

# DRAFT AIA® Document A104® - 2017

## Standard Abbreviated Form of Agreement Between Owner and Contractor

AGREEMENT made as of the «TBD» day of «TBD» in the year «2025»  
(In words, indicate day, month and year.)

BETWEEN the Owner: Manager, also referred to as ("Company"):  
(Name, legal status, address and other information)

«AEG Management HCC, LLC», «a Delaware Limited Liability Company»  
«1801 Kalakaua Avenue»  
«Honolulu, Hawaii 96815»  
« »

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

«TBD»« »  
« »  
« »  
« »

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

«Replacement of the Slate Tile Project for the Hawaii Convention Center per the scope of work described in RFP 2024-17 (Section 2) and Contractor's proposal to RFP 2024-17 dated December of 2024.»  
«Hawaii Convention Center ("HCC")»  
«1801 Kalakaua Avenue  
Honolulu, Hawaii 96815»

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

«Wiss, Janney, Elstner Associates, Inc.»« »  
«745 Fort Street, Suite 2200»  
«Honolulu, Hawaii 96813»  
« »

The Owner-Manager and Contractor agree as follows.

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

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

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

## TABLE OF ARTICLES

1	THE WORK OF THIS CONTRACT
2	DATE OF COMMENCEMENT AND SUBSTANTIAL COMPLETION
3	CONTRACT SUM
4	PAYMENT
5	DISPUTE RESOLUTION
6	ENUMERATION OF CONTRACT DOCUMENTS
7	GENERAL PROVISIONS
8	<a href="#">OWNER/MANAGER</a>
9	CONTRACTOR
10	ARCHITECT
11	SUBCONTRACTORS
12	CONSTRUCTION BY <a href="#">OWNER/MANAGER</a> OR BY SEPARATE CONTRACTORS
13	CHANGES IN THE WORK
14	TIME
15	PAYMENTS AND COMPLETION
16	PROTECTION OF PERSONS AND PROPERTY
17	INSURANCE AND BONDS
18	CORRECTION OF WORK
19	MISCELLANEOUS PROVISIONS
20	TERMINATION OF THE CONTRACT
21	CLAIMS AND DISPUTES

## EXHIBIT A DETERMINATION OF THE COST OF THE WORK

### ARTICLE 1 THE WORK OF THIS CONTRACT

~~The Contractor shall execute the Work described in the Contract Documents, except as specifically indicated in the Contract Documents to be the responsibility of others.~~ § 1.1 The Contractor shall complete the Work described in the Contract Documents for the Project. In the case of a conflict or ambiguity between the terms of the Contract Documents, the Contractor shall resolve such ambiguity or conflict in the order set forth below, with 1.1.1 taking precedence, and 1.1.7 lower in order. Notwithstanding anything to the contrary within this Section, in the event that a conflict or ambiguity exists within the Contract Documents, the Contractor shall resolve said ambiguity to include the highest quality and largest quantity. The Contract Documents consist of:

.1 This Agreement signed by the Manager and Contractor;

.2 The General Conditions, attached hereto as Exhibit M;

- [.3 The Special Conditions, attached hereto as Exhibit N;](#)
- [.4 Change Orders and Modifications to the above documents issued after the date of the Agreement \(A104-2017\);](#)
- [.5 Other Exhibits to the Agreement;](#)
- [.6 The RFP including all amendments and addenda; and](#)
- [.7 Proposal \(including BAFOs\) in response to RFP No. #2024-17.](#)

**ARTICLE 2 DATE OF COMMENCEMENT AND SUBSTANTIAL COMPLETION**

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

- The date of this Agreement.
- A date set forth in a notice to proceed issued by the Owner-Manager.
- Established as follows:  
(Insert a date or a means to determine the date of commencement of the Work.)

«A date set forth in a notice to proceed issued by the Owner; provided that the Owner may issue one or more notices to proceed for all or limited scopes of the Work.»

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

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

**§ 2.3 Substantial Completion**

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

- Not later than «TBD» («TBD») calendar days from the date of commencement of the Work.
- By the following date: « »

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

Portion of Work	Substantial Completion Date

§ 2.3.3 If the Contractor fails to achieve Substantial Completion as provided in this Section 2.3, liquidated damages, if any, shall be assessed as set forth in Section 3.5.

**ARTICLE 3 CONTRACT SUM**

§ 3.1 The Owner-Manager shall pay the Contractor the Contract Sum in current funds for the Contractor's performance of the Contract. The Contract Sum shall be one-of-issued-under the following:  
(Check the appropriate box.)

- Stipulated Sum, in accordance with Section 3.2 below
- Cost of the Work plus the Contractor's Fee, in accordance with Section 3.3 below
- Cost of the Work plus the Contractor's Fee with a Guaranteed Maximum Price, in accordance with Section 3.4 below



**§ 3.5 Liquidated damages, if any:**

*(Insert terms and conditions for liquidated damages, if any.)*

**§ 3.4.3 Guaranteed Maximum Price**

**§ 3.4.3.1** The sum of the Cost of the Work and the Contractor's Fee is guaranteed by the Contractor not to exceed (\$ ) , subject to additions and deductions by changes in the Work as provided in the Contract Documents. This maximum sum is referred to in the Contract Documents as the Guaranteed Maximum Price. Costs which would cause the Guaranteed Maximum Price to be exceeded shall be paid by the Contractor without reimbursement by the Owner. ~~The Contractor's failure to substantially complete the Work within the time period set forth in Section 2.3 shall result in liquidated damages in the amount of TBD (\$TBD) per calendar day.~~

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

**§ 3.4.3.2** The Guaranteed Maximum Price is based on the following alternates, if any, which are described in the Contract Documents and are hereby accepted by the Owner:

*(State the numbers or other identification of accepted alternates. If the bidding or proposal documents permit the Owner to accept other alternates subsequent to the execution of this Agreement, attach a schedule of such other alternates showing the amount for each and the date when that amount expires.)*

**§ 3.4.3.3 Unit Prices, if any:**

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

Item	Units and Limitations	Price per Unit (\$0.00)
<input type="text"/>	<input type="text"/>	<input type="text"/>

**§ 3.4.3.4 Allowances, if any, included in the Guaranteed Maximum Price:**

*(Identify each allowance.)*

Item	Price
<input type="text"/>	<input type="text"/>

**§ 3.4.3.5 Assumptions, if any, on which the Guaranteed Maximum Price is based:**

**§ 3.4.3.6** To the extent that the Contract Documents are anticipated to require further development, the Guaranteed Maximum Price includes the costs attributable to such further development consistent with the Contract Documents and reasonably inferable therefrom. Such further development does not include changes in scope, systems, kinds and quality of materials, finishes or equipment, all of which, if required, shall be incorporated by Change Order.

**§ 3.4.3.7** The Owner shall authorize preparation of revisions to the Contract Documents that incorporate the agreed-upon assumptions contained in Section 3.4.3.5. The Owner shall promptly furnish such revised Contract Documents to the Contractor. The Contractor shall notify the Owner and Architect of any inconsistencies between the agreed-upon assumptions contained in Section 3.4.3.5 and the revised Contract Documents. The Contractor is on notice that the Work being performed under this Contract at the Hawaii Convention Center where numerous events are scheduled that involve all or various portion of the building. Scheduling of the Work shall and will be done so as not to negatively impact scheduled events. If certain portions of the Work are not performed on time, this could have a negative impact on scheduled events and the running of the Convention Center in general. Consequently, due to the difficulty in determining actual damages should the Work not be completed as stated in the Contract documents, the liquidated damages herein are an approximation of the actual damages should such a delay in completion occur by the Contractor.»

**§ 3.5.1 Intentionally deleted.**

**§ 3.5 Liquidated damages, if any:**

~~(Insert terms and conditions for liquidated damages, if any.)~~ **§ 3.5.2** The Contractor acknowledges that in the event that the Contractor fails to achieve Substantial Completion of the Work by the Date of Substantial Completion, the Manager will incur substantial damages and the extent of such damages cannot be measured or are very difficult to accurately measure. Nonetheless, the parties acknowledge and agree that as of the date of the Agreement, the amount of liquidated damages set forth herein represents a good faith estimate on the part of the parties as to the Manager's damages that would result from late completion and that the amount of such liquidated damages does not include any penalty.

**§ 3.5.3** The liquidated damages set forth herein shall be the sole and exclusive monetary remedy available to the Manager for delays to the completion of the Work as established herein, however, the Manager hereby retains any and all non-monetary rights and remedies for delays to the completion of the Work under the terms of the Contract and applicable laws, including, without limitation, the Manager's right of termination hereunder.

**ARTICLE 4 PAYMENT**

**§ 4.1 Progress Payments**

**§ 4.1.1** Based upon complete and accurate Applications for Payment submitted to the Architect by the Contractor and Certificates for Payment issued by the Architect, the ~~Owner~~ Manager shall make progress payments of approved amounts on account of the Contract Sum to the Contractor as provided below and elsewhere in the Contract Documents.

