Oregon School Construction CONTRACT MANUAL

A GUIDE FOR:

SCHOOL DISTRICTS | EDUCATION SERVICE DISTRICTS | CHARTER SCHOOLS | COMMUNITY COLLEGES

OREGON SCHOOL BOARDS ASSOCIATION

ball janik LLP

PACE
SAFETY • SERVICE • SAVINGS
A TRUST BUILT FOR STUDENTS

Oregon School **Construction** CONTRACT MANUAL

A GUIDE FOR:

SCHOOL DISTRICTS | EDUCATION SERVICE DISTRICTS | CHARTER SCHOOLS | COMMUNITY COLLEGES

JANUARY 2018

1201 COURT STREET NE, SUITE 400
SALEM, OR 97301-4188

503.588.2800 | 800.578.6722

WWW.OSBA.ORG

OREGON SCHOOL BOARDS ASSOCIATION

ball janik LLP

PACE
SAFETY • SERVICE • SAVINGS
A TRUST BUILT FOR STUDENTS

FOREWORD

This second edition of the Oregon School Construction Contract Manual was updated in January 2018 to help school districts, education service districts, charter schools and community colleges understand the procurement process for design professional and construction services. In addition, this manual includes information regarding contract negotiations with design professionals and contractors using the prevalent American Institute of Architects (AIA) contracts. Finally, it contains useful information about potential claims during and after construction.

This manual was the result of collaboration between the Oregon School Boards Association and Ball Janik LLP. It was written and updated by Rob Wilkinson and Chris Walters, attorneys at the Portland law firm of Ball Janik LLP.

Just as every building relies on a solid foundation, every building project requires a strong and thorough process to carry it to completion. We believe this manual can provide such a foundation for school entities planning their next construction project.

Please keep in mind as you use this manual that best efforts were made to provide current information, but those requiring specific assistance with construction or design issues should consult an attorney.

Questions over contents of this manual should be directed to Rob Wilkinson at rwilkinson@balljanik.com, Chris Walters at cwalters@balljanik.com or OSBA at info@osba.org.

Jim Green, executive director

Oregon School Boards Association

TABLE OF CONTENTS

DISCLAIMER

The *Oregon School Construction Contract Manual* is based on state and federal laws, rules and regulations in effect in December 2017. The authors and editor make no guarantee or warranty as to the accuracy, adequacy and completeness of the information and materials provided in this manual. It is provided for informational purposes only, and does not constitute solicitation or the provision of legal advice. Your use and review of this manual does not create an attorney-client relationship with the authors or editor. Since legal advice must be tailored to the specific circumstances of each case, and laws are constantly changing, nothing in the manual should be used as a substitute for the advice of competent counsel.

OVERVIEW

Oregon school districts, education service districts, charter schools and community colleges frequently find themselves in need of design and construction services. These services may range from additions and remodels to existing buildings, to the construction of entirely new buildings. To perform these projects, school entities generally must follow mandated procurement rules. After the procurement process, there remains the question of contracting with professionals and contractors. The most commonly used form contracts in the industry, published by the American Institute of Architects (AIA), require careful review to ensure that the owner's interests are protected. Even after signing contracts, however, school entities may encounter difficulties. In these circumstances, both during and after construction, claims can arise between the owner and those hired to design and perform the work.

This manual is designed to help Oregon school entities understand the construction process from procurement through claims. It includes chapters on the most commonly asked procurement questions, contracting issues to consider using the most common AIA contract forms, and general information on claims that may arise.

CHAPTER 1 Procurement Rules – Public Contracting for Design Professional Services

PRACTICE TIP:

A school owner can adopt its own selection criteria, but it should be similar to the attorney general's model rules to avoid a challenge.

Schools and community colleges hire architects early in the construction process to assist with facilities programming, to organize consultants for planning and engineering services, and to help conceptualize and realize the entire project. Oregon's Public Contracting Code applies to contracts between school owners and architects. What follows in this chapter is a review of the Oregon Revised Statutes (ORS) and Oregon Administrative Rules (OAR) that govern contracts between school owners and architects, as well as other design professionals and personal-service firms. These statutes and rules are voluminous and detailed. The following is meant as an overview to help navigate these codes, but a school owner preparing for a significant project should review these sections in detail to ensure compliance.

Under ORS 279C.107, while proposals for architectural services, or other professional design and personal services, are under review by the school owner pursuant to its procedures, the school owner need not open the proposals to public scrutiny until after executing the contract. Even if a school owner opens its proposal at that time, the statute requires that the owner "withhold from disclosure to the public trade secrets, as defined in ORS 192.501, and information submitted to a public body in confidence, as described in ORS 192.502, that are contained in a proposal." Among other things, in addition, this section requires school owners to return a proposal and all its copies if a request for proposals is canceled after proposals are received.

School owners must select architects and consultants under ORS 279C.110(1) "on the basis of the consultant's qualifications for the type of professional service required. A contracting agency may solicit or use pricing policies and proposals or other pricing information ... only after the contracting agency has selected a candidate pursuant to subsection (2) [.]" (emphasis added). However, ORS 279C.110(8) allows a school owner to directly appoint a consultant if the estimated cost of the architectural or other services does not exceed $100,000. ORS 279C.110(9) allows a school owner to directly appoint a consultant in an emergency, where it may not have full knowledge of the complete scope of services and required compensation.

The parameters for a school owner to evaluate an architectural or consultant contract can be found in ORS 279C.110(2), and may be adjusted on a per-project basis if the estimated cost of the architectural or consultant services

PRACTICE TIP:

For an emergency or small project, a school owner does not need to go through the entire process, but can hire a professional directly.

does not exceed $250,000. These parameters include considering each candidate's:

"(a) Specialized experience, capabilities and technical competence, which the candidate may demonstrate with the candidate's proposed approach and methodology to meet the project requirements;

(b) Resources committed to perform the work and the proportion of the time that the candidate's staff would spend on the project, including time for specialized services, within the applicable time limits;

(c) Record of past performance, including but not limited to price and cost data from previous projects, quality of work, ability to meet schedules, cost control and contract administration;

(d) Ownership status and employment practices regarding minority, women and emerging small businesses or historically underutilized businesses;

(e) Availability to the project locale;

(f) Familiarity with the project locale; and

(g) Proposed project management techniques."

The Oregon Department of Justice publishes administrative rules that school owners must follow if they do not adopt their own parameters based on the above, titled *Model Rules: General Provisions Related to Public Contracting,* found at OAR 137-046-0100 to 137-046-0480. While there are several items here that relate to contractors, as opposed to design professionals, this chapter will focus on design professionals. OAR 137-046-0130(2) provides that a school owner that opts out of the model rules and adopts its own rules is not subject to the model rules. Under the model rules, OAR 137-046-0300 expresses that when all else is equal, local services are preferred. If equal proposals are local, or all are non-local, the school owner may draw lots. This section includes guidance on how to determine whether an offer is "equal," and how to draw lots.

Model rules for consultant selection specifically, including architects and engineers, can be found at OAR 137-048-0100 to 137-048-0320. These rules help school owners select the most qualified consultant based on demonstrated competence and qualifications at a fair and reasonable price (OAR 137-048-0130(1)).

Among other things, OAR 137-048-0120(1) provides that school owners should update their lists of qualified prospective consultants at least once every two years. This rule further describes how school owners may retain and produce records about

Do's and don'ts in hiring an **architect or consultant**

DO:

- Follow model rules (found at OAR 137-046-0100 to 137-046-0480) for consultant selection
- Formally adopt a written document outlining screening preferences and procedures
- Update lists of qualified prospective consultants at least once every two years

DON'T:

- Directly appoint a consultant if the estimated cost of the architectural or other services exceeds $100,000 – except in an emergency
- Establish "price agreements" with fewer than three consultants
- Enter contracts that would compensate design consultants for costs plus a percentage, or for a percentage of overall construction costs

PRACTICE TIP:

The big picture for architect selection is that anticipated quality of service is more important than simply price.

consultants, and what these records should contain.

Under OAR 137-048-0130, a school owner must follow a direct appointment procedure, an informal selection procedure, or a formal selection procedure. This rule again emphasizes that pricing may only be considered after qualifications and selection, except for projects under $100,000 and in emergencies. The remainder of this rule lays out detailed procedures for how school owners may weigh various criteria and select their design consultants, including when and how to consider pricing, certain issues that arise when multiple design consultants are under consideration, and certain issues that arise when design consultants offer to perform multiple services (e.g., architecture and engineering, civil and structural engineering, etc.). These rules are so detailed and numerous that they do not lend themselves to summary recitation. School owners will need to consult the rules directly, or their counsel, as part of the process.

The direct appointment procedure under OAR 137-048-0200 allows school owners to hire a design consultant directly without selection procedures if there is an emergency, the contract is under $100,000 or the project is a continuation of an earlier one with that consultant under certain conditions.

School owners may use the informal selection procedure (OAR 137-048-0210) if the fee is expected not to exceed $250,000. This rule also states a host of detailed requirements; school owners should consult the rules directly, or their counsel.

If a consultant cannot be selected by direct appointment or the informal selection procedure, the school owner must use the formal selection process outlined in OAR 137-048-0220. As with the foregoing sections, this rule lays out a very detailed process and requirements that should be consulted directly. Subsections 2 and 4 involve requirements for the type of notice, form of request for proposals, and information that must be shared at each stage. The proposals may be sent to consultants on the above-referenced qualified list maintained by the school owner, or the school owner can issue a request for qualifications to determine a list.

If there is a tie among design consultants, under OAR 137-048-0230 the school owner must make a selection "through any process" that it "believes will result in the best value for the [owner]." This evaluation, however, cannot involve pricing, but does emphasize as a fallback factor a preference for Oregon-based consultants.

A school owner can under OAR 137-048-0250 cancel a solicitation "if [the owner] believes it is in the public interest to do so." This rule states that

What definitions apply to 'personal services?'

The term "personal services contract" is defined in OAR 137-046-0110(24) to include "[c]ontracts for services performed as an independent contractor in a professional capacity, including, but not limited to the services of an … architectural or land use planning consultant; … [or] registered professional engineer." The term "personal services" means:

> the services of a person or persons that are designated by a state contracting agency with procurement authority under ORS 279A.050 or a local contract review board as personal services. "Personal services" includes architectural, engineering and land surveying services procured under ORS 279C.105 or 279C.110 and related services procured under ORS 279C.120.

PRACTICE TIP:

In contemporary projects that prioritize environmental benefits, the quality of the architectural firm may also include its experience with green techniques and materials.

in such a situation, the owner is not liable to any proposer for losses.

A school owner may establish "price agreements" under OAR 137-048-0270, provided it does so with no fewer than three consultants. Under a price agreement, a consultant will perform services for a certain price pursuant to future work orders, without a school owner committing to additional purchases. The remainder of the rule lays out detailed requirements for such an agreement.

Specific provisions of contracts between school owners and design consultants can be found in OAR 137-048-0300. This rule provides that school owners shall not enter contracts that would compensate design consultants for costs plus a percentage of those costs, or for a percentage of overall construction costs. The rule also prohibits contracts with design consultants that are solely on a "time and materials" basis unless there is a maximum amount payable. This rule finally prohibits school owners from buying any materials from design consultants, with exceptions for design build agreements and energy performance agreements.

If a contract is terminated, OAR 137-048-0310 describes the conditions under which it can be reinstated. Generally, if it is within one year and the school owner thinks it can and should proceed with the work, the contract can be reinstated. Finally, OAR 137-048-0320 provides that contracts may be amended if, in the discretion of the school owner, the amendment is within the scope of the original solicitation documents, and not materially adverse to the design consultant.

If two proposals are equally matched, under ORS 279C.110(4) the school owner "may select a candidate through any process the contracting agency adopts that is not based on the candidate's pricing policies, proposals or other pricing information" (emphasis added).

Once a candidate is selected, under ORS 279C.110(5) the school owner shall refine the scope of services and compensation so that these are "reasonable and fair to the contracting agency as determined solely by the contracting agency."

The first time that the school owner can consider pricing of the architectural or consultant services is found in ORS 279C.110(6). Only when the school owner determines it is not able to negotiate a "reasonable and fair" contract may it formally terminate negotiations with the selected candidate, then proceed to commence negotiations with the next most qualified candidate. Thereafter, "the negotiation process may continue in this manner through successive candidates until an agreement is reached or the contracting agency terminates the consultant contracting process."

The rest of ORS 279C.110(7) has specific reporting requirements that school owners must follow.

- **Statutory limits on an architect's specifications**

Architects create "specifications" for projects that state the types of products that may be used, from window types and roof materials down to paper-towel dispensers in washrooms. By statute, ORS 279C.345, these specifications may not require any product by any brand name or mark, nor the product of any particular manufacturer or seller, unless under section (2) of that statute, the school owner expressly finds that it is unlikely a precise specification will "(a) … encourage favoritism in the awarding of public improvement contracts or substantially diminish competition for public improvement contracts; (b) The specification of a product by brand name or mark, or the product of a particular manufacturer or seller, would result in substantial cost savings to the contracting agency; (c) There is only one manufacturer or seller of the product of the quality

required; or (d) Efficient utilization of existing equipment or supplies requires the acquisition of compatible equipment or supplies."

Another aspect of the project that affects architectural specifications is the use of green energy technology. ORS 279C.527 requires as follows: "a public improvement contract for the construction of a public building or for the reconstruction or major renovation of a public building, if the cost of the reconstruction or major renovation exceeds 50 percent of the value of the public building, shall contain and reserve an amount equal to at least 1.5 percent of the total contract price for the purpose of including appropriate green energy technology" as part of the work. This is something that school owners and design professionals will likely discuss early in the project.

- **The Oregon Tort Claims Act**

Another statute that affects contracts between school owners and design professionals is the Oregon Tort Claims Act (OTCA). Contracts for design services frequently incorporate and refer to other parties, such as general contractors. A school owner enjoys the privileges and immunities of the act, ORS 30.260–30.300. The construction manager, designer, contract administrator, and contractor may be classified as "agents" and, therefore, subject to the OTCA. This requires certain formalities, such as notice of claim. See, e.g. ORS 30.275. School owners should clarify in the contracts who may be considered an agent to control this.

- **Minority, women-owned and emerging businesses**

An architect or engineer may qualify for a minority or women-owned business preference when providing services to a government agency if the architect or engineer qualifies under ORS 200.005 and 200.045. See also OAR ch. 123, div. 200 (certification procedures). The terms "minority" and "minority or women business enterprise" are defined in ORS 200.005(4)-(5).

CHAPTER 2 Design Professional Contracts – Preparing the AIA Form

PRACTICE TIP:

Try to include as much as possible as "basic services."

This chapter analyzes an industry standard form of contract, the American Institute of Architects form B101-2017, Standard Form of Agreement Between Owner and Architect (Appendix I). Other forms may be used, and this form itself may be revised by the school owner to meet its needs. This chapter will focus on the B101 form because it is so commonly used.

There is little to negotiate as far as the procurement statutes, rules and laws in Chapter 1. It is primarily a matter of reading and following the detailed statutory and legal requirements. With a contract, however, a school owner is in the position of negotiating terms most beneficial to it. The following review surveys some, but not all, considerations that arise in the 2017 edition of the B101 contract form and points out opportunities for a school owner to improve language in its favor. Every project is different, and every school owner and architectural firm is different. Therefore, this discussion seeks to highlight some provisions that a school owner should address in negotiating the B101 document.

1. Details of the B101-2017 contract

The contract cover page includes basic information, but it is crucial to get it right. This includes the complete and accurate legal name of the parties, as well as a project description.

Article 1 is titled "Initial Information" and it is substantially revised in the 2017 B101. Under Article 1, the contract should include a description of the project, and the anticipated budget for the project. Article 1.1.4 calls for the anticipated design and construction milestones including the anticipated construction commencement and substantial completion dates. Article 1.1.5 calls for the intended procurement and delivery method for the project, such as whether this will be a competitive bid or negotiated contract, phased,

Architectural insurance **requirements checklist**

- Require that the architect name the school owner as an "additional insured"
- Require an architecture firm to maintain current professional liability insurance for 10 years after project completion
- Require similar coverage from the architect's sub-consultants

fast-track, and so forth. Article 1.1.6.1 is concerned with whether the owner has identified a "Sustainable Objective" and if so, then the parties are to use a "Sustainable Projects Exhibit" which is also known as a E204-2017 document.

Article 1.1.7 asks for the identification of the owner's representative, while 1.1.8 requests additional persons or entities reviewing the architect's submittals. Article 1.1.9 provides space to list all of the consultants and contractors retained by the owner.

Article 1.1.10 asks for the architect's representative, and Article 1.1.11 allows the architect to specify which consultants will be working for the architect on the project. Finally, Article 1.3 concerns the use and transmission of digital data through the use of another AIA document, titled the E203-2013 Building Information Modeling and Digital Data Exhibit.

Article 2 outlines the architect's responsibilities. A school owner may consider attaching a schedule for delivery of the architect's work product here where feasible.

Of particular interest here is an expanded insurance section. Note that the form requires that the owner compensate the architect if any of the insurance requirements in the contract are in addition to the types and limits of insurance the architect normally maintains. Article 2.5.1 specifies commercial general liability insurance (for bodily injury and property damage) with policy limits to be filled in by the parties. Article 2.5.2 specifies auto liability insurance for autos owned and/or used by the architect. Article 2.5.3 describes a process whereby the architect could achieve the limits required, through the use of excess and umbrella policies. Article 2.5.4 covers workers compensation insurance, while Article 2.5.5 requires "Employer's Liability" coverage. Article 2.5.6 requires "Professional Liability" that would cover errors and omissions in the professional services to be provided. As with the other sections, the policy limits in the form are blank, and are intended to be filled in by the parties.

Importantly, Article 2.5.7 covers "additional insured obligations." In this section, the Architect is required to include the owner as an additional insured on all of the required policies. This is an important addition to the B101 and the owner should insist on Article 2.5.7. Last, Article 2.5.8 requires the architect to provide the certificates of insurance to the owner. The owner should actually insist on the entire policies, not just the certificates.

A school owner should also require an architecture firm to maintain current professional liability insurance for 10 years after a project's completion, or to notify the school owner if the firm ceases operations within that time. This is because typical architectural insurance policies apply not to the time of design or construction, but to the time when a claim is actually made. That is, if a school owner determines there was a problem with an architect's work seven years after a project is complete, and makes a claim against the architect, only that architect's current errors and omissions insurer will provide coverage. The school owner should also require similar coverage from any of the architect's sub-consultants.

Finally, this is a good place to require that an architect or any of its consultants hold the school owner harmless, and agree to defend and indemnify the school owner from any costs or losses of any kind, including attorneys' fees at trial or any appeal, from any and all claims arising from the negligence of the architect or any of its consultants.

Article 3 outlines the scope of the architect's basic services. Here it is beneficial to the school owner to include as basic services any additional or more specific duties

PRACTICE TIP:

The standard AIA A201 document may make the architect an initial arbiter of disputes on the jobsite. Make sure your architect agrees to this, and includes it as a basic service.

PRACTICE TIP:

School owners should maintain their authority as the property owner to work directly with contractors as needed, reporting back to the architect to keep communication and documentation clear.

anticipated under the design consultant's scope or letter. This could include, for example, LEED or other sustainable program work. The parties should also consider the full range of pre-construction services likely to be required of the architect: municipal design review, pre-application drawings, graphic materials for the community, etc. This is also an opportunity to update Section 3.1.5 to state expressly that the architect will design to code, as opposed to the original language that states only that the architect will "respond" to government requirements.

Sections 3.2-3.4 outline the architect's responsibilities in the schematic design, design development, and construction document phases of a project. For all phases, the parties should consider whether "value engineering" or "cost estimating" should be added as a basic service. A school owner should add that the design phase services are not complete until all construction permits are made available.

Section 3.5 concerns the architect's support to the school owner during the bidding process. Article 3.5.2 relates to competitive bidding situations. Article 3.5.3 concerns negotiated proposals, as opposed to competitive bidding. Often in a bidding process, contractors may suggest substitutes or ask questions that may give rise to plan or design changes. A school owner should include design work necessary to respond to bidders as a basic service. In the 2017 form, this is specifically noted under Article 3.5.2.3 and 3.5.3.3 as an "Additional Service" that the architect will specifically bill for.

Section 3.6 concerns the architect's services during construction. Note that Section 3.6.1.1 coordinates this contract with the AIA A201-2017 General Conditions document (Appendix III), which applies to the contract between the school owner and its general contractor. A school owner should consider the interplay between the obligations of the architect in this B101-2017 agreement, and the architect's obligations described in the A201-2017 document. If they are not the same, the school owner should consciously track changes to the respective project documents. It is not helpful to have the contractor believe the architect has certain responsibilities when the architectural firm has not agreed to those in its own contract. For other specific issues, Section 3.6.2.2 states that the architect has the "authority" to reject work that does not conform, but it is beneficial to the school owner if this is an affirmative obligation to reject that work, rather than discretionary. Section 3.6.4.3 gives the architect discretion to decide which project elements the contractor should design. Typical examples are fire suppression systems, or other specialty systems that do not require architectural expertise. Best practice would be to specifically list, as much as possible, which systems will be left to the contractors, to avoid a gap in contract coverage.

Article 4 outlines "supplemental services." Under this section, the parties can agree on services that are not included as "Basic Services" but may be required. These supplemental services should be identified on the chart that is included with the form. Some examples from the chart include landscape design, telecommunications/data design, and commissioning.

Article 5 outlines the school owner's responsibilities. Generally, this requires that the owner give the architect a written program, budget, and various other information and documents. If, at the time of contract negotiation, this has already occurred, then this section may be deleted. A school owner is urged to work through much of this in advance to maximize efficiency for the architect and the overall

project. Section 5.2 does require the owner to update the project budget throughout the duration of the project until completion. 5.8 requires that the school owner coordinate its consultants with the architect; it would be beneficial to the project to make this mutual, either here or in sections concerning the architects' responsibilities, so that the architect has an obligation to coordinate as well.

Article 5.12 requires the owner to include the architect in all communications with the contractor that relate to or affect the architects' services. This section also requires the owner to notify the architect of the "substance" of any other direct communication between the owner and the contractor.

Article 6 concerns work costs. Section 6.7 limits the architect's responsibility for additional design work if the costs of the construction exceed the budget. Careful attention should be paid to whether this should be modified, included as a basic service, or integrated with other dispute resolution conditions of the contract.

Article 7 concerns copyrights and licenses. A primary issue here is that the article states the architect owns the plans, and only gives the school owner a license to use them for the project. This section should be negotiated to suit the school owner's needs for a given project, and use rights should be detached from the payment obligation.

Article 8 concerns claims and disputes. Article 8.1.1 specifies that all claims between the parties have to commence in accordance with the binding dispute section of the contract, and must be brought no more than 10 years after the date of substantial completion. Article 8.1.2 is typically referred to as a "waiver of subrogation" rights. Essentially, this section waives rights of the school owner and its property insurer against the architect for damages covered by property insurance. Normally, school owners should consider deleting this section in its entirety, since it waives recovery rights against responsible parties. If the "waiver of subrogation" remains in the contract, then PACE may have no recourse against responsible parties in the event of a loss covered by property insurance. A school owner may also wish to strike Section 8.1.3, which waives consequential damages. That is, if the architect makes an error, and that has other effects on the project such as delaying construction or creating other costs, these would be waived. Instead, the architect should be at risk for the full range of losses caused to the school owner because of the architect's error.

Other provisions in Article 8 should be monitored for consistency with the dispute resolution procedures in the contract between the school owner and the construction contractor. Article 8.2.1 requires any claim to be mediated as a condition precedent to arbitration or court action. Article 8.2.4 allows the parties to the contract to then select whether they will arbitrate disputes between them, or litigate in court. These provisions should be coordinated with the other contracts in use for the project. For example, does the school owner agree to out-of-court arbitration? Finally, a school owner may wish to add that the party that prevails in any dispute has the right to seek its attorneys' fees and other resolution costs.

The remaining Articles 9 through 13 contain various provisions related to project administration and the contract. Article 9 concerns termination of the contract or suspension of services. A school owner may want to negotiate that the architect will continue to provide services regardless of any payment dispute. Article 9.7 provides a space for the parties to discuss termination expenses and items such as a "termination fee" or a "licensing fee" for continued use of the work.

Article 10 contains miscellaneous provisions. Here a school owner may wish to expand its flexibility to assign its rights under the contract to other parties. Section 10.7 also concerns the architect's rights to use project materials for marketing purposes. If a school owner is sensitive to such a use, this would be the place to negotiate that.

Article 11 concerns the architect's compensation. Section 11.1 describes the compensation to the architect for its Basic Services. Section 11.2 describes how the architect is to be paid for Supplemental Services designated in the contract, or not designated in the contract. Article 11.9 is another new insurance provision. This section designates the additional insurance coverage that the architect has to procure for the project, and can correspondingly bill the owner.

Articles 12 and 13 concern the agreement's special terms and scope. A school owner should consider any modifications presented here by the architect to ensure they do not limit the school owner's rights – for example, any limitations of the architect's liability. Article 13 references other documents, including the AIA's E203-2017 digital data exhibit. Many projects now use three-dimensional computer modeling as a basis not only for aesthetic modeling, but also for the creation, manipulation and management of construction documents. The school owner should determine the extent to which this affects its projects.

2. Landscape architects

By law, landscape architects must be registered to provide landscape architectural services. When the state, or any state political subdivision, contracts for projects involving landscape architecture services, the contract must be with registered landscape architects under ORS 671.412. As with architects and engineers, the registration requirements were made to safeguard public health, safety and property. In addition, the intent is to eliminate unnecessary loss and waste.

Unlike for other design professionals, an arbitration proceeding is available through the State Landscape Architects Board. If a dispute arises out of a contractual agreement between a registered landscape architect and a member of the general public, the board or subcommittee may act as an arbitrator of the dispute. The arbitration is binding if agreed to by all parties.

CHAPTER 3 Procurement Rules – Public Contracting for Construction Services

PRACTICE TIP:

Public contracting rules change constantly. Be careful using older forms.

Oregon's laws relating to public contracting are primarily codified as follows:

- ORS chapter 279A, which contains provisions relating to all public contracts, including public contracts for public improvements;
- ORS chapter 279B, which contains provisions relating to public procurements of goods and services (other than construction services for public improvements and architectural, engineering, land surveying and related service contracts); and
- ORS chapter 279C, which contains provisions relating to public improvements (i.e., construction), and architectural, engineering, land surveying and related service contracts.

Most construction will fall into the statutory definition of "public improvement contract," and procurement will be governed by ORS 279C. ORS chapter 279B applies to construction service contracts that do not meet the definition of public improvement contracts. See ORS 279B.015.

In instances where the school owner receives federal funds for the construction of public improvements, depending on the terms of the grant or loan, some or all of the Federal Acquisition Regulation (FAR) (48 CFR parts 1-99) may also apply to the procurement. If federal funds are used for procurement, as a general matter the federal rules and regulations may apply to the extent that they conflict with Oregon's Public Contracting Code. See ORS 279A.030.

Public Contracting **Code requirements**

- Local or model rules
- Competitive bidding
- Bid advertising
- Bid solicitation documents
- Bids
- Lowest responsive and responsible bidder
- Bidding exemptions
- Contract clauses

PRACTICE TIP:

Strict compliance with the procurement rules is recommended to avoid bid challenges.

The Public Contracting Code is based on the requirement under ORS 279C.335(1) that unless public contracts (including construction contracts) are exempted from the competitive bidding process, "all public contracts shall be based upon competitive bids or proposals."

The Public Contracting Code requires each public agency to file a list of public improvements with the commissioner of the Bureau of Labor and Industries (BOLI), not less than 30 days before the adoption of the public agency's budget. The list must state every known public improvement that the agency intends to fund during that subsequent budget period. The list must also identify the improvement by name, provide an estimate of the total onsite construction costs, and include a statement whether the contracting agency intends to perform the construction through a private contractor. If the contracting agency intends to perform construction work using its own equipment and personnel, and if the project's estimated cost exceeds $125,000, the contracting agency must also show that the agency's cost of performing the work meets the least-cost policy. If the estimated cost of the project exceeds $125,000, the contracting agency must prepare adequate plans and specifications and estimate the unit cost of each classification of work. These estimates must include a reasonable allowance for the cost, including investment cost, of any equipment used. If the public contracting agency does not have a cost-accounting system that substantially complies with the model cost-accounting guidelines developed by the Oregon Department of Administrative Services, the contracting agency may not construct a public improvement with the contracting agency's own forces if the cost exceeds $5,000. See ORS 279C.305, ORS 279C.310.

It must be emphasized that the Public Contracting Code is a dense, often-revised set of procurement requirements, and that the following is merely a summary. Chapter 279C alone runs over 50 pages, and other Oregon statutes and regulations (including those relating to BOLI's prevailing wage requirements) are relevant to the procurement process. Consultation with counsel is strongly advised before a school owner proceeds with a construction procurement.

1. Local or model rules

With limited exceptions, school owners are allowed to adopt their own procurement rules that are consistent with ORS 279. If no such local rules are adopted, the public agency must follow the Oregon attorney general's model rules, codified at OAR chapter 137, div 049. ORS 279A.065(4). School owners commonly choose to adopt the model rules, often to avoid conflict that otherwise might arise between local rules and the Public Contracting Code. A school owner is considered a "contracting agency," and its board the "local contract review board" for the purposes of application of the statute and the model rules. See ORS 279A.010(1)(b), ORS 279A.060.

The rules relating to contracts for public improvements exclude:

(A) Projects for which no funds of a contracting agency are directly or indirectly used, except for participation that is incidental or related primarily to project design or inspection; or

(B) Emergency work, minor alteration, and ordinary repair or maintenance necessary to preserve a public improvement.

