# 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)

[Insert]

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

[Insert]

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

[Insert]

The Architect: (Name, legal status and address)

[Insert]

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

NV5

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

[Insert]

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

[Insert]

The Owner and Construction Manager agree as follows.

#### 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

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.

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# **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, 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 and as is consistent with reasonable professional skill and care and the orderly progress of the Project. All such time periods and deadlines are of the essence. The Construction Manager warrants that the services shall be performed in a good and workmanlike manner and shall be suitable and fir for the purpose for which they are intended. 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<sup>TM</sup>–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 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.

§ 2.1.2.1 During the Preconstruction Phase, the Construction Manager shall review the Contract Documents to ascertain whether the components of the plumbing, electrical and mechanical systems may be constructed without interference with each other, or with the structural or architectural components of the Project, or with existing systems. In the event that conflicts between the systems are discovered, the Construction Manager shall promptly notify the Owner and Architect in writing.

§ 2.1.2.2 Notwithstanding any provision of the General Conditions of the Contract for Construction to the contrary, the Construction Manager shall not be entitled to additional compensation for any delay or disruption to the Work arising from any conflict between the mechanical, electrical, and plumbing systems with each other, or with the structural or architectural components of the Work, or with existing systems, if such conflicts should have been discovered during the Construction Documents Phase by the Construction Manager through the exercise of reasonable diligence, and the Owner and Architect were not informed of such conflicts as required by subparagraph 2.1.2.1. This provision shall apply only with respect to conflicts appearing in the Drawings and Specifications provided for the Construction Manager's review prior to proposal of a Guaranteed Maximum Price.

## § 2.1.3 Project Schedule

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, at a minimum, 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; dates of Substantial Completion and Final Completion, and the occupancy requirements of the Owner. If updated Project schedules indicate that previously-approved schedule may not be met, then the Construction Manager shall make appropriate recommendations to the Owner and Architect and, upon written approval of both, shall implement necessary corrective action.

§ 2.1.3.1 The Project Schedule is attached hereto as Exhibit D and shall not be modified without prior authorization of the Owner.

## § 2.1.4 Phased Construction

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. The Construction Manager shall make recommendations to the Owner and Architect regarding the phased

issuance of Drawings and Specifications so as to facilitate the proposal of a Guaranteed Maximum Price when all elements of the Drawings and Specifications are at least ninety percent complete, unless mutually agreed otherwise by the Architect, Owner and the Construction Manager.

#### § 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 in a form acceptable to the Owner, 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 agreed to 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 promptly inform the Owner and Architect if estimates of the Cost of the Work exceed or are anticipated to exceed the latest approved Project budget and make recommendations for corrective action and/or cost reductions in writing, including but not limited to, substitution of materials or revisions or alterations to the Design Development Documents or the Construction Documents, to bring the Project within the Owner's budget, but shall not delete necessary components of the Project without Owner's consent. In the event that the quality or scope identified in the estimates are unacceptable or exceed the Owner's identified budget, the Construction Manager shall work with the Architect to develop options that are acceptable to Owner and are within the Owner's budget.

## § 2.1.6 Subcontractors and Suppliers

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

The Construction Manager shall establish a process, to be reviewed and approved by the Owner, to qualify a list of local subcontractors provided by the Owner, Owner's Consultants, and Construction Manager and will use its commercially reasonable best efforts to provide those subcontractors opportunities to bid on Work associated with the Project. As working drawings and specifications are completed, Construction Manager will establish bidding schedules and conduct pre-bid conferences to familiarize bidders with bidding documents, management techniques and any special systems, materials or methods. Construction Manager will prepare scope packages for each trade which clearly identify the bid scope, including general conditions items such as cleanup and safety. Construction Manager will review scope packages with the Owner and Architect prior to issuing same to subcontractors. Construction Manager will analyze all bids and prepare; (1) a bid matrix and scoring method (2) written bid analysis, (3) review bids and bid analysis with the Owner and Architect, (4) select and recommend lowest, qualified bidder to the Owner, and (5) award subcontracts.

The subcontractor selected for an award will be the subcontractor whose bid, as presented in the response to the bidding documents, is the most advantageous to the Project. The Owner is not bound to accept the lowest priced bid if that proposal is not in the best interests of the Project as determined by the Owner.

§ 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. 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, however, does not warrant or guarantee estimates and schedules except as may be included as part of the Guaranteed Maximum Price. The Construction Manager shall use reasonable commercial care 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 or Owner may require.

For any Work that is specified as design build systems by the Architect (e.g. Fire Sprinkler, Fire Alarm, etc...) the Construction Manager is required to ascertain that its subcontractors drawing and specifications are in accordance with applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities.

## § 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 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 to be mutually agreed upon by the Owner and the Construction Manager and in consultation with the Architect, the Construction Manager shall prepare a Guaranteed Maximum Price proposal for the Owner's review and acceptance. It is the intent that the Guaranteed Maximum Price in the proposal shall be established based on the Construction Documents and shall be the sum of the Construction Manager's estimate of the Cost of the Work, including contingencies described in Section 2.2.4, the Construction Manager's Fee, and the Construction Manager's fixed General Conditions. If any Guaranteed Maximum Price proposal submitted to the Owner exceeds previously approved estimates or the Owner's budget, then the Construction Manager shall make appropriate recommendations to the Owner and Architect for cost reductions, including but not limited to, substitution of materials or revisions or alterations to the Construction Documents, to bring the Project within the Owner's budget, but shall not delete necessary components of the Project without Owner's consent. In the event that the quality or scope identified in the proposal are unacceptable or exceed the Owner's identified budget, the Construction Manager shall work with the Architect to develop options that are acceptable to Owner, are within the Owner's budget, and meet the Owner's requirements for dates of Substantial Completion and Final Completion. The Construction Manager may propose separate Guaranteed Maximum Prices for separate Works within the Project, as schedules and efficiencies dictate. The Construction Manager will work with the Architect to achieve a Guaranteed Maximum Price that is fully acceptable to Owner and is within the Owner's budget for the Work and for the Project.

§ 2.2.1.1 Owner and Contractor agree that the Guaranteed Maximum Price may include an estimating contingency mutually agreed to in writing in advance base on the level of completion of the documents. This estimating contingency is for the Contractor's use during the Preconstruction phase to protect the Guaranteed Maximum Price from estimating errors and the market conditions at the time of subcontractor bidding.

