be ordered well in advance of construction. If the Owner agrees to procure any items prior to the establishment of the Guaranteed Maximum Price, the Owner shall procure the items on terms and conditions acceptable to the ~~Construction Manager.~~ Manager or the Construction Manager at the Owner's written direction will procure the items on the Owner's behalf. Upon the establishment of the Guaranteed Maximum Price, the Owner shall assign all contracts for these items to the Construction Manager and the Construction Manager shall thereafter accept responsibility for them.

...

The Construction Manager shall exercise reasonable care in preparing schedules and ~~estimates.~~ ~~The Construction Manager, however, does not warrant or guarantee estimates and schedules except as may be included as part of the Guaranteed Maximum Price.~~ ~~The estimates~~ The Construction Manager is not required to ascertain that the Drawings and Specifications are in accordance with applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities, but the Construction Manager shall promptly report to the Architect and Owner any nonconformity discovered by or made known to the Construction Manager as a request for information in such form as the Architect may require.

~~§ 2.2.1~~ At a time ~~to be mutually agreed upon by the Owner and the Construction Manager and in consultation with the Architect, as indicated in the milestone schedule as April 5, 2013,~~ the Construction Manager shall prepare a Guaranteed Maximum Price proposal for the Owner's review and acceptance. The Guaranteed Maximum Price in the proposal shall be the sum of the Construction Manager's estimate of the Cost of the Work, including contingencies described in Section 2.2.4, and the Construction Manager's Fee.

...

- ~~.5~~ A date by which the Owner must accept the Guaranteed Maximum Price. Price no less than ten days from submission
- ~~.6~~ Detailed plan and evidence of commitment to a local participation program as outlined in Exhibit H

§ 2.2.4 In preparing the Construction Manager's Guaranteed Maximum Price proposal, the Construction Manager shall include its contingency for the Construction Manager's exclusive use to cover those costs considered reimbursable as the Cost of the Work but not included in a Change Order. The contingency shall not be used by Construction Manager to fund deficiencies in the cost of the General Conditions Work, Staffing, Insurance, Bonds or the Construction Manager's Fee or Liquidated Damages. The Construction Manager will promptly notify the Owner of all uses of contingency and shall maintain complete records of fund status.

§ 2.2.9 The Construction Manager shall include in the Guaranteed Maximum Price all sales, consumer, use and similar taxes for the Work provided by the Construction Manager that are legally enacted, whether or not yet effective, at the time the Guaranteed Maximum Price Amendment is executed. The Project has tax-exempt status as indicated in Exhibit J. Owner shall provide Construction Manager with the appropriate tax exemption documentation as required.

...

2.3.2.1 Those portions of the Work that the Construction Manager does not customarily perform with the Construction Manager's own personnel shall be performed under subcontract or by other appropriate agreements with the Construction Manager. Pursuant to Texas Government Code Chapter 2267, the Construction Manager shall publicly advertise for bids or proposals and receive bids or proposals from trade contractors or subcontractors for the performance of all major elements of the work other than the minor work that may be included in the general conditions. The Construction Manager is required to publish notice in a newspaper of general circulation in El Paso County, once each week for at least two weeks before the deadline for receiving bids or proposals, of the time and place the bids or proposals will be received and opened. The Construction Manager shall review all trade contractor or subcontractor bids or proposals in a manner that does not disclose the contents of the bid or proposal during the selection process to a person not employed by the Construction Manager, Architect, Engineer, Owner or Owner's Representative. All bids or proposals shall be made available to the public after the later of the award of the contract or the seventh day after the date of final selection of bids or proposals. If a selected trade contractor or subcontractor defaults in the performance of its work or fails to execute a subcontract after being selected in accordance with this section, the Construction Manager may itself fulfill, without advertising, the contract requirements or select a replacement trade contractor or subcontractor to fulfill the contract requirements.

~~§ 2.3.2.1 Those portions of the Work that the Construction Manager does not customarily perform with the Construction Manager's own personnel shall be performed under subcontracts or by other appropriate agreements with the Construction Manager. The Owner may designate specific persons from whom, or entities from which, the Construction Manager shall obtain bids. The Construction Manager shall obtain bids from Subcontractors and from suppliers of materials or equipment fabricated especially for the Work and shall deliver such bids to the Architect. The Owner shall then determine, with the advice of the Construction Manager and the Architect, which bids will be accepted. The Construction Manager shall not be required to contract with anyone to whom the Construction Manager has reasonable objection.~~

~~§ 2.3.2.2~~ If the Guaranteed Maximum Price has been established and when a specific bidder (1) is recommended to the Owner by the Construction Manager, (2) is qualified to perform that portion of the Work, and (3) has submitted a bid that conforms to the requirements of the Contract Documents without reservations or exceptions, but the Owner requires that another bid be accepted, then the Construction Manager may require that a Change Order be issued to adjust the Contract Time and the Guaranteed Maximum Price by the difference between the bid of the person or entity recommended to the Owner by the Construction Manager and the amount and time requirement of the subcontract or other agreement actually signed with the person or entity designated by the Owner. Construction Manager reviews, evaluates, and recommends to the Owner a bid or proposal from a trade contractor or subcontractor but the Owner requires another bid or proposal to be accepted, the Owner shall compensate the Construction Manager by a change in price, time, or guaranteed maximum cost for any additional cost and risk that the Construction Manager incurs because of the Owner's requirement that another bid or proposal be accepted. ~~§ 2.3.2.3~~ Subcontracts or other agreements shall conform to the applicable payment provisions of this Agreement, and shall not be awarded on the basis of cost plus a fee without the prior consent of the Owner. If the Subcontract is awarded on a cost-plus a fee basis, the Construction Manager shall provide in the Subcontract for the Owner to receive the same audit rights with regard to the Subcontractor as the Owner receives with regard to the Construction Manager in Section 6.11 below.

~~§ 2.3.2.3~~ Subcontracts or other agreements shall conform to the applicable payment provisions of this Agreement, and shall not be awarded on the basis of cost plus a fee without the prior consent of the Owner. If the Subcontract is awarded on a cost-plus a fee basis, the Construction Manager shall provide in the Subcontract for the Owner to receive the same audit rights with regard to the Subcontractor as the Owner receives with regard to the Construction Manager in Section 6.11 below.

PAGE 8

## § 2.6 Environmental Work

2.6.1 The Construction Manager acknowledges that the Project may be classified as a contaminated site by the U.S. Environmental Protection Agency and such condition including all activities, administration, coordination, procedures, scheduling and processes required to be performed by the Construction Manger or its subcontractors in connection therewith are reflected in the Guaranteed Maximum Price. In addition, the Construction Manager shall ensure that all Work performed under this Agreement, including Work performed by subcontractors or others at the site shall be in full compliance with all applicable laws, statutes, ordinances, rules and regulations related to environmental issues, including any specific environmental requirements disclosed in any of the Construction Documents (which are expressly incorporated herein by reference) or which may be reasonably inferable in connection therewith. Provided however, except as otherwise provided in the Construction Documents, nothing herein shall be deemed to require the Construction Manager to assume any responsibility for testing or otherwise verifying the presence or absence of any hazardous or unsafe material present or encountered but not created on the site or to perform the task of off-site removal or containment of any such material ("Environmental Work").

2.6.2 The Owner shall be responsible for obtaining the services of a licensed laboratory to perform environmental testing services, including verification of the presence or absence of any hazardous material or substance reported by the Construction Manager pursuant to Section 10.3 of the General Conditions. In the event offsite removal is required, such work shall be performed by subcontractors of the Owner. Notwithstanding the foregoing, the Construction Manager shall provide the overall coordination, administration, bidding, site supervision, scheduling, from the site and related services necessary to facilitate the Environmental Work. Any engineering work will be performed by licensed engineers and the Construction Manager shall have no liability for the work of such engineers.

2.6.3 In the event the Construction Manager, shall in their reasonable judgment determine that reasonable precautions, including the Construction Manager's full compliance with environmental requirements disclosed in the Construction Documents will be inadequate to prevent foreseeable bodily injury or death to persons resulting from a hazardous material or substance encountered at the site, the Construction Manager shall immediately, (i) stop Work in the affected area; (ii) notify the Owner and the Architect that the Work has been stopped including a detailed description of the condition encountered and the area affected; and (iii) proceed with Work in all unaffected areas taking all available precautions to avoid or minimize any adverse impact on the Project schedule or budget.

**2.8 Vibration Monitoring**

The Construction Manager will oversee the preparation of a Vibration Monitoring Plan (VMP) in conjunction with the Project geotechnical and structural engineering consultants which shall be attached hereto as Exhibit Q and incorporated herein by reference. The Construction Manager shall have full responsibility to implement all provisions of the VMP at the site.

PAGE 9

§ 3.1.2 Prior to the execution of the Guaranteed Maximum Price Amendment, the Construction Manager may request in writing that the Owner provide reasonable evidence that the Owner has made financial arrangements to fulfill the Owner's obligations under the Contract. ~~Thereafter, the Construction Manager may only request such evidence if (1) the Owner fails to make payments to the Construction Manager as the Contract Documents require, (2) a change in the Work materially changes the Contract Sum, or (3) the Construction Manager identifies in writing a reasonable concern regarding the Owner's ability to make payment when due.~~ The Owner shall furnish such evidence as a condition precedent to commencement or continuation of the Work or the portion of the Work affected by a material change. After the Owner furnishes the evidence, the Owner shall not materially vary such financial arrangements without prior notice to the Construction Manager and Architect. The Construction Manager hereby agrees to fully cooperate and to provide such information and to perform such acts as may be reasonably requested by Owner's lender to comply with the terms of such financing, including but not limited to any specific escrow or disbursement provisions.

PAGE 10

~~The Owner shall retain an Architect to provide services, duties and responsibilities as described in AIA Document B103™ 2007, Standard Form of Agreement Between Owner and Architect, including any additional services requested by the Construction Manager that are necessary for the Preconstruction and Construction Phase services under this Agreement. The Owner shall provide the Construction Manager a including normal structural, mechanical and electrical engineering services. A copy of the executed agreement between the Owner and the Architect, and any further modifications to the agreement. Architect is posted on the City of El Paso's website.~~

...

Lump sum amount of \$ 35,000.00 for Preconstruction Phase services beginning at award of contract until acceptance of the Guaranteed Maximum Price Proposal.

§ 4.1.3 ~~If the Preconstruction Phase services covered by this Agreement have not been completed within ( ) months of the date of this Agreement, through no fault of the Construction Manager, the Construction Manager's compensation for Preconstruction Phase services shall be equitably Compensation for Preconstruction Phase Services shall not be adjusted.~~

~~§ 4.1.4 Compensation based on Direct Personnel Expense includes the direct salaries of the Construction Manager's personnel providing Preconstruction Phase services on the Project and the Construction Manager's costs for the mandatory and customary contributions and benefits related thereto, such as employment taxes and other statutory employee benefits, insurance, sick leave, holidays, vacations, employee retirement plans and similar contributions.~~

...

§ 4.2.2 ~~Payments are due and payable upon presentation of the Construction Manager's invoice. Amounts unpaid ( ) days after the invoice date fifteen (15) days from the date the Construction Manager's invoice is received by the Owner. Amounts unpaid after thirty (30) days from receipt of the invoice shall bear interest at the rate entered below, or in the absence thereof at the legal rate prevailing from time to time at the principal place of business of the Construction Manager set forth in Texas Government Code Chapter 2251.~~  
~~(Insert rate of monthly or annual interest agreed upon.)~~

—%

...

§ 5.1.1 The Construction Manager's Fee:

*(State a lump sum, percentage of Cost of the Work or other provision for determining the Construction Manager's Fee.)*

For the Construction Manager's performance of the Work as described in Section 2.3. (and Exhibit B from the Cost Proposal Form and Allocation Summary) the Owner shall pay the Construction Manager a fee calculated at 2.51% of the total cost of the work and converted to a fixed dollar amount at acceptance of the Guaranteed Maximum Price Proposal.

PAGE 11

As identified in Exhibit B- Cost Proposal Form and Allocation Summary

§ 5.1.2.1 Construction Manager's fee, general conditions and staffing shall not be increased until the GMP has been increased by change orders in a net amount in excess of One Million Dollars (\$1,000,000) of original agreed upon GMP Amendment. Adjustments in Construction Manager's fee for additional change orders that increase GMP beyond the first One Millions Dollars (\$1,000,000) threshold will be in accordance with Exhibit B from the Cost Proposal Form and Allocation Summary.

...

TBD

§ 5.1.4 Rental rates for Construction Manager-owned equipment shall not exceed percent (—%) of the standard rate paid at the place of the Project.

the Project Construction Manager will provide competitive pricing if requested by the Owner.

...

<u>Item</u>	<u>Units and Limitations</u>	<u>Price per Unit (\$0.00)</u>
-------------	------------------------------	--------------------------------

...

As defined in the Guaranteed Price Amendment.

...

*(Insert specific provisions if the Construction Manager is to participate in any savings.)*

5.2.1.1 It is mutually agreed by and between the Owner and the Construction Manager that time shall be an essential part of this Agreement. The Owner and Construction Manager have agreed that the Owner's actual damages, in the event of a failure by the Construction Manager to complete the Work within the times specified and agreed upon, would be extremely difficult or impracticable to determine. After negotiation, the Owner and the Construction Manager have agreed that, considering all the circumstances existing on the date of this Agreement, the amounts set forth below are a reasonable estimate of the damages that the Owner would incur for every day's delay in finishing the Work after the Substantial Completion Date. Liquidated damages shall be considered not as a penalty but as agreed monetary damage sustained by the Owner for loss of revenue, the cost of increased administration, and other expenses related to this Agreement because the Construction Manager failed to perform and complete the Work by the Substantial Completion Date.

5.2.1.2 In the event that the Work is not complete on or before the Substantial Completion Date as set forth in the GMP as it is amended from time to time, the Construction Manager hereby agrees that the following sums shall be deducted as liquidated damages from monies due the Construction Manager under this Agreement, and not by way of penalty, or if no money is due the Construction Manager, the Construction Manager hereby agrees to pay the Owner as

liquidated damages, and not by way of penalty, such total sum as shall be due for such delay, in accordance with the following schedule:

- a. Three Thousand Dollars (\$3,000.00) per calendar day for the first fifteen (15) days;
- b. Five Thousand Dollars (\$5,000.00) per calendar day for the next fifteen (15) days thereafter;
- c. Ten Thousand Dollars (\$10,000.00) per calendar day thereafter, until Substantial Completion is achieved.

Liquidated damages shall be capped at a sum equal to fifty percent (50%) of the Construction Manager's fee plus one hundred percent (100%) of the Construction Manager's allocation of Shared Savings.

§ 5.2.1.3 Shared Savings - If upon final completion of the Work, the Cost of the Work plus the Construction Manager's Fee is less than the Guaranteed Maximum Price, the difference shall be deemed Savings. 70 % of the Savings shall be retained by the Owner and 30 % of the Savings shall be paid to the Construction Manager by the Owner in addition to the final payment at the time final payment to the Construction Manager is made. The Savings payable to Construction Manager shall not exceed the amount of \$ 300,000.00.

PAGE 12

§ 5.3.1 The Owner may, without invalidating the Contract, order changes in the Work within the general scope of the Contract consisting of additions, deletions or other revisions. The Owner shall issue such changes in writing. The Architect may make minor changes in the Work as provided in Section 7.4 of AIA Document A201-2007, General Conditions of the Contract for Construction. ~~The Construction Manager shall be entitled to an equitable adjustment in the Contract Time as a result of changes in the Work.~~

...

§ 5.3.5 ~~If no specific provision is made in Section 5.1.2 for adjustment of the Construction Manager's Fee in the case of changes in the Work, or if the extent of such changes is such, in the aggregate, that application of the adjustment provisions of Section 5.1.2 will cause substantial inequity to the Owner or Construction Manager, the Construction Manager's Fee shall be equitably adjusted on the same basis that was used to establish the Fee for the original Work, and the Guaranteed Maximum Price shall be adjusted accordingly.~~  
Not used.

...

§ 6.1.1 The term Cost of the Work shall mean costs necessarily incurred by the Construction Manager in the proper performance of the Work. Such costs shall be at rates not higher than the standard paid at the place of the Project except with prior consent of the Owner. The Cost of the Work shall include only the items set forth in Sections 6.1 through ~~6-7-6.7~~ and as further defined by Exhibit B – Cost Proposal and Allocation Summary.

§ 6.1.2 Where any cost is subject to the Owner's prior approval, the Construction Manager shall obtain this approval prior to incurring the cost. The parties shall endeavor to identify any such costs prior to executing Guaranteed Maximum Price Amendment. Refer to Exhibit B- Cost Proposal and Allocation Summary.

...

*(If it is intended that the wages or salaries of certain personnel stationed at the Construction Manager's principal or other offices shall be included in the Cost of the Work, identify in Section 11.5, the personnel to be included, whether for all or only part of their time, and the rates at which their time will be charged to the Work.)*

...

§ 6.2.4 Costs paid or incurred by the Construction Manager for taxes, insurance, contributions, assessments and benefits required by law or collective bargaining agreements and, for personnel not covered by such agreements, customary benefits such as sick leave, medical and health benefits, holidays, vacations and pensions, provided such

costs are based on wages and salaries included in the Cost of the Work under Sections 6.2.1 through 6.2.3. Construction Manager shall apply a rate of 33% to the direct labor rates for all salaried personnel and 18% for all trade labor for all costs including but not limited to FICA, FUTA, SUTA, unemployment compensation, workmen's compensation, health insurance, pension, 401K retirement plan and payroll expense.

§ 6.2.5 Bonuses, profit sharing, incentive compensation and any other discretionary payments paid to anyone hired by the Construction Manager or paid to any Subcontractor or ~~vendor, with the Owner's prior approval.~~ vendor shall not be made without the Owner's prior written consent.

PAGE 13

§ 6.5.6 Costs of materials and equipment suitably stored off the site at a mutually acceptable location, subject to the Owner's prior ~~approval.~~ approval and in accordance with Owner's and Lender's requirements.

PAGE 14

§ 6.6.5 Royalties and license fees paid for the use of a particular design, process or product required by the Contract Documents; ~~the cost of defending suits or claims for infringement of patent rights arising from such requirement of the Contract Documents; and payments made in accordance with legal judgments against the Construction Manager resulting from such suits or claims and payments of settlements made with the Owner's consent. However, such costs of legal defenses, judgments and settlements shall not be included in the calculation of the Construction Manager's Fee or subject to the Guaranteed Maximum Price. If such royalties, fees and costs are excluded by the last sentence of Section 3.17 of AIA Document A201-2007 or other provisions of the Contract Documents, then they shall not be included in the Cost of the Work.~~

§ 6.6.6 Costs for electronic equipment and ~~software, software at the site,~~ directly related to the Work with the Owner's prior approval. Corporate electronic and software cost allocations or charges are not allowed.

...

§ 6.6.9 Subject to the Owner's prior written approval, expenses incurred in accordance with the Construction Manager's standard written personnel policy for relocation and temporary living allowances of the Construction Manager's personnel required for the Work.

PAGE 15

- .6 Any cost not specifically and expressly described in Sections 6.1 to 6.7; on Exhibit B – Cost Proposal and allocation summary;

...

§ 6.9.1 Cash discounts obtained on payments made by the Construction Manager shall accrue to the Owner if (1) before making the payment, the Construction Manager included them in an Application for Payment and received payment from the Owner, or (2) the Owner has deposited funds with the Construction Manager with which to make payments; otherwise, cash discounts shall accrue to the Construction Manager. Trade discounts, rebates, refunds and amounts received from sales of surplus materials and equipment shall accrue to the Owner, and the Construction Manager shall make provisions so that they can be obtained. All discounts must be offered to the Owner prior to any other action related to cash discounts by the Construction Manager.

...

§ 6.10.2 If any of the costs to be reimbursed arise from a transaction between the Construction Manager and a related party, the Construction Manager shall notify the Owner of the specific nature of the contemplated transaction, including the identity of the related party and the anticipated cost to be incurred, before any such transaction is consummated or cost incurred. If the Owner, after such notification, authorizes the proposed transaction, then the cost incurred shall be included as a cost to be reimbursed, and the Construction Manager shall procure the Work, equipment, goods or service from the related party, as a Subcontractor, according to the terms of Sections 2.3.2.1,

2.3.2.2 and 2.3.2.3. If the Owner fails to authorize the transaction, the Construction Manager shall procure the Work, equipment, goods or service from some person or entity other than a related party according to the terms of Sections 2.3.2.1, 2.3.2.2 and ~~2.3.2.3~~.  
2.3.2.3 at no increase to the Guaranteed Maximum Price.

...

The Construction Manager shall keep full and detailed records and accounts related to the cost of the Work and exercise such controls as may be necessary for proper financial management under this Contract and to substantiate all costs incurred. The accounting and control systems shall be satisfactory to the Owner. The Owner and the Owner's auditors shall, during regular business hours and upon reasonable notice, be afforded access to, and shall be permitted to audit and copy, the Construction Manager's records and accounts, including complete documentation supporting accounting entries, books, correspondence, instructions, drawings, receipts, subcontracts, Subcontractor's proposals, purchase orders, vouchers, memoranda and other data relating to this Contract. The Construction Manager shall preserve these records for a period of ~~three~~ five years after final payment, or for such longer period as may be required by law.

...

§ 7.1.2 The period covered by each Application for Payment shall be one calendar month ending on the last day of the month, ~~or as follows:~~

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7.1.3 Payment shall be made by the Owner not later than Fifteen ( 15 ) days after the Architect receives the Application for Payment.  
*(Federal, state or local laws may require payment within a certain period of time.)*

~~§ 7.1.3 Provided that an Application for Payment is received by the Architect not later than the day of a month, the Owner shall make payment of the certified amount to the Construction Manager not later than the day of the month. If an Application for Payment is received by the Architect after the application date fixed above, payment shall be made by the Owner not later than ( ) days after the Architect receives the Application for Payment.~~  
*(Federal, state or local laws may require payment within a certain period of time.)*

...

- .3 Add the Construction Manager's Fee, less retainage of percent (~~—~~%) five percent (5%). The Construction Manager's Fee shall be computed upon the Cost of the Work at the rate stated in Section 5.1 or, if the Construction Manager's Fee is stated as a fixed sum in that Section, shall be an amount that bears the same ratio to that fixed-sum fee as the Cost of the Work bears to a reasonable estimate of the probable Cost of the Work upon its completion;
- .4 Subtract retainage of percent (~~—~~%) Five percent (5%) from that portion of the Work that the Construction Manager self-performs;

...

§ 7.1.8 Except with the Owner's prior approval, payments to Subcontractors shall be subject to retention of not less than five percent (5%). The Owner and the Construction Manager shall agree upon ~~(1) a mutually acceptable procedure for review and approval of payments to Subcontractors and (2) the percentage of retainage held on Subcontracts, and the Construction Manager shall execute subcontracts in accordance with those agreements.~~ and retention for subcontracts.

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For all phases of the Project, the Construction Manager and the Owner shall purchase and maintain insurance, and the Construction Manager shall provide bonds as set forth in Article 11 of AIA Document A201-2007. *(State bonding requirements, if any, and limits of liability for insurance required in Article 11 of AIA Document A201-2007.)*

During both phases of the Project, the Construction Manager shall purchase and maintain insurance as set forth in the General Conditions AIA Document A201-2007 and as further set forth on Exhibit I attached hereto. The insurance required hereunder shall be at rates no greater than that currently available to the Construction Manager in the amount as set forth in Exhibit I attached hereto.

**Type of Insurance or Bond**

**Limit of Liability or Bond Amount (\$0.00)**

...

**9.1.1 Dispute Resolution for Preconstruction Phase**

Claims, disputes or other matters in question between the Owner and Construction Manager which relate to Preconstruction Phase services and arise prior to the commencement of the Construction Phase, shall be resolved by mediation or binding arbitration on a fast track schedule, as follows:

9.1.2 Claims by either the Owner or Contractor must be initiated by written notice to the other party, with a copy to the Architect, within 5 days after occurrence of the event giving rise to such Claim or within 5 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later. Any claim not raised within 5 days is waived.

9.1.3 If the parties cannot resolve the Claim within 5 days of receiving written notice of the Claim, then either party has 5 additional days to request the Claim be resolved through mediation. Any request for mediation shall be made in writing, delivered to the other party, with a copy to the Architect, and a copy to the mediator. Any request for mediation that has not been submitted to a mediator within 15 days from the date of occurrence of the event giving rise to such Claim or within 15 days after the claimant first recognized the condition giving rise to the Claim, whichever is later, is waived.

9.1.4 The mediator shall make a final decision within 15 days.

9.1.5 If the Claim has not been resolved by the parties or through mediation within 30 days of the occurrence of the event giving rise to such Claim or within 30 days after the claimant first recognized the condition giving rise to the Claim, whichever is later, then either party has 30 days from the conclusion of the mediation to request the Claim be resolved through binding arbitration. Any request for arbitration shall be made in writing delivered to the other party, with a copy to the Architect and a copy to one of the arbitrators designated below. Any request for arbitration not made within 30 days from the conclusion of mediation is waived.

9.1.6 The designated arbitrator for resolution of Preconstruction Phase disputes arising prior to the commencement of the Construction Phase is Link Beck, and if he is unavailable, Bill Hardie, each of whom are experienced construction lawyers/arbitrators in the City of El Paso.

9.1.7 There shall be no discovery allowed in preparation for the arbitration and the arbitrator shall make a final decision within 30 days of initiation of arbitration.

9.1.8 The award rendered by the arbitrator shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

9.1.9 Pending resolution of any Claim, dispute or other matter in question, the Construction Manager shall proceed diligently with the performance of the Work under this agreement.

9.1.10 All Claims, disputes or other matters in question between the Owner and Construction Manager which relate to Preconstruction Phase services and arise prior to the commencement of the Construction Phase, shall be resolved prior to the commencement of the Construction Phase.

§ 9.2 For any Claim subject to, but not resolved by mediation pursuant to Section 15.3 of AIA Document A201-2007, the method of binding dispute resolution shall be as follows:  
(Check the appropriate box. If the Owner and Construction Manager do not select a method of binding dispute resolution below, or do not subsequently agree in writing to a binding dispute resolution method other than litigation, Claims will be resolved by litigation in a court of competent jurisdiction.)

— Arbitration pursuant to Section 15.4 of AIA Document A201-2007

— Litigation in a court of competent jurisdiction

— Other: (Specify)

Claims, disputes or other matters in question between the Owner and Construction Manager which arise subsequent to the commencement of the Construction Phase shall be resolved pursuant to Article 15 of AIA Document A201-2007.

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§ 10.1.1 Prior to the execution of the Guaranteed Maximum Price Amendment, the Owner may terminate this Agreement upon not less than seven days' written notice to the Construction Manager for the Owner's convenience and without cause, and the Construction Manager may terminate this Agreement, upon not less than seven days' written notice to the Owner, for the reasons set forth in Section 14.1.1 of A201-2007.

A201-2007. § 10.1.2 In the event of termination of this Agreement pursuant to Section 10.1.1, the Construction Manager shall be equitably compensated for Preconstruction Phase services performed prior to receipt of a notice of termination. In no event shall the Construction Manager's compensation under this Section exceed the compensation set forth in Section 4.1.

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§ 10.2.2 If the Construction Manager terminates the Contract after execution of the Guaranteed Maximum Price Amendment, the amount payable to the Construction Manager under Section 14.1.3 of A201-2007 shall not exceed the amount the Construction Manager would otherwise have received under Sections 10.1.2 and 10.1.3 above, ~~except that the Construction Manager's Fee shall be calculated as if the Work had been fully completed by the Construction Manager, utilizing as necessary a reasonable estimate of the Cost of the Work for Work not actually completed.~~ of this Agreement.

...

~~.1 — AIA Document A133-2009, Standard Form of Agreement Between Owner and Construction Manager as Constructor where the basis of payment is the Cost of the Work Plus a Fee with a Guaranteed Maximum Price~~

~~.2 — AIA Document A201-2007, General Conditions of the Contract for Construction~~

~~.3 — AIA Document E201™-2007, Digital Data Protocol Exhibit, if completed, or the following:~~

~~.4 — AIA Document E202™-2008, Building Information Modeling Protocol Exhibit, if completed, or the following:~~

~~.5 — Other documents:  
(List other documents, if any, forming part of the Agreement.)~~

The Documents and Exhibits that comprise this Agreement are listed in Section 1.1 of this Agreement and in the list of Exhibits following the Table of Articles.

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(1398233159)

\_\_\_\_\_  
*ed name and title)*

\_\_\_\_\_  
*(Printed name and title)*

Joyce A. Wilson  
City Manager

APPROVED AS TO CONTENT:

\_\_\_\_\_  
R. Alan Shubert, P.E.  
Project Engineer - El Paso Ballpark

APPROVED AS TO CONTENT:

Mountain Star Sports Group, LLC  
El Paso Baseball Series,  
A Texas Limited Liability Company

By: \_\_\_\_\_

Title: \_\_\_\_\_

APPROVED AS TO FORM:

\_\_\_\_\_  
Cynthia Osborn  
Assistant City Attorney

Mike Fratianni  
Authorized Representative of  
Jordan-Hunt, a Texas Joint Venture'  
\_\_\_\_\_  
Hunt Construction Group, Inc.  
6720 North Scottsdale Rd., Suite 300  
Scottsdale, AZ 85253  
*(Printed name and title)*  
\_\_\_\_\_  
*(Printed name and title)*

## ***Certification of Document's Authenticity***

***AIA® Document D401™ – 2003***

I, R. Alan Shubert, hereby certify, to the best of my knowledge, information and belief, that I created the attached final document simultaneously with its associated Additions and Deletions Report and this certification at 13:46:28 on 12/26/2012 under Order No. 0314594249\_1 from AIA Contract Documents software and that in preparing the attached final document I made no changes to the original text of AIA® Document A133™ – 2009, Standard Form of Agreement Between Owner and Construction Manager as Constructor where the basis of payment is the Cost of the Work Plus a Fee with a Guaranteed Maximum Price, as published by the AIA in its software, other than those additions and deletions shown in the associated Additions and Deletions Report.