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

**§ 4.1.3** Provided that an Application for Payment is received by the Architect not later than the ~~«10th»~~ day of a month, the ~~Owner~~ Manager shall make payment of the certified and Manager approved amount to the Contractor not later than the ~~«10th»~~ day of the ~~«following»~~ month. If an Application for Payment is received by the Architect after the date fixed above, payment shall be made by ~~the Owner not later than~~ ~~«~~ the Manager based on the approved amount not later than «forty-five» («45») days after the Architect receives the Application for Payment. Application 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. *(Federal, state or local laws may require payment within a certain period of time.)*

**§ 4.1.4** For each progress payment made prior to Substantial Completion of the Work, the ~~Owner~~ Manager may withhold retainage from the payment otherwise due as follows:  
*(Insert a percentage or amount to be withheld as retainage from each Application for Payment and any terms for reduction of retainage during the course of the Work. The amount of retainage may be limited by governing law.)*

~~«The Manager will pay the Contractor in full minus five percent (5%) retainage for each calendar month payment application, certified by the CM/PM, until such a time that the Contract is past fifty percent (50%) complete, and the progress is satisfactory, no additional sum may be withheld from any payments to the Contractor.»~~

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

~~«6»~~ % ~~«per annum»~~

**§ 4.1.6** Section 103-32.1(d)(3), Hawaii Revised Statutes (HRS) allows the Contractor to withhold from amounts due its subcontractors, only the same percentage of retainage as that of the Contractor, and only if its subcontractors have provided valid performance and payment bonds or other bond or collateral acceptable to the Contractor. Section 103-32.1E, HRS, allows the Contractor or subcontractor to negotiate with, and retain from its respective subcontractors, a different retainage percentage which cannot exceed ten percent (10%). All amounts retained shall be held by the procurement officer. Therefore no additional amounts are to be retained by the State unless: (1) the

Contractor's progress is not satisfactory, in which case the State may continue to withhold up to five percent (5%) of the amount due the Contract, after fifty percent (50%) of the Contract is completed; or (2) there is a subcontract in which the Contractor or subcontractor has negotiated a retainage in excess of the five percent (5%), but no more than ten percent (10%).

## § 4.2 Final Payment

§ 4.2.1 Final payment, constituting the entire unpaid balance of the Contract Sum, calculated in accordance with Section 4.1.3 shall be made by the Owner-Manager to the Contractor when

- .1 the Contractor has fully performed the Contract except for the Contractor's responsibility to correct Work as provided in Section 18.2, and to satisfy other requirements, if any, which extend beyond final payment;
- .2 the Contractor has submitted a final accounting for the Cost of the Work, where payment is on the basis of the Cost of the Work with or without a Guaranteed Maximum Price; and the Manger has received certification by the Architect and the Contractor that the Work has been completed in accordance with the Contract Documents;
- .3 Intentionally deleted;
- .4 the Manager has received an affidavit of payment of debts and claims executed by the Contractor on AIA Form G706, including consent of surety for final payment if required by any performance or payment bond;
- .5 the Manager has received written certification from the Architect that each final Punch List item (defined below) for the Work has been completed;
- .6 the Manager has received copies of all special inspection reports, certificates or any similar items as required by any political subdivision relating to the Work;
- .7 Intentionally deleted;
- .8 the Manager has received copies and, as applicable, assignment, of all guaranties for workmanship, and all warranties and maintenance agreements, relating to the completed Work, and the Manager training has been completed;
- .9 the Manager has received "as built" record drawings and specifications that include all modifications and changes that have been included in the Plans and Specifications.
- ~~.3~~ .10 a final Certificate for Payment has been issued by the Architect in accordance with Section 15.7.1.
- .11 the Manager has received a certificate evidencing that insurance required by the Contract Documents to remain in force after final payment is currently in effect and will not be canceled or allowed to expire until at least thirty (30) days' prior written notice has been given to the Manager and a written statement that the Contractor knows of no substantial reason that the insurance will not be renewable to cover the period required by the Contract Documents;

§ 4.2.2 The Owner's-Manager's final payment to the Contractor shall be made no later than ~~30~~ sixty (60) days after the issuance of the Architect's final Certificate for ~~Payment, or as follows: Payment and final approval is authorized by the Manager, based on the Contractor's completion of requirements outlined in Section 4.2.1.~~

§ 4.2.3 Intentionally deleted.

## ARTICLE 5 DISPUTE RESOLUTION

### § 5.1 Binding Dispute Resolution

For any claim subject to, but not resolved ~~by, mediation pursuant to Section 21.5, by mediation,~~ the method of binding dispute resolution shall be as follows:

*(Check the appropriate box.)*

[  ] Arbitration pursuant to Section 21.6 of this Agreement

[  ] Litigation in a court of competent jurisdiction

[  ] Other *(Specify)*

[  ]

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

**§ 5.1.1 Meet and Confer**

In the event of a dispute involving terms or performance of this Contract, the Parties agree to initially attempt to resolve the dispute through a meet and confer process. The aggrieved Party shall submit information regarding the nature of the dispute to the other Party at the addresses listed herein. Upon receipt of any such notice, decision-making representatives of the Parties shall meet and confer in person in an effort to resolve such dispute. In the event that the dispute is not resolved through this informal process, the Parties may attempt, but are not required, to resolve the dispute through mediation. If the Parties do not both agree to submit the dispute to mediation, then the dispute shall be resolved through litigation as provided herein.

**§ 5.1.2 Mediation**

The Parties may mediate disputes, but only if both Parties agree to use mediation. In the event mediation is utilized, the Party seeking mediation shall send a notice to the other Party, setting forth the nature of the controversy, the dollar amount involved, if any, and the remedy sought. There shall be one mediator. The Parties shall conduct the mediation through Dispute, Prevention & Resolution, Inc. ("DPR") and shall select a mediator from the DPR Panel. The cost of the mediator and the mediation shall be borne equally by the Parties and the mediation shall take place in Honolulu, Hawaii. In the event mediation is not successful, the dispute shall be resolved through litigation.

**§ 5.1.3 Continued Performance**

Pending the final resolution of any dispute, Contractor shall continue to perform the undisputed Work required by the Contract, and Manager shall continue to pay all amounts due that are not subject to the dispute.

**ARTICLE 6 ENUMERATION OF CONTRACT DOCUMENTS**

**§ 6.1** The Contract Documents are defined in Article 7 and, except for Modifications issued after execution of this Agreement, are enumerated in the sections below.

**§ 6.1.1** The Agreement is this executed AIA Document A104™–2017, Standard Abbreviated Form of Agreement Between ~~Owner and Contractor-Manager and Contractor~~ the Manager and the Contractor, as modified and agreed to by the parties.

**§ 6.1.2** ~~Building information modeling exhibit, AIA Document E203™–2013, Building Information Modeling and Digital Data Exhibit,~~ dated as indicated below:

*(Insert the date of the ~~building information modeling exhibit E203–2013~~ incorporated into this Agreement.)*

«N/A»

**§ 6.1.3** The Supplementary and other Conditions of the Contract:

Document	Title	Date	Pages
N/A			

**§ 6.1.4** The Specifications:

*(Either list the Specifications here or refer to an exhibit attached to this Agreement.)*

«See Exhibit L – List of Drawings and Specifications»

Section	Title	Date	Pages
---------	-------	------	-------

**§ 6.1.5** The Drawings:

*(Either list the Drawings here or refer to an exhibit attached to this Agreement.)*

«See Attachment K – List of Drawings and Specifications»



Number	Title	Date

§ 6.1.6 The Addenda, if any:

Number	Date	Pages
<a href="#">«See Exhibit L – List of Drawings and Specifications»</a>		

Portions of Addenda relating to bidding or proposal requirements are not part of the Contract Documents unless the bidding or proposal requirements are enumerated in this Article 6.

§ 6.1.7 Additional documents, if any, forming part of the Contract Documents:

.1 Other Exhibits:

(Check all boxes that apply.)

Exhibit A, Determination of the Cost of the Work.

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

«N/A»

The Sustainability Plan:

Title	Date	Pages
<a href="#">None</a>		

Supplementary and other Conditions of the Contract:

Document	Title	Date	Pages

.2 Other documents, if any, listed below:

(List here any additional documents that are intended to form part of the Contract Documents.)

- [Exhibit B – Cost Summary, General Conditions costs, insurances and bond costs, as required and clarifications](#)
- [Exhibit C – General Conditions costs](#)
- [Exhibit D – Labor Rates](#)
- [Exhibit E – Staff Time Allocation](#)
- [Exhibit F – Allowances, Alternates and Unit Prices](#)
- [Exhibit G – Responsibility and Budget Matrix](#)
- [Exhibit H – Clarifications and Assumptions](#)
- [Exhibit I – Construction Schedule](#)
- [Exhibit J – Contractor’s Equipment Rates](#)
- [Exhibit K – Insurance Certificates](#)
- [Exhibit L – List of Drawings and Specifications](#)
- [Exhibit M – The Special Conditions](#)
- [Exhibit N – The General Conditions»](#)

**ARTICLE 7 GENERAL PROVISIONS**

**§ 7.1 The Contract Documents**

The Contract Documents are enumerated in Article 6 and consist of this Agreement (including, if applicable, Supplementary and other Conditions of the Contract), Drawings, Specifications, Addenda issued prior to the execution of this Agreement, other documents listed in this Agreement, and Modifications issued after execution of this Agreement. A Modification is (1) a written amendment to the Contract signed by both parties, (2) a Change

Order, (3) a Construction Change Directive, or (4) a written order for a minor change in the Work issued by the Architect. The intent of the Contract Documents is to include all items necessary for the proper execution and completion of the Work by the Contractor. The Contract Documents are complementary, and what is required by one shall be as binding as if required by all; performance by the Contractor shall be required to the extent consistent with the Contract Documents and reasonably inferable from them as being necessary to produce the indicated results.