§ 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.

§ 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, general conditions 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, mutually agreed to by the Owner and Construction Manager, by which the Owner must accept the Guaranteed Maximum Price.
- .6 The Guaranteed Maximum Price proposal may not be based in any party on any subcontract or material supply contract which would require the Owner to compensate the Construction Manager on other than a maximum price basis.

- § 2.2.4 In preparing the Construction Manager's Guaranteed Maximum Price proposal, the Construction Manager shall include its construction contingency, in an amount to be accepted and approved by the Owner, but not to exceed 10%. The construction contingency is for the Construction Manager's exclusiveuse to cover those costs considered reimbursable as the Cost of the Work but not included in a Change Order. This contingency shall not be used to increase the agreed upon General Conditions without Owner approval.
  - .1 The Construction Contingency portion of Exhibit "A" is a lump sum provided within the Guaranteed Maximum Price for the Contractor's use during the Construction Phase in protecting the Guaranteed Maximum Price from estimating the market conditions at the time of subcontractor bidding and errors and omissions from the 100% Construction Document pricing with prior authorization from the
  - .2 Under no circumstances is the Construction Contingency to be used by the Owner for increases in the scope, quality or quantity of the Work; nor by the Contractor for correcting nonconforming Work; Work items discovered during the Construction Phase not to be coordinated among the Subcontractor's scope of work due to an oversight of the Contractor of similar Contractor's errors or omissions.
  - .3 Contractor's access to the Contractor's Contingency shall be approved in writing, via change order, on a per instance basis by the Owner's Representative as being in compliance with the above requirements, such approval not to be unreasonably withheld.
- § 2.2.5 The Construction Manager and selected subcontractors shall meet with the Owner and Architect to review the Guaranteed Maximum Price proposal or portions thereof applicable to subcontractors. 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 that are acceptable to Owner.
- § 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, and incorporate same into this Agreement as Exhibit "A", 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, clarifications, and inclusions and exclusions outlined in Section 2.2.3 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.
- § 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 not include in the Guaranteed Maximum Price any taxes from which Owner is exempt.

## § 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 later date of the following:
  - .1 Owner's acceptance of the Construction Manager's Guaranteed Maximum Price ("GMP") proposal or
  - .2 The Owner's issuance of a Notice to Proceed or
  - The issuance of a construction building permit from the applicable jurisdictional authority

#### § 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 subcontracts or by other appropriate agreements with the Construction Manager. Notwithstanding the foregoing, Construction Manager represents that it has sufficient personnel with expertise to render services under this Contract for completion of the Project. The Owner may designate specific persons from whom, or entities from which, the Construction Manager shall obtain bids. The Construction Manager shall obtain at least three (3) "Qualified" bids from Subcontractors and from suppliers of materials or equipment fabricated especially for the Work and shall deliver such bids to the Owner. If Construction Manager is not able to obtain (3) "Qualified" bids, written request to provide less shall be requested of the Owner's Representative and approval shall not be reasonably withheld A "Qualified" bid is a bid that meets the criteria established collectively by the Construction Manager and the Owner as outlined in Section 2.1.6 and can include a bid from the "related party" in accordance to Section 6.10. The Owner shall then determine, with the advice of the Construction Manager and the Architect, which "Qualified" bids will be accepted. The Construction Manager shall not be required to contract with anyone to whom the Construction Manager has reasonable objection. The Construction Manager shall provide the Owner with a list of proposed subcontractors during the bidding process. The Owner shall have the right to disapprove at its discretion subcontractors proposed by the Construction Manager. If the Owner disapproves any Subcontractors, The Construction Manager shall obtain another Subcontractor bid so as not to have less than three (3) Subcontractors providing bids, unless approved by the Owner, for the respective portion of the Work.

§ 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.

§ 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.

§ 2.3.2.4 If the Construction Manager recommends a specific bidder, to submit a proposal for any portion of the Work per section 2.1.6, 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. During the Construction Phase, meetings shall be held weekly with the Owner and Architect or at a frequency mutually agreeable to the Owner and Construction Manager based on reasonably appropriate to the phase of Construction. The Construction Manager shall prepare and promptly distribute minutes to the Owner and Architect.

§ 2.3.2.6 In conjunction with 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. Upon Owner's acceptance, this approved schedule will replace the schedule previously incorporated into this Agreement as Exhibit "D" per section 2.1.3.1.

§ 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 with reasonable promptness 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, including changes to the Work approved by Owner, 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.

#### **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 Owner represents that prior to the execution of the Guaranteed Maximum Price Amendment, an amount of money equal to or in excess of the Guaranteed Maximum Price will be appropriated for all payments to be made to Construction Manager pursuant to the Agreement. Owner further represents that no change order or other form of order or directive requiring additional compensable work to be performed, which work causes the aggregate amount payable under this Agreement to exceed the amount appropriated, will be approved or made by Owner unless Construction Manager is given written assurance by the Owner that lawful appropriations to cover the costs of the additional work have been made or unless such work is covered under a remedy-granting provision in this Agreement. The Owner shall provide written evidence of such appropriation prior to commencement of the Work and prior to execution of every change order that increases the GMP.
- § 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. Such documents shall be provided for information only and are not warranted or represented to show the conditions at the Project site accurately. Construction Manager may use the information at its own risk and shall use customary precautions relating to the performance of the Work. Notwithstanding the preceding sentences and the delivery of surveys or other documents and reports by Owner, Construction Manager shall perform all work in such a non-negligent manner so as to avoid damaging any utility lines, cables, pipes, or pipelines on the Property. Contractor shall be responsible for any damage done to such lines, cables, pipes and pipelines during 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 as provided in Section 2.2.3 of AIA A201-2007.
- § 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

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 have the express authority to bind the Owner with respect to all matters requiring the Owner's approval or authorization and 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. The designated Owner's Representative shall not be changed prior to Final Completion unless documented in writing from the Owner to the Construction Manager.

§ 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.

#### § 3.2.2 Owners Representative.

The Owner designates the Owner's Representative as noted in Section 3.2 as follows: «NV5

## § 3.3 Architect

The Owner shall retain an Architect to provide services, duties and responsibilities as described in AIA Document B103<sup>TM</sup>–2007, Standard Form of Agreement Between Owner and Architect. Upon request, the Owner, at Owner's discretion, shall provide the Construction Manager a copy of the executed agreement between Owner and Architect, and any further modifications to the agreement.