---

*(Signed)*

---

*(Title)*

---

*(Dated)*

# DRAFT AIA® Document G704™ - 2000

## Certificate of Substantial Completion

**PROJECT:**  
(Name and address):  
Meredith Template

**PROJECT NUMBER:** /  
**CONTRACT FOR:** General Construction  
**CONTRACT DATE:**

OWNER:   
ARCHITECT:   
CONTRACTOR:   
FIELD:   
OTHER:

**TO OWNER:**  
(Name and address):

**TO CONTRACTOR:**  
(Name and address):

### PROJECT OR PORTION OF THE PROJECT DESIGNATED FOR PARTIAL OCCUPANCY OR USE SHALL INCLUDE:

The Work performed under this Contract has been reviewed and found, to the Architect's best knowledge, information and belief, to be substantially complete. Substantial Completion is the stage in the progress of the Work when the Work or designated portion is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use. The date of Substantial Completion of the Project or portion designated above is the date of issuance established by this Certificate, which is also the date of commencement of applicable warranties required by the Contract Documents, except as stated below:

### Warranty

### Date of Commencement

ARCHITECT

BY

DATE OF ISSUANCE

A list of items to be completed or corrected is attached hereto. The failure to include any items on such list does not alter the responsibility of the Contractor to complete all Work in accordance with the Contract Documents. Unless otherwise agreed to in writing, the date of commencement of warranties for items on the attached list will be the date of issuance of the final Certificate of Payment or the date of final payment.

**Cost estimate of Work that is incomplete or defective: \$ 0.00**

The Contractor will complete or correct the Work on the list of items attached hereto within Zero (0) days from the above date of Substantial Completion.

CONTRACTOR

BY

DATE

The Owner accepts the Work or designated portion as substantially complete and will assume full possession at (time) on (date).

OWNER

BY

DATE

The responsibilities of the Owner and Contractor for security, maintenance, heat, utilities, damage to the Work and insurance shall be as follows:

(Note: Owner's and Contractor's legal and insurance counsel should determine and review insurance requirements and coverage.)

# AIA<sup>®</sup> Document A201<sup>™</sup> – 2007

## **General Conditions of the Contract for Construction**

for the following PROJECT:

*(Name and location or address)*

El Paso Ballpark

**THE OWNER:**

*(Name, legal status and address)*

The City of El Paso  
2 Civic Center Plaza  
El Paso, TX 79901

**THE ARCHITECT:**

*(Name, legal status and address)*

Populous 300 Wyandotte, Suite 200  
Kansas City, Missouri 64105

### TABLE OF ARTICLES

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- 13 MISCELLANEOUS PROVISIONS
- 14 TERMINATION OR SUSPENSION OF THE CONTRACT
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### ADDITIONS AND DELETIONS:

The author of this document has added information needed for its completion. The author may also have revised the text of the original AIA standard form. An *Additions and Deletions Report* that notes added information as well as revisions to the standard form text is available from the author and should be reviewed. A vertical line in the left margin of this document indicates where the author has added necessary information and where the author has added to or deleted from the original AIA text.

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

Init.

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## ARTICLE 1 GENERAL PROVISIONS

### § 1.1 BASIC DEFINITIONS

#### § 1.1.1 THE CONTRACT DOCUMENTS

The Contract Documents are enumerated in the Agreement between the Owner and Contractor (hereinafter the Agreement) and consist of the Agreement, Conditions of the Contract (General, Supplementary and other Conditions), Drawings, Specifications, the Request for Proposals issued by the Owner in anticipation of receiving bids or proposals, the invitation to bid, any Addenda to the Request for Proposals issued by Owner, the Contractor's bid or proposal, Addenda relation to bidding requirements, Addenda issued prior to execution of the Agreement, other documents listed in the Agreement and Modifications issued after execution of the Agreement. A Modification is (1) a written amendment to the Agreement signed by both parties, (2) a Change Order, (3) a Construction Change Directive or (4) a written order for a minor change in the Work issued by the Architect.

#### § 1.1.2 THE CONTRACT

The Contract Documents form the Contract for Construction. The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. The Contract may be amended or modified only by a Modification. The Contract Documents shall not be construed to create a contractual relationship of any kind (1) between the Contractor and the Architect or the Architect's consultants, (2) between the Owner and a Subcontractor or a Sub-subcontractor, (3) between the Owner and the Architect or the Architect's consultants or (4) between any persons or entities other than the Owner and the Contractor. The Architect shall, however, be entitled to performance and enforcement of obligations under the Contract intended to facilitate performance of the Architect's duties.

#### § 1.1.3 THE WORK

The term "Work" means the construction and services required by the Contract Documents, whether completed or partially completed, and includes all other labor, materials, equipment and services provided or to be provided by the Contractor to fulfill the Contractor's obligations. The Work may constitute the whole or a part of the Project.

#### § 1.1.4 THE PROJECT

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

#### § 1.1.5 THE DRAWINGS

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

#### § 1.1.6 THE SPECIFICATIONS

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

#### § 1.1.7 INSTRUMENTS OF SERVICE

Instruments of Service are representations, in any medium of expression now known or later developed, of the tangible and intangible creative work performed by the Architect and the Architect's consultants under their respective professional services agreements. Instruments of Service may include, without limitation, studies, surveys, models, sketches, drawings, specifications, and other similar materials.

#### § 1.1.8 INITIAL DECISION MAKER

The Initial Decision Maker is the person identified in the Agreement to render initial decisions on Claims in accordance with Section 15.2 and certify termination of the Agreement under Section 14.2.2.

### § 1.2 CORRELATION AND INTENT OF THE CONTRACT DOCUMENTS

§ 1.2.1 The intent of the Contract Documents is to include all items necessary for the proper execution and completion of the Work by the Contractor. The Contract Documents are complementary, and what is required by one shall be as binding as if required by all, provided, however, the enumeration of any portion of the Work shall not be construed to exclude other items contemplated by or reasonably inferable from the Contract Documents.

§ 1.2.2 Contractor shall coordinate and complete the various parts of the Work so that no part shall be left in an unfinished or incomplete condition. Contractor accepts the relationship of trust and confidence established between it and Owner by this Contract. Contractor covenants and agrees with Owner to perform its services with the professional skill and care ordinarily provided by a Construction Manager practicing in the same or similar locality under the same and similar circumstances and to cooperate with Owner in furthering the best interests of Owner and to complete the Project in the most expedient and efficient manner possible.

§ 1.2.3 Generally, the Specifications describe work which cannot be readily indicated on the Drawings and indicate types, qualities and locations of installation of the various materials and equipment required for the Work. It is not intended that the specifications will mention every item of Work which can not be adequately shown on the Drawings nor is it intended that the Drawings show all items of Work described or required by the specifications even if they are of such nature that they could have been shown thereon. All materials or labor for Work which is shown on the Drawings or is reasonably inferable therefrom as being necessary to produce a finished job shall be provided by Contractor whether or not the Work is expressly covered in the Drawings and Specifications.

§ 1.2.4 By execution of the Agreement, Contractor represents that (i) Contractor has visited the Site, become familiar with local and all special conditions under which the Work is to be performed, understands what is required to enable Contractor to coordinate the Work with the efforts of the city and public utilities performing work in the vicinity of the site, (ii) Contractor has checked with all public utilities having facilities at or near the Site, and understands what is required to not interrupt utility services to the existing site and other buildings in the vicinity of the Site, (iii) Contractor has carefully examined the Drawings and Specifications, (iv) the Drawings and Specifications are sufficient in content and detail, to complete the Work in accordance with the Contract Documents and to enable Contractor to deliver, within the Contract Price, the Project, fully completed with all appurtenant improvements as shown or specified in or reasonably inferable from the Contract Documents without the need for any change to the Contract Sum specified in Article 4 of the Agreement. Other than as provided in Article 15, contractor shall not be entitled to extra or additional compensation for performance of Work to deliver the Project as contemplated by the Contract Documents.

§ 1.2.5 By execution of the Agreement, Contractor represents and warrants that it has examined all land adjoining and surrounding the site (including, for the purposes hereof, streets and sidewalks, and buildings adjoining the Site) and has ascertained the materials and construction of the buildings and all existing conditions of such premises and the buildings thereon, and Contractor shall be governed thereby for the necessary, thorough, safe and satisfactory execution of all Work called for herein, whether indicated on drawings or specified, or not, and all work and protective measures necessary to keep and leave the said premises and buildings in the same condition as they were before commencing work shall be done by contractor without any addition to the Contract Price. Wherever any parts of adjoining premises interfere with or are interfered with by the Work to be performed hereunder, the Contractor shall make whatever changes are made necessary thereby, whether shown on the Drawings, called for in the Specifications or not shown or not called for all in conformance with good construction practice and without harm to the buildings in the vicinity of the site or premises at no change to the Contract Price. Contractor will submit to Architect its intended actions to resolve same for Architect's information prior to undertaking the Work. Contractor shall not interfere with or otherwise impair the ability of Owner or the public to use any buildings in the vicinity of the Site.

§ 1.2.6 Organization of the Specifications into divisions, sections and articles, and arrangement of Drawings shall not control the Contractor in dividing the Work among Subcontractors or in establishing the extent of Work to be performed by any trade.

§ 1.2.7 Unless otherwise stated in the Contract Documents, words that have well-known technical or construction industry meanings are used in the Contract Documents in accordance with such recognized meanings.

### § 1.3 CAPITALIZATION

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

## § 1.4 INTERPRETATION

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

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

§ 1.5.1 The Drawings, Specifications and other documents, including those in electronic form, prepared with respect to the Project are Instruments of Service through which the Work to be executed by the Contractor is described. The Contractor may retain one record set. Neither the Contractor nor any Subcontractor, Sub-subcontractor or material or equipment supplier shall own or claim a copyright in the Drawings, Specifications and other documents prepared with respect to the Project. All copies of the Drawings, Specifications and other documents, except the Contractor's record set, shall be returned or suitably accounted for to the Owner on request, upon completion of the Work. The Drawings, Specifications and other documents prepared and copies thereof furnished to the Contractor, are for use solely with respect to this Project. They are not to be used by the Contractor or any Subcontractor, Sub-subcontractor or material or equipment supplier on other projects or for additions to this Project outside the scope of the Work without the specific written consent of the Owner and Architect. § 1.5.2 The Contractor, Subcontractors, Sub-subcontractors and material or equipment suppliers are authorized to use and reproduce the Instruments of Service provided to them solely and exclusively for execution of the Work. All copies made under this authorization shall bear the copyright notice, if any, shown on the Instruments of Service. The Contractor, Subcontractors, Sub-subcontractors, and material or equipment suppliers may not use the Instruments of Service on other projects or for additions to this Project outside the scope of the Work without the specific written consent of the Owner, Architect and the Architect's consultants.

## § 1.6 TRANSMISSION OF DATA IN DIGITAL FORM

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

## ARTICLE 2 OWNER

### § 2.1 GENERAL

§ 2.1.1 The Owner is the person or entity identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number. The Owner shall designate in writing a representative who shall have express authority to secure approvals on behalf of the Owner with respect to all matters requiring the Owner's approval or authorization. Except as otherwise provided in Section 4.2.1, the Architect does not have such authority. The term "Owner" means the Owner or the Owner's authorized representative.

§ 2.1.2 The Owner shall furnish to the Contractor within fifteen days after receipt of a written request, information necessary and relevant for the Contractor to evaluate, give notice of or enforce mechanic's lien rights. Such information shall include a correct statement of the record legal title to the property on which the Project is located, usually referred to as the site, and the Owner's interest therein.

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

§ 2.2.1 Prior to commencement of the Work, the Contractor may request in writing that the Owner provide reasonable evidence that the Owner has made financial arrangements to fulfill the Owner's obligations under the Contract. Thereafter, the Contractor may only request such evidence if (1) the Owner fails to make payments to the Contractor as the Contract Documents require; (2) a change in the Work materially changes the Contract Sum; or (3) the Contractor identifies in writing a reasonable concern regarding the Owner's ability to make payment when due. The Owner shall furnish such evidence as a condition precedent to commencement or continuation of the Work or the portion of the Work affected by a material change. After the Owner furnishes the evidence, the Owner shall not materially vary such financial arrangements without prior notice to the Contractor.

§ 2.2.2 The Contractor shall secure and the Owner shall pay for all necessary permits, approvals, easements, assessments and charges required for construction, use or occupancy of permanent structures or for permanent changes in existing facilities. The Contractor shall obtain the building permit on behalf of the Owner and shall secure

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and the Owner shall pay for water tap fees, street closure permits, and permits required for delivery of materials. The Owner shall not be responsible to pay for any licenses required to be maintained by Contractor and its subcontractors (including any and all trade licenses that Contractor and any Subcontractors may be required to obtain in connection with the performance of the Work (or any portion thereof)). § 2.2.3 The Owner shall furnish surveys describing physical characteristics, legal limitations and utility locations for the site of the Project, and a legal description of the site. The Contractor shall be entitled to rely on the accuracy of information furnished by the Owner but shall exercise proper precautions relating to the safe performance of the Work.

*(Paragraph deleted)*

§ 2.2.4 The Owner shall furnish information or services required of the Owner by the Contract Documents with reasonable promptness. The Owner shall also furnish any other information or services under the Owner's control and relevant to the Contractor's performance of the Work with reasonable promptness after receiving the Contractor's written request for such information or services.

§ 2.2.5 Unless otherwise provided in the Contract Documents, the Owner shall furnish to the Contractor one copy of the Contract Documents for purposes of making reproductions pursuant to Section 1.5.2.

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

If the Contractor fails to correct Work that is not in accordance with the requirements of the Contract Documents as required by Section 12.2 or repeatedly fails to carry out Work in accordance with the Contract Documents, the Owner may issue a written order to the Contractor to stop the Work, or any portion thereof, until the cause for such order has been eliminated; however, the right of the Owner to stop the Work shall not give rise to a duty on the part of the Owner to exercise this right for the benefit of the Contractor or any other person or entity, except to the extent required by Section 6.1.3.

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

If the Contractor defaults or neglects to carry out the Work in accordance with the Contract Documents and fails within a ten-day period after receipt of written notice from the Owner to commence and continue correction of such default or neglect with diligence and promptness, the Owner may, without prejudice to other remedies the Owner may have, correct such deficiencies. In such case an appropriate Change Order shall be issued deducting from payments then or thereafter due the Contractor the reasonable cost of correcting such deficiencies, including Owner's expenses and compensation for the Architect's additional services made necessary by such default, neglect or failure. Such action by the Owner and amounts charged to the Contractor are both subject to prior approval of the Architect. If payments then or thereafter due the Contractor are not sufficient to cover such amounts, the Contractor shall pay the difference to the Owner.

## 2.5 EXTENT OF OWNER'S RIGHTS

2.5.1 The rights stated in this Article 2 and elsewhere in the Contract Documents are cumulative and not in limitation of any rights of the Owner which are (1) granted in the Contract Documents, (2) at law, or (3) in equity.

2.5.2 Except as expressly set forth in the Contract Documents, and as actually exercised by the Owner, in no event shall the Owner have control over, charge of, or any responsibility for construction means, methods, techniques, sequences or procedures or for safety precautions and programs in connection with the Work.

## ARTICLE 3 CONTRACTOR

### § 3.1 GENERAL

§ 3.1.1 The Contractor is the person or entity identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number. The Contractor shall be lawfully licensed, if required in the jurisdiction where the Project is located. The Contractor shall designate in writing a representative who shall have express authority to bind the Contractor with respect to all matters under this Contract. The term "Contractor" means the Contractor or the Contractor's authorized representative.

§ 3.1.2 The Contractor shall perform the Work in accordance with the Contract Documents.

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§ 3.1.3 The Contractor shall not be relieved of obligations to perform the Work in accordance with the Contract Documents either by activities or duties of the Architect in the Architect's administration of the Contract, or by tests, inspections or approvals required or performed by persons or entities other than the Contractor.

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

§ 3.2.1 Execution of the Contract by the Contractor is a representation that the Contractor has visited the site, become generally familiar with local conditions under which the Work is to be performed and correlated personal observations with requirements of the Contract Documents.

§ 3.2.2 Because the Contract Documents are complementary, the Contractor shall, before starting each portion of the Work, carefully study and compare the various Contract Documents relative to that portion of the Work, as well as the information furnished by the Owner pursuant to Section 2.2.3, shall take field measurements of any existing conditions related to that portion of the Work, and shall observe any conditions at the site affecting it. These obligations are for the purpose of facilitating coordination and construction by the Contractor and are not for the purpose of discovering errors, omissions, or inconsistencies in the Contract Documents; however, the Contractor shall promptly report to the Architect any errors, inconsistencies or omissions discovered by or made known to the Contractor as a request for information in such form as the Architect may require. It is recognized that the Contractor's review is made in the Contractor's capacity as a contractor and not as a licensed design professional, unless otherwise specifically provided in the Contract Documents.

§ 3.2.3 The Contractor is not required to ascertain that the Contract Documents are in accordance with applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities, but the Contractor shall promptly report to the Architect any nonconformity discovered by or made known to the Contractor as a request for information in such form as the Architect may require.

§ 3.2.4 If the Contractor believes that additional cost or time is involved because of clarifications or instructions the Architect issues in response to the Contractor's notices or requests for information pursuant to Sections 3.2.2 or 3.2.3, the Contractor shall make Claims as provided in Article 15. If the Contractor fails to perform the obligations of Sections 3.2.2 or 3.2.3, the Contractor shall pay such costs and damages to the Owner as would have been avoided if the Contractor had performed such obligations. If the Contractor performs those obligations, the Contractor shall not be liable to the Owner or Architect for damages resulting from errors, inconsistencies or omissions in the Contract Documents, for differences between field measurements or conditions and the Contract Documents, or for nonconformities of the Contract Documents to applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities.

### § 3.3 SUPERVISION AND CONSTRUCTION PROCEDURES

§ 3.3.1 The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for, and have control over, construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract, unless the Contract Documents give other specific instructions concerning these matters. If the Contract Documents give specific instructions concerning construction means, methods, techniques, sequences or procedures, the Contractor shall evaluate the jobsite safety thereof and, except as stated below, shall be fully and solely responsible for the jobsite safety of such means, methods, techniques, sequences or procedures. If the Contractor determines that such means, methods, techniques, sequences or procedures may not be safe, the Contractor shall give timely written notice to the Owner and Architect and shall not proceed with that portion of the Work without further written instructions from the Architect. If the Contractor is then instructed to proceed with the required means, methods, techniques, sequences or procedures without acceptance of changes proposed by the Contractor, the Owner shall be solely responsible for any loss or damage arising solely from those Owner-required means, methods, techniques, sequences or procedures.

§ 3.3.2 The Contractor shall be responsible to the Owner for acts and omissions of the Contractor's employees, Subcontractors and their agents and employees, and other persons or entities performing portions of the Work for, or on behalf of, the Contractor or any of its Subcontractors.

§ 3.3.3 The Contractor shall be responsible for inspection of portions of Work already performed to determine that such portions are in proper condition to receive subsequent Work.

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### § 3.4 LABOR AND MATERIALS

§ 3.4.1 Unless otherwise provided in the Contract Documents, the Contractor shall provide and pay for labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, and other facilities and services necessary for proper execution and completion of the Work, whether temporary or permanent and whether or not incorporated or to be incorporated in the Work.

§ 3.4.2 Except in the case of minor changes in the Work authorized by the Architect in accordance with Sections 3.12.8 or 7.4, the Contractor may make substitutions only with the consent of the Owner, after evaluation by the Architect and in accordance with a Change Order or Construction Change Directive.

§ 3.4.3 The Contractor shall enforce strict discipline and good order among the Contractor's employees and other persons carrying out the Work. The Contractor shall not permit employment of unfit persons or persons not properly skilled in tasks assigned to them.

### § 3.5 WARRANTY

The Contractor warrants to the Owner and Architect that materials and equipment furnished under the Contract will be of good quality and new unless the Contract Documents require or permit otherwise. The Contractor further warrants that the Work will conform to the requirements of the Contract Documents and will be free from defects, except for those inherent in the quality of the Work the Contract Documents require or permit. Work, materials, or equipment not conforming to these requirements may be considered defective. The Contractor's warranty excludes remedy for damage or defect caused by abuse, alterations to the Work not executed by the Contractor, improper or insufficient maintenance, improper operation, or normal wear and tear and normal usage. If required by the Architect, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

### § 3.6 TAXES

The project is tax exempt as indicated in Exhibit J-Tax Exempt Status attached to the Agreement.

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

§ 3.7.1 Unless otherwise provided in the Contract Documents, the Contractor shall secure and the Owner shall pay for the building permit as well as for some other permits, fees, licenses, and inspections by government agencies necessary for proper execution and completion of the Work that are customarily secured after execution of the Contract and legally required at the time bids are received or negotiations concluded. A list of the permit fees to be paid by Owner is attached as Exhibit R – Permit Fees to be paid by Owner.

§ 3.7.2 The Contractor shall comply with and give notices required by applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities applicable to performance of the Work. The Contractor shall procure and obtain all bonds of the Contractor required by the Owner or by the municipality in which the Project is located or by any other public or private body with jurisdiction over the Project. In connection with such bonds, the Contractor shall prepare all applications, supply all necessary back-up material and furnish the surety with any required personal undertakings.

§ 3.7.3 If the Contractor performs Work knowing it to be contrary to applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities, the Contractor shall assume appropriate responsibility for such Work and shall bear the costs attributable to correction.

§ 3.7.4 **Concealed or Unknown Conditions.** If the Contractor encounters conditions at the site that are (1) subsurface or otherwise concealed physical conditions that differ materially from those indicated in the Contract Documents or (2) unknown physical conditions of an unusual nature, that differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents, the Contractor shall promptly provide notice to the Owner and the Architect before conditions are disturbed and in no event later than 10 days after first observance of the conditions. The Architect will promptly investigate such conditions and, if the Architect determines that they differ materially and cause an increase or decrease in the Contractor's cost of, or time required for, performance of any part of the Work, will recommend an equitable adjustment in the Contract Sum or Contract Time, or both. If the Architect determines that the conditions at the site are not materially different from those indicated in the Contract Documents and that no change in the terms of the Contract is justified, the Architect shall promptly notify the Owner and Contractor in writing, stating the reasons. If

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either party disputes the Architect's determination or recommendation, that party may proceed as provided in Article 15.

§ 3.7.5 If, in the course of the Work, the Contractor encounters human remains or recognizes the existence of burial markers, archaeological sites or wetlands not indicated in the Contract Documents, the Contractor shall immediately suspend any operations that would affect them and shall notify the Owner and Architect. Upon receipt of such notice, the Owner shall promptly take any action necessary to obtain governmental authorization required to resume the operations. The Contractor shall continue to suspend such operations until otherwise instructed by the Owner but shall continue with all other operations that do not affect those remains or features. Requests for adjustments in the Contract Sum and Contract Time arising from the existence of such remains or features may be made as provided in Article 15.

### § 3.8 ALLOWANCES

§ 3.8.1 The Contractor shall include in the Contract Sum all allowances stated in the Contract Documents. Items covered by allowances shall be supplied for such amounts and by such persons or entities as the Owner may direct, but the Contractor shall not be required to employ persons or entities to whom the Contractor has reasonable objection.

§ 3.8.2 Unless otherwise provided in the Contract Documents,

- .1 Allowances shall cover the cost to the Contractor of materials and equipment delivered at the site and all required taxes, less applicable trade discounts;
- .2 Contractor's costs for unloading and handling at the site, labor, installation costs, overhead, profit and other expenses contemplated for stated allowance amounts shall be included in the Contract Sum but not in the allowances; and
- .3 Whenever costs are more than or less than allowances, the Contract Sum shall be adjusted accordingly by Change Order. The amount of the Change Order shall reflect (1) the difference between actual costs and the allowances under Section 3.8.2.1 and (2) changes in Contractor's costs under Section 3.8.2.2.

§ 3.8.3 Materials and equipment under an allowance shall be selected by the Owner with reasonable promptness.

### § 3.9 SUPERINTENDENT

§ 3.9.1 The Contractor shall employ a competent superintendent and necessary assistants who shall be in attendance at the Project site during performance of the Work. The superintendent shall represent the Contractor, and communications given to the superintendent shall be as binding as if given to the Contractor.

§ 3.9.2 The Contractor, as soon as practicable after award of the Contract, shall furnish in writing to the Owner through the Architect the name and qualifications of a proposed superintendent. The Architect may reply within 3 days to the Contractor in writing stating (1) whether the Owner or the Architect has reasonable objection to the proposed superintendent or (2) that the Architect requires additional time to review. Failure of the Architect to reply within the 3 day period shall constitute notice of no reasonable objection.

§ 3.9.3 The Contractor shall not employ a proposed superintendent to whom the Owner or Architect has made reasonable and timely objection. The Contractor shall not change the superintendent without the Owner's consent, which shall not unreasonably be withheld or delayed.

§ 3.9.4 The Contractor will assign the key personnel to complete the work as delineated in Exhibit C Key Personnel and Staffing attached to the Agreement. The Contractor will not substitute these key personnel without the Owner's prior written permission. If requested by the Owner, the Contractor will replace these key personnel, subcontractors' personnel or any other personnel employed by the Contractor with equally capable personnel, subject to the Owner's prior approval.

### § 3.10 CONTRACTOR'S CONSTRUCTION SCHEDULES

§ 3.10.1 The Contractor, promptly after being awarded the Contract, shall prepare and submit for the Owner's and Architect's information a Contractor's construction schedule for the Work. The schedule shall not exceed time limits current under the Contract Documents, shall be revised at appropriate intervals as required by the conditions of the Work and Project, shall be related to the entire Project to the extent required by the Contract Documents, and shall

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provide for expeditious and practicable execution of the Work. Contractor will maintain and present a detailed three week look ahead schedule at each weekly Owner's and/or Architect's meeting.

§ 3.10.2 The Contractor shall prepare a submittal schedule, promptly after being awarded the Contract and thereafter as necessary to maintain a current submittal schedule, and shall submit the schedule(s) for the Architect's approval. The Architect's approval shall not unreasonably be delayed or withheld. The submittal schedule shall (1) be coordinated with the Contractor's construction schedule, and (2) allow the Architect reasonable time to review submittals. If the Contractor fails to submit a submittal schedule, the Contractor shall not be entitled to any increase in Contract Sum or extension of Contract Time based on the time required for review of submittals.

§ 3.10.3 The Contractor shall perform the Work in general accordance with the most recent schedules submitted to the Owner and Architect.

3.10.4 The construction schedule shall be in a detailed format satisfactory to the Owner which shall also: (1) provide a graphic representation of all significant activities and events that will occur during performance of the Work; (2) identify each phase of construction and occupancy; and (3) set forth dates that are critical in ensuring the timely and orderly completion of the Work in accordance with the requirements of the Contract Documents (hereinafter referred to as "Milestone Dates"). Upon review and acceptance by the Owner of the Milestone Dates, the construction schedule shall be deemed part of the Contract Documents and attached to the Agreement (as Exhibit D thereto). If not accepted, the construction schedule shall be promptly revised by the Contractor in accordance with the recommendations of the Owner and re-submitted for acceptance. The Contractor shall monitor the progress of the Work for conformance with the requirements of the construction schedule and shall promptly notify the Owner of any delays or potential delays. The accepted construction schedule shall be updated to reflect actual conditions (sometimes referred to in this Agreement as "Progress Reports") as set forth in Section 3.10.1 or if requested by the Owner. In the event any Progress Report indicates any delays, the Contractor shall propose an affirmative plan to correct the delay, including overtime and/or additional labor, if necessary. In no event shall any Progress Report constitute an adjustment in the Contract Time, any Milestone Date or the Contract Sum unless any such adjustment is agreed to by the Owner and authorized pursuant to Change Order.

3.10.5 In the event the Owner determines that the performance of the Work, as of a Milestone Date, has not progressed or reached the level of completion required by the Contract Documents, the Owner shall have the right to order the Contractor to take corrective measures necessary to expedite the progress of construction, including, without limitation, (1) working additional shifts or overtime, (2) supplying additional manpower, equipment, and facilities and (3) other similar measures (hereinafter referred to collectively as "Extraordinary Measures"). Such Extraordinary Measures shall continue until the progress of the Work complies with the stage of completion required by the Contract Documents. The Owner's right to require Extraordinary Measures is solely for the purpose of ensuring the Contractor's compliance with the construction schedule.

.1 The Contractor shall not be entitled to an adjustment in the Contract Sum in connection with Extraordinary Measures required by the Owner under or pursuant to this Section 3.10.5 (provided, however, that, if the Contractor may be reimbursed for Extraordinary Measures from within the Contract Sum without an adjustment to the Contract Sum, the Contractor may be so reimbursed).

.2 The Owner may exercise the rights furnished the Owner under or pursuant to this Section 3.10.5 as frequently as the Owner deems necessary to ensure that the Contractor's performance of the Work will comply with any Milestone Date or completion date set forth in the Contract Documents.

3.10.6 The Owner shall have the right to direct a postponement or rescheduling of any date or time for the performance of any part of the Work. The Contractor shall, upon the Owner's request, reschedule any portion of the Work. Any postponement, rescheduling or performance of the Work under this Section 3.10.6 may be grounds for an extension of the Contract Time, if permitted under Section 8.3.1, and an equitable adjustment in the Contract Sum if: (1) the performance of the Work was properly scheduled by the Contractor in compliance with the requirements of the Contract Documents, and (2) such rescheduling or postponement is required for the convenience of the Owner.

### § 3.11 DOCUMENTS AND SAMPLES AT THE SITE

The Contractor shall maintain at the site for the Owner one copy of the Drawings, Specifications, Addenda, Change Orders and other Modifications, in good order and marked currently to indicate field changes and selections made

during construction, and one copy of approved Shop Drawings, Product Data, Samples and similar required submittals. These shall be available to the Architect and shall be delivered to the Architect for submittal to the Owner upon completion of the Work as a record of the Work as constructed.

### § 3.12 SHOP DRAWINGS, PRODUCT DATA AND SAMPLES

§ 3.12.1 Shop Drawings are drawings, diagrams, schedules and other data specially prepared for the Work by the Contractor or a Subcontractor, Sub-subcontractor, manufacturer, supplier or distributor to illustrate some portion of the Work.

§ 3.12.2 Product Data are illustrations, standard schedules, performance charts, instructions, brochures, diagrams and other information furnished by the Contractor to illustrate materials or equipment for some portion of the Work.

