

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

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

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

City of Sioux Falls  
224 West Ninth Street  
PO Box 7402  
Sioux Falls SD 57117-7402

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

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

Sioux Falls Municipal Center

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

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

Erin Bofenkamp  
City of Sioux Falls  
PO Box 7402  
Sioux Falls SD 57117-7402  
605-367-8622

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

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

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

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



**ELECTRONIC COPYING** of any portion of this AIA<sup>®</sup> Document to another electronic file is prohibited and constitutes a violation of copyright laws as set forth in the footer of this document.

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

The Owner and Construction Manager agree as follows.

**A. The Project**

The "Project" means the construction of an office building in Sioux Falls, SD, along with landscaping, a parking lot, and potential skywalk (the "Municipal Center"). The Project includes an office facility that is at a minimum three stories in height and approximately 15,000 square feet per level. The potential skywalk would provide parking access to the Eighth Street and Dakota Avenue parking ramp. The Project is intended to achieve a goal of LEED Certified. The Project will include the following building components: a) an open, flexible, and functional environment; b) incorporation of office design standards, which promote employee well-being and ergonomics; c) furniture, fixtures, and equipment as approved by the City; d) a multidepartment office building.

**B. Project Phases**

The Project consists of two phases, described in general as follows:

	Reference Guide
<b>Phase I:</b>	
Preconstruction Phase	§2.1
Site Analysis	§2.1
<b>Phase II:</b>	
Final Guaranteed Maximum Price	§2.2
Construction	§2.3

**C. Conditions**

Owner and Construction Manager recognize and agree Construction Manager performance of the Work (as defined below) for the Construction Phase (as further discussed in Section 2.3 below) is contingent upon the satisfaction of the following events ("Construction Conditions"): (i) the Owner's approval of the Guaranteed Maximum Price and Construction Manager's Fees; (ii) the securing of funds necessary to pay costs of the Project, including but not limited to the authorization and sale of sales tax bonds; (iii) Owner's decision, in its sole discretion, to proceed with the Work; (iv) the issuance to the Construction Manager by Owner of a Notice to Proceed with the Work.

The Owner and the Construction Manager recognize and agree the Construction Manager's performance of the Work is expressly subject to the right of the Owner to terminate the Construction Manager, with or without cause, and without incurring any costs or liabilities beyond those defined herein for Preconstruction Services as a consequence of the failure to satisfy the Construction Conditions, or for the Owner's own convenience, even though the basis for such termination is within Owner's control, and even if Owner still intends to proceed with balance of the project utilizing another Construction Manager. The express terms and provisions of such a termination without any fault of the Construction Manager set forth in Article 14 of A201-2007, as amended, are only applicable in the event such Work is terminated during the Construction Phase.

## TABLE OF ARTICLES

1	GENERAL PROVISIONS
2	CONSTRUCTION MANAGER'S RESPONSIBILITIES
3	OWNER'S RESPONSIBILITIES
4	COMPENSATION AND PAYMENTS FOR PRECONSTRUCTION PHASE SERVICES
5	COMPENSATION FOR CONSTRUCTION PHASE SERVICES
6	COST OF THE WORK FOR CONSTRUCTION PHASE
7	PAYMENTS FOR CONSTRUCTION PHASE SERVICES
8	INSURANCE AND BONDS
9	DISPUTE RESOLUTION
10	TERMINATION OR SUSPENSION
11	MISCELLANEOUS PROVISIONS
12	SCOPE OF THE AGREEMENT

### ARTICLE 1 GENERAL PROVISIONS

#### § 1.1 The Contract Documents

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

#### § 1.2 Relationship of the Parties

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

#### § 1.3 General Conditions

AIA Document A201™–2007, General Conditions of the Contract for Construction, as modified for this Project, shall apply to all Phases of the Project, which document is incorporated herein by reference. The term "Contractor" as used in A201–2007 shall mean the Construction Manager.

### ARTICLE 2 CONSTRUCTION MANAGER'S RESPONSIBILITIES

The Construction Manager's Preconstruction Phase responsibilities are set forth in Sections 2.1 and 2.2. The Construction Manager's Construction Phase responsibilities are set forth in Section 2.3. The Owner and

Construction Manager may agree, in consultation with the Architect, for the Construction Phase to commence prior to completion of the Preconstruction Phase, in which case, both phases will proceed concurrently. The Construction Manager shall identify a representative authorized to act on behalf of the Construction Manager with respect to the Project.

## § 2.1 Preconstruction Phase

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

§2.1.1.1 The Owner's program for the Project will be developed during The Preconstruction Phase of the Project in accordance with the provisions of this Section 2.1.1.1 (the "Program"). It is the intent of the parties to proceed with the development, design and construction of a new Municipal Center, consistent with the general parameters and requirements set forth in the Project description in Section A of this Agreement. The Owner, the Architect, and the Construction Manager will mutually agree upon the Program and complete **Exhibit A**. The Program will be prepared by the Architect in consultation with the Construction Manager and the Owner based upon the collective background and experience of the Architect and Construction Manager related to the projects of this type, nature, and size and upon interviews will and/or information received from appropriate representatives of the Owner. It is understood and acknowledged the Program attached hereto as **Exhibit A** identifies and delineates only the general design goals, space needs and functional requirements for the Project, with the more detailed and specific requirements for the Project to be incorporated into the Design Development and Construction Documents. Accordingly, all references in the Agreement to "Program" will include not only the general parameters and requirements specifically set forth in **Exhibit A**, but also the more detailed designs and requirements hereafter identified for the Project which are: (i) consistent with and reasonably inferable from the general parameters and requirements set forth in **Exhibit A**; and (ii) developed, designed, and constructed in accordance with current trends for projects of similar type, nature, and size. Based upon completion of the Phase I Site Analysis Study and the Construction Manager's review of the Program, the Construction Manager will confirm to the Owner by programmatic estimate that the Program appears to be consistent with Budget and Schedule. The Program will establish the general criteria and parameters for the Project and will be the information against which Schematic Design Documents, as developed, will be measured.

After the Design Development Documents have been approved by The Owner, the Design Development Documents will establish the criteria and parameters against which the Construction Documents will be measured. The Construction Manager must monitor The Work and Services being provided and must keep all parties apprised of the programmatic requirements, schedule timelines, and budget constraints, in terms of their conformance with the Program, Schedule, and Budget. If in its review of any Design Development Documents the Construction Manager discovers or suspects that there has or may have been a deviation from the then current Program requirements, the Construction Manager must promptly advise the Owner and Architect in writing. There will be no deviation from the Program as it is developed through the various design phases, without the prior written consent of the Owner.

§ 2.1.1.2 The Owner's Budget for the entire Project will be developed by the Owner, in consultation with the Architect and Construction Manager during the Preconstruction Phase and will be set forth in Exhibit B (the "Budget"). The Owner's budget for the Cost of the Work, including the Owner's Contingency, which is separate and distinct for the Construction Manager's contingency and not available for the Construction Manager's use, will be updated from time to time by the Owner in consultation with the Architect and the Construction Manager, with all revisions to be set forth in Exhibit B. The Owner, the Architect, and the Construction Manager will mutually agree upon the Guaranteed Maximum Price at the conclusion of the Design Development Phase as set forth in Section 2.2.1, which amounts will be incorporated into the Budget and set forth in Exhibit B. The Budget will periodically be reviewed and modified in consultation with the Construction Manager and Architect and in reliance upon information developed during the Phase I Site Analysis Study. The Construction Manager must, over the course of the Preconstruction and Construction Phases, update and provide greater detail with respect to the Budget, including developing specific estimates of cost allocation for the individual Bid Packages and other Work items, consistent with the overall limitations set forth in Exhibit B.

The Construction Manager's Preconstruction Services will begin with the Phase I Site Analysis Study and preparing a cost estimate of the Schematic design documents prepared by the Architect. The Construction Manager will be expected to actively participate in all design meetings, tours of comparable buildings, constructability reviews,

periodically provide cost estimates during the design process, and ultimately develop a Guaranteed Maximum Price after the Architect completes the Design Development Documents by April 2016. The Construction Manager will be expected to actively participate in all design meetings, tours of comparable buildings, constructability reviews, periodically provide cost estimates during the design process, and ultimately develop a Guaranteed Maximum Price after the Architect completes the Design Development Documents {insert date for GMP development}. More specifically, the Construction Manager will provide the following cost management services:

§ 2.1.1.2.1 Assist the Owner and the Architect to keep the Project within the fixed Project Budget.

§ 2.1.1.2.2 Provide recommendations to the Architect and Owner regarding materials, building components and systems and also evaluate building systems, components and materials for long-term performance, life cycle cost analysis, and economy.

§ 2.1.1.2.3 Provide cost control resources for the Owner and Architect during the Schematic Design, Design Development and Construction Document Phases, which includes reviewing and monitoring the development and preparation of documents to maintain the Project cost within the Project Budget. Construction Manager will notify the Architect and the Owner of potential cost issues during the development of the Drawings and Specifications that may have an impact on the Cost of the Work. The Construction Manager will work collaboratively with the Owner and the Architect to develop alternatives to keep the cost estimates within the fixed Project Budget.

§ 2.1.1.2.4 The Schematic Design Documents will consist of drawings and other documents including a site plan, if appropriate, preliminary building plans, sections and elevations, and the Architect's written narrative statement including a description of incomplete design elements; and may include some combination of study models, perspective sketches, or digital modeling. Upon completion of the Schematic Design Documents, provide formal review and comments on the Schematic Design Documents. Following this review, the Construction Manager will prepare a Schematic Phase estimate of the Cost of the Work to confirm that the Program and Budget for the Project are in alignment. In addition, the Construction Manager will provide value analysis/engineering ideas in conjunction with preparation of the estimate of the Cost of the Work.

§ 2.1.1.2.5 The Design Development Documents will consist of drawings, specifications, and other documents including plans, sections, elevations, typical construction detail 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 the Architect's written prose statement of incomplete design elements. At the beginning of the Design Development Phase, the Owner, Construction Manager, and Architect will mutually agree upon the drawings, specifications, and other documents to be included in the Design Development Documents and will identify these components in **Exhibit H**. Provide formal review and comments, and cost estimates, at Schematic Design, and 60% Design Development Documents including evaluating costs of alternatives.

§ 2.1.1.2.6 Provide a Guaranteed Maximum Price at the conclusion of the Design Development Phase. The Guaranteed Maximum Price will include pricing of alternates as defined by the Architect, which will be equal to approximately 5% of the Guaranteed Maximum Price.

§ 2.1.1.2.7 Provide a formal review and comments, and cost estimates, at 60% and 100% of the Architect's completion of the Construction Document.

§ 2.1.1.2.8 Anticipate multiple bid packages will be developed by the Architect. Construction Manager will develop a strategy for issuing bid packages that facilitates the completion of those packages. The purpose is to utilize this bidding package strategy to gain the most advantageous issuing of the Construction Documents in order to minimize the construction duration while allowing the bid packages to be completed efficiently.

§ 2.1.1.2.9 Consider, with the Architect and Owner, the early selection of the mechanical, electrical, and other critical Subcontractors to provide design assist services to the Architect. These Subcontractors will provide preconstruction support services during the Preconstruction Phase in addition to the Construction Manager's Services. If the Project does not proceed, these Subcontractors will not be entitled to any compensation.

The Construction Manager's cost management responsibilities during the Construction Phase will include the following:



§ 2.1.1.2.10 Implement effective cost management controls and tracking procedures to provide the Owner with the opportunity to make decisions as required to keep the Cost of the Work within the fixed Project Budget.

§ 2.1.1.2.11 Implement and maintain cost control methods with an "open book" sharing of cost information.

§ 2.1.1.2.12 Inform the Owner of pending cost issues within five (5) business days of identifying potential issues.

§ 2.1.1.2.13 Implement and maintain a current log of pending cost issues impacting the final cost of the Project and review with the Owner the log no less than monthly.

§ 2.1.1.2.14 Provide drawdown and cash flow projections for the Project during the Construction Phase and update as necessary.

§ 2.1.1.2.15 Work with the Owner and Architect to develop and implement a Change Order and Construction Change Directive management process for the Project. The Construction Manager will provide its updated cost estimates to the Architect for its review and comment and to the Owner for its approval. The Construction Manager must periodically review and analyze the updated cost estimates to determine whether they are consistent with the Budget, Program and Schedule. Although the Construction Manager does not guarantee the Budget or any cost estimates provided by it prior to the fixing of the Guaranteed Maximum Price, the Construction Manager must manage the Project consistent with the Budget, refine building cost estimates and cash flow analyses, and analyze the Work and Services to be provided to keep all parties involved with the Project apprised of the budgetary constraints and their compliance with the Budget. When necessary to maintain compliance with the Budget set forth in this Agreement, the Construction Manager must, and without increase to the Construction Manager's compensation, provide value engineering services, recommend possible bid alternates, identify and evaluate post award options or otherwise identify possible cost savings options for the Owner's approval.

§ 2.1.1.3 **The Owner's schedule** for the date of commencement of the Project, milestone dates for completion of the various portions of the Project and the Date of Substantial Completion of the Project, which is anticipated to be [insert date] will be developed by mutual agreement of the Owner, the Architect and the Construction Manager during the Preconstruction Phase, and will be set forth in **Exhibit C** (the "Schedule"). The design and construction of the Project must proceed so as to achieve Substantial Completion of the Project in accordance with the Owner's Schedule. From time to time upon request of the Owner, the Construction Manager must confirm to the Owner, to the best of the Construction Manager's knowledge and based upon the Construction Manager's diligent review of the Project, the Schedule is reasonable and, absent delays or events that justify an enlargement of the Contract Time, is attainable and is consistent with the Program and the Budget. The Construction Manager accepts all portions of the Schedule relating to its Work and Services, agrees to provide its Work and Services within the time limits established by the Schedule and will provide recommendations, decisions, and information in a timely manner, which are critical to maintaining compliance with the Schedule.

The Construction Manager must periodically analyze the services being provided by the Architect, and the Work and Services being provided by the Subcontractors and others involved with the Project, and keep them apprised of the current and future scheduling requirements for purposes of coordinating their Work and Services and their compliance with the Schedule.

The Construction Manager will periodically update and provide further detail on the Schedule and the Construction Manager will: (i) consult with the Architect as to the schedule for design services and coordinate and integrate the Architect's services with the Construction Manager's Services, the Owner's responsibilities, preconstruction activities, procurement, construction activities, work to be performed by others, the advertising, bidding, and awarding of the various bid packages and the critical milestone dates for the Schedule; (ii) identify critical and long lead-time items and implement procedures to coordinate the procurement of these items consistent with the Schedule; (iii) consider weather conditions, which reasonably can be anticipated from the National Weather Service ten-year weather events for Sioux Falls, SD, during the Construction Phase; (iv) evaluate, monitor, and manage, in accordance with this Agreement, the various design, bidding and construction activities and sequences to be performed for the proper execution of the Work; and (v) evaluate all systems, components, and materials for constructability, economy, long-term performance for use intended and Schedule impacts, and provide recommendations for preferred options consistent with the Budget and Schedule.

During the Construction Phase, the Construction Manager will provide the following meeting and scheduling Services:

§ 2.1.1.3.1 Conduct weekly job site meetings that include appropriate Subcontractors, the Owner's representatives, and the Architect's representative to review open issues, schedule Work and resolve pending or upcoming issues. The Construction Manager will prepare a written agenda in advance of each meeting. The Construction Manager will maintain a list of action items with identification of the responsible party and the due date for each item. The Construction Manager will distribute written meeting minutes and action items lists within 48 hours of each meeting.

§ 2.1.1.3.2 Provide monthly updates of actual progress versus the scheduled progress, identify any variances, and prepare a written action plan along with an updated schedule to maintain the Owner's schedule.

§ 2.1.1.3.3 Determine the adequacy of the Subcontractors' personnel and equipment and the availability of materials and supplies to meet the Schedule. The Construction Manager will report the status of these items no less than weekly in regular weekly coordination meetings.

§ 2.1.1.3.4 Prepare a short-term (3-to-4 week look-ahead) schedule on a weekly basis.

§ 2.1.1.3.5 Coordinate Owner-purchased and/or third party provided furniture, fixtures, and equipment with construction of the Project.

The Construction Manager must keep the Owner fully apprised of all updates and reviews of the Schedule, and there will be no change to or deviation from the Schedule that would extend Substantial Completion of the Project, without the Owner's prior written consent, except for circumstances beyond the control of the Construction Manager, and then only to the extent expressly provided for in this Agreement or the Contract Documents. While the Construction Manager will not be liable for any failure of the Architect, or the Owner's other contractors to perform their work or services in the conformance with the Schedule, if the Construction Manager observes or suspects that any of those parties have or may deviate from the Schedule, the Construction Manager must promptly advise the Owner and the involved party and must also indicate what action the Construction Manager recommends to avoid, correct, or minimize such deviation.

As typical with complex projects of similar scope, multiple bid packages and phased construction may be utilized. The use of multiple bid packages and phased construction does not constitute for this Project what is commonly known in the industry as a fast track schedule. The number of bid packages will be determined by the Construction Manager, the Owner, and the Architect. The parties agree (subject to the Owner's right to terminate) to promptly meet and use their best efforts to reach a mutual agreement regarding the Schedule including sequence, content, and order of Bid Packages.

**§ 2.1.1.4 Deviations from Project Parameters:**

If, during the course of the Project, the Construction Manager discovers or has reason to believe there has been or may be a deviation from the Program, Budget or Schedule, or if in the Construction Manager's opinion it is in the Owner's best interest to revise the Program, Budget, or Schedule, The Construction Manager must advise the Owner and the Architect, and must (i) endeavor to reestablish conformance with the Program, Budget or Schedule, including providing further services (but only those Services as set forth in Article 2 of this Agreement) by the Construction Manager without additional cost to the Owner if such deviation is caused by or the result of an error or omission of the Construction Manager or its Subcontractors; (ii) advise and direct any Subcontractors who have deviated from the Program, Budget or Schedule, without the Owner's approval, to take such action at their own expense as is required to reestablish compliance with the Project parameters and, should they fail to do so, so advise the Owner and Architect of the remedial actions to be taken against the person or entity responsible for such deviation; (iii) consult with the Owner, the Architect, and others involved with the Project to identify and recommend, as necessary, other options available to avoid or minimize any adverse impact to the Program, Budget, or Schedule and implement such options as approved by the Owner; and (iv) advise the Owner and the Architect when the Construction Manager believes revisions to the Program, Budget, and Schedule are necessary, or are in the best interest of the Project and the Owner, including: the facts and circumstances on which the Construction Manager's belief is based; a description of the revisions being recommended; and identification of other available

options to avoid or minimize the impact of such revisions. Thereafter, in conjunction with the Architect and others involved with the Project, the Construction Manager must implement such revisions to extent approved by the Owner.

§2.1.1.5 The Owner desires to achieve at a minimum a LEED certified level for the Project. The Construction Manager, in coordination with the Architect, will develop efficiency strategies and analyze the benefits and costs of achieving LEED certification. The Construction Manager will report to the Owner the strategies, benefits, and costs for the Owner's approval as to whether the Project will be LEED certified and the level to be achieved.

§ 2.1.1.6 The Construction Manager will: (i) assist the Owner in working with various governing authorities as requested; (ii) work with the Owner and Architect to develop a project communication system that is effective for the participants and meets the Schedule requirements of the Project; and (iii) work cooperatively with the Owner and Architect to develop and implement a work plan for meeting the Project's energy efficiency goals.