## 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.)

The Owner shall pay the Construction Manager TBD (\$insert) for Preconstruction Phase services. Construction Manager shall submit invoices for these services based upon the percent of Preconstruction Services completed. Invoices shall be received and processed per the requirement outlined in Article 7.1.3.

**«** »

#### § 4.2 Payments

§ 4.2.2 Payments are due and payable per schedule outlined in Article 7. Amounts unpaid « Forty-Five » ( « 45 » ) days after the invoice date 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. (Insert rate of monthly or annual interest agreed upon.)

5% per annum.

## 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 for the Construction Manager's performance of the Contract. The Contract Sum is the Cost of the Work as defined in Section 6.1.1 plus the Construction Manager's Fee and General Conditions.

#### § 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.)

**TBD** 

This amount shall remain the lump sum amount unless adjusted by Change Orders.

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

**TBD** 

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



As agreed to in the Exhibit E – General Conditions.

- § 5.1.4 Rental rates for Construction Manager-owned equipment, are incorporated in this agreement as Exhibit "C" and shall not exceed « one hundred » percent ( « 100 » %) of the standard rate paid at the place of the Project.
- § 5.1.5 Unit prices, if any are outlined in Exhibit B: (Identify and state the unit price; state the quantity limitations, if any, to which the unit price will be applicable.)

| Item | Units and Limitations | Price per Unit (\$0.00) |
|------|-----------------------|-------------------------|
|      |                       |                         |

## § 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. (Insert specific provisions if the Construction Manager is to participate in any savings.)
- « » All savings below the Guaranteed Maximum Price shall remain with the Owner. No change in the Work or the materials or labor utilized in connection therewith shall be the basis for an addition to the Guaranteed Maximum Price or the Construction Manager's Fee and General Conditions unless and until same has been authorized by a Change Order executed and issued in accordance with the Contract Documents.
- § 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. The Date of Substantial Completion shall be adjusted for a change in the Work unless the Construction manager demonstrates to the Owner's reasonable satisfaction, in the Owner's sole discretion, that the change in the work will affect the critical path of the Construction Manager's schedule outlined in Exhibit "D".
- § 5.2.2 Construction Manager shall prepare a detailed cost breakdown of the Guaranteed Maximum Price and shall update this cost breakdown throughout the project subject to Owner's approval of any Change Orders. The Cost breakdown should be in the Standard Construction Specifications Institute ("CSI") MasterFormat.

#### § 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. The Construction Manager shall be entitled to an equitable adjustment in the Contract Time as a result of changes in the Work as provided in Section 5.2.2.
- § 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 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.

#### 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 and actually 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.
- § 6.1.2 All cost are subject to the Owner's prior approval and, the Construction Manager shall obtain this approval prior to incurring the cost except for costs outlined in Section 6.7.2 which do not require Owner's prior approval.
- § 6.1.3 Owner and Construction Manager agree that the wage, equipment, liability insurance and subcontractor default insurance rates attached as Exhibit C represent actual cost and are not subject to further review or adjustment by either party.

#### § 6.2 Labor Costs

- § 6.2.1 Wages and hourly rates, per Exhibit C, 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, excluding costs which were included in the fixed General Conditions.
- § 6.2.2 Wages or salaries of the Construction Manager's supervisory and administrative personnel when stationed at the site and for Construction Manager's Project management and reasonable administrative support whether performed at the site or in the Construction Manager's offices with the Owner's prior approval, all at the fixed rates as provided in Exhibit "C" - Billable Rates, excluding such cost included in the fixed General Conditions. (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.)
- § 6.2.3 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, excluding such costs included in the fixed General Conditions.
- § 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. Such expenses are assumed to be included in the rates published in Exhibit "C" and are not in addition to same.
- § 6.2.6 See requested change 6.6.10 for limitation.

## § 6.3 Subcontract Costs

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

The Construction Manager may provide a bid on any portion of the Work that the Construction Manager intends to perform. The Construction Manager's team performing such work may include its employees, material providers, and sub-subcontractors. If the Construction Manager is chosen to perform the work, then such work shall be performed for the Construction Manager's bid amount on the basis of a stipulated lump sum, and shall not be subject to the limitations of this Article 6 except as Construction Manager applies these limitations within their 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. A small tool cost amount may be included in Exhibit E – General Conditions, as mutually agreed upon between Owner and Construction Manager. With exception of amount noted for small tools in Exhibit E, Contractor will provide to the Project a full stock of most commonly used small tools (all tools worth less than \$500 each; drills, saws, screw guns, brooms, wheel barrows, shovels, etc.), These tools will be furnished at no cost to the Project. Consumables such as drill bits, saw blades, powder actuated load, winter fuel fittings and hose, oxygen, acetylene, etc. will be a direct cost to the Project at a rate equal to or less than 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. Tool rent is only to be charged for the time the tool is reasonably required on the job site. Contractor tool rental is subject to Owner audit at any time. Rates and quantities of equipment rented shall be competitive and subject to the Owner's prior approval and shall be at or below rental rates consistent with those prevailing in the area. Provided, however, with respect to rental of Construction Manager's own equipment, such rental rates are published in Exhibit "C" and in no event shall the total of such rental charges exceed 80% of fair market value of the piece of equipment when first utilized on the job. The total rental cost of any Construction Manager-owned item may not exceed the purchase price of any comparable item. Based upon the schedule of the work to be outlined in Exhibit "D" the Construction Manager shall provide the Owner a budget of forecasted rental equipment to include equipment type, expected duration used on the Project, and rental rate and other breakdown as requested by the Owner.

- § 6.5.3 Costs of removal of debris from the site of the Work and its proper and legal disposal, excluding such costs included in the fixed General Conditions.
- § 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, excluding such costs included in the fixed General Conditions.
- § 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, excluding such costs included in the fixed General Conditions.
- § 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.

#### § 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.

Insurance costs shall include (a) the attributable portion of premiums for Construction Manager's General Liability insurance fixed at actual costs for this insurance to the Construction Managers Corporate Offices without overhead and profit: and (b) if required by the Owner, the attributable portion of premiums for Construction Manager to furnish labor, material and performance bond shall be at actual costs for this insurance to the Construction Manager Corporate Offices without overhead and profit, and (c) as required by corporate offices without overhead and profit. Insurance costs shall be included and set in the Exhibit A – Guaranteed Maximum Price Amendment.