Some school owners adopt a broad reading of the statutes and corresponding cases, and have classified certain construction contracts as personal services: for example, installation of a fire-suppression system or a telecommunication system. It is not clear from the case law whether this approach is acceptable.

If the school owner desires to procure construction through the construction manager/general contractor (CM/GC) method, it must proceed in accordance with the model rules. See ORS 279C.335(4).

2. Competitive bidding

All construction contracts issued by contracting agencies must be based on competitive bidding unless the agency has adopted an exemption for that contract or a class of contracts, or the agency or transaction is not subject to the Public Contracting Code, under ORS 279C.300. Statutory exceptions and exclusions are listed in ORS 279A.025 and 279C.335.

The bidding process typically starts with an invitation to bid. The invitation includes the closing date and time by which all bids must be received, and a stated time for opening bids. The model rules do not specify a minimum or maximum amount of time between bid closing and bid opening. A bid that is submitted on or before the closing date is a binding offer on the bidder, unless the bid is allowed to be withdrawn, under OAR 137-049-0280(1). In certain circumstances, the bidder may withdraw or modify its offer before the bid closing. See OAR 137-049-0320.

Before bidding, the public agency may require prequalification of bidders, through the process prescribed in ORS 279C.430.

3. Bid advertising

Oregon law includes certain minimum requirements relating to advertising for bid. Advertisements must be published at least once in at least one newspaper of general circulation in the area where the contract is to be performed and in as many additional issues and publications as the contracting agency may determine, under ORS 279C.360(1). The model rules may also require an agency to advertise a public improvement contract through the Oregon Procurement Information Network (ORPIN). See OAR 125-249-0210(2). For construction projects estimated to be more than $125,000, the agency must also publish an advertisement in at least one trade newspaper of general, statewide circulation. See ORS 279C.360(1), OAR 125-249-0210(2)(d).

Under the Public Contracting Code, the advertisement must state the following:

(1) The public improvement project;

(2) The office where the specifications for the project may be reviewed;

(3) The date that prequalification applications must be filed and the class or classes of work for which bidders must be prequalified, if prequalification applies;

(4) The date and time by which all bids must be received by the agency to be considered (that final date must be not less than five days after the date of the advertisement's last publication);

(5) The name and title of the person designated for receipt of bids;

(6) The date, time and place that the public agency will publicly open the bids; and

(7) Whether the contract is for a public work that is subject to ORS 279C.800-279C.870 (Oregon's Little Davis-Bacon Act) or the federal Davis-Bacon Act (40 USC §§3141-3144, 3146, 3147). See also ORS 279C.360(2).

Although the minimum time between advertisement and when bids are due is five days, the model rules encourage agencies to use at least 14 days. See OAR 137-049-0200(1)(a)(G). Bids for public improvements in excess of $100,000 must be received by the agency only on a Tuesday, Wednesday or Thursday, between 2 p.m. and 5 p.m., under OAR 137-049-0200(1)(a)(G) and ORS 279C.370(1)(b). These day and time limitations do not apply to contracts that have been exempted from competitive bidding under ORS 279C.370(1)(d).

PRACTICE TIP:

Make sure a performance and payment bond and public works bond are in place to avoid potential personal liability.

4. Bid solicitation documents

For competitively bid public improvement contracts, the contracting agency must include the following minimum items in the solicitation documents:

- A description of or designation for the project;
- The office where the specifications may be reviewed;
- The date by which prequalification applications must be filed, if prequalification is required;
- The date and time by which bids must be received;
- The name and title of the person designated to receive bids;
- The date, time and place for bids to be publicly opened;
- A statement by the bidder that it will comply with state or federal prevailing wage statutes (or both), if the project is a "public works" project;
- A statement that each bid identifies whether the bidder is a resident bidder;
- A statement that the agency may reject a bid that does not comply with prescribed public contracting procedures and requirements and a statement that the public agency may reject all bids for good cause;
- Information addressing whether the contractor must be a licensed asbestos abatement contractor under ORS 468A.720; and
- A statement that the agency may not receive or consider a bid for a public improvement contract unless the bidder is licensed by the Construction Contractors Board or the Landscape Contractors Board. See ORS 279C.365(1)(a).

The model rules include a more complete list of bid document requirements at OAR 137-049-0200. Other provisions may be included in the solicitation document, and are by common practice. Examples of additional provisions include the requirement for provision of a bid bond, a performance and payment bond, and first-tier subcontractor disclosures (required by other statutory provisions).

For public improvement contracts in excess of $100,000, unless the public agency has exempted the contract from the requirements or from the competitive bid process, the bid documents must require the contractor, if awarded a contract, to provide a performance and a payment bond, each in the amount of the contract price. See ORS 279C.380(1), (5). If a payment bond is required but the contracting agency fails to require the contractor to post such a bond, the public body and officers approving the contract are jointly and severally liable for any payments the contractor fails to pay. See ORS 279C.625.

5. Bids

Under the statutes, at a minimum bids must be:

(1) In writing;

(2) Filed with the person designated for receipt of bids; and

(3) Opened publicly by the public contracting agency at the time designated in the advertisement. See ORS 279C.365(3).

If the bid is for a public improvement contract with an estimated value of more than $100,000, two further requirements apply.

First, within two hours after the bidding deadline, a bidder must submit a disclosure of its first-tier subcontractors who have a subcontract value "that is equal to or greater than (5) percent of the total project bid or $15,000, whichever is greater, or $350,000 regardless of the percentage of the total project bid." The requirement for first-tier subcontractors does not apply to any contract that has been exempted from competitive bidding requirements. The statute, ORS 279C.370, identifies the form of first-tier disclosure. If a subcontractor

disclosure is required and not submitted within the time required, the public contracting agency must treat that bid as nonresponsive.

Second, unless the public improvement contract has been exempted from the bid bond requirement under ORS 279C.390, the bid must also include a surety bond, irrevocable letter of credit issued by an insured institution, cashier's check, or certified check. The bid security, however, cannot exceed 10 percent of the amount bid, under ORS 279C.365(5)-(6).

For public agencies subject to the attorney general's model rules, additional requirements for the bid and solicitation documents apply, such as notice of any pre-offer (e.g., prebid) conference, the date and time of the conference, and whether the conference is mandatory. See OAR 137-049-0200.

6. Lowest responsive and responsible bidder

A public improvement contract that has been let for bid must be awarded to the lowest responsible bidder, under ORS 279C.375. The statute includes the standards for determining responsibility. Under the statute, the contracting agency must determine the lowest responsible bidder, and include a determination of the bidder's satisfactory record of performance and satisfactory record of integrity based on bidder information provided to the contracting agency.

As part of determining the lowest responsible bidder, the public agency must, among other actions, check the list the Construction Contractors Board (CCB) created under ORS 701.227 for bidders who are listed as not qualified to contract for public improvements.

Generally, contracts let through formal bidding are not subject to negotiation. There is a statutory exception if all responsive bids from responsible bidders exceed the contracting agency's cost estimate. In that case, the contracting agency, in accordance with rules it has adopted, may negotiate with the lowest responsive, responsible bidder, before awarding the contract, to solicit value engineering and other options to bring the contract within the contracting agency's cost estimate. A negotiation with the lowest responsive, responsible bidder under this section may not result in awarding the contract to that bidder if the project's scope is significantly changed from the original bid proposal. See ORS 279C.340.

Oregon gives a preference to resident bidders. A nonresident bidder is one that has not paid unemployment taxes or income taxes to the state of Oregon during the 12 calendar months immediately preceding bid submission, does not have an in-state business address, and has not stated in the bid whether it is a resident

Minimum **bid requirements**

CONTRACTS UNDER $100,000:

- Made in writing
- Filed with person designated for receipt
- Opened publicly by contracting agency at specified time

CONTRACTS OVER $100,000 (except those exempted from competitive bidding) ALSO REQUIRE:

- Disclosure of significant first-tier subcontractors within two hours after bidding deadline
- A surety bond, letter of credit, cashier's check or certified check

Note: Additional requirements apply to those public agencies subject to the attorney general's model rules.

PRACTICE TIP:

When using alternative procurement, ensure the contract form attached to the solicitation is complete and signature-ready.

bidder. See ORS 279A.120.

For projects exceeding $125,000, a public agency cannot construct public improvements with its own equipment and personnel if the agency has not (1) demonstrated that the use of its own forces and equipment will meet the statutory policy of constructing public improvements at the least cost to the agency and (2) developed adequate plans and specifications, under ORS 279C.305(3). The word "adequate" means "sufficient to control the performance of the work and to ensure satisfactory quality of construction by the contracting agency personnel," as defined by ORS 279C.305(3)(a). The public agency must keep complete and accurate records of the project cost, and these records are public. See ORS 279C.305(3)(b).

7. Bidding exemptions

A public agency may exempt a public improvement contract from competitive bidding if the agency makes certain statutory findings under ORS 279C.335, 279C.330. In general, public agencies may identify a class of contracts that are to be exempt from competitive bidding, or they can adopt an exemption for a particular contract, after making the required findings. The agency should note that the findings under Section 279C.335 are to be made "as applicable"—it is suggested that if one of the potential findings listed in the statute does not apply, the agency so note in its findings so that there is a record the statutory potential finding was taken under consideration. On the other hand, where a finding is made, it should be based on substantive considerations and not merely recite the factor stated in the statute.

Before adopting these findings, the public agency must hold a public hearing, and publish a hearing notice in a trade newspaper of general statewide circulation at least 14 days before. At the time notice is published, the agency must make a copy of its draft findings publicly available, under ORS 279C.335(5).

Contracts up to $100,000 may be let through a less formal competitive quote process.

Public agencies are also authorized to adopt alternative contracting methods such as design-build, construction manager/general contractor (CM/GC), and energy-savings performance contracts, under ORS 279A.015(6). The model rules (OAR 137-049-0600 to 137-049-0690) and Department of Administrative Services (DAS) rules (OAR 125-249-0600 to 125-249-0690) recognize these types of alternative contracting methods.

Construction contracts for emergency work, minor alterations, ordinary repair or maintenance of public improvements, as well as general construction work that does not meet the definition of a "public improvement," are awarded under ORS chapter 279B. Strict bidding is not required for emergency contracts, but the contracting agency must ensure that competition is reasonable and appropriate under the circumstances. See ORS 279C.320(1), 279B.080.

Competitive negotiations for public improvement contracts are addressed in ORS 279C.400-279C.410. Negotiation is typically employed for design-build and CM/GC contracts.

When a contract is not competitively bid, public agencies must prepare and deliver to the director of DAS or a local contract review board an evaluation of public improvement projects that cost more than $100,000. This evaluation is required for all contracts not competitively bid, including design-build and CM/GC contracts, under ORS 279C.355(1). This evaluation must be filed within 30 days after the public agency accepts the completed project, and must be available for public inspection. See ORS 279C.355(3).

Finally, after making applicable findings, a public agency may award a construction contract through competitive proposals under ORS 279C.400-279C.412, including requests for qualifications (RFQs) and

PRACTICE TIP:

Stay current on rules. The CM/GC contracting rules were substantially modified in 2013.

requests for proposal (RFPs). A fair starting point for framing the RFP is ORS 279C.405(2), which reads:

> In addition to the general requirements of ORS 279C.365 (requirements for solicitation documents and bids and proposals), a contracting agency preparing a request for proposals shall include all required contractual terms and conditions. The request for proposals also may:
>
> (a) Identify those contractual terms or conditions the contracting agency reserves, in the request for proposals, for negotiation with proposers;
>
> (b) Request that proposers propose contractual terms and conditions that relate to subject matter reasonably identified in the request for proposals; and
>
> (c) Contain or incorporate the form and content of the contract that the contracting agency will accept, or suggested contract terms and conditions that nevertheless may be the subject of negotiations with proposers.
>
> (d) The method of contractor selection, which may include but is not limited to award without negotiation, negotiation with the highest ranked proposer, competitive negotiations, multiple-tiered competition designed either to identify a class of proposers that fall within a competitive range or to otherwise eliminate from consideration a class of lower ranked proposers, or any combination of methods, as authorized or prescribed by rules adopted under ORS 279A.065 (model rules generally).
>
> (e) All evaluation factors that will be considered by the contracting agency when evaluating the proposals, including the relative importance of price and any other evaluation factors. [2003 c.794 §130; 2007 c.764 §30]

When proceeding on the basis of an RFQ or RFP, it is recommended that the agency start with a solicitation document modeled after a prior successful procurement of the same type, then conform the solicitation to current rules. A key provision of the solicitation will be the identified evaluation factors. Those factors normally should be as objective as is feasible, and will often include a point scoring system with selection factors weighted based on the agency's perceived needs. While price is often a significant evaluation factor, it should not be the sole factor, or competitive procurement instead should be used. Examples of factors that can be included for consideration include contractor experience, expertise, and availability for fast-track projects. The anticipated contract form should be attached to the solicitation, and the agency should designate whether it is subject to negotiation. Many agencies include in the solicitation a requirement that the proposers state any exception that they take to the contract form, and include review of those exceptions as a scoring factor in the evaluation of the proposal.

8. Contract clauses

Certain clauses must be included in the bid or contract documents or both for public improvements and public works contracts, under ORS 279C.500-279C.670. Some public agencies incorporate these provisions by reference to the relevant statute. Although incorporation by reference probably is effective to read these statutory clauses into the contract, the more conservative practice is to physically include the clauses verbatim in the contract language. A helpful summary of required clauses can be found at OAR 137-049-0200(1) and OAR 137-049-0800.

These mandatory provisions include clauses requiring a contractor to do the following, among other requirements:

(1) Make payment promptly, when due, to all persons supplying the contractor with labor or materials for the performance of the work provided for in the contract. ORS 279C.505(1)(a).

(2) Pay all contributions due to the industrial accident fund. ORS 279C.505(1)(b).

(3) Not permit any lien or claim to be filed or prosecuted against the public agency. ORS 279C.505(1)(c).

(4) Not employ any person for more than 10 hours in any one day, or 40 hours in any one week, except in cases of necessity or emergency or when the public policy absolutely requires it. ORS 279C.520(1).

(5) Prevailing wage provisions, as required under ORS 279C.800-279C.870.

(6) Prompt payment provisions, including a clause that requires the prime contractor to pay first-tier subcontractors and material suppliers within 10 days after the public agency has paid the prime contractor. ORS 279C.580.

(7) Provisions regarding payment of interest on late payments. ORS 279C.580(3)(a).

(8) Provisions regarding withholding of retainage. ORS 279C.550-279C.570.

Solar-energy technology must be included in the construction of any new public buildings or the reconstruction or major renovation of such buildings when the cost of renovation or reconstruction exceeds 50 percent of the building's value. This technology must include solar electric or solar thermal systems and passive solar if the passive solar energy system will achieve a reduction in energy usage of at least 20 percent, under ORS 279C.527-528. The state Department of Energy has published regulations for the application of these statutes, at OAR 330-135.

Under ORS 279C.315, a public agency cannot include a clause that "purports to waive, release or extinguish the rights of a contractor to damages or an equitable adjustment arising out of unreasonable delay in performing the contract, if the delay is caused by acts or omissions of the contracting agency or persons acting therefor." These are commonly referred to as "no damage for owner delay" clauses. Such a clause is against public policy and void and unenforceable. See ORS 279C.315.

The solicitation or contract may include affirmative action provisions within its procurement process and contract provisions for minorities, women, disabled veterans, and emerging small businesses, and a bidder or proposer may not discriminate against a business enterprise owned by these individuals. See ORS 279A.100-279A.110.

Three other contracting preferences may apply: (1) a preference for goods and services manufactured or produced in Oregon, ORS 279A.120; (2) a preference for goods manufactured from recycled materials, ORS 279A.125; and (3) a preference for goods that are fabricated or processed, or services that are performed, entirely within Oregon if the goods or services cost no more than 10 percent more than goods that are not fabricated or processed, or services that are not performed, entirely within Oregon.

Additional solicitation and contract provisions are required for CM/GC contracts. See ORS 279C.337.

A public agency is generally free to include other clauses it deems necessary or in its best interests that do not directly conflict with statutorily required clauses. This is a critical point. Some public agencies focus on strict compliance with the myriad minimum statutory requirements for contracting, without also giving due consideration to provisions that are not specifically addressed in statutes. Contracting agencies should consider use of a model construction

PRACTICE TIP:

Construction Manager/General Contractor and Design-Build procurement methods may be attractive options for new school and specific systems builds.

form, such as those published by the AIA, as a basis for their contract, to ensure all appropriate provisions are contractually covered. These forms can then be modified to include the applicable state-mandated provisions.

9. Construction Manager and Design-Build Procurements

As noted above, the public procurement statutes specifically permit the use of Construction Manager/General Contractor (CM/GC) and Design-Build as alternative procurement methods to traditional hard-bid construction contracting. Agencies are increasingly turning to these methods as effective means of procurement where cost, time, and quality considerations merit.

Under the CM/GC method, the contractor is selected through an RFP process, then contracted at an early stage before the plans and specifications have been completed. The construction manager, typically for a fee, assists in the preconstruction process, providing input as the plans are developed on such matters as constructability, value engineering, life-cycle review, schedule, and comparative quotes for labor and materials. The construction manager can develop subcontractor and vendor interest in the project during this time. After a competitive subcontractor selection process, the contractor presents to the school owner a price or proposed guaranteed maximum price (GMP), and, unless the original contract specified a completion date, a required date for completion of the project. The GMP and completion dates are then added by amendment. If the parties cannot agree on a GMP and completion date, the construction manager is paid its preconstruction fee and the parties move on.

Under the design-build method, the design-builder acts as both designer and contractor for the project. Again, the counterparty initially is selected by RFQ or RFP. The school owner provides in the contract the criteria the design-builder must meet in designing and constructing the project, and satisfactory completion is measured against those criteria. The school owner provides necessary approvals during the course of design. While typically a price and schedule for the project is set once the designs are final, it is not uncommon for a maximum price or budget to be initially established in the design-build contract itself.

CM/GC contracting is increasingly used for complex projects where experience, coordination and scheduling concerns may trump the school owner's desire for lowest-cost procurement, for example new school builds. Design-build contracting, on the other hand, may be an appropriate alternative when the school owner's bottom line is systems performance rather than achievement of a specific design, such as solar or roof system installations.

The public procurement statutes and regulations have different requirements for the CM/GC and design-build methods. CM/GC contracting is controlled by ORS 279C.337, which provides in relevant part regarding the procurement:

- The procurement must be in accordance with the Attorney General Model Rules.
- The procurement must include a description of the evaluation criteria and a scoring system.
- The agency must state in the procurement if and how it will use interviews and the information gathered in interviews, and how it will combine that information with scoring.
- The agency must identify if and how any contract savings will be shared with the CM/GC.
- The agency must state how the price or GMP will be determined, including any phased work, and state the price or GMP will not be exceeded except for material changes to scope.

- The agency must identify the deadlines and periods for proposals, interviews, intent to award, and the time period non-selected proposers may meet to discuss the procurement.

The CM/GC statute goes on to include contract requirements that are in addition to those generally applicable to traditional procurements, at ORS 279.337(3). The Attorney General model rules themselves include myriad additional procurement and contract requirements, at OAR 137-049-0690. Critical among those requirements is that the agency must "use this contracting method only with the assistance of legal counsel with substantial experience and necessary expertise in using the CM/GC Method, as well as knowledgeable staff, consultants or both staff and consultants who have a demonstrated capability of managing the CM/GC process in the necessary disciplines of engineering, construction scheduling and cost control, accounting, legal, Public Contracting and project management."

In contrast, the legislature has not provided statutory guidance for use of the design-build method of contracting. Instead, the procurement statute defers to the Attorney General to promulgate model rules for design-build contracting (ORS 279C.307). Those Attorney General model rules are primarily at OAR 137-049-0670. The rules require that the agency anticipate five stated benefits as a result of use of the design-build method, that the Oregon-licensed design professional who will be employed for the project be identified in the procurement response, and that the agency address six concepts or requirements in the procurement. The last of those six standards should be given serious consideration by the contracting agency: the procurement is to identify whether honoraria or stipends may be provided for design submittals from qualified finalists during the solicitation process on the basis that the contracting agency is benefited from such deliverables. As a practical reality, it may be difficult for the agency to attract qualified design-build proposers without payment of a stipend for the proposer's effort in presenting preliminary designs for its submission.

CHAPTER 4 Construction Contracts – Preparing the AIA Form

PRACTICE TIP:

Coordinate the extent of consequential damages with any liquidated damages provision.

This chapter will outline a section-based review of commonly used construction contract forms, the American Institute of Architects' form A101 (Appendix II) and A201 (Appendix III), 2017 edition, from a public agency's perspective. The A101 covers contracts where compensation is based on a stipulated sum, appropriate for projects procured under invitation to bid. AIA publishes other construction contract forms, including those for use on a small project, a construction manager-general contractor (CM/GC) project where a guaranteed maximum price is set after contract signing, and a design-build project where one entity acts as both the designer and contractor.

The A101 covers most of the specific project terms, such as the description of the work, price, and time. The A201 contains general contract conditions, and covers boilerplate terms. Solicitation documents are commonly included in this contract, particularly since they often contain provisions statutorily required by procurement statutes and regulations. Other exhibits may vary, depending on the contract's type and complexity.

1. The A101 contract

The first page identifies the owner, architect, contractor and the project. The school owner should confirm that its proper legal name is included. The contractor is obligated by statute to include its Construction Contractors Board license number. Note that, under the AIA forms, the architect is heavily involved in contract administration; if the school owner wants to perform administration services in-house, it will be necessary to modify these provisions.

Article 1 defines the documents that comprise the contract. Someone familiar with the contract should carefully review these exhibits and compare them to the contract text. It is common for exhibits to include provisions that are inconsistent with the AIA document.

Article 2 concerns the "work," and the capitalized term "Work" is what the contractor is supposed to do. It correlates to Article 15, which enumerates the contract documents, including plans and specifications. Be careful of projects where an architect or engineer has not prepared the contract documents, or where their specifications seek to defray a large portion of design or engineering to the contractor.

Article 3 identifies when the project is to be commenced and when it is to be substantially completed. If the school owner requires project delivery in multiple stages (for example, a core and shell date for owner installing fixtures, then a later date for school occupancy), there is a provision for such staged dates. The provision gives alternatives of requiring completion by a stated

PRACTICE TIP:

Make sure any public contract provisions conform to the solicitation documents.

date or within a stated duration—for school owners, dates are typically key and the former normally should be selected. Note that the AIA form does not fix a time for "final completion" when punch-list items must be fully performed – it is useful to set a required duration after substantial completion for final completion of the punch list.

Article 4 defines the contractor's payment as the "Contract Sum." There are breakouts for alternates, unit pricing and allowances included in the sum. The contract should specify which alternates are included in the contract sum and the pricing of any alternates that might be selected after contract signature. Allowances should be kept to a minimum, since the values for allowance items are just placeholders until later pricing is available. Finally (unlike prior versions of this form), the 2017 form defaults to stating a liquidated damages provision for late delivery. This can be particularly useful for school projects where time is of the essence and damage calculation from delays might be difficult to establish. The liquidated damages provision requires modification to sustain challenge in Oregon courts.

Article 5 includes the calculation of monthly and final payment, including the timing of release of retainage and identification of the interest rate. These provisions should be reconciled to the applicable public contracting statutes, including prompt payment, prevailing wage payment and reporting, interest and retainage.

Article 6 calls for selection of arbitration, litigation, or another dispute resolution mechanism. The default selection is arbitration. The relative merits of arbitration versus litigation from a school owner's perspective are discussed elsewhere in this manual (on page 29). If arbitration is selected, the arbitration provisions are contained in the A201 general conditions. The school owner may wish to include a provision expressly limiting its liability as allowed under the Tort Claims Act.

Article 7 cross-references the termination and suspension provisions of the A201 general conditions. The 2017 A101 includes a new provision identifying a fee the school owner will pay if the owner decides to terminate for convenience. Because Section 14.4.3 of the AIA A201 already requires compensating the contractor for costs incurred as a result of termination for convenience, this new fee provision normally should be deleted.

Article 8 references an Exhibit for identification of the insurance and bond requirements of the contract. School owners should ensure with their risk managers that the insurance provisions are consistent with the risks and size of the project. This article also is an appropriate place to include the provisions required in all public construction contracts that do not already appear in the solicitation documents. A helpful summary of required clauses can be found at OAR 137-049-0200(1) and OAR 137-049-0800. These statutory provisions supersede any conflicting provisions elsewhere in the contract.

Article 9 designates the contract documents. The contract should specify by date and title the project's plans and specifications. Typically the solicitation documents also are included, together with some or all of the contractor's bid documents. The school owner should consider attaching as a contract exhibit its required form of bond document, if it did not do so as part of the original solicitation. Note that, under the updated 2017 form A101, two additional AIA E-series documents are referenced as potential exhibits that should be deleted if inapplicable.

Exhibit A of the A101 is a new 2017 document that provides much more extensive requirements for insurance and bonds than was covered in prior AIA forms.

Section A.3.2.1 requires the school owner to procure the builders risk

PRACTICE TIP:

Consider developing standard school protocols for access, security screening and other recurring matters.

policy for the project unless a box is checked otherwise in Section A.3.3.2.1. A list of optional builders risk coverages is identified—the school owner should go over this list with its risk manager. The contractor's required liability insurance and bond coverages are dealt with in Section A.3. Again, many coverages are optional, and may vary on a project-by-project basis. The limits, deductibles and any special owner requirements must be included in this exhibit, which itself should be conformed to existing school owner insurance standards. The requirement for the contractor to provide bonds is also stated in this exhibit, which should be conformed to the requirements for a public performance and payment bond and public works bond.

2. The A201 contract

Article 1, for the most part, defines terms. A significant provision is Section 1.2.1, which provides the AIA's method of reconciling the contract documents to the actual work:

> "The intent of the Contract Documents is to include all items necessary for the proper execution and completion of the Work by the Contractor. The Contract Documents are complementary, and what is required by one shall be as binding as if required by all; performance by the Contractor shall be required only to the extent consistent with the Contract Documents and reasonably inferable from them as being necessary to produce the indicated results."

Because inconsistencies among the contract documents are common, however, it is helpful to also include a specific order of precedence provision.

Section 1.5 clarifies the ownership rights of the parties in the plans and specifications. This should be made consistent with the owner's rights in the plans and specifications under its agreement with the architect.

Sections 1.7 and 1.8 of the new 2017 form call for the parties to use separate AIA documents, AIA E-203 and G-202, for handling digital data. These documents include fairly extensive provisions focusing on building information modeling (BIM) protocols and may be inappropriate for inclusion on many projects.

Commonly asked questions about **construction contracts**

Q: What is the difference between alternates and allowances?

A: Alternates are two (or more) alternative construction options regarding a particular part of the project, with each alternate priced. Allowances are dollar estimates for parts of the construction project for which specifications are not available at the time of contracting.

Q: Does the school own the plans and specifications?

A: Unless the contract is changed, the author of the plans and specifications (the architect or the contractor's engineers) owns them. The school has a limited license to use them for the particular project.

Q: What change order forms should be used?

A: If the school does not have its own forms, the AIA publishes standard forms for change orders, payment applications, certifications of completion and other administrative matters.

Q: Can the school terminate the contract at any time if it is dissatisfied with the contractor?

A: Yes, this concept is called "termination for convenience" and does not require contractor breach. The school should be careful, however, to limit the payments owed the contractor upon termination.

PRACTICE TIP:

Consider including an early access date for the school to start its own installations.

Article 2 specifies the owner's duties. The school owner should delete Section 2.2, which requires proof of financing before the contractor is obligated to perform work. Assuming the school owner has already included with bid invitation documents all information that it will provide regarding the project and property, Section 2.3 should be modified to say so. Section 2.3.1 should be modified to state exactly which permits the school owner will procure outside of the contract price. This section should be conformed to Section 3.7, which states the contractor's responsibility for permits.

Article 3 specifies the contractor's performance obligations, and includes its warranty and indemnity.

Section 3.2 should be supplemented to have the contractor acknowledge the contract documents (including plans and specifications) and project information are complete and sufficient to perform the work. This helps avoid later change order requests based on claimed insufficiency of plans and specifications, and project information. Also consider addressing more specifically the contractor's responsibility and assumption of risk for unforeseen conditions, such as utility locations.

Provisions in Section 3.4 regarding hiring of personnel can be supplemented with the school owner's security check procedures, particularly if work will be performed while students may be present.

The contractor's warranty is found in Section 3.5. If the contractor is to provide additional or extended warranties, this provision should be supplemented. Given the nature and necessary timing of defect repairs at schools, the provision also can be supplemented with language allowing the school owner to self-perform warranty repairs and seek reimbursement if the contractor does not respond within a specified time.

Section 3.7 deals with procurement of permits. Regardless of which party is responsible for ultimate payment for particular permits, the contractor should be obligated to deliver a copy of all permits to the owner before it proceeds with the work at issue.

If the contractor will be expected to provide design or engineering services for a portion of the work, as is sometimes the case with mechanical, electrical and plumbing systems, Section 3.12.10 should be modified appropriately.

If the school facility will remain in use during performance of the work, Section 3.13 should be modified so that the contractor accommodates such use.

The contractor's indemnity under Section 3.18 should be modified to expressly include a duty to defend. As written, the indemnity is limited to bodily injury and tangible property damage arising from contractor negligence. The school owner should consider expanding the scope of this indemnity by removing the bodily injury and tangible property damage limitation.

The contract should identify the contractor as an independent contractor, responsible for all employment and worker safety laws.

Article 4 identifies the architect's role. The owner should make sure this article conforms to the architect agreement. The school owner may wish to reserve for itself some of the architect's duties that are outlined in this section, such as approval of pay applications, or reserve the right to approve action the architect takes on such approvals.