§2.1.1.7 The Owner may request the Construction Manager complete certain minor construction activities, such as installing a site fence to secure the Project site, site grading, filling in the cavity at the location of the demolished pool, or providing engineered fill, during the Preconstruction Phase. The Work to be performed by the Construction Manager, and the Cost of the Work, will be identified by the Owner and approved by the Architect, and set forth in an amendment to this Agreement. Notwithstanding any other provision of the Contract Documents, the performance of Work by the Construction Manager during the Preconstruction Phase will not serve as a waiver of the Construction Conditions, the Owner's right to utilize a different construction manager for the Construction Phase, or to terminate this Agreement.

#### **§ 2.1.2 Consultation**

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

#### **§ 2.1.3 Project Schedule**

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

#### **§ 2.1.4 Phased Construction**

The Construction Manager shall provide recommendations with regard to accelerated or fast-track scheduling, procurement, or phased construction. The Construction Manager shall take into consideration cost reductions, cost information, constructability, provisions for temporary facilities and procurement, and construction scheduling issues.

#### **§ 2.1.5 Preliminary Cost Estimates**

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



provide cost evaluations of those alternative materials and systems. The preliminary cost estimate will include other soft costs to allow for a proper understanding of the Owner's total Project cost.

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

### **§ 2.1.6 Subcontractors and Suppliers**

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

§ 2.1.6.1 The Construction Manager will work with the Owner and Architect to interview and select mechanical, electrical, and other critical Subcontractors through a process that the Construction Manager, Architect, and Owner, mutually deem appropriate utilizing a competitive process based on the principles of "Best Value" and agreed to by the Owner. These Subcontractors will provide preconstruction support services during the design phases in addition to the Construction Manager's services. These selected Subcontractors will have the opportunity to submit a bid for the appropriate trade packages with other Subcontractors during the construction bidding phase, and any costs associated with this preconstruction services may be included as a part of their bid. If the Project does not proceed, these Subcontractors will not be entitled to any compensation.

§ 2.1.6.2 The Construction Manager will complete a quality/coordination/constructability review of each bid package prior to issuing bid documents to Subcontractors.

§ 2.1.6.3 The Construction Manager will manage the bidding process, evaluation proposals, and interview Subcontractors along with the Architect and Owner. The Construction Manager, the Architect and the Owner will utilize, by mutual agreement, any of the following methods for awarding contracts to Subcontractors for portions of the Work: competitive bid; best value; and negotiated terms. For those subcontracts to be awarded on a competitive bid or best value basis, the Construction Manager will obtain a minimum of three (3) competitive bids for each subtrade category, unless otherwise authorized by the Owner, and will interview at a minimum two (2) bidders with the Architect and Owner. The Construction Manager will provide to the Owner a written award recommendation.

§ 2.1.6.4 If the Construction Manager desires to self-perform portions of the Work, the Construction Manager must follow the competitive bid requirements of SDCL Chap. 5-18 with respect to those portions of the Work.

### **§ 2.1.7 Procurement Schedule**

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

### **§ 2.1.8 Extent of Responsibility**

The Construction Manager shall exercise reasonable care in preparing schedules and estimates. The Construction Manager, however, does not warrant or guarantee estimates and schedules except as may be included as part of the Guaranteed Maximum Price. The recommendations and advice of the Construction Manager concerning design alternatives or value analysis will be subject to the review and approval of Owner's professional consultants, provided, however, Owner and its professional consultants are relying on the Construction Manager's extensive experience, knowledge, and expertise in similar projects to provide factual and valid recommendations and advice the Owner can rely upon to make such decisions. The ultimate responsibility for the performance or aesthetic characteristics inherent in the design will remain with the Architect. The Construction Manager is not required to ascertain that the Drawings and Specifications are in accordance with applicable laws, statutes, ordinances, codes,

rules and regulations, or lawful orders of public authorities, but the Construction Manager shall promptly report to the Architect and Owner any nonconformity discovered by or made known to the Construction Manager as a request for information in such form as the Architect may require.

### § 2.1.9 Notices and Compliance with Laws

The Construction Manager shall comply with applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities applicable to its performance under this Contract, and with equal employment opportunity programs, and other programs as may be required by governmental and quasi governmental authorities for inclusion in the Contract Documents.

### § 2.2 Guaranteed Maximum Price Proposal and Contract Time

§ 2.2.1 Upon completion of the Design Development Documents and in consultation with the Architect, the Construction Manager shall prepare a Guaranteed Maximum Price proposal for the Owner's review and acceptance. The Guaranteed Maximum Price in the proposal shall be the sum of the Construction Manager's estimate of the Cost of the Work, including contingencies described in Section 2.2.4, and the Construction Manager's Fee. The Construction Manager's Fee will be fixed at the time the Guaranteed Maximum Price is fixed.

2.2.4 the Construction Managers Fee, insurance costs and Builder's Risk costs.

§ 2.2.1.1 At end of schematic design and 60% and 100% completion of the Design Development Documents the Architect will submit to the Owner and the Construction Manager the plans and specifications for the Guaranteed Maximum Price package. The package will include the Design Development Documents, and a written narrative (prose) statement which includes the Architect's description of incomplete design elements of the Design Development Documents. The Construction Manager must meet with the Owner and the Architect to review the Design Development Documents.

§ 2.2.1.2 Upon receipt of the Construction Manager's estimate of the Guaranteed Maximum Price at the conclusion of the Design Development Phase, the Architect will make its recommendations to the Owner and request the Owner's approval of the Design Development Documents and Guaranteed Maximum Price. If revisions to the Guaranteed Maximum Price package are required to comply with the Owner's Budget, including the Cost of the Work, the Construction Manager must make the required revisions without additional fee or expense to the Owner until the Guaranteed Maximum Price complies with the Owner's Budget, including the Cost of the Work.

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

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

- .1 A list of the Drawings and Specifications, including all Addenda thereto, and the Conditions of the Contract;
- .2 A list of the clarifications and assumptions made by the Construction Manager in the preparation of the Guaranteed Maximum Price proposal, including assumptions under Section 2.2.2, to supplement the information provided by the Owner and contained in the Drawings and Specifications;
- .3 A statement of the proposed Guaranteed Maximum Price, including a statement of the estimated Cost of the Work organized by trade categories or systems, allowances, contingency, and the Construction Manager's Fee;
- .4 The anticipated date of Substantial Completion upon which the proposed Guaranteed Maximum Price is based and the date by which the Notice to Proceed must be issued by the Owner, and a schedule of the Construction Document issuance dates developed with and agreed to by the Architect upon which the Date of Substantial Completion is based; and.5 A date by which the Owner must accept the Guaranteed Maximum Price.

**§ 2.2.4** In preparing the Construction Manager's Guaranteed Maximum Price proposal, the Construction Manager shall include its contingency for the Construction Manager's exclusive use to cover those costs considered reimbursable as the Cost of the Work but not included in a Change Order.

§ 2.2.4.1 The Construction Manager's contingency will be agreed upon by the parties as part of the Guaranteed Maximum Price. The Construction Manager's contingency is separate from the Owner's contingency. The Owner and Construction Manager acknowledge the cost estimating process is not exact, and therefore, the Construction Manager's contingency is included to adjust the estimate for quantity and price estimate inaccuracies, and other eventualities, which have not been taken into precise account in the establishment of the Guaranteed Maximum Price, including but not limited to (a) unfavorable bidding from trade contractors due to market conditions, price increases, lack of competition, and other variables; (b) default in payment or performance by a Subcontractor or supplier not reimbursed by Subcontractor's payment and performance bond; (c) costs of corrective work not provided for elsewhere; and (d) other conditions, which result in an increase in the Cost of the Work, without increasing the Guaranteed Maximum Price. The Construction Manager's contingency will not be used for changes in the Work due to effect of unsuitable soil conditions, or negligent acts, errors or omissions by the Construction Manager.

§ 2.2.4.2 The Construction Manager's contingency will be included in early estimates and a final agreed upon dollar amount as follows:

2.2.4.2.1. A ten percent (10%) contingency upon completion of the Program and upon completion of the Schematic Design documents.

2.2.4.2.2 A five percent (5%) contingency upon completion of the Design Development Documents to be included in the Guaranteed Maximum Price.

2.2.4.2.3 A two and one one-half percent (2.5%) contingency upon completion of the Construction Documents and acceptance of the Subcontractors' bids for all Bid Packages.

§ 2.2.4.3 The Guaranteed Maximum Price, when determined, is to be an adequate representation of the cost to complete the Work as described or reasonably inferred from the Contract Documents referenced within this Agreement. The Construction Manager acknowledges the Contract Documents referenced herein may not be 100% complete and the Construction Manager's contingency will be included within the Guaranteed Maximum Price sufficient to fully complete the scope of the Work as described or reasonably inferred from the Contract Documents. All such contingencies will be clearly identified and defined in the Guaranteed Maximum Price clarifications and assumptions as defined in Section 2.2.3.

§ 2.2.4.4 Should the sum of the Cost of Work and the Construction Manager's Fee be less than the Guaranteed Maximum Price, One Hundred Percent (100%) of the savings will be distributed to the Owner.

§ 2.2.4.5 Any allowance existing at the time the Guaranteed Maximum Price is established will be converted to the Cost of the Work within the Guaranteed Maximum Price after the Work is awarded to a Subcontractor or the Construction Manager after the respective bid therefore is approved in writing by Owner. After all portions of the Work have been bid to Subcontractors, or to the Construction Manager as approved by Owner in writing, the remaining allowances, if any, will be a Change Order reducing or increasing the Guaranteed Maximum Price. Any remaining allowance can only be combined into another allowance upon Owner's written approval. The parties agree to use all reasonable efforts to attempt to minimize allowances included within the Guaranteed Maximum Price.

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

**§ 2.2.6** If the Owner notifies the Construction Manager that the Owner has accepted the Guaranteed Maximum Price proposal in writing before the date specified in the Guaranteed Maximum Price proposal, the Guaranteed Maximum Price proposal shall be deemed effective without further acceptance from the Construction Manager. Following

acceptance of a Guaranteed Maximum Price, the Owner and Construction Manager shall execute the Guaranteed Maximum Price Amendment amending this Agreement, a copy of which the Owner shall provide to the Architect. The Guaranteed Maximum Price Amendment shall set forth the agreed upon Guaranteed Maximum Price with the information, clarifications, and assumptions upon which it is based.

§ 2.2.7 The Construction Manager shall not incur any cost to be reimbursed as part of the Cost of the Work prior to the commencement of the Construction Phase, unless the Owner provides prior written authorization for such costs as set forth in Section 2.1.1.7.

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

§ 2.2.9 The Construction Manager shall include in the Guaranteed Maximum Price all excise, sales, consumer, use and similar taxes for the Work provided by the Construction Manager that are legally enacted, whether or not yet effective, at the time the Guaranteed Maximum Price Amendment is executed.

§ 2.2.10 The Cost of the Work reimbursable to the Construction Manager will be limited only by the Guaranteed Maximum Price in the aggregate and not by estimates for the various categories or line items of Work comprising the Guaranteed Maximum Price, subject to the requirement that any portion of the trade Work the Construction Manager self-performs is a fixed amount and not subject to the provisions of Section 2.2.10.

§ 2.2.11 Any changes to the scope of the Work as measured from the written statement of the basis of The Guaranteed Maximum Price documents submitted pursuant to § 2.2.3 as accepted by Owner will be cause for adjustment in the Guaranteed Maximum Price and Date of Substantial Completion, as applicable. Construction Manager acknowledges and agrees that upon approval and acceptance of the Guaranteed Maximum Price by Owner, Construction Manager will guarantee the Cost of the Work will not exceed the Guaranteed Maximum Price for the agreed-upon scope of Work set forth in the Contract Documents, except as expressly provided herein. If the Cost of the Work exceeds the Guaranteed Maximum Price for any reason, except as otherwise provided in this Agreement, Construction Manager will be responsible for amounts in excess thereof required to complete such Work.

## § 2.3 Construction Phase

### § 2.3.1 General

§ 2.3.1.1 For purposes of Section 8.1.2 of A201–2007, and except for Work authorized during the Preconstruction Phase pursuant to Section 2.1.1.7, the date of commencement of the Work shall mean the earlier of:

.1 The Owner's acceptance of the Construction Manager's Guaranteed Maximum Price and Fee proposal and issuance of a Notice to Proceed, or

.2 The Owner's first authorization to the Construction Manager to:

- a. Award a subcontract, or
- b. Undertake construction Work with the Construction Manager's own forces, or
- c. Issue a purchase order for materials or equipment required for the Work.

§ 2.3.1.2 The Construction Phase shall commence upon the Owner's acceptance of the Construction Manager's Guaranteed Maximum Price and Fee proposal and the satisfaction of the Construction Conditions.

### § 2.3.2 Administration

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



§ 2.3.2.2 If the Guaranteed Maximum Price has been established and when a specific bidder (1) is recommended to the Owner by the Construction Manager, (2) is qualified to perform that portion of the Work, and (3) has submitted a bid that conforms to the requirements of the Contract Documents without reservations or exceptions, but the Owner requires that another bid be accepted, then the Construction Manager may require that a Change Order be issued to adjust the Contract Time and the Guaranteed Maximum Price by the difference between the bid of the person or entity recommended to the Owner by the Construction Manager and the amount and time requirement of the subcontract or other agreement actually signed with the person or entity designated by the Owner.

§ 2.3.2.3 Subcontracts or other agreements shall conform to the applicable payment provisions of this Agreement, and shall not be awarded on the basis of cost plus a fee without the prior consent of the Owner. If the Subcontract is awarded on a cost plus a fee basis, the Construction Manager shall provide in the Subcontract for the Owner to receive the same audit rights with regard to the Subcontractor as the Owner receives with regard to the Construction Manager in Section 6.11 with regard to the Construction Manager in Section 6.11 and 7.2 below.

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

§ 2.3.2.5 The Construction Manager shall schedule and conduct meetings to discuss such matters as procedures, progress, coordination, scheduling, and status of the Work. The Construction Manager shall prepare and promptly distribute minutes to the Owner and Architect as soon as is reasonably possible following the meeting, but in all circumstances within 48 hours of the meeting, unless otherwise agreed to by Owner.

§ 2.3.2.6 Upon the execution of the Guaranteed Maximum Price Amendment, the Construction Manager shall prepare and submit to the Owner and Architect a construction schedule for the Work and submittal schedule in accordance with Section 3.10 of A201–2007, as amended, and Section 2.1.1.3 above.

§ 2.3.2.7 The Construction Manager shall record the progress of the Project. On a monthly basis, or otherwise as agreed to by the Owner, the Construction Manager shall submit written progress reports to the Owner and Architect, showing percentages of completion and other information required by the Owner including Construction Manager's contingency status, subcontract, and materials buy-out status versus Guaranteed Maximum Price schedule of values, list of identified and potential issues affecting construction progress, or having the potential to result in a cost or Schedule claim, action item list and responsibility for resolution for action items affecting the Work or its progress, and Schedule versus actual progress analysis including detailed action plans to correct any negative schedule deviations.. The Construction Manager shall also keep, and make available to the Owner and Architect, a contemporaneous daily log of weather, portions of the Work in progress, number of workers on site, identification of equipment on site, problems that might affect progress of the work, accidents, injuries, and other information required by the Owner.

§ 2.3.2.8 The Construction Manager shall develop a system of cost control for the Work, including regular monitoring of actual costs for activities in progress and estimates for uncompleted tasks and proposed changes. The Construction Manager shall identify variances between actual and estimated costs and report the variances to the Owner and Architect and shall provide this information in its monthly reports to the Owner and Architect, in accordance with Section 2.3.2.7 above. The Construction Manager will revise and refine the initially approved Project Budget, incorporate approved changes as they occur, and develop cash flow reports and forecasts as the Owner may require. The Construction Manager will also identify variances between actual and budgeted or estimated costs and advise Owner and Architect whenever the projected cost exceeds budgets or estimates. The Construction Manager can reallocate estimated costs among trade categories, except such costs cannot be reallocated among self-performed work, contingencies, Construction Manager General conditions, other items which by their nature are fixed costs, and the Construction Manager's Fee.

§ 2.3.2.9 The Construction Manager will keep the Owner informed on a timely basis of any event, circumstance, or issue that may be cause for a cost or Schedule claim from the Construction Manager, or any Subcontractor or supplier under contract with the Construction Manager. Written notification to the Owner of any potential cost or Schedule claim must be provided within seven (7) days of the Construction Manger's first knowledge of any potential claim. Detailed cost or Schedule claims must be provided within twenty-one (21) days of the



Construction Manager's first knowledge of any potential claim. Failure to notify Owner within the seven (7) day period, or failure to provide detailed cost information within the twenty-one (21) day period will be cause for the Owner to deny any such claim. Construction Manager will include this notice requirement in its agreements with all Subcontractors and suppliers. This requirement is in addition to the reporting requirements in Sec. 2.3.2.7.

#### § 2.4 Professional Services

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

#### § 2.5 Hazardous Materials

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

#### § 2.6 Electronic Document Library and Warranty Management

During the one-year period for correction of Work identified under Section 12.2.2 of A201-2007, as amended, Construction Manager will provide online a facility document library and warranty management service through a web-based computerized maintenance management system the InfoCentre™<sup>[LK1]</sup> system. This electronic library will include as-built drawings, operations and maintenance manuals, catalog and important equipment data, as well as, other facility documents (e.g. permits, inspection reports, certifications, security procedures, etc.). Owner will receive access to the electronic document library system upon execution of an access waiver. Construction Manager will have no obligation to maintain this electronic library after the one-year period for correction of warranty items, unless Owner executes a contract for ongoing services. If Owner does not elect to contract for ongoing electronic document library and warranty management services, Construction Manager will provide to Owner, at no cost to the Owner, a record copy of the facility document library and warranty document electronic library in the quantity, form and format that Owner elects.

#### § 2.7 Project Management Team

The Construction Manager will provide competent, experienced full-time staff, including an experienced construction field superintendent and project management team to coordinate the Work, maintain the progress of the Subcontractors, coordinate with the Owner's and Architect's ongoing activities and operations, and provide overall direction for the Project during the Construction Phase. The Construction Manager will establish on-site organization and levels of authority to carry out the overall plans of the construction team. The Construction Manager's staff must: (i) demonstrate high levels of effective, proactive project leadership; and (ii) work cooperatively and constructively with the Owner's and Architect's members and representatives to foster positive relationships that support positive outcomes for all persons and the Project.

#### § 2.8 Construction Manager's Personnel Assigned

The Owner reserves the right to approve the superintendent, the project manager, and other key management and supervisory personnel of the Construction Manager who will provide the Construction Manager's Services for the Project. Attached hereto as Exhibit D is (a) a listing of key personnel assigned to each phase of the project; (b) a description of roles/responsibilities for such individuals; and (c) the anticipated commitment to be expended by such individuals in performing the Construction Manager's Services required for each such Phase. The Construction Manager further represents and warrants it will commit such personnel for the duration of the Project necessary to complete the Construction Manager's Services under this Agreement, in terms of expertise and fulfillment of its duties and obligations under this Agreement in accordance with the Schedule. No substitutions of any principal or key management and supervisory personnel may be made by the Construction Manager without the Owner's prior written consent unless the principal or key personnel are no longer employed by the Construction Manager. In the event any principal or key management and supervisory personnel are no longer employed by the Construction Manager, the Construction Manager must notify Owner within five (5) days after learning of such event. The Construction Manager must use its best efforts to provide a permanent replacement within thirty (30) days after such event. Owner will have the right to approve the proposed replacement in advance of his or her assignment to the Project. Owner may require the Construction Manager to remove from the Project any personnel whose performance under this Agreement is not satisfactory in Owner's sole judgment.