## § 7.2 The Contract

The Contract Documents form the Contract for ~~Construction~~, Construction ("Contract"). The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations, or agreements, either written or oral. The Contract may be amended or modified only by a Modification. The Contract Documents shall not be construed to create a contractual relationship of any kind between any persons or entities other than the Owner-Manager and the Contractor.

## § 7.3 The Work

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

## § 7.4 Instruments of Service

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

## § 7.5 Ownership and use of Drawings, Specifications and Other Instruments of Service

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

**§ 7.5.2** The Contractor, ~~Subcontractors, Sub-subcontractors-subcontractors, sub-subcontractors~~ and suppliers are authorized to use and reproduce the Instruments of Service provided to them, subject to the protocols established pursuant to Sections 7.6 and 7.7, solely and exclusively for execution of the Work. All copies made under this authorization shall bear the copyright notice, if any, shown on the Instruments of Service. The Contractor, Subcontractors, Sub-subcontractors, and suppliers may not use the Instruments of Service on other projects or for additions to this Project outside the scope of the Work without the specific written consent of the Owner-Manager, Architect and the Architect's consultants.

## § 7.6 Digital Data Use and Transmission

~~The parties shall agree upon written protocols governing the transmission and use of, and reliance on, Instruments of Service or any other information or documentation in digital form.~~ Intentionally deleted.

## § 7.7 Building Information Models Use and Reliance

~~Any use of, or reliance on, all or a portion of a building information model without agreement to written protocols governing the use of, and reliance on, the information contained in the model shall be at the using or relying party's sole risk and without liability to the other party and its contractors or consultants, the authors of, or contributors to, the building information model, and each of their agents and employees.~~ Intentionally deleted.

## § 7.8 Severability

The invalidity of any provision of the Contract Documents shall not invalidate the Contract or its remaining provisions. If it is determined that any provision of the Contract Documents violates any law, or is otherwise invalid or unenforceable, then that provision shall be revised to the extent necessary to make that provision legal and

enforceable. In such case the Contract Documents shall be construed, to the fullest extent permitted by law, to give effect to the parties' intentions and purposes in executing the Contract.

### § 7.9 Notice

§ 7.9.1 Except as otherwise provided in Section 7.9.2, where the Contract Documents require one party to notify or give notice to the other party, such notice shall be provided in writing to the designated representative of the party to whom the notice is addressed and shall be deemed to have been duly served if delivered in person, by mail, by courier, or by electronic transmission in accordance with a building information modeling exhibit, if completed, or as otherwise set forth below:

*(If other than in accordance with a building information modeling exhibit, insert requirements for delivering Notice in electronic format such as name, title and email address of the recipient and whether and how the system will be required to generate a read receipt for the transmission.)*

or by courier.

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

### § 7.10 Relationship of the Parties

Where the Contract is based on the Cost of the Work plus the Contractor's Fee, with or without a Guaranteed Maximum Price, the Contractor accepts the relationship of trust and confidence established by this Agreement and covenants with the Owner-Manager to cooperate with the Architect and exercise the Contractor's skill and judgment in furthering the interests of the Owner-Manager; to furnish efficient business administration 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-Manager's interests. The Owner-Manager agrees to furnish and approve, in a timely manner, information required by the Contractor and to make payments to the Contractor in accordance with the requirements of the Contract Documents.

## ARTICLE 8 – OWNER

### ARTICLE 8 MANAGER

#### § 8.1 Information and Services Required of the Owner ~~Information and Services Required of the Manager~~

§ 8.1.1 Prior to commencement of the Work, at the written request by the Contractor, the Owner-Manager shall furnish to the Contractor reasonable evidence that the Owner-Manager has made financial arrangements to fulfill the Owner's-Manager's obligations under the Contract. The Contractor shall have no obligation to commence the Work until the Owner-Manager provides such evidence. If commencement of the Work is delayed under this Section 8.1.1, the Contract Time shall be extended appropriately.

§ 8.1.2 The Owner-Manager shall furnish all necessary surveys and a legal description of the site.

§ 8.1.3 The Contractor shall be entitled to rely on the accuracy of information furnished by the Owner-Manager but shall exercise proper precautions relating to the safe performance of the Work.

§ 8.1.4 Except for permits and fees that are the responsibility of the Contractor under the Contract Documents, including those required under Section 9.6.1, the Owner-Manager shall secure and pay for other necessary approvals, easements, assessments, and charges required for the construction, use, or occupancy of permanent structures or for permanent changes in existing facilities.

#### § 8.2 ~~Owner's Right to Stop the Work~~ Manager's Right to Stop the Work

If the Contractor fails to correct Work which is not in accordance with the requirements of the Contract Documents, or repeatedly fails to carry out the Work in accordance with the Contract Documents, the Owner-Manager may issue a written order to the Contractor to stop the Work, or any portion thereof, until the cause for such order is eliminated; however, the right of the Owner-Manager to stop the Work shall not give rise to a duty on the part of the Owner-Manager to exercise this right for the benefit of the Contractor or any other person or entity. The Contractor shall be liable for all impacts related to delays resulting from a stop Work order issued by the Manager based on the Contractor's failure to perform under this paragraph. The exercise of the Manager's right to stop Work shall not result in any extensions to the Project Schedule.

### **§ 8.3 Owner's Right to Carry Out the Work/Manager's Right to Carry Out the Work**

If the Contractor defaults or neglects to carry out the Work in accordance with the Contract Documents, and fails within a ten-day period after receipt of notice from the Owner-Manager to commence and continue correction of such default or neglect with diligence and promptness, the Owner-Manager may, without prejudice to any other remedies the Owner-Manager may have, correct such default or neglect. Such action by the Owner-Manager and amounts charged to the Contractor are both subject to prior approval of the Architect and the Architect may, pursuant to Section 15.4.3, withhold or nullify a Certificate for Payment in whole or in part, to the extent reasonably necessary to reimburse the Owner-Manager for the reasonable cost of correcting such deficiencies, including the Owner's-Manager's expenses and compensation for the Architect's additional services made necessary by such default, neglect, or failure. If the Contractor disagrees with the actions of the Owner-Manager or the Architect, or the amounts claimed as costs to the Owner-Manager, the Contractor may file a Claim pursuant to Article 21.

### **§ 8.4 Manager Inspections**

The Manager has the right, at all reasonable times and prior to acceptance, to inspect or otherwise evaluate the Work performed or being performed under the Contract and the site in which it is being performed. The Contractor shall provide and shall require Subcontractors to provide all reasonable access and assistance for the safety and convenience of the Manager. All inspections and evaluations shall be performed in such a manner as will not unduly delay the Work. Any such inspections or evaluations do not constitute acceptance of the Work nor waive any rights of the Manager under the Contract Documents. If any of the Work is not acceptable to the Manager or the Architect as conforming to the requirements of the Contract Documents, any such nonconforming Work shall be corrected in accordance with Article 18 herein.

§ 8.5 The Contractor shall treat all information relating to the Project and all information supplied to the Contractor by the Manager or Architect, or to which the Contractor has access on site, as confidential and proprietary information of the Manager and shall not permit its release to other parties except as may be necessary in dealing with governmental authorities, Subcontractors, suppliers and consultants in the ordinary course of permitting and constructing the Project, and shall not make any public announcement or publicity releases without the Manager's prior express written authorization. All Subcontracts shall require the same of Subcontractors of all tiers.

## **ARTICLE 9 CONTRACTOR**

### **§ 9.1 Review of Contract Documents and Field Conditions by Contractor**

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

**§ 9.1.2** Because the Contract Documents are complementary, the Contractor shall, before starting each portion of the Work, carefully study and compare the various Contract Documents relative to that portion of the Work, as well as the information furnished by the Owner-Manager pursuant to Section 8.1.2, shall take and verify field measurements of any existing conditions related to that portion of the Work and shall observe any conditions at the site affecting it. These obligations are for the purpose of facilitating coordination and construction by the Contractor and are not for the purpose of discovering errors, omissions, or inconsistencies in the Contract Documents; however, the Contractor shall promptly shall, within three (3) days report to the Architect any errors, inconsistencies, or omissions discovered by or made known to the Contractor as a request for information in such form as the Architect may require. It is recognized that the Contractor's review is made in the Contractor's capacity as a contractor and not as a licensed design professional unless otherwise specifically provided in the Contract Documents. If the Contractor performs any construction activity knowing it involves a recognized error, omission, or inconsistency in the Contract Documents without such notice to the Manager, the Contractor shall assume responsibility for such performance and shall bear the amount of the attributable costs for any necessary correction of the Work.