§ 3.12.3 Samples are physical examples that illustrate materials, equipment or workmanship and establish standards by which the Work will be judged.

§ 3.12.4 Shop Drawings, Product Data, Samples and similar submittals are not Contract Documents. Their purpose is to demonstrate the way by which the Contractor proposes to conform to the information given and the design concept expressed in the Contract Documents for those portions of the Work for which the Contract Documents require submittals. Review by the Architect is subject to the limitations of Section 4.2.7. Informational submittals upon which the Architect is not expected to take responsive action may be so identified in the Contract Documents. Submittals that are not required by the Contract Documents may be returned by the Architect without action.

§ 3.12.5 The Contractor shall review for compliance with the Contract Documents, approve and submit to the Architect Shop Drawings, Product Data, Samples and similar submittals required by the Contract Documents in accordance with the submittal schedule approved by the Architect or, in the absence of an approved submittal schedule, with reasonable promptness and in such sequence as to cause no delay in the Work or in the activities of the Owner or of separate contractors.

§ 3.12.6 By submitting Shop Drawings, Product Data, Samples and similar submittals, the Contractor represents to the Owner and Architect that the Contractor has (1) reviewed and approved them, (2) determined and verified materials, field measurements and field construction criteria related thereto, or will do so and (3) checked and coordinated the information contained within such submittals with the requirements of the Work and of the Contract Documents.

§ 3.12.7 The Contractor shall perform no portion of the Work for which the Contract Documents require submittal and review of Shop Drawings, Product Data, Samples or similar submittals until the respective submittal has been approved by the Architect.

§ 3.12.8 The Work shall be in accordance with approved submittals except that the Contractor shall not be relieved of responsibility for deviations from requirements of the Contract Documents by the Architect's approval of Shop Drawings, Product Data, Samples or similar submittals unless the Contractor has specifically informed the Architect in writing of such deviation at the time of submittal and (1) the Architect has given written approval to the specific deviation as a minor change in the Work, or (2) a Change Order or Construction Change Directive has been issued authorizing the deviation. The Contractor shall not be relieved of responsibility for errors or omissions in Shop Drawings, Product Data, Samples or similar submittals by the Architect's approval thereof.

§ 3.12.9 The Contractor shall direct specific attention, in writing or on resubmitted Shop Drawings, Product Data, Samples or similar submittals, to revisions other than those requested by the Architect on previous submittals. In the absence of such written notice, the Architect's approval of a resubmission shall not apply to such revisions.

§ 3.12.10 The Contractor shall not be required to provide professional services that constitute the practice of architecture or engineering unless such services are specifically required by the Contract Documents for a portion of the Work or unless the Contractor needs to provide such services in order to carry out the Contractor's responsibilities for construction means, methods, techniques, sequences and procedures. The Contractor shall not be required to provide professional services in violation of applicable law. If professional design services or certifications by a design professional related to systems, materials or equipment are specifically required of the Contractor by the Contract Documents, the Owner and the Architect will specify all performance and design criteria that such services must satisfy. The Contractor shall cause such services or certifications to be provided by a properly licensed design

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professional, whose signature and seal shall appear on all drawings, calculations, specifications, certifications, Shop Drawings and other submittals prepared by such professional. Shop Drawings and other submittals related to the Work designed or certified by such professional, if prepared by others, shall bear such professional's written approval when submitted to the Architect. The Owner and the Architect shall be entitled to rely upon the adequacy, accuracy and completeness of the services, certifications and approvals performed or provided by such design professionals, provided the Owner and Architect have specified to the Contractor all performance and design criteria that such services must satisfy. Pursuant to this Section 3.12.10, the Architect will review, approve or take other appropriate action on submittals only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. The Contractor shall not be responsible for the adequacy of the performance and design criteria specified in the Contract Documents.

**3.12.11** When professional certification of performance criteria of materials, systems, or equipment is required by the Contract Documents, the Contractor shall provide the person or party providing the certification with full information on the relevant performance requirements and on the materials, systems, or equipment that are expected to operate at the Project site. The certification shall be based on performance under the operating conditions generally prevailing or expected at the Project site. The Owner shall be entitled to rely upon the accuracy and completeness of such certificates.

**3.12.12** All Shop Drawings for any architectural, structural, building mechanical or building electrical work must be submitted to, and approved by, the Architect. If required by the Specifications or if the nature of any mechanical, electrical or plumbing Work requires a professional seal, any Shop Drawings for any mechanical, electrical, or other Work must be submitted to, and approved by, an engineer designated by the Architect. The Contractor represents and warrants that all such Shop Drawings shall be prepared by persons and entities possessing expertise and experience in the trade for which the shop drawing is prepared and, if required by any applicable law, by a licensed engineer.

#### **§ 3.13 USE OF SITE**

The Contractor shall confine operations at the site to areas permitted by applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities and the Contract Documents and shall not unreasonably encumber the site with materials or equipment, limits as indicated on Construction Documents Phasing Plan.

#### **§ 3.14 CUTTING AND PATCHING**

**§ 3.14.1** The Contractor shall be responsible for cutting, fitting or patching required to complete the Work or to make its parts fit together properly. All areas requiring cutting, fitting and patching shall be restored to the condition existing prior to the cutting, fitting and patching, unless otherwise required by the Contract Documents.

**§ 3.14.2** The Contractor shall not damage or endanger a portion of the Work or fully or partially completed construction of the Owner or separate contractors by cutting, patching or otherwise altering such construction, or by excavation. The Contractor shall not cut or otherwise alter such construction by the Owner or a separate contractor except with written consent of the Owner and of such separate contractor; such consent shall not be unreasonably withheld. The Contractor shall not unreasonably withhold from the Owner or a separate contractor the Contractor's consent to cutting or otherwise altering the Work.

#### **§ 3.15 CLEANING UP**

**§ 3.15.1** The Contractor shall keep the premises and surrounding area free from accumulation of waste materials or rubbish caused by operations under the Contract. At completion of the Work, the Contractor shall remove waste materials, rubbish, the Contractor's tools, construction equipment, machinery and surplus materials from and about the Project.

**§ 3.15.2** If the Contractor fails to clean up as provided in the Contract Documents, the Owner may do so and Owner shall be entitled to reimbursement from the Contractor.

#### **§ 3.16 ACCESS TO WORK**

The Contractor shall provide the Owner and Architect access to the Work in preparation and progress wherever located.

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### § 3.17 ROYALTIES, PATENTS AND COPYRIGHTS

The Contractor shall pay all royalties and license fees. The Contractor shall defend suits or claims for infringement of copyrights and patent rights and shall hold the Owner and Architect harmless from loss on account thereof, but shall not be responsible for such defense or loss when a particular design, process or product of a particular manufacturer or manufacturers is required by the Contract Documents, or where the copyright violations are contained in Drawings, Specifications or other documents prepared by the Owner or Architect. However, if the Contractor has reason to believe that the required design, process or product is an infringement of a copyright or a patent, the Contractor shall be responsible for such loss unless such information is promptly furnished to the Architect.

### § 3.18 INDEMNIFICATION

#### § 3.18.1

To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner, Owner's consultants, as well as the agents and employees of any of them from and against any and all claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, or any individual working on the site under the Contractor's supervision, anyone directly or indirectly employed by them or anyone for whose acts, they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Paragraph 3.18.

§ 3.18.2 In claims against any person or entity indemnified under this Section 3.18 by an employee of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under Section 3.18.1 shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for the Contractor or a Subcontractor under workers' compensation acts, disability benefit acts or other employee benefit acts.

## ARTICLE 4 ARCHITECT

### § 4.1 GENERAL

§ 4.1.1 The Owner shall retain an architect lawfully licensed to practice architecture or an entity lawfully practicing architecture in the jurisdiction where the Project is located. That person or entity is identified as the Architect in the Agreement and is referred to throughout the Contract Documents as if singular in number.

§ 4.1.2 Duties, responsibilities and limitations of authority of the Architect as set forth in the Contract Documents shall not be restricted, modified or extended without written consent of the Owner, Contractor and Architect. Consent shall not be unreasonably withheld.

§ 4.1.3 If the employment of the Architect is terminated, the Owner shall employ a successor architect as to whom the Contractor has no reasonable objection and whose status under the Contract Documents shall be that of the Architect.

### § 4.2 ADMINISTRATION OF THE CONTRACT

§ 4.2.1 The Architect will provide administration of the Contract as described in the Contract Documents and will be an Owner's representative during construction until the date the Architect issues the final Certificate for Payment. The Architect will have authority to act on behalf of the Owner only to the extent provided in the Contract Documents.

§ 4.2.2 The Architect will visit the site at intervals appropriate to the stage of construction, or as otherwise agreed with the Owner, to become generally familiar with the progress and quality of the portion of the Work completed, and to determine in general if the Work observed is being performed in a manner indicating that the Work, when fully completed, will be in accordance with the Contract Documents. However, the Architect will not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work. The Architect will not have control over, charge of, or responsibility for, the construction means, methods, techniques, sequences or procedures, or

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for the safety precautions and programs in connection with the Work, since these are solely the Contractor's rights and responsibilities under the Contract Documents, except as provided in Section 3.3.1.

§ 4.2.3 On the basis of the site visits, the Architect will keep the Owner reasonably informed about the progress and quality of the portion of the Work completed, and report to the Owner (1) known deviations from the Contract Documents and from the most recent construction schedule submitted by the Contractor, and (2) defects and deficiencies observed in the Work. The Architect will not be responsible for the Contractor's failure to perform the Work in accordance with the requirements of the Contract Documents. The Architect will not have control over or charge of and will not be responsible for acts or omissions of the Contractor, Subcontractors, or their agents or employees, or any other persons or entities performing portions of the Work.

**§ 4.2.4 COMMUNICATIONS FACILITATING CONTRACT ADMINISTRATION**

Except as otherwise provided in the Contract Documents or when direct communications have been specially authorized, the Owner and Contractor shall endeavor to communicate with each other directly through their respective authorized representatives about matters arising out of or relating to the Contract. Communications by and with the Architect's consultants shall be through the Architect. Communications by and with Subcontractors and material suppliers shall be through the Contractor. Communications by and with separate contractors shall be through the Owner.

§ 4.2.5 Based on the Architect's evaluations of the Contractor's Applications for Payment, the Architect will review and certify the amounts due the Contractor and will issue Certificates for Payment in such amounts.

§ 4.2.6 The Architect has authority to reject Work that does not conform to the Contract Documents. Whenever the Architect considers it necessary or advisable, the Architect will have authority to require inspection or testing of the Work in accordance with Sections 13.5.2 and 13.5.3, whether or not such Work is fabricated, installed or completed. However, neither this authority of the Architect nor a decision made in good faith either to exercise or not to exercise such authority shall give rise to a duty or responsibility of the Architect to the Contractor, Subcontractors, material and equipment suppliers, their agents or employees, or other persons or entities performing portions of the Work.

§ 4.2.7 The Architect will review and approve, or take other appropriate action upon, the Contractor's submittals such as Shop Drawings, Product Data and Samples, but only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. The Architect's action will be taken in accordance with the submittal schedule approved by the Architect or, in the absence of an approved submittal schedule, with reasonable promptness while allowing sufficient time in the Architect's professional judgment to permit adequate review. Review of such submittals is not conducted for the purpose of determining the accuracy and completeness of other details such as dimensions and quantities, or for substantiating instructions for installation or performance of equipment or systems, all of which remain the responsibility of the Contractor as required by the Contract Documents. The Architect's review of the Contractor's submittals shall not relieve the Contractor of the obligations under Sections 3.3, 3.5 and 3.12. The Architect's review shall not constitute approval of safety precautions or, unless otherwise specifically stated by the Architect, of any construction means, methods, techniques, sequences or procedures. The Architect's approval of a specific item shall not indicate approval of an assembly of which the item is a component.

§ 4.2.8 The Architect will prepare Change Orders and Construction Change Directives with the Owner's permission, and may authorize minor changes in the Work as provided in Section 7.4. The Architect will investigate and make determinations and recommendations regarding concealed and unknown conditions as provided in Section 3.7.4.

§ 4.2.9 The Architect will conduct inspections to determine the date or dates of Substantial Completion and the date of final completion; issue Certificates of Substantial Completion pursuant to Section 9.8; receive and forward to the Owner, for the Owner's review and records, written warranties and related documents required by the Contract and assembled by the Contractor pursuant to Section 9.10; and issue a final Certificate for Payment pursuant to Section 9.10.

§ 4.2.10 If the Owner and Architect agree, the Architect will provide one or more project representatives to assist in carrying out the Architect's responsibilities at the site. The duties, responsibilities and limitations of authority of such project representatives shall be as set forth in an exhibit to be incorporated in the Contract Documents.

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§ 4.2.11 The Architect will interpret and decide matters concerning performance under, and requirements of, the Contract Documents on written request of either the Owner or Contractor. The Architect's response to such requests will be made in writing within any time limits agreed upon or otherwise with reasonable promptness.

§ 4.2.12 Interpretations and decisions of the Architect will be consistent with the intent of, and reasonably inferable from, the Contract Documents and will be in writing or in the form of drawings. When making such interpretations and decisions, the Architect will endeavor to secure faithful performance by both Owner and Contractor, will not show partiality to either and will not be liable for results of interpretations or decisions rendered in good faith.

§ 4.2.13 The Architect's decisions on matters relating to aesthetic effect will be final if consistent with the intent expressed in the Contract Documents.

§ 4.2.14 The Architect will review and respond to requests for information about the Contract Documents. The Architect's response to such requests will be made in writing within any time limits agreed upon or otherwise with reasonable promptness. If appropriate, the Architect will prepare and issue supplemental Drawings and Specifications in response to the requests for information.

## ARTICLE 5 SUBCONTRACTORS

### § 5.1 DEFINITIONS

§ 5.1.1 A Subcontractor is a person or entity who has a direct contract with the Contractor to perform a portion of the Work at the site. The term "Subcontractor" is referred to throughout the Contract Documents as if singular in number and means a Subcontractor or an authorized representative of the Subcontractor. The term "Subcontractor" does not include a separate contractor or subcontractors of a separate contractor.

§ 5.1.2 A Sub-subcontractor is a person or entity who has a direct or indirect contract with a Subcontractor to perform a portion of the Work at the site. The term "Sub-subcontractor" is referred to throughout the Contract Documents as if singular in number and means a Sub-subcontractor or an authorized representative of the Sub-subcontractor.

### § 5.2 AWARD OF SUBCONTRACTS AND OTHER CONTRACTS FOR PORTIONS OF THE WORK

5.2.1 Those portions of the Work that the Construction Manager does not customarily perform with the Construction Manager's own personnel shall be performed under subcontract or by other appropriate agreements with the Construction Manager. Pursuant to Texas Government Code Chapter 2267, the Construction Manager shall publicly advertise for bids or proposals and receive bids or proposals from trade contractors or subcontractors for the performance of all major elements of the work other than the minor work that may be included in the general conditions. The Construction Manager is required to publish notice in a newspaper of general circulation in El Paso County, once each week for at least two weeks before the deadline for receiving bids or proposals, of the time and place the bids or proposals will be received and opened. The Construction Manager shall review all trade contractor or subcontractor bids or proposals in a manner that does not disclose the contents of the bid or proposal during the selection process to a person not employed by the Construction Manager, Architect, Engineer, Owner or Owner's Representative. All bids or proposals shall be made available to the public after the later of the award of the contract or the seventh day after the date of final selection of bids or proposals. If a selected trade contractor or subcontractor defaults in the performance of its work or fails to execute a subcontract after being selected in accordance with this section, the Construction Manager may itself fulfill, without advertising, the contract requirements or select a replacement trade contractor or subcontractor to fulfill the contract requirements.

5.2.3 If the Construction Manager reviews, evaluates, and recommends to the Owner a bid or proposal from a trade contractor or subcontractor but the Owner requires another bid or proposal to be accepted, the Owner shall compensate the Construction Manager by a change in price, time, or guaranteed maximum cost for any additional cost and risk that the Construction Manager incurs because of the Owner's requirement that another bid or proposal be accepted.

*(Paragraphs deleted)*

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

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### § 5.3 SUBCONTRACTUAL RELATIONS

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

Subcontractors will similarly make copies of applicable portions of such documents available to their respective proposed Sub-subcontractors. All subcontracts shall be in writing in form and substance substantially similar to the Contractor's standard form subcontract, attached as Exhibit O Contractor's Standard Form Subcontract attached to the Agreement and shall specifically provide that the Owner is an intended third party beneficiary of such subcontract.

### § 5.4 CONTINGENT ASSIGNMENT OF SUBCONTRACTS

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

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

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

§ 5.4.2 Upon such assignment, if the Work has been suspended for more than 30 days, the Subcontractor's compensation shall be equitably adjusted for increases in cost resulting from the suspension.

§ 5.4.3 Upon such assignment to the Owner under this Section 5.4, the Owner may further assign the subcontract to a successor contractor or other entity. If the Owner assigns the subcontract to a successor contractor or other entity, the Owner shall nevertheless remain legally responsible for all of the successor contractor's obligations under the subcontract.

## ARTICLE 6 CONSTRUCTION BY OWNER OR BY SEPARATE CONTRACTORS

### § 6.1 OWNER'S RIGHT TO PERFORM CONSTRUCTION AND TO AWARD SEPARATE CONTRACTS

§ 6.1.1 The Owner reserves the right to perform construction or operations related to the Project with the Owner's own forces, and to award separate contracts in connection with other portions of the Project or other construction or operations on the site under Conditions of the Contract identical or substantially similar to these including those portions related to insurance and waiver of subrogation. If the Contractor claims that delay or additional cost is involved because of such action by the Owner, the Contractor shall make such Claim as provided in Article 15.

§ 6.1.2 When separate contracts are awarded for different portions of the Project or other construction or operations on the site, the term "Contractor" in the Contract Documents in each case shall mean the Contractor who executes each separate Owner-Contractor Agreement.

§ 6.1.3 The Owner shall provide for coordination of the activities of the Owner's own forces and of each separate contractor with the Work of the Contractor, who shall cooperate with them. The Contractor shall participate with other separate contractors and the Owner in reviewing their construction schedules. The Contractor shall make any revisions to the construction schedule deemed necessary after a joint review and mutual agreement. The construction schedules

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shall then constitute the schedules to be used by the Contractor, separate contractors and the Owner until subsequently revised.

§ 6.1.4 Unless otherwise provided in the Contract Documents, when the Owner performs construction or operations related to the Project with the Owner's own forces, the Owner shall be deemed to be subject to the same obligations and to have the same rights that apply to the Contractor under the Conditions of the Contract, including, without excluding others, those stated in Article 3, this Article 6 and Articles 10, 11 and 12.

## § 6.2 MUTUAL RESPONSIBILITY

§ 6.2.1 The Contractor shall afford the Owner and separate contractors reasonable opportunity for introduction and storage of their materials and equipment and performance of their activities, and shall connect and coordinate the Contractor's construction and operations with theirs as required by the Contract Documents.

§ 6.2.2 If part of the Contractor's Work depends for proper execution or results upon construction or operations by the Owner or a separate contractor, the Contractor shall, prior to proceeding with that portion of the Work, promptly report to the Architect apparent discrepancies or defects in such other construction that would render it unsuitable for such proper execution and results. Failure of the Contractor so to report shall constitute an acknowledgment that the Owner's or separate contractor's completed or partially completed construction is fit and proper to receive the Contractor's Work, except as to defects not then reasonably discoverable.

§ 6.2.3 The Contractor shall reimburse the Owner for costs the Owner incurs that are payable to a separate contractor because of the Contractor's delays, improperly timed activities or defective construction. The Owner shall be responsible to the Contractor for costs the Contractor incurs because of a separate contractor's delays, improperly timed activities, damage to the Work or defective construction.

§ 6.2.4 The Contractor shall promptly remedy damage the Contractor wrongfully causes to completed or partially completed construction or to property of the Owner or separate contractors as provided in Section 10.2.5.

§ 6.2.5 The Owner and each separate contractor shall have the same responsibilities for cutting and patching as are described for the Contractor in Section 3.14.

## § 6.3 OWNER'S RIGHT TO CLEAN UP

If a dispute arises among the Contractor, separate contractors and the Owner as to the responsibility under their respective contracts for maintaining the premises and surrounding area free from waste materials and rubbish, the Owner may clean up and the Architect will allocate the cost among those responsible.

## ARTICLE 7 CHANGES IN THE WORK

### § 7.1 GENERAL

§ 7.1.1 Changes in the Work may be accomplished after execution of the Contract, and without invalidating the Contract, by Change Order, Construction Change Directive or order for a minor change in the Work, subject to the limitations stated in this Article 7 and elsewhere in the Contract Documents.

§ 7.1.2 A Change Order shall be based upon agreement among the Owner, Contractor and Architect; a Construction Change Directive requires agreement by the Owner and Architect and may or may not be agreed to by the Contractor; an order for a minor change in the Work may be issued by the Architect alone.

§ 7.1.3 Changes in the Work shall be performed under applicable provisions of the Contract Documents, and the Contractor shall proceed promptly, unless otherwise provided in the Change Order, Construction Change Directive or order for a minor change in the Work. Except as permitted in Section 7.3, a change in the Contract Sum or the Contract Time shall be accomplished only by Change Order. Accordingly, no course of conduct or dealings between the parties, no express or implied acceptance of alterations or additions to the Work, and no claim that the Owner has been unjustly enriched by any alteration or addition to the Work, whether or not there is, in fact, any unjust enrichment to the Work, shall be the basis of any claim to an increase in any amounts due under the Contract Documents or a change in any time period provided for in the Contract Documents.

## § 7.2 CHANGE ORDERS

§ 7.2.1 A Change Order is a written instrument prepared by the Architect and signed by the Owner, Contractor and Architect stating their agreement upon all of the following:

- .1 The change in the Work;
- .2 The amount of the adjustment, if any, in the Contract Sum; and
- .3 The extent of the adjustment, if any, in the Contract Time.

## § 7.3 CONSTRUCTION CHANGE DIRECTIVES

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

§ 7.3.2 A Construction Change Directive shall be used in the absence of total agreement on the terms of a Change Order.

§ 7.3.3 If the Construction Change Directive provides for an adjustment to the Contract Sum, the adjustment shall be based on one of the following methods:

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

§ 7.3.4 If unit prices are stated in the Contract Documents or subsequently agreed upon, and if quantities originally contemplated are materially changed in a proposed Change Order or Construction Change Directive so that application of such unit prices to quantities of Work proposed will cause substantial inequity to the Owner or Contractor, the applicable unit prices shall be equitably adjusted.

§ 7.3.5 Upon receipt of a Construction Change Directive, the Contractor shall promptly proceed with the change in the Work involved and advise the Architect of the Contractor's agreement or disagreement with the method, if any, provided in the Construction Change Directive for determining the proposed adjustment in the Contract Sum or Contract Time.

§ 7.3.6 A Construction Change Directive signed by the Contractor indicates the Contractor's agreement therewith, including adjustment in Contract Sum and Contract Time or the method for determining them. Such agreement shall be effective immediately and shall be recorded as a Change Order.

§ 7.3.7 If the Contractor does not respond promptly or disagrees with the method for adjustment in the Contract Sum, the Architect shall determine the method and the adjustment on the basis of reasonable expenditures and savings of those performing the Work attributable to the change, including, in case of an increase in the Contract Sum, an amount for overhead and profit as set forth in the Agreement, or if no such amount is set forth in the Agreement, a reasonable amount. In such case, and also under Section 7.3.3.3, the Contractor shall keep and present, in such form as the Architect may prescribe, an itemized accounting together with appropriate supporting data. Unless otherwise provided in the Contract Documents, costs for the purposes of this Section 7.3.7 shall be limited to the following:

- .1 Costs of labor, including social security, old age and unemployment insurance, fringe benefits required by agreement or custom, and workers' compensation insurance;
- .2 Costs of materials, supplies and equipment, including cost of transportation, whether incorporated or consumed;
- .3 Rental costs of machinery and equipment, exclusive of hand tools, whether rented from the Contractor or others;
- .4 Costs of premiums for all bonds and insurance, permit fees, and sales, use or similar taxes related to the Work; and

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.5 Additional costs of supervision and field office personnel directly attributable to the change.

§ 7.3.8 The amount of credit to be allowed by the Contractor to the Owner for a deletion or change that results in a net decrease in the Contract Sum shall be actual net cost as confirmed by the Architect. When both additions and credits covering related Work or substitutions are involved in a change, the allowance for overhead and profit shall be figured on the basis of net increase, if any, with respect to that change.

§ 7.3.9 Pending final determination of the total cost of a Construction Change Directive to the Owner, the Contractor may request payment for Work completed under the Construction Change Directive in Applications for Payment. The Architect will make an interim determination for purposes of monthly certification for payment for those costs and certify for payment the amount that the Architect determines, in the Architect's professional judgment, to be reasonably justified. The Architect's interim determination of cost shall adjust the Contract Sum on the same basis as a Change Order, subject to the right of either party to disagree and assert a Claim in accordance with Article 15.

§ 7.3.10 When the Owner and Contractor agree with a determination made by the Architect concerning the adjustments in the Contract Sum and Contract Time, or otherwise reach agreement upon the adjustments, such agreement shall be effective immediately and the Architect will prepare a Change Order. Change Orders may be issued for all or any part of a Construction Change Directive.

#### § 7.4 MINOR CHANGES IN THE WORK

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

### ARTICLE 8 TIME

#### § 8.1 DEFINITIONS

§ 8.1.1 Unless otherwise provided, Contract Time is the period of time, including authorized adjustments, allotted in the Contract Documents for Substantial Completion of the Work.

§ 8.1.2 The date of commencement of the Work is the date established in the Agreement.

§ 8.1.3 The date of Substantial Completion is the date certified by the Architect in accordance with Section 9.8.

§ 8.1.4 The term "day" as used in the Contract Documents shall mean calendar day unless otherwise specifically defined.

#### § 8.2 PROGRESS AND COMPLETION

§ 8.2.1 Time limits stated in the Contract Documents are of the essence of the Contract. By executing the Agreement the Contractor confirms that the Contract Time is a reasonable period for performing the Work. Contractor acknowledges and understands that failure by the Contractor to complete the Work in accordance with the Construction Schedule will cause significant damage to the Owner.

§ 8.2.2 The Contractor shall not knowingly, except by agreement or instruction of the Owner in writing, prematurely commence operations on the site or elsewhere prior to the effective date of insurance required by Article 11 to be furnished by the Contractor and Owner. The date of commencement of the Work shall not be changed by the effective date of such insurance.

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

#### § 8.3 DELAYS AND EXTENSIONS OF TIME

§ 8.3.1 If the Contractor is materially delayed at any time in the commencement or progress of the Work by an act or neglect of the Owner or Architect, or of an employee of either, or of a separate contractor employed by the Owner; or by changes ordered in the Work; or by labor disputes, fire or unavoidable casualties, or other causes beyond the

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Contractor's reasonable control, then to the extent such delay will prevent the Contractor from achieving Substantial Completion within the Contract Time and if the performance of the Work is not, has not, or would not have been delayed by any other cause for which the Contractor is not entitled to an extension in the Contract Time under the Contract Documents, the Contract Time shall be extended by Change Order. The Contractor further acknowledges and agrees that adjustments in the Contract Time will be permitted for a delay only to the extent such delay (1) is not caused, or could not have been anticipated, by the Contractor, (2) could not be limited or avoided by the Contractor's timely notice to the Owner of the delay, and (3) is of a duration not less than one day. The Contractor shall be entitled to an equitable adjustment for general conditions.

§ 8.3.2 Claims relating to time shall be made in accordance with applicable provisions of Article 15.

§ 8.3.3 Notwithstanding anything to the contrary in the Contract Documents, an extension in the Contract Time, to the extent permitted under Section 8.3.1, shall be the sole remedy of the Contractor for any (1) delay in the commencement, prosecution or completion of the Work, (2) hindrance or obstruction in the performance of the Work, (3) loss of productivity, or (4) other similar claims (collectively referred to in this Section 8.3.3 as "Delays") whether or not such Delays are foreseeable, unless a Delay is caused by acts of the Owner, and only to the extent such acts continue after the Contractor furnishes the Owner with notice of such interference. In no event shall the Contractor be entitled to any compensation or recovery of any damages, in connection with any Delay, including, without limitation, consequential damages, lost opportunity costs, impact damages or other similar remuneration. The Owner's exercise of any of its rights or remedies under the Contract Documents, shall not be construed as a Delay in the performance of the Work. This Section 8.3 does not preclude recovery of damages for delay by either party under other provisions of the Contract Documents.

## ARTICLE 9 PAYMENTS AND COMPLETION

### § 9.1 CONTRACT SUM

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

### § 9.2 SCHEDULE OF VALUES

9.2.1 Where the Contract is based on a stipulated sum or Guaranteed Maximum Price, the Contractor shall submit to the Architect, before the first Application for Payment, a schedule of values allocating the entire Contract Sum to the various portions of the Work and prepared in such form and supported by such data to substantiate its accuracy as the Architect may require. This schedule, unless objected to by the Architect, shall be used as a basis for reviewing the Contractor's Applications for Payment.

9.2.2 The Contractor and each Subcontractor shall prepare a payment breakdown for the Work for which each is responsible in such detail as required by the Owner. This breakdown shall include a description of the Work with assigned dollar value for the miscellaneous phases and/or items of Work. Once accepted by the Owner, all payment requests shall include this information together with the percent of the Work completed to date, the value of the Work completed to date, the percent of previous amount billed, the previous amount billed, and the current percent completed. Any trade breakdown which fails to include sufficient detail, is unbalanced, or exhibits "front-loading" of the value of the Work shall be rejected. The Owner shall review each such payment breakdown and shall approve or disapprove such breakdown. If a breakdown had been initially approved and subsequently used, but later found improper for any reason, sufficient funds shall be withheld from future Applications for Payment to ensure an adequate reserve (exclusive of normal retainage) to complete the Work.

### § 9.3 APPLICATIONS FOR PAYMENT

§ 9.3.1 At least ten days before the date established for each progress payment, the Contractor shall submit to the Architect an itemized Application for Payment prepared in accordance with the schedule of values, if required under Section 9.2, for completed portions of the Work. Such application shall be notarized, if required, and supported by such data substantiating the Contractor's right to payment as the Owner or Architect may require, such as copies of requisitions from Subcontractors and material suppliers, and shall reflect retainage if provided for in the Contract Documents.