#### § 2.9 Testing/Inspection.

All testing and independent inspection services required to confirm the quality of the Work and Materials, and their conformance with the Contract Documents will be secured and paid for by Owner. The Construction Manager will cooperate and coordinate with the testing and inspection service agencies. The Construction Manager will be

responsible for the cost of additional testing and inspection services, established at GMP, due to failed tests and inspections.

§ 2.10 Project Safety Plan.

The Construction Manager will develop, implement, and maintain a Site-Specific Project Safety Plan.

### ARTICLE 3 OWNER'S RESPONSIBILITIES

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

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

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

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

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

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

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

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

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

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

### § 3.2 Owner's Designated Representative

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

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

### § 3.3 Architect

The Owner shall retain an Architect to provide services, duties, and responsibilities as described in AIA Document B101™-2007, Standard Form of Agreement Between Owner and Architect, as modified for this Project, including any additional services requested by the Construction Manager that are necessary for the Preconstruction and Construction Phase services under this Agreement. The Owner shall provide the Construction Manager a copy of the executed Agreement between the Owner and the Architect, and any further modifications to the Agreement.

## ARTICLE 4 COMPENSATION AND PAYMENTS FOR PRECONSTRUCTION PHASE SERVICES

### § 4.1 Compensation

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

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

Preconstruction Services. Stipulated Sum \$ . Preconstruction Services compensation is not part of the Construction Manager's Fee and will be paid for by Owner outside of the Guaranteed Maximum Price.

§ 4.1.3 If the Preconstruction Phase services covered by this Agreement have not been completed within twelve (12) months of the date of this Agreement, through no fault of the Construction Manager, the Construction Manager's compensation for Preconstruction Phase services shall be equitably adjusted.

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

### § 4.2 Payments

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

§ 4.2.2 Payments are due by electronic funds transfer and payable upon presentation and receipt of the Construction Manager's invoice. Amounts unpaid thirty (30) days after the invoice receipt and approval by Architect and the Owner's designated representative 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 Owner. *(Insert rate of monthly or annual interest agreed upon.)*

Two % (2) percent over prime rate annually as published by Wells Fargo N A

## ARTICLE 5 COMPENSATION FOR CONSTRUCTION PHASE SERVICES

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

§ 5.1.1 The Construction Manager's Fee:

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

A Fee equal to \_\_\_\_\_ percent (%) of the Cost of the Work, including the Construction Manager's contingency, the Construction Manager's general conditions, and all Work the Construction Manager directly procures and manages as stated in the Guaranteed Maximum Price. Construction Manager's coordination of work procured directly by Owner and assigned to the Construction Manager will be subject to the Construction Manager's Fee. If Construction Manager's Services for Work procured and paid for directly by Owner are only coordination services for the Owner-procured work and the Construction Manager's Work, Owner and Construction Manager will mutually agree upon the scope of the Construction Manager's additional Services, the compensation amount and the basis for these Services, if any, but said compensation will not exceed a fee equal to the percentage fee set forth above in this Section 5.1.1.

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

For net additive changes to the Cost of the Work in excess of five percent (5%) of the Guaranteed Maximum Price, the Construction Manager will receive a fee equal to the percentage fee set forth above in Section 5.1.1. The Construction Manager's Fee will not be reduced by reason of Change Orders reducing the Cost of the Work. Deductive Change Orders will not apply to the five percent (5%) buffer calculation.

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

Under no circumstances will the compensation to Subcontractors in connection with Change Orders and Construction Change Directives be more than the Subcontractor's costs set forth in Article 7.3.7 of AIA Document A201-2007, as amended, plus no more than ten percent (10%) as full compensation to the Subcontractor for overhead and profit.

**§ 5.1.4** Rental rates for Construction Manager-owned equipment shall not exceed \_\_\_\_\_ the Construction Manager's published Equipment Rental Rates attached to this Agreement as Exhibit E, provided, however, the cumulative rental amount may not exceed the purchase price for the specific items. Rental rates for non-Construction Manager-owned equipment will be subject to Owner's approval.

**§ 5.1.5** Unit prices, if any:

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

Intentionally Omitted.

**§ 5.1.6** The Construction Manager's general conditions will include mobilization and set up, job site office equipment, field documents/duplication, job site superintendent (with vehicle), on-site field engineer (with vehicle), safety director field visits, project manager field visits, field office trailer (CM), field phones, cellular and internet. A fixed dollar amount of \$[insert amount] will be included for the general condition s(the "General Conditions") as part of the Cost of the Work at such time as the Guaranteed Maximum Price is determined. The General Conditions Amount is based on the assumption the Owner will issue the Notice to Proceed for an {Insert Month Year} construction start time frame and the Schedule will include a {insert # a months to complete project} construction schedule to the Date of Substantial Completion. If the foregoing are otherwise modified, the General Condition Amount will be reviewed and modified according to the mutual agreement of the Owner and the Construction Manager.

## **§ 5.2 Guaranteed Maximum Price**

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

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

All savings if the Cost of Work plus the Construction Manager's Fee is less than the Guaranteed Maximum Price will be returned one hundred percent (100%) to Owner.

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

§ 5.2.3 The cost of the items, such as furniture, fixtures, and equipment, purchased through the Construction Manager at the Owner's request, are not included in the Guaranteed Maximum Price. The costs for delivery, unloading, handling, storage, and installation of items purchased through the Construction Manager acting as the Owner's purchasing agent are included in the Guaranteed Maximum Price.

### § 5.3 Changes in the Work

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

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

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

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

*(Paragraph deleted)*

## ARTICLE 6 COST OF THE WORK FOR CONSTRUCTION PHASE

### § 6.1 Costs to Be Reimbursed

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

*(Paragraph deleted)*

§ 6.1.2 The Construction Manager will prepare and submit to the Owner for approval at the time the Guaranteed Maximum Price is agreed upon, that portion of the Guaranteed Maximum Price which will constitute the Construction Manager's general conditions. The Construction Manager's general conditions will include: (i) the cost of the Construction Manager's supervisory and administrative staff as set forth in Sections 6.2.2 and 6.2.3; and (ii) the costs for the Construction Manager's office trailer, including copiers, furniture, computers, phones, radios, office supplies and all other equipment and materials to be utilized by the Construction Manager's supervisory and administrative staff at the Project site. All Change Orders and Construction Change Directives will include the Construction Manager's general conditions percentage (the dollar amount of the general conditions divided by the Guaranteed Maximum Price) but no other overhead or profits amounts.



§ 6.1.3 Where any cost is subject to the Owner's prior written approval, the Construction Manager shall obtain this approval prior to incurring the cost. The parties shall endeavor to identify any such costs prior to executing the Guaranteed Price Amendment.

§ 6.1.4 Where any cost is subject to the Owner's prior written approval, the Construction Manager shall obtain this approval prior to incurring the cost. The parties shall endeavor to identify any such costs prior to executing a Guaranteed Maximum Price Amendment.

## § 6.2 Labor Costs

§ 6.2.1 Wages of construction workers directly employed by the Construction Manager to perform the construction of the Work at the site or, with the Owner's prior approval, at off-site workshops. The cost for those craft workers will be billed at the billing rates listed in Exhibit F.

§ 6.2.2 Wages or salaries of the Construction Manager's supervisory and administrative personnel when stationed at the job site only when in a capacity that expeditiously, economically, effectively, and efficiently benefits the Owner's interest in prosecution of the Work, not the Construction Manager's interest in activities not benefitting the Owner's interests. Other personnel stationed offsite will be reimbursable only for the actual time spent directly performing services in an expeditious, economical, effective, and efficient manner benefitting the Owner's interests in prosecution of the Work. The cost for these personnel including benefits, bonuses, vacation time, personal time off, cell phone costs, mileage, per diem, relocation, and all other costs, will be billed at the personnel billing rates as listed in Exhibit G.

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

§ 6.2.3 Wages and salaries of the Construction Manager's supervisory or administrative personnel engaged at factories, workshops, or on the road, in expediting the production or transportation of materials or equipment required for the Work, but only for that portion of their time required for the Work, to be billed and paid as further described in Section 6.2.2 above.

§ 6.2.4 Costs paid or incurred by the Construction Manager for taxes, insurance, contributions, assessments and benefits required by law or collective bargaining agreements and, for personnel not covered by such agreements, customary benefits such as sick leave, medical and health benefits, holidays, vacations, and pensions, provided such costs are based on wages and salaries included in the Cost of the Work under Sections 6.2.1 through 6.2.3. The rate to be charged for the cost of these items, including workers' compensation, FICA, and state unemployment and federal unemployment will be % of all Wages. For those persons listed in Exhibit G, the rates included in Exhibit G already include the items listed in this Section and no amount in addition to the rates on Exhibit G will be charged for the persons listed on Exhibit G.

§ 6.2.5 Intentionally Omitted.

§ 6.2.6 If the Construction Manager elects to bid the performance of any trade work, that work will be performed under a fixed price subcontract. If successful in securing said self-performed work through the bidding and interview process conducted and supervised by Owner and its designated representative, all skill, labor, material, direct and subcontracted costs, general condition costs, and fees directly attributable to the prosecution of self-performed work will be included in that subcontract fixed amount. No costs incurred for prosecution, supervision, and management of self-performed work will accrue to or be reimbursed outside of the subcontract. Additionally, the subcontracted amount for the Construction Manager's self-performed trade work will be a line item guarantee in the Guaranteed Maximum Price Schedule of Values; no costs in excess of the subcontract fixed amount will be reimbursed through the Construction Manager's contingency fund.

## § 6.3 Subcontract Costs

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

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

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

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

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

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

§ 6.5.2 Rental charges for temporary facilities, machinery, equipment, and hand tools not customarily owned by construction workers that are provided by the Construction Manager at the site and costs of transportation, installation, minor repairs, dismantling, and removal. The total rental cost of any Construction Manager-owned item may not exceed the purchase price of any comparable item. Rates of Construction Manager-owned equipment and quantities of equipment shall be subject to the Owner's prior approval. Construction Manager's furnished equipment will be billed at the equipment billing rates defined in Exhibit E. Expendable tools and minor equipment costs for Construction Manager's general conditions will be billed at percent L (%) of fully burdened hourly trade labor cost directly attributable to such work, provided, however, the expendable tools and minor equipment compensated by this % may not exceed \$500 in cost and will not be additionally compensated for as Construction Manager-owned equipment in Exhibit E. Construction Manager's furnished equipment will be billed at the equipment billing rates defined in Exhibit E.

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

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

§ 6.5.5 That portion of the reasonable expenses of the Construction Manager's supervisory or administrative personnel incurred while traveling in discharge of duties connected with the Work, but not including travel from home to the Project site.

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

## § 6.6 Miscellaneous Costs

*(Paragraph deleted)*

§ 6.6.1 Costs of premiums for bonds and insurance which the Construction Manager is required by the Contract Documents to purchase and maintain, or which Construction Manager deems necessary for the prosecution of the Work, and cost of Subcontractor's payment and performance bonds, required under the Subcontracts. Primary commercial general liability insurance, automobile liability insurance, and umbrella/excess liability insurance will be reimbursed at the rate of \$ /\$1,000 of each monthly project billing. Rates will be subject to annual adjustment if required by the Construction Manager. Performance and payment bonds obtained by the Construction Manager for The Project will be reimbursed at the rate of /\$1,000 of the Guaranteed Maximum Price, based on an 18-24 month duration with construction starting in the spring of 2016.

§ 6.6.2 Sales, use or similar taxes imposed by a governmental authority that are related to the Work and for which the Construction Manager is liable. Excise taxes will not be included in the Cost of the Work, but will be reimbursed by the Owner to the Construction Manager.

§ 6.6.3 Fees and assessments for the building permit and for other permits, licenses, and inspections for which the Construction Manager is required by the Contract Documents to pay will not be included in the Cost of the Work, but will be funded or waived by the Owner.

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

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

§ 6.6.6 Costs for electronic equipment and software, directly related to the Work with the Owner's prior approval.

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

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

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

§ 6.6.10 Costs to procure and maintain a builder's risk policy for the Project, if the Owner requests the Construction Manager to purchase the builder's risk policy.

### § 6.7 Other Costs and Emergencies

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

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

§ 6.7.3 Costs of repairing or correcting damaged or nonconforming Work executed by the Construction Manager, Subcontractors or suppliers, provided that such damaged or nonconforming Work was not caused by negligence or failure to fulfill a specific responsibility of the Construction Manager, Subcontractors, and suppliers, or anyone directly or indirectly employed by any of them or for whose acts any of them may be liable to fulfill a specific responsibility of this Agreement, and only to the extent that the cost of repair or correction is not recovered by the Construction Manager from insurance, sureties, Subcontractors, suppliers, or others.

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

§ 6.7.5 The deductible portion of any losses under policies of builder's risk insurance, provided however, such loss was not caused in whole or part by negligence or the negligent acts of the Construction Manager, Subcontractors and suppliers or anyone directly or indirectly employed by any of them or for whose acts any of them may be liable.

**§ 6.7.6** Costs incurred by the Construction Manager because a Subcontractor becomes insolvent or bankrupt, provided however, only to the extent that reimbursement of such costs does not result in the Guaranteed Maximum Price being exceeded and were not caused by the negligent hiring of the Subcontractor, or the Construction Manager's failure to fulfill a specific responsibility of this Agreement.

**§ 6.8 Costs Not To Be Reimbursed**

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

- .1 Salaries and other compensation of the Construction Manager's personnel stationed at the Construction Manager's principal office or offices other than the site office, except as specifically provided in Section 6.2, or as may be provided in Article 11;
- .2 Expenses of the Construction Manager's principal office and offices other than the site office;
- .3 Overhead and general expenses, except as may be expressly included in Sections 6.1 to 6.7;
- .4 The Construction Manager's capital expenses, including interest on the Construction Manager's capital employed for the Work;
- .5 Except as provided in Section 6.7.3 of this Agreement, costs due to the negligence or failure of the Construction Manager, Subcontractors, and suppliers or anyone directly or indirectly employed by any of them or for whose acts any of them may be liable to fulfill a specific responsibility of the Contract;
- .6 Any cost not specifically and expressly described in Sections 6.1 to 6.7;
- .7 Costs, other than costs included in Change Orders approved by the Owner, that would cause the Guaranteed Maximum Price to be exceeded;
- .8 Costs for services incurred during the Preconstruction Phase, which will be reimbursed as a stipulated sum as set forth in Section 5.1.1; and
- .9 Mark up on utilities, dumpsters, temporary toilets, safety equipment, hoisting, snow removal, periodic and final clean up, and other purchased and leased equipment and services. However, the actual costs of these items are to be included in the Cost of the Work.

**§ 6.9 Discounts, Rebates and Refunds**

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

**§ 6.9.2** Amounts that accrue to the Owner in accordance with the provisions of Section 6.9.1 shall be credited to the Owner as a deduction from the Guaranteed Maximum Price.

**§ 6.10 Related Party Transactions**

**§ 6.10.1** For purposes of Section 6.10, the term "related party" shall mean a parent, subsidiary, affiliate, or other entity having common ownership or management with the Construction Manager; any entity in which any stockholder in, or management employee of, the Construction Manager owns any interest in excess of 10% in the aggregate; or any person or entity which has the right to control the business or affairs of the Construction Manager. The term "related party" includes any member of the immediate family of any person identified above.

**§ 6.10.2** If any of the costs to be reimbursed arise from a transaction between the Construction Manager and a related party, the Construction Manager shall notify the Owner of the specific nature of the contemplated transaction, including the identity of the related party and the anticipated cost to be incurred, before any such transaction is consummated or cost incurred. If the Owner, after such notification, authorizes the proposed transaction, then the cost incurred shall be included as a cost to be reimbursed, and the Construction Manager shall procure the Work, equipment, goods or service from the related party, as a Subcontractor, according to the terms of Sections 2.3.2.1, 2.3.2.2, and 2.3.2.3. If the Owner fails to authorize the transaction, the Construction Manager shall procure the Work, equipment, goods or service from some person or entity other than a related party according to the terms of Sections 2.3.2.1, 2.3.2.2, and 2.3.2.3.

**§ 6.11 Accounting Records**

The Construction Manager shall keep full and detailed records and accounts related to the cost of the Work and exercise such controls as may be necessary for proper financial management under this Contract and to substantiate all costs incurred. The accounting and control systems shall be satisfactory to the Owner. The Owner and the



Owner's auditors shall, during regular business hours and upon reasonable notice, be afforded access to, and shall be permitted to audit and copy, the Construction Manager's records and accounts, including complete documentation supporting accounting entries, books, correspondence, instructions, drawings, receipts, subcontracts, Subcontractor's proposals, purchase orders, vouchers, memoranda, and other data relating to this Contract. The Construction Manager shall preserve these records for a period of three years after final payment, or for such longer period as may be required by law. Because of the procurement requirements governing the Owner's responsibilities and duties for expenditure of public funds, the rates established by the Parties in connection with any Cost of the Work furnished on a unit basis, as established in any of the Exhibits attached to this Agreement or in Article 6 for such things including, but not limited to, personnel rates, field rates, burden, tools, equipment, and insurance will be subject to audit and adjustment. Notwithstanding the foregoing, the buildup of personnel rates will not be subject to audit.

## **ARTICLE 7 PAYMENTS FOR CONSTRUCTION PHASE SERVICES**

### **§ 7.1 Progress Payments**

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

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

*(Paragraphs deleted)*

**§ 7.1.3** *The Construction Manager will deliver to the Architect, the Owner and the Owner's representative each Application for Payment. The Architect will, within ten days after receipt of the Construction Manager's Application for Payment, either issue to the Owner, and the Owner's representative a Certificate for Payment, with a copy to the Construction Manager, for such amount as the Architect determines is properly due, or notify the Construction Manager, the Owner and the Owner's representative in writing of the Architect's reasons for withholding certification in whole or in part. The Owner's designated representative will also determine whether the amount approved by the Architect is properly due and advise the Owner accordingly. The Owner will make payment for all amounts not in dispute by electronic funds transfer to the Construction Manager within thirty (30) days of receipt of the Application for Payment by the Architect, Owner and the Owner's designated representative. (Federal, state or local laws may require payment within a certain period of time.)*

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

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

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



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

- .1 Take that portion of the Guaranteed Maximum Price properly allocable to completed Work as determined by multiplying the percentage of completion of each portion of the Work by the share of the Guaranteed Maximum Price allocated to that portion of the Work in the schedule of values. Pending final determination of cost to the Owner of changes in the Work, amounts not in dispute shall be included as provided in Section 7.3.9 of AIA Document A201–2007, as amended;
- .2 Add that portion of the Guaranteed Maximum Price properly allocable to materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work, or if approved in advance by the Owner, suitably stored off the site at a location agreed upon in writing;
- .3 Add the Construction Manager’s Fee, with no retainage. The Construction Manager’s Fee shall be computed upon the Cost of the Work at the rate stated in Section 5.1 or, if the Construction Manager’s Fee is stated as a fixed sum in that Section, shall be an amount that bears the same ratio to that fixed-sum fee as the Cost of the Work bears to a reasonable estimate of the probable Cost of the Work upon its completion;
- .4 Subtract retainage of five percent ( 5 %) from that portion of the Work that the Construction Manager self-performs;
- .5 Subtract the aggregate of previous payments made by the Owner;
- .6 Subtract the shortfall, if any, indicated by the Construction Manager in the documentation required by Section 7.1.4 to substantiate prior Applications for Payment, or resulting from errors subsequently discovered by the Owner’s auditors in such documentation; and
- .7 Subtract amounts, if any, for which the Architect or the Owner’s designated representative has withheld or nullified a Certificate for Payment as provided in Section 9.5 of AIA Document A201–2007, as amended.