The Contractor shall carefully study all the Contract Documents including the Drawings, Specifications, as well as any test information, existing conditions, historical data, conditions of permits and licenses, and other site-specific information as deemed necessary by the Contractor to fully understand the Project's scope of Work. It is the responsibility of the Contractor to notify the Manager, in writing, of conditions or exemptions which are not included in the Contractor's scope of Work; provided, however, such conditions or exemptions shall not result in any change to the Stipulated Sum or the schedule except as provided in Article 13 herein.

**§ 9.1.3** The Contractor is not required to ascertain that the Contract Documents are in accordance with applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities, but the Contractor shall promptly shall, within three (3) days report to the Architect any nonconformity discovered by or made known to the Contractor as a request for information in such form as the Architect may require.

## **§ 9.2 Supervision and Construction Procedures**

**§ 9.2.1** The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences, and procedures, and for coordinating all portions of the Work under the Contract, unless the Contract Documents give other specific instructions concerning these matters.

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

**§ 9.2.3** Contractor's Project Superintendent shall be (TBD), and the Project Manager shall be (TBD). The Contractor commits that the Project Superintendent and Project Manager will be available throughout the Project for their respective roles and will not be removed from the Project without the Manager's prior written approval. The Contractor commits that the Project Superintendent will be committed to this Project and onsite during all construction activity. The Contractor also commits the Project Manager will be available throughout the Project and close-out process, completing at receipt of Final Payment. These commitments shall be adhered to unless the Project Superintendent or Project Manager leaves the employment with the Contractor and any replacement shall be subject to approval of the Manager, which approval shall not be unreasonably withheld or delayed.

## **§ 9.3 Labor and Materials**

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

**§ 9.3.2** The Contractor shall enforce strict discipline and good order among the Contractor's employees and other persons carrying out the Work. The Contractor shall not permit employment of unfit persons or persons not skilled in tasks assigned to them. The Contractor shall take all necessary steps to ensure labor harmony on the Project and shall perform all Work in accordance with local labor laws and regulations.

**§ 9.3.3** The Contractor may make a substitution only with the written consent of the Owner-Manager, after evaluation by the Architect and in accordance with a Modification.

**§ 9.3.4** Contractor warrants that it has, with the Staff Time Allocation and Responsibility and Budget Matrices attached as Exhibits E and G hereto, are sufficient to provide the requisite experience and sufficient personnel to perform the Work herein, and shall perform such Work, in a good and workmanlike manner; and that employees of the Contractor shall be adequately trained and supervised. The Contractor shall ensure that each Subcontractor it uses on this Project shall have the requisite expertise and competent personnel to properly perform services for this Project.

## **§ 9.4 Warranty**

The Contractor warrants to the Owner and Manager and the Architect that materials and equipment furnished under the Contract will be of good quality and new unless the Contract Documents require or permit otherwise. The Contractor further warrants that the Work will conform to the requirements of the Contract Documents and will be free from defects, except for those inherent in the quality of the Work the Contract Documents require or permit. Work, materials, or equipment not conforming to these requirements may be considered defective. The Contractor's warranty excludes remedy for damage or defect caused by abuse, alterations to the Work not executed by the Contractor, improper or insufficient maintenance, improper operation or normal wear and tear under normal usage. All other warranties required by the Contract Documents shall be issued in the name of the Owner-Manager, or shall be transferable to the Owner-Manager, and shall commence in accordance with Section 15.6.3. Notwithstanding any inspection or acceptance by the Manager, the Contractor warrants that all Work performed

under the Contract shall be performed in a good and workmanlike manner in accordance with established industry standards, the Contract Documents, and all applicable Federal, State, and local law.

### **§ 9.5 Taxes**

The Contractor shall pay applicable sales, consumer, use, and other similar taxes that are legally enacted when bids are received or negotiations concluded, whether or not yet effective or merely scheduled to go into effect, taxes, whether or not yet effective, or adopted after the effective date of this Agreement.

### **§ 9.6 Permits, Fees, Notices, and Compliance with Laws**

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

**§ 9.6.2** The Contractor shall comply with and give notices required by applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities applicable to performance of the Work. The Contractor shall obtain certificates of compliance, where required. If the Contractor performs Work knowing it to be contrary to applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities, the Contractor shall notify the Manager in writing before the Work is performed. The Contractor shall assume appropriate responsibility for such Work and shall bear the costs attributable to correction.

### **§ 9.7 Allowances**

The Contractor shall include in the Contract Sum all allowances stated in the Contract Documents. The Owner/Manager shall select materials and equipment under allowances with reasonable promptness. Allowance amounts shall include the costs to the Contractor of materials and equipment delivered at the site and all required taxes, less applicable trade discounts. The Contractor's costs for unloading and handling at the site, labor, installation, overhead, profit, and other expenses contemplated for stated allowance amounts shall be included in the Contract Sum but not in the allowance. Allowances shall be tracked separately on a monthly basis. A Change Order must be utilized to adjust Allowances amounts. The Change Order must detail the difference between the original allowance amount and the purchase amount of the allowance, including, if applicable, reasonable allowances for cutting losses, tolerances, mixing wastes, normal imperfections and similar margins and installation costs in the purchase amount only where indicated as part of the allowances. Documentation must be provided to substantiate the distribution of any margins claimed. The Manager reserves the right to establish the quantity of work-in-place by independent quantity survey, measure or count.

### **§ 9.8 Contractor's Construction Schedules**

**§ 9.8.1** The Contractor, promptly after being awarded the Contract, shall submit for the Owner's/Manager's and Architect's information a Contractor's construction schedule for the Work. The detailed Project Construction Schedule for the Work in a critical-path format for the Manager and Architect's review and the Manager's acceptance. The Contractor shall obtain the Architect's concurrence for the portion of the detailed Project Construction Schedule relating to the performance of the Architect's services. The detailed Project Construction Schedule shall coordinate and integrate the Contractor services, the Architect's services, other Manager consultants' services, and the Manager's responsibilities as well as identify major milestone items that could affect the Project's timely completion. Thereafter, the Contractor shall, at least bi-weekly, or more often, if required by the Manager, update the detailed project Construction Schedule and the updated schedule shall also include the following: 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 Manager. The detailed Project Construction Schedule shall not exceed time limits current under the Contract Documents, shall be revised at appropriate intervals as required by the conditions of the Work and Project, shall be related to the entire Project to the extent required by the Contract Documents, and shall provide for expeditious and practicable execution of the Work. The Manager reserves the right to provide a list of critical dates when Work at the site and/or interruptions should be avoided.

**§ 9.8.2** The Contractor shall perform the Work in general accordance with the most recent schedule submitted to the Owner and Manager and the Architect.

## **§ 9.9 Submittals**

**§ 9.9.1** The Within ten (10) days following the Notice to Proceed with construction phase Work, the Contractor shall provide a detailed schedule to the Architect which identifies all submittals for Shop Drawings, Product Data, Samples and similar submittals to the Architect ("Submittal Schedule"). Once the Architect accepts the Submittal Schedule, which approval shall not be unreasonably withheld, the Contractor shall review for compliance with the Contract Documents and submit to the Architect Shop Drawings, Product Data, Samples, and similar submittals required by the Contract Documents in coordination with the Contractor's construction schedule and in such sequence as to allow the Architect reasonable time for review. Submittal Schedule. By submitting Shop Drawings, Product Data, Samples, and similar submittals, the Contractor represents to the Owner and Manager and the Architect that the Contractor has (1) reviewed and approved them; (2) determined and verified materials, field measurements, and field construction criteria related thereto, or will do so; and (3) checked and coordinated the information contained within such submittals with the requirements of the Work and of the Contract Documents. The Work shall be in accordance with approved submittals. Submittals which in the Architect's opinion are incomplete, contain numerous errors, or have not been adequately checked by the Contractor may be returned by the Architect for proper review and re-submittal. In the event that the Architect and the Contractor are in dispute over the quality of any submittal, the Manager shall be the final judge.

**§ 9.9.2** Shop Drawings, Product Data, Samples and similar submittals are not Contract Documents.

**§ 9.9.3** The Contractor shall not be required to provide professional services that constitute the practice of architecture or engineering unless such services are specifically required by the Contract Documents or unless the Contractor needs to provide such services in order to carry out the Contractor's own responsibilities. If professional design services or certifications by a design professional are specifically required, the Owner-Manager and the Architect will specify the performance and design criteria that such services must satisfy. The Contractor shall cause such services or certifications to be provided by an appropriately licensed design professional. If no criteria are specified, the design shall comply with applicable codes and ordinances. Each Party shall be entitled to rely upon the information provided by the other Party. The Architect will review and approve or take other appropriate action on submittals for the limited purpose of checking for conformance with information provided and the design concept expressed in the Contract Documents. The Architect's review of Shop Drawings, Product Data, Samples, and similar submittals shall be for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. In performing such review, the Architect will approve, or take other appropriate action upon, the Contractor's Shop Drawings, Product Data, Samples, and similar submittals.