Article 5 deals with subcontractors and states that the contractor is obligated to furnish to the school owner, through the architect, the names of all proposed subcontractors and suppliers for each principal portion of the work. Consider including a provision that expressly states the school owner may require replacement of any subcontractor that the school

PRACTICE TIP:

Review by the school's risk manager or insurance broker is crucial.

owner determines is not responsible based on prior experience. The provisions on appointment and vetting subcontractors should be subject to public contracting laws on engagement and substitution of first-tier subcontractors. The contract should also identify under what circumstances the contractor must supply claim waivers from subcontractors. Under Oregon law subcontractors cannot make lien claims against school property, but periodic direct confirmation that major subcontractors are being paid can help avoid bond and change-order claims.

Article 6 includes an allocation of coordination duties, if a separate contractor performs portions of the project. This is common, for example, for installation of furnishings and school equipment. The standard AIA form requires the owner to coordinate the two contractors' work; to the extent appropriate, the owner should seek to allocate this duty to the contractor.

Article 7 includes provisions for processing and pricing change orders and change directives, the latter being change orders that the contractor has not signed. Many owner-oriented forms insist that no change order will be effective unless the owner has agreed in writing. This concept works for a change proposed by either party, but does not work for changes arising from unforeseen conditions or owner-caused delays. Also note that this article requires that all change orders be prepared or signed by the architect–this normally should be changed so that the owner may do so without the architect's involvement. The change pricing mechanisms may be supplemented to limit costs and fees that may be passed to the school owner. Also consider including a provision that the change order, once signed, is a final settlement of any payment arising from the change.

Article 8 identifies circumstances under which the contractor may claim a time delay. Some owner representatives seek to include a provision that the contractor's only remedy for delay is time extension, a so-called "no damage for delay" provision. Please note that these provisions are not allowed under Oregon law for public contracts, to the extent the delay is attributable to the owner. See ORS 279C.315.

Article 9 states the procedures for calculating progress and final payments, and defines the concepts of substantial and final completion. The owner should confirm that payment procedures are consistent with the owner's internal payment processing protocol, and requirements of the owner's funding source (including any bonds). The definition of substantial completion in this form is very summary and typically should be supplemented. The owner also should consider what additional deliverables should be required before work is considered substantially or finally completed, such as permits, as-built drawings, manufacturer's warranties, claim waivers and prevailing wage reports. Section 9.10.4 includes a waiver of school owner claims upon final payment other than four stated exceptions; given the school owner's responsibilities for protecting public claims, consider deleting this provision. Finally, consider including a provision requiring the contractor to retain project records after completion, for the purpose of a potential public audit.

Article 10 allocates the responsibility for jobsite safety to the contractor. This is a good place to include reference to any school owner access and construction rules and regulations, and any restrictions not otherwise listed in the contract on staging, storage, parking, access, restroom, noise and dust, and work hours. However, under recent Oregon court rulings, the school owner should avoid any

implication that the school has the right to control or direct the contractor's safety program. There is also a section dealing with hazardous materials; if the contractor is to be responsible for handling of hazardous materials, the section requires modification to state that. The school owner might also consider deleting the indemnification of the contractor for hazardous materials.

Article 11 gives a few general provisions regarding insurance and bonds, deferring to the exhibits for the details. Two sections in this Article remain of significant substance. Section 11.3 waives subrogation rights. This means the school owner waives its and its property insurer's rights against the contractor for damages covered by property insurance. Normally, school owners insured by PACE are advised to delete Section 11.3 in its entirety, since it waives recovery rights against responsible parties. If the "waiver of subrogation" remains in the contract, then PACE may have no recourse against responsible parties in the event of a loss covered by property insurance. For major projects involving so-called "wrap" policies (also known as owner-controlled insurance policies or contractor-controlled insurance policies), the AIA insurance language will require significant modification.

Article 12 covers the contractor's duty to uncover and correct work at the insistence of either the architect or government agencies. It also provides the process for correction of such work. The AIA form grants no extension of the correction period for the corrective work itself; this should be revised, since corrective work may take place near the end or after the one-year period.

Article 13 is a good place to include additional boilerplate contract provisions, including the school owner's standard boilerplate procurement forms that are not redundant or in conflict with the AIA provisions.

Article 14 concerns contract termination or suspension. The A201 has separate provisions for termination by the contractor for cause, termination by the owner for cause, and termination by the owner for convenience. Each has a different calculation of payments owed to the contractor; consider in any event limiting the contractor's recovery for unearned profit and overhead. Make sure to delete the requirement of certification in Section 14.2.2 before the school owner can terminate for cause. Because the school owner may be uncertain whether a termination for cause will later be upheld in dispute resolution, it is a good idea to include language allowing the school owner to convert a termination for cause to a termination for convenience at any time. It is also prudent to include a provision that, to the fullest extent allowed by law, the contractor will not suspend work over a payment dispute.

Article 15 concerns claims and disputes. The 10-year time limit on claims included in the language of Section 15.1.2 should be eliminated. Section 15.1.3 requires notice that any claims be filed within 21 days of the event in question. We suggest this time limit should be restricted to contractor claims. The school owner should delete the waiver of consequential damages in Section 15.1.7, unless the school owner includes a liquidated damages provision in the AIA A101 (since liquidated damages generally substitute for consequential damages). Section 15.2 requires a decision from a designated "initial decision maker" before proceeding to mediation and arbitration or litigation; the school owner should consider deleting this unnecessary step and instead include any school owner administrative procedures that precede formal dispute resolution. If the school owner does not want to include mediation before formal dispute resolution, delete the mediation provisions. If the school

owner has selected litigation as its means of formal dispute resolution in the AIA A101, delete the arbitration provisions. Finally, the school owner should consider inclusion of a prevailing-party attorney fee provision. This seems like an obvious item, but if the school owner has in-house counsel qualified to address contract claims, it may decide to let each party bear its own attorney fees as a strategy to minimize its exposure to legal costs.

3. Other AIA Forms – Alternative Contracting

As noted in Chapter 3, the public contracting statutes permit the use of alternative contracting methods other than hard bid when the statutory and regulatory prerequisites to such contracting are followed. In these cases, school owners may turn to alternative AIA contract forms as the basis for contracting. In the case of Construction Manager/ General Contractor procurements, the AIA publishes form 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." The form includes an exhibit for eventual establishment of the Guaranteed Maximum Price, and is to be accompanied with the AIA general conditions document, form AIA A201.

In the case of Design-Build procurements, the AIA publishes form A141–2014, "Standard Form of Agreement Between Owner and Design-Builder." With the A141, the general conditions of the contract are included in an exhibit to the form itself, so the A201 General Conditions document is not used. Practitioners should note that the A141 anticipates that the design, cost and schedule for the project will be established at a future date, after the contract is executed. Many school owners may find this approach unacceptable, and will want a stated price or maximum price and an outside completion date established in the contract itself.

In all cases, the AIA documents, which are geared toward private procurement, will require substantial modification or supplement to comply with the state statutes and attorney general Model Rules. Consultation with seasoned counsel and project consultants who have participated in prior school procurements using these forms is advised.

CHAPTER 5 Claims and Insurance

PRACTICE TIP:

The amount of liquidated damages must not constitute a "penalty."

In any construction project, things can go wrong. When this happens, the school owner and the design professional and/or contractor will necessarily refer to the work contracts. One of the first considerations in any dispute is whether the parties should attempt mediation.

In mediation, the two parties (or more) negotiate toward settlement with assistance from a neutral third party. Mediation is commonplace in the construction industry and required before arbitration or litigation in most standard AIA contract forms. Unlike arbitration, which is typically binding, mediation is nonbinding unless the parties reach a settlement.

The benefit of mediation is that it provides the parties an opportunity to settle before incurring arbitration or litigation costs. Furthermore, information shared as part of mediation is generally treated as confidential. Project documents and other evidence disclosed during mediation will not transform them into confidential communications simply because they were used in mediation, but documents prepared specifically for mediation are generally not admissible in later proceedings. The protection of such information is aimed at encouraging the parties to candidly acknowledge case weaknesses should the matter proceed.

Under most construction contracts, the parties mutually select the mediator. In doing so, the parties should consider:

- Construction and construction law experience. Not all mediators need be construction lawyers. Some mediators are professional mediators, retired judges, claims representatives, former industry personnel, etc. Depending on the dispute's nature, the parties should consider whether it is necessary that the mediator understand all the complexities of construction-related disputes.
- Style. The parties should consider whether the dispute involves primarily factual versus legal issues, and the strengths and weaknesses of those issues. For a party with a strong legal or factual position, a more evaluative mediator may be desirable. If, on the other hand, the party's legal and/or factual merits are weak, that party might opt for a mediator who acts more as a facilitator– that is, one who will push for an acceptable business solution as opposed to weighing the merits of a particular case or argument.
- Success rate. The parties should also inquire into the track record of any proposed mediator. As the goal of mediation is to reach an acceptable settlement, both parties should be vested in selecting a mediator who is best able to achieve that goal.

Arbitration vs. litigation

In the AIA contracts, there is an opportunity to select the dispute resolution mechanism—arbitration

or litigation in court. In making this determination, the parties should consider the following:

- Privacy and confidentiality. Unlike litigation, which is subject to public hearings and a trial, arbitration offers the parties more privacy. Attendance at an arbitration hearing is limited to the parties, their lawyers, witnesses and the arbitrator(s). The arbitrator is not required to produce a detailed written opinion of his or her decision and no record is made of the arbitration hearing. The parties also have more flexibility to add protections in arbitration versus litigation. If the parties seek to minimize publicity, arbitration is more desirable.
- Certainty and convenience in scheduling hearing dates. In arbitration, the parties have significantly more flexibility in scheduling and generally have more accessibility to the arbitrator for any pre-arbitration disputes. The parties are not bound by the trial court's docket or built-in time constraints. For example, most circuit courts require that a case be tried within one year of a complaint's filing. Parties that elect arbitration are not similarly bound and can select a hearing date dependent upon the complexity of issues. Parties can also argue pre-arbitration motions by phone, schedule arbitration for non-consecutive days to accommodate witness schedules, etc. This becomes more important if the arbitration will require several weeks.
- Expertise. Another commonly cited advantage to arbitration over litigation is that the parties have some say in who will be the decision-maker. Depending on whom the parties select (see considerations discussed above), an arbitrator will likely have more familiarity with construction-related complexities than a judge or jury. The time required to educate can be significantly reduced if the parties select an arbitrator with construction experience.

Arbitration or **litigation?**

ARBITRATION	LITIGATION
Parties control ability to keep private and confidential	Filing of lawsuit is published and hearings are generally open to the public
Parties control scheduling of hearings	Hearings and trial subject to the court's availability
Parties select decision-maker	Case assigned to judge
Arbitrators have more flexibility to consider evidence	Judges are bound by court rules in considering evidence
Parties control amount of discovery	Discovery dictated by court rules
Parties control design of arbitration process	Case subject to court timelines and rules
Third parties can only be joined if contractually bound to the same or similar dispute resolution process	Third parties can be joined if claims involve similar issues
Filing fees tied to amount of claim	Filing fees tied to amount of claim
Parties must compensate arbitrator(s)	Judges are paid government officials
Generally final and binding	Right to appeal unfavorable outcome

- Eased rules of evidence. Another potential benefit of arbitration is that the strict rules of evidence need not apply. Arbitrators generally have more flexibility to allow evidence to be introduced than a judge, and more experience weighing evidence than a jury. In considering whether this factor is beneficial, the parties should also weigh what arbitration rules will apply. Article 15 of the standard AIA A201-2017 generally requires that arbitration be governed by the American Arbitration Association (AAA) Construction Industry Arbitration Rules. If the parties seek more flexibility, they should consider opting out of or modifying the AAA rules.
- Discovery limitations. Unlike litigation, which permits broad discovery and generally unlimited depositions, arbitration limits discovery to the exchange of relevant documents and few, if any, depositions. Due to the general limitation of discovery, discovery disputes and related motion practice are also typically reduced in arbitration.
- Flexibility. As indicated above, one of arbitration's greatest advantages is the flexibility it allows the parties in designing dispute parameters. If the dispute is relatively simple, the parties can minimize discovery and set a cap on the hearing time allotted. If it is complex and involves multiple parties, they can expand discovery, the time to conduct discovery, the timing and length of the arbitration hearing, etc. Depending on how the parties draft their arbitration provisions, they can largely control how the dispute is to be resolved.
- Efficiency. Traditionally, arbitration has been promoted as a speedier alternative to litigation as the

AMOUNT OF CLAIM	INITIAL FILING FEE	FINAL FEE
Up to $75,000	$750	$800
>$75,000 to $150,000	$1,750	$1,250
>$150,000 to $300,000	$2,650	$2,000
>$300,000 to $500,000	$4,000	$3,500
>$500,000 to $1,000,000	$5,000	$6,200
>$1,000,000 to $10,000,000	$7,000	$7,700
>$10,000,000	$10,000 plus .01% of the claim amount above $10,000,000 up to $65,000	$12,500
Undetermined monetary claims	$7,000	$7,700
Nonmonetary claims	$3,250	$2,500
Additional party fees	If there are more than two separately represented parties in the arbitration, an additional 10% of each fee contained in these fee schedules will be charged for each additional separately represented party. However, additional party fees will not exceed 50% of the base fees contained in these fee schedules unless there are more than 10 separately represented parties.	

parties generally have more control over the process. The time to educate a court or jury can also be significantly reduced if the parties select an arbitrator with construction experience. These potential benefits, however, depend on how the parties and the arbitrator ultimately process the arbitration.

- Costs. Similarly, arbitration has also been promoted as a more cost-effective means of resolution. Again, this potential benefit depends entirely on how efficiently the parties and arbitrator run the process. If it involves numerous complex issues and sizeable claims, the cost of arbitration can actually dwarf the cost of litigation. Further, unlike litigation, arbitration requires that the parties compensate the arbitrator for his or her time. If the amount in dispute requires a panel of arbitrators under the AAA rules (or as otherwise agreed upon), this cost will automatically triple. Additionally, the AAA requires sizeable filing and administrative fees, which increase with the amount in dispute. The AAA standard fee schedule as of July 1, 2015, is as follows:
- Joinder of parties/multi-party disputes. Because arbitration is consensual in nature, a party cannot be compelled to arbitrate without consent or an arbitration clause in that party's contract or agreement. As such, if the parties to a construction contract elect to arbitrate, they must also consider whether other parties on the project (design professionals, subcontractors, suppliers, etc.) are similarly bound by the arbitration provision.
    - Dual-track disputes. To avoid a dual-track dispute (two claims that proceed in arbitration and litigation, two separate arbitrations, etc.), the owner must first confirm that its own contracts are consistent. That is, if the owner elects arbitration in its design contract under Article 8 of the AIA B101-2017, it must also elect arbitration in its construction contract under Article 6 of the AIA A101-2017. The owner must also ensure that both contracts contain joinder provisions that permit the parties to join all affected parties in one consolidated arbitration (or litigation). Failure to do so will result in increased costs should a dispute arise that involves both design and installation.
    - Flow-down provisions. While Article 15 of the AIA A201-2017 allows consolidation of arbitrations and joinder of necessary third parties, such third parties must similarly be bound by the contract's arbitration provision before they can be compelled to participate. For this reason, Article 5 of the AIA A201-2017 includes what is generally known as a flow-down provision, wherein the contractor must require its subcontractors to be bound by the prime contract's terms, including its alternative dispute resolution procedures. The owner's risk, however, is relying on the contractor to include such provisions in its downstream subcontracts and agreements. If the contractor fails to include such a flow-down provision in its agreements with suppliers, vendors, etc., then those third parties will not be obligated to participate in arbitration. This could result in fragmented claims and increased costs should a third party bring a direct action against the owner. Accordingly, it is prudent to review the contractor's subcontract forms (or other agreements, including purchase orders) before they are executed. Furthermore, the standard AIA B101-2017 form contains no flow-down provision concerning consultants that may

be hired by the architect. As such, the AIA B101-2017 form should be modified to include such a provision, and the owner should review any sub-consultant agreements before they are executed.

- Enforceability of arbitration clause. Under Oregon law, an arbitration provision will be enforced and cannot be waived, except by the parties' mutual agreement. See ORS 36.610. Accordingly, if the parties elect to arbitrate, it is all the more important that they ensure consistency between all project contracts and agreements.
- Finality. Unlike litigation, arbitration is generally final and binding – with no right to appeal. Under Oregon law, a court will only review an arbitration award under the very limited circumstances of: (1) fraud, (2) evidence of partiality, corruption or prejudicial misconduct by the arbitrator, (3) the arbitrator's refusal to postpone a hearing on a showing of good cause that resulted in substantial prejudice, (4) the arbitrator exceeding his or her authority, (5) lack of an agreement to arbitrate, or (6) the arbitration was conducted without proper notice. See ORS 36.705.

1. Types of claims in construction disputes

Claims during the construction process can take various forms, limited only by the creativity of the party's counsel. A review of all theories of recovery available on public construction projects is beyond the scope of this chapter, but an overview follows.

2. Bid protests

As discussed above, public contracting for construction projects requires that specific procurement procedures be followed. If not, any adversely affected bidder or trade association of construction contractors has the statutory right under ORS 279C.460(1) to file suit to require compliance with bidding laws. This right does not extend to personal service contracts for architectural, engineering, photogrammetric mapping, transportation planning, or land surveying services. Venue for such suit is the circuit court in the county where the public contracting agency maintains its principal offices.

The most common causes of bid disputes involve:

- Nonresponsive bids. A party that is not declared the low bidder may file a formal protest against the contracting agency's award to the apparent low bidder. These disputes typically include allegations that the apparent low bid was somehow deficient and, therefore, nonresponsive. Such deficiencies can include:
  - The failure to fully complete the bid form;
  - The inclusion of a clerical or computational error in the bid;
  - A deficiency in the structure or status of the party submitting the bid;
  - The failure to submit the necessary bid bond;
  - The failure to submit a bid bond in the name of the same party submitting the bid;
  - A bidder's failure to acknowledge an addendum to the solicitation documents;
  - The failure to disclose required first-tier subcontractors;
  - The failure to demonstrate that the bidder is qualified to submit a bid; and/or
  - Any other bid mistake.
- Untimely bids. Issues over timeliness usually arise when a bid is delivered late by mail or courier service, or when the contracting agency permits a late submission.
- Bid modifications or withdrawals. A party that is not declared the

low bidder may also protest when the contracting agency permits a bid modification or allows a party to withdraw its bid after the submission deadline.

Most bid protests are filed only by the second-lowest bidder when there is evidence of a bid error or irregularity in procurement procedures. Furthermore, before an adversely affected bidder can file a claim under ORS 279C.460, it must exhaust its administrative remedies.

Should a formal protest be filed in circuit court, the court has discretion to award reasonable attorney fees and costs on trial and appeal to the prevailing party. The court also has discretion to award "any damages suffered as a result of the court action" to the public contracting agency if it successfully defends the claim.

3. Little Miller Act claims

Oregon's Little Miller Act, modeled after the federal Miller Act, requires general contractors on a public construction project to post bonds guaranteeing performance of their contractual duties and payment of their subcontractors and material suppliers. Oregon's Little Miller Act requires a bond because liens on public projects are not permitted. Under Oregon's Little Miller Act, the following persons may have a right of action:

- A person claiming to have supplied project labor or material;
- Any person having a direct contractual relationship with the contractor furnishing the payment bond;
- Any person having a direct contractual relationship with any subcontractor;
- Any assignee of the above person; or
- A person claiming money due from the State Accident Insurance Fund Corporation, the Unemployment Compensation Trust Fund, or the Department of Revenue in connection with the performance of the contract.

Claim notice must be sent by registered or certified mail or hand-delivered to both the contracting agency and the contractor that supplied the bond within 120 days after the claimant last supplied labor, materials or rental equipment. For persons claiming money due under the final bullet point above, the notice period is 150 days after the employee last supplied labor or materials. Assuming proper notice was provided, an action against the bond must be filed within two years after the claimant last supplied labor or materials.

Under Oregon law, the contracting agency can be held liable to unpaid claimants if it fails to require the contractor to provide the bond.

4. Breach of contract

The primary type of construction claim is an action for breach of contract. To determine whether such a claim exists, one must look to the contract terms. The most frequently litigated construction contract provisions include the following (this list is not exhaustive):

- Payment;
- Scope of work;
- Changed or additional work;
- Defective plans or specifications;
- Notice;
- Site investigation;
- Concealed or unknown conditions;
- Time extensions;
- Late or defective owner-furnished items;
- Acceleration of work;
- Delays;
- Improper termination;
- Breach of express warranties; and
- Breach of implied warranties.

Generally, under a breach claim, only direct damages – those that were reasonably foreseeable by the parties at the time of contracting – are recoverable. Most public contracts waive the right to recover consequential damages. See e.g., AIA A201-2017, § 15.1.6.

5. Tort claims

The Oregon Tort Claims Act (OTCA), ORS 30.310-30.400, does not prevent a party from asserting a tort claim against a contracting agency on a construction project. However, before a party can bring a tort claim against a contracting agency, it must comply with the notice provisions of ORS 30.275. These provisions require that any person asserting an action "arising from any act or omission of a public body or an officer, employee or agent of a public body" provide notice within:

- One year after the alleged loss or injury, for wrongful death; or
- 180 days after the alleged loss or injury, for all other claims.

Failure to provide such notice can result in the waiver of claim rights.

6. Quantum meruit claims

Quantum meruit (Latin: "what one has earned") is a theory of implied contract in the absence of an express, written contract. Generally, if a contractor performs work beyond what is required under the contract and no change order is entered, the contractor may attempt to recover fees for the additional work under quantum meruit. Although routinely brought as an alternative theory of recovery in the private construction context, it is not as common in the public construction context. For example, a public body arguably may not be held liable in quantum meruit if its charter requires that any contract be written and/or approved by the governing body. Indeed, Oregon courts have held that, even if agreed, the performance of extra work on a public project without an executed change order from the public body may bar recovery of additional fees.

(See below, however, discussing cardinal change/reasonable value.)

7. Claims for additional time and money

In addition to standard payment claims, discussed further below, construction contracts present a host of potential theories of recovery. The most common theories include the following:

- Changed or additional work. Most public contracts include a changes provision. See e.g., Article 7 of the AIA A201-2017. These provisions generally grant the owner the right to change, increase and/or decrease the scope of work without voiding the contract. These provisions also generally require the contractor to continue performing the work despite any dispute over resultant cost or time impacts. To the extent the contractor intends to seek additional time or costs associated with what it considers to be a change in the scope of its work, the contract typically requires that the contractor provide proper written notice. See e.g., AIA A201-2017, §15.1.4 (requiring written notice of increased costs before proceeding with work); §15.1.2 (requiring written notice within 21 days of event giving rise to the claim).

Common causes of **bid disputes**

- Nonresponsive: failure to complete a bid form, clerical errors, failure to submit bond, etc.
- Untimely: those bids that arrive late by mail or courier service, or when the contracting agency permits a late submission.
- Modifications or withdrawals: when the contracting agency permits such actions after the submission deadline.

- Defective plans or specifications. Claims based on defective plans or specifications, also known as claims for the breach of the warranty of the plans and specifications, are also generally cognizable under the changes provision. These claims are based on the assumption that owner-supplied plans and specifications, if followed, will result in satisfactory project construction. These types of claims generally do not arise until after the contractor has attempted to comply with the plans and specifications and discovers conflicts or errors. To the extent the contractor seeks additional time or costs associated with defective plans or specifications, the contractor must provide notice. See e.g., Article 15 of the AIA A201-2017.
- Concealed or unknown conditions. Most public contracts include a provision to address subsurface or other concealed conditions. See e.g., AIA A201-2017, §3.7.4. To the extent a contractor encounters such conditions, it must comply with the contract notice provisions to preserve its claim rights. To prevail on a concealed or unknown conditions claim, the contractor must show that the conditions encountered were reasonably unforeseeable based on all the information available to the contractor at the time of bid. Although owners routinely insert exculpatory language into their contract documents [see e.g., AIA A201-2017, §3.2 (requiring a contractor to familiarize itself with the site, contract documents and field conditions)], such provisions do not universally protect owners from claims where the contractor relied on owner-supplied information such as geotechnical reports, surveys, boring data, etc.
- Cardinal change/reasonable value. By definition, a cardinal change is so profound that it cannot be redressed under the contract. Oregon has generally adopted this doctrine, which was born out of federal law, but does not refer to it as a "cardinal change." Rather, a contractor in Oregon may seek to recover, under a theory of quantum meruit, the reasonable value of its performance if it has been made substantially more difficult and costly by the owner's actions following contract execution. The contractor must generally demonstrate that the changes were so great that the court is justified in treating the contract as abandoned and implying a new contract for the reasonable value of services actually rendered.
- Impact claims. Impact claims often result from alleged mismanagement, delay or other circumstances that make the work more difficult to complete than anticipated at the time the parties executed the contract. However characterized, these types of claims generally seek to recover additional contract time, costs, or both due to a loss of anticipated efficiency during construction. The most common impact claims affecting public contracts include:
    - Delay. This generally refers to incidents that affect the performance of a given activity, thus changing the project completion date. Although commonplace in private construction contracts, "no-damages-for-delay" provisions are generally unenforceable as a matter of law on public projects. See ORS 279C.315.
    - Disruption. This generally refers to the interruption of the contractor's planned work sequence. This can result from changed or extra work, defective plans or specifications, concealed or unknown conditions, or simply interference by the owner or the owner's

agents. Although distinguishable from delay, the two often go together as a disruption usually leads to a delay.

- Acceleration. This results from an attempt to speed up work progress to achieve an earlier completion date or recover time lost due to previous delays. Directed acceleration occurs when an owner instructs the contractor to work overtime, add days, etc. Constructive acceleration occurs when the owner refuses to recognize an excusable delay that should entitle the contractor to additional time under the contract, but the owner demands that the contractor adhere to the original completion schedule.
- Trade stacking. This occurs when a contractor asks separate trades to work in a congested area at the same time, causing potential delays and inefficiencies.
- Labor productivity losses. Such losses can occur when owners create disruption or cut job-site access, limiting the ability of contractor crews to profit from an "experience curve" or "production rhythm."
- Extended overhead costs. When a contractor claims that it has been delayed due to no fault of its own, it may seek to recover extended overhead costs. These typically include additional office trailer rental, equipment rental, office supplies, phones, utilities, vehicles and administrative staff costs.

8. Termination for cause

All public contracts have a termination for cause or termination for default clause. A termination for cause occurs when an owner or contractor declares a party to the contract to be in material breach, excusing performance by another party. The measure of damages under a termination for cause is typically outlined in the contract. See e.g., AIA A201-2017, §§14.1-14.2. Generally, if the owner is the defaulting party, the contractor recovers its expectation, including the cost of work performed to date, plus its reasonable overhead, profit and resultant damages. Recovery, however, is generally conditioned upon the contractor's compliance with the notice provisions of the contract. See AIA A201-2017, §14.1.3. If the contractor is the defaulting party, the owner has the right to hire a replacement contractor and charge costs to complete the work back to the original contractor. To withhold further payments from the contractor, the owner must similarly give the contractor contractual notice. See AIA A201-2017, §14.2.2 and §14.2.4.

9. Termination for convenience

Similarly, most construction contracts grant the owner the right to terminate the contract for convenience and without cause. See e.g., AIA A201-2017, §14.4. In such events, the contractor is entitled to payment for work executed, plus costs incurred as a result of the termination and reasonable overhead and profit on work not executed. In short, the contractor is entitled to be made whole. Generally, no construction contracts grant the contractor the right to terminate for convenience. Contractors are generally only permitted to terminate for cause, which most often stems from non-payment.

10. Liquidated damages

Under Oregon law, liquidated damages are generally enforceable if, at the time of contracting, the amount fixed was a reasonable forecast of the harm likely to be caused by the contractor's failure to timely complete construction. In essence, liquidated damages act as a substitute for actual damages resulting from a specific breach. A liquidated damages provision

generally relieves the owner of the burden of proving actual damages. Although the standard AIA forms do not include a liquidated damages provision, they do reference liquidated damages. See e.g., AIA A101-2017, §3.3 (prompting the parties to include liquidated damages, if appropriate). We generally recommend adding a liquidated damages provision if time is of the essence and the project must be available for use by a date certain.

Care must be taken, however, to ensure that liquidated damages bear a reasonable relation to the anticipated loss. Failure to do so could render the provision void and unenforceable as an illegal penalty. Please note that if the contract is not included as part of the bid package, a liquidated damages provision might also be deemed an unenforceable penalty due to the bidder's inability to identify and quantify such damages.

11. Construction defect claims

Problems with an improvement's design or construction can arise after completion, necessitating costly repairs and potentially interfering with the owner's use of the improvement. Such problems can also result from improper repairs, additions or remodel work. Fortunately, Oregon law provides owners an opportunity to seek compensation for necessary repairs and expenses.

- **Who can assert a claim for construction defects?**

The owner of a building can assert construction-defect claims for problems arising from original construction, repairs or remodeling. The building's owner does not have to be the same one who originally contracted for the work–in other words, Oregon law allows such claims by "subsequent owners." What legal claims are available to an owner?

A building owner who actually hired the architect or contractor can assert a claim for contract breach in design or construction. The owner can also assert claims for breach of warranties found in the contract, breach of "implied warranties," and in many circumstances a variety of non-contract claims such as negligence, negligent misrepresentation, and intentional misrepresentation.

A "subsequent owner" cannot assert contract-based claims unless the "subsequent owner" can demonstrate a valid assignment of contract rights or that he or she was a third-party beneficiary of the original contract.

- **Who is potentially liable for construction defect problems?**

Architects, engineers, contractors, subcontractors, and product suppliers can all be liable for construction-defect problems. In addition, project managers or other consultants involved in design or construction may also be liable parties under Oregon law.