§ 7.1.8 The Owner and Construction Manager shall agree upon (1) a mutually acceptable procedure for review and approval of payments to Subcontractors and (2) the percentage of retainage held on Subcontracts, and the Construction Manager shall execute subcontracts in accordance with those agreements.

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

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

## § 7.2 Final Payment

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

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

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

a final and unconditional certificate of occupancy has been issued by the governing authority, whichever occurs later.

§ 7.2.2 The Owner's auditors will review and report in writing on the Construction Manager's final accounting within 45 days after delivery of the final accounting to the Architect by the Construction Manager. Based upon such Cost of the Work as the Owner's auditors report to be substantiated by the Construction Manager's final accounting, and provided the other conditions of Section 7.2.1 have been met, the Architect and the Owner's designated representative will, within seven days after receipt of the written report of the Owner's auditors, either issue to the Owner a final Certificate for Payment with a copy to the Construction Manager, or notify the Construction Manager and Owner in writing of the Architect's or Owner's designated representative's reasons for withholding a certificate as provided in Section 9.5.1 of the AIA Document A201-2007. The time periods stated in this Section supersede those stated in Section 9.4.1 of the AIA Document A201-2007. Neither the Architect nor the Owner's designated representative is responsible for verifying the accuracy of the Construction Manager's final accounting.

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

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

## ARTICLE 8 INSURANCE AND BONDS

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

*(State bonding requirements, if any, and limits of liability for insurance required in Article 11 of AIA Document A201-2007.)*

**Type of Insurance or Bond**

**Limit of Liability or Bond Amount (\$0,00)**

## § 8.1 INSURANCE REQUIRED OF THE CONSTRUCTION MANAGER

During both Phases of the Project, the Construction Manager must purchase and maintain insurance as set forth in Article 8 and as set forth in Section I 1.1 of A201™-2007, as amended. Such insurance must be written for not less than the following limits, or greater limits if required by law:

§ 8.1.1 Workers' Compensation and Employers' Liability meeting statutory limits mandated by state and federal laws. If (1) limits in excess of those required by statute are to be provided, or (2) the employer is not statutorily bound to obtain such insurance coverage or (3) additional coverages are required, additional coverages and limits for such insurance will be as follows:

Workers' Compensation at statutory limits and Employers' Liability with a policy limit of not less than \$1,000,000 bodily injury by accident each accident, and \$1,000,000 bodily injury by disease each employee

§ 8.1.2 Commercial General Liability including coverage for Premises-Operations, Independent Contractors' Protective, Products-Completed Operations, Contractual Liability, Personal Injury and Broad Form Property Damage (including coverage for Explosion, Collapse and Underground hazards):

\$ 1,000,000	Each Occurrence
\$ 2,000,000	General Aggregate
\$ 1,000,000	Personal and Advertising Injury
\$ 2,000,000	Products-Completed Operations Aggregate
\$50,000	Fire Damage (any one fire)
\$5,000	Medical Expense (any one person)

- .1 The policy must be endorsed to have the General Aggregate apply to this Project only.
- .2 Products and Completed Operations insurance must be maintained for a minimum period of at least two ( 2 ) year(s) after either 90 days following Substantial Completion or final payment, whichever is earlier.
- .3 The Contractual Liability insurance must include coverage sufficient to meet the obligations in Section 3.18 of A201™-2007, as amended, subject to policy terms and conditions.
- .4 Coverage must be maintained without interruption from the date of commencement of the Work until the date of final payment.
- .5 Construction Manager must endorse its Commercial General Liability Policy to add Owner as an additional insured.

§ 8.1.3 Automobile Liability (owned, nonowned and hired vehicles) for bodily injury and property damage:

\$1,000,000	Bodily Injury/Property Damage Combined Single Limit (each accident)
\$5,000	Medical Payment (each person)
\$1,000,000	Underinsured Motorist (each accident)

### § 8.1.4 Other coverages:

Umbrella may be used to provide a portion of the limits required under Sections 8.1.2 and 8.1.3.

§ 8.1.5 The Construction Manager may furnish these coverages under one policy or separate policies. The Construction Manager must provide to the Owner certificates of insurance evidencing compliance with the requirements of Article 8 and Article 11 of A201™2007, as amended. The certificates must show the Owner and its elected and appointed officials, agents, officers, city council members, employees, and consultants as additional insureds on the Commercial General Liability, Automobile Liability, Umbrella or Excess policies, and must provide that such insurance is primary and that any other insurance available to the Owner is in excess of and noncontributory to the insurance provided by the Construction Manager. The Insurance Services Office's (ISO) CG 2010 10 01 and CG 2037 or an equivalent endorsement form is to be used for the Commercial General Liability Policy providing additional insured status for completed operations.

§ 8.1.7 All such insurance must be maintained with responsible insurance carriers legally permitted to do business in the State of South Dakota, having a Best rating of not less than A-X, and otherwise reasonably acceptable to the Owner. Upon the signing of this Agreement, the Construction Manager must deposit with the Owner certificates of insurance evidencing the required insurance coverages, bearing notations, or accompanied by other evidence satisfactory to the Owner of the payment of all premiums thereunder.

**§ 8.1.8** The Construction Manager must not allow insurance policies required by this Agreement to lapse, be canceled, reduced in coverage, nonrenewed, or materially changed or have restrictive modifications added at any time. As required below, riders or other documentation satisfactory to the Owner must be made part of the insurance policies described herein (and 45 days before the expiration date of any required policy), the Construction Manager must provide equivalent satisfactory evidence to the Owner of the payment of the premium and the renewal of the policy.

**§ 8.1.9** The policies must not be canceled, terminated, reduced in limits or coverage, nonrenewed, materially changed, or have restrictive modifications added until thirty (30) days after the Owner's receipt from the Construction Manager's insurance agent or carrier of written notice thereof by certified or registered mail, return receipt requested, addressed to the Owner.

**§ 8.1.10** The representations (or the inaccuracies thereof) of the Owner, the Architect, the Construction Manager, Subcontractors, or any other authorized persons on the Project must not invalidate the policies.

**§ 8.1.11** The negligence, misrepresentations, or misconduct by the Construction Manager, Subcontractors, and other persons providing labor, services, equipment, or materials must not invalidate the policies as to the Owner.

**§ 8.1.12** Insurance policies required by this Agreement must be kept in full force and effect for the following periods:

**8.1.12.1** Commercial general liability insurance and umbrella insurance must be kept in full force and effect until five years past Substantial Completion of the Project.

**8.1.12.2** Workers' compensation insurance, employers' liability, automobile liability insurance, and umbrella liability insurance must be kept in full force and effect until receipt of final payment by the Construction Manager.

**§8.1.13** If the Construction Manager fails to provide or keep in force insurance as required under this Agreement, the Owner may purchase or pay premiums for such insurance on the Construction Manager's behalf, and the Construction Manager will be liable to and must indemnify the Owner for all of the Owner's costs related thereto, including attorney's fees and costs incurred in collecting and enforcing Section 8.1.13.

**§8.1.14** Compliance by the Construction Manager with the insurance requirements of this Agreement will not relieve the Construction Manager from liability for amounts in excess of the limits of insurance.

**§8.1.15** The commercial general liability policy must be endorsed to provide that the general aggregate applies separate to each project. ISO Endorsement CG2503 per project endorsement or its equivalent is to be used to satisfy this requirement.

**§8.1.16** The commercial general liability, automobile liability, umbrella, employers' liability, and workers' compensation policies must be endorsed to provide a waiver of subrogation endorsement in favor of the Owner and its elected and appointed officials, agents, officers, city council members, employees, and consultants.

**§8.1.17** The commercial general liability policy must be endorsed to provide primary and non-contributing coverage on the Owner's Project.

**§8.1.18** The automobile policy must state by endorsement that it provides primary coverage.

**§8.1.19** Upon request of the Owner, the Construction Manager must furnish the Owner complete and certified copies of all policies required by this Article.

**§8.1.20** Construction Manager will require all of its Subcontractors and Sub-subcontractors performing work on the Project to purchase employers' liability, workers' compensation, commercial general liability, automobile liability and umbrella liability insurance consistent with the types of insurance coverages required to be purchased by the Construction Manager pursuant hereto to the extent such insurance coverages are applicable to their Work. Construction Manager will obtain Owner's written preapproval for lower insurance limits for any Subcontractor

prior to awarding bids.

(If Umbrella Excess Liability coverage is required over the primary insurance or **retention**, insert the coverage limits. Commercial General Liability and Automobile Liability limits may be attained by individual policies or by a combination of primary policies and Umbrella and/or Excess Liability policies. If Project Management Protective Liability Insurance is to be provided, state the limits here.)

## § 8.2 INSURANCE REQUIRED OF THE OWNER

During both phases of the Project, the Owner shall purchase and maintain liability insurance, including waivers of subrogation, as set forth in Sections 11.2 and 11.3 of A201ThL2007, as amended. Such insurance shall be written for not less than the following limits, or greater if required by law:

§ 8.2.1 Property insurance: Intentionally omitted.

§ 8.2.2 Boiler and Machinery insurance with a limit of: \$  
(If not a blanket policy, list the objects to be insured.)

Intentionally omitted.

§ 8.2.3 Commercial general liability insurance  
\$1,000,000 per occurrence

## § 8.3 PERFORMANCE BOND AND PAYMENT BOND

§ 8.3.1 The Construction Manager must furnish bonds covering faithful performance of the Contract and payment of obligations arising thereunder. Bonds may be obtained through the Construction Manager's usual source, and the cost thereof will be included in the Cost of the Work. The costs of the bonds are stipulated in Section 6.6.1.

§ 8.3.2 The Construction Manager must deliver to the Owner the required bonds at least three days before the commencement of any Work at the Project site.

## ARTICLE 9 DISPUTE RESOLUTION

§ 9.1 Any claim between the Owner and Construction Manager shall be resolved in accordance with the provisions set forth in Article 9 and Article 15 of A201–2007, as amended.

§ 9.2 For any Claim subject to, but not resolved by mediation pursuant to Section 15.3 of AIA Document A201–2007, the method of binding dispute resolution shall be as follows:

*(Check the appropriate box. If the Owner and Construction Manager do not select a method of binding dispute resolution below, or do not subsequently agree in writing to a binding dispute resolution method other than litigation, Claims will be resolved by litigation in a court of competent jurisdiction.)*

- Arbitration pursuant to Section 15.4 of AIA Document A201–2007
- Litigation in a court of competent jurisdiction
- Other: *(Specify)*

*(Paragraphs deleted)*



§ 9.3 Neither party may initiate litigation to pursue a claim arising out of or related to this Agreement, or the performance thereof, without first exhausting the two-stage resolution mechanism set forth in Article 15 of A201-2007, as amended. Exhaustion of such dispute resolution mechanism is a condition precedent to the filing of any litigation on such claim; provided, however, either party may file an appropriate action in a state or federal court where the Project is located for the sole purpose of preserving and protecting its lien rights or avoiding a statute of limitations cut off, with both parties thereafter proceeding to exhaust the dispute resolution mechanism set forth herein before proceeding to prosecute or defend the pending judicial proceedings, except as necessary to avoid prejudice in such litigation.

§ 9.4 The Construction Manager and the Owner agree the dispute resolution provisions of this Article 9 control for all claims and disputes arising under this Agreement. The parties waive the administrative appeals requirements of Article VI, Chapter 2 of the Code of Ordinances of Sioux Falls, entitled.

Administrative Appeals.

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

## ARTICLE 10 TERMINATION OR SUSPENSION

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

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

§ 10.1.2 In the event of termination of this Agreement pursuant to Section 10.1.1, the Construction Manager shall be equitably compensated for Preconstruction Phase services performed prior to receipt of a notice of termination set forth in Section 4.1.

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

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

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

If the Owner accepts assignment of subcontracts, purchase orders, or rental agreements as described above, the Owner will reimburse or indemnify the Construction Manager for all costs arising under the subcontract, purchase

order, or rental agreement, if those costs would have been reimbursable as Cost of the Work if the contract had not been terminated. If the Owner chooses not to accept assignment of any subcontract, purchase order or rental agreement that would have constituted a Cost of the Work had this agreement not been terminated, the Construction Manager will terminate the subcontract, purchase order or rental Agreement and the Owner will pay the Construction Manager the costs necessarily incurred by the Construction Manager because of such termination.

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

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

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

**§ 10.2.2** If the Construction Manager terminates the Contract after execution of the Guaranteed Maximum Price Amendment, the amount payable to the Construction Manager under Section 14.1.3 of A201–2007, as amended, shall not exceed the amount the Construction Manager would otherwise have received under Sections 10.1.2 and 10.1.3 above, except that the Construction Manager's Fee shall be calculated on the Cost of the Work completed to the date of termination at the rate stated in Article 5.

### **§ 10.3 Suspension**

The Work may be suspended by the Owner as provided in Article 14 of AIA Document A201–2007. In such case, the Guaranteed Maximum Price and Contract Time shall be increased as provided in Section 14.3.2 of AIA Document A201–2007, except that the term "profit" shall be understood to mean the Construction Manager's Fee as described in Sections 5 and 5.3.5 of this Agreement.

## **ARTICLE 11 MISCELLANEOUS PROVISIONS**

**§ 11.1** Terms in this Agreement shall have the same meaning as those in A201–2007, as amended.

### **§ 11.2 Ownership and Use of Documents**

Section 1.5 of A201–2007, as amended, shall apply to both the Preconstruction and Construction Phases.

### **§ 11.3 Governing Law**

Section 13.1 of A201–2007, as amended, shall apply to both the Preconstruction and Construction Phases.

### **§ 11.4 Assignment**

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

### **§ 11.5 Other provisions:**

**§ 11.5.1** The failure of one party to insist upon or enforce, in any instance, strict performance by the other party of any of the terms of this Agreement, may not be construed as a waiver or relinquishment to any extent of its right to assert or rely upon such terms or right on any future occasion.

**§ 11.5.2** The Construction Manager will be liable to and must indemnify the Owner and its elected and appointed officials, agents, officers, city council members, employees, and consultants, and must hold each of the foregoing harmless from and against any and all claims made against any of the foregoing for infringement of any copyright, trademark, or patent arising out of the use of any plans, designs, drawings, or specifications furnished by the Construction Manager in the performance of this Agreement, unless the Owner has given its written approval of the

use of the system, method, or equipment in connection therewith after explicit warning that there may be an infringement.

§ 11.5.3 The parties agree the terms of this Agreement must be construed neutrally and not against the Owner or Construction Manager as the drafter of this Agreement.

§ 11.5.4 The Construction Manager acknowledges the Work is to proceed as a no-lien Project in accordance with the laws of the state of South Dakota regarding public projects . No party, therefore, will have the right to assert a mechanics or other lien as against the real estate or the Project. The Construction Manager for itself and for all who claim through the Construction Manager , acknowledge and agree the Project is a public project and that no lien may be asserted against or attach to the real estate on which the Project is to be performed or to any improvements now existing or to be constructed thereon. The Construction Manager must provide written notice to and to any other persons with whom the Construction Manager contracts with respect to Services provided or Work completed pursuant to this Agreement, that this is a public project against which liens cannot be filed, except as against Project proceeds remaining with the Owner. The Construction Manager must indemnify and hold harmless the Owner and City of Sioux Falls for all costs, expenses, and attorneys' fees, should an attempt to assert a lien against the real estate or Project be made on the Construction Manager 's behalf or on behalf of or any other person for whom the Construction Manager is responsible.

§ 11.5.5 All notices required under this Agreement must be made in writing and be served by personal delivery, prepaid registered or certified mail, overnight delivery and/or electronic transmission , with such notices to be deemed effective upon delivery, address to the respect parties as follows:

As to the Owner:

Erin Bofenkamp  
City of Sioux Falls  
224 West Ninth Street  
PO Box 7402  
Sioux Falls, SD 57117-7402  
Email: ebofenkamp@siouxfalls.org

With copies to:

Ms. Karen Leonard  
Assistant City Attorney  
City of Sioux Falls  
224 West Ninth Street  
PO Box 7402  
Sioux Falls, SD 57117-7402  
Email: kleonard@siouxfalls.org

As to the Architect:

As to the Construction Manager:

§ 11.5.6 The Owner and Construction Manager each covenant, warrant, and represent: (i) the individual executing this Agreement on its behalf is duly authorized to execute and deliver this Agreement on behalf of the party for whom he or she signs, (ii) this Agreement is binding upon such party, and (iii) the execution and delivery of this Agreement will not result in any breach of or constitute a default under any Agreement , contract or other instrument to which it is a party or by which it may be bound .

§ 11.5.7 Civil Rights Requirements. The Construction Manager agrees as follows:

§ 11.5.7.1 With respect to any and all business conducted or acts performed pursuant to this Agreement, the Construction Manager will be deemed an employer within the meaning of Chapter 98 of the Code of Ordinances of Sioux Falls entitled "Human Relations" and will be subject to the provisions of such Chapter .

§ 11.5.7.2 If the Construction Manager fails to perform these provisions, this Agreement may forthwith be terminated and canceled in whole or in part by the Owner, and the Construction Manager will be liable for any costs or expense incurred by Owner in obtaining from other sources the Work and Services to be rendered or performed or the goods or properties to be furnished or delivered to the Owner under this Agreement so terminated or canceled.

§ 11.5.7.3 Should the Human Relations Commission in a proceeding brought as provided in Chapter 98 of the Code of Ordinances of Sioux Falls find that the Construction Manager has engaged in discrimination in connection with this Agreement and issues a cease and desist order with respect thereto, the Owner will withhold up to 15 percent of the Agreement price until such time as the Commission's order has been complied with or the Construction Manager has been actiudicated not guilty of such discrimination .

§ 11.5.7.4 The Construction Manager will permit access to any and all records pertaining to hiring and employment and to other pertinent data and records for the purpose of enabling the Human Relations Commission, its agencies or representatives, to ascertain compliance with the provisions of Chapter 98 of the Code of Ordinances of Sioux Falls applicable to the Construction Manager.

§ 11.5.7.5 Section 11.5.7 is binding on all of the Construction Manager's Subcontractors and others performing the Services and Work for the Construction Manager.

§ 11.5.8 Sales and Use Tax. Construction Manager hereby represents and warrants that it does not fail or refuse to collect or remit South Dakota or City sales or use tax for transactions, which are taxable under the laws of the State of South Dakota.

§ 11.5.9 Independent Contractor Status. The parties agree the Construction Manager operates an independent business and is contracting to perform the Services and to do the Work according to its own methods, without being subject to the control of the Owner, except as to the product or the result of the Services and Work. The relationship between the Owner and the Construction Manager is that as between an independent contractor and an owner and not as an employer-employee relationship. The payment of the Cost of the Work and Construction Manager's Fees under Articles 4 and 5 of this Agreement are inclusive of any use, sales, income, or any other tax, except for excise tax assessed on said Fees.

§ 11.5.10 Funds Appropriation. If funds are not budgeted or appropriated for any fiscal year for Services under the terms of this Agreement, this Agreement will impose no obligation on the Owner for payment. This Agreement is null and void except as to annual payments herein agreed upon for which funds have been budgeted or appropriated, and no right of action or damage may accrue to the benefit of the Construction Manager, its successors, or assignees, for any further payments.

§ 11.5.11 Records. When fees or reimbursable expenses are not contracted for as lump sum amounts, the Construction Manager will maintain, and also require its consultants and Subcontractors to maintain, all books, documents, papers, accounting records, and other evidence, which supports the charges invoiced to the Owner relating to this Agreement , and will make all such evidence available for audit by the Owner at its offices at all reasonable times during the term of this Agreement and for a period of three years from the date of final payment for the Services rendered under this Agreement.