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

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

*(Paragraph deleted)*

§ 9.3.2 Unless otherwise provided in the Contract Documents, payments shall be made on account of materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work. If approved in advance by the Owner, payment may similarly be made for materials and equipment suitably stored off the site at a location agreed upon in writing. Owner is not obligated to pay for typical building materials (for example, drywall, conduit, paint, masonry) and will only consider payment for materials that are unique and fabricated specifically for the project.

Payment for materials and equipment stored on or off the site shall be conditioned upon compliance by the Contractor with procedures satisfactory to the Owner to establish the Owner's title to such materials and equipment or otherwise protect the Owner's interest, and shall include the costs of applicable insurance, storage and transportation to the site for such materials and equipment stored off the site.

9.3.2.1 Contractor shall also comply with the following specific requirements related to stored material:

- 1 The aggregate cost of material stored off site shall not exceed the aggregate amount which has been approved in writing by Owner under Section 9.3.2 above;
- .2 Title to such materials shall be vested in the Owner, as evidenced by documentation satisfactory in form and substance to the Owner and the Owner's construction lender, if any, including, without limitation, recorded financing statements, UCC filings and UCC searches;
- .3 With each Application for Payment, the Contractor shall submit to the Owner a written list identifying each location where materials are stored off the Project site and the value of materials at each location. The Contractor shall procure insurance satisfactory to the Owner for materials stored off the Project site in an amount not less than the total value thereof;
- .4 The consent of any surety shall be obtained to the extent required prior to payment for any materials stored off the Project site;
- .5 The Contractor will provide an Observation Report confirming that a Contractor has viewed and confirmed material, quantities and conditions at the stored location and that Representatives of the Owner and Owner's construction lender, if any, shall have the right to make inspections of the storage areas at any time; and
- .6 Such materials shall be (a) protected from diversion, destruction, theft and damage to the satisfaction of the Owner and Owner's construction lender, if any, (b) specifically marked for use on the Project, and (c) segregated from other materials at the storage facility.

§ 9.3.3 The Contractor warrants that title to all Work covered by an Application for Payment will pass to the Owner no later than the time of payment. The Contractor further warrants that upon submittal of an Application for Payment all Work for which Certificates for Payment have been previously issued and payments received from the Owner shall, to the best of the Contractor's knowledge, information and belief, be free and clear of liens, claims, security interests or encumbrances in favor of the Contractor, Subcontractors, material suppliers, or other persons or entities making a claim by reason of having provided labor, materials and equipment relating to the Work.

9.3.4 The Contractor further expressly undertakes to defend the Indemnitees, at the Contractor's sole expense, against any actions, lawsuits or proceedings brought against Indemnitees as a result of liens filed against the Work, the site of any of the Work, the Project site and any improvements thereon, payments due the Contractor or any portion of the property of any of the Indemnitees (referred to collectively as "Liens"). The Contractor hereby agrees to indemnify and hold Indemnitees harmless against any such Liens or claims of Lien and agrees to pay any judgment or Lien resulting from any such actions, lawsuits or proceedings.

9.3.5 The Owner shall release any payments withheld due to a Lien or claim of Lien if the Contractor obtains

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security acceptable to the Owner or Lien bond which is: (1) issued by a surety acceptable to the Owner, (2) in form and substance satisfactory to the Owner, and (3) in an amount not less than One Hundred Fifty Percent (150%) of such Lien claim. By posting a lien bond or other acceptable security, however, the Contractor shall not be relieved of any responsibilities or obligations under this Section 9.3, including, without limitation, the duty to defend and indemnify the Indemnitees. The cost of any premiums incurred in connection with such bonds and security shall be the responsibility of the Contractor and shall not be part of, or cause any adjustment to, the Contract Sum.

**9.3.6** The Contractor agrees to waive any right which it may have to assert a mechanic's or other Lien against the Project site and any improvements thereon, including, without limitation, the Work itself. Furthermore, the Contractor will cause a similar provision, waiving any right to a mechanic's or other Lien against the Project site and Owner's property to be included in all of its subcontracts, any sub-subcontracts and all contracts with material suppliers.

**9.3.7** Notwithstanding the foregoing, the Owner reserves the right to settle any disputed mechanic's or materialmen's Lien claim by payments to the Lien claimant or by such other means as the Owner, in the Owner's sole discretion, determines is the most economical or advantageous method of settling the dispute. The Contractor shall promptly reimburse the Owner upon demand, for any payments so made.

## § 9.4 CERTIFICATES FOR PAYMENT

**§ 9.4.1** The Architect will, within seven days after receipt of the Contractor's Application for Payment, either issue to the Owner a Certificate for Payment, with a copy to the Contractor, for such amount as the Architect determines is properly due, or notify the Contractor and Owner in writing of the Architect's reasons for withholding certification in whole or in part as provided in Section 9.5.1.

**§ 9.4.2** The issuance of a Certificate for Payment will constitute a representation by the Architect to the Owner, based on the Architect's evaluation of the Work and the data comprising the Application for Payment, that, to the best of the Architect's knowledge, information and belief, the Work has progressed to the point indicated and that the quality of the Work is in accordance with the Contract Documents. The foregoing representations are subject to an evaluation of the Work for conformance with the Contract Documents upon Substantial Completion, to results of subsequent tests and inspections, to correction of minor deviations from the Contract Documents prior to completion and to specific qualifications expressed by the Architect. The issuance of a Certificate for Payment will further constitute a representation that the Contractor is entitled to payment in the amount certified. However, the issuance of a Certificate for Payment will not be a representation that the Architect has (1) made exhaustive or continuous on-site inspections to check the quality or quantity of the Work, (2) reviewed construction means, methods, techniques, sequences or procedures, (3) reviewed copies of requisitions received from Subcontractors and material suppliers and other data requested by the Owner to substantiate the Contractor's right to payment, or (4) made examination to ascertain how or for what purpose the Contractor has used money previously paid on account of the Contract Sum.

## § 9.5 DECISIONS TO WITHHOLD CERTIFICATION

**§ 9.5.1** The Architect may withhold a Certificate for Payment in whole or in part, to the extent reasonably necessary to protect the Owner, if in the Architect's opinion the representations to the Owner required by Section 9.4.2 cannot be made. If the Architect is unable to certify payment in the amount of the Application, the Architect will notify the Contractor and Owner as provided in Section 9.4.1. If the Contractor and Architect cannot agree on a revised amount, the Architect will promptly issue a Certificate for Payment for the amount for which the Architect is able to make such representations to the Owner. The Architect may also withhold a Certificate for Payment or, because of subsequently discovered evidence, may nullify the whole or a part of a Certificate for Payment previously issued, to such extent as may be necessary in the Architect's opinion to protect the Owner from loss for which the Contractor is responsible, including loss resulting from acts and omissions described in Section 3.3.2, because of

- .1 defective Work not remedied;
- .2 third party claims filed or reasonable evidence indicating probable filing of such claims unless security acceptable to the Owner is provided by the Contractor;
- .3 failure of the Contractor to make payments properly to Subcontractors or for labor, materials or equipment;
- .4 reasonable evidence that the Work cannot be completed for the unpaid balance of the Contract Sum;

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- .5 damage to the Owner or a separate contractor;
- .6 reasonable evidence that the Work will not be completed within the Contract Time, and that the unpaid balance would not be adequate to cover actual or liquidated damages for the anticipated delay; or
- .7 repeated failure to carry out the Work in accordance with the Contract Documents.

§ 9.5.2 When the above reasons for withholding certification are removed, certification will be made for amounts previously withheld.

§ 9.5.3 If the Architect withholds certification for payment under Section 9.5.1.3, the Owner may, at its sole option, issue joint checks to the Contractor and to any Subcontractor or material or equipment suppliers to whom the Contractor failed to make payment for Work properly performed or material or equipment suitably delivered. If the Owner makes payments by joint check, the Owner shall notify the Architect and the Architect will reflect such payment on the next Certificate for Payment.

## § 9.6 PROGRESS PAYMENTS

§ 9.6.1 After the Architect has issued a Certificate for Payment, the Owner shall make payment in the manner and within the time provided in the Contract Documents, and shall so notify the Architect.

§ 9.6.2 The Contractor shall pay each Subcontractor no later than seven days after receipt of payment from the Owner the amount to which the Subcontractor is entitled, reflecting percentages actually retained from payments to the Contractor on account of the Subcontractor's portion of the Work. The Contractor shall, by appropriate agreement with each Subcontractor, require each Subcontractor to make payments to Sub-subcontractors in a similar manner.

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

§ 9.6.4 The Owner requires evidence from the Contractor that the Contractor has properly paid Subcontractors and material and equipment suppliers amounts paid by the Owner to the Contractor for subcontracted Work, in the form of conditional and unconditional waiver(s) of lien for each progress payment and Final Waiver of Lien when the Work is complete. The required Waiver of Lien to Date and Final Waiver of Lien forms are attached to the Agreement as Exhibit N Waiver of Lien Forms attached to the Agreement. The Contractor will submit Conditional Waiver of Lien forms(s) for Owner's review and approval prior to the first application for payment. If the Contractor fails to furnish such evidence within seven days, the Owner shall have the right to contact Subcontractors to ascertain whether they have been properly paid. Neither the Owner nor Architect shall have an obligation to pay or to see to the payment of money to a Subcontractor, except as may otherwise be required by law.

§ 9.6.5 Contractor payments to material and equipment suppliers shall be treated in a manner similar to that provided in Sections 9.6.2, 9.6.3 and 9.6.4.

§ 9.6.6 A Certificate for Payment, a progress payment, or partial or entire use or occupancy of the Project by the Owner shall not constitute acceptance of Work not in accordance with the Contract Documents.

§ 9.6.7 Unless the Contractor provides the Owner with a payment bond in the full penal sum of the Contract Sum, payments received by the Contractor for Work properly performed by Subcontractors and suppliers shall be held by the Contractor for those Subcontractors or suppliers who performed Work or furnished materials, or both, under contract with the Contractor for which payment was made by the Owner. Nothing contained herein shall require money to be placed in a separate account and not commingled with money of the Contractor, shall create any fiduciary liability or tort liability on the part of the Contractor for breach of trust or shall entitle any person or entity to an award of punitive damages against the Contractor for breach of the requirements of this provision.

## § 9.7 FAILURE OF PAYMENT

If the Architect does not issue a Certificate for Payment, through no fault of the Contractor, within seven days after receipt of the Contractor's Application for Payment, or if the Owner does not pay the Contractor within seven days after the date established in the Contract Documents the amount certified by the Architect or awarded by binding dispute resolution, then the Contractor may, upon seven additional days' written notice to the Owner and Architect,

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stop the Work until payment of the amount owing has been received. The Contract Time shall be extended appropriately and the Contract Sum shall be increased by the amount of the Contractor's reasonable costs of shut-down, delay and start-up, plus interest as provided for in the Contract Documents.

## § 9.8 SUBSTANTIAL COMPLETION

§ 9.8.1 Substantial Completion is the stage in the progress of the Work when the Work, or designated portion thereof, is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work, or such designated portion thereof, for the uses for which it is intended. Substantial completion shall include, but is not limited to, finished and operational clubhouses, finished suites, club seats, installed seating, natural grass playing field, operational air conditioning systems, operational elevators and escalators, operational systems for baseball games and all other anticipated uses, operational scoreboards, operational concessions and other revenue generating functions, and the issuance by the proper governmental authority of a temporary certificate of occupancy and any other permits and orders necessary for occupancy and if no such certificates, permits or orders have been issued, that they would have been issued but for some reason that is not due to the fault or neglect of the Contractor.

§ 9.8.2 When the Contractor considers that the Work, or a portion thereof which the Owner agrees to accept separately, is substantially complete, the Contractor shall prepare and submit to the Architect a comprehensive list of items to be completed or corrected prior to final payment. Failure to include an item on such list does not alter the responsibility of the Contractor to complete all Work in accordance with the Contract Documents.

§ 9.8.3 Upon receipt of the Contractor's list, the Architect will make an inspection to determine whether the Work or designated portion thereof is substantially complete. If the Architect's inspection discloses any item, whether or not included on the Contractor's list, which is not sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work or designated portion thereof for its intended use, the Contractor shall, before issuance of the Certificate of Substantial Completion, complete or correct such item upon notification by the Architect. In such case, the Contractor shall then submit a request for another inspection by the Architect to determine Substantial Completion.

§ 9.8.4 When the Work or designated portion thereof is substantially complete, the Architect will prepare a Certificate of Substantial Completion that shall establish the date of Substantial Completion, shall establish responsibilities of the Owner and Contractor for security, maintenance, heat, utilities, damage to the Work and insurance, and shall fix the time within which the Contractor shall finish all items on the list accompanying the Certificate. Warranties required by the Contract Documents shall commence on the date of Substantial Completion of the Work or designated portion thereof unless otherwise provided in the Certificate of Substantial Completion.

§ 9.8.5 The Certificate of Substantial Completion shall be submitted to the Owner and Contractor for their written acceptance of responsibilities assigned to them in such Certificate. Upon such acceptance and consent of surety, if any, the Owner shall make payment of retainage applying to such Work or designated portion thereof. Such payment shall be adjusted for Work that is incomplete or not in accordance with the requirements of the Contract Documents.

## § 9.9 PARTIAL OCCUPANCY OR USE

§ 9.9.1 The Owner may occupy or use any completed or partially completed portion of the Work at any stage when such portion is designated by separate agreement with the Contractor, provided such occupancy or use is consented to by the insurer as required under Section 11.3.1.5 and authorized by public authorities having jurisdiction over the Project. Such partial occupancy or use may commence whether or not the portion is substantially complete, provided the Owner and Contractor have accepted in writing the responsibilities assigned to each of them for payments, retainage, if any, security, maintenance, heat, utilities, damage to the Work and insurance, and have agreed in writing concerning the period for correction of the Work and commencement of warranties required by the Contract Documents. When the Contractor considers a portion substantially complete, the Contractor shall prepare and submit a list to the Architect as provided under Section 9.8.2. Consent of the Contractor to partial occupancy or use shall not be unreasonably withheld. The stage of the progress of the Work shall be determined by written agreement between the Owner and Contractor or, if no agreement is reached, by decision of the Architect.

§ 9.9.2 Immediately prior to such partial occupancy or use, the Owner, Contractor and Architect shall jointly inspect the area to be occupied or portion of the Work to be used in order to determine and record the condition of the Work.

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§ 9.9.3 Unless otherwise agreed upon, partial occupancy or use of a portion or portions of the Work shall not constitute acceptance of Work not complying with the requirements of the Contract Documents.

#### § 9.10 FINAL COMPLETION AND FINAL PAYMENT

§ 9.10.1 Upon receipt of the Contractor's written notice that the Work is ready for final inspection and acceptance and upon receipt of a final Application for Payment, the Architect will promptly make such inspection and, when the Architect finds the Work acceptable under the Contract Documents and the Contract fully performed, the Architect will promptly issue a final Certificate for Payment stating that to the best of the Architect's knowledge, information and belief, and on the basis of the Architect's on-site visits and inspections, the Work has been completed in accordance with terms and conditions of the Contract Documents and that the entire balance found to be due the Contractor and noted in the final Certificate is due and payable. The Architect's final Certificate for Payment will constitute a further representation that conditions listed in Section 9.10.2 as precedent to the Contractor's being entitled to final payment have been fulfilled.

§ 9.10.2 Neither final payment nor any remaining retained percentage shall become due until the Contractor submits to the Architect (1) an affidavit that payrolls, bills for materials and equipment, and other indebtedness connected with the Work for which the Owner or the Owner's property might be responsible or encumbered (less amounts withheld by Owner) have been paid or otherwise satisfied, (2) a certificate evidencing that insurance required by the Contract Documents to remain in force after final payment is currently in effect and will not be canceled or allowed to expire until at least 30 days' prior written notice has been given to the Owner, (3) a written statement that the Contractor knows of no substantial reason that the insurance will not be renewable to cover the period required by the Contract Documents, (4) consent of surety, if any, to final payment and (5), if required by the Owner, other data establishing payment or satisfaction of obligations, such as receipts, releases and waivers of liens, claims, security interests or encumbrances arising out of the Contract, to the extent and in such form as may be designated by the Owner. If a Subcontractor refuses to furnish a release or waiver required by the Owner, the Contractor may furnish a bond satisfactory to the Owner to indemnify the Owner against such lien. If such lien remains unsatisfied after payments are made, the Contractor shall refund to the Owner all money that the Owner may be compelled to pay in discharging such lien, including all costs and reasonable attorneys' fees.

§ 9.10.3 If, after Substantial Completion of the Work, final completion thereof is materially delayed through no fault of the Contractor or by issuance of Change Orders affecting final completion, and the Architect so confirms, the Owner shall, upon application by the Contractor and certification by the Architect, and without terminating the Contract, make payment of the balance due for that portion of the Work fully completed and accepted. If the remaining balance for Work not fully completed or corrected is less than retainage stipulated in the Contract Documents, and if bonds have been furnished, the written consent of surety to payment of the balance due for that portion of the Work fully completed and accepted shall be submitted by the Contractor to the Architect prior to certification of such payment. Such payment shall be made under terms and conditions governing final payment, except that it shall not constitute a waiver of claims.

§ 9.10.4 The making of final payment shall constitute a waiver of Claims by the Owner except those arising from

- .1 liens, Claims, security interests or encumbrances arising out of the Contract and unsettled;
- .2 failure of the Work to comply with the requirements of the Contract Documents; or
- .3 terms of special warranties required by the Contract Documents.

§ 9.10.5 Acceptance of final payment by the Contractor, a Subcontractor or material supplier shall constitute a waiver of claims by that payee except those previously made in writing and identified by that payee as unsettled at the time of final Application for Payment.

#### ARTICLE 10 PROTECTION OF PERSONS AND PROPERTY

##### § 10.1 SAFETY PRECAUTIONS AND PROGRAMS

The Contractor shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the Contract.

##### § 10.2 SAFETY OF PERSONS AND PROPERTY

§ 10.2.1 The Contractor shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to

- .1 employees on the Work and other persons who may be affected thereby;
- .2 the Work and materials and equipment to be incorporated therein, whether in storage on or off the site, under care, custody or control of the Contractor or the Contractor's Subcontractors or Sub-subcontractors; and
- .3 other property at the site or adjacent thereto, such as trees, shrubs, lawns, walks, pavements, roadways, structures and utilities not designated for removal, relocation or replacement in the course of construction.

§ 10.2.2 The Contractor shall comply with and give notices required by applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities bearing on safety of persons or property or their protection from damage, injury or loss.

§ 10.2.3 The Contractor shall erect and maintain, as required by existing conditions and performance of the Contract, reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards, promulgating safety regulations and notifying owners and users of adjacent sites and utilities. The Contractor shall also be responsible for all measures necessary to protect any property adjacent to the Project and improvements therein. Any damage to such property or improvements shall be promptly repaired by the Contractor. § 10.2.4 When use or storage of explosives or other hazardous materials or equipment or unusual methods are necessary for execution of the Work, the Contractor shall exercise utmost care and carry on such activities under supervision of properly qualified personnel.

§ 10.2.5 The Contractor shall promptly remedy damage and loss (other than damage or loss insured under property insurance required by the Contract Documents) to property referred to in Sections 10.2.1.2 and 10.2.1.3 caused in whole or in part by the Contractor, a Subcontractor, a Sub-subcontractor, or anyone directly or indirectly employed by any of them, or by anyone for whose acts they may be liable and for which the Contractor is responsible under Sections 10.2.1.2 and 10.2.1.3, except damage or loss attributable to acts or omissions of the Owner or Architect or anyone directly or indirectly employed by either of them, or by anyone for whose acts either of them may be liable, and not attributable to the fault or negligence of the Contractor. The foregoing obligations of the Contractor are in addition to the Contractor's obligations under Section 3.18.

§ 10.2.6 The Contractor shall designate a responsible member of the Contractor's organization at the site whose duty shall be the prevention of accidents. This person shall be the Contractor's superintendent unless otherwise designated by the Contractor in writing to the Owner and Architect.

§ 10.2.7 The Contractor shall not permit any part of the construction or site to be loaded so as to cause damage or create an unsafe condition.

#### § 10.2.8 INJURY OR DAMAGE TO PERSON OR PROPERTY

If either party suffers injury or damage to person or property because of an act or omission of the other party, or of others for whose acts such party is legally responsible, written notice of such injury or damage, whether or not insured, shall be given to the other party within a reasonable time not exceeding 21 days after discovery. The notice shall provide sufficient detail to enable the other party to investigate the matter.

#### § 10.3 HAZARDOUS MATERIALS

*(Paragraphs deleted)*

§ 10.3.1 The Contractor is responsible for compliance with any requirements included in the Contract Documents regarding hazardous materials. This includes, but is not limited to, the demolition of two existing buildings containing Asbestos Containing Materials (ACMs) that must be abated by the Contractor as part of the demolition work and demolition of various site improvements to accommodate the new construction. The Contractor also acknowledges that the Project site may contain hazardous or contaminated material as classified by the U.S. Environmental Protection Agency and if any such conditions are encountered the Contractor will coordinate remediation activities including, administration, procedures, scheduling and processes required to be performed by the Contractor or its subcontractors in connection therewith within the Contract Sum.

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If the Contractor encounters a hazardous material or substance not identified for removal, abatement, or remediation in the Contract Documents and if reasonable precautions will be inadequate to prevent foreseeable bodily injury or death to persons resulting from a material or substance, including but not limited to asbestos or polychlorinated biphenyl (PCB), encountered on the site by the Contractor, the Contractor shall immediately, (i) stop Work in the affected area; (ii) notify the Owner and the Architect that the Work has been stopped including a detailed description of the condition encountered and the area affected; and (iii) proceed with Work in all unaffected areas taking all available precautions to avoid or minimize any adverse impact on the Project schedule or Contract Sum. § 10.3.2 Upon receipt of the Contractor's written notice, the Owner shall obtain the services of a licensed laboratory to verify the presence or absence of the material or substance reported by the Contractor and, in the event such material or substance is found to be present, the Contractor will solicit or negotiate competitive bids on behalf of the Owner to perform the required remediation work and provide administration of the work. When the material or substance has been rendered harmless, Work in the affected area shall resume upon written agreement of the Owner and Contractor. By Change Order, the Contract Time shall be extended appropriately and the Contract Sum shall be increased in the amount of the Contractor's reasonable costs of this additional work.

§ 10.3.3 To the fullest extent permitted by law, the Owner shall indemnify and hold harmless the Contractor, Subcontractors, Architect, Architect's consultants and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work in the affected area if in fact the material or substance presents the risk of bodily injury or death as described in Section 10.3.1 or if the disturbance of those materials would have caused the Contractor to be deemed a Potentially Responsible Party or otherwise be liable for the remediation of the material or substance under the Environmental Laws of the United States and has not been rendered harmless, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property, except to the extent that such damage, loss or expense is due to the fault or negligence of the party seeking indemnity. The Owner shall not be responsible under this Section 10.3 for materials or substances the Contractor brings to the site unless such materials or substances are required by the Contract Documents. The Owner shall be responsible for materials or substances required by the Contract Documents, except to the extent of the Contractor's fault or negligence in the use and handling of such materials or substances.

§ 10.3.4 The Contractor shall indemnify the Owner for the cost and expense the Owner incurs (1) for remediation of a material or substance the Contractor brings to the site and negligently handles, or (2) where the Contractor fails to perform its obligations under Section 10.3.1, except to the extent that the cost and expense are due to the Owner's fault or negligence.

§ 10.3.5 If, without negligence on the part of the Contractor, the Contractor is held liable by a government agency for the cost of remediation of a hazardous material or substance solely by reason of performing Work as required by the Contract Documents, the Owner shall reimburse this expense.

10.3.6 If, without negligence on the part of the Contractor, the Contractor is held liable for the cost of remediation of a hazardous material or substance solely by reason of performing Work as required by the Contract Documents, the Owner shall reimburse the Contractor for all cost and expense thereby incurred, including reasonable attorney's fees.

#### § 10.4 EMERGENCIES

In an emergency affecting safety of persons or property, the Contractor shall act, at the Contractor's discretion, to prevent threatened damage, injury or loss. Additional compensation or extension of time claimed by the Contractor on account of an emergency shall be determined as provided in Article 15 and Article 7.

### ARTICLE 11 INSURANCE AND BONDS

#### § 11.1 CONTRACTOR'S LIABILITY INSURANCE

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

- .1 Claims under workers' compensation, disability benefit and other similar employee benefit acts that are applicable to the Work to be performed;
- .2 Claims for damages because of bodily injury, occupational sickness or disease, or death of the Contractor's employees;

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

§ 11.1.2 The insurance required by Section 11.1.1 shall be written for not less than limits of liability specified in Exhibit I Insurance Requirements attached to the Agreement or required by law, whichever coverage is greater. Coverages, whether written on an occurrence or claims-made basis, shall be maintained without interruption from the date of commencement of the Work until the date of final payment and termination of any coverage required to be maintained after final payment, and, with respect to the Contractor's completed operations coverage, until the expiration of the period for correction of Work or for such other period for maintenance of completed operations coverage as specified in the Contract Documents.

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

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

## § 11.2 OWNER'S LIABILITY INSURANCE

*(Paragraph deleted)*

## § 11.3 PROPERTY INSURANCE

§ 11.3.1 As indicated in Exhibit I Insurance Requirements attached to the Agreement, the Contractor shall purchase and maintain, in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located, property insurance written on a builder's risk "all-risk" or equivalent policy form in the amount of the initial Contract Sum, plus value of subsequent Contract Modifications and cost of materials supplied or installed by others, comprising total value for the entire Project at the site on a replacement cost basis without optional deductibles. Such property insurance shall be maintained, unless otherwise provided in the Contract Documents or otherwise agreed in writing by all persons and entities who are beneficiaries of such insurance, until final payment has been made as provided in Section 9.10 or until no person or entity other than the Owner has an insurable interest in the property required by this Section 11.3 to be covered, whichever is later. This insurance shall include interests of the Owner, the Contractor, Subcontractors and Sub-subcontractors in the Project.

§ 11.3.1.1 Property insurance shall be on an "all-risk" or equivalent policy form and shall include, without limitation, insurance against the perils of fire (with extended coverage) and physical loss or damage including, without duplication of coverage, theft, vandalism, malicious mischief, collapse, earthquake, flood, windstorm, falsework, testing and startup, temporary buildings and debris removal including demolition occasioned by enforcement of any applicable legal requirements, and shall cover reasonable compensation for Architect's and Contractor's services and expenses required as a result of such insured loss.

§ 11.3.1.2 The Owner does not intend to purchase property insurance

The Contractor may effect additional insurance that will protect the interests of the Contractor, Subcontractors and Sub-subcontractors in the Work.

§ 11.3.1.3 If the property insurance requires deductibles, the Owner shall pay costs not covered because of such deductibles.

§ 11.3.1.4 This property insurance shall cover portions of the Work stored off the site, and also portions of the Work in transit.

§ 11.3.1.5 Partial occupancy or use in accordance with Section 9.9 shall not commence until the insurance company or companies providing property insurance have consented to such partial occupancy or use by endorsement or otherwise. The Owner and the Contractor shall take reasonable steps to obtain consent of the insurance company or companies and shall, without mutual written consent, take no action with respect to partial occupancy or use that would cause cancellation, lapse or reduction of insurance.

11.3.1.6 All insurance coverage procured by the Contractor shall be provided by insurance companies having policyholder ratings no lower than A-IX in the Best's Insurance Guide, latest edition. The Contractor may provide insurance pursuant to "blanket policies" of insurance which are reasonably satisfactory to the Owner.

11.3.1.7 If the Owner or the Contractor is damaged by the failure of the other party to purchase or maintain insurance required under this Article 11, then the party who failed to purchase or maintain the insurance shall bear all reasonable costs (including attorneys' fees and court and settlement expenses) properly attributable thereto.

### 11.3.3 LOSS OF USE INSURANCE

The Owner, at the Owner's option, may purchase and maintain such insurance as will insure the Owner against loss of use of the Owner's property due to fire or other hazards, however caused. The Owner waives all rights of action against the Contractor for loss of use of the Owner's property, including consequential losses due to fire or other hazards however caused.

*(Paragraphs deleted)*

### § 11.3.7 WAIVERS OF SUBROGATION

The Owner and Contractor waive all rights against (1) each other and any of their subcontractors, sub-subcontractors, agents and employees, each of the other, and (2) the Architect, Architect's consultants, separate contractors described in Article 6, if any, and any of their subcontractors, sub-subcontractors, agents and employees, for damages caused by fire or other causes of loss to the extent covered by property insurance obtained pursuant to this Section 11.3 or other property insurance applicable to the Work, except such rights as they have to proceeds of such insurance held by the Owner as fiduciary. The Owner or Contractor, as appropriate, shall require of the Architect, Architect's consultants, separate contractors described in Article 6, if any, and the subcontractors, sub-subcontractors, agents and employees of any of them, by appropriate agreements, written where legally required for validity, similar waivers each in favor of other parties enumerated herein. The policies shall provide such waivers of subrogation by endorsement or otherwise. A waiver of subrogation shall be effective as to a person or entity even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, did not pay the insurance premium directly or indirectly, and whether or not the person or entity had an insurable interest in the property damaged.

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

§ 11.3.9 If required in writing by a party in interest, the Owner as fiduciary shall, upon occurrence of an insured loss, give bond for proper performance of the Owner's duties. The cost of required bonds shall be charged against proceeds received as fiduciary. The Owner shall deposit in a separate account proceeds so received, which the Owner shall distribute in accordance with such agreement as the parties in interest may reach, or as determined in accordance with the method of binding dispute resolution selected in the Agreement between the Owner and Contractor. If after such loss no other special agreement is made and unless the Owner terminates the Contract for convenience, replacement of

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damaged property shall be performed by the Contractor after notification of a Change in the Work in accordance with Article 7.

§ 11.3.10 The Owner as fiduciary shall have power to adjust and settle a loss with insurers unless one of the parties in interest shall object in writing within five days after occurrence of loss to the Owner's exercise of this power; if such objection is made, the dispute shall be resolved in the manner selected by the Owner and Contractor as the method of binding dispute resolution in the Agreement. If the Owner and Contractor have selected arbitration as the method of binding dispute resolution, the Owner as fiduciary shall make settlement with insurers or, in the case of a dispute over distribution of insurance proceeds, in accordance with the directions of the arbitrators.