- § 6.6.2 Unavoidable sales, use or similar taxes imposed by a governmental authority that are related to the Work and for which the Construction Manager is liable.
- § 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. Owner will pay the fee for the building permit directly. Construction Manager and subcontractors will pay all trade permits.
- § 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; 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, directly related to the Work with the Owner's prior approval.
- § 6.6.7 Depostis 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 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, excluding such costs included in the fixed General Conditions. General Conditions shall be billed on a lump sum basis, with the exception of any Allowances that have been mutually agreed upon between Owner and Construction Manager.
- § 6.6.9 The Cost of Work shall include a fixed fee for "Div. 1 General Conditions" as agreed to in Exhibit E General Conditions. The General Conditions fee is based upon a construction duration that will be agreed upon in Exhibit D – Project Schedule and Exhibit E – General Conditions. And is subject of increase for a delay in the date of Substantial Completion per Section 5.2.2 providing that such delay was at no fault of the Construction Manager.

A General Conditions line item breakdown shall be detailed and line item priced in a format acceptable to the Owner. Upon acceptance the General Conditions detailed breakdown will be incorporated into the agreement at Exhibit E. The Construction Manager shall not shift the costs for General Conditions to Subcontractors by including such items in Subcontractors scope of work. Notwithstanding any other provisions to the contrary, the not-to- for exceed value for General Conditions shall be deemed to cover the costs for all the items included within General

Conditions, and the Owner shall not be charged or liable for any other compensation to the Construction Manager for General Conditions.

#### § 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 Construction Manager is allowed to use up to 50% of its Construction Contingency for 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:

- 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;
- Expenses of the Construction Manager's principal office and offices other than the site office; .2
- .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 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 responsibly of the Contract.
- Any cost not specifically and expressly described in Sections 6.1 to 6.7; .6
- Costs, other than costs included in Change Orders approved by the Owner, that would cause the .7 Guaranteed Maximum Price to be exceeded; and
- .8 Costs for services incurred during the Preconstruction Phase.
- Any costs beyond 50% of Contractor's Construction Contingency for repairing or correcting damaged or nonconforming Work executed by the Construction Manager, Subcontractors or suppliers, provided that such damaged or nonconforming Work was not a result of negligence or failure to fulfill a responsibility of the Owner.
- .10 Costs of General Conditions in excess of those outlined in section 6.6.10 above

## § 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.

§ 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.

#### § 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 three years after final payment, or for such longer period as may be required by law. Failure to provide such access within ten (10) days of request therefore shall constitute a material default hereunder. If Owner desires to retain an accountant and/or auditor that is not an employee of Owner to review the accounting records, then such accountant or auditor will be a certified public accounting firm licensed to practice in the state of Colorado.

## ARTICLE 7 PAYMENTS FOR CONSTRUCTION PHASE SERVICES § 7.1 Progress Payments

§ 7.1.1 Based upon Applications for Payment submitted to the Architect and Owner's Representative by the Construction Manager and Certificates for Payment issued by the Architect and Owner's Representative, 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. Unless otherwise agreed to by the Owner, each application for Payment shall be accompanied by partial waivers of lien by the Construction Manager and applicable subcontractors.

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

« The Construction Manager shall, during the last week of each month meet with the Architect, Owner's Representative, and Owner, and/or other parties designated by the Owner, to review and approve an itemized draft indicating the total estimated value of the Work completed through the end of the current calendar month including the value of all material and equipment suitable stored at the jobsite or other approved location. Such a draft shall set forth the dollar amounts of completion of each part of the Work, including a prorated share of the Construction Manager's Fee and General Conditions less applicable retentions. The approved draft will then be formalized into an Application for Payment and will be submitted to the Owner for processing.

During the course of construction, each Application for Payment shall be subject to retention of 5%. Subject to approval by the Owner the retention requirements may be modified where full or extended retention is not warranted.

The Construction Manager and all subcontractors shall submit applications for payment utilizing AIA G702 and G703 forms or similar acceptable to the Owner. »

§ 7.1.3 Provided that an approvable Application for Payment is received by the Owner's Representative not later than the « 20th » day of a month, the Owner shall make payment of the certified amount to the Construction Manager not later than the « 30th » day of the « following » month. If an Application for Payment is received by the Owner's Representative after the application date fixed above, payment shall be made by the Owner not later than « forty five » ( « 45 » ) days after the Owner's Representative receives the approvable Application for Payment.

- § 7.1.4 With each Application for Payment, the Construction Manager and Subcontractors shall submit payrolls, petty cash accounts, receipted invoices or invoices with check vouchers attached, subcontractor lien waivers, proof of payment to Subcontractors for amounts submitted under previous pay applications, 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 and General Conditions, 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, including the Construction Manager's Fee and General Conditions. The schedule of values shall be prepared in such form and supported by such data to substantiate its accuracy as the Architect, Owner's Representative and Owner 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. The schedule shall detail work in several phases as required by the Owner.
- § 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;
  - Add the Construction Manager's Fee. The Construction Manager's Fee shall be computed upon the .3 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;
  - Add the Construction manager's General Conditions. The Construction Manager's General Conditions shall be computed by dividing the lump sum by the project duration, in months, identified in the most recently accepted schedule in Exhibit "D", then multiplying the number of months that have passed since the date of commencement per Section 2.3.12.
  - .5 Subtract the aggregate of previous payments made by the Owner;
  - 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 The Owner and 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.
- § 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 and Owner's Representative 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 or Owner's Representative 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 or Owner's Representative has made exhaustive or continuous onsite inspections; or that the Architect or Owner's Representative 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. The Owner reserves the right to withhold payments at any time regardless of the Architect's recommendations, as provided for in the withholding of payment provisions of the A201 Section 9.5.1.

#### § 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 The Construction Manager has provided the Owner with a final Certificate of Occupancy, to the extent the conditions required to obtain the final certificate of occupancy are the responsibility of the Construction Manager under the Contract Documents;
- .4 final conditional lien waivers have been issued by the Construction Manager and all Subcontractors
- .5 The Owner has met its notification for final settlement advertisement requirements defined in Section 7.2.5: and.
- **.6** 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, and all requirements in this Section have been met.