### **§ 9.9.4 Requests for Information**

All Requests for Information (RFI) shall be submitted to the Architect for review. The Manager, at its sole discretion, may agree with the Architect's response, amend the response, or prepare its own superseding response. If the timely response to an RFI is critical to maintaining the Construction Schedule, it is the responsibility of the Contractor to annotate such on the RFI submittal with a "provide a response no later than" date.

**§ 9.9.4.1** RFI shall be submitted in a timely manner, well in advance of related work, and allow sufficient time for the resolution of issues relating to the request for interpretation or clarification. The Contractor shall schedule the submission of RFI so as to moderate and manage the flow of RFI's. RFI's shall be submitted in a manner consistent with the schedule and progress of the Work, and shall not be submitted in a sporadic and/or excessive manner.

**§ 9.9.4.2** RFI shall be numbered in a sequential manner and contain a detailed description of the areas of work requiring interpretation or clarification, including drawing and specification references, sketches, technical data, brochures, or other supporting data as deemed necessary by the Architect, for the Architect to provide the interpretations and clarifications requested. The Contractor shall include a "proposed solution" to the issue requiring interpretation or clarification.

**§ 9.9.4.3** RFI submitted to the Contractor by Subcontractors, suppliers, or other parties to the Work shall be reviewed by the Contractor prior to submission to the Architect. If the Architect deems that such RFI requests have not been adequately reviewed by the Contractor, such requests will be returned to the Contractor for further action. Sub-contractor's RFI shall contain a "proposed solution".

§ 9.9.4.4 RFI shall not contain submittals, substitutions requests, routine communications, correspondence, memos, claims, or any information required by, or for other purposes under the Contract Documents. RFI containing such information will be returned to the Contractor without action by the Architect.

§ 9.9.4.5 RFI are limited to a request for interpretation or clarification of the requirements of the Contract Documents. Interpretations provided by the Architect shall not change the requirements of the Contract or the Contract Documents.

§ 9.9.4.6 If the Contractor determines that the Architect's response to an RFI gives cause for a change in the Contract or the Contract Documents, the Contractor shall, within five (5) days following receipt of the Architect's response, give written notice to the Architect of request for a Change Order. Requests for Change Orders shall be submitted in a manner consistent with the terms and conditions of Article 13 herein.

§ 9.9.4.7 If the Architect, after review, determines that any RFI has been submitted in an incomplete manner, is unnecessary, or does not otherwise comply with the requirements of this Section, the RFI will be returned without action to the Contractor. The Contractor shall delete the original submittal date from the RFI log and enter a new submittal date at the time of resubmittal.

#### **§ 9.9.5 Substitutions**

The Contractor may not make any substitutions of products approved during the submittal process and/or explicitly enumerated in the Contract Documents without the written consent of the Manager.

#### **§ 9.10 Use of Site**

The Contractor shall confine operations at the site to areas permitted by applicable laws, statutes, ordinances, codes, rules and regulations, lawful orders of public authorities, and the Contract Documents and shall not unreasonably encumber the site with materials or equipment. The Contractor shall not use drives and entrances for storage of materials. The Contractor shall schedule deliveries to minimize use of driveways and entrances, and to minimize space and time requirements for storage of materials and equipment on-site. The Contractor assumes full responsibility for the protection and safekeeping of materials and equipment stored at the site. The Contractor may be requested to move any stored materials and equipment under the Contractor's control that interfere with operations of the Manager or separate contractors. Contractor and all Contractor's employees on the Manager's premises shall also conform to Manager's Health & Safety Procedures which was attached as part of Appendix E to the RFP.

#### **§ 9.11 Cutting and Patching**

The Contractor shall be responsible for cutting, fitting, or patching required to complete the Work or to make its parts fit together properly.

#### **§ 9.12 Cleaning Up**

The Contractor shall keep the premises and surrounding area free from accumulation of waste materials and rubbish caused by operations under the Contract. The Manager may direct the Contractor to provide immediate clean-up of the site and the Contractor shall comply at no additional cost to the Manager. At completion of the Work, the Contractor shall remove waste materials, rubbish, the Contractor's tools, construction equipment, machinery, and surplus material from and about the Project-Project, including leaving the rights-of-way, easements and other Work areas free of all debris, and in a neat, clean and safe condition in conformance with this paragraph and all applicable rules, laws and ordinances.

#### **§ 9.13 Access to Work**

The Contractor shall provide the ~~Owner and Manager, the Manager's Representative and the Architect~~ with access to the Work in preparation and progress wherever ~~located~~ located to determine if the construction of Work is in conformity with the Plans and Specifications and all other requirements of this Agreement and to examine and make copies and extracts of any books, records, accounting data and other documents, including, without limitation, all permits, licenses, consents and approvals of governmental authorities having jurisdiction over the Work and the Contractor and all Subcontractors supplying labor and/or materials in connection with the Work.



#### § 9.14 Royalties, Patents and Copyrights

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

#### § 9.15 Indemnification

**§ 9.15.1** To the fullest extent permitted by law, the Contractor shall ~~indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss, or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, indemnify, defend, and hold harmless the Manager Indemnitees (as defined in Section 17.1.6 herein), from and against any all claims, loss, cost, damage, injury (including, without limitation to or death of an employee of the Contractor or its sub-consultants or contractors), expense and liability of every kind, nature, and description (including, without limitation, incidental and consequential damages, court costs, attorneys' fees, litigation expenses, fees of expert consultants or witnesses in litigation, and costs of investigation), that arise directly, in whole or in part, from (a) the Services under this Agreement, or any part of such Services, and (b) any negligent, reckless, or willful act or omission of the Contractor, any sub-consultant or contractor, anyone directly or indirectly employed by them, or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss, or expense is caused in part by a party indemnified hereunder that they control, unless due to the gross negligence or willful misconduct of the Manager Indemnitees (as defined in Section 17.1.6 herein).~~ Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity ~~which that~~ would otherwise exist as to a party or person described in this ~~Section 9.15.1 paragraph.~~

**§ 9.15.2** In claims against any person or entity indemnified under this Section 9.15 by an employee of the Contractor, a Subcontractor, anyone directly or indirectly employed by them, or anyone for whose acts they may be liable, the indemnification obligation under Section 9.15.1 shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for the Contractor or Subcontractor under workers' compensation acts, disability benefit acts or other employee benefit acts.

**§ 9.15.3** The Contractor's indemnity, defense and hold harmless obligations under this Section 9.15 shall also specifically include, to the extent caused in whole or in part by the Contractor and to the extent not prohibited by law, without limitation, all fines, claims, penalties, damages, liability, costs, expenses, settlements (including, without limitation, reasonable attorneys' fees, consultant fees, court costs and related expenses) and punitive damages (if any) arising out of, or in connection with, any (i) violation of or failure to comply with any government requirement that is consistent with the Contract Documents and which bears upon the performance of the Work by the Contractor, a Subcontractor, Sub-subcontractor or any person or entity for whom either is responsible, (ii) means, methods, procedures, techniques or sequences of execution or performance of the Work, and (iii) failure to secure and/or pay for Surveys, Permits, fees, approvals, licenses and inspections as required under the Contract Documents, any violation of any Permit or other approval of a public authority applicable to the Work, or any labor, materials, equipment and/or services provided to the Project or for the Work.

**§ 9.15.4** The Contractor specifically agrees that it shall defend, indemnify and hold the Manager harmless from any assertion of security interests, claims or filings of mechanic's liens by Subcontractors, Sub-subcontractors or any other persons or entities which provided labor, materials, equipment and/or services to the Project and/or for the Work. The Contractor shall defend the Manager, at the Contractor's own expense and not as a Cost of the Work, from all such assertions, liens and/or claims if the Manager so requests in writing. The Contractor agrees that it shall pay all reasonable attorneys' fees, consultant fees, court costs and related expenses and other costs, expenses or fees which the Contractor or the Manager incur in responding to such assertions, liens and claims. In the event that assertions, liens or claims are asserted or filed by anyone in relation to labor, materials, services and/or equipment furnished by the Contractor or any of its Subcontractors, Sub-subcontractors or other persons or entities, the Contractor agrees to have the same discharged by posting a bond in accordance with Section 15.5.5. Premiums for

such bonds, unless required through the sole fault of the Manager, shall not be a reimbursable cost and any and all asserts, liens and claims shall be bonded off by the Contractor, regardless of dispute, with the issue of bond premium reimbursement to be determined at a later date in accordance with the Contract Documents. This provision shall not be applicable in the event the Manager is in default of the payment provisions of the Contract.

§ 9.15.5 The Contractor shall defend the Manager Indemnitees using counsel selected by the Contractor and approved by the Manager. The Contractor's obligations shall include the obligation to pay reasonable attorneys' fees and costs in connection with such defense.