- **What damages are available under state law?**

In general, Oregon law allows an owner to assert monetary claims sufficient to restore the property, as well as additional costs that the owner may incur. The primary damage typically asserted in a construction-defect claim is the cost to restore the property. For example, if the claim is that a building's windows leak, then the claim will focus on the cost to repair windows and any harm caused by leaks.

An owner may be able to assert the costs of consultants to analyze the building's condition, and perform other work such as formulating the scope of necessary repairs.

An owner may also be able to assert additional damages associated with loss of use or impaired use of the improvement due to construction problems, such as a leaky roof rendering a room unusable. Similarly, if expected repairs will render an improvement unusable for a period of time, the owner may be entitled to loss-of-use damages.

Along with repair costs, an owner may also seek to recover costs such as the anticipated moving and storage of personal property.

Attorneys' fees and other costs of any litigation over construction defects are not generally recoverable under Oregon law for most construction-defect claims unless the contract(s) between parties have a specific provision for doing so.

- **What repairs can be made before or during the claim process?**

An owner can repair the defective condition before formally instituting a claim, during the claim's pendency, or after it has been resolved. If an owner conducts repairs before or during the claim's pendency, the owner must take steps to notify, well in advance, all potential responsible parties. Failure to do so could result in severe consequences for the owner.

- **Are there time limitations in asserting claims for construction defects?**

Oregon law imposes time limitations for all construction-defect claims. In addition, contracts between parties may define different time limitations, which a court may enforce.

- **What is the statute of repose?**

In the construction context, Oregon law imposes a claim's outer time limit, which is called a "statute of repose." When a building's owner is a "public body" as defined by Oregon statute (this includes school owners), the statute of repose is 10 years from the "substantial completion or abandonment of such construction, alteration or repair of the improvement to real property." See ORS 12.135(2). Any construction-defect claim, then, whether based on the contract between parties, or a tort claim, must be commenced within 10 years of substantial completion (or abandonment).

Given that an owner as described above will have 10 years from "substantial completion" to assert a claim, the definition of "substantial completion" is important. This is the date either (i) when the contractee accepts in writing that the construction has been completed so that the structure is ready for use or occupancy, or (ii) if there is no written acceptance, the date the contractee accepts the fully completed construction.

Typically, a Certificate of Substantial Completion is used to show the contractee's acceptance in writing as to use or occupancy, although any written acceptance could suffice.

- **Are there shorter statutes of limitation?**

The "statute of repose" described above sets an outer limit on any construction defect claim. Within that 10-year period, however, shorter statutes of limitation apply to limit when claims can be brought.

For claims based on contract, such as breach of contract, claims must be asserted within six years. When to start the six-year limitation is a question in Oregon. Recent decisions suggest that it should start when the owner reasonably discovers the problem. For most tort claims, such as negligence, the statute of limitations is six years from the problem's discovery. Some tort claims, such as fraud, will probably be deemed to be covered by a two-year statute of limitations, dating from the problem's reasonable discovery.

An important caveat to these rules is that the time limitation for any claim (whether arising from contract or otherwise) for design professionals such as architects and engineers is two years from discovery of the injury or damage. See ORS 12.135(3)(a).

Contractual clauses may change statutes of limitation and ultimate repose. For example, some older AIA contracts contain an "accrual clause" that starts ALL statutes of limitation upon substantial completion, not upon the actual discovery of the problem.

- **How about insurance coverage for construction defects?**

Contractors carry commercial general liability policies, which are generally available for resultant damage caused by construction defects. Insurance

coverage is typically not available for damage to the work performed by the contractor itself, unless that work was performed by subcontractors. Policy endorsements may limit or totally exclude coverage, such as an exclusion for mold. This type of insurance policy is occurrence-based (i.e., insurance policies are triggered on the dates that the physical loss occurred).

Engineers and architects typically carry errors and omissions policies, not commercial general liability policies. These policies are generally available, depending upon the claims, for the professionals' malpractice. These errors and omissions policies are generally claim-based [i.e., insurance policy is triggered on the date that a covered claim is made and (possibly) reported to the insurer].

Construction defect problems may also be addressed through the property owner's own insurance. These property insurance policies generally do not cover damage caused by construction defects. However, some insurance policies may have provisions that allow for coverage

Common construction **defect questions**

1. **I discovered leaks in our 7-year-old building and want to stop them right away. Is this OK?** Yes, but you should consult with an attorney, and make sure to put anyone potentially at fault on notice of the repairs before you start them.
2. **If we have a dispute with our architect that involves attorneys, who has to pay for them?** Generally, under Oregon law, each side has to pay its own legal expenses. Any exception would be spelled out either in the contract or in an Oregon statute.
3. **We are almost 10 years from the completion of construction on one of our buildings—is there anything we should be aware of?** Yes, 10 years after construction any potential claims relating to construction are extinguished. The owner should consider having the building inspected by a professional before that 10-year period expires.

12. Insurance

Insurance is a crucial component in every project involving construction or property improvement. The AIA contract forms themselves have specific provisions relating to insurance procurement. In general, the owner's three main considerations are the (1) builder's risk policy coverage; (2) contractor's insurance; and (3) the design professional's insurance.[1] Insurance is a specialized field, however, and any owner would be well-advised to involve an insurance professional at any construction project's outset.

- **What is builder's risk insurance?**

Builder's risk insurance is also known as "course of construction" insurance, and covers against damage or loss of a building while it is under construction, renovation or repair. Such coverage generally includes, among other things, fire, theft, wind, lightning, vandalism and mischief. The policy may also include coverage for items in transit to the construction site and items stored there, as well as "soft costs" not directly related to construction. The policy may also include loss of revenue due to a delay in completion. The insurance is normally written for a specified amount on the building and does not cover losses that occur before construction begins or after it is completed.

The AIA contract form by default places the burden of obtaining this insurance on the owner. This can be found in the A201 general conditions section, Article 11. The owner may consider shifting that burden of obtaining builder's risk insurance to the general contractor. The owner may also consider specifying that the owner (as well as the contractors and subcontractors) be protected under this policy.

- **What are the contractor's insurance considerations?**

The typical contractor liability insurance policy covers damages that the insured becomes legally obligated to pay under certain specified circumstances. This typically includes property damage or bodily injury. This insurance is often referred to as third-party coverage because it applies to claims by those who are not parties to the insurance contract. Liability insurance for contractors is generally a commercial general liability policy. In addition to indemnifying the insured, the policy generally obligates the insurer to defend any lawsuit against an insured for damages payable under the policy's terms.

These are known as "occurrence-based" policies. That means that the coverage applies to property damage or bodily injury that occurs during the policy year in question. These contractor policies typically exclude coverage for "professional liability" such as design work.

Frequently, liability insurance policies provide coverage for additional insureds, or AIs. An AI is entitled to all protection under the policy, unless the policy specifies limitations. In most cases, an AI is listed on a separate endorsement.

As described more fully above, the AIA contracts include insurance requirements. The A101 Article 10 includes generic requirements for insurance. The limits, deductibles, and any special insurance requirements should be included in this section. The A201 general conditions contract terms also include an article, number 11, concerning insurance. This article by default requires the contractor to name the owner, the architect and the architect's consultants as additional insureds under the contractor's general liability policy. This helps to protect them from liability arising from the contractor's negligent acts or omissions. An owner should consider requiring copies of the endorsements for AI as well as the underlying policy of insurance.

- **What about design professional's insurance?**

Professional liability coverage for design professionals differs from the commercial general liability insurance provided for contractors. The key areas to consider with professional liability policies are that they cover third-party claims against the insured for liabilities arising in the scope of providing professional services (such as architectural drawings). The coverage is for errors and omissions ("E and O") of the insured in the course of providing professional services. The policy's definition of "professional services" is key to the coverage provided. The policy will usually provide a specific list of professional services insured.

Professional liability coverage is also known as "claims made" coverage. Such coverage means that the insurance applies to claims made during the policy period, regardless of when the wrongful actions or omissions took place. However, E and O policies typically carry a retroactive date listed in the insurance policy. This has the effect of limiting coverage to wrongful actions and omissions that took place within the retroactive date listed in the policy. Some E and O policies will also include, as part of the coverage, a reporting requirement for the professional, such as "We will pay on behalf of the insured all sums… for any claim first made against the insured during the policy period and reported to us during the policy period…"

The revised AIA B101-2017 article 2.5 includes a detailed section on architect insurance. The new B101 requires commercial general liability insurance, employer's insurance, even auto insurance.

[1]For projects involving "wrap insurance policies" the language of the AIA contract forms may require significant modification.

AIA B101–2017
Standard Form of Agreement between Owner and Architect

AIA® Document B101™ – 2017

Standard Form of Agreement Between Owner and Architect

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

BETWEEN the Architect's client identified as the Owner:
(Name, legal status, address and other information)

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

and the Architect:
(Name, legal status, address and other information)

for the following Project:
(Name, location and detailed description)

The Owner and Architect agree as follows.

TABLE OF ARTICLES

ARTICLE 1 INITIAL INFORMATION

§ 1.1 This Agreement is based on the Initial Information set forth in this Section 1.1.
(For each item in this section, insert the information or a statement such as "not applicable" or "unknown at time of execution.")

§ 1.1.1 The Owner's program for the Project:
(Insert the Owner's program, identify documentation that establishes the Owner's program, or state the manner in which the program will be developed.)

§ 1.1.2 The Project's physical characteristics:
(Identify or describe pertinent information about the Project's physical characteristics, such as size; location; dimensions; geotechnical reports; site boundaries; topographic surveys; traffic and utility studies; availability of public and private utilities and services; legal description of the site, etc.)

§ 1.1.3 The Owner's budget for the Cost of the Work, as defined in Section 6.1:
(Provide total and, if known, a line item breakdown.)

§ 1.1.4 The Owner's anticipated design and construction milestone dates:

.1 Design phase milestone dates, if any:

.2 Construction commencement date:

.3 Substantial Completion date or dates:

.4 Other milestone dates:

§ 1.1.5 The Owner intends the following procurement and delivery method for the Project:
(Identify method such as competitive bid or negotiated contract, as well as any requirements for accelerated or fast-track design and construction, multiple bid packages, or phased construction.)

§ 1.1.6 The Owner's anticipated Sustainable Objective for the Project:
(Identify and describe the Owner's Sustainable Objective for the Project, if any.)

§ 1.1.6.1 If the Owner identifies a Sustainable Objective, the Owner and Architect shall complete and incorporate AIA Document E204™–2017, Sustainable Projects Exhibit, into this Agreement to define the terms, conditions and services related to the Owner's Sustainable Objective. If E204–2017 is incorporated into this agreement, the Owner and Architect shall incorporate the completed E204–2017 into the agreements with the consultants and contractors performing services or Work in any way associated with the Sustainable Objective.

§ 1.1.7 The Owner identifies the following representative in accordance with Section 5.3:
(List name, address, and other contact information.)

§ 1.1.8 The persons or entities, in addition to the Owner's representative, who are required to review the Architect's submittals to the Owner are as follows:
(List name, address, and other contact information.)

§ 1.1.9 The Owner shall retain the following consultants and contractors:
(List name, legal status, address, and other contact information.)

.1 Geotechnical Engineer:

.2 Civil Engineer:

.3 Other, if any:
(List any other consultants and contractors retained by the Owner.)

§ 1.1.10 The Architect identifies the following representative in accordance with Section 2.3:
(List name, address, and other contact information.)

§ 1.1.11 The Architect shall retain the consultants identified in Sections 1.1.11.1 and 1.1.11.2:
(List name, legal status, address, and other contact information.)

§ 1.1.11.1 Consultants retained under Basic Services:

.1 Structural Engineer:

.2 Mechanical Engineer:

.3 Electrical Engineer:

§ 1.1.11.2 Consultants retained under Supplemental Services:

§ 1.1.12 Other Initial Information on which the Agreement is based:

§ 1.2 The Owner and Architect may rely on the Initial Information. Both parties, however, recognize that the Initial Information may materially change and, in that event, the Owner and the Architect shall appropriately adjust the Architect's services, schedule for the Architect's services, and the Architect's compensation. The Owner shall adjust the Owner's budget for the Cost of the Work and the Owner's anticipated design and construction milestones, as necessary, to accommodate material changes in the Initial Information.

§ 1.3 The parties shall agree upon protocols governing the transmission and use of Instruments of Service or any other information or documentation in digital form. The parties will use AIA Document E203™–2013, Building Information Modeling and Digital Data Exhibit, to establish the protocols for the development, use, transmission, and exchange of digital data.

§ 1.3.1 Any use of, or reliance on, all or a portion of a building information model without agreement to protocols governing the use of, and reliance on, the information contained in the model and without having those protocols set forth in AIA Document E203™–2013, Building Information Modeling and Digital Data Exhibit, and the requisite AIA Document G202™–2013, Project Building Information Modeling Protocol Form, shall be at the using or relying party's sole risk and without liability to the other party and its contractors or consultants, the authors of, or contributors to, the building information model, and each of their agents and employees.

ARTICLE 2 ARCHITECT'S RESPONSIBILITIES

§ 2.1 The Architect shall provide professional services as set forth in this Agreement. The Architect represents that it is properly licensed in the jurisdiction where the Project is located to provide the services required by this Agreement, or shall cause such services to be performed by appropriately licensed design professionals.

§ 2.2 The Architect shall perform its services consistent with the professional skill and care ordinarily provided by architects practicing in the same or similar locality under the same or similar circumstances. The Architect shall perform its services as expeditiously as is consistent with such professional skill and care and the orderly progress of the Project.

§ 2.3 The Architect shall identify a representative authorized to act on behalf of the Architect with respect to the Project.

§ 2.4 Except with the Owner's knowledge and consent, the Architect shall not engage in any activity, or accept any employment, interest or contribution that would reasonably appear to compromise the Architect's professional judgment with respect to this Project.

§ 2.5 The Architect shall maintain the following insurance until termination of this Agreement. If any of the requirements set forth below are in addition to the types and limits the Architect normally maintains, the Owner shall pay the Architect as set forth in Section 11.9.

§ 2.5.1 Commercial General Liability with policy limits of not less than ($) for each occurrence and ($) in the aggregate for bodily injury and property damage.

§ 2.5.2 Automobile Liability covering vehicles owned, and non-owned vehicles used, by the Architect with policy limits of not less than ($) per accident for bodily injury, death of any person, and property damage arising out of the ownership, maintenance and use of those motor vehicles, along with any other statutorily required automobile coverage.

§ 2.5.3 The Architect may achieve the required limits and coverage for Commercial General Liability and Automobile Liability through a combination of primary and excess or umbrella liability insurance, provided such primary and excess or umbrella liability insurance policies result in the same or greater coverage as the coverages required under Sections 2.5.1 and 2.5.2, and in no event shall any excess or umbrella liability insurance provide narrower coverage than the primary policy. The excess policy shall not require the exhaustion of the underlying limits only through the actual payment by the underlying insurers.

§ 2.5.4 Workers' Compensation at statutory limits.

§ 2.5.5 Employers' Liability with policy limits not less than ($) each accident, ($) each employee, and ($) policy limit.

§ 2.5.6 Professional Liability covering negligent acts, errors and omissions in the performance of professional services with policy limits of not less than ($) per claim and ($) in the aggregate.

§ 2.5.7 Additional Insured Obligations. To the fullest extent permitted by law, the Architect shall cause the primary and excess or umbrella polices for Commercial General Liability and Automobile Liability to include the Owner as an additional insured for claims caused in whole or in part by the Architect's negligent acts or omissions. The additional insured coverage shall be primary and non-contributory to any of the Owner's insurance policies and shall apply to both ongoing and completed operations.

§ 2.5.8 The Architect shall provide certificates of insurance to the Owner that evidence compliance with the requirements in this Section 2.5.

ARTICLE 3 SCOPE OF ARCHITECT'S BASIC SERVICES

§ 3.1 The Architect's Basic Services consist of those described in this Article 3 and include usual and customary structural, mechanical, and electrical engineering services. Services not set forth in this Article 3 are Supplemental or Additional Services.

§ 3.1.1 The Architect shall manage the Architect's services, research applicable design criteria, attend Project meetings, communicate with members of the Project team, and report progress to the Owner.

§ 3.1.2 The Architect shall coordinate its services with those services provided by the Owner and the Owner's consultants. The Architect shall be entitled to rely on, and shall not be responsible for, the accuracy, completeness, and timeliness of, services and information furnished by the Owner and the Owner's consultants. The Architect shall provide prompt written notice to the Owner if the Architect becomes aware of any error, omission, or inconsistency in such services or information.

§ 3.1.3 As soon as practicable after the date of this Agreement, the Architect shall submit for the Owner's approval a schedule for the performance of the Architect's services. The schedule initially shall include anticipated dates for the commencement of construction and for Substantial Completion of the Work as set forth in the Initial Information. The schedule shall include allowances for periods of time required for the Owner's review, for the performance of the Owner's consultants, and for approval of submissions by authorities having jurisdiction over the Project. Once approved by the Owner, time limits established by the schedule shall not, except for reasonable cause, be exceeded by the Architect or Owner. With the Owner's approval, the Architect shall adjust the schedule, if necessary, as the Project proceeds until the commencement of construction.

§ 3.1.4 The Architect shall not be responsible for an Owner's directive or substitution, or for the Owner's acceptance of non-conforming Work, made or given without the Architect's written approval.

§ 3.1.5 The Architect shall contact governmental authorities required to approve the Construction Documents and entities providing utility services to the Project. The Architect shall respond to applicable design requirements imposed by those authorities and entities.

§ 3.1.6 The Architect shall assist the Owner in connection with the Owner's responsibility for filing documents required for the approval of governmental authorities having jurisdiction over the Project.

§ 3.2 Schematic Design Phase Services

§ 3.2.1 The Architect shall review the program and other information furnished by the Owner, and shall review laws, codes, and regulations applicable to the Architect's services.

§ 3.2.2 The Architect shall prepare a preliminary evaluation of the Owner's program, schedule, budget for the Cost of the Work, Project site, the proposed procurement and delivery method, and other Initial Information, each in terms of the other, to ascertain the requirements of the Project. The Architect shall notify the Owner of (1) any inconsistencies discovered in the information, and (2) other information or consulting services that may be reasonably needed for the Project.

§ 3.2.3 The Architect shall present its preliminary evaluation to the Owner and shall discuss with the Owner alternative approaches to design and construction of the Project. The Architect shall reach an understanding with the Owner regarding the requirements of the Project.

§ 3.2.4 Based on the Project requirements agreed upon with the Owner, the Architect shall prepare and present, for the Owner's approval, a preliminary design illustrating the scale and relationship of the Project components.

§ 3.2.5 Based on the Owner's approval of the preliminary design, the Architect shall prepare Schematic Design Documents for the Owner's approval. The Schematic Design Documents shall consist of drawings and other documents including a site plan, if appropriate, and preliminary building plans, sections and elevations; and may include some combination of study models, perspective sketches, or digital representations. Preliminary selections of major building systems and construction materials shall be noted on the drawings or described in writing.

§ 3.2.5.1 The Architect shall consider sustainable design alternatives, such as material choices and building orientation, together with other considerations based on program and aesthetics, in developing a design that is consistent with the Owner's program, schedule and budget for the Cost of the Work. The Owner may obtain more advanced sustainable design services as a Supplemental Service under Section 4.1.1.

§ 3.2.5.2 The Architect shall consider the value of alternative materials, building systems and equipment, together with other considerations based on program and aesthetics, in developing a design for the Project that is consistent with the Owner's program, schedule, and budget for the Cost of the Work.

§ 3.2.6 The Architect shall submit to the Owner an estimate of the Cost of the Work prepared in accordance with Section 6.3.

§ 3.2.7 The Architect shall submit the Schematic Design Documents to the Owner, and request the Owner's approval.

§ 3.3 Design Development Phase Services

§ 3.3.1 Based on the Owner's approval of the Schematic Design Documents, and on the Owner's authorization of any adjustments in the Project requirements and the budget for the Cost of the Work, the Architect shall prepare Design Development Documents for the Owner's approval. The Design Development Documents shall illustrate and describe the development of the approved Schematic Design Documents and shall consist of drawings and other documents including plans, sections, elevations, typical construction details, and diagrammatic layouts of building systems to fix and describe the size and character of the Project as to architectural, structural, mechanical and electrical systems, and other appropriate elements. The Design Development Documents shall also include outline specifications that identify major materials and systems and establish, in general, their quality levels.

§ 3.3.2 The Architect shall update the estimate of the Cost of the Work prepared in accordance with Section 6.3.

§ 3.3.3 The Architect shall submit the Design Development Documents to the Owner, advise the Owner of any adjustments to the estimate of the Cost of the Work, and request the Owner's approval.

§ 3.4 Construction Documents Phase Services

§ 3.4.1 Based on the Owner's approval of the Design Development Documents, and on the Owner's authorization of any adjustments in the Project requirements and the budget for the Cost of the Work, the Architect shall prepare Construction Documents for the Owner's approval. The Construction Documents shall illustrate and describe the further development of the approved Design Development Documents and shall consist of Drawings and Specifications setting forth in detail the quality levels and performance criteria of materials and systems and other requirements for the construction of the Work. The Owner and Architect acknowledge that, in order to perform the Work, the Contractor will provide additional information, including Shop Drawings, Product Data, Samples and other similar submittals, which the Architect shall review in accordance with Section 3.6.4.

§ 3.4.2 The Architect shall incorporate the design requirements of governmental authorities having jurisdiction over the Project into the Construction Documents.

§ 3.4.3 During the development of the Construction Documents, the Architect shall assist the Owner in the development and preparation of (1) procurement information that describes the time, place, and conditions of bidding, including bidding or proposal forms; (2) the form of agreement between the Owner and Contractor; and (3) the Conditions of the Contract for Construction (General, Supplementary and other Conditions). The Architect shall also compile a project manual that includes the Conditions of the Contract for Construction and Specifications, and may include bidding requirements and sample forms.

§ 3.4.4 The Architect shall update the estimate for the Cost of the Work prepared in accordance with Section 6.3.

§ 3.4.5 The Architect shall submit the Construction Documents to the Owner, advise the Owner of any adjustments to the estimate of the Cost of the Work, take any action required under Section 6.5, and request the Owner's approval.

§ 3.5 Procurement Phase Services

§ 3.5.1 General

The Architect shall assist the Owner in establishing a list of prospective contractors. Following the Owner's approval of the Construction Documents, the Architect shall assist the Owner in (1) obtaining either competitive bids or negotiated proposals; (2) confirming responsiveness of bids or proposals; (3) determining the successful bid or proposal, if any; and, (4) awarding and preparing contracts for construction.

§ 3.5.2 Competitive Bidding

§ 3.5.2.1 Bidding Documents shall consist of bidding requirements and proposed Contract Documents.

§ 3.5.2.2 The Architect shall assist the Owner in bidding the Project by:

.1 facilitating the distribution of Bidding Documents to prospective bidders;

.2 organizing and conducting a pre-bid conference for prospective bidders;

.3 preparing responses to questions from prospective bidders and providing clarifications and interpretations of the Bidding Documents to the prospective bidders in the form of addenda; and,

.4 organizing and conducting the opening of the bids, and subsequently documenting and distributing the bidding results, as directed by the Owner.

§ 3.5.2.3 If the Bidding Documents permit substitutions, upon the Owner's written authorization, the Architect shall, as an Additional Service, consider requests for substitutions and prepare and distribute addenda identifying approved substitutions to all prospective bidders.

§ 3.5.3 Negotiated Proposals

§ 3.5.3.1 Proposal Documents shall consist of proposal requirements and proposed Contract Documents.

§ 3.5.3.2 The Architect shall assist the Owner in obtaining proposals by:

.1 facilitating the distribution of Proposal Documents for distribution to prospective contractors and requesting their return upon completion of the negotiation process;

.2 organizing and participating in selection interviews with prospective contractors;

.3 preparing responses to questions from prospective contractors and providing clarifications and interpretations of the Proposal Documents to the prospective contractors in the form of addenda; and,

.4 participating in negotiations with prospective contractors, and subsequently preparing a summary report of the negotiation results, as directed by the Owner.

§ 3.5.3.3 If the Proposal Documents permit substitutions, upon the Owner's written authorization, the Architect shall, as an Additional Service, consider requests for substitutions and prepare and distribute addenda identifying approved substitutions to all prospective contractors.

§ 3.6 Construction Phase Services

§ 3.6.1 General

§ 3.6.1.1 The Architect shall provide administration of the Contract between the Owner and the Contractor as set forth below and in AIA Document A201™–2017, General Conditions of the Contract for Construction. If the Owner and Contractor modify AIA Document A201–2017, those modifications shall not affect the Architect's services under this Agreement unless the Owner and the Architect amend this Agreement.

§ 3.6.1.2 The Architect shall advise and consult with the Owner during the Construction Phase Services. The Architect shall have authority to act on behalf of the Owner only to the extent provided in this Agreement. The Architect shall not have control over, charge of, or responsibility for the construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, nor shall the Architect be responsible for the Contractor's failure to perform the Work in accordance with the requirements of the Contract Documents. The Architect shall be responsible for the Architect's negligent acts or omissions, but shall not have control over or charge of, and shall not be responsible for, acts or omissions of the Contractor or of any other persons or entities performing portions of the Work.

§ 3.6.1.3 Subject to Section 4.2 and except as provided in Section 3.6.6.5, the Architect's responsibility to provide Construction Phase Services commences with the award of the Contract for Construction and terminates on the date the Architect issues the final Certificate for Payment.

§ 3.6.2 Evaluations of the Work

§ 3.6.2.1 The Architect shall visit the site at intervals appropriate to the stage of construction, or as otherwise required in Section 4.2.3, to become generally familiar with the progress and quality of the portion of the Work completed, and to determine, in general, if the Work observed is being performed in a manner indicating that the Work, when fully completed, will be in accordance with the Contract Documents. However, the Architect shall not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work. On the basis of the site visits, the Architect shall keep the Owner reasonably informed about the progress and quality of the portion of the Work completed, and promptly report to the Owner (1) known deviations from the Contract Documents, (2) known deviations from the most recent construction schedule submitted by the Contractor, and (3) defects and deficiencies observed in the Work.

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

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

§ 3.6.2.4 Interpretations and decisions of the Architect shall be consistent with the intent of, and reasonably inferable from, the Contract Documents and shall be in writing or in the form of drawings. When making such interpretations and decisions, the Architect shall endeavor to secure faithful performance by both Owner and Contractor, shall not show partiality to either, and shall not be liable for results of interpretations or decisions rendered in good faith. The Architect's decisions on matters relating to aesthetic effect shall be final if consistent with the intent expressed in the Contract Documents.

§ 3.6.2.5 Unless the Owner and Contractor designate another person to serve as an Initial Decision Maker, as that term is defined in AIA Document A201–2017, the Architect shall render initial decisions on Claims between the Owner and Contractor as provided in the Contract Documents.

§ 3.6.3 Certificates for Payment to Contractor

§ 3.6.3.1 The Architect shall review and certify the amounts due the Contractor and shall issue certificates in such amounts. The Architect's certification for payment shall constitute a representation to the Owner, based on the Architect's evaluation of the Work as provided in Section 3.6.2 and on the data comprising the Contractor's Application for Payment, that, to the best of the Architect's knowledge, information and belief, the Work has progressed to the point indicated, the quality of the Work is in accordance with the Contract Documents, and that the Contractor is entitled to payment in the amount certified. The foregoing representations are subject to (1) an evaluation of the Work for conformance with the Contract Documents upon Substantial Completion, (2) results of subsequent tests and inspections, (3) correction of minor deviations from the Contract Documents prior to completion, and (4) specific qualifications expressed by the Architect.

§ 3.6.3.2 The issuance of a Certificate for Payment shall not be a representation that the Architect has (1) made exhaustive or continuous on-site inspections to check the quality or quantity of the Work, (2) reviewed construction means, methods, techniques, sequences or procedures, (3) reviewed copies of requisitions received from Subcontractors and suppliers and other data requested by the Owner to substantiate the Contractor's right to payment, or (4) ascertained how or for what purpose the Contractor has used money previously paid on account of the Contract Sum.

§ 3.6.3.3 The Architect shall maintain a record of the Applications and Certificates for Payment.

§ 3.6.4 Submittals

§ 3.6.4.1 The Architect shall review the Contractor's submittal schedule and shall not unreasonably delay or withhold approval of the schedule. The Architect's action in reviewing submittals shall be taken in accordance with the approved submittal schedule or, in the absence of an approved submittal schedule, with reasonable promptness while allowing sufficient time, in the Architect's professional judgment, to permit adequate review.

§ 3.6.4.2 The Architect shall review and approve, or take other appropriate action upon, the Contractor's submittals such as Shop Drawings, Product Data and Samples, but only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. Review of such submittals is not for the purpose of determining the accuracy and completeness of other information such as dimensions, quantities, and installation or performance of equipment or systems, which are the Contractor's responsibility. The Architect's review shall not constitute approval of safety precautions or construction means, methods, techniques, sequences or procedures. The Architect's approval of a specific item shall not indicate approval of an assembly of which the item is a component.

§ 3.6.4.3 If the Contract Documents specifically require the Contractor to provide professional design services or certifications by a design professional related to systems, materials, or equipment, the Architect shall specify the appropriate performance and design criteria that such services must satisfy. The Architect shall review and take appropriate action on Shop Drawings and other submittals related to the Work designed or certified by the Contractor's design professional, provided the submittals bear such professional's seal and signature when submitted to the Architect. The Architect's review shall be for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. The Architect shall be entitled to rely upon, and shall not be responsible for, the adequacy and accuracy of the services, certifications, and approvals performed or provided by such design professionals.