§ 7.2.2 The amount of the final payment shall be calculated as follows:

- .1 Begin with the actual Cost of the Work substantiated by the Construction Manager's final accounting, which includes deductions for all discounts and unused contingencies, and construction savings achieved in the Cost of the Work, if applicable.
- .2 Add the actual expended general conditions substantiated by the Construction Manager's final accounting, which includes savings to the Owner for unused general conditions.
- .3 Add the Construction Manager's Fee.
- **.4** Subtract amounts, if any, for which Architect or Owner disputes, refuses or withholds payment, if any.
- .5 If Owner is entitled to deduct liquidated damages or any other damages or amounts provided in the Contract Documents, including clean-up fees, then subtract all such liquidated damages, amounts and fees.
- .6 If Construction Manager fails or refuses to complete the Work, or has unsettled claims with Owner, then subtract such amounts as the Architect shall determine as the cost for completing incomplete Work and the value of unsettled claims.
- .7 Subtract all previous payments made by the Owner.
- .8 In no event shall the total of subsections .1, .2, and .3 above exceed the Guaranteed Maximum Price.
- **9** If the aggregate of previous payments made by the Owner exceeds the amount due the Construction Manager, the Construction Manager shall reimburse the difference to the Owner, plus interest as allowed by law.

**«** »

§ 7.2.3 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 and Owner's Representative are 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 The Architect will not issue the final Certificate for Payment and final payment will not be made until the time of final settlement shall be established by the Owner and shall thereafter be advertised by two (2) publications of notice, the last of which shall appear at least ten (10) days prior to the time of final settlement as required pursuant to Colo. Rev. Stat. §38-26-107. The Owner shall withhold form all payments to Construction Manager sufficient funds to insure the payment of all claims filed by any person that has furnished labor, materials, sustenance, or other supplies used or consumed by Construction Manager or a subcontractor in or about the performance of the Work, or that supplies laborers, rental machinery, tools, or equipment to the extent used in the prosecution of the Work whose claim therefore has not been paid by Construction Manager or the subcontractor, all in accordance with the provisions of Colo. Rev. Stat. §38-26-107.

#### ARTICLE 8 INSURANCE AND BONDS

For all phases of the Project, the Construction Manager shall purchase and maintain the insurance required by this Article and set forth in Article 11 of AIA Document A201–2007. All insurance provided herein will name the Owner as an additional insured on the policy.

- § 8.1.1 2. Without limiting the generality of the foregoing, Contractor shall procure and maintain, and shall cause any subcontractor of Contractor to procure and maintain, the minimum insurance coverages listed below. Such coverages shall be procured and maintained with forms and insurers acceptable to the Town. In the case of any claims-made policy, the necessary retroactive dates and extended reporting periods shall be procured to maintain such continuous coverage.
- a. Worker's compensation insurance to cover obligations imposed by applicable law for any employee engaged in the performance of Work under the Contract, and Employer's Liability insurance with minimum limits of five hundred thousand dollars (\$500,000) each accident, one million dollars (\$1,000,000) disease policy limit, and one million dollars (\$1,000,000) disease each employee. Evidence of qualified self-insured status may be substituted for the worker's compensation requirements of this paragraph.
- b. Commercial general liability insurance with minimum combined single Invite of at least six hundred thousand (\$600,000) each occurrence and one million dollars (\$1,000,000) general aggregate. The policy shall be applicable to all premises and operations. The policy shall include coverage for bodily injury, broad form property damage (including completed operations), personal injury (including coverage for contractual and employee acts), blanket contractual, products, and completed operations. The policy shall contain a severability of interests provision, and shall be endorsed to include the Town and the Town's officers, employees, and consultants as additional insureds. No additional insured endorsement shall contain any exclusion for bodily injury or property damage arising from completed operations.
- c. "All Risk" Builder's Risk insurance in a form acceptable to the TOWN upon the entire Project for the full cost of replacement at the time of any loss. This insurance shall include, as named insureds, the Town, Contractor, and any Subcontractors. This insurance shall include "all risk" insurance for physical loss or damage including without duplication of coverage, at least theft, vandalism, malicious mischief, transit, materials stored off site, collapse, falsework, temporary buildings, debris removal, flood, earthquake, testing, and damage resulting from defective design, workmanship or materials. The Contractor shall increase limits of coverage, if necessary, to reflect estimated replacement cost. The insurance shall be written without a co-insurance clause.

(All deductibles to be paid by Construction Manager and shall not be paid from GMP or Contractor's Contingency). The insurance provided must be primary to any insurance coverage carried by Owner.

- § 8.1.1.1 Prior to commencement of Work, the Construction Manager shall furnish and deliver to the Owner proof that the insurance described above shall be in force and effect for the duration of the Project, including all applicable warranties and inspections periods. Acceptance of a certificate with less than the required amounts and coverage shall not be deemed a waiver of the requirements in Article 8. All Certificates of Insurance relating to Broad Form General Liability, Automobile Liability and Excess Liability, shall list as additional project-specific insureds, Owner and the Owner's Designated Representative. Additional Insured Endorsements will be provided to Owner by Construction Manager's Insurance Company with other Certificates of Insurance.
- § 8.1.1.2 The full aggregate liability policy limits required above shall be available with respect to the Construction Manager's obligations hereunder, and the Construction Manager shall obtain a location specific aggregate limited endorsement confirming such coverages as to Owner and additional insureds. The Construction Manager agrees to promptly notify in writing Owner and additional insureds of any substantial claims, paid or resolved, applied against the aggregate of any of the required insurance policies.
- § 8.1.1.3 All insurance policies will contain the following entities named as additional insured for general liability (ongoing & completed operations) & automobile liability on a primary, noncontributory basis. Contractor shall execute a waiver of subrogation, which will apply to general liability, automobile & workers compensation claims and shall be evidenced by an endorsement to such policies delivered with the **Certificate of Insurance:**