#### § 11.4 PERFORMANCE BOND AND PAYMENT BOND

11.4.1 The Contractor shall furnish a performance bond conditioned on the faithful performance of the Work in accordance with the plans, specifications, and contract documents and a payment bond for the protection and use by payment bond beneficiaries who have a direct contractual relationship with the Contractor or a subcontractor to supply public work labor or material. Each bond shall be for 100% of the guaranteed maximum price and shall comply with all requirements of Texas Government Code Chapter 2253 and Texas Insurance Code Chapter 3503. The bonds may be executed only by a surety company that is authorized to write surety bonds in the State of Texas. If the surety's obligation is in an amount that exceeds 10 percent of the surety company's capital and surplus, the Owner requires, as a condition of accepting the obligation, written certification that the surety company has reinsured the portion of the risk that exceeds 10 percent of the surety company's capital and surplus with one or more reinsurers who are authorized, accredited, or trusted to engage in business in the State of Texas. Owner also requires that the corporate surety tender an agent who is a resident of El Paso County to whom any required notices may be delivered and on whom process may be served in matters arising out of the suretyship. The bonds required under this section must clearly and prominently display on the bond or on an attachment to the bond the name, mailing address, physical address, and telephone number, including the area code, of the surety company to which any notice of claim should be sent, or the toll-free telephone number maintained by the Texas Department of Insurance under Texas Insurance Code Chapter 521, and a statement that the address of the surety company to which any notice of claim should be sent may be obtained from the Texas Department of Insurance by calling the toll-free telephone number.

11.4.2 Pursuant to Texas Government Code Chapter 2267, the Contractor shall deliver the bonds not later than the 10th day after the date the Contractor executes the contract unless the Contractor furnishes a bid bond acceptable to the Owner to ensure that the Contractor will furnish the required performance and payment bonds when a guaranteed maximum price is established. If a fixed contract amount or guaranteed maximum price has not been determined at the time the contract is awarded, the penal sums of the performance and payment bonds delivered to the Owner must each be in an amount equal to the Construction Budget as specified in the request for proposals.

*(Paragraphs deleted)*

#### ARTICLE 12 UNCOVERING AND CORRECTION OF WORK

##### § 12.1 UNCOVERING OF WORK

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

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

##### § 12.2 CORRECTION OF WORK

###### § 12.2.1 BEFORE OR AFTER SUBSTANTIAL COMPLETION

The Contractor shall promptly correct Work rejected by the Architect or failing to conform to the requirements of the Contract Documents, whether discovered before or after Substantial Completion and whether or not fabricated, installed or completed. Costs of correcting such rejected Work, including additional testing and inspections, the cost of

uncovering and replacement, and compensation for the Architect's services and expenses made necessary thereby, shall be at the Contractor's expense.

#### § 12.2.2 AFTER SUBSTANTIAL COMPLETION

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

§ 12.2.2.2 The one-year period for correction of Work shall be extended with respect to portions of Work first performed after Substantial Completion by the period of time between Substantial Completion and the actual completion of that portion of the Work.

§ 12.2.2.3 The one-year period for correction of Work shall not be extended by corrective Work performed by the Contractor pursuant to this Section 12.2.

§ 12.2.3 The Contractor shall remove from the site portions of the Work that are not in accordance with the requirements of the Contract Documents and are neither corrected by the Contractor nor accepted by the Owner.

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

§ 12.2.5 Nothing contained in this Section 12.2 shall be construed to establish a period of limitation with respect to other obligations the Contractor has under the Contract Documents. Establishment of the one-year period for correction of Work as described in Section 12.2.2 relates only to the specific obligation of the Contractor to correct the Work, and has no relationship to the time within which the obligation to comply with the Contract Documents may be sought to be enforced, nor to the time within which proceedings may be commenced to establish the Contractor's liability with respect to the Contractor's obligations other than specifically to correct the Work.

#### § 12.3 ACCEPTANCE OF NONCONFORMING WORK

If the Owner prefers to accept Work that is not in accordance with the requirements of the Contract Documents, the Owner may do so instead of requiring its removal and correction, in which case the Contract Sum will be reduced as appropriate and equitable. Such adjustment shall be effected whether or not final payment has been made.

### ARTICLE 13 MISCELLANEOUS PROVISIONS

#### § 13.1 GOVERNING LAW

The Contract shall be governed by the law of the place where the Project is located

#### § 13.2 SUCCESSORS AND ASSIGNS

§ 13.2.1 The Owner and Contractor respectively bind themselves, their partners, successors, assigns and legal representatives to covenants, agreements and obligations contained in the Contract Documents. Except as provided in Section 13.2.2, neither party to the Contract shall assign the Contract as a whole without written consent of the other. If either party attempts to make such an assignment without such consent, that party shall nevertheless remain legally responsible for all obligations under the Contract.

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§ 13.2.2 The Owner may, without consent of the Contractor, assign the Contract to a lender providing construction financing for the Project, if the lender assumes the Owner's rights and obligations under the Contract Documents. The Contractor shall execute all consents reasonably required to facilitate such assignment.

### § 13.3 WRITTEN NOTICE

Written notice shall be deemed to have been duly served if delivered in person to the individual, to a member of the firm or entity, or to an officer of the corporation for which it was intended; or if delivered at, or sent by registered or certified mail or by courier service providing proof of delivery to, the last business address known to the party giving notice.

### § 13.4 RIGHTS AND REMEDIES

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

§ 13.4.2 No action or failure to act by the Owner, Architect or Contractor shall constitute a waiver of a right or duty afforded them under the Contract, nor shall such action or failure to act constitute approval of or acquiescence in a breach there under, except as may be specifically agreed in writing.

### § 13.5 TESTS AND INSPECTIONS

§ 13.5.1 The responsibility of the parties for testing services is set forth in the Agreement in Testing and Inspection Exhibit K attached to the Agreement. Failure of the Owner to timely or properly perform its testing obligations shall not relieve the Contractor and its Subcontractors from their obligations to perform quality control. Tests, inspections and approvals of portions of the Work shall be made as required by the Contract Documents and by applicable laws, statutes, ordinances, codes, rules and regulations or lawful orders of public authorities. Unless otherwise provided, the Contractor shall make arrangements for such tests, inspections and approvals with an independent testing laboratory or entity acceptable to the Owner, or with the appropriate public authority, and shall bear all related costs of tests, inspections and approvals. The Contractor shall give the Architect timely notice of when and where tests and inspections are to be made so that the Architect may be present for such procedures. The Owner shall bear costs of (1) tests, inspections or approvals that do not become requirements until after bids are received or negotiations concluded, and (2) tests, inspections or approvals where building codes or applicable laws or regulations prohibit the Owner from delegating their cost to the Contractor.

§ 13.5.2 If the Architect, Owner or public authorities having jurisdiction determine that portions of the Work require additional testing, inspection or approval not included under Section 13.5.1, the Architect will, upon written authorization from the Owner, instruct the Contractor to make arrangements for such additional testing, inspection or approval by an entity acceptable to the Owner, and the Contractor shall give timely notice to the Architect of when and where tests and inspections are to be made so that the Architect may be present for such procedures. Such costs, except as provided in Section 13.5.3, shall be at the Owner's expense.

§ 13.5.3 If such procedures for testing, inspection or approval under Sections 13.5.1 and 13.5.2 reveal failure of the portions of the Work to comply with requirements established by the Contract Documents, all costs made necessary by such failure including those of repeated procedures and compensation for the Architect's services and expenses shall be at the Contractor's expense.

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

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

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

### § 13.6 INTEREST

*(Paragraph deleted)*

See Article 8.2 of the Agreement (AIA Document A133-2009).

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### § 13.7 TIME LIMITS ON CLAIMS

The Contractor shall commence all claims and causes of action, whether in contract, tort, breach of warranty or otherwise, against the Owner arising out of or related to the Contract in accordance with the requirements of the final dispute resolution method selected in the Agreement.

## ARTICLE 14 TERMINATION OR SUSPENSION OF THE CONTRACT

### § 14.1 TERMINATION BY THE CONTRACTOR

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

- .1 Issuance of an order of a court or other public authority having jurisdiction that requires all Work to be stopped;
- .2 An act of government, such as a declaration of national emergency that requires all Work to be stopped;

*(Paragraphs deleted)*

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

§ 14.1.3 If one of the reasons described in Section 14.1.1 or 14.1.2 exists, the Contractor may, upon seven days' written notice to the Owner and Architect, terminate the Contract and recover from the Owner payment for Work executed, including reasonable overhead and profit, costs incurred by reason of such termination, and damages.

§ 14.1.4 If the Work is stopped for a period of 60 consecutive days through no act or fault of the Contractor or a Subcontractor or their agents or employees or any other persons performing portions of the Work under contract with the Contractor because the Owner has repeatedly failed to fulfill the Owner's obligations under the Contract Documents with respect to matters important to the progress of the Work, the Contractor may, upon seven additional days' written notice to the Owner and the Architect, terminate the Contract and recover from the Owner as provided in Section 14.1.3.

### § 14.2 TERMINATION BY THE OWNER FOR CAUSE

§ 14.2.1 The Owner may terminate the Contract if the Contractor

- .1 repeatedly refuses or fails to supply enough properly skilled workers or proper materials;
- .2 fails to make payment to Subcontractors for materials or labor in accordance with the respective agreements between the Contractor and the Subcontractors;
- .3 repeatedly disregards applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of a public authority; or
- .4 otherwise is guilty of substantial breach of a provision of the Contract Documents.

§ 14.2.2 When any of the above reasons exist, the Owner may without prejudice to any other rights or remedies of the Owner and after giving the Contractor and the Contractor's surety, if any, seven days' written notice, terminate employment of the Contractor and may, subject to any prior rights of the surety:

- .1 Exclude the Contractor from the site and take possession of all materials, equipment, tools, and construction equipment and machinery thereon owned by the Contractor;
- .2 Accept assignment of subcontracts pursuant to Section 5.4; and
- .3 Finish the Work by whatever reasonable method the Owner may deem expedient. Upon written request of the Contractor, the Owner shall furnish to the Contractor a detailed accounting of the costs incurred by the Owner in finishing the Work.

§ 14.2.3 When the Owner terminates the Contract for one of the reasons stated in Section 14.2.1, the Contractor shall not be entitled to receive further payment until the Work is finished.

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§ 14.2.4 If the unpaid balance of the Contract Sum exceeds costs of finishing the Work, including compensation for the Architect's services and expenses made necessary thereby, and other damages incurred by the Owner and not expressly waived, such excess shall be paid to the Contractor. If such costs and damages exceed the unpaid balance, the Contractor shall pay the difference to the Owner. The amount to be paid to the Contractor or Owner, as the case may be, shall be certified by the Initial Decision Maker, upon application, and this obligation for payment shall survive termination of the Contract.

#### § 14.3 SUSPENSION BY THE OWNER FOR CONVENIENCE

§ 14.3.1 The Owner may, without cause, order the Contractor in writing to suspend, delay or interrupt the Work in whole or in part for such period of time as the Owner may determine.

§ 14.3.2 The Contract Sum and Contract Time shall be adjusted for increases in the cost and time caused by suspension, delay or interruption as described in Section 14.3.1. Adjustment of the Contract Sum shall include profit. No adjustment shall be made to the extent

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

#### § 14.4 TERMINATION BY THE OWNER FOR CONVENIENCE

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

§ 14.4.2 Upon receipt of written notice from the Owner of such termination for the Owner's convenience, the Contractor shall

- .1 cease operations as directed by the Owner in the notice;
- .2 take actions necessary, or that the Owner may direct, for the protection and preservation of the Work; and
- .3 except for Work directed to be performed prior to the effective date of termination stated in the notice, terminate all existing subcontracts and purchase orders and enter into no further subcontracts and purchase orders.

§ 14.4.3 In case of such termination for the Owner's convenience, the Contractor shall be entitled to receive payment for Work executed, and costs incurred by reason of such termination, however the amount payable to the Contractor pursuant to Sections 14.2 and 14.4 of A201-2007 shall not exceed the amount the Contractor would otherwise have received pursuant to Sections 10.1.2 and 10.1.3 of the Agreement (AIA Document A133-2009).

### ARTICLE 15 CLAIMS AND DISPUTES

#### § 15.1 CLAIMS

Claims, disputes or other matters in question between the Owner and Contractor arising prior to the commencement of the Construction Phase shall be resolved pursuant to Article 9 of AIA A133-2009. Claims, disputes or other matters in question between the Owner and Contractor which arise subsequent to the commencement of the Construction Phase shall be resolved pursuant to this Article 15.

##### § 15.1.1 DEFINITION

A Claim is a demand or assertion by one of the parties seeking, as a matter of right, payment of money, or other relief with respect to the terms of the Contract. The term "Claim" also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract. The responsibility to substantiate Claims shall rest with the party making the Claim.

##### § 15.1.2 NOTICE OF CLAIMS

Claims by either the Owner or Contractor must be initiated by written notice to the other party and to the Initial Decision Maker with a copy sent to the Architect, if the Architect is not serving as the Initial Decision Maker. Claims by either party must be initiated within 10 days after occurrence of the event giving rise to such Claim or within 10 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later, provided, however, that the claimant shall use its best efforts to furnish the other party, as expeditiously as possible, with notice of any Claim including, without limitation, those in connection with concealed or unknown conditions, once such Claim is

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recognized, and shall cooperate with the party against whom the Claim is made in any effort to mitigate the alleged or potential damages, delay or other adverse consequences arising out of the condition which is the cause of such a Claim.

#### § 15.1.3 CONTINUING CONTRACT PERFORMANCE

Pending final resolution of a Claim, except as otherwise agreed in writing or as provided in Section 9.7 and Article 14, the Contractor shall proceed diligently with performance of the Contract and the Owner shall continue to make payments in accordance with the Contract Documents. The Architect will prepare Change Orders and issue Certificates for Payment in accordance with the decisions of the Initial Decision Maker.

#### § 15.1.4 CLAIMS FOR ADDITIONAL COST

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

#### § 15.1.5 CLAIMS FOR ADDITIONAL TIME

§ 15.1.5.1 If the Contractor wishes to make a Claim for an increase in the Contract Time, written notice as provided herein shall be given. The Contractor's Claim shall include an estimate of cost and of probable effect of delay on progress of the Work. In the case of a continuing delay, only one Claim is necessary.

§ 15.1.5.2 If adverse weather conditions are the basis for a Claim for additional time, such Claim shall be documented by data substantiating that weather conditions were abnormal for the period of time, could not have been reasonably anticipated and had an adverse effect on the scheduled construction. Normal conditions shall be the average of the previous five (5) years.

#### § 15.1.6 CLAIMS FOR CONSEQUENTIAL DAMAGES

The Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract. This mutual waiver includes

- .1 damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and
- .2 damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit except anticipated profit arising directly from the Work.

This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination in accordance with Article 14. Nothing contained in this Section 15.1.6 shall be deemed to preclude an award of liquidated damages, when applicable, in accordance with the requirements of the Contract Documents.

#### § 15.2 INITIAL DECISION

§ 15.2.1 Claims, excluding those arising under Sections 10.3, 10.4, 11.3.9, and 11.3.10, shall be referred to the Initial Decision Maker for initial decision. The Architect will serve as the Initial Decision Maker, unless otherwise indicated in the Agreement. Except for those Claims excluded by this Section 15.2.1, an initial decision shall be required as a condition precedent to mediation of any Claim arising prior to the date final payment is due, unless 30 days have passed after the Claim has been referred to the Initial Decision Maker with no decision having been rendered. Unless the Initial Decision Maker and all affected parties agree, the Initial Decision Maker will not decide disputes between the Contractor and persons or entities other than the Owner.

§ 15.2.2 The Initial Decision Maker will review Claims and within ten days of the receipt of a Claim 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) reject the Claim in whole or in part, (3) approve the Claim, (4) suggest a compromise, or (5) advise the parties that the Initial Decision Maker is unable to resolve the Claim if the Initial Decision Maker lacks sufficient information to evaluate the merits of the Claim or if the Initial Decision Maker concludes that, in the Initial Decision Maker's sole discretion, it would be inappropriate for the Initial Decision Maker to resolve the Claim.

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§ 15.2.3 In evaluating Claims, the Initial Decision Maker 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 Initial Decision Maker in rendering a decision. The Initial Decision Maker may request the Owner to authorize retention of such persons at the Owner's expense.

§ 15.2.4 If the Initial Decision Maker requests a party to provide a response to a Claim or to furnish additional supporting data, such party shall respond, within ten days after receipt of such request, and shall either (1) provide a response on the requested supporting data, (2) advise the Initial Decision Maker when the response or supporting data will be furnished or (3) advise the Initial Decision Maker that no supporting data will be furnished. Upon receipt of the response or supporting data, if any, the Initial Decision Maker will either reject or approve the Claim in whole or in part.

§ 15.2.5 The Initial Decision Maker will render an initial decision approving or rejecting the Claim, or indicating that the Initial Decision Maker is unable to resolve the Claim. This initial decision shall (1) be in writing; (2) state the reasons therefor; and (3) notify the parties and the Architect, if the Architect is not serving as the Initial Decision Maker, of any change in the Contract Sum or Contract Time or both. The initial decision shall be final and binding on the parties but subject to mediation and, if the parties fail to resolve their dispute through mediation, to binding dispute resolution.

§ 15.2.6 Either party may file for mediation of an initial decision at any time, subject to the terms of Section 15.2.6.1.

§ 15.2.6.1 Either party may, within 10 days from the date of an initial decision, demand in writing that the other party file for mediation within 30 days of the initial decision. If such a demand is made and the party receiving the demand fails to file for mediation within the time required, then both parties waive their rights to mediate or pursue binding dispute resolution proceedings with respect to the initial decision.

§ 15.2.7 In the event of a Claim against the Contractor, the Owner may, but is not obligated to, notify the surety, if any, of the nature and amount of the Claim. If the Claim relates to a possibility of a Contractor's default, the Owner may, but is not obligated to, notify the surety and request the surety's assistance in resolving the controversy.

§ 15.2.8 If a Claim relates to or is the subject of a mechanic's lien, the party asserting such Claim may proceed in accordance with applicable law to comply with the lien notice or filing deadlines.

### § 15.3 MEDIATION

§ 15.3.1 Claims, disputes, or other matters in controversy arising out of or related to the Contract except those waived as provided for in Sections 9.10.4, 9.10.5, and 15.1.6 shall be subject to mediation as a condition precedent to filing a lawsuit with respect to the controversy or claim.

§ 15.3.2 A request for mediation shall be made in writing, delivered to the other party to the Contract, and filed with the person or entity administering the mediation. § 15.3.3 The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in the place where the Project is located, unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

15.3.4 Any disputes which cannot be successfully resolved through mediation shall be settled in the State of Texas in a court having jurisdiction over the matter.

15.3.5 Pending resolution of any controversy claim or dispute, the Contractor shall proceed diligently with the performance of the work under the agreement.

*(Paragraphs deleted)*

# Additions and Deletions Report for AIA<sup>®</sup> Document A201<sup>™</sup> – 2007

This Additions and Deletions Report, as defined on page 1 of the associated document, reproduces below all text the author has added to the standard form AIA document in order to complete it, as well as any text the author may have added to or deleted from the original AIA text. Added text is shown underlined. Deleted text is indicated with a horizontal line through the original AIA text.

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## PAGE 1

El Paso Ballpark

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The City of El Paso  
2 Civic Center Plaza  
El Paso, TX 79901

...

Populous 300 Wyandotte, Suite 200  
Kansas City, Missouri 64105

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The Contract Documents are enumerated in the Agreement between the Owner and Contractor (hereinafter the Agreement) and consist of the Agreement, Conditions of the Contract (General, Supplementary and other Conditions), Drawings, Specifications, the Request for Proposals issued by the Owner in anticipation of receiving bids or proposals, the invitation to bid, any Addenda to the Request for Proposals issued by Owner, the Contractor's bid or proposal, Addenda relation to bidding requirements, Addenda issued prior to execution of the ~~Contract, Agreement,~~ other documents listed in the Agreement and Modifications issued after execution of the ~~Contract, Agreement.~~ A Modification is (1) a written amendment to the ~~Contract, Agreement~~ signed by both parties, (2) a Change Order, (3) a Construction Change Directive or (4) a written order for a minor change in the Work issued by the Architect. ~~Unless specifically enumerated in the Agreement, the Contract Documents do not include the advertisement or invitation to bid, Instructions to Bidders, sample forms, other information furnished by the Owner in anticipation of receiving bids or proposals, the Contractor's bid or proposal, or portions of Addenda relating to bidding requirements.~~

...

§ 1.2.1 The intent of the Contract Documents is to include all items necessary for the proper execution and completion of the Work by the Contractor. The Contract Documents are complementary, and what is required by one shall be as binding as if required by all; ~~performance by the Contractor shall be required only to the extent consistent with the Contract Documents and reasonably inferable from them as being necessary to produce the indicated results.~~ all, provided, however, the enumeration of any portion of the Work shall not be construed to exclude other items contemplated by or reasonably inferable from the Contract Documents.

§ 1.2.2 ~~Organization of the Specifications into divisions, sections and articles, and arrangement of Drawings shall not control the Contractor in dividing the Work among Subcontractors or in establishing the extent of Work to be performed by any trade.~~

Contractor shall coordinate and complete the various parts of the Work so that no part shall be left in an unfinished or incomplete condition. Contractor accepts the relationship of trust and confidence established between it and Owner by this Contract. Contractor covenants and agrees with Owner to perform its services with the professional skill and care ordinarily provided by a Construction Manager practicing in the same or similar locality under the same and similar circumstances and to cooperate with Owner in furthering the best interests of Owner and to complete the Project in the most expedient and efficient manner possible.

§ 1.2.3 Unless otherwise stated in the Contract Documents, words that have well-known technical or construction industry meanings are used in the Contract Documents in accordance with such recognized meanings. Generally, the Specifications describe work which cannot be readily indicated on the Drawings and indicate types, qualities and locations of installation of the various materials and equipment required for the Work. It is not intended that the specifications will mention every item of Work which can not be adequately shown on the Drawings nor is it intended that the Drawings show all items of Work described or required by the specifications even if they are of such nature that they could have been shown thereon. All materials or labor for Work which is shown on the Drawings or is reasonably inferable therefrom as being necessary to produce a finished job shall be provided by Contractor whether or not the Work is expressly covered in the Drawings and Specifications.

§ 1.2.4 By execution of the Agreement, Contractor represents that (i) Contractor has visited the Site, become familiar with local and all special conditions under which the Work is to be performed, understands what is required to enable Contractor to coordinate the Work with the efforts of the city and public utilities performing work in the vicinity of the site, (ii) Contractor has checked with all public utilities having facilities at or near the Site, and understands what is required to not interrupt utility services to the existing site and other buildings in the vicinity of the Site, (iii) Contractor has carefully examined the Drawings and Specifications, (iv) the Drawings and Specifications are sufficient in content and detail, to complete the Work in accordance with the Contract Documents and to enable Contractor to deliver, within the Contract Price, the Project, fully completed with all appurtenant improvements as shown or specified in or reasonably inferable from the Contract Documents without the need for any change to the Contract Sum specified in Article 4 of the Agreement. Other than as provided in Article 15, contractor shall not be entitled to extra or additional compensation for performance of Work to deliver the Project as contemplated by the Contract Documents.

§ 1.2.5 By execution of the Agreement, Contractor represents and warrants that it has examined all land adjoining and surrounding the site (including, for the purposes hereof, streets and sidewalks, and buildings adjoining the Site) and has ascertained the materials and construction of the buildings and all existing conditions of such premises and the buildings thereon, and Contractor shall be governed thereby for the necessary, thorough, safe and satisfactory execution of all Work called for herein, whether indicated on drawings or specified, or not, and all work and protective measures necessary to keep and leave the said premises and buildings in the same condition as they were before commencing work shall be done by contractor without any addition to the Contract Price. Wherever any parts of adjoining premises interfere with or are interfered with by the Work to be performed hereunder, the Contractor shall make whatever changes are made necessary thereby, whether shown on the Drawings, called for in the Specifications or not shown or not called for all in conformance with good construction practice and without harm to the buildings in the vicinity of the site or premises at no change to the Contract Price. Contractor will submit to Architect its intended actions to resolve same for Architect's information prior to undertaking the Work. Contractor shall not interfere with or otherwise impair the ability of Owner or the public to use any buildings in the vicinity of the Site.

§ 1.2.6 Organization of the Specifications into divisions, sections and articles, and arrangement of Drawings shall not control the Contractor in dividing the Work among Subcontractors or in establishing the extent of Work to be performed by any trade.

§ 1.2.7 Unless otherwise stated in the Contract Documents, words that have well-known technical or construction industry meanings are used in the Contract Documents in accordance with such recognized meanings.

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§ 1.5.1 The Architect and the Architect's consultants shall be deemed the authors and owners of their respective Instruments of Service, including the Drawings and Specifications, and will retain all common law, statutory and other reserved rights, including copyrights. The Contractor, Subcontractors, Sub-subcontractors, and material or equipment suppliers shall not Drawings, Specifications and other documents, including those in electronic form, prepared with

~~respect to the Project are Instruments of Service through which the Work to be executed by the Contractor is described. The Contractor may retain one record set. Neither the Contractor nor any Subcontractor, Sub-subcontractor or material or equipment supplier shall own or claim a copyright in the Instruments of Service. Submittal or distribution to meet official regulatory requirements or for other purposes in connection with this Project is not to be construed as publication in derogation of the Architect's or Architect's consultants' reserved rights.~~

Drawings, Specifications and other documents prepared with respect to the Project. All copies of the Drawings, Specifications and other documents, except the Contractor's record set, shall be returned or suitably accounted for to the Owner on request, upon completion of the Work. The Drawings, Specifications and other documents prepared and copies thereof furnished to the Contractor, are for use solely with respect to this Project. They are not to be used by the Contractor or any Subcontractor, Sub-subcontractor or material or equipment supplier on other projects or for additions to this Project outside the scope of the Work without the specific written consent of the Owner and Architect.

§ 1.5.2 The Contractor, Subcontractors, Sub-subcontractors and material or equipment suppliers are authorized to use and reproduce the Instruments of Service provided to them solely and exclusively for execution of the Work. All copies made under this authorization shall bear the copyright notice, if any, shown on the Instruments of Service. The Contractor, Subcontractors, Sub-subcontractors, and material or equipment suppliers may not use the Instruments of Service on other projects or for additions to this Project outside the scope of the Work without the specific written consent of the Owner, Architect and the Architect's consultants.

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§ 2.1.1 The Owner is the person or entity identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number. The Owner shall designate in writing a representative who shall have express authority to ~~bind~~ secure approvals on behalf of the Owner with respect to all matters requiring the Owner's approval or authorization. Except as otherwise provided in Section 4.2.1, the Architect does not have such authority. The term "Owner" means the Owner or the Owner's authorized representative.

...

~~§ 2.2.2 Except for permits and fees that are the responsibility of the Contractor under the Contract Documents, including those required under Section 3.7.1, the Owner shall secure and pay for necessary~~ The Contractor shall secure and the Owner shall pay for all necessary permits, approvals, easements, assessments and charges required for construction, use or occupancy of permanent structures or for permanent changes in existing facilities. The Contractor shall obtain the building permit on behalf of the Owner and shall secure and the Owner shall pay for water tap fees, street closure permits, and permits required for delivery of materials. The Owner shall not be responsible to pay for any licenses required to be maintained by Contractor and its subcontractors (including any and all trade licenses that Contractor and any Subcontractors may be required to obtain in connection with the performance of the Work (or any portion thereof). § 2.2.3 The Owner shall furnish surveys describing physical characteristics, legal limitations and utility locations for the site of the Project, and a legal description of the site. The Contractor shall be entitled to rely on the accuracy of information furnished by the Owner but shall exercise proper precautions relating to the safe performance of the Work.

~~§ 2.2.3 The Owner shall furnish surveys describing physical characteristics, legal limitations and utility locations for the site of the Project, and a legal description of the site. The Contractor shall be entitled to rely on the accuracy of information furnished by the Owner but shall exercise proper precautions relating to the safe performance of the Work.~~

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## 2.5 EXTENT OF OWNER'S RIGHTS

2.5.1 The rights stated in this Article 2 and elsewhere in the Contract Documents are cumulative and not in limitation of any rights of the Owner which are (1) granted in the Contract Documents, (2) at law, or (3) in equity.

2.5.2 Except as expressly set forth in the Contract Documents, and as actually exercised by the Owner, in no event shall the Owner have control over, charge of, or any responsibility for construction means, methods, techniques, sequences or procedures or for safety precautions and programs in connection with the Work.

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~~The Contractor shall pay sales, consumer, use and similar taxes for the Work provided by the Contractor that are legally enacted when bids are received or negotiations concluded, whether or not yet effective or merely scheduled to go into effect.~~  
project is tax exempt as indicated in Exhibit J-Tax Exempt Status attached to the Agreement.

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§ 3.7.1 Unless otherwise provided in the Contract Documents, the Contractor shall secure and the Owner shall pay for the building permit as well as for some other permits, fees, licenses, and inspections by government agencies necessary for proper execution and completion of the Work that are customarily secured after execution of the Contract and legally required at the time bids are received or negotiations concluded. A list of the permit fees to be paid by Owner is attached as Exhibit R – Permit Fees to be paid by Owner.

§ 3.7.2 The Contractor shall comply with and give notices required by applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities applicable to performance of the Work. The Contractor shall procure and obtain all bonds of the Contractor required by the Owner or by the municipality in which the Project is located or by any other public or private body with jurisdiction over the Project. In connection with such bonds, the Contractor shall prepare all applications, supply all necessary back-up material and furnish the surety with any required personal undertakings.