§ 11.5.12 Severability. If a court of competent jurisdiction determines any term of this Agreement is invalid or unenforceable to any extent under applicable law, the remainder of this Agreement, and the application of this Agreement to other circumstances will not be affected thereby, and each remaining term will be valid and enforceable to the fullest extent permitted by law.

§ 11.5.13 Publicity. The Construction Manager agrees all communications \with the general public and press will be handled by the Owner, and Construction Manager agrees to make no communication, be it official or unofficial,

concerning the construction of the Municipal Center or its progress without first obtaining the Owner's consent and approval. Construction Manager understands and acknowledges that in an attempt to coordinate media and other public interactions to the benefit of both Parties, any effort by Construction Manager to publicize via its website, print media, press release, interviews with the news media, or prominent clients or partners regarding the Construction Manager's relationship with the Owner and the construction of the Municipal Center will proceed only after obtaining consent of and in coordination with the Owner.

**§ 11.5.14 Confidentiality.** The Construction Manager and the Owner acknowledge that in the performance of this Agreement it may be necessary for the Owner to disclose information to the Construction Manager that is considered proprietary or confidential ("Confidential Information"). Confidential Information includes, but not limited to, the details and financial information related to elements or potential elements of the Project including but not limited to advertising, third-party tenants, and or other aspects of the Project. If the Owner considers the information to be Confidential Information, it must be identified as such in writing or marked "Confidential." If orally disclosed to or observed by the Construction Manager, a description of the Confidential Information will be reduced to writing by the Owner, marked "Confidential" and delivered to the Construction Manager within thirty (30) days of disclosure. The Construction Manager agrees to keep in confidence and not to disclose Confidential Information of the Owner to any person outside the Construction Manager's organization or to any authorized person within Construction Manager's organization.

**ARTICLE 12 SCOPE OF THE AGREEMENT**

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

**§ 12.2** The following documents comprise the Agreement:

- .1 AIA Document A133–2009, Standard Form of Agreement between Owner and Construction Manager as Constructor where the basis of payment is the Cost of the Work Plus a Fee with a Guaranteed Maximum Price
- .2 AIA Document A201–2007, General Conditions of the Contract for Construction, as amended
- .3 AIA Document E201™–2007, Digital Data Protocol Exhibit, if completed, or the following:
  
- .4 Intentionally Omitted.
  
- .5 Other Documents:  
(List other documents, if any, forming part of the Agreement.)

Exhibits	Description	Agreement
A	Project Program	2.1.1.1
B	Project Budget	2.1.1.2
c	Project Schedule	2.1.1.3
D	Construction Manager's Personnel	2.7
E	Construction Manager's Equipment Billing Rates	5.1.4, 6.5.2
F	Craft Worker Billing Rates	6.2.1
G	Supervisory Billing Rates	6.2.2
H	Description Design Development Document Components	2.1.1.2.5



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

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

\_\_\_\_\_  
Mike Huether, Mayor  
*(Printed name and title)*

\_\_\_\_\_  
(City Clerk)

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

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



# Additions and Deletions Report for AIA<sup>®</sup> Document A133<sup>™</sup> – 2009

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

Note: This Additions and Deletions Report is provided for information purposes only and is not incorporated into or constitute any part of the associated AIA document. This Additions and Deletions Report and its associated document were generated simultaneously by AIA software at 11:38:02 on 07/31/2015.

## PAGE 1

City of Sioux Falls  
224 West Ninth Street  
PO Box 7402  
Sioux Falls SD 57117-7402

...

Sioux Falls Municipal Center

...

Erin Bofenkamp  
City of Sioux Falls  
PO Box 7402  
Sioux Falls SD 57117-7402  
605-367-8622

## PAGE 2

The Owner and Construction Manager agree as follows.

### A. The Project

The "Project" means the construction of an office building in Sioux Falls, SD, along with landscaping, a parking lot, and potential skywalk (the "Municipal Center"). The Project includes an office facility that is at a minimum three stories in height and approximately 15,000 square feet per level. The potential skywalk would provide parking access to the Eighth Street and Dakota Avenue parking ramp. The Project is intended to achieve a goal of LEED Certified. The Project will include the following building components: a) an open, flexible, and functional environment; b) incorporation of office design standards, which promote employee well-being and ergonomics; c) furniture, fixtures, and equipment as approved by the City; d) a multidepartment office building.

### B. Project Phases

The Project consists of two phases, described in general as follows:

	<b>Reference Guide</b>
<b>Phase I:</b>	
<u>Preconstruction Phase</u>	<u>§2.1</u>
<u>Site Analysis</u>	<u>§2.1</u>
<b>Phase II:</b>	
<u>Final Guaranteed Maximum Price</u>	<u>§2.2</u>
<u>Construction</u>	<u>§2.3</u>

C. Conditions

Owner and Construction Manager recognize and agree Construction Manager performance of the Work (as defined below) for the Construction Phase (as further discussed in Section 2.3 below) is contingent upon the satisfaction of the following events ("Construction Conditions"): (i) the Owner's approval of the Guaranteed Maximum Price and Construction Manager's Fees; (ii) the securing of funds necessary to pay costs of the Project, including but not limited to the authorization and sale of sales tax bonds; (iii) Owner's decision, in its sole discretion, to proceed with the Work; (iv) the issuance to the Construction Manager by Owner of a Notice to Proceed with the Work.

The Owner and the Construction Manager recognize and agree the Construction Manager's performance of the Work is expressly subject to the right of the Owner to terminate the Construction Manager, with or without cause, and without incurring any costs or liabilities beyond those defined herein for Preconstruction Services as a consequence of the failure to satisfy the Construction Conditions, or for the Owner's own convenience, even though the basis for such termination is within Owner's control, and even if Owner still intends to proceed with balance of the project utilizing another Construction Manager. The express terms and provisions of such a termination without any fault of the Construction Manager set forth in Article 14 of A201-2007, as amended, are only applicable in the event such Work is terminated during the Construction Phase.

PAGE 3

~~EXHIBIT A — GUARANTEED MAXIMUM PRICE AMENDMENT~~

...

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

...

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

...

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

PAGE 4

§2.1.1.1 The Owner's program for the Project will be developed during The Preconstruction Phase of the Project in accordance with the provisions of this Section 2.1.1.1 (the "Program"). It is the intent of the parties to proceed with the development, design and construction of a new Municipal Center, consistent with the general parameters and requirements set forth in the Project description in Section A of this Agreement. The Owner, the Architect, and the Construction Manager will mutually agree upon the Program and complete Exhibit A. The Program will be prepared by the Architect in consultation with the Construction Manager and the Owner based upon the collective background and experience of the Architect and Construction Manager related to the projects of this type, nature, and size and upon interviews will and/or information received from appropriate representatives of the Owner. It is understood and acknowledged the Program attached hereto as Exhibit A identifies and delineates only the general design goals, space needs and functional requirements for the Project, with the more detailed and specific requirements for the Project to be incorporated into the Design Development and Construction Documents. Accordingly, all references in the Agreement to "Program" will include not only the general parameters and requirements specifically set forth in Exhibit A, but also the more detailed designs and requirements hereafter identified for the Project which are: (i) consistent with and reasonably inferable from the general parameters and requirements set forth in Exhibit A; and (ii) developed, designed, and constructed in accordance with current trends for projects of similar type, nature, and size. Based upon completion of the Phase I Site Analysis Study and the Construction Manager's review of the Program, the Construction Manager will confirm to the Owner by programmatic estimate that the Program appears to be consistent with Budget and Schedule. The Program will establish the general criteria and parameters for the Project and will be the information against which Schematic Design Documents, as developed, will be measured.

After the Design Development Documents have been approved by The Owner, the Design Development Documents will establish the criteria and parameters against which the Construction Documents will be measured. The Construction Manager must monitor The Work and Services being provided and must keep all parties apprised of the programmatic requirements, schedule timelines, and budget constraints, in terms of their conformance with the Program, Schedule, and Budget. If in its review of any Design Development Documents the Construction Manager discovers or suspects that there has or may have been a deviation from the then current Program requirements, the Construction Manager must promptly advise the Owner and Architect in writing. There will be no deviation from the Program as it is developed through the various design phases, without the prior written consent of the Owner.

§ 2.1.1.2 The Owner's Budget for the entire Project will be developed by the Owner, in consultation with the Architect and Construction Manager during the Preconstruction Phase and will be set forth in Exhibit B (the "Budget"). The Owner's budget for the Cost of the Work, including the Owner's Contingency, which is separate and distinct for the Construction Manager's contingency and not available for the Construction Manager's use, will be updated from time to time by the Owner in consultation with the Architect and the Construction Manager, with all revisions to be set forth in Exhibit B. The Owner, the Architect, and the Construction Manager will mutually agree upon the Guaranteed Maximum Price at the conclusion of the Design Development Phase as set forth in Section 2.2.1, which amounts will be incorporated into the Budget and set forth in Exhibit B. The Budget will periodically be reviewed and modified in consultation with the Construction Manager and Architect and in reliance upon information developed during the Phase I Site Analysis Study. The Construction Manager must, over the course of the Preconstruction and Construction Phases, update and provide greater detail with respect to the Budget, including developing specific estimates of cost allocation for the individual Bid Packages and other Work items, consistent with the overall limitations set forth in Exhibit B.

The Construction Manager's Preconstruction Services will begin with the Phase I Site Analysis Study and preparing a cost estimate of the Schematic design documents prepared by the Architect. The Construction Manager will be expected to actively participate in all design meetings, tours of comparable buildings, constructability reviews, periodically provide cost estimates during the design process, and ultimately develop a Guaranteed Maximum Price after the Architect completes the Design Development Documents by April 2016. The Construction Manager will be expected to actively participate in all design meetings, tours of comparable buildings, constructability reviews, periodically provide cost estimates during the design process, and ultimately develop a Guaranteed Maximum Price after the Architect completes the Design Development Documents {insert date for GMP development}. More specifically, the Construction Manager will provide the following cost management services:

§ 2.1.1.2.1 Assist the Owner and the Architect to keep the Project within the fixed Project Budget.

§ 2.1.1.2.2 Provide recommendations to the Architect and Owner regarding materials, building components and systems and also evaluate building systems, components and materials for long-term performance, life cycle cost analysis, and economy.

§ 2.1.1.2.3 Provide cost control resources for the Owner and Architect during the Schematic Design, Design Development and Construction Document Phases, which includes reviewing and monitoring the development and preparation of documents to maintain the Project cost within the Project Budget. Construction Manager will notify the Architect and the Owner of potential cost issues during the development of the Drawings and Specifications that may have an impact on the Cost of the Work. The Construction Manager will work collaboratively with the Owner and the Architect to develop alternatives to keep the cost estimates within the fixed Project Budget.

§ 2.1.1.2.4 The Schematic Design Documents will consist of drawings and other documents including a site plan, if appropriate, preliminary building plans, sections and elevations, and the Architect's written narrative statement including a description of incomplete design elements; and may include some combination of study models, perspective sketches, or digital modeling. Upon completion of the Schematic Design Documents, provide formal review and comments on the Schematic Design Documents. Following this review, the Construction Manager will prepare a Schematic Phase estimate of the Cost of the Work to confirm that the Program and Budget for the Project are in alignment. In addition, the Construction Manager will provide value analysis/engineering ideas in conjunction with preparation of the estimate of the Cost of the Work.

§ 2.1.1.2.5 The Design Development Documents will consist of drawings, specifications, and other documents including plans, sections, elevations, typical construction detail 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 the Architect's written prose statement of incomplete design elements. At the beginning of the Design Development Phase, the Owner, Construction Manager, and Architect will mutually agree upon the drawings, specifications, and other documents to be included in the Design Development Documents and will identify these components in **Exhibit H**. Provide formal review and comments, and cost estimates, at Schematic Design, and 60% Design Development Documents including evaluating costs of alternatives.

§ 2.1.1.2.6 Provide a Guaranteed Maximum Price at the conclusion of the Design Development Phase. The Guaranteed Maximum Price will include pricing of alternates as defined by the Architect, which will be equal to approximately 5% of the Guaranteed Maximum Price.

§ 2.1.1.2.7 Provide a formal review and comments, and cost estimates, at 60% and 100% of the Architect's completion of the Construction Document.

§ 2.1.1.2.8 Anticipate multiple bid packages will be developed by the Architect. Construction Manager will develop a strategy for issuing bid packages that facilitates the completion of those packages. The purpose is to utilize this bidding package strategy to gain the most advantageous issuing of the Construction Documents in order to minimize the construction duration while allowing the bid packages to be completed efficiently.

§ 2.1.1.2.9 Consider, with the Architect and Owner, the early selection of the mechanical, electrical, and other critical Subcontractors to provide design assist services to the Architect. These Subcontractors will provide preconstruction support services during the Preconstruction Phase in addition to the Construction Manager's Services. If the Project does not proceed, these Subcontractors will not be entitled to any compensation.

The Construction Manager's cost management responsibilities during the Construction Phase will include the following:

§ 2.1.1.2.10 Implement effective cost management controls and tracking procedures to provide the Owner with the opportunity to make decisions as required to keep the Cost of the Work within the fixed Project Budget.

§ 2.1.1.2.11 Implement and maintain cost control methods with an "open book" sharing of cost information.

§ 2.1.1.2.12 Inform the Owner of pending cost issues within five (5) business days of identifying potential issues.



§ 2.1.1.2.13 Implement and maintain a current log of pending cost issues impacting the final cost of the Project and review with the Owner the log no less than monthly.

§ 2.1.1.2.14 Provide drawdown and cash flow projections for the Project during the Construction Phase and update as necessary.

§ 2.1.1.2.15 Work with the Owner and Architect to develop and implement a Change Order and Construction Change Directive management process for the Project. The Construction Manager will provide its updated cost estimates to the Architect for its review and comment and to the Owner for its approval. The Construction Manager must periodically review and analyze the updated cost estimates to determine whether they are consistent with the Budget, Program and Schedule. Although the Construction Manager does guarantee the Budget or any cost estimates provided by it prior to the fixing of the Guaranteed Maximum Price, the Construction Manager must manage the Project consistent with the Budget, refine building cost estimates and cash flow analyses, and analyze the Work and Services to be provided to keep all parties involved with the Project apprised of the budgetary constraints and their compliance with the Budget. When necessary to maintain compliance with the Budget set forth in this Agreement, the Construction Manager must, and without increase to the Construction Manager's compensation, provide value engineering services, recommend possible bid alternates, identify and evaluate post award options or otherwise identify possible cost savings options for the Owner's approval.

§ 2.1.1.3 The Owner's schedule for the date of commencement of the Project, milestone dates for completion of the various portions of the Project and the Date of Substantial Completion of the Project, which is anticipated to be [insert date] will be developed by mutual agreement of the Owner, the Architect and the Construction Manager during the Preconstruction Phase, and will be set forth in Exhibit C (the "Schedule"). The design and construction of the Project must proceed so as to achieve Substantial Completion of the Project in accordance with the Owner's Schedule. From time to time upon request of the Owner, the Construction Manager must confirm to the Owner, to the best of the Construction Manager's knowledge and based upon the Construction Manager's diligent review of the Project, the Schedule is reasonable and, absent delays or events that justify an enlargement of the Contract Time, is attainable and is consistent with the Program and the Budget. The Construction Manager accepts all portions of the Schedule relating to its Work and Services, agrees to provide its Work and Services within the time limits established by the Schedule and will provide recommendations, decisions, and information in a timely manner, which are critical to maintaining compliance with the Schedule.

The Construction Manager must periodically analyze the services being provided by the Architect, and the Work and Services being provided by the Subcontractors and others involved with the Project, and keep them apprised of the current and future scheduling requirements for purposes of coordinating their Work and Services and their compliance with the Schedule.

The Construction Manager will periodically update and provide further detail on the Schedule and the Construction Manager will: (i) consult with the Architect as to the schedule for design services and coordinate and integrate the Architect's services with the Construction Manager's Services, the Owner's responsibilities, preconstruction activities, procurement, construction activities, work to be performed by others, the advertising, bidding, and awarding of the various bid packages and the critical milestone dates for the Schedule; (ii) identify critical and long lead-time items and implement procedures to coordinate the procurement of these items consistent with the Schedule; (iii) consider weather conditions, which reasonably can be anticipated from the National Weather Service ten-year weather events for Sioux Falls, SD, during the Construction Phase; (iv) evaluate, monitor, and manage, in accordance with this Agreement, the various design, bidding and construction activities and sequences to be performed for the proper execution of the Work; and (v) evaluate all systems, components, and materials for constructability, economy, long-term performance for use intended and Schedule impacts, and provide recommendations for preferred options consistent with the Budget and Schedule.

During the Construction Phase, the Construction Manager will provide the following meeting and scheduling Services:

§ 2.1.1.3.1 Conduct weekly job site meetings that include appropriate Subcontractors, the Owner's representatives, and the Architect's representative to review open issues, schedule Work and resolve pending or upcoming issues. The Construction Manager will prepare a written agenda in advance of each meeting. The Construction Manager will maintain a list of action items with identification of the responsible party and the due date for each item. The

Construction Manager will distribute written meeting minutes and action items lists within 48 hours of each meeting.

§ 2.1.1.3.2 Provide monthly updates of actual progress versus the scheduled progress, identify any variances, and prepare a written action plan along with an updated schedule to maintain the Owner's schedule.

§2.1.1.3.3 Determine the adequacy of the Subcontractors' personnel and equipment and the availability of materials and supplies to meet the Schedule. The Construction Manager will report the status of these items no less than weekly in regular weekly coordination meetings.

§ 2.1.1.3.4 Prepare a short-term (3-to-4 week look-ahead) schedule on a weekly basis.

§ 2.1.1.3.5 Coordinate Owner-purchased and/or third party provided furniture, fixtures, and equipment with construction of the Project.

The Construction Manager must keep the Owner fully apprised of all updates and reviews of the Schedule, and there will be no change to or deviation from the Schedule that would extend Substantial Completion of the Project, without the Owner's prior written consent, except for circumstances beyond the control of the Construction Manager, and then only to the extent expressly provided for in this Agreement or the Contract Documents. While the Construction Manager will not be liable for any failure of the Architect, or the Owner's other contractors to perform their work or services in the conformance with the Schedule, if the Construction Manager observes or suspects that any of those parties have or may deviate from the Schedule, the Construction Manager must promptly advise the Owner and the involved party and must also indicate what action the Construction Manager recommends to avoid, correct, or minimize such deviation.

As typical with complex projects of similar scope, multiple bid packages and phased construction may be utilized. The use of multiple bid packages and phased construction does not constitute for this Project what is commonly known in the industry as a fast track schedule. The number of bid packages will be determined by the Construction Manager, the Owner, and the Architect. The parties agree (subject to the Owner's right to terminate) to promptly meet and use their best efforts to reach a mutual agreement regarding the Schedule including sequence, content, and order of Bid Packages.