## All policies will name the Certificate Holder as:

- § 8.1.1.4 All insurance shall include a provision prohibiting cancellation, termination or alteration (so as to affect the intent of this agreement) without thirty (30) days' prior notice by certified mail to the Owner. In the event of threatened cancellation for nonpayment or nonrenewal, the Owner may pay the same on behalf of the Construction Manager, at the Owner's discretion, and deduct the same from any amount or payment due to the Construction Manager hereunder.
- § 8.1.1.5 Payments for services provided will be withheld from Construction Manager until acceptable Certificates of Insurance and Additional Insured Endorsements are received by Owner.
- § 8.1.2 No Work will be conducted on the Project site until satisfactory evidence has been submitted that the Construction Manager has insurance that complies with the specific insurance and indemnity requirements listed in the Contract Documents. Construction Manager is also responsible to verify that any Design/Build subcontractors (any subcontractor providing engineered drawings for review and approval), including but not limited to joist manufacturers, fire alarm subcontractors, fire sprinkler subcontractors, security subcontractors, landscape irrigation engineers, and precast concrete subcontractors, carry the following Professional Errors and Omissions Insurance: Professional Liability Insurance (Errors and Omissions), covering the services provided under this Agreement, including contractual liability insurance against the liability assumed in this Agreement, as is acceptable to and approved by the Owner. The costs and benefits of Professional Liability Insurance for design build subcontractors is to be reviewed with the project team at the design development phase of the project at which time it will be confirmed which Design/Build subcontractors will be required to carry Professional Liability Insurance. Such insurance shall have minimum policy limits of \$2,000,000 in the aggregate and \$2,000,000 per claim (All deductibles to be paid by Design/Build Subcontractor). The insurance provided must be primary to any insurance coverage carried by Owner.
- § 8.2 Construction Manager shall require that each Subcontractor procure and maintain, at its own cost and expense, during such Subcontractor's Project contract, the following insurance coverages:
- § 8.2.1 Prior to start of Subcontractor's Work, Subcontractor will procure for Subcontractor's Work and maintain in force Worker's Compensation Insurance, Commercial General Liability Insurance, Comprehensive Automobile Liability Insurance and Builder's Risk Insurance, if required, and all other insurance required of Contractor by the Contract Documents. This insurance shall include contractual liability insurance covering Subcontractor's indemnity

obligations under the Subcontract.

§ 8.2.2 Subcontractor will obtain insurance with limits as specified below, or such higher limits if imposed by Owner or by the Prime Contract Documents.

#### (TYPE OF INSURANCE ALL LIMITS IN THOUSANDS)

Commercial General Liability Premises/Operations General Aggregate (Per Project) \$2,000 Products/Completed Operations Products Comp/OPS Aggregate \$2,000 Contractual Personal & Advertising Injury \$1,000 Independent Contractors Each Occurrence/Combined \$1,000 Broad Form Property Damage Single Limit (BI/PD) Personal Injury Explosion/Collapse/Underground (XCU)



Automobile Liability Any Auto or All Owned Autos Bodily Injury (Per Person) \$1,000 Hired Autos Bodily Injury (Per Accident) \$1,000 Non-Owned Autos Property Damage \$1,000 or Combined Single Limit \$1,000

Umbrella or Excess Liability Per Project Aggregate All Subcontractors \$2,000 -\$5,000, depending on general contractors assessment of risk

Workers' Compensation (Coverage A) Coverage A – Statutory Employer's Liability (Coverage B) Coverage B – \$500 (Each Accident) \$500 (Disease - Policy Limit) \$500 (Disease - Each Employee)

Errors and Omissions (when any design or professional services of any type is supplied) Per Occurrence/Claim

Aggregate with 3 Year Tail if Claims Made \$1,000

§ 8.3 The Construction Manager shall maintain, and shall require that each subcontractor provide, a performance bond and a separate labor and material payment bond, which shall (a) be executed by a corporate surety licensed to do business in the State, (b) be in customary form, (c) be in the amount payable to Construction Manager hereunder or to such subcontractor pursuant to its contract with the Construction Manager and (d) be payable to the Owner. If, at any time prior to completion of the Work covered by any such bond, the surety shall be disqualified from doing business within the State, a new bond shall be provided from an alternate surety licensed to do business in the State. The amount of each bond shall be increased or decreased, as appropriate, to reflect changes to the Contract Documents. A copy of each such bond and all modifications thereto shall be furnished to the Owner within 30 days of the effective date of authorization of the Guaranteed Maximum Price. Subcontractor default insurance may be accepted in lieu of bonds after review and written approval of the Owner.

#### **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.

§ 9.2 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.)

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[ « » ] Arbitration pursuant to Section 15.4 of AIA Document A201–2007

[ « X » ] Litigation in a court of competent jurisdiction

[ **« »** ] Other: (Specify)

**«** »

#### § 9.3 Initial Decision Maker

The Architect will serve as the Initial Decision Maker pursuant to Section 15.2 of AIA Document A201–2007 fo 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 thirty (3) days' written notice to the Owner, for the reasons set forth in Section 14.1.1 and Section 15.1.3 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;
- 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.

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 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.

## § 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:

# § 11.5.1 Confidential Information

§ 11.5.1.1 In connection with the performance of the Contract, the Construction Manager, including its officers, directors, employees and agents (collectively, the "Receiving Group"), will have access to certain information of a confidential nature related to the Project. The Owner makes such information available only on the terms of confidentiality set forth in this Article.

§ 11.5.1.2 All information furnished to any person in the Receiving Group concerning the Project shall be deemed "Confidential Information" for purposes of the Contract. Confidential Information shall include information furnished in written, oral or electronic form, as well as any information that may be derived from on-site visits to the Project.

§ 11.5.1.3 The Confidential Information shall not be used by any member of the Receiving Group in any way detrimental to the Owner, or in direct or indirect competition with the business activities of the Owner, and shall be used solely for the purpose of work on the Project.

- § 11.5.1.4 Each and every member of the Receiving Group shall keep the Confidential Information strictly confidential and shall not disclose or provide any of such information to any third party and shall take all necessary measures to prevent any such disclosure by the officers, directors, employees, agents, contractors, subcontractors or consultants of the members of the Receiving Group. Construction Manager shall require that its subcontractors agree to be bound by the provisions in this Article 16 in the subcontracts entered into between the Construction Manager and its subcontractors and that all subcontractors likewise include these Article 16 provisions in their subsubcontracts with sub-subcontractors.
- § 11.5.1.5 No failure or delay by the Owner in exercising any right, power or privilege hereunder shall operate as a waiver thereof, nor shall any single or partial exercise thereof preclude any other or further exercise of any right, power or privilege.
- § 11.5.1.6 It is understood and agreed that money damages would not be sufficient remedy for any breach of any term of the Article 16 by the Contractor or any other member of the Receiving Group and that the Owner shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach, but shall be in addition to all other legal and equitable remedies available to the Owner.