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§ 3.7.4 **Concealed or Unknown Conditions.** If the Contractor encounters conditions at the site that are (1) subsurface or otherwise concealed physical conditions that differ materially from those indicated in the Contract Documents or (2) unknown physical conditions of an unusual nature, that differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents, the Contractor shall promptly provide notice to the Owner and the Architect before conditions are disturbed and in no event later than 21-10 days after first observance of the conditions. The Architect will promptly investigate such conditions and, if the Architect determines that they differ materially and cause an increase or decrease in the Contractor's cost of, or time required for, performance of any part of the Work, will recommend an equitable adjustment in the Contract Sum or Contract Time, or both. If the Architect determines that the conditions at the site are not materially different from those indicated in the Contract Documents and that no change in the terms of the Contract is justified, the Architect shall promptly notify the Owner and Contractor in writing, stating the reasons. If either party disputes the Architect's determination or recommendation, that party may proceed as provided in Article 15.

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§ 3.9.2 The Contractor, as soon as practicable after award of the Contract, shall furnish in writing to the Owner through the Architect the name and qualifications of a proposed superintendent. The Architect may reply within 14-3 days to the Contractor in writing stating (1) whether the Owner or the Architect has reasonable objection to the proposed superintendent or (2) that the Architect requires additional time to review. Failure of the Architect to reply within the 14-3 day period shall constitute notice of no reasonable objection.

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§ 3.9.4 The Contractor will assign the key personnel to complete the work as delineated in Exhibit C Key Personnel and Staffing attached to the Agreement. The Contractor will not substitute these key personnel without the Owner's prior written permission. If requested by the Owner, the Contractor will replace these key personnel, subcontractors' personnel or any other personnel employed by the Contractor with equally capable personnel, subject to the Owner's prior approval.

§ 3.10.1 The Contractor, promptly after being awarded the Contract, shall prepare and submit for the Owner's and Architect's information a Contractor's construction schedule for the Work. The schedule shall not exceed time limits current under the Contract Documents, shall be revised at appropriate intervals as required by the conditions of the Work and Project, shall be related to the entire Project to the extent required by the Contract Documents, and shall provide for expeditious and practicable execution of the Work. Contractor will maintain and present a detailed three week look ahead schedule at each weekly Owner's and/or Architect's meeting.

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3.10.4 The construction schedule shall be in a detailed format satisfactory to the Owner which shall also: (1) provide a graphic representation of all significant activities and events that will occur during performance of the Work; (2) identify each phase of construction and occupancy; and (3) set forth dates that are critical in ensuring the timely and orderly completion of the Work in accordance with the requirements of the Contract Documents (hereinafter referred to as "Milestone Dates"). Upon review and acceptance by the Owner of the Milestone Dates, the construction schedule shall be deemed part of the Contract Documents and attached to the Agreement (as Exhibit D thereto). If not accepted, the construction schedule shall be promptly revised by the Contractor in accordance with the recommendations of the Owner and re-submitted for acceptance. The Contractor shall monitor the progress of the Work for conformance with the requirements of the construction schedule and shall promptly notify the Owner of any delays or potential delays. The accepted construction schedule shall be updated to reflect actual conditions (sometimes referred to in this Agreement as "Progress Reports") as set forth in Section 3.10.1 or if requested by the Owner. In the event any Progress Report indicates any delays, the Contractor shall propose an affirmative plan to correct the delay, including overtime and/or additional labor, if necessary. In no event shall any Progress Report constitute an adjustment in the Contract Time, any Milestone Date or the Contract Sum unless any such adjustment is agreed to by the Owner and authorized pursuant to Change Order.

3.10.5 In the event the Owner determines that the performance of the Work, as of a Milestone Date, has not progressed or reached the level of completion required by the Contract Documents, the Owner shall have the right to order the Contractor to take corrective measures necessary to expedite the progress of construction, including, without limitation, (1) working additional shifts or overtime, (2) supplying additional manpower, equipment, and facilities and (3) other similar measures (hereinafter referred to collectively as "Extraordinary Measures"). Such Extraordinary Measures shall continue until the progress of the Work complies with the stage of completion required by the Contract Documents. The Owner's right to require Extraordinary Measures is solely for the purpose of ensuring the Contractor's compliance with the construction schedule.

.1 The Contractor shall not be entitled to an adjustment in the Contract Sum in connection with Extraordinary Measures required by the Owner under or pursuant to this Section 3.10.5 (provided, however, that, if the Contractor may be reimbursed for Extraordinary Measures from within the Contract Sum without an adjustment to the Contract Sum, the Contractor may be so reimbursed).

.2 The Owner may exercise the rights furnished the Owner under or pursuant to this Section 3.10.5 as frequently as the Owner deems necessary to ensure that the Contractor's performance of the Work will comply with any Milestone Date or completion date set forth in the Contract Documents.

3.10.6 The Owner shall have the right to direct a postponement or rescheduling of any date or time for the performance of any part of the Work. The Contractor shall, upon the Owner's request, reschedule any portion of the Work. Any postponement, rescheduling or performance of the Work under this Section 3.10.6 may be grounds for an extension of the Contract Time, if permitted under Section 8.3.1, and an equitable adjustment in the Contract Sum if: (1) the performance of the Work was properly scheduled by the Contractor in compliance with the requirements of the Contract Documents, and (2) such rescheduling or postponement is required for the convenience of the Owner.

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3.12.11 When professional certification of performance criteria of materials, systems, or equipment is required by the Contract Documents, the Contractor shall provide the person or party providing the certification with full information on the relevant performance requirements and on the materials, systems, or equipment that are expected to operate at the Project site. The certification shall be based on performance under the operating conditions generally prevailing or

expected at the Project site. The Owner shall be entitled to rely upon the accuracy and completeness of such certificates.

3.12.12 All Shop Drawings for any architectural, structural, building mechanical or building electrical work must be submitted to, and approved by, the Architect. If required by the Specifications or if the nature of any mechanical, electrical or plumbing Work requires a professional seal, any Shop Drawings for any mechanical, electrical, or other Work must be submitted to, and approved by, an engineer designated by the Architect. The Contractor represents and warrants that all such Shop Drawings shall be prepared by persons and entities possessing expertise and experience in the trade for which the shop drawing is prepared and, if required by any applicable law, by a licensed engineer.

The Contractor shall confine operations at the site to areas permitted by applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities and the Contract Documents and shall not unreasonably encumber the site with materials or ~~equipment~~equipment, limits as indicated on Construction Documents Phasing Plan.

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To the fullest extent permitted by ~~law~~law, the Contractor shall indemnify and hold harmless the Owner, ~~Architect, Architect's consultants, and Owner's consultants, as well as the~~ agents and employees of any of them from and against any and all claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, or any individual working on the site under the Contractor's supervision, anyone directly or indirectly employed by them or anyone for whose ~~acts~~acts, they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity ~~that~~which would otherwise exist as to a party or person described in this ~~Section 3.18.~~Paragraph 3.18.

#### PAGE 20

Except as otherwise provided in the Contract Documents or when direct communications have been specially authorized, the Owner and Contractor shall endeavor to communicate with each other ~~through the Architect~~directly through their respective authorized representatives about matters arising out of or relating to the Contract. Communications by and with the Architect's consultants shall be through the Architect. Communications by and with Subcontractors and material suppliers shall be through the Contractor. Communications by and with separate contractors shall be through the Owner.

...

§ 4.2.8 The Architect will prepare Change Orders and Construction Change ~~Directives~~Directives with the Owner's permission, and may authorize minor changes in the Work as provided in Section 7.4. The Architect will investigate and make determinations and recommendations regarding concealed and unknown conditions as provided in Section 3.7.4.

#### PAGE 21

5.2.1 Those portions of the Work that the Construction Manager does not customarily perform with the Construction Manager's own personnel shall be performed under subcontract or by other appropriate agreements with the Construction Manager. Pursuant to Texas Government Code Chapter 2267, the Construction Manager shall publicly advertise for bids or proposals and receive bids or proposals from trade contractors or subcontractors for the performance of all major elements of the work other than the minor work that may be included in the general conditions. The Construction Manager is required to publish notice in a newspaper of general circulation in El Paso County, once each week for at least two weeks before the deadline for receiving bids or proposals, of the time and place the bids or proposals will be received and opened. The Construction Manager shall review all trade contractor or subcontractor bids or proposals in a manner that does not disclose the contents of the bid or proposal during the

selection process to a person not employed by the Construction Manager, Architect, Engineer, Owner or Owner's Representative. All bids or proposals shall be made available to the public after the later of the award of the contract or the seventh day after the date of final selection of bids or proposals. If a selected trade contractor or subcontractor defaults in the performance of its work or fails to execute a subcontract after being selected in accordance with this section, the Construction Manager may itself fulfill, without advertising, the contract requirements or select a replacement trade contractor or subcontractor to fulfill the contract requirements.

§ 5.2.3 If the Construction Manager reviews, evaluates, and recommends to the Owner a bid or proposal from a trade contractor or subcontractor but the Owner requires another bid or proposal to be accepted, the Owner shall compensate the Construction Manager by a change in price, time, or guaranteed maximum cost for any additional cost and risk that the Construction Manager incurs because of the Owner's requirement that another bid or proposal be accepted.

~~§ 5.2.1 Unless otherwise stated in the Contract Documents or the bidding requirements, the Contractor, as soon as practicable after award of the Contract, shall furnish in writing to the Owner through the Architect the names of persons or entities (including those who are to furnish materials or equipment fabricated to a special design) proposed for each principal portion of the Work. The Architect may reply within 14 days to the Contractor in writing stating (1) whether the Owner or the Architect has reasonable objection to any such proposed person or entity or (2) that the Architect requires additional time for review. Failure of the Owner or Architect to reply within the 14-day period shall constitute notice of no reasonable objection.~~

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

~~§ 5.2.3 If the Owner or Architect has reasonable objection to a person or entity proposed by the Contractor, the Contractor shall propose another to whom the Owner or Architect has no reasonable objection. If the proposed but rejected Subcontractor was reasonably capable of performing the Work, the Contract Sum and Contract Time shall be increased or decreased by the difference, if any, occasioned by such change, and an appropriate Change Order shall be issued before commencement of the substitute Subcontractor's Work. However, no increase in the Contract Sum or Contract Time shall be allowed for such change unless the Contractor has acted promptly and responsively in submitting names as required.~~

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By appropriate agreement, written where legally required for validity, the Contractor shall require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound to the Contractor by terms of the Contract Documents, and to assume toward the Contractor all the obligations and responsibilities, including the responsibility for safety of the Subcontractor's Work, which the Contractor, by these Documents, assumes toward the Owner and Architect. Each subcontract agreement shall preserve and protect the rights of the Owner and Architect under the Contract Documents with respect to the Work to be performed by the Subcontractor so that subcontracting thereof will not prejudice such rights, and shall allow to the Subcontractor, unless specifically provided otherwise in the subcontract agreement, the benefit of all rights, remedies and redress against the Contractor that the Contractor, by the Contract Documents, has against the Owner. Where appropriate, the Contractor shall require each Subcontractor to enter into similar agreements with Sub-subcontractors. The Contractor shall make available to each proposed Subcontractor, prior to the execution of the subcontract agreement, copies of the Contract Documents to which the Subcontractor will be bound, and, upon written request of the Subcontractor, identify to the Subcontractor terms and conditions of the proposed subcontract agreement that may be at variance with the Contract Documents. Subcontractors will similarly make copies of applicable portions of such documents available to their respective proposed Sub-subcontractors. All subcontracts shall be in writing in form and substance substantially similar to the Contractor's standard form subcontract, attached as Exhibit O Contractor's Standard Form Subcontract attached to the Agreement and shall specifically provide that the Owner is an intended third party beneficiary of such subcontract.

**PAGE 23**

§ 7.1.3 Changes in the Work shall be performed under applicable provisions of the Contract Documents, and the

Contractor shall proceed promptly, unless otherwise provided in the Change Order, Construction Change Directive or order for a minor change in the Work. Except as permitted in Section 7.3, a change in the Contract Sum or the Contract Time shall be accomplished only by Change Order. Accordingly, no course of conduct or dealings between the parties, no express or implied acceptance of alterations or additions to the Work, and no claim that the Owner has been unjustly enriched by any alteration or addition to the Work, whether or not there is, in fact, any unjust enrichment to the Work, shall be the basis of any claim to an increase in any amounts due under the Contract Documents or a change in any time period provided for in the Contract Documents.

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§ 8.2.1 Time limits stated in the Contract Documents are of the essence of the Contract. By executing the Agreement the Contractor confirms that the Contract Time is a reasonable period for performing the Work. Contractor acknowledges and understands that failure by the Contractor to complete the Work in accordance with the Construction Schedule will cause significant damage to the Owner.

...

§ 8.3.1 If the Contractor is materially delayed at any time in the commencement or progress of the Work by an act or neglect of the Owner or Architect, or of an employee of either, or of a separate contractor employed by the Owner; or by changes ordered in the Work; or by labor disputes, ~~fire, unusual delay in deliveries, unavoidable casualties, fire or unavoidable casualties,~~ or other causes beyond the Contractor's control; ~~or by delay authorized by the Owner pending mediation and arbitration; or by other causes that the Architect determines may justify delay, then reasonable control,~~ then to the extent such delay will prevent the Contractor from achieving Substantial Completion within the Contract Time and if the performance of the Work is not, has not, or would not have been delayed by any other cause for which the Contractor is not entitled to an extension in the Contract Time under the Contract Documents, the Contract Time shall be extended by Change Order ~~for such reasonable time as the Architect may determine.~~ Order. The Contractor further acknowledges and agrees that adjustments in the Contract Time will be permitted for a delay only to the extent such delay (1) is not caused, or could not have been anticipated, by the Contractor, (2) could not be limited or avoided by the Contractor's timely notice to the Owner of the delay, and (3) is of a duration not less than one day. The Contractor shall be entitled to an equitable adjustment for general conditions.

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§ 8.3.3 Notwithstanding anything to the contrary in the Contract Documents, an extension in the Contract Time, to the extent permitted under Section 8.3.1, shall be the sole remedy of the Contractor for any (1) delay in the commencement, prosecution or completion of the Work, (2) hindrance or obstruction in the performance of the Work, (3) loss of productivity, or (4) other similar claims (collectively referred to in this Section 8.3.3 as "Delays") whether or not such Delays are foreseeable, unless a Delay is caused by acts of the Owner, and only to the extent such acts continue after the Contractor furnishes the Owner with notice of such interference. In no event shall the Contractor be entitled to any compensation or recovery of any damages, in connection with any Delay, including, without limitation, consequential damages, lost opportunity costs, impact damages or other similar remuneration. The Owner's exercise of any of its rights or remedies under the Contract Documents, shall not be construed as a Delay in the performance of the Work. This Section 8.3 does not preclude recovery of damages for delay by either party under other provisions of the Contract Documents.  
Documents. Documents. ARTICLE 9 PAYMENTS AND COMPLETION

#### ARTICLE 9 PAYMENTS AND COMPLETION

...

9.2.1 Where the Contract is based on a stipulated sum or Guaranteed Maximum Price, the Contractor shall submit to the Architect, before the first Application for Payment, a schedule of values allocating the entire Contract Sum to the various portions of the Work and prepared in such form and supported by such data to substantiate its accuracy as the Architect may require. This schedule, unless objected to by the Architect, shall be used as a basis for reviewing the Contractor's Applications for Payment.

9.2.2 The Contractor and each Subcontractor shall prepare a payment breakdown for the Work for which each is responsible in such detail as required by the Owner. This breakdown shall include a description of the Work with assigned dollar value for the miscellaneous phases and/or items of Work. Once accepted by the Owner, all payment requests shall include this information together with the percent of the Work completed to date, the value of the Work completed to date, the percent of previous amount billed, the previous amount billed, and the current percent completed. Any trade breakdown which fails to include sufficient detail, is unbalanced, or exhibits "front-loading" of the value of the Work shall be rejected. The Owner shall review each such payment breakdown and shall approve or disapprove such breakdown. If a breakdown had been initially approved and subsequently used, but later found improper for any reason, sufficient funds shall be withheld from future Applications for Payment to ensure an adequate reserve (exclusive of normal retainage) to complete the Work.

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

~~§ 9.3.1.2 Applications for Payment shall not include requests for payment for portions of the Work for which the Contractor does not intend to pay a Subcontractor or material supplier, unless such Work has been performed by others whom the Contractor intends to pay.~~

§ 9.3.2 Unless otherwise provided in the Contract Documents, payments shall be made on account of materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work. If approved in advance by the Owner, payment may similarly be made for materials and equipment suitably stored off the site at a location agreed upon in writing. Owner is not obligated to pay for typical building materials (for example, drywall, conduit, paint, masonry) and will only consider payment for materials that are unique and fabricated specifically for the project. Payment for materials and equipment stored on or off the site shall be conditioned upon compliance by the Contractor with procedures satisfactory to the Owner to establish the Owner's title to such materials and equipment or otherwise protect the Owner's interest, and shall include the costs of applicable insurance, storage and transportation to the site for such materials and equipment stored off the site.

9.3.2.1 Contractor shall also comply with the following specific requirements related to stored material:

1 The aggregate cost of material stored off site shall not exceed the aggregate amount which has been approved in writing by Owner under Section 9.3.2 above;

.2 Title to such materials shall be vested in the Owner, as evidenced by documentation satisfactory in form and substance to the Owner and the Owner's construction lender, if any, including, without limitation, recorded financing statements, UCC filings and UCC searches;

.3 With each Application for Payment, the Contractor shall submit to the Owner a written list identifying each location where materials are stored off the Project site and the value of materials at each location. The Contractor shall procure insurance satisfactory to the Owner for materials stored off the Project site in an amount not less than the total value thereof;

.4 The consent of any surety shall be obtained to the extent required prior to payment for any materials stored off the Project site;

.5 The Contractor will provide an Observation Report confirming that a Contractor has viewed and confirmed material, quantities and conditions at the stored location and that Representatives of the Owner and Owner's construction lender, if any, shall have the right to make inspections of the storage areas at any time; and

.6 Such materials shall be (a) protected from diversion, destruction, theft and damage to the satisfaction of the Owner and Owner's construction lender, if any, (b) specifically marked for use on the Project, and (c) segregated from other materials at the storage facility.

...

9.3.4 The Contractor further expressly undertakes to defend the Indemnitees, at the Contractor's sole expense, against any actions, lawsuits or proceedings brought against Indemnitees as a result of liens filed against the Work, the site of any of the Work, the Project site and any improvements thereon, payments due the Contractor or any portion of the property of any of the Indemnitees (referred to collectively as "Liens"). The Contractor hereby agrees to indemnify and hold Indemnitees harmless against any such Liens or claims of Lien and agrees to pay any judgment or Lien resulting from any such actions, lawsuits or proceedings.

9.3.5 The Owner shall release any payments withheld due to a Lien or claim of Lien if the Contractor obtains security acceptable to the Owner or Lien bond which is: (1) issued by a surety acceptable to the Owner, (2) in form and substance satisfactory to the Owner, and (3) in an amount not less than One Hundred Fifty Percent (150%) of such Lien claim. By posting a lien bond or other acceptable security, however, the Contractor shall not be relieved of any responsibilities or obligations under this Section 9.3, including, without limitation, the duty to defend and indemnify the Indemnitees. The cost of any premiums incurred in connection with such bonds and security shall be the responsibility of the Contractor and shall not be part of, or cause any adjustment to, the Contract Sum.

9.3.6 The Contractor agrees to waive any right which it may have to assert a mechanic's or other Lien against the Project site and any improvements thereon, including, without limitation, the Work itself. Furthermore, the Contractor will cause a similar provision, waiving any right to a mechanic's or other Lien against the Project site and Owner's property to be included in all of its subcontracts, any sub-subcontracts and all contracts with material suppliers.

9.3.7 Notwithstanding the foregoing, the Owner reserves the right to settle any disputed mechanic's or materialmen's Lien claim by payments to the Lien claimant or by such other means as the Owner, in the Owner's sole discretion, determines is the most economical or advantageous method of settling the dispute. The Contractor shall promptly reimburse the Owner upon demand, for any payments so made.

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§ 9.6.4 The Owner ~~has the right to request written~~ requires evidence from the Contractor that the Contractor has properly paid Subcontractors and material and equipment suppliers amounts paid by the Owner to the Contractor for subcontracted ~~Work-Work~~, in the form of conditional and unconditional waiver(s) of lien for each progress payment and Final Waiver of Lien when the Work is complete. The required Waiver of Lien to Date and Final Waiver of Lien forms are attached to the Agreement as Exhibit N Waiver of Lien Forms attached to the Agreement. The Contractor will submit Conditional Waiver of Lien forms(s) for Owner's review and approval prior to the first application for payment. If the Contractor fails to furnish such evidence within seven days, the Owner shall have the right to contact Subcontractors to ascertain whether they have been properly paid. Neither the Owner nor Architect shall have an obligation to pay or to see to the payment of money to a Subcontractor, except as may otherwise be required by law.

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§ 9.8.1 Substantial Completion is the stage in the progress of the Work when the ~~Work-Work~~, or designated portion thereof ~~thereof~~, is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the ~~Work~~ for its intended use. the Work, or such designated portion thereof, for the uses for which it is intended. Substantial completion shall include, but is not limited to, finished and operational clubhouses, finished suites, club seats, installed seating, natural grass playing field, operational air conditioning systems, operational elevators and escalators, operational systems for baseball games and all other anticipated uses, operational scoreboards, operational concessions and other revenue generating functions, and the issuance by the proper governmental authority of a temporary certificate of occupancy and any other permits and orders necessary for occupancy and if no such certificates, permits or orders have been issued, that they would have been issued but for some reason that is not due to the fault or neglect of the Contractor.

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§ 10.2.3 The Contractor shall erect and maintain, as required by existing conditions and performance of the Contract, reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards,

promulgating safety regulations and notifying owners and users of adjacent sites and utilities. The Contractor shall also be responsible for all measures necessary to protect any property adjacent to the Project and improvements therein. Any damage to such property or improvements shall be promptly repaired by the Contractor. § 10.2.4 When use or storage of explosives or other hazardous materials or equipment or unusual methods are necessary for execution of the Work, the Contractor shall exercise utmost care and carry on such activities under supervision of properly qualified personnel.

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§ 10.3.1 The Contractor is responsible for compliance with any requirements included in the Contract Documents regarding hazardous materials. If the Contractor encounters a hazardous material or substance not addressed in the Contract Documents and if reasonable precautions will be inadequate to prevent foreseeable bodily injury or death to persons resulting from a material or substance, including but not limited to asbestos or polychlorinated biphenyl (PCB), encountered on the site by the Contractor, the Contractor shall, upon recognizing the condition, immediately stop Work in the affected area and report the condition to the Owner and Architect in writing.

§ 10.3.2 Upon receipt of the Contractor's written notice, the Owner shall obtain the services of a licensed laboratory to verify the presence or absence of the material or substance reported by the Contractor and, in the event such material or substance is found to be present, to cause it to be rendered harmless. Unless otherwise required by the Contract Documents, the Owner shall furnish in writing to the Contractor and Architect the names and qualifications of persons or entities who are to perform tests verifying the presence or absence of such material or substance or who are to perform the task of removal or safe containment of such material or substance. The Contractor and the Architect will promptly reply to the Owner in writing stating whether or not either has reasonable objection to the persons or entities proposed by the Owner. If either the Contractor or Architect has an objection to a person or entity proposed by the Owner, the Owner shall propose another to whom the Contractor and the Architect have no reasonable objection. When the material or substance has been rendered harmless, Work in the affected area shall resume upon written agreement of the Owner and Contractor. By Change Order, the Contract Time shall be extended appropriately and the Contract Sum shall be increased in the amount of the Contractor's reasonable additional costs of shut-down, delay and start-up.

§ 10.3.3 To the fullest extent permitted by law, the Owner shall indemnify and hold harmless the Contractor, Subcontractors, Architect, Architect's consultants and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work in the affected area if in fact the material or substance presents the risk of bodily injury or death as described in Section 10.3.1 and has not been rendered harmless, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), except to the extent that such damage, loss or expense is due to the fault or negligence of the party seeking indemnity.

§ 10.3.4 The Owner shall not be responsible under this Section 10.3 for materials or substances the Contractor brings to the site unless such materials or substances are required by the Contract Documents. The Owner shall be responsible for materials or substances required by the Contract Documents, except to the extent of the Contractor's fault or negligence in the use and handling of such materials or substances.

§ 10.3.5 The Contractor shall indemnify the Owner for the cost and expense the Owner incurs (1) for remediation of a material or substance the Contractor brings to the site and negligently handles, or (2) where the Contractor fails to perform its obligations under Section 10.3.1, except to the extent that the cost and expense are due to the Owner's fault or negligence.

§ 10.3.6 If, without negligence on the part of the Contractor, the Contractor is held liable by a government agency for the cost of remediation of a hazardous material or substance solely by reason of performing Work as required by the Contract Documents, the Owner shall indemnify the Contractor for all cost and expense thereby incurred.

§ 10.3.1 The Contractor is responsible for compliance with any requirements included in the Contract Documents regarding hazardous materials. This includes, but is not limited to, the demolition of two existing buildings containing Asbestos Containing Materials (ACMs) that must be abated by the Contractor as part of the demolition work and demolition of various site improvements to accommodate the new construction. The Contractor also acknowledges

that the Project site may contain hazardous or contaminated material as classified by the U.S. Environmental Protection Agency and if any such conditions are encountered the Contractor will coordinate remediation activities including, administration, procedures, scheduling and processes required to be performed by the Contractor or its subcontractors in connection therewith within the Contract Sum.

If the Contractor encounters a hazardous material or substance not identified for removal, abatement, or remediation in the Contract Documents and if reasonable precautions will be inadequate to prevent foreseeable bodily injury or death to persons resulting from a material or substance, including but not limited to asbestos or polychlorinated biphenyl (PCB), encountered on the site by the Contractor, the Contractor shall immediately, (i) stop Work in the affected area; (ii) notify the Owner and the Architect that the Work has been stopped including a detailed description of the condition encountered and the area affected; and (iii) proceed with Work in all unaffected areas taking all available precautions to avoid or minimize any adverse impact on the Project schedule or Contract Sum. § 10.3.2 Upon receipt of the Contractor's written notice, the Owner shall obtain the services of a licensed laboratory to verify the presence or absence of the material or substance reported by the Contractor and, in the event such material or substance is found to be present, the Contractor will solicit or negotiate competitive bids on behalf of the Owner to perform the required remediation work and provide administration of the work. When the material or substance has been rendered harmless, Work in the affected area shall resume upon written agreement of the Owner and Contractor. By Change Order, the Contract Time shall be extended appropriately and the Contract Sum shall be increased in the amount of the Contractor's reasonable costs of this additional work.

§ 10.3.3 To the fullest extent permitted by law, the Owner shall indemnify and hold harmless the Contractor, Subcontractors, Architect, Architect's consultants and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work in the affected area if in fact the material or substance presents the risk of bodily injury or death as described in Section 10.3.1 or if the disturbance of those materials would have caused the Contractor to be deemed a Potentially Responsible Party or otherwise be liable for the remediation of the material or substance under the Environmental Laws of the United States and has not been rendered harmless, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property, except to the extent that such damage, loss or expense is due to the fault or negligence of the party seeking indemnity. The Owner shall not be responsible under this Section 10.3 for materials or substances the Contractor brings to the site unless such materials or substances are required by the Contract Documents. The Owner shall be responsible for materials or substances required by the Contract Documents, except to the extent of the Contractor's fault or negligence in the use and handling of such materials or substances.

§ 10.3.4 The Contractor shall indemnify the Owner for the cost and expense the Owner incurs (1) for remediation of a material or substance the Contractor brings to the site and negligently handles, or (2) where the Contractor fails to perform its obligations under Section 10.3.1, except to the extent that the cost and expense are due to the Owner's fault or negligence.

§ 10.3.5 If, without negligence on the part of the Contractor, the Contractor is held liable by a government agency for the cost of remediation of a hazardous material or substance solely by reason of performing Work as required by the Contract Documents, the Owner shall reimburse this expense.

10.3.6 If, without negligence on the part of the Contractor, the Contractor is held liable for the cost of remediation of a hazardous material or substance solely by reason of performing Work as required by the Contract Documents, the Owner shall reimburse the Contractor for all cost and expense thereby incurred, including reasonable attorney's fees.

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§ 11.1.2 The insurance required by Section 11.1.1 shall be written for not less than limits of liability specified in the Contract Documents Exhibit I Insurance Requirements attached to the Agreement or required by law, whichever coverage is greater. Coverages, whether written on an occurrence or claims-made basis, shall be maintained without interruption from the date of commencement of the Work until the date of final payment and termination of any coverage required to be maintained after final payment, and, with respect to the Contractor's completed operations coverage, until the expiration of the period for correction of Work or for such other period for maintenance of completed operations coverage as specified in the Contract Documents.

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~~The Owner shall be responsible for purchasing and maintaining the Owner's usual liability insurance.~~

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~~§ 11.3.1 Unless otherwise provided, the Owner As indicated in Exhibit I Insurance Requirements attached to the Agreement, the Contractor shall purchase and maintain, in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located, property insurance written on a builder's risk "all-risk" or equivalent policy form in the amount of the initial Contract Sum, plus value of subsequent Contract Modifications and cost of materials supplied or installed by others, comprising total value for the entire Project at the site on a replacement cost basis without optional deductibles. Such property insurance shall be maintained, unless otherwise provided in the Contract Documents or otherwise agreed in writing by all persons and entities who are beneficiaries of such insurance, until final payment has been made as provided in Section 9.10 or until no person or entity other than the Owner has an insurable interest in the property required by this Section 11.3 to be covered, whichever is later. This insurance shall include interests of the Owner, the Contractor, Subcontractors and Sub-subcontractors in the Project.~~

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~~§ 11.3.1.2 If the The Owner does not intend to purchase such property insurance required by the Contract and with all of the coverages in the amount described above, the Owner shall so inform the Contractor in writing prior to commencement of the Work. The Contractor may then effect property insurance~~  
The Contractor may effect additional insurance that will protect the interests of the Contractor, Subcontractors and Sub-subcontractors in the Work, and by appropriate Change Order the cost thereof shall be charged to the Owner. If the Contractor is damaged by the failure or neglect of the Owner to purchase or maintain insurance as described above, without so notifying the Contractor in writing, then the Owner shall bear all reasonable costs properly attributable thereto.  
Work.

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11.3.1.6 All insurance coverage procured by the Contractor shall be provided by insurance companies having policyholder ratings no lower than A-IX in the Best's Insurance Guide, latest edition. The Contractor may provide insurance pursuant to "blanket policies" of insurance which are reasonably satisfactory to the Owner.