**§ 2.1.1.4 Deviations from Project Parameters:**

If, during the course of the Project, the Construction Manager discovers or has reason to believe there has been or may be a deviation from the Program, Budget or Schedule, or if in the Construction Manager's opinion it is in the Owner's best interest to revise the Program, Budget, or Schedule, The Construction Manager must advise the Owner and the Architect, and must (i) endeavor to reestablish conformance with the Program, Budget or Schedule, including providing further services (but only those Services as set forth in Article 2 of this Agreement) by the Construction Manager without additional cost to the Owner if such deviation is caused by or the result of an error or omission of the Construction Manager or its Subcontractors; (ii) advise and direct any Subcontractors who have deviated from the Program, Budget or Schedule, without the Owner's approval, to take such action at their own expense as is required to reestablish compliance with the Project parameters and, should they fail to do so, so advise the Owner and Architect of the remedial actions to be taken against the person or entity responsible for such deviation; (iii) consult with the Owner, the Architect, and others involved with the Project to identify and recommend, as necessary, other options available to avoid or minimize any adverse impact to the Program, Budget, or Schedule and implement such options as approved by the Owner; and (iv) advise the Owner and the Architect when the Construction Manager believes revisions to the Program, Budget, and Schedule are necessary, or are in the best interest of the Project and the Owner, including: the facts and circumstances on which the Construction Manager's belief is based; a description of the revisions being recommended; and identification of other available options to avoid or minimize the impact of such revisions. Thereafter, in conjunction with the Architect and others involved with the Project, the Construction Manager must implement such revisions to extent approved by the Owner.

§2.1.1.5 The Owner desires to achieve at a minimum a LEED certified level for the Project. The Construction Manager, in coordination with the Architect, will develop efficiency strategies and analyze the benefits and costs of achieving LEED certification. The Construction Manager will report to the Owner the strategies, benefits, and costs for the Owner's approval as to whether the Project will be LEED certified and the level to be achieved.

§ 2.1.1.6 The Construction Manager will: (i) assist the Owner in working with various governing authorities as requested; (ii) work with the Owner and Architect to develop a project communication system that is effective for the participants and meets the Schedule requirements of the Project; and (iii) work cooperatively with the Owner and Architect to develop and implement a work plan for meeting the Project's energy efficiency goals.

§2.1.1.7 The Owner may request the Construction Manager complete certain minor construction activities, such as installing a site fence to secure the Project site, site grading, filling in the cavity at the location of the demolished pool, or providing engineered fill, during the Preconstruction Phase . The Work to be performed by the Construction Manager, and the Cost of the Work, will be identified by the Owner and approved by the Architect, and set forth in an amendment to this Agreement. Notwithstanding any other provision of the Contract Documents, the performance of Work by the Construction Manager during the Preconstruction Phase will not serve as a waiver of the Construction Conditions, the Owner's right to utilize a different construction manager for the Construction Phase, or to terminate this Agreement.

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

### § 2.1.3 Project Schedule

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

## PAGE 8

The Construction Manager shall provide recommendations with regard to accelerated or fast-track scheduling, procurement, or phased construction. The Construction Manager shall take into consideration cost reductions, cost information, constructability, provisions for temporary facilities and ~~procurement~~ procurement, and construction scheduling issues.

...

§ 2.1.5.1 Based on the preliminary design and other design criteria prepared by the Architect, the Construction Manager shall prepare preliminary estimates of the Cost of the Work or the cost of program requirements using area, volume or similar conceptual estimating techniques for the Architect's review and Owner's approval. If the Architect or Construction Manager suggests alternative materials and systems, the Construction Manager shall provide cost evaluations of those alternative materials and systems. The preliminary cost estimate will include other soft costs to allow for a proper understanding of the Owner's total Project cost.

## PAGE 9

§ 2.1.6.1 The Construction Manager will work with the Owner and Architect to interview and select mechanical, electrical, and other critical Subcontractors through a process that the Construction Manager, Architect, and Owner,

mutually deem appropriate utilizing a competitive process based on the principles of "Best Value" and agreed to by the Owner. These Subcontractors will provide preconstruction support services during the design phases in addition to the Construction Manager's services. These selected Subcontractors will have the opportunity to submit a bid for the appropriate trade packages with other Subcontractors during the construction bidding phase, and any costs associated with this preconstruction services may be included as a part of their bid. If the Project does not proceed, these Subcontractors will not be entitled to any compensation.

§ 2.1.6.2 The Construction Manager will complete a quality/coordination/constructability review of each bid package prior to issuing bid documents to Subcontractors.

§ 2.1.6.3 The Construction Manager will manage the bidding process, evaluation proposals, and interview Subcontractors along with the Architect and Owner. The Construction Manager, the Architect and the Owner will utilize, by mutual agreement, any of the following methods for awarding contracts to Subcontractors for portions of the Work: competitive bid; best value; and negotiated terms. For those subcontracts to be awarded on a competitive bid or best value basis, the Construction Manager will obtain a minimum of three (3) competitive bids for each subtrade category, unless otherwise authorized by the Owner, and will interview at a minimum two (2) bidders with the Architect and Owner. The Construction Manager will provide to the Owner a written award recommendation.

§ 2.1.6.4 If the Construction Manager desires to self-perform portions of the Work, the Construction Manager must follow the competitive bid requirements of SDCL Chap. 5-18 with respect to those portions of the Work.

#### § 2.1.7 Procurement Schedule

...

The Construction Manager shall exercise reasonable care in preparing schedules and estimates. The Construction Manager, however, does not warrant or guarantee estimates and schedules except as may be included as part of the Guaranteed Maximum Price. The recommendations and advice of the Construction Manager concerning design alternatives or value analysis will be subject to the review and approval of Owner's professional consultants, provided, however, Owner and its professional consultants are relying on the Construction Manager's extensive experience, knowledge, and expertise in similar projects to provide factual and valid recommendations and advice the Owner can rely upon to make such decisions. The ultimate responsibility for the performance or aesthetic characteristics inherent in the design will remain with the Architect. The Construction Manager is not required to ascertain that the Drawings and Specifications are in accordance with applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities, but the Construction Manager shall promptly report to the Architect and Owner any nonconformity discovered by or made known to the Construction Manager as a request for information in such form as the Architect may require.

#### **PAGE 10**

§ 2.2.1 At a time to be mutually agreed upon by the Owner and the Construction Manager Upon completion of the Design Development Documents and in consultation with the Architect, the Construction Manager shall prepare a Guaranteed Maximum Price proposal for the Owner's review and acceptance. The Guaranteed Maximum Price in the proposal shall be the sum of the Construction Manager's estimate of the Cost of the Work, including contingencies described in Section 2.2.4, and the Construction Manager's Fee. The Construction Manager's Fee will be fixed at the time the Guaranteed Maximum Price is fixed.

2.2.4 the Construction Managers Fee, insurance costs and Builder's Risk costs.

§ 2.2.1.1 At end of schematic design and 60% and 100% completion of the Design Development Documents the Architect will submit to the Owner and the Construction Manager the plans and specifications for the Guaranteed Maximum Price package. The package will include the Design Development Documents, and a written narrative (prose) statement which includes the Architect's description of incomplete design elements of the Design Development Documents. The Construction Manager must meet with the Owner and the Architect to review the Design Development Documents.



§ 2.2.1.2 Upon receipt of the Construction Manager's estimate of the Guaranteed Maximum Price at the conclusion of the Design Development Phase, the Architect will make its recommendations to the Owner and request the Owner's approval of the Design Development Documents and Guaranteed Maximum Price. If revisions to the Guaranteed Maximum Price package are required to comply with the Owner's Budget, including the Cost of the Work, the Construction Manager must make the required revisions without additional fee or expense to the Owner until the Guaranteed Maximum Price complies with the Owner's Budget, including the Cost of the Work.

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

...

- ~~4~~ The anticipated date of Substantial Completion upon which the proposed Guaranteed Maximum Price is based; and
- ~~5~~ based and the date by which the Notice to Proceed must be issued by the Owner, and a schedule of the Construction Document issuance dates developed with and agreed to by the Architect upon which the Date of Substantial Completion is based; and ~~5~~ A date by which the Owner must accept the Guaranteed Maximum Price.

#### PAGE 11

§ 2.2.4.1 The Construction Manager's contingency will be agreed upon by the parties as part of the Guaranteed Maximum Price. The Construction Manager's contingency is separate from the Owner's contingency. The Owner and Construction Manager acknowledge the cost estimating process is not exact, and therefore, the Construction Manager's contingency is included to adjust the estimate for quantity and price estimate inaccuracies, and other eventualities, which have not been taken into precise account in the establishment of the Guaranteed Maximum Price, including but not limited to (a) unfavorable bidding from trade contractors due to market conditions, price increases, lack of competition, and other variables; (b) default in payment or performance by a Subcontractor or supplier not reimbursed by Subcontractor's payment and performance bond; (c) costs of corrective work not provided for elsewhere; and (d) other conditions, which result in an increase in the Cost of the Work, without increasing the Guaranteed Maximum Price. The Construction Manager's contingency will not be used for changes in the Work due to effect of unsuitable soil conditions, or negligent acts, errors or omissions by the Construction Manager.

§ 2.2.4.2 The Construction Manager's contingency will be included in early estimates and a final agreed upon dollar amount as follows:

2.2.4.2.1. A ten percent (10%) contingency upon completion of the Program and upon completion of the Schematic Design documents.

2.2.4.2.2 A five percent (5%) contingency upon completion of the Design Development Documents to be included in the Guaranteed Maximum Price.

2.2.4.2.3 A two and one one-half percent (2.5%) contingency upon completion of the Construction Documents and acceptance of the Subcontractors' bids for all Bid Packages.

§ 2.2.4.3 The Guaranteed Maximum Price, when determined, is to be an adequate representation of the cost to complete the Work as described or reasonably inferred from the Contract Documents referenced within this Agreement. The Construction Manager acknowledges the Contract Documents referenced herein may not be 100% complete and the Construction Manager's contingency will be included within the Guaranteed Maximum Price sufficient to fully complete the scope of the Work as described or reasonably inferred from the Contract Documents. All such contingencies will be clearly identified and defined in the Guaranteed Maximum Price clarifications and assumptions as defined in Section 2.2.3.



§ 2.2.4.4 Should the sum of the Cost of Work and the Construction Manager's Fee be less than the Guaranteed Maximum Price, One Hundred Percent (100%) of the savings will be distributed to the Owner.

§ 2.2.4.5 Any allowance existing at the time the Guaranteed Maximum Price is established will be converted to the Cost of the Work within the Guaranteed Maximum Price after the Work is awarded to a Subcontractor or the Construction Manager after the respective bid therefore is approved in writing by Owner. After all portions of the Work have been bid to Subcontractors, or to the Construction Manager as approved by Owner in writing , the remaining allowances , if any, will be a Change Order reducing or increasing the Guaranteed Maximum Price . Any remaining allowance can only be combined into another allowance upon Owner's written approval. The parties agree to use all reasonable efforts to attempt to minimize allowances included within the Guaranteed Maximum Price.

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

**§ 2.2.7** The Construction Manager shall not incur any cost to be reimbursed as part of the Cost of the Work prior to the commencement of the Construction Phase, unless the Owner provides prior written authorization for such ~~costs~~ costs as set forth in Section 2.1.1.7.

**PAGE 12**

**§ 2.2.9** The Construction Manager shall include in the Guaranteed Maximum Price all excise, sales, consumer, use and similar taxes for the Work provided by the Construction Manager that are legally enacted, whether or not yet effective, at the time the Guaranteed Maximum Price Amendment is executed.

§ 2.2.10 The Cost of the Work reimbursable to the Construction Manager will be limited only by the Guaranteed Maximum Price in the aggregate and not by estimates for the various categories or line items of Work comprising the Guaranteed Maximum Price, subject to the requirement that any portion of the trade Work the Construction Manager self-performs is a fixed amount and not subject to the provisions of Section 2.2.10.

§ 2.2.11 Any changes to the scope of the Work as measured from the written statement of the basis of The Guaranteed Maximum Price documents submitted pursuant to § 2.2.3 as accepted by Owner will be cause for adjustment in the Guaranteed Maximum Price and Date of Substantial Completion, as applicable. Construction Manager acknowledges and agrees that upon approval and acceptance of the Guaranteed Maximum Price by Owner, Construction Manager will guarantee the Cost of the Work will not exceed the Guaranteed Maximum Price for the agreed-upon scope of Work set forth in the Contract Documents, except as expressly provided herein. If the Cost of the Work exceeds the Guaranteed Maximum Price for any reason, except as otherwise provided in this Agreement, Construction Manager will be responsible for amounts in excess thereof required to complete such Work.

...

**§ 2.3.1.1** For purposes of Section 8.1.2 of A201–2007, and except for Work authorized during the Preconstruction Phase pursuant to Section 2.1.1.7, the date of commencement of the Work shall mean the date of commencement of the Construction Phase earlier of:

.1 The Owner's acceptance of the Construction Manager's Guaranteed Maximum Price and Fee proposal and issuance of a Notice to Proceed, or

.2 The Owner's first authorization to the Construction Manager to:

a. Award a subcontract, or

b. Undertake construction Work with the Construction Manager's own forces, or

c. Issue a purchase order for materials or equipment required for the Work.

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

...

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

PAGE 13

§ 2.3.2.3 Subcontracts or other agreements shall conform to the applicable payment provisions of this Agreement, and shall not be awarded on the basis of cost plus a fee without the prior consent of the Owner. If the Subcontract is awarded on a cost plus a fee basis, the Construction Manager shall provide in the Subcontract for the Owner to receive the same audit rights with regard to the Subcontractor as the Owner receives with regard to the Construction Manager in Section 6.11 with regard to the Construction Manager in Section 6.11 and 7.2 below.

...

§ 2.3.2.5 The Construction Manager shall schedule and conduct meetings to discuss such matters as procedures, progress, coordination, scheduling, and status of the Work. The Construction Manager shall prepare and promptly distribute minutes to the Owner and ~~Architect.~~ Architect as soon as is reasonably possible following the meeting, but in all circumstances within 48 hours of the meeting, unless otherwise agreed to by Owner.

§ 2.3.2.6 Upon the execution of the Guaranteed Maximum Price Amendment, the Construction Manager shall prepare and submit to the Owner and Architect a construction schedule for the Work and submittal schedule in accordance with Section 3.10 of ~~A201-2007.~~ A201-2007, as amended, and Section 2.1.1.3 above.

§ 2.3.2.7 The Construction Manager shall record the progress of the Project. On a monthly basis, or otherwise as agreed to by the Owner, the Construction Manager shall submit written progress reports to the Owner and Architect, showing percentages of completion and other information required by the ~~Owner.~~ Owner including Construction Manager's contingency status, subcontract, and materials buy-out status versus Guaranteed Maximum Price schedule of values, list of identified and potential issues affecting construction progress, or having the potential to result in a cost or Schedule claim, action item list and responsibility for resolution for action items affecting the Work or its progress, and Schedule versus actual progress analysis including detailed action plans to correct any negative schedule deviations.. The Construction Manager shall also keep, and make available to the Owner and Architect, a ~~daily log containing a record for each day~~ contemporaneous daily log of weather, portions of the Work in progress, number of workers on site, identification of equipment on site, problems that might affect progress of the work, accidents, injuries, and other information required by the Owner.

§ 2.3.2.8 The Construction Manager shall develop a system of cost control for the Work, including regular monitoring of actual costs for activities in progress and estimates for uncompleted tasks and proposed changes. The Construction Manager shall identify variances between actual and estimated costs and report the variances to the Owner and Architect and shall provide this information in its monthly reports to the Owner and Architect, in accordance with Section 2.3.2.7 above. The Construction Manager will revise and refine the initially approved Project Budget, incorporate approved changes as they occur, and develop cash flow reports and forecasts as the Owner may require. The Construction Manager will also identify variances between actual and budgeted or estimated costs and advise Owner and Architect whenever the projected cost exceeds budgets or estimates. The Construction Manager can reallocate estimated costs among trade categories, except such costs cannot be reallocated

among self-performed work, contingencies, Construction Manager General conditions, other items which by their nature are fixed costs, and the Construction Manager's Fee.

§ 2.3.2.9 The Construction Manager will keep the Owner informed on a timely basis of any event, circumstance, or issue that may be cause for a cost or Schedule claim from the Construction Manager, or any Subcontractor or supplier under contract with the Construction Manager. Written notification to the Owner of any potential cost or Schedule claim must be provided within seven (7) days of the Construction Manger's first knowledge of any potential claim. Detailed cost or Schedule claims must be provided within twenty-one (21) days of the Construction Manager's first knowledge of any potential claim. Failure to notify Owner within the seven (7) day period, or failure to provide detailed cost information within the twenty-one (21) day period will be cause for the Owner to deny any such claim. Construction Manager will include this notice requirement in its agreements with all Subcontractors and suppliers. This requirement is in addition to the reporting requirements in Sec. 2.3.2.7.

## **PAGE 14**

### § 2.6 Electronic Document Library and Warranty Management

During the one-year period for correction of Work identified under Section 12.2.2 of A201-2007, as amended, Construction Manager will provide online a facility document library and warranty management service through a web-based computerized maintenance management system the InfoCentre<sup>TM[LK2]</sup> system. This electronic library will include as-built drawings, operations and maintenance manuals, catalog and important equipment data, as well as, other facility documents (e.g. permits, inspection reports, certifications, security procedures, etc.). Owner will receive access to the electronic document library system upon execution of an access waiver. Construction Manager will have no obligation to maintain this electronic library after the one-year period for correction of warranty items, unless Owner executes a contract for ongoing services. If Owner does not elect to contract for ongoing electronic document library and warranty management services, Construction Manager will provide to Owner, at no cost to the Owner, a record copy of the facility document library and warranty document electronic library in the quantity, form and format that Owner elects.

### § 2.7 Project Management Team

The Construction Manager will provide competent, experienced full-time staff, including an experienced construction field superintendent and project management team to coordinate the Work, maintain the progress of the Subcontractors, coordinate with the Owner's and Architect's ongoing activities and operations, and provide overall direction for the Project during the Construction Phase. The Construction Manager will establish on-site organization and levels of authority to carry out the overall plans of the construction team. The Construction Manager's staff must: (i) demonstrate high levels of effective, proactive project leadership; and (ii) work cooperatively and constructively with the Owner's and Architect's members and representatives to foster positive relationships that support positive outcomes for all persons and the Project.

### § 2.8 Construction Manager's Personnel Assigned

The Owner reserves the right to approve the superintendent, the project manager, and other key management and supervisory personnel of the Construction Manager who will provide the Construction Manager's Services for the Project. Attached hereto as Exhibit D is (a) a listing of key personnel assigned to each phase of the project; (b) a description of roles/responsibilities for such individuals; and (c) the anticipated commitment to be expended by such individuals in performing the Construction Manager's Services required for each such Phase. The Construction Manager further represents and warrants it will commit such personnel for the duration of the Project necessary to complete the Construction Manager's Services under this Agreement, in terms of expertise and fulfillment of its duties and obligations under this Agreement in accordance with the Schedule. No substitutions of any principal or key management and supervisory personnel may be made by the Construction Manager without the Owner's prior written consent unless the principal or key personnel are no longer employed by the Construction Manager. In the event any principal or key management and supervisory personnel are no longer employed by the Construction Manager, the Construction Manager must notify Owner within five (5) days after learning of such event. The Construction Manager must use its best efforts to provide a permanent replacement within thirty (30) days after such event. Owner will have the right to approve the proposed replacement in advance of his or her assignment to the Project. Owner may require the Construction Manager to remove from the Project any personnel whose performance under this Agreement is not satisfactory in Owner's sole judgment.

### § 2.9 Testing/Inspection.

All testing and independent inspection services required to confirm the quality of the Work and Materials, and their conformance with the Contract Documents will be secured and paid for by Owner. The Construction Manager will cooperate and coordinate with the testing and inspection service agencies. The Construction Manager will be responsible for the cost of additional testing and inspection services, established at GMP, due to failed tests and inspections.

§ 2.10 Project Safety Plan.