## § 11.5.2 Governmental Entity Provisions

- § 11.5.2.1 Appropriation of Funds. Anything in this Agreement to the contrary notwithstanding, the Owner represents that a full and lawful appropriation for the Project has been made and that the amount of money appropriated therefore is equal to or in excess of the Agreement Sum. No change order or other form of order of directive shall be issued by the Owner requiring additional compensable work to be performed, which work causes the aggregate amount payable under this Agreement to exceed the amount appropriated for the Agreement, unless the Owner gives written assurance that a lawful appropriation to cover the costs of additional work have been named or unless such work is covered under a remedy granting provision of the Agreement. As used herein the term "remedy granting provision" means any agreement clause which permits additional compensation in the event that a specific contingency or event occurs.
- § 11.5.2.2 All work performed under this Agreement shall be subject to the requirements of any state or local codes having jurisdiction at the site of the Work, and shall meet or exceed the requirements regarding the Work set forth in any intergovernmental agreement now existing or subsequently entered into between Owner and any town or local governmental entity. The Construction Manager shall be aware of the Owner's obligations under any such agreement and shall perform the Work so as to comply with such obligations. The Construction Manager shall also be aware of the provisions of sections 8-1-107(2)(d) and 22-32-124, C.R.S., which govern the jurisdiction of state and local authorities with respect to building standards and the application of local planning and zoning ordinances.
- § 11.5.2.3 The Owner is a public entity and the Project is a public works project within the intent and meaning of section 38-26-105, C.R.S. Accordingly, all payments properly due to the Construction Manager and all claims for amounts lawfully due from the Construction Manager and all rights to mechanic's liens to secure payment thereof arising on behalf of any person, co-partnership, association of person, company or corporation that has furnished or provided labor, materials, team hire, sustenance, provisions, provender, or other supplies used or consumed by the Construction Manager in the performance of the Work shall be subject to section 38-26-101, 105, 106, and 107, C.R.S.
- § 11.5.2.4 The Construction Manager shall not discriminate against any employee or applicant for employment because of race, creed, color, sex, sexual orientation, national origin, disability, age, or other legally protected status except when sex or age is a bona fide occupational qualification. The Construction Manager shall take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to race, creed, color, sex, sexual orientation, national origin, disability, age, or other legally protected status. Such action shall include, but not be limited to, the following: employment, upgrade, demotion, or transfer; recruitment, or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Construction Manager agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided, setting forth the provisions of the Equal Opportunity laws.
- § 11.5.2.5 The Construction Manager shall, in all solicitation or advertisements for employees placed by them or on their behalf, state that qualified applicants will receive consideration for employment without regard to race, creed, color, sex, sexual orientation, national origin, disability, age, or other legally protected status.

§ 11.5.2.6 Immunity. The Owner retains all of its rights and immunities under the Colorado Governmental Immunity Act, C.R.S. 24-10-101. *et sea*.

#### § 11.5.3 Provisions Required by section 8-17.5-102, C.R.S.

§ 11.5.3.1 Construction Manager represents and warrants that, prior to executing this Agreement, it supplied the Owner with a certification meeting the requirements of section 8-17.5-102(1), C.R.S., a copy of which is appended hereto as Exhibit F.

§ 11.5.3.2 During the term of this Agreement, Construction Manager shall not—

- 1 knowingly employ or contract with an illegal alien to perform work under this Agreement; or
- enter into a contract with a subcontractor that (a) knowingly employs or contracts with an illegal alien to perform work under this Agreement or (b) fails to certify to Construction Manager that that subcontractor shall not knowingly employ or contract with an illegal alien to perform work under this Agreement.
- § 11.5.3.3 Construction Manager warrants and represents that it has confirmed the employment eligibility of all employees who are newly hired for employment to perform work under this Agreement through participation in either the Federal E-Verify Program or the Colorado Department of Labor and Employment Verification Program, or any future verification programs authorized by either the federal government or the Colorado Department of Labor.
- § 11.5.3.4 During the term of this Agreement, Construction Manager shall not use Program procedures to undertake pre-employment screening of job applicants.
- § 11.5.3.5 If Construction Manager obtains actual knowledge that a subcontractor performing work under this Agreement knowingly employs or contracts with an illegal alien, Construction Manager shall:
  - .1 Notify the subcontractor and the Owner within three days that it has such knowledge; and
  - Terminate the contract with such subcontractor if within three days of receiving the notice required pursuant to subparagraph .1 of this subsection 11.5.3.7, the subcontractor does not stop employing or contracting with the illegal alien; except that Construction Manager shall not terminate the contract with the subcontractor if during such three days the subcontractor provides information to establish that the subcontractor has not knowingly employed or contracted with an illegal alien.
- § 11.5.3.6 Construction Manager shall comply with all reasonable requests made by the Colorado Department of Labor and Employment in the course of any investigation undertaken pursuant to section 8-17.5-102(5), C.R.S.
- § 11.5.3.7 Any other provision in this Agreement to the contrary notwithstanding, in the event Construction Manager violates any provision set forth in this Section 11.5.3, the Owner may terminate this agreement for breach and hold Construction Manager liable for actual and consequential damages pursuant to section 8-17.5-102(3), C.R.S.
- § 11.5.4 Attorney's Fees: If either party to this Agreement engages legal counsel to enforce any terms or conditions of this Agreement, the initiation of any arbitration, legal proceedings or the defense thereof including any appeals, the prevailing party shall be entitled to prompt payment and reimbursement in full for all of its attorney's fees and costs.
- § 11.5.5 One hundred percent (100%) of the project/value engineering savings shall accrue to the Owner.
- § 11.5.6 The Owner has retained NV5, Inc. as the Owner's Representative. The Construction Manager shall fully cooperate with the Owner and the Owner's Representative.
- § 11.5.7 The Construction Manager shall:
  - 1. Prepare and update a consolidated project schedule on a weekly basis until Substantial Completion and

provide copies to the Owner, the Owner's Process Manager, and the Architect as soon as the schedule is prepared.