§ 3.6.4.4 Subject to Section 4.2, the Architect shall review and respond to requests for information about the Contract Documents. The Architect shall set forth, in the Contract Documents, the requirements for requests for information. Requests for information shall include, at a minimum, a detailed written statement that indicates the specific Drawings or Specifications in need of clarification and the nature of the clarification requested. The Architect's response to such requests shall be made in writing within any time limits agreed upon, or otherwise with reasonable promptness. If appropriate, the Architect shall prepare and issue supplemental Drawings and Specifications in response to the requests for information.

§ 3.6.4.5 The Architect shall maintain a record of submittals and copies of submittals supplied by the Contractor in accordance with the requirements of the Contract Documents.

§ 3.6.5 Changes in the Work

§ 3.6.5.1 The Architect may order minor changes in the Work that are consistent with the intent of the Contract Documents and do not involve an adjustment in the Contract Sum or an extension of the Contract Time. Subject to Section 4.2, the Architect shall prepare Change Orders and Construction Change Directives for the Owner's approval and execution in accordance with the Contract Documents.

§ 3.6.5.2 The Architect shall maintain records relative to changes in the Work.

§ 3.6.6 Project Completion

§ 3.6.6.1 The Architect shall:

.1 conduct inspections to determine the date or dates of Substantial Completion and the date of final completion;

.2 issue Certificates of Substantial Completion;

.3 forward to the Owner, for the Owner's review and records, written warranties and related documents required by the Contract Documents and received from the Contractor; and,

.4 issue a final Certificate for Payment based upon a final inspection indicating that, to the best of the Architect's knowledge, information, and belief, the Work complies with the requirements of the Contract Documents.

§ 3.6.6.2 The Architect's inspections shall be conducted with the Owner to check conformance of the Work with the requirements of the Contract Documents and to verify the accuracy and completeness of the list submitted by the Contractor of Work to be completed or corrected.

§ 3.6.6.3 When Substantial Completion has been achieved, the Architect shall inform the Owner about the balance of the Contract Sum remaining to be paid the Contractor, including the amount to be retained from the Contract Sum, if any, for final completion or correction of the Work.

§ 3.6.6.4 The Architect shall forward to the Owner the following information received from the Contractor: (1) consent of surety or sureties, if any, to reduction in or partial release of retainage or the making of final payment; (2) affidavits, receipts, releases and waivers of liens, or bonds indemnifying the Owner against liens; and (3) any other documentation required of the Contractor under the Contract Documents.

§ 3.6.6.5 Upon request of the Owner, and prior to the expiration of one year from the date of Substantial Completion, the Architect shall, without additional compensation, conduct a meeting with the Owner to review the facility operations and performance.

ARTICLE 4 SUPPLEMENTAL AND ADDITIONAL SERVICES

§ 4.1 Supplemental Services

§ 4.1.1 The services listed below are not included in Basic Services but may be required for the Project. The Architect shall provide the listed Supplemental Services only if specifically designated in the table below as the Architect's responsibility, and the Owner shall compensate the Architect as provided in Section 11.2. Unless otherwise specifically addressed in this Agreement, if neither the Owner nor the Architect is designated, the parties agree that the listed Supplemental Service is not being provided for the Project.

(Designate the Architect's Supplemental Services and the Owner's Supplemental Services required for the Project by indicating whether the Architect or Owner shall be responsible for providing the identified Supplemental Service. Insert a description of the Supplemental Services in Section 4.1.2 below or attach the description of services as an exhibit to this Agreement.)

Supplemental Services		Responsibility *(Architect, Owner, or not provided)*
§ 4.1.1.1	Programming	
§ 4.1.1.2	Multiple preliminary designs	
§ 4.1.1.3	Measured drawings	
§ 4.1.1.4	Existing facilities surveys	
§ 4.1.1.5	Site evaluation and planning	
§ 4.1.1.6	Building Information Model management responsibilities	
§ 4.1.1.7	Development of Building Information Models for post construction use	
§ 4.1.1.8	Civil engineering	
§ 4.1.1.9	Landscape design	
§ 4.1.1.10	Architectural interior design	
§ 4.1.1.11	Value analysis	
§ 4.1.1.12	Detailed cost estimating beyond that required in Section 6.3	
§ 4.1.1.13	On-site project representation	
§ 4.1.1.14	Conformed documents for construction	
§ 4.1.1.15	As-designed record drawings	
§ 4.1.1.16	As-constructed record drawings	
§ 4.1.1.17	Post-occupancy evaluation	
§ 4.1.1.18	Facility support services	
§ 4.1.1.19	Tenant-related services	
§ 4.1.1.20	Architect's coordination of the Owner's consultants	
§ 4.1.1.21	Telecommunications/data design	

Supplemental Services	Responsibility *(Architect, Owner, or not provided)*
§ 4.1.1.22 Security evaluation and planning	
§ 4.1.1.23 Commissioning	
§ 4.1.1.24 Sustainable Project Services pursuant to Section 4.1.3	
§ 4.1.1.25 Fast-track design services	
§ 4.1.1.26 Multiple bid packages	
§ 4.1.1.27 Historic preservation	
§ 4.1.1.28 Furniture, furnishings, and equipment design	
§ 4.1.1.29 Other services provided by specialty Consultants	
§ 4.1.1.30 Other Supplemental Services	

§ 4.1.2 Description of Supplemental Services

§ 4.1.2.1 A description of each Supplemental Service identified in Section 4.1.1 as the Architect's responsibility is provided below.

(Describe in detail the Architect's Supplemental Services identified in Section 4.1.1 or, if set forth in an exhibit, identify the exhibit. The AIA publishes a number of Standard Form of Architect's Services documents that can be included as an exhibit to describe the Architect's Supplemental Services.)

§ 4.1.2.2 A description of each Supplemental Service identified in Section 4.1.1 as the Owner's responsibility is provided below.

(Describe in detail the Owner's Supplemental Services identified in Section 4.1.1 or, if set forth in an exhibit, identify the exhibit.)

§ 4.1.3 If the Owner identified a Sustainable Objective in Article 1, the Architect shall provide, as a Supplemental Service, the Sustainability Services required in AIA Document E204™–2017, Sustainable Projects Exhibit, attached to this Agreement. The Owner shall compensate the Architect as provided in Section 11.2.

§ 4.2 Architect's Additional Services

The Architect may provide Additional Services after execution of this Agreement without invalidating the Agreement. Except for services required due to the fault of the Architect, any Additional Services provided in accordance with this Section 4.2 shall entitle the Architect to compensation pursuant to Section 11.3 and an appropriate adjustment in the Architect's schedule.

§ 4.2.1 Upon recognizing the need to perform the following Additional Services, the Architect shall notify the Owner with reasonable promptness and explain the facts and circumstances giving rise to the need. The Architect shall not proceed to provide the following Additional Services until the Architect receives the Owner's written authorization:

.1 Services necessitated by a change in the Initial Information, previous instructions or approvals given by the Owner, or a material change in the Project including size, quality, complexity, the Owner's schedule or budget for Cost of the Work, or procurement or delivery method;

.2 Services necessitated by the enactment or revision of codes, laws, or regulations, including changing or editing previously prepared Instruments of Service;

.3 Changing or editing previously prepared Instruments of Service necessitated by official interpretations of applicable codes, laws or regulations that are either (a) contrary to specific interpretations by the applicable authorities having jurisdiction made prior to the issuance of the building permit, or (b) contrary to requirements of the Instruments of Service when those Instruments of Service were prepared in accordance with the applicable standard of care;

.4 Services necessitated by decisions of the Owner not rendered in a timely manner or any other failure of performance on the part of the Owner or the Owner's consultants or contractors;
.5 Preparing digital models or other design documentation for transmission to the Owner's consultants and contractors, or to other Owner-authorized recipients;
.6 Preparation of design and documentation for alternate bid or proposal requests proposed by the Owner;
.7 Preparation for, and attendance at, a public presentation, meeting or hearing;
.8 Preparation for, and attendance at, a dispute resolution proceeding or legal proceeding, except where the Architect is party thereto;
.9 Evaluation of the qualifications of entities providing bids or proposals;
.10 Consultation concerning replacement of Work resulting from fire or other cause during construction; or,
.11 Assistance to the Initial Decision Maker, if other than the Architect.

§ 4.2.2 To avoid delay in the Construction Phase, the Architect shall provide the following Additional Services, notify the Owner with reasonable promptness, and explain the facts and circumstances giving rise to the need. If, upon receipt of the Architect's notice, the Owner determines that all or parts of the services are not required, the Owner shall give prompt written notice to the Architect of the Owner's determination. The Owner shall compensate the Architect for the services provided prior to the Architect's receipt of the Owner's notice.

.1 Reviewing a Contractor's submittal out of sequence from the submittal schedule approved by the Architect;
.2 Responding to the Contractor's requests for information that are not prepared in accordance with the Contract Documents or where such information is available to the Contractor from a careful study and comparison of the Contract Documents, field conditions, other Owner-provided information, Contractor-prepared coordination drawings, or prior Project correspondence or documentation;
.3 Preparing Change Orders and Construction Change Directives that require evaluation of Contractor's proposals and supporting data, or the preparation or revision of Instruments of Service;
.4 Evaluating an extensive number of Claims as the Initial Decision Maker; or,
.5 Evaluating substitutions proposed by the Owner or Contractor and making subsequent revisions to Instruments of Service resulting therefrom.

§ 4.2.3 The Architect shall provide Construction Phase Services exceeding the limits set forth below as Additional Services. When the limits below are reached, the Architect shall notify the Owner:

.1 ( ) reviews of each Shop Drawing, Product Data item, sample and similar submittals of the Contractor
.2 ( ) visits to the site by the Architect during construction
.3 ( ) inspections for any portion of the Work to determine whether such portion of the Work is substantially complete in accordance with the requirements of the Contract Documents
.4 ( ) inspections for any portion of the Work to determine final completion.

§ 4.2.4 Except for services required under Section 3.6.6.5 and those services that do not exceed the limits set forth in Section 4.2.3, Construction Phase Services provided more than 60 days after (1) the date of Substantial Completion of the Work or (2) the initial date of Substantial Completion identified in the agreement between the Owner and Contractor, whichever is earlier, shall be compensated as Additional Services to the extent the Architect incurs additional cost in providing those Construction Phase Services.

§ 4.2.5 If the services covered by this Agreement have not been completed within ( ) months of the date of this Agreement, through no fault of the Architect, extension of the Architect's services beyond that time shall be compensated as Additional Services.

ARTICLE 5 OWNER'S RESPONSIBILITIES

§ 5.1 Unless otherwise provided for under this Agreement, the Owner shall provide information in a timely manner regarding requirements for and limitations on the Project, including a written program, which shall set forth the Owner's objectives; schedule; constraints and criteria, including space requirements and relationships; flexibility; expandability; special equipment; systems; and site requirements.

§ 5.2 The Owner shall establish the Owner's budget for the Project, including (1) the budget for the Cost of the Work as defined in Section 6.1; (2) the Owner's other costs; and, (3) reasonable contingencies related to all of these costs. The Owner shall update the Owner's budget for the Project as necessary throughout the duration of the Project until final completion. If the Owner significantly increases or decreases the Owner's budget for the Cost of the Work, the Owner

shall notify the Architect. The Owner and the Architect shall thereafter agree to a corresponding change in the Project's scope and quality.

§ 5.3 The Owner shall identify a representative authorized to act on the Owner's behalf with respect to the Project. The Owner shall render decisions and approve the Architect's submittals in a timely manner in order to avoid unreasonable delay in the orderly and sequential progress of the Architect's services.

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

§ 5.5 The Owner shall furnish services of geotechnical engineers, which may include 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.

§ 5.6 The Owner shall provide the Supplemental Services designated as the Owner's responsibility in Section 4.1.1.

§ 5.7 If the Owner identified a Sustainable Objective in Article 1, the Owner shall fulfill its responsibilities as required in AIA Document E204™–2017, Sustainable Projects Exhibit, attached to this Agreement.

§ 5.8 The Owner shall coordinate the services of its own consultants with those services provided by the Architect. Upon the Architect's request, the Owner shall furnish copies of the scope of services in the contracts between the Owner and the Owner's consultants. The Owner shall furnish the services of consultants other than those designated as the responsibility of the Architect in this Agreement, or authorize the Architect to furnish them as an Additional Service, when the Architect requests such services and demonstrates that they are reasonably required by the scope of the Project. The Owner shall require that its consultants and contractors maintain insurance, including professional liability insurance, as appropriate to the services or work provided.

§ 5.9 The Owner shall furnish tests, inspections and reports required by law or the Contract Documents, such as structural, mechanical, and chemical tests, tests for air and water pollution, and tests for hazardous materials.

§ 5.10 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.

§ 5.11 The Owner shall provide prompt written notice to the Architect if the Owner becomes aware of any fault or defect in the Project, including errors, omissions or inconsistencies in the Architect's Instruments of Service.

§ 5.12 The Owner shall include the Architect in all communications with the Contractor that relate to or affect the Architect's services or professional responsibilities. The Owner shall promptly notify the Architect of the substance of any direct communications between the Owner and the Contractor otherwise relating to the Project. Communications by and with the Architect's consultants shall be through the Architect.

§ 5.13 Before executing the Contract for Construction, the Owner shall coordinate the Architect's duties and responsibilities set forth in the Contract for Construction with the Architect's services set forth in this Agreement. The Owner shall provide the Architect a copy of the executed agreement between the Owner and Contractor, including the General Conditions of the Contract for Construction.

§ 5.14 The Owner shall provide the Architect access to the Project site prior to commencement of the Work and shall obligate the Contractor to provide the Architect access to the Work wherever it is in preparation or progress.

§ 5.15 Within 15 days after receipt of a written request from the Architect, the Owner shall furnish the requested information as necessary and relevant for the Architect to evaluate, give notice of, or enforce lien rights.

ARTICLE 6 COST OF THE WORK

§ 6.1 For purposes of this Agreement, the Cost of the Work shall be the total cost to the Owner to construct all elements of the Project designed or specified by the Architect and shall include contractors' general conditions costs, overhead and profit. The Cost of the Work also includes the reasonable value of labor, materials, and equipment, donated to, or otherwise furnished by, the Owner. The Cost of the Work does not include the compensation of the Architect; the costs of the land, rights-of-way, financing, or contingencies for changes in the Work; or other costs that are the responsibility of the Owner.

§ 6.2 The Owner's budget for the Cost of the Work is provided in Initial Information, and shall be adjusted throughout the Project as required under Sections 5.2, 6.4 and 6.5. Evaluations of the Owner's budget for the Cost of the Work, and the preliminary estimate of the Cost of the Work and updated estimates of the Cost of the Work, prepared by the Architect, represent the Architect's judgment as a design professional. It is recognized, however, that neither the Architect nor the Owner has control over the cost of labor, materials, or equipment; the Contractor's methods of determining bid prices; or competitive bidding, market, or negotiating conditions. Accordingly, the Architect cannot and does not warrant or represent that bids or negotiated prices will not vary from the Owner's budget for the Cost of the Work, or from any estimate of the Cost of the Work, or evaluation, prepared or agreed to by the Architect.

§ 6.3 In preparing estimates of the Cost of Work, the Architect shall be permitted to include contingencies for design, bidding, and price escalation; to determine what materials, equipment, component systems, and types of construction are to be included in the Contract Documents; to recommend reasonable adjustments in the program and scope of the Project; and to include design alternates as may be necessary to adjust the estimated Cost of the Work to meet the Owner's budget. The Architect's estimate of the Cost of the Work shall be based on current area, volume or similar conceptual estimating techniques. If the Owner requires a detailed estimate of the Cost of the Work, the Architect shall provide such an estimate, if identified as the Architect's responsibility in Section 4.1.1, as a Supplemental Service.

§ 6.4 If, through no fault of the Architect, the Procurement Phase has not commenced within 90 days after the Architect submits the Construction Documents to the Owner, the Owner's budget for the Cost of the Work shall be adjusted to reflect changes in the general level of prices in the applicable construction market.

§ 6.5 If at any time the Architect's estimate of the Cost of the Work exceeds the Owner's budget for the Cost of the Work, the Architect shall make appropriate recommendations to the Owner to adjust the Project's size, quality, or budget for the Cost of the Work, and the Owner shall cooperate with the Architect in making such adjustments.

§ 6.6 If the Owner's budget for the Cost of the Work at the conclusion of the Construction Documents Phase Services is exceeded by the lowest bona fide bid or negotiated proposal, the Owner shall

- **.1** give written approval of an increase in the budget for the Cost of the Work;
- **.2** authorize rebidding or renegotiating of the Project within a reasonable time;
- **.3** terminate in accordance with Section 9.5;
- **.4** in consultation with the Architect, revise the Project program, scope, or quality as required to reduce the Cost of the Work; or,
- **.5** implement any other mutually acceptable alternative.

§ 6.7 If the Owner chooses to proceed under Section 6.6.4, the Architect shall modify the Construction Documents as necessary to comply with the Owner's budget for the Cost of the Work at the conclusion of the Construction Documents Phase Services, or the budget as adjusted under Section 6.6.1. If the Owner requires the Architect to modify the Construction Documents because the lowest bona fide bid or negotiated proposal exceeds the Owner's budget for the Cost of the Work due to market conditions the Architect could not reasonably anticipate, the Owner shall compensate the Architect for the modifications as an Additional Service pursuant to Section 11.3; otherwise the Architect's services for modifying the Construction Documents shall be without additional compensation. In any event, the Architect's modification of the Construction Documents shall be the limit of the Architect's responsibility under this Article 6.

ARTICLE 7 COPYRIGHTS AND LICENSES

§ 7.1 The Architect and the Owner warrant that in transmitting Instruments of Service, or any other information, the transmitting party is the copyright owner of such information or has permission from the copyright owner to transmit such information for its use on the Project.

§ 7.2 The Architect and the Architect's consultants shall be deemed the authors and owners of their respective Instruments of Service, including the Drawings and Specifications, and shall retain all common law, statutory and other

reserved rights, including copyrights. Submission or distribution of Instruments of Service to meet official regulatory requirements or for similar purposes in connection with the Project is not to be construed as publication in derogation of the reserved rights of the Architect and the Architect's consultants.

§ 7.3 The Architect grants to the Owner a nonexclusive license to use the Architect's Instruments of Service solely and exclusively for purposes of constructing, using, maintaining, altering and adding to the Project, provided that the Owner substantially performs its obligations under this Agreement, including prompt payment of all sums due pursuant to Article 9 and Article 11. The Architect shall obtain similar nonexclusive licenses from the Architect's consultants consistent with this Agreement. The license granted under this section permits the Owner to authorize the Contractor, Subcontractors, Sub-subcontractors, and suppliers, as well as the Owner's consultants and separate contractors, to reproduce applicable portions of the Instruments of Service, subject to any protocols established pursuant to Section 1.3, solely and exclusively for use in performing services or construction for the Project. If the Architect rightfully terminates this Agreement for cause as provided in Section 9.4, the license granted in this Section 7.3 shall terminate.

§ 7.3.1 In the event the Owner uses the Instruments of Service without retaining the authors of the Instruments of Service, the Owner releases the Architect and Architect's consultant(s) from all claims and causes of action arising from such uses. The Owner, to the extent permitted by law, further agrees to indemnify and hold harmless the Architect and its consultants from all costs and expenses, including the cost of defense, related to claims and causes of action asserted by any third person or entity to the extent such costs and expenses arise from the Owner's use of the Instruments of Service under this Section 7.3.1. The terms of this Section 7.3.1 shall not apply if the Owner rightfully terminates this Agreement for cause under Section 9.4.

§ 7.4 Except for the licenses granted in this Article 7, no other license or right shall be deemed granted or implied under this Agreement. The Owner shall not assign, delegate, sublicense, pledge or otherwise transfer any license granted herein to another party without the prior written agreement of the Architect. Any unauthorized use of the Instruments of Service shall be at the Owner's sole risk and without liability to the Architect and the Architect's consultants.

§ 7.5 Except as otherwise stated in Section 7.3, the provisions of this Article 7 shall survive the termination of this Agreement.

ARTICLE 8 CLAIMS AND DISPUTES

§ 8.1 General

§ 8.1.1 The Owner and Architect shall commence all claims and causes of action against the other and arising out of or related to this Agreement, whether in contract, tort, or otherwise, in accordance with the requirements of the binding dispute resolution method selected in this Agreement and within the period specified by applicable law, but in any case not more than 10 years after the date of Substantial Completion of the Work. The Owner and Architect waive all claims and causes of action not commenced in accordance with this Section 8.1.1.

§ 8.1.2 To the extent damages are covered by property insurance, the Owner and Architect waive all rights against each other and against the contractors, consultants, agents, and employees of the other for damages, except such rights as they may have to the proceeds of such insurance as set forth in AIA Document A201–2017, General Conditions of the Contract for Construction. The Owner or the Architect, as appropriate, shall require of the contractors, consultants, agents, and employees of any of them, similar waivers in favor of the other parties enumerated herein.

§ 8.1.3 The Architect and Owner waive consequential damages for claims, disputes, or other matters in question, arising out of or relating to this Agreement. This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination of this Agreement, except as specifically provided in Section 9.7.

§ 8.2 Mediation

§ 8.2.1 Any claim, dispute or other matter in question arising out of or related to this Agreement shall be subject to mediation as a condition precedent to binding dispute resolution. If such matter relates to or is the subject of a lien arising out of the Architect's services, the Architect may proceed in accordance with applicable law to comply with the lien notice or filing deadlines prior to resolution of the matter by mediation or by binding dispute resolution.

§ 8.2.2 The Owner and Architect shall endeavor to resolve claims, disputes and other matters in question between them by mediation, which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Mediation Procedures in effect on the date of this Agreement. A request for mediation shall be made in writing, delivered to the other party to this Agreement, and filed with the

person or entity administering the mediation. The request may be made concurrently with the filing of a complaint or other appropriate demand for binding dispute resolution but, in such event, mediation shall proceed in advance of binding dispute resolution proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order. If an arbitration proceeding is stayed pursuant to this section, the parties may nonetheless proceed to the selection of the arbitrator(s) and agree upon a schedule for later proceedings.

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

§ 8.2.4 If the parties do not resolve a dispute through mediation pursuant to this Section 8.2, the method of binding dispute resolution shall be the following:
(Check the appropriate box.)

☐ Arbitration pursuant to Section 8.3 of this Agreement

☐ Litigation in a court of competent jurisdiction

☐ Other: *(Specify)*

If the Owner and Architect do not select a method of binding dispute resolution, or do not subsequently agree in writing to a binding dispute resolution method other than litigation, the dispute will be resolved in a court of competent jurisdiction.

§ 8.3 Arbitration

§ 8.3.1 If the parties have selected arbitration as the method for binding dispute resolution in this Agreement, any claim, dispute or other matter in question arising out of or related to this Agreement subject to, but not resolved by, mediation shall be subject to arbitration, which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Arbitration Rules in effect on the date of this Agreement. A demand for arbitration shall be made in writing, delivered to the other party to this Agreement, and filed with the person or entity administering the arbitration.

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

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

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

§ 8.3.4 Consolidation or Joinder

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

§ 8.3.4.2 Either party, at its sole discretion, may include by joinder persons or entities substantially involved in a common question of law or fact whose presence is required if complete relief is to be accorded in arbitration, provided that the party sought to be joined consents in writing to such joinder. Consent to arbitration involving an additional

person or entity shall not constitute consent to arbitration of any claim, dispute or other matter in question not described in the written consent.

§ 8.3.4.3 The Owner and Architect grant to any person or entity made a party to an arbitration conducted under this Section 8.3, whether by joinder or consolidation, the same rights of joinder and consolidation as the Owner and Architect under this Agreement.

§ 8.4 The provisions of this Article 8 shall survive the termination of this Agreement.

ARTICLE 9 TERMINATION OR SUSPENSION

§ 9.1 If the Owner fails to make payments to the Architect in accordance with this Agreement, such failure shall be considered substantial nonperformance and cause for termination or, at the Architect's option, cause for suspension of performance of services under this Agreement. If the Architect elects to suspend services, the Architect shall give seven days' written notice to the Owner before suspending services. In the event of a suspension of services, the Architect shall have no liability to the Owner for delay or damage caused the Owner because of such suspension of services. Before resuming services, the Owner shall pay the Architect all sums due prior to suspension and any expenses incurred in the interruption and resumption of the Architect's services. The Architect's fees for the remaining services and the time schedules shall be equitably adjusted.

§ 9.2 If the Owner suspends the Project, the Architect shall be compensated for services performed prior to notice of such suspension. When the Project is resumed, the Architect shall be compensated for expenses incurred in the interruption and resumption of the Architect's services. The Architect's fees for the remaining services and the time schedules shall be equitably adjusted.

§ 9.3 If the Owner suspends the Project for more than 90 cumulative days for reasons other than the fault of the Architect, the Architect may terminate this Agreement by giving not less than seven days' written notice.

§ 9.4 Either party may terminate this Agreement upon not less than seven days' written notice should the other party fail substantially to perform in accordance with the terms of this Agreement through no fault of the party initiating the termination.

§ 9.5 The Owner may terminate this Agreement upon not less than seven days' written notice to the Architect for the Owner's convenience and without cause.

§ 9.6 If the Owner terminates this Agreement for its convenience pursuant to Section 9.5, or the Architect terminates this Agreement pursuant to Section 9.3, the Owner shall compensate the Architect for services performed prior to termination, Reimbursable Expenses incurred, and costs attributable to termination, including the costs attributable to the Architect's termination of consultant agreements.

§ 9.7 In addition to any amounts paid under Section 9.6, if the Owner terminates this Agreement for its convenience pursuant to Section 9.5, or the Architect terminates this Agreement pursuant to Section 9.3, the Owner shall pay to the Architect the following fees:
(Set forth below the amount of any termination or licensing fee, or the method for determining any termination or licensing fee.)

.1 Termination Fee:

.2 Licensing Fee if the Owner intends to continue using the Architect's Instruments of Service:

§ 9.8 Except as otherwise expressly provided herein, this Agreement shall terminate one year from the date of Substantial Completion.

§ 9.9 The Owner's rights to use the Architect's Instruments of Service in the event of a termination of this Agreement are set forth in Article 7 and Section 9.7.

ARTICLE 10 MISCELLANEOUS PROVISIONS

§ 10.1 This Agreement shall be governed by the law of the place where the Project is located, excluding that jurisdiction's choice of law rules. If the parties have selected arbitration as the method of binding dispute resolution, the Federal Arbitration Act shall govern Section 8.3.

§ 10.2 Terms in this Agreement shall have the same meaning as those in AIA Document A201–2017, General Conditions of the Contract for Construction.

§ 10.3 The Owner and Architect, respectively, bind themselves, their agents, successors, assigns, and legal representatives to this Agreement. Neither the Owner nor the Architect 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, including any payments due to the Architect by the Owner prior to the assignment.

§ 10.4 If the Owner requests the Architect to execute certificates, the proposed language of such certificates shall be submitted to the Architect for review at least 14 days prior to the requested dates of execution. If the Owner requests the Architect to execute consents reasonably required to facilitate assignment to a lender, the Architect shall execute all such consents that are consistent with this Agreement, provided the proposed consent is submitted to the Architect for review at least 14 days prior to execution. The Architect shall not be required to execute certificates or consents that would require knowledge, services, or responsibilities beyond the scope of this Agreement.

§ 10.5 Nothing contained in this Agreement shall create a contractual relationship with, or a cause of action in favor of, a third party against either the Owner or Architect.

§ 10.6 Unless otherwise required in this Agreement, the Architect shall have no responsibility for the discovery, presence, handling, removal or disposal of, or exposure of persons to, hazardous materials or toxic substances in any form at the Project site.

§ 10.7 The Architect shall have the right to include photographic or artistic representations of the design of the Project among the Architect's promotional and professional materials. The Architect shall be given reasonable access to the completed Project to make such representations. However, the Architect's materials shall not include the Owner's confidential or proprietary information if the Owner has previously advised the Architect in writing of the specific information considered by the Owner to be confidential or proprietary. The Owner shall provide professional credit for the Architect in the Owner's promotional materials for the Project. This Section 10.7 shall survive the termination of this Agreement unless the Owner terminates this Agreement for cause pursuant to Section 9.4.

§ 10.8 If the Architect or Owner receives information specifically designated as "confidential" or "business proprietary," the receiving party shall keep such information strictly confidential and shall not disclose it to any other person except as set forth in Section 10.8.1. This Section 10.8 shall survive the termination of this Agreement.

§ 10.8.1 The receiving party may disclose "confidential" or "business proprietary" information after 7 days' notice to the other party, when required by law, arbitrator's order, or court order, including a subpoena or other form of compulsory legal process issued by a court or governmental entity, or to the extent such information is reasonably necessary for the receiving party to defend itself in any dispute. The receiving party may also disclose such information to its employees, consultants, or contractors in order to perform services or work solely and exclusively for the Project, provided those employees, consultants and contractors are subject to the restrictions on the disclosure and use of such information as set forth in this Section 10.8.

§ 10.9 The invalidity of any provision of the Agreement shall not invalidate the Agreement or its remaining provisions. If it is determined that any provision of the Agreement violates any law, or is otherwise invalid or unenforceable, then that provision shall be revised to the extent necessary to make that provision legal and enforceable. In such case the Agreement shall be construed, to the fullest extent permitted by law, to give effect to the parties' intentions and purposes in executing the Agreement.

ARTICLE 11 COMPENSATION

§ 11.1 For the Architect's Basic Services described under Article 3, the Owner shall compensate the Architect as follows:

.1 Stipulated Sum
(Insert amount)

.2 Percentage Basis
(Insert percentage value)

( ) % of the Owner's budget for the Cost of the Work, as calculated in accordance with Section 11.6.