§ 9.15.6 The Contractor shall also indemnify, defend and hold harmless all Manager Indemnitees from all suits or claims by a third party for infringement of the patent rights, copyright, trade secret, trade name, trademark, service mark, or any other proprietary right of any person or persons in consequence of the use by the Manager Indemnitees of articles or services to be supplied in the performance of the Contractor's Services under this Agreement. Infringement of patent rights, copyrights, or other proprietary rights in the performance of this Agreement, if not the basis for indemnification under the law, shall nevertheless be considered a material breach of the Agreement.

§ 9.15.7 The provisions of this Section 9.15 shall survive the completion of the Work or termination of the Contract.

### **§ 9.16 Project Meetings**

§ 9.16.1 The Contractor shall hold, attend, and lead regular Project meetings with the Manager's Representative and the Architect and other Project participants as determined in accordance with Section 19.7.3 below. Meetings shall be held every two (2) weeks, or as mutually agreed upon. The Contractor shall prepare an agenda for each meeting in advance, including the subjects listed in Sections 9.16.1.1 and 9.16.1.2, and shall come to the meetings prepared with the complete and up to date information.

§ 9.16.1.1 Schedule. The agenda for each meeting shall include a review of progress since the last meeting, including whether each activity is on time, ahead of schedule, or behind schedule, in relation to Contractor's Construction Schedule, how construction that is behind schedule will be expedited; and whether schedule revisions are required to ensure that current and subsequent activities will be completed within the Contract Time. Each meeting shall include a three-week look ahead schedule, and identify major milestones on the Project, such as delivery of major equipment and utility interruption requests, etc.

§ 9.16.1.2 The agenda for each meeting shall include a review of any pending or proposed Change Orders, Construction Change Directives, RFIs, any site conditions that differ materially from those indicated in the Contract Documents and that may give rise to a request for a Change Order in accordance with Section 13.4, and any other event or circumstances which may change the Contract Sum. All items shall be either be assigned a value or a Rough Order of Magnitude (ROM) value by the Contractor until the actual value is known through quotes.

### **§ 9.17 Monthly Construction Report**

The Contractor shall prepare and update monthly a monthly construction report, in Microsoft Word format, that shall contain, at a minimum the requirements provided for in this Section 9.17.

§ 9.17.1.1 Submittal Schedule. The Submittal Schedule for the Contractor provided equipment and materials, and Manager furnished equipment, if any. This schedule will provide the Manager and the Contractor the means to require other Contractors and Subcontractors to meet submittal dates.

§ 9.17.1.2 Construction Schedule. The Construction Schedule shall show, in detail all the construction activities and indicate what activities are behind schedule and what actions are being planned to correct the deficiency. The Schedule shall be a horizontal, Critical Path Method, Gantt chart type.

§ 9.17.1.3 Schedule of Values. The Contractor shall provide a schedule of values summary by the Construction Specification Institute (CSI) Division, indicating the Manager approved Change Orders, pending Change Orders and any other information that will forewarn the Manager of potential changes in the Contract Sum.

§ 9.17.1.4 Construction Photographs. Construction photographs must be sufficient digital photographs (four per page) to indicate the monthly progress of the Work. No less than eight (8) photographs is acceptable.

[§ 9.17.1.5 Major Milestones. The report must indicate the major and/or significant milestones accomplished on the project for the previous month, including the critical path tasks.](#)

[§ 9.17.1.6 Field Condition Report. The report must include a detailed description of any site conditions that differ materially from those indicated in the Contract Documents and that may give rise to a request for a Change Order in accordance with Section 13.4, together with recommendations for the terms of any such Change Order.](#)

## ARTICLE 10 ARCHITECT

[§ 10.1](#) The Architect will provide administration of the Contract as described in the Contract ~~Documents and will be an Owner's representative during construction.~~ [Documents](#), until the date the Architect issues the final Certificate for Payment. The Architect will have authority to act on behalf of the [Owner-Manager](#) only to the extent provided in the Contract Documents, unless otherwise modified in writing in accordance with other provisions of the Contract.

[§ 10.2](#) Duties, responsibilities, and limitations of authority of the Architect as set forth in the Contract Documents shall not be restricted, modified, or extended without written consent of the [Owner-Manager](#), [the Contractor](#), and [the Architect](#). Consent shall not be unreasonably withheld.

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

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

[§ 10.5](#) Based on the Architect's evaluations of the Work and of the Contractor's Applications for Payment, the Architect will review and certify the amounts due the Contractor and will issue Certificates for Payment in such amounts.

[§ 10.6](#) The Architect has authority to reject Work that does not conform to the Contract Documents and to require inspection or testing of the Work.

[§ 10.7](#) The Architect will review and approve or take other appropriate action upon, the Contractor's submittals such as Shop Drawings, Product Data, and Samples, but only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents.

[§ 10.8](#) The Architect will interpret and decide matters concerning performance under, and requirements of, the Contract Documents on written request of either the [Owner or Manager or the Contractor](#). The Architect will make initial decisions on all claims, disputes, and other matters in question between the [Owner and Manager and the Contractor](#) but will not be liable for results of any interpretations or decisions rendered in good faith.

[§ 10.9](#) The Architect's decisions on matters relating to aesthetic effect will be final if consistent with the intent expressed in the Contract Documents.

## ARTICLE 11 SUBCONTRACTORS

[§ 11.1](#) A Subcontractor is a person or entity who has a direct contract with the Contractor to perform a portion of the Work at the site. [Whenever the word Subcontractor is used within this Agreement it shall mean Subcontractor, sub-](#)

subcontractor, vendor or supplier as an entity that provides labor, materials, equipment and/or services to the Project through an agreement with the Contractor.

**§ 11.2** Unless otherwise stated in the Contract Documents, the Contractor, as soon as practicable after award of the Contract, shall notify the Owner and Architect of the Subcontractors provide a list to the Manager's Representative and the Architect of the Subcontractors, vendors or suppliers proposed for each of the principal portions of the Work. The list shall include the name, address and telephone number of each such person, a general statement of the nature of the work to be done, the labor and material to be supplied, the names of materialmen if known, and the approximate dollar value of such labor or work with respect to each. The Contractor shall not contract with any Subcontractor-Subcontractor, vendor or supplier to whom the Owner or Manager or the Architect has made reasonable written objection within ten (10) days after receipt of the Contractor's list of Subcontractors and suppliers-suppliers, or with Subcontractors who are not duly licensed in the jurisdiction of the Project. If the proposed but rejected Subcontractor was reasonably capable of performing the Work, the Contract Sum and Contract Time shall be increased or decreased by the difference, if any, occasioned by such change, and an appropriate Change Order shall be issued before commencement of the substitute Subcontractor's Work. The Contractor shall not be required to contract with anyone to whom the Contractor has made reasonable objection.

**§ 11.3** Contracts between the Contractor and Subcontractors shall (1) require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound to the Contractor by the terms of the Contract Documents, and to assume toward the Contractor all the obligations and responsibilities, including the responsibility for safety of the Subcontractor's Work, which the Contractor, by the Contract Documents, assumes toward the Owner and Manager and the Architect, and (2) allow the Subcontractor the benefit of all rights, remedies and redress against the Contractor that the Contractor, by these Contract Documents, has against the Owner, the Manager. If requested by the Manager, the Contractor shall provide copies of each such contract between the Contractor and Subcontractor.

#### ARTICLE 12 CONSTRUCTION BY OWNER OR BY SEPARATE CONTRACTORS ARTICLE 12 CONSTRUCTION BY MANAGER OR BY SEPARATE CONTRACTORS

**§ 12.1** The term "Separate Contractor(s)" shall mean other contractors retained by the Owner-Manager under separate agreements. The Owner-Manager reserves the right to perform construction or operations related to the Project with the Owner's-Manager's own forces, and with Separate Contractors retained under Conditions of the Contract substantially similar to those of this Contract, including those provisions of the Conditions of the Contract related to insurance and waiver of subrogation.

**§ 12.2** The Contractor shall afford the Owner-Manager and Separate Contractors reasonable opportunity for introduction and storage of their materials and equipment and performance of their activities, and shall connect and coordinate the Contractor's activities with theirs as required by the Contract Documents.

**§ 12.3** The Owner-Manager shall be reimbursed by the Contractor for costs incurred by the Owner-Manager which are payable to a Separate Contractor because of delays, improperly timed activities, or defective construction of the Contractor. The Owner-Manager shall be responsible to the Contractor for costs incurred by the Contractor because of delays, improperly timed activities, damage to the Work, or defective construction of a Separate Contractor.

#### **ARTICLE 13 CHANGES IN THE WORK**

**§ 13.1** By appropriate Modification, changes in the Work may be accomplished after execution of the Contract. The Owner-Manager, without invalidating the Contract, may order changes in the Work within the general scope of the Contract consisting of additions, deletions, or other revisions, with the Contract Sum and Contract Time being adjusted accordingly. Such changes in the Work shall be authorized by written Change Order or Change Order Directive signed by the Manager, the Owner-Contractor, and the Architect, or by written Construction Change Directive signed by the Owner and Manager and the Architect. Upon issuance of the Change Order, Change Order Directive, or Construction Change Directive, the Contractor shall proceed promptly with such changes in the Work, unless otherwise provided in the Change Order, Change Order Directive, or Construction Change Directive. A Change Order or a Change Order Directive requires written agreement between the Manager, the Architect, and the Contractor. A Construction Change Directive does not require agreement by the Contractor prior to implementation. Claims by the Contractor for additional time or an adjustment in the Contract Sum must be initiated in writing within twenty-one (21) days after occurrence of the event giving rise to such claim, or within twenty-one (21) days after the Contractor first recognizes, or reasonably should have recognized, the condition giving rise to the claim, whichever is later.