The Construction Manager will develop, implement, and maintain a Site-Specific Project Safety Plan.

**PAGE 15**

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

...

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

**PAGE 16**

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

...

The Owner shall retain an Architect to provide services, duties, and responsibilities as described in AIA Document ~~B133™-2014, B101™-2007~~, Standard Form of Agreement Between Owner and Architect, ~~Construction Manager as Constructor Edition~~, as modified for this Project, including any additional services requested by the Construction Manager that are necessary for the Preconstruction and Construction Phase services under this Agreement. The Owner shall provide the Construction Manager a copy of the executed ~~agreement-Agreement~~ between the Owner and the Architect, and any further modifications to the ~~agreement-Agreement~~.

...

Preconstruction Services. Stipulated Sum \$ . Preconstruction Services compensation is not part of the Construction Manager's Fee and will be paid for by Owner outside of the Guaranteed Maximum Price.

§ 4.1.3 If the Preconstruction Phase services covered by this Agreement have not been completed **within twelve (12 ) months of the date of this Agreement**, through no fault of the Construction Manager, the Construction Manager's compensation for Preconstruction Phase services shall be equitably adjusted.

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

...

§ 4.2.2 Payments are due by electronic funds transfer and payable upon presentation and receipt of the Construction Manager's invoice. Amounts unpaid (  ) days after the invoice date thirty (30) days after the invoice receipt and approval by Architect and the Owner's designated representative shall bear interest at the rate entered below, or in the absence thereof at the legal rate prevailing from time to time at the principal place of business of the Construction Manager-Owner.

...

   % Two % (2) percent over prime rate annually as published by Wells Fargo N A

**PAGE 17**

A Fee equal to    percent (%) of the Cost of the Work, including the Construction Manager's contingency, the Construction Manager's general conditions, and all Work the Construction Manager directly procures and manages as stated in the Guaranteed Maximum Price. Construction Manager's coordination of work procured directly by Owner and assigned to the Construction Manager will be subject to the Construction Manager's Fee. If Construction Manager's Services for Work procured and paid for directly by Owner are only coordination services for the Owner-procured work and the Construction Manager's Work, Owner and Construction Manager will mutually agree upon the scope of the Construction Manager's additional Services, the compensation amount and the basis for these Services, if any, but said compensation will not exceed a fee equal to the percentage fee set forth above in this Section 5.1.1.

...

For net additive changes to the Cost of the Work in excess of five percent (5%) of the Guaranteed Maximum Price, the Construction Manager will receive a fee equal to the percentage fee set forth above in Section 5.1.1. The Construction Manager's Fee will not be reduced by reason of Change Orders reducing the Cost of the Work. Deductive Change Orders will not apply to the five percent (5%) buffer calculation.

...

Under no circumstances will the compensation to Subcontractors in connection with Change Orders and Construction Change Directives be more than the Subcontractor's costs set forth in Article 7.3.7 of AIA Document A201-2007, as amended, plus no more than ten percent (10%) as full compensation to the Subcontractor for overhead and profit.

§ 5.1.4 Rental rates for Construction Manager-owned equipment shall not exceed    percent (  %) of the standard rate paid at the place of the Project, the Construction Manager's published Equipment Rental Rates attached to this Agreement as Exhibit E, provided, however, the cumulative rental amount may not exceed the purchase price for the specific items. Rental rates for non-Construction Manager-owned equipment will be subject to Owner's approval.

...

Intentionally Omitted.

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



§ 5.1.6 The Construction Manager's general conditions will include mobilization and set up, job site office equipment, field documents/duplication, job site superintendent (with vehicle), on-site field engineer (with vehicle), safety director field visits, project manager field visits, field office trailer (CM), field phones, cellular and internet. A fixed dollar amount of \$[ insert amount] will be included for the general conditions (the "General Conditions") as part of the Cost of the Work at such time as the Guaranteed Maximum Price is determined. The General Conditions Amount is based on the assumption the Owner will issue the Notice to Proceed for an {Insert Month Year} construction start time frame and the Schedule will include a {insert # a months to complete project} construction schedule to the Date of Substantial Completion. If the foregoing are otherwise modified, the General Condition Amount will be reviewed and modified according to the mutual agreement of the Owner and the Construction Manager.

PAGE 18

All savings if the Cost of Work plus the Construction Manager's Fee is less than the Guaranteed Maximum Price will be returned one hundred percent (100%) to Owner.

...

§ 5.2.3 The cost of the items, such as furniture, fixtures, and equipment, purchased through the Construction Manager at the Owner's request, are not included in the Guaranteed Maximum Price. The costs for delivery, unloading, handling, storage, and installation of items purchased through the Construction Manager acting as the Owner's purchasing agent are included in the Guaranteed Maximum Price.

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

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

...

~~§ 5.3.5 If no specific provision is made in Section 5.1.2 for adjustment of the Construction Manager's Fee in the case of changes in the Work, or if the extent of such changes is such, in the aggregate, that application of the adjustment provisions of Section 5.1.2 will cause substantial inequity to the Owner or Construction Manager, the Construction Manager's Fee shall be equitably adjusted on the same basis that was used to establish the Fee for the original Work, and the Guaranteed Maximum Price shall be adjusted accordingly.~~

...

~~§ 6.1.2 Where any cost is subject to the Owner's prior approval, the Construction Manager shall obtain this approval prior to incurring the cost. The parties shall endeavor to identify any such costs prior to executing Guaranteed Maximum Price Amendment.~~

§ 6.1.2 The Construction Manager will prepare and submit to the Owner for approval at the time the Guaranteed Maximum Price is agreed upon, that portion of the Guaranteed Maximum Price which will constitute the Construction Manager's general conditions. The Construction Manager's general conditions will include: (i) the cost of the Construction Manager's supervisory and administrative staff as set forth in Sections 6.2.2 and 6.2.3; and (ii) the costs for the Construction Manager's office trailer, including copiers, furniture, computers, phones, radios, office supplies and all other equipment and materials to be utilized by the Construction Manager's supervisory and

administrative staff at the Project site. All Change Orders and Construction Change Directives will include the Construction Manager's general conditions percentage (the dollar amount of the general conditions divided by the Guaranteed Maximum Price) but no other overhead or profits amounts.

§ 6.1.3 Where any cost is subject to the Owner's prior written approval, the Construction Manager shall obtain this approval prior to incurring the cost. The parties shall endeavor to identify any such costs prior to executing the Guaranteed Price Amendment.

§ 6.1.4 Where any cost is subject to the Owner's prior written approval, the Construction Manager shall obtain this approval prior to incurring the cost. The parties shall endeavor to identify any such costs prior to executing a Guaranteed Maximum Price Amendment.

§ 6.2.1 Wages of construction workers directly employed by the Construction Manager to perform the construction of the Work at the site or, with the Owner's prior approval, at off-site workshops. The cost for those craft workers will be billed at the billing rates listed in Exhibit F.

§ 6.2.2 Wages or salaries of the Construction Manager's supervisory and administrative personnel when stationed at the site with the Owner's prior approval, job site only when in a capacity that expeditiously, economically, effectively, and efficiently benefits the Owner's interest in prosecution of the Work, not the Construction Manager's interest in activities not benefitting the Owner's interests. Other personnel stationed offsite will be reimbursable only for the actual time spent directly performing services in an expeditious, economical, effective, and efficient manner benefitting the Owner's interests in prosecution of the Work. The cost for these personnel including benefits, bonuses, vacation time, personal time off, cell phone costs, mileage, per diem, relocation, and all other costs, will be billed at the personnel billing rates as listed in Exhibit G.

#### PAGE 19

§ 6.2.3 Wages and salaries of the Construction Manager's supervisory or administrative personnel engaged at factories, ~~workshops~~ ~~workshops~~, or on the road, in expediting the production or transportation of materials or equipment required for the Work, but only for that portion of their time required for the ~~Work~~ ~~Work~~, to be billed and paid as further described in Section 6.2.2 above.

§ 6.2.4 Costs paid or incurred by the Construction Manager for taxes, insurance, contributions, assessments and benefits required by law or collective bargaining agreements and, for personnel not covered by such agreements, customary benefits such as sick leave, medical and health benefits, holidays, ~~vacations~~ ~~vacations~~, and pensions, provided such costs are based on wages and salaries included in the Cost of the Work under Sections 6.2.1 through 6.2.3. The rate to be charged for the cost of these items, including workers' compensation, FICA, and state unemployment and federal unemployment will be % of all Wages. For those persons listed in Exhibit G, the rates included in Exhibit G already include the items listed in this Section and no amount in addition to the rates on Exhibit G will be charged for the persons listed on Exhibit G.

§ 6.2.5 Bonuses, profit sharing, incentive compensation and any other discretionary payments paid to anyone hired by the Construction Manager or paid to any Subcontractor or vendor, with the Owner's prior approval. ~~Intentionally Omitted.~~

§ 6.2.6 If the Construction Manager elects to bid the performance of any trade work, that work will be performed under a fixed price subcontract. If successful in securing said self-performed work through the bidding and interview process conducted and supervised by Owner and its designated representative, all skill, labor, material, direct and subcontracted costs, general condition costs, and fees directly attributable to the prosecution of self-performed work will be included in that subcontract fixed amount. No costs incurred for prosecution, supervision, and management of self-performed work will accrue to or be reimbursed outside of the subcontract. Additionally, the subcontracted amount for the Construction Manager's self-performed trade work will be a line item guarantee in the Guaranteed Maximum Price Schedule of Values; no costs in excess of the subcontract fixed amount will be reimbursed through the Construction Manager's contingency fund.

#### PAGE 20

§ 6.5

~~Costs of Other Materials and Equipment, Temporary Facilities and Related Items~~ Costs of Other Materials and Equipment, Temporary Facilities, and Related Items

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

~~§ 6.5.2~~ § 6.5.2 Rental charges for temporary facilities, machinery, ~~equipment~~ equipment, and hand tools not customarily owned by construction workers that are provided by the Construction Manager at the site and costs of transportation, installation, minor repairs, ~~dismantling~~ dismantling, and removal. The total rental cost of any Construction Manager-owned item may not exceed the purchase price of any comparable item. Rates of Construction Manager-owned equipment and quantities of equipment shall be subject to the Owner's prior approval. Construction Manager's furnished equipment will be billed at the equipment billing rates defined in Exhibit E. Expendable tools and minor equipment costs for Construction Manager's general conditions will be billed at \_\_\_\_\_ percent (\_\_\_\_\_% of fully burdened hourly trade labor cost directly attributable to such work, provided, however, the expendable tools and minor equipment compensated by this \_\_\_\_\_ % may not exceed \$500 in cost and will not be additionally compensated for as Construction Manager-owned equipment in Exhibit E. Construction Manager's furnished equipment will be billed at the equipment billing rates defined in Exhibit E.

...

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

~~§ 6.5.5~~ § 6.5.5 That portion of the reasonable expenses of the Construction Manager's supervisory or administrative personnel incurred while traveling in discharge of duties connected with the ~~Work~~ Work, but not including travel from home to the Project site.

...

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

§ 6.6.1 Costs of premiums for bonds and insurance which the Construction Manager is required by the Contract Documents to purchase and maintain, or which Construction Manager deems necessary for the prosecution of the Work, and cost of Subcontractor's payment and performance bonds, required under the Subcontracts. Primary commercial general liability insurance, automobile liability insurance, and umbrella/excess liability insurance will be reimbursed at the rate of \$ \_\_\_\_\_ /\$1,000 of each monthly project billing. Rates will be subject to annual adjustment if required by the Construction Manager. Performance and payment bonds obtained by the Construction Manager for The Project will be reimbursed at the rate of \_\_\_\_\_ /\$1,000 of the Guaranteed Maximum Price, based on an 18-24 month duration with construction starting in the spring of 2016.

§ 6.6.2 Sales, use or similar taxes imposed by a governmental authority that are related to the Work and for which the Construction Manager is liable. Excise taxes will not be included in the Cost of the Work, but will be reimbursed by the Owner to the Construction Manager.

§ 6.6.3 Fees and assessments for the building permit and for other permits, ~~licenses~~ licenses, and inspections for which the Construction Manager is required by the Contract Documents to ~~pay~~ pay will not be included in the Cost of the Work, but will be funded or waived by the Owner.

PAGE 21

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

...

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

...

§ 6.6.10 Costs to procure and maintain a builder's risk policy for the Project, if the Owner requests the Construction Manager to purchase the builder's risk policy.

...

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

§ 6.7.3 Costs of repairing or correcting damaged or nonconforming Work executed by the Construction Manager, Subcontractors or suppliers, provided that such damaged or nonconforming Work was not caused by negligence or failure to fulfill a specific responsibility of the Construction ~~Manager-Manager, Subcontractors, and suppliers, or anyone directly or indirectly employed by any of them or for whose acts any of them may be liable to fulfill a specific responsibility of this Agreement,~~ and only to the extent that the cost of repair or correction is not recovered by the Construction Manager from insurance, sureties, Subcontractors, suppliers, or others.

...

§ 6.7.5 The deductible portion of any losses under policies of builder's risk insurance, provided however, such loss was not caused in whole or part by negligence or the negligent acts of the Construction Manager, Subcontractors and suppliers or anyone directly or indirectly employed by any of them or for whose acts any of them may be liable.

§ 6.7.6 Costs incurred by the Construction Manager because a Subcontractor becomes insolvent or bankrupt, provided however, only to the extent that reimbursement of such costs does not result in the Guaranteed Maximum Price being exceeded and were not caused by the negligent hiring of the Subcontractor, or the Construction Manager's failure to fulfill a specific responsibility of this Agreement.

## PAGE 22

.5 Except as provided in Section 6.7.3 of this Agreement, costs due to the negligence or failure of the Construction Manager, ~~Subcontractors-Subcontractors,~~ and suppliers or anyone directly or indirectly employed by any of them or for whose acts any of them may be liable to fulfill a specific responsibility of the Contract;

...

.7 Costs, other than costs included in Change Orders approved by the Owner, that would cause the Guaranteed Maximum Price to be ~~exceeded;~~ and

- ~~8~~ ~~exceeded;~~ ~~8~~ Costs for services incurred during the Preconstruction Phase-Phase, which will be reimbursed as a stipulated sum as set forth in Section 5.1.1; and
- 9 Mark up on utilities, dumpsters, temporary toilets, safety equipment, hoisting, snow removal, periodic and final clean up, and other purchased and leased equipment and services. However, the actual costs of these items are to be included in the Cost of the Work.

...

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

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

...

§ 6.10.1 For purposes of Section 6.10, the term "related party" shall mean a parent, subsidiary, ~~affiliate~~ affiliate, or other entity having common ownership or management with the Construction Manager; any entity in which any stockholder in, or management employee of, the Construction Manager owns any interest in excess of ~~ten percent~~ 10% in the aggregate; or any person or entity which has the right to control the business or affairs of the Construction Manager. The term "related party" includes any member of the immediate family of any person identified above.

§ 6.10.2 If any of the costs to be reimbursed arise from a transaction between the Construction Manager and a related party, the Construction Manager shall notify the Owner of the specific nature of the contemplated transaction, including the identity of the related party and the anticipated cost to be incurred, before any such transaction is consummated or cost incurred. If the Owner, after such notification, authorizes the proposed transaction, then the cost incurred shall be included as a cost to be reimbursed, and the Construction Manager shall procure the Work, equipment, goods or service from the related party, as a Subcontractor, according to the terms of Sections 2.3.2.1, ~~2.3.2.2~~ 2.3.2.2, and 2.3.2.3. If the Owner fails to authorize the transaction, the Construction Manager shall procure the Work, equipment, goods or service from some person or entity other than a related party according to the terms of Sections 2.3.2.1, ~~2.3.2.2~~ 2.3.2.2, and 2.3.2.3.

...

The Construction Manager shall keep full and detailed records and accounts related to the cost of the Work and exercise such controls as may be necessary for proper financial management under this Contract and to substantiate all costs incurred. The accounting and control systems shall be satisfactory to the Owner. The Owner and the Owner's auditors shall, during regular business hours and upon reasonable notice, be afforded access to, and shall be permitted to audit and copy, the Construction Manager's records and accounts, including complete documentation supporting accounting entries, books, correspondence, instructions, drawings, receipts, subcontracts, Subcontractor's proposals, purchase orders, vouchers, ~~memoranda~~ memoranda, and other data relating to this Contract. The Construction Manager shall preserve these records for a period of three years after final payment, or for such longer period as may be required by law. Because of the procurement requirements governing the Owner's responsibilities and duties for expenditure of public funds, the rates established by the Parties in connection with any Cost of the Work furnished on a unit basis, as established in any of the Exhibits attached to this Agreement or in Article 6 for such things including, but not limited to, personnel rates, field rates, burden, tools, equipment, and insurance will be subject to audit and adjustment. Notwithstanding the foregoing, the buildup of personnel rates will not be subject to audit.

PAGE 23



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

§ 7.1.3 The Construction Manager will deliver to the Architect, the Owner and the Owner's representative each Application for Payment. The Architect will, within ten days after receipt of the Construction Manager's Application for Payment, either issue to the Owner, and the Owner's representative a Certificate for Payment, with a copy to the Construction Manager, for such amount as the Architect determines is properly due, or notify the Construction Manager, the Owner and the Owner's representative in writing of the Architect's reasons for withholding certification in whole or in part. The Owner's designated representative will also determine whether the amount approved by the Architect is properly due and advise the Owner accordingly. The Owner will make payment for all amounts not in dispute by electronic funds transfer to the Construction Manager within thirty (30) days of receipt of the Application for Payment by the Architect, Owner and the Owner's designated representative. (Federal, state or local laws may require payment within a certain period of time.)

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

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

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

#### PAGE 24

- .1 Take that portion of the Guaranteed Maximum Price properly allocable to completed Work as determined by multiplying the percentage of completion of each portion of the Work by the share of the Guaranteed Maximum Price allocated to that portion of the Work in the schedule of values. Pending final determination of cost to the Owner of changes in the Work, amounts not in dispute shall be included as provided in Section 7.3.9 of AIA Document ~~A201-2007~~; A201-2007, as amended;

...

- .3 Add the Construction Manager's Fee, ~~less retainage of  percent (  %).~~ with no retainage. The Construction Manager's Fee shall be computed upon the Cost of the Work at the rate stated in Section 5.1 or, if the Construction Manager's Fee is stated as a fixed sum in that Section, shall be an amount that bears the same ratio to that fixed-sum fee as the Cost of the Work bears to a reasonable estimate of the probable Cost of the Work upon its completion;

- 4 Subtract retainage of five percent ( 5 %) from that portion of the Work that the Construction Manager self-performs;

...

- 7 Subtract amounts, if any, for which the Architect or the Owner's designated representative has withheld or nullified a Certificate for Payment as provided in Section 9.5 of AIA Document ~~A201-2007~~A201-2007, as amended.

...

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

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

...

- 3 a final Certificate for Payment has been issued by the ~~Architect~~Architect or a final and unconditional certificate of occupancy has been issued by the governing authority, whichever event occurs later.

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

a final and unconditional certificate of occupancy has been issued by the governing authority, whichever occurs later.

§ 7.2.2 The Owner's auditors will review and report in writing on the Construction Manager's final accounting within ~~30-45~~ days after delivery of the final accounting to the Architect by the Construction Manager. Based upon such Cost of the Work as the Owner's auditors report to be substantiated by the Construction Manager's final accounting, and provided the other conditions of Section 7.2.1 have been met, the Architect and the Owner's designated representative will, within seven days after receipt of the written report of the Owner's auditors, either issue to the Owner a final Certificate for Payment with a copy to the Construction Manager, or notify the Construction Manager and Owner in writing of the Architect's or Owner's designated representative's reasons for withholding a certificate as provided in Section 9.5.1 of the AIA Document A201-2007. The time periods stated in this Section supersede those stated in Section 9.4.1 of the AIA Document A201-2007. ~~The Architect is not~~ Neither the Architect nor the Owner's designated representative is responsible for verifying the accuracy of the Construction Manager's final accounting.