.3 Other
(Describe the method of compensation)

§ 11.2 For the Architect's Supplemental Services designated in Section 4.1.1 and for any Sustainability Services required pursuant to Section 4.1.3, the Owner shall compensate the Architect as follows:
(Insert amount of, or basis for, compensation. If necessary, list specific services to which particular methods of compensation apply.)

§ 11.3 For Additional Services that may arise during the course of the Project, including those under Section 4.2, the Owner shall compensate the Architect as follows:
(Insert amount of, or basis for, compensation.)

§ 11.4 Compensation for Supplemental and Additional Services of the Architect's consultants when not included in Section 11.2 or 11.3, shall be the amount invoiced to the Architect plus percent (%), or as follows:
(Insert amount of, or basis for computing, Architect's consultants' compensation for Supplemental or Additional Services.)

§ 11.5 When compensation for Basic Services is based on a stipulated sum or a percentage basis, the proportion of compensation for each phase of services shall be as follows:

Schematic Design Phase		percent (		%)
Design Development Phase		percent (		%)
Construction Documents Phase		percent (		%)
Procurement Phase		percent (		%)
Construction Phase		percent (		%)
Total Basic Compensation	one hundred	percent (	100	%)

§ 11.6 When compensation identified in Section 11.1 is on a percentage basis, progress payments for each phase of Basic Services shall be calculated by multiplying the percentages identified in this Article by the Owner's most recent budget for the Cost of the Work. Compensation paid in previous progress payments shall not be adjusted based on subsequent updates to the Owner's budget for the Cost of the Work.

§ 11.6.1 When compensation is on a percentage basis and any portions of the Project are deleted or otherwise not constructed, compensation for those portions of the Project shall be payable to the extent services are performed on those portions. The Architect shall be entitled to compensation in accordance with this Agreement for all services performed whether or not the Construction Phase is commenced.

§ 11.7 The hourly billing rates for services of the Architect and the Architect's consultants are set forth below. The rates shall be adjusted in accordance with the Architect's and Architect's consultants' normal review practices.
(If applicable, attach an exhibit of hourly billing rates or insert them below.)

Employee or Category	Rate ($0.00)

§ 11.8 Compensation for Reimbursable Expenses
§ 11.8.1 Reimbursable Expenses are in addition to compensation for Basic, Supplemental, and Additional Services and include expenses incurred by the Architect and the Architect's consultants directly related to the Project, as follows:

.1 Transportation and authorized out-of-town travel and subsistence;
.2 Long distance services, dedicated data and communication services, teleconferences, Project web sites, and extranets;
.3 Permitting and other fees required by authorities having jurisdiction over the Project;
.4 Printing, reproductions, plots, and standard form documents;
.5 Postage, handling, and delivery;
.6 Expense of overtime work requiring higher than regular rates, if authorized in advance by the Owner;
.7 Renderings, physical models, mock-ups, professional photography, and presentation materials requested by the Owner or required for the Project;
.8 If required by the Owner, and with the Owner's prior written approval, the Architect's consultants' expenses of professional liability insurance dedicated exclusively to this Project, or the expense of additional insurance coverage or limits in excess of that normally maintained by the Architect's consultants;
.9 All taxes levied on professional services and on reimbursable expenses;
.10 Site office expenses;
.11 Registration fees and any other fees charged by the Certifying Authority or by other entities as necessary to achieve the Sustainable Objective; and,
.12 Other similar Project-related expenditures.

§ 11.8.2 For Reimbursable Expenses the compensation shall be the expenses incurred by the Architect and the Architect's consultants plus percent (%) of the expenses incurred.

§ 11.9 Architect's Insurance. If the types and limits of coverage required in Section 2.5 are in addition to the types and limits the Architect normally maintains, the Owner shall pay the Architect for the additional costs incurred by the Architect for the additional coverages as set forth below:
(Insert the additional coverages the Architect is required to obtain in order to satisfy the requirements set forth in Section 2.5, and for which the Owner shall reimburse the Architect.)

§ 11.10 Payments to the Architect
§ 11.10.1 Initial Payments
§ 11.10.1.1 An initial payment of ($) shall be made upon execution of this Agreement and is the minimum payment under this Agreement. It shall be credited to the Owner's account in the final invoice.

§ 11.10.1.2 If a Sustainability Certification is part of the Sustainable Objective, an initial payment to the Architect of ($) shall be made upon execution of this Agreement for registration fees and other fees payable to the Certifying Authority and necessary to achieve the Sustainability Certification. The Architect's payments to the Certifying Authority shall be credited to the Owner's account at the time the expense is incurred.

§ 11.10.2 Progress Payments

§ 11.10.2.1 Unless otherwise agreed, payments for services shall be made monthly in proportion to services performed. Payments are due and payable upon presentation of the Architect's invoice. Amounts unpaid ( ) 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 Architect.
(Insert rate of monthly or annual interest agreed upon.)

%

§ 11.10.2.2 The Owner shall not withhold amounts from the Architect's compensation to impose a penalty or liquidated damages on the Architect, or to offset sums requested by or paid to contractors for the cost of changes in the Work, unless the Architect agrees or has been found liable for the amounts in a binding dispute resolution proceeding.

§ 11.10.2.3 Records of Reimbursable Expenses, expenses pertaining to Supplemental and Additional Services, and services performed on the basis of hourly rates shall be available to the Owner at mutually convenient times.

ARTICLE 12 SPECIAL TERMS AND CONDITIONS

Special terms and conditions that modify this Agreement are as follows:
(Include other terms and conditions applicable to this Agreement.)

ARTICLE 13 SCOPE OF THE AGREEMENT

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

§ 13.2 This Agreement is comprised of the following documents identified below:

.1 AIA Document B101™–2017, Standard Form Agreement Between Owner and Architect

.2 AIA Document E203™–2013, Building Information Modeling and Digital Data Exhibit, dated as indicated below:
(Insert the date of the E203-2013 incorporated into this agreement.)

.3 Exhibits:
(Check the appropriate box for any exhibits incorporated into this Agreement.)

☐ AIA Document E204™–2017, Sustainable Projects Exhibit, dated as indicated below:
(Insert the date of the E204-2017 incorporated into this agreement.)

☐ Other Exhibits incorporated into this Agreement:
(Clearly identify any other exhibits incorporated into this Agreement, including any exhibits and scopes of services identified as exhibits in Section 4.1.2.)

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

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

OWNER *(Signature)*	**ARCHITECT** *(Signature)*
(Printed name and title)	*(Printed name, title, and license number, if required)*

Init.

/

AIA A101–2017
Standard Form of Agreement between Owner and Contractor

AIA® Document A101™ – 2017

***Standard Form of Agreement Between Owner and Contractor** where the basis of payment is a Stipulated Sum*

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

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

and the Contractor:
(Name, legal status, address and other information)

for the following Project:
(Name, location and detailed description)

The Architect:
(Name, legal status, address and other information)

The Owner and Contractor agree as follows.

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

The parties should complete A101™–2017, Exhibit A, Insurance and Bonds, contemporaneously with this Agreement.

AIA Document A201™–2017, 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.

Init.
/

1

TABLE OF ARTICLES

ARTICLE 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 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. The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations, or agreements, either written or oral. An enumeration of the Contract Documents, other than a Modification, appears in Article 9.

ARTICLE 2 THE WORK OF THIS CONTRACT

The Contractor shall fully execute the Work described in the Contract Documents, except as specifically indicated in the Contract Documents to be the responsibility of others.

ARTICLE 3 DATE OF COMMENCEMENT AND SUBSTANTIAL COMPLETION

§ 3.1 The date of commencement of the Work shall be:
(Check one of the following boxes.)

☐ The date of this Agreement.

☐ A date set forth in a notice to proceed issued by the Owner.

☐ Established as follows:
(Insert a date or a means to determine the date of commencement of the Work.)

If a date of commencement of the Work is not selected, then the date of commencement shall be the date of this Agreement.

§ 3.2 The Contract Time shall be measured from the date of commencement of the Work.

§ 3.3 Substantial Completion

§ 3.3.1 Subject to adjustments of the Contract Time as provided in the Contract Documents, the Contractor shall achieve Substantial Completion of the entire Work:
(Check one of the following boxes and complete the necessary information.)

☐ Not later than ( ) calendar days from the date of commencement of the Work.

☐ By the following date:

§ 3.3.2 Subject to adjustments of the Contract Time as provided in the Contract Documents, if portions of the Work are to be completed prior to Substantial Completion of the entire Work, the Contractor shall achieve Substantial Completion of such portions by the following dates:

Portion of Work	Substantial Completion Date

§ 3.3.3 If the Contractor fails to achieve Substantial Completion as provided in this Section 3.3, liquidated damages, if any, shall be assessed as set forth in Section 4.5.

ARTICLE 4 CONTRACT SUM

§ 4.1 The Owner shall pay the Contractor the Contract Sum in current funds for the Contractor's performance of the Contract. The Contract Sum shall be ($), subject to additions and deductions as provided in the Contract Documents.

§ 4.2 Alternates

§ 4.2.1 Alternates, if any, included in the Contract Sum:

Item	Price

§ 4.2.2 Subject to the conditions noted below, the following alternates may be accepted by the Owner following execution of this Agreement. Upon acceptance, the Owner shall issue a Modification to this Agreement.
(Insert below each alternate and the conditions that must be met for the Owner to accept the alternate.)

Item	Price	Conditions for Acceptance

§ 4.3 Allowances, if any, included in the Contract Sum:
(Identify each allowance.)

Item	Price

§ 4.4 Unit prices, if any:
(Identify the item and state the unit price and quantity limitations, if any, to which the unit price will be applicable.)

Item	Units and Limitations	Price per Unit ($0.00)

§ 4.5 Liquidated damages, if any:
(Insert terms and conditions for liquidated damages, if any.)

§ 4.6 Other:
(Insert provisions for bonus or other incentives, if any, that might result in a change to the Contract Sum.)

ARTICLE 5 PAYMENTS

§ 5.1 Progress Payments

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

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

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

§ 5.1.4 Each Application for Payment shall be based on the most recent schedule of values submitted by the Contractor in accordance with the Contract Documents. The schedule of values shall allocate the entire Contract Sum among the various portions of the Work. The schedule of values shall be prepared in such form, and supported by such data to substantiate its accuracy, as the Architect may require. This schedule of values shall be used as a basis for reviewing the Contractor's Applications for Payment.

§ 5.1.5 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.

§ 5.1.6 In accordance with AIA Document A201™–2017, General Conditions of the Contract for Construction, and subject to other provisions of the Contract Documents, the amount of each progress payment shall be computed as follows:

§ 5.1.6.1 The amount of each progress payment shall first include:

.1 That portion of the Contract Sum properly allocable to completed Work;

.2 That portion of the Contract Sum properly allocable to materials and equipment delivered and suitably stored at the site for subsequent incorporation in the completed construction, or, if approved in advance by the Owner, suitably stored off the site at a location agreed upon in writing; and

.3 That portion of Construction Change Directives that the Architect determines, in the Architect's professional judgment, to be reasonably justified.

§ 5.1.6.2 The amount of each progress payment shall then be reduced by:

.1 The aggregate of any amounts previously paid by the Owner;

.2 The amount, if any, for Work that remains uncorrected and for which the Architect has previously withheld a Certificate for Payment as provided in Article 9 of AIA Document A201–2017;

.3 Any amount for which the Contractor does not intend to pay a Subcontractor or material supplier, unless the Work has been performed by others the Contractor intends to pay;

.4 For Work performed or defects discovered since the last payment application, any amount for which the Architect may withhold payment, or nullify a Certificate of Payment in whole or in part, as provided in Article 9 of AIA Document A201–2017; and

.5 Retainage withheld pursuant to Section 5.1.7.

§ 5.1.7 Retainage

§ 5.1.7.1 For each progress payment made prior to Substantial Completion of the Work, the Owner may withhold the following amount, as retainage, from the payment otherwise due:
(Insert a percentage or amount to be withheld as retainage from each Application for Payment. The amount of retainage may be limited by governing law.)

§ 5.1.7.1.1 The following items are not subject to retainage:
(Insert any items not subject to the withholding of retainage, such as general conditions, insurance, etc.)

§ 5.1.7.2 Reduction or limitation of retainage, if any, shall be as follows:
(If the retainage established in Section 5.1.7.1 is to be modified prior to Substantial Completion of the entire Work, including modifications for Substantial Completion of portions of the Work as provided in Section 3.3.2, insert provisions for such modifications.)

§ 5.1.7.3 Except as set forth in this Section 5.1.7.3, upon Substantial Completion of the Work, the Contractor may submit an Application for Payment that includes the retainage withheld from prior Applications for Payment pursuant to this Section 5.1.7. The Application for Payment submitted at Substantial Completion shall not include retainage as follows:
(Insert any other conditions for release of retainage upon Substantial Completion.)

§ 5.1.8 If final completion of the Work is materially delayed through no fault of the Contractor, the Owner shall pay the Contractor any additional amounts in accordance with Article 9 of AIA Document A201–2017.

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

§ 5.2 Final Payment

§ 5.2.1 Final payment, constituting the entire unpaid balance of the Contract Sum, shall be made by the Owner to the Contractor when

.1 the Contractor has fully performed the Contract except for the Contractor's responsibility to correct Work as provided in Article 12 of AIA Document A201–2017, and to satisfy other requirements, if any, which extend beyond final payment; and

.2 a final Certificate for Payment has been issued by the Architect.

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

§ 5.3 Interest

Payments due and unpaid under the Contract shall bear interest from the date payment is due at the rate stated below, or in the absence thereof, at the legal rate prevailing from time to time at the place where the Project is located.
(Insert rate of interest agreed upon, if any.)

_____ %

ARTICLE 6 DISPUTE RESOLUTION

§ 6.1 Initial Decision Maker

The Architect will serve as the Initial Decision Maker pursuant to Article 15 of AIA Document A201–2017, unless the parties appoint below another individual, not a party to this 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.)

§ 6.2 Binding Dispute Resolution
For any Claim subject to, but not resolved by, mediation pursuant to Article 15 of AIA Document A201–2017, the method of binding dispute resolution shall be as follows:
(Check the appropriate box.)

☐ Arbitration pursuant to Section 15.4 of AIA Document A201–2017

☐ Litigation in a court of competent jurisdiction

☐ Other *(Specify)*

If the Owner and Contractor do not select a method of binding dispute resolution, 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.

ARTICLE 7 TERMINATION OR SUSPENSION
§ 7.1 The Contract may be terminated by the Owner or the Contractor as provided in Article 14 of AIA Document A201–2017.

§ 7.1.1 If the Contract is terminated for the Owner's convenience in accordance with Article 14 of AIA Document A201–2017, then the Owner shall pay the Contractor a termination fee as follows:
(Insert the amount of, or method for determining, the fee, if any, payable to the Contractor following a termination for the Owner's convenience.)

§ 7.2 The Work may be suspended by the Owner as provided in Article 14 of AIA Document A201–2017.

ARTICLE 8 MISCELLANEOUS PROVISIONS
§ 8.1 Where reference is made in this Agreement to a provision of AIA Document A201–2017 or another Contract Document, the reference refers to that provision as amended or supplemented by other provisions of the Contract Documents.

§ 8.2 The Owner's representative:
(Name, address, email address, and other information)

§ 8.3 The Contractor's representative:
(Name, address, email address, and other information)

§ 8.4 Neither the Owner's nor the Contractor's representative shall be changed without ten days' prior notice to the other party.

§ 8.5 Insurance and Bonds

§ 8.5.1 The Owner and the Contractor shall purchase and maintain insurance as set forth in AIA Document A101™–2017, Standard Form of Agreement Between Owner and Contractor where the basis of payment is a Stipulated Sum, Exhibit A, Insurance and Bonds, and elsewhere in the Contract Documents.

§ 8.5.2 The Contractor shall provide bonds as set forth in AIA Document A101™–2017 Exhibit A, and elsewhere in the Contract Documents.

§ 8.6 Notice in electronic format, pursuant to Article 1 of AIA Document A201–2017, may be given in accordance with AIA Document E203™–2013, Building Information Modeling and Digital Data Exhibit, if completed, or as otherwise set forth below:

(If other than in accordance with AIA Document E203–2013, insert requirements for delivering notice in electronic format such as name, title, and email address of the recipient and whether and how the system will be required to generate a read receipt for the transmission.)

§ 8.7 Other provisions:

ARTICLE 9 ENUMERATION OF CONTRACT DOCUMENTS

§ 9.1 This Agreement is comprised of the following documents:

.1 AIA Document A101™–2017, Standard Form of Agreement Between Owner and Contractor

.2 AIA Document A101™–2017, Exhibit A, Insurance and Bonds

.3 AIA Document A201™–2017, General Conditions of the Contract for Construction

.4 AIA Document E203™–2013, Building Information Modeling and Digital Data Exhibit, dated as indicated below:

(Insert the date of the E203-2013 incorporated into this Agreement.)

.5 Drawings

Number	Title	Date

.6 Specifications

Section	Title	Date	Pages

.7 Addenda, if any:

Number	Date	Pages

Portions of Addenda relating to bidding or proposal requirements are not part of the Contract Documents unless the bidding or proposal requirements are also enumerated in this Article 9.

.8 Other Exhibits:

(Check all boxes that apply and include appropriate information identifying the exhibit where required.)

☐ AIA Document E204™–2017, Sustainable Projects Exhibit, dated as indicated below:

(Insert the date of the E204-2017 incorporated into this Agreement.)

☐ The Sustainability Plan:

Title	Date	Pages

☐ Supplementary and other Conditions of the Contract:

Document	Title	Date	Pages

.9 Other documents, if any, listed below:
(List here any additional documents that are intended to form part of the Contract Documents. AIA Document A201™–2017 provides that the advertisement or invitation to bid, Instructions to Bidders, sample forms, the Contractor's bid or proposal, portions of Addenda relating to bidding or proposal requirements, and other information furnished by the Owner in anticipation of receiving bids or proposals, are not part of the Contract Documents unless enumerated in this Agreement. Any such documents should be listed here only if intended to be part of the Contract Documents.)

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

OWNER *(Signature)*	**CONTRACTOR** *(Signature)*
(Printed name and title)	*(Printed name and title)*

AIA A101–2017 Exhibit A
Insurance and Bonds

AIA® Document A101™ – 2017 Exhibit A

Insurance and Bonds

This Insurance and Bonds Exhibit is part of the Agreement, between the Owner and the Contractor, dated the _____ day of _____ in the year _____
(In words, indicate day, month and year.)

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

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

This document is intended to be used in conjunction with AIA Document A201™–2017, General Conditions of the Contract for Construction. Article 11 of A201™–2017 contains additional insurance provisions.

THE OWNER:
(Name, legal status and address)

THE CONTRACTOR:
(Name, legal status and address)

TABLE OF ARTICLES

ARTICLE A.1 GENERAL

The Owner and Contractor shall purchase and maintain insurance, and provide bonds, as set forth in this Exhibit. As used in this Exhibit, the term General Conditions refers to AIA Document A201™–2017, General Conditions of the Contract for Construction.

ARTICLE A.2 OWNER'S INSURANCE

§ A.2.1 General

Prior to commencement of the Work, the Owner shall secure the insurance, and provide evidence of the coverage, required under this Article A.2 and, upon the Contractor's request, provide a copy of the property insurance policy or policies required by Section A.2.3. The copy of the policy or policies provided shall contain all applicable conditions, definitions, exclusions, and endorsements.

§ A.2.2 Liability Insurance

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

§ A.2.3 Required Property Insurance

§ A.2.3.1 Unless this obligation is placed on the Contractor pursuant to Section A.3.3.2.1, the Owner shall purchase and maintain, from an insurance company or insurance companies lawfully authorized to issue insurance in the jurisdiction where the Project is located, property insurance written on a builder's risk "all-risks" completed value or equivalent policy form and sufficient to cover the total value of the entire Project on a replacement cost basis. The Owner's

property insurance coverage shall be no less than the amount of the initial Contract Sum, plus the value of subsequent Modifications and labor performed and materials or equipment supplied by others. The property insurance shall be maintained until Substantial Completion and thereafter as provided in Section A.2.3.1.3, unless otherwise provided in the Contract Documents or otherwise agreed in writing by the parties to this Agreement. This insurance shall include the interests of the Owner, Contractor, Subcontractors, and Sub-subcontractors in the Project as insureds. This insurance shall include the interests of mortgagees as loss payees.

§ A.2.3.1.1 Causes of Loss. The insurance required by this Section A.2.3.1 shall provide coverage for direct physical loss or damage, and shall not exclude the risks of fire, explosion, theft, vandalism, malicious mischief, collapse, earthquake, flood, or windstorm. The insurance shall also provide coverage for ensuing loss or resulting damage from error, omission, or deficiency in construction methods, design, specifications, workmanship, or materials. Sub-limits, if any, are as follows:
(Indicate below the cause of loss and any applicable sub-limit.)

Cause of Loss	Sub-Limit

§ A.2.3.1.2 Specific Required Coverages. The insurance required by this Section A.2.3.1 shall provide coverage for loss or damage to falsework and other temporary structures, and to building systems from testing and startup. The insurance shall also cover debris removal, including demolition occasioned by enforcement of any applicable legal requirements, and reasonable compensation for the Architect's and Contractor's services and expenses required as a result of such insured loss, including claim preparation expenses. Sub-limits, if any, are as follows:
(Indicate below type of coverage and any applicable sub-limit for specific required coverages.)

Coverage	Sub-Limit

§ A.2.3.1.3 Unless the parties agree otherwise, upon Substantial Completion, the Owner shall continue the insurance required by Section A.2.3.1 or, if necessary, replace the insurance policy required under Section A.2.3.1 with property insurance written for the total value of the Project that shall remain in effect until expiration of the period for correction of the Work set forth in Section 12.2.2 of the General Conditions.

§ A.2.3.1.4 Deductibles and Self-Insured Retentions. If the insurance required by this Section A.2.3 is subject to deductibles or self-insured retentions, the Owner shall be responsible for all loss not covered because of such deductibles or retentions.

§ A.2.3.2 Occupancy or Use Prior to Substantial Completion. The Owner's occupancy or use of any completed or partially completed portion of the Work prior to Substantial Completion shall not commence until the insurance company or companies providing the insurance under Section A.2.3.1 have consented in writing to the continuance of coverage. The Owner and the Contractor shall take no action with respect to partial occupancy or use that would cause cancellation, lapse, or reduction of insurance, unless they agree otherwise in writing.

§ A.2.3.3 Insurance for Existing Structures
If the Work involves remodeling an existing structure or constructing an addition to an existing structure, the Owner shall purchase and maintain, until the expiration of the period for correction of Work as set forth in Section 12.2.2 of the General Conditions, "all-risks" property insurance, on a replacement cost basis, protecting the existing structure against direct physical loss or damage from the causes of loss identified in Section A.2.3.1, notwithstanding the undertaking of the Work. The Owner shall be responsible for all co-insurance penalties.

§ A.2.4 Optional Extended Property Insurance.
The Owner shall purchase and maintain the insurance selected and described below.
(Select the types of insurance the Owner is required to purchase and maintain by placing an X in the box(es) next to the description(s) of selected insurance. For each type of insurance selected, indicate applicable limits of coverage or other conditions in the fill point below the selected item.)

☐ **§ A.2.4.1 Loss of Use, Business Interruption, and Delay in Completion Insurance,** to reimburse the Owner for loss of use of the Owner's property, or the inability to conduct normal operations due to a covered cause of loss.

☐ **§ A.2.4.2 Ordinance or Law Insurance,** for the reasonable and necessary costs to satisfy the minimum requirements of the enforcement of any law or ordinance regulating the demolition, construction, repair, replacement or use of the Project.

☐ **§ A.2.4.3 Expediting Cost Insurance,** for the reasonable and necessary costs for the temporary repair of damage to insured property, and to expedite the permanent repair or replacement of the damaged property.

☐ **§ A.2.4.4 Extra Expense Insurance,** to provide reimbursement of the reasonable and necessary excess costs incurred during the period of restoration or repair of the damaged property that are over and above the total costs that would normally have been incurred during the same period of time had no loss or damage occurred.

☐ **§ A.2.4.5 Civil Authority Insurance,** for losses or costs arising from an order of a civil authority prohibiting access to the Project, provided such order is the direct result of physical damage covered under the required property insurance.

☐ **§ A.2.4.6 Ingress/Egress Insurance,** for loss due to the necessary interruption of the insured's business due to physical prevention of ingress to, or egress from, the Project as a direct result of physical damage.

☐ **§ A.2.4.7 Soft Costs Insurance,** to reimburse the Owner for costs due to the delay of completion of the Work, arising out of physical loss or damage covered by the required property insurance: including construction loan fees; leasing and marketing expenses; additional fees, including those of architects, engineers, consultants, attorneys and accountants, needed for the completion of the construction, repairs, or reconstruction; and carrying costs such as property taxes, building permits, additional interest on loans, realty taxes, and insurance premiums over and above normal expenses.

§ A.2.5 Other Optional Insurance.
The Owner shall purchase and maintain the insurance selected below.
(Select the types of insurance the Owner is required to purchase and maintain by placing an X in the box(es) next to the description(s) of selected insurance.)

☐ **§ A.2.5.1 Cyber Security Insurance** for loss to the Owner due to data security and privacy breach, including costs of investigating a potential or actual breach of confidential or private information.
(Indicate applicable limits of coverage or other conditions in the fill point below.)

☐ **§ A.2.5.2 Other Insurance**
(List below any other insurance coverage to be provided by the Owner and any applicable limits.)

Coverage	Limits

ARTICLE A.3 CONTRACTOR'S INSURANCE AND BONDS

§ A.3.1 General

§ A.3.1.1 Certificates of Insurance. The Contractor shall provide certificates of insurance acceptable to the Owner evidencing compliance with the requirements in this Article A.3 at the following times: (1) prior to commencement of the Work; (2) upon renewal or replacement of each required policy of insurance; and (3) upon the Owner's written request. An additional certificate evidencing continuation of commercial liability coverage, including coverage for completed operations, shall be submitted with the final Application for Payment and thereafter upon renewal or replacement of such coverage until the expiration of the periods required by Section A.3.2.1 and Section A.3.3.1. The certificates will show the Owner as an additional insured on the Contractor's Commercial General Liability and excess or umbrella liability policy or policies.

§ A.3.1.2 Deductibles and Self-Insured Retentions. The Contractor shall disclose to the Owner any deductible or self-insured retentions applicable to any insurance required to be provided by the Contractor.

§ A.3.1.3 Additional Insured Obligations. To the fullest extent permitted by law, the Contractor shall cause the commercial general liability coverage to include (1) the Owner, the Architect, and the Architect's consultants as additional insureds for claims caused in whole or in part by the Contractor's negligent acts or omissions during the Contractor's operations; and (2) the Owner as an additional insured for claims caused in whole or in part by the Contractor's negligent acts or omissions for which loss occurs during completed operations. The additional insured coverage shall be primary and non-contributory to any of the Owner's general liability insurance policies and shall apply to both ongoing and completed operations. To the extent commercially available, the additional insured coverage shall be no less than that provided by Insurance Services Office, Inc. (ISO) forms CG 20 10 07 04, CG 20 37 07 04, and, with respect to the Architect and the Architect's consultants, CG 20 32 07 04.

§ A.3.2 Contractor's Required Insurance Coverage

§ A.3.2.1 The Contractor shall purchase and maintain the following types and limits of insurance from an insurance company or insurance companies lawfully authorized to issue insurance in the jurisdiction where the Project is located. The Contractor shall maintain the required insurance until the expiration of the period for correction of Work as set forth in Section 12.2.2 of the General Conditions, unless a different duration is stated below:
(If the Contractor is required to maintain insurance for a duration other than the expiration of the period for correction of Work, state the duration.)

§ A.3.2.2 Commercial General Liability

§ A.3.2.2.1 Commercial General Liability insurance for the Project written on an occurrence form with policy limits of not less than _____ ($__) each occurrence, _____ ($__) general aggregate, and _____ ($__) aggregate for products-completed operations hazard, providing coverage for claims including

.1 damages because of bodily injury, sickness or disease, including occupational sickness or disease, and death of any person;
.2 personal injury and advertising injury;
.3 damages because of physical damage to, or destruction of, tangible property, including the loss of use of such property;
.4 bodily injury or property damage arising out of completed operations; and
.5 the Contractor's indemnity obligations under Section 3.18 of the General Conditions.

§ A.3.2.2.2 The Contractor's Commercial General Liability policy under this Section A.3.2.2 shall not contain an exclusion or restriction of coverage for the following:

.1 Claims by one insured against another insured, if the exclusion or restriction is based solely on the fact that the claimant is an insured, and there would otherwise be coverage for the claim.

.2 Claims for property damage to the Contractor's Work arising out of the products-completed operations hazard where the damaged Work or the Work out of which the damage arises was performed by a Subcontractor.

.3 Claims for bodily injury other than to employees of the insured.

.4 Claims for indemnity under Section 3.18 of the General Conditions arising out of injury to employees of the insured

.5 Claims or loss excluded under a prior work endorsement or other similar exclusionary language.

.6 Claims or loss due to physical damage under a prior injury endorsement or similar exclusionary language.

.7 Claims related to residential, multi-family, or other habitational projects, if the Work is to be performed on such a project.

.8 Claims related to roofing, if the Work involves roofing.

.9 Claims related to exterior insulation finish systems (EIFS), synthetic stucco or similar exterior coatings or surfaces, if the Work involves such coatings or surfaces.

.10 Claims related to earth subsidence or movement, where the work involves such hazards.

.11 Claims related to explosion, collapse, and underground hazards, where the Work involves such hazards.

§ A.3.2.3 Automobile Liability covering vehicles owned, and non-owned vehicles used, by the Contractor, with policy limits of not less than _____ ($__) per accident, for bodily injury, death of any person, and property damage arising out of the ownership, maintenance and use of those motor vehicles along with any other statutorily required automobile coverage.