11.3.1.7 If the Owner or the Contractor is damaged by the failure of the other party to purchase or maintain insurance required under this Article 11, then the party who failed to purchase or maintain the insurance shall bear all reasonable costs (including attorneys' fees and court and settlement expenses) properly attributable thereto.

### 11.3.3 LOSS OF USE INSURANCE

The Owner, at the Owner's option, may purchase and maintain such insurance as will insure the Owner against loss of use of the Owner's property due to fire or other hazards, however caused. The Owner waives all rights of action against the Contractor for loss of use of the Owner's property, including consequential losses due to fire or other hazards however caused.

### ~~§ 11.3.2 BOILER AND MACHINERY INSURANCE~~

~~The Owner shall purchase and maintain boiler and machinery insurance required by the Contract Documents or by law, which shall specifically cover such insured objects during installation and until final acceptance by the Owner; this insurance shall include interests of the Owner, Contractor, Subcontractors and Sub-subcontractors in the Work, and the Owner and Contractor shall be named insureds.~~

### ~~§ 11.3.3 LOSS OF USE INSURANCE~~

~~The Owner, at the Owner's option, may purchase and maintain such insurance as will insure the Owner against loss of use of the Owner's property due to fire or other hazards, however caused. The Owner waives all rights of action against the Contractor for loss of use of the Owner's property, including consequential losses due to fire or other hazards however caused.~~

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

~~§ 11.3.5~~ If during the Project construction period the Owner insures properties, real or personal or both, at or adjacent to the site by property insurance under policies separate from those insuring the Project, or if after final payment property insurance is to be provided on the completed Project through a policy or policies other than those insuring the Project during the construction period, the Owner shall waive all rights in accordance with the terms of Section 11.3.7 for damages caused by fire or other causes of loss covered by this separate property insurance. All separate policies shall provide this waiver of subrogation by endorsement or otherwise.

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

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11.4.1 The Contractor shall furnish a performance bond conditioned on the faithful performance of the Work in accordance with the plans, specifications, and contract documents and a payment bond for the protection and use by payment bond beneficiaries who have a direct contractual relationship with the Contractor or a subcontractor to supply public work labor or material. Each bond shall be for 100% of the guaranteed maximum price and shall comply with all requirements of Texas Government Code Chapter 2253 and Texas Insurance Code Chapter 3503. The bonds may be executed only by a surety company that is authorized to write surety bonds in the State of Texas. If the surety's obligation is in an amount that exceeds 10 percent of the surety company's capital and surplus, the Owner requires, as a condition of accepting the obligation, written certification that the surety company has reinsured the portion of the risk that exceeds 10 percent of the surety company's capital and surplus with one or more reinsurers who are authorized, accredited, or trusted to engage in business in the State of Texas. Owner also requires that the corporate surety tender an agent who is a resident of El Paso County to whom any required notices may be delivered and on whom process may be served in matters arising out of the suretyship. The bonds required under this section must clearly and prominently display on the bond or on an attachment to the bond the name, mailing address, physical address, and telephone number, including the area code, of the surety company to which any notice of claim should be sent, or the toll-free telephone number maintained by the Texas Department of Insurance under Texas Insurance Code Chapter 521, and a statement that the address of the surety company to which any notice of claim should be sent may be obtained from the Texas Department of Insurance by calling the toll-free telephone number.

11.4.2 Pursuant to Texas Government Code Chapter 2267, the Contractor shall deliver the bonds not later than the 10th day after the date the Contractor executes the contract unless the Contractor furnishes a bid bond acceptable to the Owner to ensure that the Contractor will furnish the required performance and payment bonds when a guaranteed maximum price is established. If a fixed contract amount or guaranteed maximum price has not been determined at the time the contract is awarded, the penal sums of the performance and payment bonds delivered to the Owner must each be in an amount equal to the Construction Budget as specified in the request for proposals.

~~§ 11.4.4~~ The Owner shall have the right to require the Contractor to furnish bonds covering faithful performance of the Contract and payment of obligations arising thereunder as stipulated in bidding requirements or specifically required in the Contract Documents on the date of execution of the Contract.

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

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The Contract shall be governed by the law of the place where the Project is located except that, if the parties have selected arbitration as the method of binding dispute resolution, the Federal Arbitration Act shall govern Section 15.4.

PAGE 38

§ 13.5.1 The responsibility of the parties for testing services is set forth in the Agreement in Testing and Inspection Exhibit K attached to the Agreement. Failure of the Owner to timely or properly perform its testing obligations shall not relieve the Contractor and its Subcontractors from their obligations to perform quality control. Tests, inspections and approvals of portions of the Work shall be made as required by the Contract Documents and by applicable laws, statutes, ordinances, codes, rules and regulations or lawful orders of public authorities. Unless otherwise provided, the Contractor shall make arrangements for such tests, inspections and approvals with an independent testing laboratory or entity acceptable to the Owner, or with the appropriate public authority, and shall bear all related costs of tests, inspections and approvals. The Contractor shall give the Architect timely notice of when and where tests and inspections are to be made so that the Architect may be present for such procedures. The Owner shall bear costs of (1) tests, inspections or approvals that do not become requirements until after bids are received or negotiations concluded, and (2) tests, inspections or approvals where building codes or applicable laws or regulations prohibit the Owner from delegating their cost to the Contractor.

...

~~Payments due and unpaid under the Contract Documents shall bear interest from the date payment is due at such rate as the parties may agree upon in writing or, in the absence thereof, at the legal rate prevailing from time to time at the place where the Project is located.~~

See Article 8.2 of the Agreement (AIA Document A133-2009).

### PAGE 39

~~The Owner and Contractor shall commence all claims and causes of action, whether in contract, tort, breach of warranty or otherwise, against the other Owner arising out of or related to the Contract in accordance with the requirements of the final dispute resolution method selected in the Agreement within the time period specified by applicable law, but in any case not more than 10 years after the date of Substantial Completion of the Work. The Owner and Contractor waive all claims and causes of action not commenced in accordance with this Section 13.7. Agreement.~~

...

- ~~.3 Because the Architect has not issued a Certificate for Payment and has not notified the Contractor of the reason for withholding certification as provided in Section 9.4.1, or because the Owner has not made payment on a Certificate for Payment within the time stated in the Contract Documents; or~~
- ~~.4 The Owner has failed to furnish to the Contractor promptly, upon the Contractor's request, reasonable evidence as required by Section 2.2.1.~~

...

§ 14.2.2 ~~When any of the above reasons exist, the Owner, upon certification by the Initial Decision Maker that sufficient cause exists to justify such action, Owner may without prejudice to any other rights or remedies of the Owner and after giving the Contractor and the Contractor's surety, if any, seven days' written notice, terminate employment of the Contractor and may, subject to any prior rights of the surety:~~

### PAGE 40

§ 14.4.3 ~~In case of such termination for the Owner's convenience, the Contractor shall be entitled to receive payment for Work executed, and costs incurred by reason of such termination, along with reasonable overhead and profit on the Work not executed.~~

however the amount payable to the Contractor pursuant to Sections 14.2 and 14.4 of A201-2007 shall not exceed the amount the Contractor would otherwise have received pursuant to Sections 10.1.2 and 10.1.3 of the Agreement (AIA Document A133-2009).

...

Claims, disputes or other matters in question between the Owner and Contractor arising prior to the commencement of the Construction Phase shall be resolved pursuant to Article 9 of AIA A133-2009. Claims, disputes or other matters

in question between the Owner and Contractor which arise subsequent to the commencement of the Construction Phase shall be resolved pursuant to this Article 15.

...

Claims by either the Owner or Contractor must be initiated by written notice to the other party and to the Initial Decision Maker with a copy sent to the Architect, if the Architect is not serving as the Initial Decision Maker. Claims by either party must be initiated within ~~21~~ 10 days after occurrence of the event giving rise to such Claim or within ~~21~~ 10 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later, provided, however, that the claimant shall use its best efforts to furnish the other party, as expeditiously as possible, with notice of any Claim including, without limitation, those in connection with concealed or unknown conditions, once such Claim is recognized, and shall cooperate with the party against whom the Claim is made in any effort to mitigate the alleged or potential damages, delay or other adverse consequences arising out of the condition which is the cause of such a Claim.

#### PAGE 41

§ 15.1.5.2 If adverse weather conditions are the basis for a Claim for additional time, such Claim shall be documented by data substantiating that weather conditions were abnormal for the period of time, could not have been reasonably anticipated and had an adverse effect on the scheduled construction. Normal conditions shall be the average of the previous five (5) years.

#### PAGE 42

§ 15.2.6.1 Either party may, within ~~30~~ 10 days from the date of an initial decision, demand in writing that the other party file for mediation within ~~60~~ 30 days of the initial decision. If such a demand is made and the party receiving the demand fails to file for mediation within the time required, then both parties waive their rights to mediate or pursue binding dispute resolution proceedings with respect to the initial decision.

...

§ 15.3.1 Claims, disputes, or other matters in controversy arising out of or related to the Contract except those waived as provided for in Sections 9.10.4, 9.10.5, and 15.1.6 shall be subject to mediation as a condition precedent to ~~binding dispute resolution~~ filing a lawsuit with respect to the controversy or claim.

§ 15.3.2 ~~The parties shall endeavor to resolve their Claims by mediation which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Mediation Procedures in effect on the date of the Agreement. A request for mediation shall be made in writing, delivered to the other party to the Contract, and filed with the person or entity administering the mediation. The request may be made concurrently with the filing of binding dispute resolution proceedings but, in such event, mediation shall proceed in advance of binding dispute resolution proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order. If an arbitration is stayed pursuant to this Section 15.3.2, the parties may nonetheless proceed to the selection of the arbitrator(s) and agree upon a schedule for later proceedings.~~

§ 15.3.3 The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in the place where the Project is located, unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

15.3.4 Any disputes which cannot be successfully resolved through mediation shall be settled in the State of Texas in a court having jurisdiction over the matter.

15.3.5 Pending resolution of any controversy claim or dispute, the Contractor shall proceed diligently with the performance of the work under the agreement.

**§ 15.4 ARBITRATION**

~~§ 15.4.1~~ If the parties have selected arbitration as the method for binding dispute resolution in the Agreement, any Claim subject to, but not resolved by, mediation shall be subject to arbitration which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Arbitration Rules in effect on the date of the Agreement. A demand for arbitration shall be made in writing, delivered to the other party to the Contract, and filed with the person or entity administering the arbitration. The party filing a notice of demand for arbitration must assert in the demand all Claims then known to that party on which arbitration is permitted to be demanded.

~~§ 15.4.1.1~~ A demand for arbitration shall be made no earlier than concurrently with the filing of a request for mediation, but in no event shall it be made after the date when the institution of legal or equitable proceedings based on the Claim would be barred by the applicable statute of limitations. For statute of limitations purposes, receipt of a written demand for arbitration by the person or entity administering the arbitration shall constitute the institution of legal or equitable proceedings based on the Claim.

~~§ 15.4.2~~ The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

~~§ 15.4.3~~ The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by parties to the Agreement shall be specifically enforceable under applicable law in any court having jurisdiction thereof.

**§ 15.4.4 CONSOLIDATION OR JOINDER**

~~§ 15.4.4.1~~ Either party, at its sole discretion, may consolidate an arbitration conducted under this Agreement with any other arbitration to which it is a party provided that (1) the arbitration agreement governing the other arbitration permits consolidation, (2) the arbitrations to be consolidated substantially involve common questions of law or fact, and (3) the arbitrations employ materially similar procedural rules and methods for selecting arbitrator(s).

~~§ 15.4.4.2~~ Either party, at its sole discretion, may include by joinder persons or entities substantially involved in a common question of law or fact whose presence is required if complete relief is to be accorded in arbitration, provided that the party sought to be joined consents in writing to such joinder. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of any claim, dispute or other matter in question not described in the written consent.

~~§ 15.4.4.3~~ The Owner and Contractor grant to any person or entity made a party to an arbitration conducted under this Section 15.4, whether by joinder or consolidation, the same rights of joinder and consolidation as the Owner and Contractor under this Agreement.

## **Certification of Document's Authenticity**

**AIA® Document D401™ – 2003**

I, R. Alan Shubert, hereby certify, to the best of my knowledge, information and belief, that I created the attached final document simultaneously with its associated Additions and Deletions Report and this certification at 13:44:18 on 12/26/2012 under Order No. 0314594249\_1 from AIA Contract Documents software and that in preparing the attached final document I made no changes to the original text of AIA® Document A201™ – 2007, General Conditions of the Contract for Construction, as published by the AIA in its software, other than those additions and deletions shown in the associated Additions and Deletions Report.

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*(Signed)*

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*(Title)*

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*(Dated)*

## Exhibit A

### CONSTRUCTION MANAGER SCOPE OF SERVICES

#### 1.0 PRECONSTRUCTION PHASE

The Construction Manager at Risk (CMAR) will establish and implement plans and controls for all aspects of the project. These procedures will be coordinated with the completion of contracts and approvals being negotiated simultaneously with the various members of the project team and the project schedule and budget. All work product is subject to the Owner's approval. The Preconstruction Phase will be terminated upon the commencement date of the Construction Phase.

##### 1.1 Documentation Review and Negotiation Support

Existing information related to land use restrictions, overall master plan objectives, the design development progress and public approval requirements will be reviewed and coordinated with initial activities. The CMAR shall provide technical support to the Owner as required to coordinate preliminary architectural and conceptual project planning.

##### 1.2 Conceptual Development Program, Budget & Schedule

The CMAR shall receive a written program statement and drawings prepared by the Architect defining major project components, systems and quality levels. This conceptual program and drawings will serve as the basis for the initial project budget and schedule. Taken together, these documents will become the project baseline and will be used to measure future performance. The conceptual program, budget and schedule will be updated on a periodic basis throughout the Preconstruction Phase.

###### 1.2.1 Design Program

- ◆ Identify size and capacity of the facility and site requirements along with quality or performance criteria for all major building systems.
- ◆ Provide solid baseline for conceptual estimates and measurements of future performance.
- ◆ Provide comparable data from other facilities, as directed by Owner.

###### 1.2.2 Project Budget

- ◆ Based on the program conceptual design and site information, prepare detailed project budget baseline for all cost categories within two weeks of commencing the Preconstruction Phase.
- ◆ Provide pricing from comparable facilities adjusted for this project.
- ◆ Identify all major assumptions.

- ◆ Meet with the Owner and Architect to insure cost reports capture all applicable expenditures in format appropriate for reporting performance and for cost allocation.
- ◆ Obtain Owner approval of cost formats. Provide consistent and complete budget and performance reporting.
- ◆ Incorporate all Owner procured items into the budget.

### 1.2.3 Schedule

- ◆ Coordinate conceptual schedule with development master plan activities including approval strategy and permitting process.
- ◆ Identify all required reviews and approval, and appropriate levels of information necessary for action and timely response.
- ◆ Prepare and maintain master project schedule. Update periodically at Owner's request. This should be a critical path type schedule and include all construction, facility start-up activities as well as project milestones.
- ◆ Establish schedule for the preparation and submission of the GMP proposal.
- ◆ Assist in developing drawing package issuance schedules to meet requirements of a fast-track schedule.
- ◆ Schedule to include all Owner and Club activities related to the ballpark development.

## 1.3 Contracting and Administration

As requested by the Owner review and make recommendations regarding designers, engineers, specialty consultants and advisors as required to address project requirements. Review and/or make recommendations on work descriptions for each party. Establish consistent administrative procedures for communication and documentation, for reporting on efforts to meet or exceed goals for Local Business Participation.

### 1.3.1 Design and Engineering

- ◆ Review agreement with Architect, confirm that the proposed work is compatible with the CMAR scope of work.
- ◆ Review all Architect's subconsultants and confirm that scope of work is compatible with CMAR work.
- ◆ Recommend additional design activities needed to complete ballpark development.

### 1.3.2 Miscellaneous Services Procurement, as may be requested by the Owner.

- ◆ Assist the Owner with the procurement of additional geotechnical investigations that may be required.
- ◆ Assist the Owner with the procurement of the necessary site survey(s).
- ◆ Assist the Owner with the procurement of the necessary construction testing and inspection services.

- ◆ Assist the Owner with the procurement of specialty consultants as determined

#### 1.4 Project Administration

Provide a comprehensive plan stating the objectives, scope, organization and reporting guidelines for effective quality, schedule and cost controls. This is subject to Owner's review and acceptance.

##### 1.4.1 Reporting

- ◆ Prepare and submit a monthly narrative report, in a form acceptable to the Owner, including:
  - ◆ Progress Report
  - ◆ Status (Summary)
  - ◆ Forecast
  - ◆ Analysis of critical path(s) and secondary critical paths
  - ◆ Update master project schedule
  - ◆ Analysis of time lost/gained
  - ◆ Identification of problem areas and proposed solutions, with the parties responsible for them
  - ◆ Update master project budget
  - ◆ Budget modifications
  - ◆ Project final cost.
  - ◆ Summary of significant changes in the anticipated costs
  - ◆ Action list - update of last action list
  - ◆ Cash flow summary

## 2.0 DESIGN MANAGEMENT

The Owner will retain a design team composed of qualified architects, engineers and consultants. The CMAR will provide management of the project during both the preconstruction and construction phases to ensure that the project and construction documents meet the program requirements, budget and schedule goals outlined by the approved program for the facility and site work.

### 2.1 Coordination with Project Participants

- ◆ Coordinate all activities with the Owner, Architect, separate contractors and other parties.
- ◆ Coordinate and assist with all activities related to the design of infrastructure and utilities serving the site or impacted by the project.

### 2.2 Drawing Review and Oversight

- ◆ Review and recommend any needed changes to design drawings, specifications and construction documents.
- ◆ Maintain a list of value engineering options and list of potential deferrable items.
- ◆ Coordinate and document weekly project meetings.
- ◆ Monitor preparation of design and construction documents.
- ◆ Coordinate with specialty consultants and equipment vendors to ensure completeness.
- ◆ Conduct periodic reviews of construction documents, including examination(s) by all specialty consultants.
- ◆ Coordinate project utility requirements with utility companies.
- ◆ Review site logistics and sequence of construction for incorporation in the GMP.
- ◆ Advise the Owner of materials availability.
- ◆ Identify long-lead time items and recommend pre-purchase for these or other items subject to expected price volatility, if required. Develop strategies to mitigate the duration of long lead items.
- ◆ Prepare any recommended alternates.
- ◆ Review and comment on all design decisions made by the Owner and Architect that impact schedule, constructability and project cost.

### 2.3 Value Engineering Program

- ◆ Investigate alternate solutions, systems, materials or techniques to achieve project requirements economically and consistently with the Owner objectives.
- ◆ Develop and implement a value-engineering program for all major facility and site elements, systems and materials.
- ◆ Advise the Owner and Architect on the cost of building systems and materials.
- ◆ Prepare comparative analysis of alternate systems and materials.
- ◆ Review documents at the conclusion of design development for value-engineering options.
- ◆ Submit value-engineering recommendations/benefits to the Owner and Architect.
- ◆ Create a list of deferrable items that could be feasibly be added to the project during or after the initial construction

### 2.4 Refine Budget & Schedule

- ◆ Forecast construction costs based on completed design documents.
- ◆ Prepare a detailed cost estimate based on completed design development drawings.
- ◆ Analyze deviations from the previous cost estimate.
- ◆ Forecast impact of these deviations.
- ◆ Recommend corrective action if cost estimate exceeds the budgeted amount.
- ◆ Incorporate revised cost estimates into project budget.
- ◆ Recommend to the Owner any changes necessary to maintain the budget requirements.
- ◆ Provide periodic update of the budget and schedule.

- ◆ Monitor and maintain project schedule. Project Schedule shall include all pre-construction activities, design activities, third party activities as well as construction activities.
- ◆ Identify design tasks that the AE and consultants must meet to maintain project schedule.
- ◆ Identify decisions the Owner must make to keep the project on schedule.

## 2.5 Project Administration

- ◆ Support the Owner in all aspects of project design and engineering.
- ◆ Coordinate project activities.
- ◆ Establish management systems to oversee all aspects of design activities
- ◆ Coordinate weekly project meetings.
  - ◆ Provide input for meeting agenda.
  - ◆ Summarize required actions at the conclusion of each meeting.
  - ◆ Monitor completion of these activities.
- ◆ Assist in establishing schedule goals for each team member and consultants.
- ◆ Red-flag costly design elements, facilitating the decision to eliminate prohibitively expensive items before valuable time is spent pursuing them.
- ◆ Provide daily administration of the project
- ◆ Monitor coordination of mechanical/electrical requirements of all equipment.
- ◆ Draft the GMP proposal for approval by the Owner prior to its submission.
- ◆ Define key elements of risk management in the contract:
  - ◆ Schedule requirements
  - ◆ Insurance requirements
  - ◆ Payment schedules
  - ◆ Claims control
  - ◆ Alternates
  - ◆ Bonds
- ◆ Provide recommendation to Owner for the following:
  - ◆ Subcontractor mark-ups allowed on change orders.
  - ◆ Overtime charges required to meet project schedule requirements.
  - ◆ Appropriate unit costs for price protection.
  - ◆ Alternates for the Owner to select after award.
  - ◆ Appropriate parties to be named as additional insureds.
  - ◆ Realistic payment schedule that eliminates interest charges.
  - ◆ Payment submittal requirements to protect the Owner from overpayment.
  - ◆ Support the solicitation, interview and recommend subcontractors to bid on the project.
  - ◆ Prepare bidders' list.
  - ◆ Meet with the bidders to discuss specific Local Business Enterprise participation strategies.
  - ◆ Prepare the bid packages with the AE and the Owner's consent.
  - ◆ Distribute bid information to contractors.
  - ◆ Respond to contractor questions during bidding.
  - ◆ Review bids received.

- ◆ Obtain clarification of any contractor's bid qualifications as needed.
- ◆ Prepare comparative analysis of bids.
- ◆ Review voluntary alternate recommendations.
- ◆ Review alternates and recommend acceptance or rejection.
- ◆ Submit to the Owner a line-item comparison of contractor bids and estimates with the initial Owner's budget.

## 2.6 Peer Review

- ◆ Perform peer review services for all major systems.
- ◆ Provide design assist services for key building systems evaluations.

## 3.0 PROCUREMENT SUPPORT

Project costs will be kept as low as possible through aggressive use of competitive bidding procedures for all work. The CMAR will develop and direct a well coordinated procedure for all major packages. The CMAR will assist the AE to ensure that completed bid documents used in conjunction with contract formats establish binding obligations for full performance through lump sum bidding within the framework of the GMP. The following activities shall be completed by the CMAR in preparation for the Construction Phase.

### 3.1 Construction Procurement

In accordance with the project schedule, the CMAR will propose a Guaranteed Maximum Price (GMP) for construction of the project.

### 3.2 Specialty Equipment

- ◆ Coordinate development of equipment specifications with operational criteria.
- ◆ Solicit proposals from pre-qualified vendors for equipment, installation and maintenance.
- ◆ Coordinate proprietary equipment specifications from the successful vendor with construction drawings and details.
- ◆ Expedite timely delivery and turnover to the Owner.

## 4.0 CONSTRUCTION ADMINISTRATION

The CMAR shall be responsible for the coordination of all construction activities on the project. CMAR shall not be responsible for design. Quality control inspections and testing programs shall be put into place and results monitored to insure compliance with design requirements. Contract actions initiated by the CMAR or subcontractors will be reviewed, analyzed and documented to insure responses are consistent with prior agreements and project specifications. The CMAR shall be solely responsible for coordination between its subcontractors and suppliers. CMAR will provide OA/OC manuals, site procedure manuals, organization charts and management standards to describe method of construction administration.

#### 4.1 Field Observation

- ◆ Chair weekly progress meetings.
- ◆ Monitor construction progress and report on site testing
- ◆ Provide monthly report on status of:
  - ◆ Construction cost
  - ◆ Schedule
  - ◆ Local Business Enterprise participation performance (Actual vs. Goals)
- ◆ Thoroughly review and recommend approval or rejection of proposal requests, change orders, and contractor claims.
- ◆ Recommend approval or rejection of pay requests, based upon percentage of project completion.
- ◆ Identification and resolution of potential problems.
- ◆ Review the safety programs of each of subcontractors and make appropriate recommendations. The performance of such services by the CMAR shall not relieve the subcontractors of their responsibilities for the safety of persons and property, and for compliance with all federal, state and local statutes, rules, regulations and orders applicable to the conduct of the work nor shall there be reliance on this review by the contractors.

#### 4.2 Quality Assurance/Quality Control (QA/QC)

- ◆ Develop a performance monitoring system.
- ◆ Implement an effective Construction QA/QC program.
- ◆ Conduct field monitoring and audit procedures.
- ◆ Develop and maintain a QA/QC reporting system.
- ◆ Review testing and inspection reports.
- ◆ Monitor construction progress to assure that work does not proceed beyond specified points without the appropriate inspections and required authorizations.
- ◆ Monitor Environmental Protection requirements.

#### 4.3 Shop Drawing Controls

- ◆ Set up a tracking system to keep all project participants informed of each submittal's status.
- ◆ Establish and implement a uniform system for the timely processing and control of shop and vendor drawings by the design team and contractors.
- ◆ Review status of shop drawings with the AE and subcontractors at weekly progress meetings.
- ◆ Review the contractor's schedule of all shop drawings that must be submitted.
- ◆ Monitor the AE's and contractor's follow-through on submittal of critical shop drawings.

#### 4.4 Change and Claims Control

Review completeness of proposal requests prepared by the Architect.

- ◆ Establish and implement a system for preparing, reviewing and processing requests for changes.
- ◆ Review change requests:
  - ◆ Identify charges for items already included in the contract document.
  - ◆ Reduce costs for items not valued at market rates.
  - ◆ Evaluate whether the change or claim is appropriate.
- ◆ Support the negotiations and resolution of change proposals and claims.

#### 4.5 Project Administration

- ◆ Maintain a competent full-time staff at the project site (staffing plan to be included within the GMP proposal) to coordinate and provide general direction of the work and progress on the project (including Mechanical, Electrical and Plumbing Supervisors as necessary).
- ◆ Coordinate a preconstruction meeting with the Owner and the Architect to:
  - ◆ Establish cost control procedures
  - ◆ Outline procedures for preparation and submittal of proposal requests, change orders and clarifications
  - ◆ Establish payment request procedures
  - ◆ Review construction procedures
  - ◆ Outline testing and inspection consultants' requirements.
- ◆ Communicate construction management procedures and requirements to the Architect and Owner' vendors.
- ◆ Coordinate the requirements and scheduling of vendors.
- ◆ Coordinate construction commencement
- ◆ Monitor the Architect follow-through on approved value-engineering strategies and alternates.
- ◆ Review the project schedule.
- ◆ Coordinate the submission of insurance certificates and payment and performance bonds.
- ◆ Provide project accounting services, including all ledgers and records for the project.
- ◆ Coordinate Owner and Club on site activities, deliveries and third party improvements.
- ◆ Track budgeted and paid amounts for each project expense:
  - ◆ Code all invoices against the appropriate budgeted amount
  - ◆ Input all coded invoices into an accounting system customized for the project based upon CSI format.
- ◆ Prepare, review and submit the Application for Payment, including:
  - ◆ Summary cover sheet
  - ◆ Detail recap indicating all individual costs incurred during the month
  - ◆ Sworn statements
  - ◆ Original applications for payment
- ◆ Facilitate project and contract close-out.

- ◆ Prepare the monthly financial reports, including:
  - ◆ Construction Budget Report
  - ◆ Job Cost Budget comparison
  - ◆ Projected Job Cost to Complete
  - ◆ Current/YTD Construction Budget Reports

#### 4.6 Project Close Out

- ◆ Timely completion of punch list.
- ◆ Bring project to a satisfactory conclusion.
- ◆ Review testing and inspection reports.
- ◆ Monitor testing of all equipment and systems.
- ◆ Facilitate project and contract close-out.
- ◆ Coordinate facility turnover.
- ◆ Determine Substantial Completion of the Work or designated portions thereof and prepare for the Owner, Architect a list of incomplete or unsatisfactory items and a schedule of their completion.
- ◆ Determine Final Completion and provide written notice to the Owner and AE that the Work is ready for final inspection. Secure and transmit to the AE required guarantees, affidavits, releases, bonds and waivers.

### 5.0 FACILITY COMMISSIONING

The CMAR will provide for the coordination of requirements for opening of the facility. With the Owner's maintenance personnel, direct the checkout of utilities, operations systems and equipment for readiness and assist in their initial start-up and testing by the contractors.

#### 5.1 Punch List Coordination

- ◆ Bring project to a satisfactory conclusion.
- ◆ Monitor punchlist completion.
- ◆ Review testing and inspection reports.
- ◆ Verify submittal to the Owner of operating and maintenance manuals and as-built drawings.
- ◆ Facilitate project and contract close-out.
- ◆ Resolve all contractor claim issues.
- ◆ Coordinate facility turnover with the Owner and its stadium/parking operator(s).

#### 5.2 Guarantee, Warranty Review and Administration

- ◆ Expedite the delivery of all warranties and guarantees required at the conclusion of the project.
- ◆ Verify submittal to the Owner of operating and maintenance manuals and as-built drawings.

- ◆ Provide administration and technical support for maintenance of guarantee and warranty agreements and completion of remedial work during first full year of operation.
- ◆ Review all systems one year after substantial completion and one month prior to expiration of warranty.

### 5.3 Final Project Cost Reports

- ◆ Provide final accounting of all project costs and preserve for no less than five (5) years after final payment.

## 6.0 LOCAL BUSINESS ENTERPRISE PROGRAM

The CMAR shall develop and administer a program or programs for involving targeted, minority, and women owned businesses in the work to be performed and materials to be supplied in connection with the construction of the Project. Provide the services outlined below:

6.1 Prepare the program for presentation to review by the Owner.

6.2 Notify and maintain relationships with Local and other targeted contractors and suppliers and to encourage the greatest possible level of support and practicable involvement in the Project.

6.3.1 Identify and maintain an updated list and background information on qualified Local contractors.

6.3.2 Maintain an updated database of individuals interested in being employed in the construction of the Project.

6.3.3 Participate in meetings with and at the request of the Owner, to insure that the development of the Project and implementation of the program continues to address community concerns and legislative mandates.