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



## **§ 8.1 INSURANCE REQUIRED OF THE CONSTRUCTION MANAGER**

During both Phases of the Project, the Construction Manager must purchase and maintain insurance as set forth in Article 8 and as set forth in Section I 1.1 of A201™-2007, as amended. Such insurance must be written for not less than the following limits, or greater limits if required by law:

§ 8.1.1 Workers' Compensation and Employers' Liability meeting statutory limits mandated by state and federal laws. If (1) limits in excess of those required by statute are to be provided, or (2) the employer is not statutorily bound to obtain such insurance coverage or (3) additional coverages are required, additional coverages and limits for such insurance will be as follows:

Workers' Compensation at statutory limits and Employers' Liability with a policy limit of not less than \$1,000,000 bodily injury by accident each accident, and \$1,000,000 bodily injury by disease each employee

§ 8.1.2 Commercial General Liability including coverage for Premises-Operations, Independent Contractors' Protective, Products-Completed Operations, Contractual Liability, Personal Injury and Broad Form Property Damage (including coverage for Explosion, Collapse and Underground hazards):

<u>\$ 1,000,000</u>	<u>Each Occurrence</u>
<u>\$ 2,000,000</u>	<u>General Aggregate</u>
<u>\$ 1,000,000</u>	<u>Personal and Advertising Injury</u>
<u>\$ 2,000,000</u>	<u>Products-Completed Operations Aggregate</u>
<u>\$50,000</u>	<u>Fire Damage (any one fire)</u>
<u>\$5,000</u>	<u>Medical Expense (any one person)</u>

- .1 The policy must be endorsed to have the General Aggregate apply to this Project only.
- .2 Products and Completed Operations insurance must be maintained for a minimum period of at least two ( 2 ) year(s) after either 90 days following Substantial Completion or final payment, whichever is earlier.
- .3 The Contractual Liability insurance must include coverage sufficient to meet the obligations in Section 3.18 of A201™-2007, as amended, subject to policy terms and conditions.
- .4 Coverage must be maintained without interruption from the date of commencement of the Work until the date of final payment.
- .5 Construction Manager must endorse its Commercial General Liability Policy to add Owner as an additional insured.

§ 8.1.3 Automobile Liability (owned, nonowned and hired vehicles) for bodily injury and property damage:

<u>\$1,000,000</u>	<u>Bodily Injury/Property Damage Combined Single Limit (each accident)</u>
<u>\$5,000</u>	<u>Medical Payment (each person)</u>
<u>\$1,000,000</u>	<u>Underinsured Motorist (each accident)</u>

§ 8.1.4 Other coverages:

Umbrella may be used to provide a portion of the limits required under Sections 8.1.2 and 8.1.3.

§ 8.1.5 The Construction Manager may furnish these coverages under one policy or separate policies. The Construction Manager must provide to the Owner certificates of insurance evidencing compliance with the requirements of Article 8 and Article 11 of A201™2007, as amended. The certificates must show the Owner and its elected and appointed officials, agents, officers, city council members, employees, and consultants as additional insureds on the Commercial General Liability, Automobile Liability, Umbrella or Excess policies, and must provide that such insurance is primary and that any other insurance available to the Owner is in excess of and noncontributory to the insurance provided by the Construction Manager. The Insurance Services Office's (ISO) CG 2010 10 01 and CG 2037 or an equivalent endorsement form is to be used for the Commercial General Liability Policy providing additional insured status for completed operations.

§ 8.1.7 All such insurance must be maintained with responsible insurance carriers legally permitted to do business in the State of South Dakota, having a Best rating of not less than A-X, and otherwise reasonably acceptable to the Owner. Upon the signing of this Agreement, the Construction Manager must deposit with the Owner certificates of insurance evidencing the required insurance coverages, bearing notations, or accompanied by other evidence satisfactory to the Owner of the payment of all premiums thereunder.

§ 8.1.8 The Construction Manager must not allow insurance policies required by this Agreement to lapse, be canceled, reduced in coverage, nonrenewed, or materially changed or have restrictive modifications added at any time. As required below, riders or other documentation satisfactory to the Owner must be made part of the insurance policies described herein (and 45 days before the expiration date of any required policy), the Construction Manager must provide equivalent satisfactory evidence to the Owner of the payment of the premium and the renewal of the policy.

§ 8.1.9 The policies must not be canceled, terminated, reduced in limits or coverage, nonrenewed, materially changed, or have restrictive modifications added until thirty (30) days after the Owner's receipt from the Construction Manager's insurance agent or carrier of written notice thereof by certified or registered mail, return receipt requested, addressed to the Owner.

§ 8.1.10 The representations (or the inaccuracies thereof) of the Owner, the Architect, the Construction Manager, Subcontractors, or any other authorized persons on the Project must not invalidate the policies.

§ 8.1.11 The negligence, misrepresentations, or misconduct by the Construction Manager, Subcontractors, and other persons providing labor, services, equipment, or materials must not invalidate the policies as to the Owner.

§ 8.1.12 Insurance policies required by this Agreement must be kept in full force and effect for the following periods:

8.1.12.1 Commercial general liability insurance and umbrella insurance must be kept in full force and effect until five years past Substantial Completion of the Project.

8.1.12.2 Workers' compensation insurance, employers' liability, automobile liability insurance, and umbrella liability insurance must be kept in full force and effect until receipt of final payment by the Construction Manager.

§8.1.13 If the Construction Manager fails to provide or keep in force insurance as required under this Agreement, the Owner may purchase or pay premiums for such insurance on the Construction Manager's behalf, and the Construction Manager will be liable to and must indemnify the Owner for all of the Owner's costs related thereto, including attorney's fees and costs incurred in collecting and enforcing Section 8.1.13.

§8.1.14 Compliance by the Construction Manager with the insurance requirements of this Agreement will not relieve the Construction Manager from liability for amounts in excess of the limits of insurance.

§8.1.15 The commercial general liability policy must be endorsed to provide that the general aggregate applies separate to each project. ISO Endorsement CG2503 per project endorsement or its equivalent is to be used to satisfy this requirement.

§8.1.16 The commercial general liability, automobile liability, umbrella, employers' liability, and workers' compensation policies must be endorsed to provide a waiver of subrogation endorsement in favor of the Owner and its elected and appointed officials, agents, officers, city council members, employees, and consultants.

§8.1.17 The commercial general liability policy must be endorsed to provide primary and non-contributing coverage on the Owner's Project.

§8.1.18 The automobile policy must state by endorsement that it provides primary coverage.

§8.1.19 Upon request of the Owner, the Construction Manager must furnish the Owner complete and certified copies of all policies required by this Article.

§8.1.20 Construction Manager will require all of its Subcontractors and Sub-subcontractors performing work on the Project to purchase employers' liability, workers' compensation, commercial general liability, automobile liability and umbrella liability insurance consistent with the types of insurance coverages required to be purchased by the Construction Manager pursuant hereto to the extent such insurance coverages are applicable to their Work. Construction Manager will obtain Owner's written preapproval for lower insurance limits for any Subcontractor



prior to awarding bids.

(If Umbrella Excess Liability coverage is required over the primary insurance or **retention**, insert the coverage limits. Commercial General Liability and Automobile Liability limits may be attained by individual policies or by a combination of primary policies and Umbrella and/or Excess Liability policies. If Project Management Protective Liability Insurance is to be provided, state the limits here.)

## **§ 8.2 INSURANCE REQUIRED OF THE OWNER**

During both phases of the Project, the Owner shall purchase and maintain liability insurance, including waivers of subrogation, as set forth in Sections 11.2 and 11.3 of A201ThL2007, as amended. Such insurance shall be written for not less than the following limits, or greater if required by law:

**§ 8.2.1** Property insurance: Intentionally omitted.

**§ 8.2.2** Boiler and Machinery insurance with a limit of: \$  
(If not a blanket policy, list the objects to be insured.)

Intentionally omitted.

**§ 8.2.3** Commercial general liability insurance  
\$1,000,000 per occurrence

## **§ 8.3 PERFORMANCE BOND AND PAYMENT BOND**

**§ 8.3.1** The Construction Manager must furnish bonds covering faithful performance of the Contract and payment of obligations arising thereunder. Bonds may be obtained through the Construction Manager's usual source, and the cost thereof will be included in the Cost of the Work. The costs of the bonds are stipulated in Section 6.6.1.

**§ 8.3.2** The Construction Manager must deliver to the Owner the required bonds at least three days before the commencement of any Work at the Project site.

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

A201-2007, as amended.

## **PAGE 28**

[  ] Litigation in a court of competent jurisdiction

...

## **§ 9.3 Initial Decision Maker**

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

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

§ 9.3 Neither party may initiate litigation to pursue a claim arising out of or related to this Agreement, or the performance thereof, without first exhausting the two-stage resolution mechanism set forth in Article 15 of A201-2007, as amended. Exhaustion of such dispute resolution mechanism is a condition precedent to the filing of any litigation on such claim; provided, however, either party may file an appropriate action in a state or federal court where the Project is located for the sole purpose of preserving and protecting its lien rights or avoiding a statute of limitations cut off, with both parties thereafter proceeding to exhaust the dispute resolution mechanism set forth herein before proceeding to prosecute or defend the pending judicial proceedings, except as necessary to avoid prejudice in such litigation.

§ 9.4 The Construction Manager and the Owner agree the dispute resolution provisions of this Article 9 control for all claims and disputes arising under this Agreement. The parties waive the administrative appeals requirements of Article VI, Chapter 2 of the Code of Ordinances of Sioux Falls, entitled,

Administrative Appeals.

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

PAGE 29

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

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

...

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

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

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

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

**§ 10.2.2** If the Construction Manager terminates the Contract after execution of the Guaranteed Maximum Price Amendment, the amount payable to the Construction Manager under Section 14.1.3 of ~~A201-2007~~A201-2007, as amended, shall not exceed the amount the Construction Manager would otherwise have received under Sections 10.1.2 and 10.1.3 above, except that the Construction Manager's Fee shall be calculated ~~as if the Work had been fully completed by the Construction Manager, utilizing as necessary a reasonable estimate of the Cost of the Work for Work not actually completed.~~  
on the Cost of the Work completed to the date of termination at the rate stated in Article 5.

...

The Work may be suspended by the Owner as provided in Article 14 of AIA Document A201-2007. In such case, the Guaranteed Maximum Price and Contract Time shall be increased as provided in Section 14.3.2 of AIA Document A201-2007, except that the term "profit" shall be understood to mean the Construction Manager's Fee as described in Sections ~~5.1-5~~5.1 and 5.3.5 of this Agreement.

...

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

...

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

...

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

...

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

...

**§ 11.5.1** The failure of one party to insist upon or enforce, in any instance, strict performance by the other party of any of the terms of this Agreement, may not be construed as a waiver or relinquishment to any extent of its right to assert or rely upon such terms or right on any future occasion.

§ 11.5.2 The Construction Manager will be liable to and must indemnify the Owner and its elected and appointed officials, agents, officers, city council members, employees, and consultants, and must hold each of the foregoing harmless from and against any and all claims made against any of the foregoing for infringement of any copyright, trademark, or patent arising out of the use of any plans, designs, drawings, or specifications furnished by the Construction Manager in the performance of this Agreement, unless the Owner has given its written approval of the use of the system, method, or equipment in connection therewith after explicit warning that there may be an infringement.

§ 11.5.3 The parties agree the terms of this Agreement must be construed neutrally and not against the Owner or Construction Manager as the drafter of this Agreement.

§ 11.5.4 The Construction Manager acknowledges the Work is to proceed as a no-lien Project in accordance with the laws of the state of South Dakota regarding public projects . No party, therefore, will have the right to assert a mechanics or other lien as against the real estate or the Project. The Construction Manager for itself and for all who claim through the Construction Manager , acknowledge and agree the Project is a public project and that no lien may be asserted against or attach to the real estate on which the Project is to be performed or to any improvements now existing or to be constructed thereon. The Construction Manager must provide written notice to and to any other persons with whom the Construction Manager contracts with respect to Services provided or Work completed pursuant to this Agreement, that this is a public project against which liens cannot be filed, except as against Project proceeds remaining with the Owner. The Construction Manager must indemnify and hold harmless the Owner and City of Sioux Falls for all costs, expenses, and attorneys' fees, should an attempt to assert a lien against the real estate or Project be made on the Construction Manager 's behalf or on behalf of or any other person for whom the Construction Manager is responsible.

§ 11.5.5 All notices required under this Agreement must be made in writing and be served by personal delivery, prepaid registered or certified mail, overnight delivery and/or electronic transmission , with such notices to be deemed effective upon delivery, address to the respect parties as follows:

As to the Owner:

Erin Bofenkamp  
City of Sioux Falls  
224 West Ninth Street  
PO Box 7402  
Sioux Falls, SD 57117-7402  
Email: ebofenkamp@siouxfalls.org

With copies to:

Ms. Karen Leonard  
Assistant City Attorney  
City of Sioux Falls  
224 West Ninth Street  
PO Box 7402  
Sioux Falls, SD 57117-7402  
Email: kleonard@siouxfalls .org

As to the Architect:

As to the Construction Manager:

§ 11.5.6 The Owner and Construction Manager each covenant, warrant, and represent: (i) the individual executing this Agreement on its behalf is duly authorized to execute and deliver this Agreement on behalf of the party for whom he or she signs, (ii) this Agreement is binding upon such party, and (iii) the execution and delivery of this Agreement will not result in any breach of or constitute a default under any Agreement, contract or other instrument to which it is a party or by which it may be bound.

§ 11.5.7 Civil Rights Requirements. The Construction Manager agrees as follows:

§ 11.5.7.1 With respect to any and all business conducted or acts performed pursuant to this Agreement, the Construction Manager will be deemed an employer within the meaning of Chapter 98 of the Code of Ordinances of Sioux Falls entitled "Human Relations" and will be subject to the provisions of such Chapter.

§ 11.5.7.2 If the Construction Manager fails to perform these provisions, this Agreement may forthwith be terminated and canceled in whole or in part by the Owner, and the Construction Manager will be liable for any costs or expense incurred by Owner in obtaining from other sources the Work and Services to be rendered or performed or the goods or properties to be furnished or delivered to the Owner under this Agreement so terminated or canceled.

§ 11.5.7.3 Should the Human Relations Commission in a proceeding brought as provided in Chapter 98 of the Code of Ordinances of Sioux Falls find that the Construction Manager has engaged in discrimination in connection with this Agreement and issues a cease and desist order with respect thereto, the Owner will withhold up to 15 percent of the Agreement price until such time as the Commission's order has been complied with or the Construction Manager has been actiudicated not guilty of such discrimination.

§ 11.5.7.4 The Construction Manager will permit access to any and all records pertaining to hiring and employment and to other pertinent data and records for the purpose of enabling the Human Relations Commission, its agencies or representatives, to ascertain compliance with the provisions of Chapter 98 of the Code of Ordinances of Sioux Falls applicable to the Construction Manager.

§ 11.5.7.5 Section 11.5.7 is binding on all of the Construction Manager's Subcontractors and others performing the Services and Work for the Construction Manager.

§ 11.5.8 Sales and Use Tax. Construction Manager hereby represents and warrants that it does not fail or refuse to collect or remit South Dakota or City sales or use tax for transactions, which are taxable under the laws of the State of South Dakota.

§ 11.5.9 Independent Contractor Status. The parties agree the Construction Manager operates an independent business and is contracting to perform the Services and to do the Work according to its own methods, without being subject to the control of the Owner, except as to the product or the result of the Services and Work. The relationship between the Owner and the Construction Manager is that as between an independent contractor and an owner and not as an employer-employee relationship. The payment of the Cost of the Work and Construction Manager's Fees under Articles 4 and 5 of this Agreement are inclusive of any use, sales, income, or any other tax, except for excise tax assessed on said Fees.

§ 11.5.10 Funds Appropriation. If funds are not budgeted or appropriated for any fiscal year for Services under the terms of this Agreement, this Agreement will impose no obligation on the Owner for payment. This Agreement is null and void except as to annual payments herein agreed upon for which funds have been budgeted or appropriated, and no right of action or damage may accrue to the benefit of the Construction Manager, its successors, or assignees, for any further payments.

§ 11.5.11 Records. When fees or reimbursable expenses are not contracted for as lump sum amounts, the Construction Manager will maintain, and also require its consultants and Subcontractors to maintain, all books, documents, papers, accounting records, and other evidence, which supports the charges invoiced to the Owner relating to this Agreement, and will make all such evidence available for audit by the Owner at its offices at all reasonable times during the term of this Agreement and for a period of three years from the date of final payment for the Services rendered under this Agreement.



§ 11.5.12 Severability. If a court of competent jurisdiction determines any term of this Agreement is invalid or unenforceable to any extent under applicable law, the remainder of this Agreement, and the application of this Agreement to other circumstances will not be affected thereby, and each remaining term will be valid and enforceable to the fullest extent permitted by law.

§ 11.5.13 Publicity. The Construction Manager agrees all communications \with the general public and press will be handled by the Owner, and Construction Manager agrees to make no communication, be it official or unofficial, concerning the construction of the Municipal Center or its progress without first obtaining the Owner’s consent and approval. Construction Manager understands and acknowledges that in an attempt to coordinate media and other public interactions to the benefit of both Parties, any effort by Construction Manager to publicize via its website, print media, press release, interviews with the news media, or prominent clients or partners regarding the Construction Manager’s relationship with the Owner and the construction of the Municipal Center will proceed only after obtaining consent of and in coordination with the Owner.

§ 11.5.14 Confidentiality. The Construction Manager and the Owner acknowledge that in the performance of this Agreement it may be necessary for the Owner to disclose information to the Construction Manager that is considered proprietary or confidential ("Confidential Information"). Confidential Information includes, but not limited to, the details and financial information related to elements or potential elements of the Project including but not limited to advertising, third-party tenants, and or other aspects of the Project. If the Owner considers the information to be Confidential Information, it must be identified as such in writing or marked "Confidential." If orally disclosed to or observed by the Construction Manager, a description of the Confidential Information will be reduced to writing by the Owner, marked "Confidential" and delivered to the Construction Manager within thirty (30) days of disclosure. The Construction Manager agrees to keep in confidence and not to disclose Confidential Information of the Owner to any person outside the Construction Manager’s organization or to any authorized person within Construction Manager’s organization.

PAGE 33

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

...

- .1 AIA Document A133–2009, Standard Form of Agreement ~~Between~~ between Owner and Construction Manager as Constructor where the basis of payment is the Cost of the Work Plus a Fee with a Guaranteed Maximum Price
- .2 AIA Document A201–2007, General Conditions of the Contract for ~~Construction~~ Construction, as amended

...

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

...

- .5 ~~Other documents:~~ Documents:

...

Exhibits	Description	Agreement
A	Project Program	2.1.1.1
B	Project Budget	2.1.1.2
c	Project Schedule	2.1.1.3
D	Construction Manager’s Personnel	2.7

E	Construction Manager's Equipment Billing Rates	5.1.4, 6.5.2
F	Craft Worker Billing Rates	6.2.1
G	Supervisory Billing Rates	6.2.2
H	Description Design Development Document Components	2.1.1.2.5

PAGE 34

Mike Huether, Mayor

...

(City Clerk)