§ A.3.2.4 The Contractor may achieve the required limits and coverage for Commercial General Liability and Automobile Liability through a combination of primary and excess or umbrella liability insurance, provided such primary and excess or umbrella insurance policies result in the same or greater coverage as the coverages required under Section A.3.2.2 and A.3.2.3, and in no event shall any excess or umbrella liability insurance provide narrower coverage than the primary policy. The excess policy shall not require the exhaustion of the underlying limits only through the actual payment by the underlying insurers.

§ A.3.2.5 Workers' Compensation at statutory limits.

§ A.3.2.6 Employers' Liability with policy limits not less than _____ ($__) each accident, _____ ($__) each employee, and _____ ($__) policy limit.

§ A.3.2.7 Jones Act, and the Longshore & Harbor Workers' Compensation Act, as required, if the Work involves hazards arising from work on or near navigable waterways, including vessels and docks

§ A.3.2.8 If the Contractor is required to furnish professional services as part of the Work, the Contractor shall procure Professional Liability insurance covering performance of the professional services, with policy limits of not less than _____ ($__) per claim and _____ ($__) in the aggregate.

§ A.3.2.9 If the Work involves the transport, dissemination, use, or release of pollutants, the Contractor shall procure Pollution Liability insurance, with policy limits of not less than _____ ($__) per claim and _____ ($__) in the aggregate.

§ A.3.2.10 Coverage under Sections A.3.2.8 and A.3.2.9 may be procured through a Combined Professional Liability and Pollution Liability insurance policy, with combined policy limits of not less than _____ ($__) per claim and _____ ($__) in the aggregate.

§ A.3.2.11 Insurance for maritime liability risks associated with the operation of a vessel, if the Work requires such activities, with policy limits of not less than_____ ($__) per claim and_____ ($__) in the aggregate.

§ A.3.2.12 Insurance for the use or operation of manned or unmanned aircraft, if the Work requires such activities, with policy limits of not less than_____ ($__) per claim and_____ ($__) in the aggregate.

§ A.3.3 Contractor's Other Insurance Coverage

§ A.3.3.1 Insurance selected and described in this Section A.3.3 shall be purchased from an insurance company or insurance companies lawfully authorized to issue insurance in the jurisdiction where the Project is located. The Contractor shall maintain the required insurance until the expiration of the period for correction of Work as set forth in Section 12.2.2 of the General Conditions, unless a different duration is stated below:

(If the Contractor is required to maintain any of the types of insurance selected below for a duration other than the expiration of the period for correction of Work, state the duration.)

§ A.3.3.2 The Contractor shall purchase and maintain the following types and limits of insurance in accordance with Section A.3.3.1.

(Select the types of insurance the Contractor is required to purchase and maintain by placing an X in the box(es) next to the description(s) of selected insurance. Where policy limits are provided, include the policy limit in the appropriate fill point.)

☐ **§ A.3.3.2.1** Property insurance of the same type and scope satisfying the requirements identified in Section A.2.3, which, if selected in this section A.3.3.2.1, relieves the Owner of the responsibility to purchase and maintain such insurance except insurance required by Section A.2.3.1.3 and Section A.2.3.3. The Contractor shall comply with all obligations of the Owner under Section A.2.3 except to the extent provided below. The Contractor shall disclose to the Owner the amount of any deductible, and the Owner shall be responsible for losses within the deductible. Upon request, the Contractor shall provide the Owner with a copy of the property insurance policy or policies required. The Owner shall adjust and settle the loss with the insurer and be the trustee of the proceeds of the property insurance in accordance with Article 11 of the General Conditions unless otherwise set forth below.

(Where the Contractor's obligation to provide property insurance differs from the Owner's obligations as described under Section A.2.3, indicate such differences in the space below. Additionally, if a party other than the Owner will be responsible for adjusting and settling a loss with the insurer and acting as the trustee of the proceeds of property insurance in accordance with Article 11 of the General Conditions, indicate the responsible party below.)

☐ **§ A.3.3.2.2 Railroad Protective Liability Insurance,** with policy limits of not less than _____ ($__) per claim and _____ ($__) in the aggregate, for Work within fifty (50) feet of railroad property.

☐ **§ A.3.3.2.3 Asbestos Abatement Liability Insurance,** with policy limits of not less than _____ ($__) per claim and _____ ($__) in the aggregate, for liability arising from the encapsulation, removal, handling, storage, transportation, and disposal of asbestos-containing materials.

☐ **§ A.3.3.2.4** Insurance for physical damage to property while it is in storage and in transit to the construction site on an "all-risks" completed value form.

☐ **§ A.3.3.2.5** Property insurance on an "all-risks" completed value form, covering property owned by the Contractor and used on the Project, including scaffolding and other equipment.

☐ **§ A.3.3.2.6 Other Insurance**

(List below any other insurance coverage to be provided by the Contractor and any applicable limits.)

Coverage	Limits

§ A.3.4 Performance Bond and Payment Bond
The Contractor shall provide surety bonds, from a company or companies lawfully authorized to issue surety bonds in the jurisdiction where the Project is located, as follows:
(Specify type and penal sum of bonds.)

Type	Penal Sum ($0.00)
Payment Bond	
Performance Bond	

Payment and Performance Bonds shall be AIA Document A312™, Payment Bond and Performance Bond, or contain provisions identical to AIA Document A312™, current as of the date of this Agreement.

ARTICLE A.4 SPECIAL TERMS AND CONDITIONS
Special terms and conditions that modify this Insurance and Bonds Exhibit, if any, are as follows:

APPENDIX IV AIA A201–2017 General Conditions of the Contract for Construction

AIA® Document A201™ – 2017

General Conditions of the Contract for Construction

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

THE OWNER:
(Name, legal status and address)

THE ARCHITECT:
(Name, legal status and address)

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

For guidance in modifying this document to include supplementary conditions, see AIA Document A503™, Guide for Supplementary Conditions.

TABLE OF ARTICLES

INDEX
(Topics and numbers in bold are Section headings.)

Init.
/

ARTICLE 1 GENERAL PROVISIONS

§ 1.1 Basic Definitions

§ 1.1.1 The Contract Documents

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

§ 1.1.2 The Contract

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

§ 1.1.3 The Work

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

§ 1.1.4 The Project

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

§ 1.1.5 The Drawings

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

§ 1.1.6 The Specifications

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

§ 1.1.7 Instruments of Service

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

§ 1.1.8 Initial Decision Maker

The Initial Decision Maker is the person identified in the Agreement to render initial decisions on Claims in accordance with Section 15.2. The Initial Decision Maker shall not show partiality to the Owner or Contractor and shall not be liable for results of interpretations or decisions rendered in good faith.

§ 1.2 Correlation and Intent of the Contract Documents

§ 1.2.1 The intent of the Contract Documents is to include all items necessary for the proper execution and completion of the Work by the Contractor. The Contract Documents are complementary, and what is required by one shall be as binding as if required by all; performance by the Contractor shall be required only to the extent consistent with the Contract Documents and reasonably inferable from them as being necessary to produce the indicated results.

§ 1.2.1.1 The invalidity of any provision of the Contract Documents shall not invalidate the Contract or its remaining

provisions. If it is determined that any provision of the Contract Documents violates any law, or is otherwise invalid or unenforceable, then that provision shall be revised to the extent necessary to make that provision legal and enforceable. In such case the Contract Documents shall be construed, to the fullest extent permitted by law, to give effect to the parties' intentions and purposes in executing the Contract.

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

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

§ 1.3 Capitalization

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

§ 1.4 Interpretation

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

§ 1.5 Ownership and Use of Drawings, Specifications, and Other Instruments of Service

§ 1.5.1 The Architect and the Architect's consultants shall be deemed the authors and owners of their respective Instruments of Service, including the Drawings and Specifications, and retain all common law, statutory, and other reserved rights in their Instruments of Service, including copyrights. The Contractor, Subcontractors, Sub-subcontractors, and suppliers shall not own or claim a copyright in the Instruments of Service. Submittal or distribution to meet official regulatory requirements or for other purposes in connection with the Project is not to be construed as publication in derogation of the Architect's or Architect's consultants' reserved rights.

§ 1.5.2 The Contractor, Subcontractors, Sub-subcontractors, and suppliers are authorized to use and reproduce the Instruments of Service provided to them, subject to any protocols established pursuant to Sections 1.7 and 1.8, solely and exclusively for execution of the Work. All copies made under this authorization shall bear the copyright notice, if any, shown on the Instruments of Service. The Contractor, Subcontractors, Sub-subcontractors, and suppliers may not use the Instruments of Service on other projects or for additions to the Project outside the scope of the Work without the specific written consent of the Owner, Architect, and the Architect's consultants.

§ 1.6 Notice

§ 1.6.1 Except as otherwise provided in Section 1.6.2, where the Contract Documents require one party to notify or give notice to the other party, such notice shall be provided in writing to the designated representative of the party to whom the notice is addressed and shall be deemed to have been duly served if delivered in person, by mail, by courier, or by electronic transmission if a method for electronic transmission is set forth in the Agreement.

§ 1.6.2 Notice of Claims as provided in Section 15.1.3 shall be provided in writing and shall be deemed to have been duly served only if delivered to the designated representative of the party to whom the notice is addressed by certified or registered mail, or by courier providing proof of delivery.

§ 1.7 Digital Data Use and Transmission

The parties shall agree upon protocols governing the transmission and use of Instruments of Service or any other information or documentation in digital form. The parties will use AIA Document E203™–2013, Building Information Modeling and Digital Data Exhibit, to establish the protocols for the development, use, transmission, and exchange of digital data.

§ 1.8 Building Information Models Use and Reliance

Any use of, or reliance on, all or a portion of a building information model without agreement to protocols governing the use of, and reliance on, the information contained in the model and without having those protocols set forth in AIA Document E203™–2013, Building Information Modeling and Digital Data Exhibit, and the requisite AIA Document G202™–2013, Project Building Information Modeling Protocol Form, shall be at the using or relying party's sole risk and without liability to the other party and its contractors or consultants, the authors of, or contributors to, the building

information model, and each of their agents and employees.

ARTICLE 2 OWNER

§ 2.1 General

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

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

§ 2.2 Evidence of the Owner's Financial Arrangements

§ 2.2.1 Prior to commencement of the Work and upon written request by the Contractor, the Owner shall furnish to the Contractor reasonable evidence that the Owner has made financial arrangements to fulfill the Owner's obligations under the Contract. The Contractor shall have no obligation to commence the Work until the Owner provides such evidence. If commencement of the Work is delayed under this Section 2.2.1, the Contract Time shall be extended appropriately.

§ 2.2.2 Following commencement of the Work and upon written request by the Contractor, the Owner shall furnish to the Contractor reasonable evidence that the Owner has made financial arrangements to fulfill the Owner's obligations under the Contract only if (1) the Owner fails to make payments to the Contractor as the Contract Documents require; (2) the Contractor identifies in writing a reasonable concern regarding the Owner's ability to make payment when due; or (3) a change in the Work materially changes the Contract Sum. If the Owner fails to provide such evidence, as required, within fourteen days of the Contractor's request, the Contractor may immediately stop the Work and, in that event, shall notify the Owner that the Work has stopped. However, if the request is made because a change in the Work materially changes the Contract Sum under (3) above, the Contractor may immediately stop only that portion of the Work affected by the change until reasonable evidence is provided. If the Work is stopped under this Section 2.2.2, the Contract Time shall be extended appropriately and the Contract Sum shall be increased by the amount of the Contractor's reasonable costs of shutdown, delay and start-up, plus interest as provided in the Contract Documents.

§ 2.2.3 After the Owner furnishes evidence of financial arrangements under this Section 2.2, the Owner shall not materially vary such financial arrangements without prior notice to the Contractor.

§ 2.2.4 Where the Owner has designated information furnished under this Section 2.2 as "confidential," the Contractor shall keep the information confidential and shall not disclose it to any other person. However, the Contractor may disclose "confidential" information, after seven (7) days' notice to the Owner, where disclosure is required by law, including a subpoena or other form of compulsory legal process issued by a court or governmental entity, or by court or arbitrator(s) order. The Contractor may also disclose "confidential" information to its employees, consultants, sureties, Subcontractors and their employees, Sub-subcontractors, and others who need to know the content of such information solely and exclusively for the Project and who agree to maintain the confidentiality of such information.

§ 2.3 Information and Services Required of the Owner

§ 2.3.1 Except for permits and fees that are the responsibility of the Contractor under the Contract Documents, including those required under Section 3.7.1, the Owner shall secure and pay for necessary approvals, easements, assessments and charges required for construction, use or occupancy of permanent structures or for permanent changes in existing facilities.

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

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

§ 2.3.4 The Owner shall furnish surveys describing physical characteristics, legal limitations and utility locations for the

site of the Project, and a legal description of the site. The Contractor shall be entitled to rely on the accuracy of information furnished by the Owner but shall exercise proper precautions relating to the safe performance of the Work.

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

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

§ 2.4 Owner's Right to Stop the Work

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

§ 2.5 Owner's Right to Carry Out the Work

If the Contractor defaults or neglects to carry out the Work in accordance with the Contract Documents and fails within a ten-day period after receipt of notice from the Owner to commence and continue correction of such default or neglect with diligence and promptness, the Owner may, without prejudice to other remedies the Owner may have, correct such default or neglect. Such action by the Owner and amounts charged to the Contractor are both subject to prior approval of the Architect and the Architect may, pursuant to Section 9.5.1, withhold or nullify a Certificate for Payment in whole or in part, to the extent reasonably necessary to reimburse the Owner for the reasonable cost of correcting such deficiencies, including Owner's expenses and compensation for the Architect's additional services made necessary by such default, neglect, or failure. If current and future payments are not sufficient to cover such amounts, the Contractor shall pay the difference to the Owner. If the Contractor disagrees with the actions of the Owner or the Architect, or the amounts claimed as costs to the Owner, the Contractor may file a Claim pursuant to Article 15.

ARTICLE 3 CONTRACTOR

§ 3.1 General

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

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

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

§ 3.2 Review of Contract Documents and Field Conditions by Contractor

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

§ 3.2.2 Because the Contract Documents are complementary, the Contractor shall, before starting each portion of the Work, carefully study and compare the various Contract Documents relative to that portion of the Work, as well as the information furnished by the Owner pursuant to Section 2.3.4, shall take field measurements of any existing conditions related to that portion of the Work, and shall observe any conditions at the site affecting it. These obligations are for the purpose of facilitating coordination and construction by the Contractor and are not for the purpose of discovering errors, omissions, or inconsistencies in the Contract Documents; however, the Contractor shall promptly report to the Architect any errors, inconsistencies or omissions discovered by or made known to the Contractor as a request for information in such form as the Architect may require. It is recognized that the Contractor's review is made in the Contractor's

capacity as a contractor and not as a licensed design professional, unless otherwise specifically provided in the Contract Documents.

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

§ 3.2.4 If the Contractor believes that additional cost or time is involved because of clarifications or instructions the Architect issues in response to the Contractor's notices or requests for information pursuant to Sections 3.2.2 or 3.2.3, the Contractor shall submit Claims as provided in Article 15. If the Contractor fails to perform the obligations of Sections 3.2.2 or 3.2.3, the Contractor shall pay such costs and damages to the Owner, subject to Section 15.1.7, as would have been avoided if the Contractor had performed such obligations. If the Contractor performs those obligations, the Contractor shall not be liable to the Owner or Architect for damages resulting from errors, inconsistencies or omissions in the Contract Documents, for differences between field measurements or conditions and the Contract Documents, or for nonconformities of the Contract Documents to applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities.

§ 3.3 Supervision and Construction Procedures

§ 3.3.1 The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for, and have control over, construction means, methods, techniques, sequences, and procedures, and for coordinating all portions of the Work under the Contract. If the Contract Documents give specific instructions concerning construction means, methods, techniques, sequences, or procedures, the Contractor shall evaluate the jobsite safety thereof and shall be solely responsible for the jobsite safety of such means, methods, techniques, sequences, or procedures. If the Contractor determines that such means, methods, techniques, sequences or procedures may not be safe, the Contractor shall give timely notice to the Owner and Architect, and shall propose alternative means, methods, techniques, sequences, or procedures. The Architect shall evaluate the proposed alternative solely for conformance with the design intent for the completed construction. Unless the Architect objects to the Contractor's proposed alternative, the Contractor shall perform the Work using its alternative means, methods, techniques, sequences, or procedures.

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

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

§ 3.4 Labor and Materials

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

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

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

§ 3.5 Warranty

§ 3.5.1 The Contractor warrants to the Owner and Architect that materials and equipment furnished under the Contract will be of good quality and new unless the Contract Documents require or permit otherwise. The Contractor further warrants that the Work will conform to the requirements of the Contract Documents and will be free from defects, except for those inherent in the quality of the Work the Contract Documents require or permit. Work, materials, or equipment not conforming to these requirements may be considered defective. The Contractor's warranty excludes

remedy for damage or defect caused by abuse, alterations to the Work not executed by the Contractor, improper or insufficient maintenance, improper operation, or normal wear and tear and normal usage. If required by the Architect, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

§ 3.5.2 All material, equipment, or other special warranties required by the Contract Documents shall be issued in the name of the Owner, or shall be transferable to the Owner, and shall commence in accordance with Section 9.8.4.

§ 3.6 Taxes

The Contractor shall pay sales, consumer, use and similar taxes for the Work provided by the Contractor that are legally enacted when bids are received or negotiations concluded, whether or not yet effective or merely scheduled to go into effect.

§ 3.7 Permits, Fees, Notices and Compliance with Laws

§ 3.7.1 Unless otherwise provided in the Contract Documents, the Contractor shall secure and pay for the building permit as well as for other permits, fees, licenses, and inspections by government agencies necessary for proper execution and completion of the Work that are customarily secured after execution of the Contract and legally required at the time bids are received or negotiations concluded.

§ 3.7.2 The Contractor shall comply with and give notices required by applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities applicable to performance of the Work.

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

§ 3.7.4 Concealed or Unknown Conditions

If the Contractor encounters conditions at the site that are (1) subsurface or otherwise concealed physical conditions that differ materially from those indicated in the Contract Documents or (2) unknown physical conditions of an unusual nature that differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents, the Contractor shall promptly provide notice to the Owner and the Architect before conditions are disturbed and in no event later than 14 days after first observance of the conditions. The Architect will promptly investigate such conditions and, if the Architect determines that they differ materially and cause an increase or decrease in the Contractor's cost of, or time required for, performance of any part of the Work, will recommend that an equitable adjustment be made in the Contract Sum or Contract Time, or both. If the Architect determines that the conditions at the site are not materially different from those indicated in the Contract Documents and that no change in the terms of the Contract is justified, the Architect shall promptly notify the Owner and Contractor, stating the reasons. If either party disputes the Architect's determination or recommendation, that party may submit a Claim as provided in Article 15.

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

§ 3.8 Allowances

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

§ 3.8.2 Unless otherwise provided in the Contract Documents,

.1 allowances shall cover the cost to the Contractor of materials and equipment delivered at the site and all required taxes, less applicable trade discounts;

.2 Contractor's costs for unloading and handling at the site, labor, installation costs, overhead, profit, and other expenses contemplated for stated allowance amounts shall be included in the Contract Sum but not in the allowances; and

.3 whenever costs are more than or less than allowances, the Contract Sum shall be adjusted accordingly by Change Order. The amount of the Change Order shall reflect (1) the difference between actual costs and the allowances under Section 3.8.2.1 and (2) changes in Contractor's costs under Section 3.8.2.2.

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

§ 3.9 Superintendent

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

§ 3.9.2 The Contractor, as soon as practicable after award of the Contract, shall notify the Owner and Architect of the name and qualifications of a proposed superintendent. Within 14 days of receipt of the information, the Architect may notify the Contractor, stating whether the Owner or the Architect (1) has reasonable objection to the proposed superintendent or (2) requires additional time for review. Failure of the Architect to provide notice within the 14-day period shall constitute notice of no reasonable objection.

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

§ 3.10 Contractor's Construction and Submittal Schedules

§ 3.10.1 The Contractor, promptly after being awarded the Contract, shall submit for the Owner's and Architect's information a Contractor's construction schedule for the Work. The schedule shall contain detail appropriate for the Project, including (1) the date of commencement of the Work, interim schedule milestone dates, and the date of Substantial Completion; (2) an apportionment of the Work by construction activity; and (3) the time required for completion of each portion of the Work. The schedule shall provide for the orderly progression of the Work to completion and shall not exceed time limits current under the Contract Documents. The schedule shall be revised at appropriate intervals as required by the conditions of the Work and Project.

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

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

§ 3.11 Documents and Samples at the Site

The Contractor shall make available, at the Project site, the Contract Documents, including Change Orders, Construction Change Directives, and other Modifications, in good order and marked currently to indicate field changes and selections made during construction, and the approved Shop Drawings, Product Data, Samples, and similar required submittals. These shall be in electronic form or paper copy, available to the Architect and Owner, and delivered to the Architect for submittal to the Owner upon completion of the Work as a record of the Work as constructed.

§ 3.12 Shop Drawings, Product Data and Samples

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

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

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

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

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

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

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

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

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

§ 3.12.10 The Contractor shall not be required to provide professional services that constitute the practice of architecture or engineering unless such services are specifically required by the Contract Documents for a portion of the Work or unless the Contractor needs to provide such services in order to carry out the Contractor's responsibilities for construction means, methods, techniques, sequences, and procedures. The Contractor shall not be required to provide professional services in violation of applicable law.

§ 3.12.10.1 If professional design services or certifications by a design professional related to systems, materials, or equipment are specifically required of the Contractor by the Contract Documents, the Owner and the Architect will specify all performance and design criteria that such services must satisfy. The Contractor shall be entitled to rely upon the adequacy and accuracy of the performance and design criteria provided in the Contract Documents. The Contractor shall cause such services or certifications to be provided by an appropriately licensed design professional, whose signature and seal shall appear on all drawings, calculations, specifications, certifications, Shop Drawings, and other submittals prepared by such professional. Shop Drawings, and other submittals related to the Work, designed or certified by such professional, if prepared by others, shall bear such professional's written approval when submitted to the Architect. The Owner and the Architect shall be entitled to rely upon the adequacy and accuracy of the services, certifications, and approvals performed or provided by such design professionals, provided the Owner and Architect have specified to the Contractor the performance and design criteria that such services must satisfy. Pursuant to this Section 3.12.10, the Architect will review and approve or take other appropriate action on submittals only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents.

§ 3.12.10.2 If the Contract Documents require the Contractor's design professional to certify that the Work has been performed in accordance with the design criteria, the Contractor shall furnish such certifications to the Architect at the

time and in the form specified by the Architect.

§ 3.13 Use of Site
The Contractor shall confine operations at the site to areas permitted by applicable laws, statutes, ordinances, codes, rules and regulations, lawful orders of public authorities, and the Contract Documents and shall not unreasonably encumber the site with materials or equipment.

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

§ 3.14.2 The Contractor shall not damage or endanger a portion of the Work or fully or partially completed construction of the Owner or Separate Contractors by cutting, patching, or otherwise altering such construction, or by excavation. The Contractor shall not cut or otherwise alter construction by the Owner or a Separate Contractor except with written consent of the Owner and of the Separate Contractor. Consent shall not be unreasonably withheld. The Contractor shall not unreasonably withhold, from the Owner or a Separate Contractor, its consent to cutting or otherwise altering the Work.

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

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

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

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

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

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

ARTICLE 4 ARCHITECT

§ 4.1 General

§ 4.1.1 The Architect is the person or entity retained by the Owner pursuant to Section 2.3.2 and identified as such in the Agreement.

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

§ 4.2 Administration of the Contract

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

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

§ 4.2.3 On the basis of the site visits, the Architect will keep the Owner reasonably informed about the progress and quality of the portion of the Work completed, and promptly report to the Owner (1) known deviations from the Contract Documents, (2) known deviations from the most recent construction schedule submitted by the Contractor, and (3) defects and deficiencies observed in the Work. The Architect will not be responsible for the Contractor's failure to perform the Work in accordance with the requirements of the Contract Documents. The Architect will not have control over or charge of, and will not be responsible for acts or omissions of, the Contractor, Subcontractors, or their agents or employees, or any other persons or entities performing portions of the Work.

§ 4.2.4 Communications

The Owner and Contractor shall include the Architect in all communications that relate to or affect the Architect's services or professional responsibilities. The Owner shall promptly notify the Architect of the substance of any direct communications between the Owner and the Contractor otherwise relating to the Project. Communications by and with the Architect's consultants shall be through the Architect. Communications by and with Subcontractors and suppliers shall be through the Contractor. Communications by and with Separate Contractors shall be through the Owner. The Contract Documents may specify other communication protocols.

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

§ 4.2.6 The Architect has authority to reject Work that does not conform to the Contract Documents. Whenever the Architect considers it necessary or advisable, the Architect will have authority to require inspection or testing of the Work in accordance with Sections 13.4.2 and 13.4.3, whether or not the Work is fabricated, installed or completed. However, neither this authority of the Architect nor a decision made in good faith either to exercise or not to exercise such authority shall give rise to a duty or responsibility of the Architect to the Contractor, Subcontractors, suppliers, their agents or employees, or other persons or entities performing portions of the Work.

§ 4.2.7 The Architect will review and approve, or take other appropriate action upon, the Contractor's submittals such as Shop Drawings, Product Data, and Samples, but only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. The Architect's action will be taken in accordance with the submittal schedule approved by the Architect or, in the absence of an approved submittal schedule, with reasonable promptness while allowing sufficient time in the Architect's professional judgment to permit adequate review. Review of such submittals is not conducted for the purpose of determining the accuracy and completeness of other details such as dimensions and quantities, or for substantiating instructions for installation or performance of equipment or systems, all of which remain the responsibility of the Contractor as required by the Contract Documents. The Architect's review of the Contractor's submittals shall not relieve the Contractor of the obligations under

Sections 3.3, 3.5, and 3.12. The Architect's review shall not constitute approval of safety precautions or of any construction means, methods, techniques, sequences, or procedures. The Architect's approval of a specific item shall not indicate approval of an assembly of which the item is a component.

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

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

§ 4.2.10 If the Owner and Architect agree, the Architect will provide one or more Project representatives to assist in carrying out the Architect's responsibilities at the site. The Owner shall notify the Contractor of any change in the duties, responsibilities and limitations of authority of the Project representatives.

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

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

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

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

ARTICLE 5 SUBCONTRACTORS

§ 5.1 Definitions

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

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

§ 5.2 Award of Subcontracts and Other Contracts for Portions of the Work

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

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

§ 5.2.3 If the Owner or Architect has reasonable objection to a person or entity proposed by the Contractor, the

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

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

§ 5.3 Subcontractual Relations

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

§ 5.4 Contingent Assignment of Subcontracts

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

.1 assignment is effective only after termination of the Contract by the Owner for cause pursuant to Section 14.2 and only for those subcontract agreements that the Owner accepts by notifying the Subcontractor and Contractor; and

.2 assignment is subject to the prior rights of the surety, if any, obligated under bond relating to the Contract.

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

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

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

ARTICLE 6 CONSTRUCTION BY OWNER OR BY SEPARATE CONTRACTORS

§ 6.1 Owner's Right to Perform Construction and to Award Separate Contracts

§ 6.1.1 The term "Separate Contractor(s)" shall mean other contractors retained by the Owner under separate agreements. The Owner reserves the right to perform construction or operations related to the Project with the Owner's own forces, and with Separate Contractors retained under Conditions of the Contract substantially similar to those of this Contract, including those provisions of the Conditions of the Contract related to insurance and waiver of subrogation.

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

§ 6.1.3 The Owner shall provide for coordination of the activities of the Owner's own forces and of each Separate

Contractor with the Work of the Contractor, who shall cooperate with them. The Contractor shall participate with any Separate Contractors and the Owner in reviewing their construction schedules. The Contractor shall make any revisions to its construction schedule deemed necessary after a joint review and mutual agreement. The construction schedules shall then constitute the schedules to be used by the Contractor, Separate Contractors, and the Owner until subsequently revised.

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

§ 6.2 Mutual Responsibility

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

§ 6.2.2 If part of the Contractor's Work depends for proper execution or results upon construction or operations by the Owner or a Separate Contractor, the Contractor shall, prior to proceeding with that portion of the Work, promptly notify the Architect of apparent discrepancies or defects in the construction or operations by the Owner or Separate Contractor that would render it unsuitable for proper execution and results of the Contractor's Work. Failure of the Contractor to notify the Architect of apparent discrepancies or defects prior to proceeding with the Work shall constitute an acknowledgment that the Owner's or Separate Contractor's completed or partially completed construction is fit and proper to receive the Contractor's Work. The Contractor shall not be responsible for discrepancies or defects in the construction or operations by the Owner or Separate Contractor that are not apparent.

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

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

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

§ 6.3 Owner's Right to Clean Up

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

ARTICLE 7 CHANGES IN THE WORK

§ 7.1 General

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

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

§ 7.1.3 Changes in the Work shall be performed under applicable provisions of the Contract Documents. The Contractor shall proceed promptly with changes in the Work, unless otherwise provided in the Change Order, Construction Change Directive, or order for a minor change in the Work.

§ 7.2 Change Orders

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

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

§ 7.3 Construction Change Directives

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

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

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

.1 Mutual acceptance of a lump sum properly itemized and supported by sufficient substantiating data to permit evaluation;
.2 Unit prices stated in the Contract Documents or subsequently agreed upon;
.3 Cost to be determined in a manner agreed upon by the parties and a mutually acceptable fixed or percentage fee; or
.4 As provided in Section 7.3.4.