- 2. Support value-engineering efforts to reduce costs and to identify reasonable equivalent materials and supplies.
- 3. Support Owner in meeting requirements imposed upon the Owner for financing.
- 4. Conduct weekly construction meetings, until Substantial Completion, with all Subcontractors and any other necessary Project participants and include the Owner, Architect and Owner's Process Manager and develop and distribute minutes of all such meetings, and:
- 5. Participate in weekly Project meetings conducted by the Owner's Representative.
- § 11.5.8 Construction of Owner's Work will not interfere with Landlord or Landlord's tenants' or other owners' or occupants' activities in, or use or enjoyment of, the Building;
- § 11.5.9 Construction Manager will cooperate with other contractors in the buildings to ensure harmonious working relationships, including, without limitation, coordinating with other contractors in the buildings, trash removal and water and utility usage.
- § 11.5.10 Construction Manager will leave all Common Areas in a neat, clean, orderly and safe condition at the end of each day during construction of Owner's Work.
- § 11.5.11 Construction Manager will procure and maintain and cause its subcontractors to procure and maintain the insurance described in this document.
- § 11.5.12 The Construction Manager shall maintain an accurate set of as-built drawings at the site. At the completion of the Work, the Construction Manager shall certify by signing on them that each of the as-built drawings and specifications are complete and accurate. No later than thirty (30) days after Substantial Completion of Owner's Work and prior to application for Final Payment, and as a condition to its approval by the Architect and Owner, the Construction Manager shall transfer the job site as-built drawings, arranged in proper order, indexed and certified as accurate to the Architect for transmittal to the Owner. The Construction Manager will not be responsible for transferring to the as-built documents any addenda, clarifications or changes documented by the Architect and its consultants.
- § 11.5.13 Any purchased materials remaining after completion of the subject portion of Owner's Work (such as, for example, extra paint, wall coverings or carpet) will be given by Construction Manager to Owner for use in subsequent repairs. Materials should be labeled, sealed, boxed and protected as appropriate to ensure the materials remain in good condition.
- § 11.5.14 All Work performed by Construction Manager, or any subcontractor or person performing work on its behalf, shall be guaranteed against defective workmanship and materials for a period of two (2) years from the date of Substantial Completion, provided that such two-year period shall not begin with respect to any portion of the Work that is not completed on the date of Substantial Completion until such item is completed.
- § 11.5.15 If requested by the Owner, the Construction Manager will furnish Owner with sworn Construction Manager's statements, Construction Manager's affidavits and partial and final waivers of lien, in such form and content as Owner may require, in order to establish that the cost of all labor, services and materials furnished in connection with Owner's Work has been paid in full and to keep the Premises free from all liens and claims.
- § 11.5.16 Construction Manager and Owner acknowledge that they or their employees may, in the performance of the resultant Contract, come into the possession of proprietary or confidential information owned by or in the possession of the other. Neither party shall use any such information for its own benefit or make such information available to any person, firm, corporation, or other organization, regardless of whether directly or indirectly affiliated with Construction Manager or Owner, unless (i) required by law, (ii) by order of any court or tribunal, (iii) such disclosure is necessary for the assertion of a right, or defense of an assertion of a right, by one party against the other party hereto, or (iv) such information has been acquired from other sources.

- § 11.5.17 Construction Manager agrees that at all times its employees will observe and comply with all regulations of the facilities, including but not limited to, no smoking, and parking and security regulations.
- § 11.5.18 Upon Substantial Completion and for a period of 15 calendar days thereafter the Construction Manager will replace burned out light bulbs at no cost to the Owner. Owner acknowledges that Construction Manager is not responsible to re-lamp usable working bulbs in permanent light fixtures.
- § 11.5.19 The Construction Manager shall provide notification within 72 hours after becoming aware of the basis of any request for change. The Construction Manager shall develop and submit pricing of proposed changes within seven (7) days after a solution has been provided. The Owner shall provide a written response to the Construction Manager's proposal within ten (10) business days of the Owner's receipt of the Construction Manager's submission.
- § 11.5.20 The Construction Manager shall include with every subcontract agreement the following language: "Subcontractor binds itself to Construction Manager and Owner and is obligated to Construction Manager and Owner in the same manner and to the same extent that Construction Manager is bound and obligated to Owner under the Prime Contract. All Rights which Owner may exercise and enforce against Construction Manager may be exercised and enforced by Owner against Subcontractor. In the event of any dispute between the Owner and Construction Manager, Subcontractor shall be bound by all decisions, directives, and interpretations and rulings of the Owner, including Owner's termination or suspension of Construction Manager."
- § 11.5.21 The Construction Manager represents that he (1) has sufficient knowledge and expertise to construct the Work in accordance with all applicable codes and regulations; (2) has reviewed, analyzed, and has current knowledge of the site; (3) has reviewed, analyzed and has found sufficient for construction and completion of the Work the Contract Documents listed in this agreement; any exceptions to this statement have been specifically identified in this Agreement. The Construction Manager represents and warrants that it can and will complete the Work for the Contract Sum identified in this agreement, and that no sums additional to the Contract Sum are required for Construction Manager's completion of the Work as identified in this agreement.
- § 11.5.22 The parties agree expressly that the intent of the Contract Documents is to include in the Work to be performed by the Construction Manager all labor, materials and supplies, insurance, tools, equipment, licenses, taxes (exclusive of real estate taxes and City of [enter city] Use Taxes), transportation, and field surveying and other services and items necessary for the Project to be a complete and workable system as required for the satisfactory performance, execution and final completion of the Work. Matters not expressly included in the Contract Documents that are reasonably inferable from the Contract Documents shall be deemed included as part of the Work and the Construction Manager's responsibility.
- § 11.5.23 Construction Manager hereby waives and releases any and all claims for consequential and/or indirect damages including but not limited to attorneys' fees for lost profits, lost opportunities, lost bonding capacity, and/or damages to reputation.

**«** »

## 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:
  - .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: (List other documents, if any, forming part of the Agreement.)

## « Exhibit Summary Exhibit "A" –

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

| OWNER (Signature)        | CONSTRUCTION MANAGER (Signature) |
|--------------------------|----------------------------------|
|                          | « »« »                           |
| (Printed name and title) | (Printed name and title)         |