6.4 Work with local building trade unions to implement and administer the apprenticeship program and to identify other areas for their constructive involvement.

6.5 Review the breakdown of budget, project schedule and areas of work for the Project with the bidding contractors to develop trade packages that can be targeted for Local and other targeted contractor's participation.

6.6 Work affirmatively to identify obstacles to the involvement of targeted businesses in the project and investigate appropriate methods to minimize the impact caused by the obstacles.

- 6.7 Help identify and encourage majority/minority joint-venture relationships for the contractors bid list.
- 6.9 Hold a pre-bid conference for the bidders, suppliers and contractors and interested Local contractors and suppliers.
- 6.11 Design and implement with the contractors record keeping and reporting systems for Local utilization and workforce composition.
- 6.12 Monitor the implementation of the program through the development of tracking reports, attending meetings and walking the job site. Provide regularly updated information to the Owner.
- 6.13 Facilitate, arbitrate and evaluate with all contractors and subcontractors' Local activities to insure that best efforts are being made.
- 6.14 Provide reports as necessary to the Owner. This distribution list may be expanded to incorporate other necessary project participants.

-End of Exhibit-

**EXHIBIT B**  
**El Paso Ballpark**  
**Construction Management Services**  
**Cost Proposal & Allocation Summary**

**I. Cost Proposal**

**Preconstruction Phase Services**

For all Preconstruction Phase Services until acceptance of the Guaranteed Maximum Price Proposal. (Lump Sum Amount) \$ 35,000

**Construction Phase Services**

Demolition (allowance).....	\$ <u>2,500,000</u>
Bid Trades.....	\$ <u>33,251,257</u>
CM Contingency.....	\$ <u>1,750,000</u>
General Conditions (Fixed Lump Sum).....	\$ <u>202,670</u>
Staffing (Fixed Lump Sum).....	\$ <u>902,073</u>
CM Insurance.....	\$ <u>296,500</u>
CM Fee .....	\$ <u>942,305</u>
Payment & Performance Bond.....	\$ <u>302,306</u>
Target Budget.....	\$ 40,182,111

**Key Personnel & Staffing**

Total number of Staffing hours..... 19,248 hours  
 Submit an itemized breakdown of the Staffing separately.

**CM Mark-ups on Scope Changes to the Bid Trades**

For Work in excess of the Target Budget (as a % of Bid Trades):

General Conditions (Fixed)	0.54 %
Staffing (Fixed)	2.41 %
CM Insurance (Fixed)	0.79 %
CM Bond (Fixed)	0.81 %
CM Fee (Fixed)	2.51 %

For Work that reduces the Target Budget (as a % of Bid Trades):

General Conditions (Not-to-exceed)	0.00 %
Staffing (Not-to-Exceed)	0.00 %
CM Insurance (Fixed)	<0.79 %>
CM Bond (Fixed)	<0.81 %>
CM Fee (Fixed)	0.00 %

### Shared Savings

If upon final completion of the Work, the Cost of the Work plus the Construction Manager's Fee is less than the Guaranteed Maximum Price, the difference shall be deemed Savings. 70 % of the Savings shall be retained by the Owner and 30 % of the Savings shall be paid to the Construction Manager by the Owner in addition to the final payment at the time that the final payment is made to the Construction Manager. The Savings payable to Construction Manager shall not exceed the amount of \$ 300,000.

### Burden Rates (from Section 6.2.4 of the CM Contract)

Construction Manager shall apply a rate of 33 % to the direct labor rates for all salaried personnel and 18 % for all trades labor for all costs including but not limited to FICA, FUTA, SUTA, unemployment compensation, worker's compensation, health insurance, pension, 401K retirement plan and payroll expense.

## II. Cost Allocation Summary

### Cost Allocation Key

- O = Owner Cost
- BT = Bid Trade
- GC = General Conditions
- ST = Staffing
- I = Insurance
- Fee = CM Fee
- Bond= CM Payment & Performance Bond

### COST ITEM

### COST ALLOCATION

#### I. Home Office Costs

All profit	Fee
Home office overhead	Fee
Project managers, corporate professionals	Fee
Corporate accounting and related charges	Fee
Corporate computers and systems charges	Fee

Executive and other corporate personnel (unless specified in staffing)	Fee
Joint venture administrative expenses ( if required)	Fee
Staff relocation expenses	Fee
Travel for home office staff	Fee
Business licenses, taxes, etc.	Fee
Legal expenses	Fee
CM Insurance premiums (incl. Builder's Risk)	I
CM Payment and Performance Bond	Bond

## II. Field Office

Site supervision	ST
Project executive	ST
Project managers	ST
Engineer/supervisors	ST
Purchasing/estimating/scheduling	ST
Office manager	ST
Clerical	ST
Safety staff	ST
Any other staff directly employed at the project site or who have specific duties that may be charged to the project	ST
Watchmen/guards	BT
Laborers (related to CM's work)	GC
Carpenters (related to CM's work)	GC
Layout crews	GC
Messenger/delivery services	GC
Travel (in town only)	GC
Computers, printers, fax, internet service & phones (at site only)	GC
Copying, postage, paper (at site only)	GC
Furniture, supplies (at site only)	GC
Drawing reproduction (including bid document and specification reproduction for bidding)	GC
Vehicles	GC

## III. Temporary Facilities

Temporary offices/field offices	GC
Sheds	GC
Toilets	GC
Storage	GC
Protection	GC
Utilities (sanitary, sewer, water, electrical, etc.)	GC
Utility hook-up/disconnect fees	GC
Temporary heating & cooling	GC
First aid and facilities	GC

Elevators, hoists & tower cranes	BT
Fencing, barricades, signage	BT
Roads	BT
Flagmen	BT
Sidewalk Bridges	BT

#### **IV. Miscellaneous Costs**

General building permits	O
Zoning and land-use permits	O
Site survey	O
Existing conditions surveys	GC
Project sign	GC
Misc. tools and equipment	GC
Quality control testing and inspection	GC
Construction testing and inspection	O
Soil testing	O
Roofing & waterproofing testing	O
Rubbish chutes	BT
Rubbish removal	BT
Scaffolding	BT
Pumping	GC
Pest control	GC
Ceremonies	GC
Alcohol and drug testing	GC
Progress photos/site web camera	GC
Clean-up	GC
Final clean-up	GC
Punchlist, LEED Commissioning activities and administration	GC
Contract closeout	GC
Warranty administration	GC
Premium time	BT
All other items necessary to properly complete the work (CM to identify in proposal)	GC

-End of Exhibit B-

## Exhibits E, F, and G

**Exhibit E**      **Alta/ACSM Land Title Survey –**

This Exhibit refers to the Land Survey included in the RFP and used to support the re-plat of the property Titled Stevens Addition Re-plat "A" and included in the RFP

**Exhibit F**      **Geotechnical Investigations –**

This Exhibit refers to the Geotechnical Investigation performed by AMEC, Inc., titled GEOTECHNICAL STUDY, PROPOSED BASEBALL STADIUM, EL PASO, TEXAS, AMEC Project Number 1237192031.

**Exhibit G**      **Environmental Exhibits –**

This Exhibit refers to the Asbestos Inspection at City Hall Building by Sun City Analytical Inc. dated September 8, 11, and 12, 2012, Lead Based Paint Testing for City Hall dated September 17, 2013 by Sun City Analytical, Inc., Microbial Investigation for City Hall dated September 12, 2012 by Sun City Analytical, Inc., Hazardous Materials Inspection for City Hall dated September 17, 2012 by Sun City Analytical, Inc., and Asbestos Inspection Report for Insights Museum Building dated October 12, 2012 by Sun City Analytical, Inc.

**EL PASO BALLPARK**  
**INSURANCE REQUIREMENTS**

**EXHIBIT I**

**SECTION 1**  
**GENERAL PROVISIONS**

1.1 In accordance with the Agreement, Contractor shall, for the protection and benefit of Owner and Contractor, procure, pay for and maintain in full force and effect, at all times during the performance of the work until final acceptance of the work or for such duration as required, policies of insurance set forth in Section 2, in form and substance acceptable Owner.

1.2 All policies set forth in Section 2 shall be issued by a responsible carrier or carriers (i) acceptable to Owner, (ii) authorized to do business in the State of Texas and (iii) with a rating, according to the most recent edition of Best's Insurance Guide, of not less than A-IX. Unless Owner consents in writing, all insurance procured by Contractor under or pursuant to this Exhibit shall be written on an occurrence basis. Owner consents to Contractors' pollution liability and professional liability being on claims made form.

1.3 If Contractor or any subcontractor desires additional coverage, higher limits of liability or other modifications to insurance coverage set forth in this Exhibit for its own protection, Contractor or such subcontractor shall be responsible for the acquisition and cost of the additional protection.

1.4 Contractor hereby agrees to deliver to Owner, within ten (10) days of the date of the Agreement and prior to any equipment or personnel being brought onto the site of the work or the Project site, Certificates of Insurance in form and substance satisfactory to Owner evidencing the required coverage with limits not less than those specified in Section 2. The coverage afforded under any insurance policy obtained under or pursuant to Section 2 shall be primary to any valid and collectible insurance carried separately by any of the required additional insureds. Further, all policies and Certificates of Insurance shall expressly provide that no less than thirty (30) days' prior written notice shall be given to Owner in the event of material alteration, cancellation or non-renewal of the coverage evidenced by such Certificate of Insurance, except notice of cancellation for failure to pay any required premium which shall be furnished no less than ten (10) days prior to any such cancellation. All certificates shall also include the name of the project on the corresponding insurance certificate.

1.5 In no event shall any failure of Owner to receive certificates of insurance required under Section 2 hereof or to demand receipt of such certificates of insurance prior to Contractor commencing the work required under or pursuant to the Agreement be construed as a waiver of the Contractor's obligations to obtain insurance pursuant to this Exhibit. The obligation of Contractor to procure and maintain any insurance required by this Exhibit is a separate responsibility of Contractor and independent of the duty to furnish a certificate of insurance of any such insurance policies.

1.6 If Contractor fails to purchase and maintain, or require to be purchased and maintained, any insurance required under Section 2, Owner may, but shall not be obligated to, upon five (5) days' written notice to Contractor, purchase such insurance on behalf of Contractor and shall be entitled to be reimbursed by Contractor upon demand or to set-off against any payments thereafter due Contractor the

amount of purchasing such insurance.

1.7 When any required insurance, due to the attainment of a normal expiration date or renewal date, shall expire, Contractor shall supply Owner with Certificates of Insurance that clearly evidence the continuation of all coverage in the same manner, limits of protection and scope of coverage as was provided by the previous policies. All renewal and replacement policies shall be (i) in form and substance satisfactory to Owner, (ii) written by carriers acceptable to Owner and (iii) satisfy all requirements set forth in this Section 1 for the initial carrier.

1.8 Contractor shall cause each subcontractor, vendor or supplier to procure and maintain insurance coverage in the forms and amounts in accordance with the requirements of this Exhibit. Contractor shall be responsible for any losses incurred as a result of any subcontractor's failure to procure and maintain the required insurance coverage, unless a lesser amount has been approved by Owner.

## SECTION 2 COVERAGE REQUIREMENTS

### 2.1 Worker's Compensation

2.1.1. In form and with limits in accordance with the laws of the State of Texas, including Occupational Disease Insurance, Voluntary Compensation Insurance, and if applicable, United States Longshoreman's and Harbor Workers' Coverage and Maritime Coverage.

2.1.2. Employer's Liability Insurance with limits not less than One Million Dollars (\$1,000,000) per occurrence; per employee for disease; and in the aggregate for disease.

### 2.2 Commercial General Liability

2.2.1 Including, without limitation, the following coverage:

- (i) Premises/Operations, including deletion of explosion, collapse and underground (XCU) exclusions;
- (ii) Independent Contractors' Protective Liability;
- (iii) Products/Completed Operations to be maintained in full force and effect for a period of two (2) years following final completion of the Project and continuing to name required parties as additional insureds for the entire two (2) year period;
- (iv) Contractual Liability;
- (v) Broad Form Property Damage, including Products/Completed Operations;
- (vi) Personal Injury Liability.

2.2.2 Limits of Liability shall not be less than a combined single limit of One Million Dollars (\$1,000,000) per occurrence for bodily injury and property damage and with the following aggregate limits:

- (i) General Aggregate limit of One Million Dollars (\$1,000,000), which shall be specifically endorsed to provide that the General Aggregate Limit applies

- separately to the Project;
- (ii) Personal and Advertising Injury sub-limit of One Million Dollars (\$1,000,000);
  - (iii) Products/Completed Operations of One Million Dollars (\$1,000,000) each occurrence and in the aggregate.

2.2.3 Contractor shall cause its insurer to add endorsements to the policy which add the Owner and others as required by Owner as additional insureds, but only with respect to liability arising out of the operations performed for such Insured or on behalf of the Named Insured.

It is further understood that any insurance carried by any additional insured shall be excess of any coverage provided by Contractor or its subcontractors.

### 2.3 Commercial Automobile Liability

- 2.3.1 Including contractual liability coverage and coverage for all owned, non-owned and hired vehicles.
- 2.3.2 Limits of liability not less than One Million Dollars (\$1,000,000) for each occurrence for bodily injury and property damage.
- 2.3.3 Contractor shall cause its insurer to attach endorsements to the policy which add the Owner and others as required by Owner as Additional Insureds, but only with respect to liability arising out of the ownership, operation or maintenance of autos.

It is further understood that any insurance carried by any additional insured shall be excess of any coverage provided by Contractor or its subcontractors.

### 2.4 Umbrella Liability

- 2.4.1 Shall specifically identify each of the policies described above in this Section 2 on the Schedule of Underlying Coverage, and shall provide excess coverage over each of the underlying policies.
- 2.4.2 With limits not less than Twenty Five Million Dollars (\$25,000,000), each occurrence and Fifty Million Dollars (\$50,000,000.) in the aggregate, excess of the underlying policy limits.
- 2.4.3 Contractor shall cause its insurer to add endorsements to the policy which add the Owner and others as required by Owner as additional insureds, but only with respect to liability arising out of the operations performed for such Insured or on behalf of the Named Insured.

### 2.5 Contractors' Pollution Liability Insurance

- 2.5.1 With limits of liability of \$5,000,000 each claim and aggregate with a deductible no greater than \$250,000 each claim.
- 2.5.2 The policy will provide coverage for sums that the insured become legally obligated to pay as loss as a result of claims for bodily injury, property damage or clean-up costs caused by pollution incident. .
- 2.5.3 If the policy is a "claims made" form, coverage will be maintained for four years after completion of the project.

## 2.6 Professional Liability Insurance (Errors & Omissions)

- 2.6.1 The Contractor and subcontractors whose contracts require design services will maintain professional liability insurance providing coverage for claims allegedly arising out of errors, omissions or negligent acts due to their performance, or failure to perform, design, architectural, engineering, land surveying or interior design services.
- 2.6.2 With limits of liability of at least \$2,000,000 each claim and annual aggregate with a deductible no greater than \$250,000.

## SECTION 3 SPECIFIC PROJECT PROPERTY INSURANCE

- 3.1 The Contractor shall purchase and maintain Builder's Risk insurance on a completed value form in the amount of the contract cost of the project. The policy shall include the Owner, Contractor and subcontractors of any tier as insureds. The policy deductible of \$10,000 shall be borne by the Contractor.
- 3.2 Owner, Contractor and all subcontractors waive all rights against each other for damages caused by fire or other perils and for the loss of use to the extent covered by property insurance obtained pursuant to this Insurance Rider, or other property insurance applicable to the work, except such rights as they may have to the proceeds of such insurance.
- 3.3 Owner shall not be responsible for, nor shall they insure, the property of Contractor or any subcontractor, including, but not limited to, tools and equipment, located at the job site which is not intended to be incorporated into the work.

## SECTION 4 ADDITIONAL INSUREDS

- 4.1 Contractor shall cause the City of El Paso (including all City of El Paso entities); the Mountain Star Sports Group, LLC (including all Mountain Star Sports Group Ownership entities); All Owner's Consultants (Owner's Consultants) including but not limited to: Populous. (Architect); all design consultants, International Facilities Group, LLC (Owner's Representative);etc. to be included as Additional Insureds under Contractor's Automobile/General Liability policy and Umbrella Liability policy, if any. Contractor's policies shall be primary and non-contributory for the benefit of the additional insureds and

on ISO Form CG2010 or equivalent in coverage. Products/Completed Operations coverage shall be continued for a minimum of two years after the work is completed.

# TEXAS SALES AND USE TAX EXEMPTION CERTIFICATION

Name of purchaser, firm or agency <b>CITY OF EL PASO</b>	
Address (Street & number, P.O. Box or Route number) <b>TWO CIVIC CENTER PLAZA</b>	Phone (Area code and number) <b>(915) 541-4435</b>
City, State, ZIP code <b>EL PASO, TEXAS 79901</b>	

I, the purchaser named above, claim an exemption from payment of sales and use taxes (for the purchase of taxable items described below or on the attached order or invoice) from:

Seller: \_\_\_\_\_

Street address: \_\_\_\_\_ City, State, ZIP code: \_\_\_\_\_

Description of items to be purchased or on the attached order or invoice:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Purchaser claims this exemption for the following reason:

The City of El Paso is a Municipality and Political Subdivision of the State of Texas and thereby exempt  
from State and local government sales / use taxes and Federal income taxes. IAW State Comptroller  
Ruling #3.322 dated June 18, 1986.

I understand that I will be liable for payment of sales or use taxes which may become due for failure to comply with the provisions of the Tax Code: Limited Sales, Excise, and Use Tax Act; Municipal Sales and Use Tax Act; Sales and Use Taxes for Special Purpose Taxing Authorities; County Sales and Use Tax Act; County Health Services Sales and Use Tax; The Texas Health and Safety Code; Special Provisions Relating to Hospital Districts, Emergency Services Districts, and Emergency Services Districts in counties with a population of 125,000 or less.

I understand that it is a criminal offense to give an exemption certificate to the seller for taxable items that I know, at the time of purchase, will be used in a manner other than that expressed in this certificate and, depending on the amount of tax evaded, the offense may range from a Class C misdemeanor to a felony of the second degree.

sign here	Purchaser	Title	Date
	<i>Carmen Quintero Landilana</i>	CHIEF FINANCIAL OFFICER	

NOTE: This certificate cannot be issued for the purchase, lease, or rental of a motor vehicle.

**THIS CERTIFICATE DOES NOT REQUIRE A NUMBER TO BE VALID.**

Sales and Use Tax "Exemption Numbers" or "Tax Exempt" Numbers do not exist.

This certificate should be furnished to the supplier. Do not send the completed certificate to the Comptroller of Public Accounts.

# DRAFT AIA® Document G704™ - 2000

## Certificate of Substantial Completion

**PROJECT:**  
(Name and address):  
Meredith Template

**PROJECT NUMBER:** /  
**CONTRACT FOR:** General Construction  
**CONTRACT DATE:**

**OWNER:**   
**ARCHITECT:**   
**CONTRACTOR:**   
**FIELD:**   
**OTHER:**

**TO OWNER:**  
(Name and address):

**TO CONTRACTOR:**  
(Name and address):

### PROJECT OR PORTION OF THE PROJECT DESIGNATED FOR PARTIAL OCCUPANCY OR USE SHALL INCLUDE:

The Work performed under this Contract has been reviewed and found, to the Architect's best knowledge, information and belief, to be substantially complete. Substantial Completion is the stage in the progress of the Work when the Work or designated portion is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use. The date of Substantial Completion of the Project or portion designated above is the date of issuance established by this Certificate, which is also the date of commencement of applicable warranties required by the Contract Documents, except as stated below:

#### Warranty

#### Date of Commencement

\_\_\_\_\_  
ARCHITECT

BY

\_\_\_\_\_  
DATE OF ISSUANCE

A list of items to be completed or corrected is attached hereto. The failure to include any items on such list does not alter the responsibility of the Contractor to complete all Work in accordance with the Contract Documents. Unless otherwise agreed to in writing, the date of commencement of warranties for items on the attached list will be the date of issuance of the final Certificate of Payment or the date of final payment.

**Cost estimate of Work that is incomplete or defective:** \$ 0.00

The Contractor will complete or correct the Work on the list of items attached hereto within Zero (0) days from the above date of Substantial Completion.

\_\_\_\_\_  
CONTRACTOR

BY

\_\_\_\_\_  
DATE

The Owner accepts the Work or designated portion as substantially complete and will assume full possession at \_\_\_\_\_ (time) on \_\_\_\_\_ (date).

\_\_\_\_\_  
OWNER

BY

\_\_\_\_\_  
DATE

The responsibilities of the Owner and Contractor for security, maintenance, heat, utilities, damage to the Work and insurance shall be as follows:

(Note: Owner's and Contractor's legal and insurance counsel should determine and review insurance requirements and coverage.)





# Item 9C

## “Solicitation No. 2013-109R – Construction Manager At Risk” El Paso Ballpark

R. Alan Shubert, P.E.

Project Engineer – El Paso Ballpark



January 8, 2013



## ***Background***

- ❑ On September 18, 2012 City Council approved the Ballpark Development Agreement between the City and Mountainstar Sports Group
  
- ❑ City Council also approved the use of Construction Manager-At-Risk as an alternative project delivery method and approved the use of the process for this particular project on September 18, 2012.



## ***Construction Manager-at-Risk Overview***

- ✓ Ability to expedite construction schedule
  - Eliminates step of separate bidding process
  
- ✓ Requires an ongoing interactive approach
  
- ✓ Constructability reviews embedded in process
  - More flexibility to tailor project phasing
  
- ✓ Necessity to complete project with aggressive deadline



## ***Construction Manager-at-Risk Overview (continued)***

- ✓ The procedure for the selection of a Construction Manager-at-Risk can be a one or two-step process:
  
- ✓ Two-Step Process: Request for Qualifications (RFQ) followed by Request for Proposals (RFP)
  - Qualifications & cost evaluated to short-list
  - Five or fewer selected
  - Fee is negotiated with top-ranked proposer



# Selection Criteria

**CITY OF EL PASO CONSTRUCTION MANAGER @ RISK SELECTION CRITERIA**

PROJECT: Construction Manager @ Risk - El Paso Ballpark			SCORESHEET			
SUBMITTAL BY THE PRIME		MAX POINTS				
<i>PAST EXPERIENCE</i>		25	FIRM A	FIRM B	FIRM C	FIRM D
Related sports facilities minor league venues of at least 5,000 seat capacity.	5					
Offeror has successfully completed, as CM At Risk, a minimum of three (3) ballpark projects in the past (10) years of similar size and type.	10					
Offeror has demonstrated experience with fast track projects and/or public/private development based projects and their delivery systems.	5					
Offeror has demonstrated use of local staff for the performance of the CM At Risk services.	5					



# Selection Criteria (Continued)

<b>PROJECT APPROACH</b>		<b>25</b>	<b>FIRM A</b>	<b>FIRM B</b>	<b>FIRM C</b>	<b>FIRM D</b>
<b>Does the Offeror include a detailed approach to accomplishing the project? Does proposed project approach address all phases of the project?</b>	<b>5</b>					
<b>Does the Offeror's proposed schedule detail all important milestones and deliverables?</b>	<b>5</b>					
<b>Experience and commitment of Offeror's proposed personnel. Resources are clearly identified, including staffing levels, technology and equipment.</b>	<b>5</b>					
<b>Offeror's QA/QC Plan and safety record on recent projects.</b>	<b>5</b>					
<b>Offeror's record of incorporating local businesses in similar projects.</b>	<b>5</b>					



# Selection Criteria (Continued)

<i><b>CAPABILITIES</b></i>		<b>20</b>	<b>FIRM A</b>	<b>FIRM B</b>	<b>FIRM C</b>	<b>FIRM D</b>
Offeror's financial capacity is appropriate to the size and scope of the scope of the Project.	<b>5</b>					
Offeror has the ability to provide 100% payment and performance bond for the project.	<b>10</b>					
Does Offeror provide health benefits to its employees?	<b>5</b>					
<i><b>FINANCIAL PROPOSAL</b></i>		<b>30</b>				
Cost of Preconstruction phase services.	<b>10</b>					
Proposed staffing hours, cost and burden rates.	<b>10</b>					
Proposed cost of insurance, bonding and CM Fee.	<b>10</b>					
<b>TOTAL SCORE</b>		<b>100</b>				



# Selection Summary

## Short List

SHORTLIST				
<b>RFQ Notification Date:</b>	Tuesday, November 20, 2012	<b>RFQ Due Date:</b>	Wednesday, December 05, 2012	
Shortlist Committee		Rank of CMAR Firms that Submitted RFQ package		
Alan Shubert, Engineering & Construction Management	1	Mortenson Construction	X	X=Shortlisted
Bill Studer, Deputy Director - City of El Paso	2	Jordan-Hunt JV	X	
Josh Hunt, Owner's Rep Mountain Star Sports	3	Manhattan Construction	X	
Juan Gonzalez-Garza, Owner's Rep. Mountain Star Sports	4	Turner-Byers JV	X	
	5	EMJ Construction	X	
	6	Crossland Construction		
<b>Scoring sheets issued / due date:</b>	Wednesday, December 05, 2012			
<b>Final Ranking Date:</b>	Thursday, December 06, 2012			
<b>Firms Notified Date:</b>	Thursday, December 06, 2012			



# Selection Summary

## Final Selection

FINAL SELECTION			
Presentation Committee		Rank of Finalists	
Alan Shubert, Engineering & Construction Management	1	Jordan-Hunt JV	
Irene D. Ramirez, Engineering & Construction Management	2	Mortenson Construction	
Bill Studer, Deputy Director - City of El Paso	3	Turner-Byers JV	
Josh Hunt, Owner's Rep Mountain Star Sports	4	EMJ Construction	
Juan Gonzalez-Garza, Owner's Rep. Mountain Star Sports	X	Manhattan Const. (Withdraw)	
Tom Philley, Owner's Rep. Mountain Star Sports			
		<b>Selected Firm:</b>	<b>Jordan-Hunt Joint Venture</b>
<i>Presentation Date:</i>	Thursday, December 20, 2012		
<i>Firms Notified Date:</i>	Wednesday, January 02, 2013		



## ***Background on Selected Team***

- Jordan-Hunt joint venture
- CF Jordan Construction is an El Paso, Texas based general construction services company with over 43 years experience and over \$5 billion in completed projects.
- Local subcontractors are historically used at approximately 94%.



## ***Background on Selected Team (continued)***

- Hunt Construction Group has been in the construction industry for nearly 70 years; its portfolio ranges from sports facilities, to hospitals, to research and development facilities.
- Hunt has constructed over 40 different arenas and multipurpose venues. Examples include, Busch Stadium, Lucas Oil Field and Marlins Park.

Please note: Hunt Construction Group is in no way related or affiliated with Hunt Companies.



## ***Background on Selected Team (continued)***

- Hunt demonstrates a strong commitment of using local contractors.
- The RFP showed how this company has enhanced local communities.



# Examples - Busch Stadium

## Busch Stadium • St. Louis, MO



**Brief Description:**

A 1,500,000 SF baseball facility, including 46,844 seats and 106 suites and party rooms. Additional scope of work included the demolition of old Busch Stadium. Home of MLB's St. Louis Cardinals.

**Client:**

*St. Louis Cardinals*

**Architect:**

Populous

**Hunt's Role(s):**

Design-Build

**Project Value:**

\$287 million





# Examples - Lucas Oil Field

## Lucas Oil Stadium • Indianapolis, IN



### Brief Description:

A 1,800,000 SF retractable roof stadium consisting of 63,000-seats including 7,100 club seats and 150 suites, eight of which are at field level. Home of the NFL's Indianapolis Colts, NCAA basketball Championships, major conventions and other events.

### Client:

*Indiana Stadium & Convention Building Authority*

### Architect:

HKS

### Hunt's Role(s):

Construction Management Agency

### Project Value:

\$598 million

### Awards:

- 2008 Midwest Construction's Best Overall Project
- 2009 American Council of Engineering Companies (ACEC) Grand Award - Awards of Excellence
- 2009 Sports Facility of the Year Street and Smith's SportsBusiness Journal
- 2009 A Monumental Affair Awards for Excellence in Construction, Downtown Development, Engineering – Honor Award
- 2010 Aon Build America Merit Award Construction Management New Construction
- 2010 Named one of SportsPro's World's Most Important Sports Venues



# *Other Examples*

Marlins Park



Nationals Park



Citi Field



University of Phoenix Stadium









## ***Item Information – 9C***

### **Action Requested:**

- “Authorize the City Manager to execute the modified AIA A133-2009 Standard Form of Agreement between Owner and Construction Manager as Contractor and any related contract documents and agreements necessary to effectuate this award, including the Guaranteed Maximum Price Amendment.”



## ***Contract Information***

### **Consultants Information:**

- Jordan-Hunt, a Texas Joint Venture

### **Contract Amount:**

- Contractor's fee for Preconstruction Phase - \$35,000
- Contractor's fee for Construction Phase - \$40,147,000
- Total Budget - \$40,182,111



# Cost Breakdown

<b>Proposal</b>	<b>Cost</b>
Preconstruction Phase Svcs	\$35,000
CM Fee	\$942,305
General Conditions (NTE)	\$202,670
Staffing (NTE)	\$902,073
Insurance	\$296,500
Bond	\$302,306
<b><i>Subtotal</i></b>	<b><i>\$2,680,854</i></b>
Demolition	\$2,500,000
Bid Trades	\$33,251,257
CM Contingency	\$1,750,000
<b>Total</b>	<b>\$40,182,111</b>



## ***Next Steps***

- ✓ 01/08/2013 - City Council approval of CMAR Agreement
- ✓ 01/17/2013 – CMAR submits Concept Design estimate based upon Schematic Design and Program Documents.
- ✓ 01/21/2013 – CMAR to receive Demolition Bids, salvage plan and implosion plan for City Hall Building
- ✓ 01/28/2013 – CMAR to commence with site demolition, utility relocations and Insights Building Demolition (Schedule may require multiple Guaranteed Maximum Price (GMP))
- ✓ 03/01/2013 – CMAR receives scope drawings for preparation of GMP proposal (Estimate schedule may require multiple GMP's)



# ***Questions/Comments***

January 8, 2013