§ 7.3.4 If the Contractor does not respond promptly or disagrees with the method for adjustment in the Contract Sum, the Architect shall determine the adjustment on the basis of reasonable expenditures and savings of those performing the Work attributable to the change, including, in case of an increase in the Contract Sum, an amount for overhead and profit as set forth in the Agreement, or if no such amount is set forth in the Agreement, a reasonable amount. In such case, and also under Section 7.3.3.3, the Contractor shall keep and present, in such form as the Architect may prescribe, an itemized accounting together with appropriate supporting data. Unless otherwise provided in the Contract Documents, costs for the purposes of this Section 7.3.4 shall be limited to the following:

.1 Costs of labor, including applicable payroll taxes, fringe benefits required by agreement or custom, workers' compensation insurance, and other employee costs approved by the Architect;
.2 Costs of materials, supplies, and equipment, including cost of transportation, whether incorporated or consumed;
.3 Rental costs of machinery and equipment, exclusive of hand tools, whether rented from the Contractor or others;
.4 Costs of premiums for all bonds and insurance, permit fees, and sales, use, or similar taxes, directly related to the change; and
.5 Costs of supervision and field office personnel directly attributable to the change.

§ 7.3.5 If the Contractor disagrees with the adjustment in the Contract Time, the Contractor may make a Claim in accordance with applicable provisions of Article 15.

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

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

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

§ 7.3.9 Pending final determination of the total cost of a Construction Change Directive to the Owner, the Contractor may request payment for Work completed under the Construction Change Directive in Applications for Payment. The

Architect will make an interim determination for purposes of monthly certification for payment for those costs and certify for payment the amount that the Architect determines, in the Architect's professional judgment, to be reasonably justified. The Architect's interim determination of cost shall adjust the Contract Sum on the same basis as a Change Order, subject to the right of either party to disagree and assert a Claim in accordance with Article 15.

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

§ 7.4 Minor Changes in the Work

The Architect may order minor changes in the Work that are consistent with the intent of the Contract Documents and do not involve an adjustment in the Contract Sum or an extension of the Contract Time. The Architect's order for minor changes shall be in writing. If the Contractor believes that the proposed minor change in the Work will affect the Contract Sum or Contract Time, the Contractor shall notify the Architect and shall not proceed to implement the change in the Work. If the Contractor performs the Work set forth in the Architect's order for a minor change without prior notice to the Architect that such change will affect the Contract Sum or Contract Time, the Contractor waives any adjustment to the Contract Sum or extension of the Contract Time.

ARTICLE 8 TIME

§ 8.1 Definitions

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

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

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

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

§ 8.2 Progress and Completion

§ 8.2.1 Time limits stated in the Contract Documents are of the essence of the Contract. By executing the Agreement, the Contractor confirms that the Contract Time is a reasonable period for performing the Work.

§ 8.2.2 The Contractor shall not knowingly, except by agreement or instruction of the Owner in writing, commence the Work prior to the effective date of insurance required to be furnished by the Contractor and Owner.

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

§ 8.3 Delays and Extensions of Time

§ 8.3.1 If the Contractor is delayed at any time in the commencement or progress of the Work by (1) an act or neglect of the Owner or Architect, of an employee of either, or of a Separate Contractor; (2) by changes ordered in the Work; (3) by labor disputes, fire, unusual delay in deliveries, unavoidable casualties, adverse weather conditions documented in accordance with Section 15.1.6.2, or other causes beyond the Contractor's control; (4) by delay authorized by the Owner pending mediation and binding dispute resolution; or (5) by other causes that the Contractor asserts, and the Architect determines, justify delay, then the Contract Time shall be extended for such reasonable time as the Architect may determine.

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

§ 8.3.3 This Section 8.3 does not preclude recovery of damages for delay by either party under other provisions of the Contract Documents.

ARTICLE 9 PAYMENTS AND COMPLETION

§ 9.1 Contract Sum

§ 9.1.1 The Contract Sum is stated in the Agreement and, including authorized adjustments, is the total amount payable

by the Owner to the Contractor for performance of the Work under the Contract Documents.

§ 9.1.2 If unit prices are stated in the Contract Documents or subsequently agreed upon, and if quantities originally contemplated are materially changed so that application of such unit prices to the actual quantities causes substantial inequity to the Owner or Contractor, the applicable unit prices shall be equitably adjusted.

§ 9.2 Schedule of Values

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

§ 9.3 Applications for Payment

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

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

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

§ 9.3.2 Unless otherwise provided in the Contract Documents, payments shall be made on account of materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work. If approved in advance by the Owner, payment may similarly be made for materials and equipment suitably stored off the site at a location agreed upon in writing. Payment for materials and equipment stored on or off the site shall be conditioned upon compliance by the Contractor with procedures satisfactory to the Owner to establish the Owner's title to such materials and equipment or otherwise protect the Owner's interest, and shall include the costs of applicable insurance, storage, and transportation to the site, for such materials and equipment stored off the site.

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

§ 9.4 Certificates for Payment

§ 9.4.1 The Architect will, within seven days after receipt of the Contractor's Application for Payment, either (1) issue to the Owner a Certificate for Payment in the full amount of the Application for Payment, with a copy to the Contractor; or (2) issue to the Owner a Certificate for Payment for such amount as the Architect determines is properly due, and notify the Contractor and Owner of the Architect's reasons for withholding certification in part as provided in Section 9.5.1; or (3) withhold certification of the entire Application for Payment, and notify the Contractor and Owner of the Architect's reason for withholding certification in whole as provided in Section 9.5.1.

§ 9.4.2 The issuance of a Certificate for Payment will constitute a representation by the Architect to the Owner, based on the Architect's evaluation of the Work and the data in the Application for Payment, that, to the best of the Architect's knowledge, information, and belief, the Work has progressed to the point indicated, the quality of the Work is in accordance with the Contract Documents, and that the Contractor is entitled to payment in the amount certified. The

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

§ 9.5 Decisions to Withhold Certification

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

.1 defective Work not remedied;
.2 third party claims filed or reasonable evidence indicating probable filing of such claims, unless security acceptable to the Owner is provided by the Contractor;
.3 failure of the Contractor to make payments properly to Subcontractors or suppliers for labor, materials or equipment;
.4 reasonable evidence that the Work cannot be completed for the unpaid balance of the Contract Sum;
.5 damage to the Owner or a Separate Contractor;
.6 reasonable evidence that the Work will not be completed within the Contract Time, and that the unpaid balance would not be adequate to cover actual or liquidated damages for the anticipated delay; or
.7 repeated failure to carry out the Work in accordance with the Contract Documents.

§ 9.5.2 When either party disputes the Architect's decision regarding a Certificate for Payment under Section 9.5.1, in whole or in part, that party may submit a Claim in accordance with Article 15.

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

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

§ 9.6 Progress Payments

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

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

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

§ 9.6.4 The Owner has the right to request written evidence from the Contractor that the Contractor has properly paid Subcontractors and suppliers amounts paid by the Owner to the Contractor for subcontracted Work. If the Contractor fails to furnish such evidence within seven days, the Owner shall have the right to contact Subcontractors and suppliers

to ascertain whether they have been properly paid. Neither the Owner nor Architect shall have an obligation to pay, or to see to the payment of money to, a Subcontractor or supplier, except as may otherwise be required by law.

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

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

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

§ 9.6.8 Provided the Owner has fulfilled its payment obligations under the Contract Documents, the Contractor shall defend and indemnify the Owner from all loss, liability, damage or expense, including reasonable attorney's fees and litigation expenses, arising out of any lien claim or other claim for payment by any Subcontractor or supplier of any tier. Upon receipt of notice of a lien claim or other claim for payment, the Owner shall notify the Contractor. If approved by the applicable court, when required, the Contractor may substitute a surety bond for the property against which the lien or other claim for payment has been asserted.

§ 9.7 Failure of Payment

If the Architect does not issue a Certificate for Payment, through no fault of the Contractor, within seven days after receipt of the Contractor's Application for Payment, or if the Owner does not pay the Contractor within seven days after the date established in the Contract Documents, the amount certified by the Architect or awarded by binding dispute resolution, then the Contractor may, upon seven additional days' notice to the Owner and Architect, stop the Work until payment of the amount owing has been received. The Contract Time shall be extended appropriately and the Contract Sum shall be increased by the amount of the Contractor's reasonable costs of shutdown, delay and start-up, plus interest as provided for in the Contract Documents.

§ 9.8 Substantial Completion

§ 9.8.1 Substantial Completion is the stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use.

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

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

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

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

§ 9.9 Partial Occupancy or Use

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

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

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

§ 9.10 Final Completion and Final Payment

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

§ 9.10.2 Neither final payment nor any remaining retained percentage shall become due until the Contractor submits to the Architect (1) an affidavit that payrolls, bills for materials and equipment, and other indebtedness connected with the Work for which the Owner or the Owner's property might be responsible or encumbered (less amounts withheld by Owner) have been paid or otherwise satisfied, (2) a certificate evidencing that insurance required by the Contract Documents to remain in force after final payment is currently in effect, (3) a written statement that the Contractor knows of no reason that the insurance will not be renewable to cover the period required by the Contract Documents, (4) consent of surety, if any, to final payment, (5) documentation of any special warranties, such as manufacturers' warranties or specific Subcontractor warranties, and (6) if required by the Owner, other data establishing payment or satisfaction of obligations, such as receipts and releases and waivers of liens, claims, security interests, or encumbrances arising out of the Contract, to the extent and in such form as may be designated by the Owner. If a Subcontractor refuses to furnish a release or waiver required by the Owner, the Contractor may furnish a bond satisfactory to the Owner to indemnify the Owner against such lien, claim, security interest, or encumbrance. If a lien, claim, security interest, or encumbrance remains unsatisfied after payments are made, the Contractor shall refund to the Owner all money that the Owner may be compelled to pay in discharging the lien, claim, security interest, or encumbrance, including all costs and reasonable attorneys' fees.

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

Init.

/

constitute a waiver of Claims.

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

.1 liens, Claims, security interests, or encumbrances arising out of the Contract and unsettled;
.2 failure of the Work to comply with the requirements of the Contract Documents;
.3 terms of special warranties required by the Contract Documents; or
.4 audits performed by the Owner, if permitted by the Contract Documents, after final payment.

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

ARTICLE 10 PROTECTION OF PERSONS AND PROPERTY

§ 10.1 Safety Precautions and Programs

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

§ 10.2 Safety of Persons and Property

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

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

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

§ 10.2.3 The Contractor shall implement, erect, and maintain, as required by existing conditions and performance of the Contract, reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards; promulgating safety regulations; and notifying the owners and users of adjacent sites and utilities of the safeguards.

§ 10.2.4 When use or storage of explosives or other hazardous materials or equipment, or unusual methods are necessary for execution of the Work, the Contractor shall exercise utmost care and carry on such activities under supervision of properly qualified personnel.

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

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

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

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

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

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

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

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

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

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

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

ARTICLE 11 INSURANCE AND BONDS
§ 11.1 Contractor's Insurance and Bonds
§ 11.1.1 The Contractor shall purchase and maintain insurance of the types and limits of liability, containing the

endorsements, and subject to the terms and conditions, as described in the Agreement or elsewhere in the Contract Documents. The Contractor shall purchase and maintain the required insurance from an insurance company or insurance companies lawfully authorized to issue insurance in the jurisdiction where the Project is located. The Owner, Architect, and Architect's consultants shall be named as additional insureds under the Contractor's commercial general liability policy or as otherwise described in the Contract Documents.

§ 11.1.2 The Contractor shall provide surety bonds of the types, for such penal sums, and subject to such terms and conditions as required by the Contract Documents. The Contractor shall purchase and maintain the required bonds from a company or companies lawfully authorized to issue surety bonds in the jurisdiction where the Project is located.

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

§ 11.1.4 Notice of Cancellation or Expiration of Contractor's Required Insurance. Within three (3) business days of the date the Contractor becomes aware of an impending or actual cancellation or expiration of any insurance required by the Contract Documents, the Contractor shall provide notice to the Owner of such impending or actual cancellation or expiration. Upon receipt of notice from the Contractor, the Owner shall, unless the lapse in coverage arises from an act or omission of the Owner, have the right to stop the Work until the lapse in coverage has been cured by the procurement of replacement coverage by the Contractor. The furnishing of notice by the Contractor shall not relieve the Contractor of any contractual obligation to provide any required coverage.

§ 11.2 Owner's Insurance

§ 11.2.1 The Owner shall purchase and maintain insurance of the types and limits of liability, containing the endorsements, and subject to the terms and conditions, as described in the Agreement or elsewhere in the Contract Documents. The Owner shall purchase and maintain the required insurance from an insurance company or insurance companies lawfully authorized to issue insurance in the jurisdiction where the Project is located.

§ 11.2.2 Failure to Purchase Required Property Insurance. If the Owner fails to purchase and maintain the required property insurance, with all of the coverages and in the amounts described in the Agreement or elsewhere in the Contract Documents, the Owner shall inform the Contractor in writing prior to commencement of the Work. Upon receipt of notice from the Owner, the Contractor may delay commencement of the Work and may obtain insurance that will protect the interests of the Contractor, Subcontractors, and Sub-Subcontractors in the Work. When the failure to provide coverage has been cured or resolved, the Contract Sum and Contract Time shall be equitably adjusted. In the event the Owner fails to procure coverage, the Owner waives all rights against the Contractor, Subcontractors, and Sub-subcontractors to the extent the loss to the Owner would have been covered by the insurance to have been procured by the Owner. The cost of the insurance shall be charged to the Owner by a Change Order. If the Owner does not provide written notice, and the Contractor is damaged by the failure or neglect of the Owner to purchase or maintain the required insurance, the Owner shall reimburse the Contractor for all reasonable costs and damages attributable thereto.

§ 11.2.3 Notice of Cancellation or Expiration of Owner's Required Property Insurance. Within three (3) business days of the date the Owner becomes aware of an impending or actual cancellation or expiration of any property insurance required by the Contract Documents, the Owner shall provide notice to the Contractor of such impending or actual cancellation or expiration. Unless the lapse in coverage arises from an act or omission of the Contractor: (1) the Contractor, upon receipt of notice from the Owner, shall have the right to stop the Work until the lapse in coverage has been cured by the procurement of replacement coverage by either the Owner or the Contractor; (2) the Contract Time and Contract Sum shall be equitably adjusted; and (3) the Owner waives all rights against the Contractor, Subcontractors, and Sub-subcontractors to the extent any loss to the Owner would have been covered by the insurance had it not expired or been cancelled. If the Contractor purchases replacement coverage, the cost of the insurance shall be charged to the Owner by an appropriate Change Order. The furnishing of notice by the Owner shall not relieve the Owner of any contractual obligation to provide required insurance.

§ 11.3 Waivers of Subrogation

§ 11.3.1 The Owner and Contractor waive all rights against (1) each other and any of their subcontractors, sub-subcontractors, agents, and employees, each of the other; (2) the Architect and Architect's consultants; and (3) Separate Contractors, if any, and any of their subcontractors, sub-subcontractors, agents, and employees, for damages caused by fire, or other causes of loss, to the extent those losses are covered by property insurance required by the Agreement or other property insurance applicable to the Project, except such rights as they have to proceeds of such insurance. The

Owner or Contractor, as appropriate, shall require similar written waivers in favor of the individuals and entities identified above from the Architect, Architect's consultants, Separate Contractors, subcontractors, and sub-subcontractors. The policies of insurance purchased and maintained by each person or entity agreeing to waive claims pursuant to this section 11.3.1 shall not prohibit this waiver of subrogation. This waiver of subrogation shall be effective as to a person or entity (1) even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, (2) even though that person or entity did not pay the insurance premium directly or indirectly, or (3) whether or not the person or entity had an insurable interest in the damaged property.

§ 11.3.2 If during the Project construction period the Owner insures properties, real or personal or both, at or adjacent to the site by property insurance under policies separate from those insuring the Project, or if after final payment property insurance is to be provided on the completed Project through a policy or policies other than those insuring the Project during the construction period, to the extent permissible by such policies, the Owner waives all rights in accordance with the terms of Section 11.3.1 for damages caused by fire or other causes of loss covered by this separate property insurance.

§ 11.4 Loss of Use, Business Interruption, and Delay in Completion Insurance

The Owner, at the Owner's option, may purchase and maintain insurance that will protect the Owner against loss of use of the Owner's property, or the inability to conduct normal operations, due to fire or other causes of loss. The Owner waives all rights of action against the Contractor and Architect for loss of use of the Owner's property, due to fire or other hazards however caused.

§11.5 Adjustment and Settlement of Insured Loss

§ 11.5.1 A loss insured under the property insurance required by the Agreement shall be adjusted by the Owner as fiduciary and made payable to the Owner as fiduciary for the insureds, as their interests may appear, subject to requirements of any applicable mortgagee clause and of Section 11.5.2. The Owner shall pay the Architect and Contractor their just shares of insurance proceeds received by the Owner, and by appropriate agreements the Architect and Contractor shall make payments to their consultants and Subcontractors in similar manner.

§ 11.5.2 Prior to settlement of an insured loss, the Owner shall notify the Contractor of the terms of the proposed settlement as well as the proposed allocation of the insurance proceeds. The Contractor shall have 14 days from receipt of notice to object to the proposed settlement or allocation of the proceeds. If the Contractor does not object, the Owner shall settle the loss and the Contractor shall be bound by the settlement and allocation. Upon receipt, the Owner shall deposit the insurance proceeds in a separate account and make the appropriate distributions. Thereafter, if no other agreement is made or the Owner does not terminate the Contract for convenience, the Owner and Contractor shall execute a Change Order for reconstruction of the damaged or destroyed Work in the amount allocated for that purpose. If the Contractor timely objects to either the terms of the proposed settlement or the allocation of the proceeds, the Owner may proceed to settle the insured loss, and any dispute between the Owner and Contractor arising out of the settlement or allocation of the proceeds shall be resolved pursuant to Article 15. Pending resolution of any dispute, the Owner may issue a Construction Change Directive for the reconstruction of the damaged or destroyed Work.

ARTICLE 12 UNCOVERING AND CORRECTION OF WORK

§ 12.1 Uncovering of Work

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

§ 12.1.2 If a portion of the Work has been covered that the Architect has not specifically requested to examine prior to its being covered, the Architect may request to see such Work and it shall be uncovered by the Contractor. If such Work is in accordance with the Contract Documents, the Contractor shall be entitled to an equitable adjustment to the Contract Sum and Contract Time as may be appropriate. If such Work is not in accordance with the Contract Documents, the costs of uncovering the Work, and the cost of correction, shall be at the Contractor's expense.

§ 12.2 Correction of Work

§ 12.2.1 Before Substantial Completion

The Contractor shall promptly correct Work rejected by the Architect or failing to conform to the requirements of the Contract Documents, discovered before Substantial Completion and whether or not fabricated, installed or completed. Costs of correcting such rejected Work, including additional testing and inspections, the cost of uncovering and replacement, and compensation for the Architect's services and expenses made necessary thereby, shall be at the

Contractor's expense.

§ 12.2.2 After Substantial Completion

§ 12.2.2.1 In addition to the Contractor's obligations under Section 3.5, if, within one year after the date of Substantial Completion of the Work or designated portion thereof or after the date for commencement of warranties established under Section 9.9.1, or by terms of any applicable special warranty required by the Contract Documents, any of the Work is found to be not in accordance with the requirements of the Contract Documents, the Contractor shall correct it promptly after receipt of notice from the Owner to do so, unless the Owner has previously given the Contractor a written acceptance of such condition. The Owner shall give such notice promptly after discovery of the condition. During the one-year period for correction of Work, if the Owner fails to notify the Contractor and give the Contractor an opportunity to make the correction, the Owner waives the rights to require correction by the Contractor and to make a claim for breach of warranty. If the Contractor fails to correct nonconforming Work within a reasonable time during that period after receipt of notice from the Owner or Architect, the Owner may correct it in accordance with Section 2.5.

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

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

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

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

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

§ 12.3 Acceptance of Nonconforming Work

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

ARTICLE 13 MISCELLANEOUS PROVISIONS

§ 13.1 Governing Law

The Contract shall be governed by the law of the place where the Project is located, excluding that jurisdiction's choice of law rules. If the parties have selected arbitration as the method of binding dispute resolution, the Federal Arbitration Act shall govern Section 15.4.

§ 13.2 Successors and Assigns

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

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

§ 13.3 Rights and Remedies

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

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

§ 13.4 Tests and Inspections

§ 13.4.1 Tests, inspections, and approvals of portions of the Work shall be made as required by the Contract Documents and by applicable laws, statutes, ordinances, codes, rules, and regulations or lawful orders of public authorities. Unless otherwise provided, the Contractor shall make arrangements for such tests, inspections, and approvals with an independent testing laboratory or entity acceptable to the Owner, or with the appropriate public authority, and shall bear all related costs of tests, inspections, and approvals. The Contractor shall give the Architect timely notice of when and where tests and inspections are to be made so that the Architect may be present for such procedures. The Owner shall bear costs of tests, inspections, or approvals that do not become requirements until after bids are received or negotiations concluded. The Owner shall directly arrange and pay for tests, inspections, or approvals where building codes or applicable laws or regulations so require.

§ 13.4.2 If the Architect, Owner, or public authorities having jurisdiction determine that portions of the Work require additional testing, inspection, or approval not included under Section 13.4.1, the Architect will, upon written authorization from the Owner, instruct the Contractor to make arrangements for such additional testing, inspection, or approval, by an entity acceptable to the Owner, and the Contractor shall give timely notice to the Architect of when and where tests and inspections are to be made so that the Architect may be present for such procedures. Such costs, except as provided in Section 13.4.3, shall be at the Owner's expense.

§ 13.4.3 If procedures for testing, inspection, or approval under Sections 13.4.1 and 13.4.2 reveal failure of the portions of the Work to comply with requirements established by the Contract Documents, all costs made necessary by such failure, including those of repeated procedures and compensation for the Architect's services and expenses, shall be at the Contractor's expense.

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

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

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

§ 13.5 Interest

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

ARTICLE 14 TERMINATION OR SUSPENSION OF THE CONTRACT

§ 14.1 Termination by the Contractor

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

.1 Issuance of an order of a court or other public authority having jurisdiction that requires all Work to be stopped;

.2 An act of government, such as a declaration of national emergency, that requires all Work to be stopped;

.3 Because the Architect has not issued a Certificate for Payment and has not notified the Contractor of the reason for withholding certification as provided in Section 9.4.1, or because the Owner has not made payment on a Certificate for Payment within the time stated in the Contract Documents; or

.4 The Owner has failed to furnish to the Contractor reasonable evidence as required by Section 2.2.

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

§ 14.1.3 If one of the reasons described in Section 14.1.1 or 14.1.2 exists, the Contractor may, upon seven days' notice to the Owner and Architect, terminate the Contract and recover from the Owner payment for Work executed, as well as reasonable overhead and profit on Work not executed, and costs incurred by reason of such termination.

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

§ 14.2 Termination by the Owner for Cause

§ 14.2.1 The Owner may terminate the Contract if the Contractor

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

§ 14.2.2 When any of the reasons described in Section 14.2.1 exist, and upon certification by the Architect that sufficient cause exists to justify such action, the Owner may, without prejudice to any other rights or remedies of the Owner and after giving the Contractor and the Contractor's surety, if any, seven days' notice, terminate employment of the Contractor and may, subject to any prior rights of the surety:

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

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

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

§ 14.3 Suspension by the Owner for Convenience

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

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

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

§ 14.4 Termination by the Owner for Convenience

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

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

.1 cease operations as directed by the Owner in the notice;

.2 take actions necessary, or that the Owner may direct, for the protection and preservation of the Work; and

.3 except for Work directed to be performed prior to the effective date of termination stated in the notice, terminate all existing subcontracts and purchase orders and enter into no further subcontracts and purchase orders.

§ 14.4.3 In case of such termination for the Owner's convenience, the Owner shall pay the Contractor for Work properly executed; costs incurred by reason of the termination, including costs attributable to termination of Subcontracts; and the termination fee, if any, set forth in the Agreement.

ARTICLE 15 CLAIMS AND DISPUTES

§ 15.1 Claims

§ 15.1.1 Definition

A Claim is a demand or assertion by one of the parties seeking, as a matter of right, payment of money, a change in the Contract Time, or other relief with respect to the terms of the Contract. The term "Claim" also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract. The responsibility to substantiate Claims shall rest with the party making the Claim. This Section 15.1.1 does not require the Owner to file a Claim in order to impose liquidated damages in accordance with the Contract Documents.

§ 15.1.2 Time Limits on Claims

The Owner and Contractor shall commence all Claims and causes of action against the other and arising out of or related to the Contract, whether in contract, tort, breach of warranty or otherwise, in accordance with the requirements of the binding dispute resolution method selected in the Agreement and within the period specified by applicable law, but in any case not more than 10 years after the date of Substantial Completion of the Work. The Owner and Contractor waive all Claims and causes of action not commenced in accordance with this Section 15.1.2.

§ 15.1.3 Notice of Claims

§ 15.1.3.1 Claims by either the Owner or Contractor, where the condition giving rise to the Claim is first discovered prior to expiration of the period for correction of the Work set forth in Section 12.2.2, shall be initiated by notice to the other party and to the Initial Decision Maker with a copy sent to the Architect, if the Architect is not serving as the Initial Decision Maker. Claims by either party under this Section 15.1.3.1 shall be initiated within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later.

§ 15.1.3.2 Claims by either the Owner or Contractor, where the condition giving rise to the Claim is first discovered after expiration of the period for correction of the Work set forth in Section 12.2.2, shall be initiated by notice to the other party. In such event, no decision by the Initial Decision Maker is required.

§ 15.1.4 Continuing Contract Performance

§ 15.1.4.1 Pending final resolution of a Claim, except as otherwise agreed in writing or as provided in Section 9.7 and Article 14, the Contractor shall proceed diligently with performance of the Contract and the Owner shall continue to make payments in accordance with the Contract Documents.

§ 15.1.4.2 The Contract Sum and Contract Time shall be adjusted in accordance with the Initial Decision Maker's decision, subject to the right of either party to proceed in accordance with this Article 15. The Architect will issue Certificates for Payment in accordance with the decision of the Initial Decision Maker.

§ 15.1.5 Claims for Additional Cost

If the Contractor wishes to make a Claim for an increase in the Contract Sum, notice as provided in Section 15.1.3 shall be given before proceeding to execute the portion of the Work that is the subject of the Claim. Prior notice is not required for Claims relating to an emergency endangering life or property arising under Section 10.4.

§ 15.1.6 Claims for Additional Time

§ 15.1.6.1 If the Contractor wishes to make a Claim for an increase in the Contract Time, notice as provided in Section

15.1.3 shall be given. The Contractor's Claim shall include an estimate of cost and of probable effect of delay on progress of the Work. In the case of a continuing delay, only one Claim is necessary.

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

§ 15.1.7 Waiver of Claims for Consequential Damages

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

.1 damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and

.2 damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit, except anticipated profit arising directly from the Work.

This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination in accordance with Article 14. Nothing contained in this Section 15.1.7 shall be deemed to preclude assessment of liquidated damages, when applicable, in accordance with the requirements of the Contract Documents.

§ 15.2 Initial Decision

§ 15.2.1 Claims, excluding those where the condition giving rise to the Claim is first discovered after expiration of the period for correction of the Work set forth in Section 12.2.2 or arising under Sections 10.3, 10.4, and 11.5, shall be referred to the Initial Decision Maker for initial decision. The Architect will serve as the Initial Decision Maker, unless otherwise indicated in the Agreement. Except for those Claims excluded by this Section 15.2.1, an initial decision shall be required as a condition precedent to mediation of any Claim. If an initial decision has not been rendered within 30 days after the Claim has been referred to the Initial Decision Maker, the party asserting the Claim may demand mediation and binding dispute resolution without a decision having been rendered. Unless the Initial Decision Maker and all affected parties agree, the Initial Decision Maker will not decide disputes between the Contractor and persons or entities other than the Owner.

§ 15.2.2 The Initial Decision Maker will review Claims and within ten days of the receipt of a Claim take one or more of the following actions: (1) request additional supporting data from the claimant or a response with supporting data from the other party, (2) reject the Claim in whole or in part, (3) approve the Claim, (4) suggest a compromise, or (5) advise the parties that the Initial Decision Maker is unable to resolve the Claim if the Initial Decision Maker lacks sufficient information to evaluate the merits of the Claim or if the Initial Decision Maker concludes that, in the Initial Decision Maker's sole discretion, it would be inappropriate for the Initial Decision Maker to resolve the Claim.

§ 15.2.3 In evaluating Claims, the Initial Decision Maker may, but shall not be obligated to, consult with or seek information from either party or from persons with special knowledge or expertise who may assist the Initial Decision Maker in rendering a decision. The Initial Decision Maker may request the Owner to authorize retention of such persons at the Owner's expense.

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

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

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

Init.

/

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

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

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

§ 15.3 Mediation

§ 15.3.1 Claims, disputes, or other matters in controversy arising out of or related to the Contract, except those waived as provided for in Sections 9.10.4, 9.10.5, and 15.1.7, shall be subject to mediation as a condition precedent to binding dispute resolution.

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

§ 15.3.3 Either party may, within 30 days from the date that mediation has been concluded without resolution of the dispute or 60 days after mediation has been demanded without resolution of the dispute, demand in writing that the other party file for binding dispute resolution. If such a demand is made and the party receiving the demand fails to file for binding dispute resolution within 60 days after receipt thereof, then both parties waive their rights to binding dispute resolution proceedings with respect to the initial decision.

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

§ 15.4 Arbitration

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

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

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

§ 15.4.3 The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly

consented to by parties to the Agreement, shall be specifically enforceable under applicable law in any court having jurisdiction thereof.

§ 15.4.4 Consolidation or Joinder

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

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

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