**§ 13.2** Adjustments in the Contract Sum and Contract Time resulting from a change in the Work shall be determined by mutual agreement of the parties or, in the case of a Construction Change Directive signed only by the Owner and Manager and the Architect, by the Contractor's cost of labor, material, equipment, and reasonable overhead and profit, unless the parties agree on another method for determining the cost or credit. Pending final determination of the total cost of a Construction Change Directive, the Contractor may request payment for Work completed pursuant to the Construction Change Directive. The Architect will make an interim determination of the amount of payment due for purposes of certifying the Contractor's monthly Application for Payment. When the Owner and Manager and the Contractor agree on adjustments to the Contract Sum and Contract Time arising from a Construction Change Directive, the Architect will prepare a Change Order.

**§ 13.3** The Architect will have authority to order minor changes in the Work not involving adjustment in the Contract Sum or extension of the Contract Time and not inconsistent with the intent of the Contract Documents. Such changes shall be effected by written order (on an AIA G701-107 Change Order form) and shall be binding on the Owner and Manager and the Contractor. The Contractor shall carry out such written orders promptly. If the Contractor believes that the proposed minor change in the Work will affect the Contract Sum or Contract Time, the Contractor shall notify the Architect and shall not proceed to implement the change in the Work.

**§ 13.4** If concealed or unknown physical conditions are encountered at the site that differ materially from those indicated in the Contract Documents or from those conditions ordinarily found to exist, the Contract Sum and Contract Time shall be equitably adjusted as mutually agreed between the Owner and Manager and the Contractor; provided that the Contractor provides notice to the Owner and Manager and the Architect promptly and before conditions are disturbed.

**§ 13.5** Change Order scope shall be detailed and specific. Unrelated Work shall not be included together in a single change order. Separate Change Orders shall be prepared for each change. Each Change Order shall detail (1) a description of the change in the Work, (2) the total amount of the Change Order including detailed back-up information such as subcontractor quotes, materials, labor, unit prices, equipment quotes, and any other information as requested by the Manager to justify such change, and (3) the adjustment in Contract Time and Contract Sum if any.

**§ 13.6** All requests for Changes in the Work shall be entered in a Change Order log provided by the Contractor and updated weekly, with an estimated cost by the Contractor. A copy of the log shall be available to the Manager, the Manager's Representative, and the Architect during the Project meetings and at other times upon request.

**§ 13.7** The maximum cumulative allowable percent of mark-ups by the Subcontractors for changes in the Work shall be a total of eleven percent (11%) for overhead and profit.

**§ 13.8** The maximum cumulative allowable percent of mark-ups by the Subcontractor, sub-subcontractors, vendors and suppliers for changes in the Work shall be a total of fifteen percent (15%) overhead and profit.

**§ 13.9** Contractor's Fee on Change Orders may be increased or decreased under the following conditions:

- .1 For additive change orders, the Contractor's Fee will be increased by TBD percent (TBD%).
- .2 For deductive change orders, the Contractor's Fee will be decreased by TBD percent (TBD%).

**§ 13.10** The Contractor shall incorporate the Change Order in its payment application, no later than two (2) payment applications after the approved date of the Change Order.

**§ 13.11** From time to time, the Manager, the Architect and the Contractor may agree that a Change Order needs to be executed as part of the Work, and the document preparation time for a Change Order may negatively impact the cost of the Change Order. In this circumstance, the Contractor shall prepare a Change Order Directive ("CCD") document which will include (a) scope of work and (b) a stipulated maximum sum for the Change Order. The CCD will be signed by the Manager, the Architect and the Contractor as a preliminary approval of the Change Order. The preliminary approval is only active for fifteen (15) days. The Contractor shall prepare the actual Change Order within that time frame to be approved by the Manager.

## ARTICLE 14 TIME

§ 14.1 Time limits stated in the Contract Documents are of the essence of the Contract. By executing this Agreement the Contractor confirms that the Contract Time is a reasonable period for performing the Work.

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

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

§ 14.4 The date of Substantial Completion is the date certified by the Architect in accordance with Section 15.6.3.

§ 14.5 If the Contractor is delayed at any time in the commencement or progress of the Work by (1) changes ordered in the Work; (2) by labor disputes, fire, unusual delay in deliveries, abnormal adverse weather conditions not reasonably anticipatable, unavoidable casualties, or any causes beyond the Contractor's control; or (3) by other causes that the Contractor asserts, and the Architect determines, and the Manager determine, justify delay, then the Contract Time shall be extended for such reasonable time as the Architect and the Manager may determine, subject to the provisions of Article 21.

§ 14.6 Contractor shall notify the Manager in writing within twenty-one (21) days following the start of any perceived delay for which a request for Change Order may be submitted.

§ 14.7 The Manager reserves the right to suspend and reinstate execution of the whole or any part of the Work without invalidating the provisions of the Agreement. Orders for suspension or reinstatement of work shall be issued by the Manager to the Contractor in writing. The Contract Time will be extended for a period equal to the time lost by reason of the suspension, and the Contractor will receive compensation for reasonable, substantiated extra costs incurred by reason of the suspension by Change Order.

## ARTICLE 15 PAYMENTS AND COMPLETION

### § 15.1 Schedule of Values

§ 15.1.1 Where the Contract is based on a Stipulated Sum or the Cost of the Work with a Guaranteed Maximum Price pursuant to Section 3.2 or 3.4, the Contractor shall submit a schedule of values to the Architect and the Manager before the first Application for Payment, allocating the entire Stipulated Sum or Guaranteed Maximum Price to the various portions of the Work. The schedule of values shall be prepared in the form, and supported by the data to substantiate its accuracy required by the ~~Architect~~ Architect and the Manager. This schedule of values shall be used as a basis for reviewing the Contractor's Applications for Payment.

§ 15.1.2 The allocation of the Stipulated Sum or Guaranteed Maximum Price under this Section 15.1 shall not constitute a separate stipulated sum or guaranteed maximum price for each individual line item in the schedule of values.

### § 15.2 Control Estimate

§ 15.2.1 Where the Contract Sum is the Cost of the Work, plus the Contractor's Fee without a Guaranteed Maximum Price pursuant to Section 3.3, the Contractor shall prepare and submit to the Owner a Control Estimate within 14 days of executing this Agreement. The Control Estimate shall include the estimated Cost of the Work plus the Contractor's Fee.

Intentionally deleted.

§ 15.2.2 The Control Estimate shall include:

- .1 the documents enumerated in Article 6, including all Modifications thereto;
- .2 a list of the assumptions made by the Contractor in the preparation of the Control Estimate to supplement the information provided by the Owner and contained in the Contract Documents;
- .3 a statement of the estimated Cost of the Work organized by trade categories or systems and the Contractor's Fee;
- .4 a project schedule upon which the Control Estimate is based, indicating proposed Subcontractors, activity sequences and durations, milestone dates for receipt and approval of pertinent information, schedule of shop drawings and samples, procurement and delivery of materials or equipment the Owner's occupancy requirements, and the date of Substantial Completion; and

- ~~.5 — a list of any contingency amounts included in the Control Estimate for further development of design and construction.~~

~~Intentionally deleted.~~

~~§ 15.2.3 When the Control Estimate is acceptable to the Owner and Architect, the Owner shall acknowledge it in writing. The Owner's acceptance of the Control Estimate does not imply that the Control Estimate constitutes a Guaranteed Maximum Price.~~

~~Intentionally deleted.~~

~~§ 15.2.4 The Contractor shall develop and implement a detailed system of cost control that will provide the Owner and Architect with timely information as to the anticipated total Cost of the Work. The cost control system shall compare the Control Estimate with the actual cost for activities in progress and estimates for uncompleted tasks and proposed changes. This information shall be reported to the Owner, in writing, no later than the Contractor's first Application for Payment and shall be revised and submitted with each Application for Payment.~~

~~Intentionally deleted.~~

~~§ 15.2.5 The Owner shall authorize preparation of revisions to the Contract Documents that incorporate the agreed-upon assumptions contained in the Control Estimate. The Owner shall promptly furnish such revised Contract Documents to the Contractor. The Contractor shall notify the Owner and Architect of any inconsistencies between the Control Estimate and the revised Contract Documents.~~~~Intentionally deleted.~~

### § 15.3 Applications for Payment

~~§ 15.3.1 At least ten days before the date established for each progress payment, the Contractor shall submit to the Architect an itemized Application for Payment prepared in accordance with the schedule of values, if required under Section 15.1, for completed portions of the Work. The application shall be notarized, if required; be supported by all data substantiating the Contractor's right to payment that the Owner or Architect require; shall reflect retainage if provided for in the Contract Documents; and include any revised cost control information required by Section 15.2.4. Each month the Contractor shall submit:~~

- ~~.1 Three (3) signed and notarized original copies of each Application for Payment using AIA Forms G702 and G703 to the Architect and the Manager's Representative by a method ensuring receipt within 24 hours. One (1) copy shall include waivers of lien and similar attachments as required herein. The Contractor shall transmit each copy with a transmittal form listing attachments and recording appropriate information about the application. Applications for Payment shall not include requests for payment for portions of the Work for which the Contractor does not intend to pay a Subcontractor or supplier, supplier unless such Work has been performed by others whom the Contractor intends to pay.~~
- ~~.2 The certification by the Architect and the Contractor that: (i) all work performed is in substantial accordance with the Plans and Specifications; (ii) all governmental licenses and permits required for the Work as then completed have been obtained; (iii) the Work as then completed does not violate, and, if further completed in accordance with the Plans and Specifications, will not violate, any law, ordinance, rule or regulation; (iv) the remaining undisbursed balance of the Contract Sum is sufficient to pay for the completion of the Improvements~~
- ~~.3 Evidence that any inspection required by any state, city or other governmental authority has been completed with results satisfactory to that authority.~~
- ~~.4 Such other information and documents as the Manager may reasonably require.~~

~~§ 15.3.2 With each Application for Payment where the Contract Sum is based upon the Cost of the Work, or the Cost of the Work with a Guaranteed Maximum Price, the Contractor shall submit payrolls, petty cash accounts, receipted invoices or invoices with check vouchers attached, and any other evidence required by the Owner to demonstrate that cash disbursements already made by the Contractor on account of the Cost of the Work equal or exceed progress payments already received by the Contractor plus payrolls for the period covered by the present Application for Payment, less that portion of the progress payments attributable to the Contractor's Fee.~~~~Intentionally deleted.~~

~~§ 15.3.3 Payments shall be made on account of materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work. If approved in advance by the Owner, payment may similarly be made for materials and equipment stored, and protected from damage, off the site at a location agreed upon in writing.~~  
~~Waivers of Mechanic's Lien: With each Application for Payment, the Contractor shall submit waivers of mechanic's liens from the Contractor and every entity who is lawfully entitled to file a mechanic's lien arising out of the Contract and related to the Work covered by the Application for Payment in a form acceptable to the Manager. Each waiver may be conditioned on payment of the amount requested and shall be unconditional with respect to all~~

previous payments made by the Manager, subject to final payment for retainage. The Manager reserves the right to designate which entities involved in the Work must submit waivers.

**§ 15.3.4** The Contractor warrants that title to all Work covered by an Application for Payment will pass to the Owner no later than the time of payment. The Contractor further warrants that upon submittal of an Application for Payment all Work for which Certificates for Payment have been previously issued and payments received from the Owner shall, to the best of the Contractor's knowledge, information and belief, be free and clear of liens, claims, security interests or other encumbrances adverse to the Owner's interests. Payments shall be made on account of materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work. If approved in advance by the Manager, payment may similarly be made for materials and equipment stored, and protected from damage, off the site at a location agreed upon in writing.

**§ 15.3.5** The Contractor warrants that title to all Work covered by an Application for Payment will pass to the Manager no later than the time of payment. The Contractor further warrants that upon submittal of an Application for Payment all Work for which Certificates for Payment have been previously issued and payments received from the Manager shall, to the best of the Contractor's knowledge, information and belief, be free and clear of liens, claims, security interests or other encumbrances adverse to the Manager's interests.

**§ 15.3.6** The Contractor may, with the Manager's prior written approval, make advance payments for Work materials, or equipment; provided, however, that such payments made by the Contractor shall not be reimbursed by the Manager unless and until: (i) with respect to Work, the Manager has certified the completion of the portion of the Work sought to be reimbursed for payment; (ii) with respect to materials, such materials meet the requirements of Section 15.3.4 above and (iii) with respect to equipment, the Contractor certifies that such equipment was utilized in Work performed during such period.

#### **§ 15.4 Certificates for Payment**

**§ 15.4.1** The Architect will, within seven (7) days after receipt of the Contractor's Application for Payment, either issue to the ~~Owner-Manager~~ a Certificate for ~~Payment, Payment using AIA Form G702~~, with a copy to the Contractor, for such amount as the Architect determines is properly due, or notify the Contractor and ~~Owner-the Manager~~ of the Architect's reasons for withholding certification in whole or in part as provided in Section 15.4.3.

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

**§ 15.4.3** The Architect ~~and the Manager~~ may withhold a Certificate for Payment in whole or in part, to the extent reasonably necessary to protect the ~~Owner, Manager~~, if in the Architect's opinion the representations to the ~~Owner-Manager~~ required by Section 15.4.2 cannot be made. If the Architect is unable to certify payment in the amount of the Application, the Architect will notify the Contractor and ~~Owner-Manager~~ as provided in Section 15.4.1. If the Contractor and the Architect cannot agree on a revised amount, the Architect will promptly issue a Certificate for Payment for the amount for which the Architect is able to make such representations to the ~~Owner-Manager~~. The Architect may also withhold a Certificate for Payment or, because of subsequently discovered evidence, may nullify the whole or a part of a Certificate for Payment previously issued, to such extent as may be necessary in the Architect's opinion to protect the ~~Owner-Manager~~ from loss for which the Contractor is responsible, including loss resulting from acts and omissions described in Section 9.2.2, because of

- .1** defective Work not remedied;



- .2 third-party claims filed or reasonable evidence indicating probable filing of such claims unless security acceptable to the Owner-Manager is provided by the Contractor;
- .3 failure of the Contractor to make payments properly to Subcontractors or suppliers for labor, materials or equipment;
- .4 reasonable evidence that the Work cannot be completed for the unpaid balance of the Contract Sum;
- .5 damage to the Owner-Manager or a Separate Contractor;
- .6 reasonable evidence that the Work will not be completed within the Contract Time and that the unpaid balance would not be adequate to cover actual or liquidated damages for the anticipated delay;  
or
- .7 repeated failure to carry out the Work in accordance with the Contract Documents;
- .8 filing of any mechanics lien by a Subcontractor, including a supplier, of the Contractor that the Contractor fails to cause to be dissolved or discharged within seven (7) days after demand by the Manager;  
or
- .9 other default or failure by the Contractor to comply with the provisions of the Contract Documents.

**§ 15.4.4** The Manager shall approve, or disapprove payment based on the Architect's Certificate for Payment within seven (7) days following receipt. When either party disputes the Architect's decision regarding a Certificate for Payment under Section 15.4.3, in whole or in part, that party may submit a Claim in accordance with Article 21.

**§ 15.4.5** When the above reasons for withholding certification are removed, the Architect shall certify payment of amounts previously withheld.

### **§ 15.5 Progress Payments**

**§ 15.5.1** The Contractor shall pay each Subcontractor, no later than seven (7) days after receipt of payment from the Owner-Manager, the amount to which the Subcontractor is entitled, reflecting percentages actually retained from payments to the Contractor on account of the Subcontractor's portion of the Work. The Contractor shall, by appropriate agreement with each Subcontractor, require each Subcontractor to make payments to sub-subcontractors in a similar manner.

**§ 15.5.2** Neither the Owner nor Manager nor the Architect shall have an obligation to pay or see to the payment of money to a Subcontractor or supplier except as may otherwise be required by law.

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

**§ 15.5.4** Provided the Owner-Manager has fulfilled its payment obligations under the Contract Documents, the Contractor shall defend and indemnify the Owner-Manager from all loss, liability, damage or expense, including reasonable attorney's fees and litigation expenses, arising out of any lien claim or other claim for payment by any Subcontractor or supplier of any tier. Upon receipt of notice of a lien claim or other claim for payment, the Owner-Manager shall notify the Contractor. If approved by the applicable court, when required, the Contractor may substitute a surety bond for the property against which the lien or other claim for payment has been asserted.

**§ 15.5.5** If a Subcontractor refuses to furnish a release or waiver of a mechanic's lien as required by the Manager, the Contractor may furnish, at the Contractor's expense, a bond satisfactory to the Manager to indemnify the Manager against such lien. If such lien remains unsatisfied after payments are made, the Contractor shall refund to the Manager all the money that the Manager may be compelled to pay in discharging such lien, including all costs and reasonable attorney's fees. If any dispute exists regarding the amount to be paid to the Contractor, Subcontractor or a vendor or supplier of any tier, a final waiver and release of lien need not be produced to entitle the Contractor to payment to the extent that such claim exceeds the amount due. To the extent the Manager contends a lesser sum than requested is due, payment shall be made of such lesser sum upon delivery of a partial waiver of lien in such amount. In no event shall Contractor (including any subsidiary) file a lien on any part of this Project.

### **§ 15.6 Substantial Completion**

**§ 15.6.1** Substantial Completion is the stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so that the Owner-Manager can occupy or utilize the Work for its intended use.

**§ 15.6.2** When the Contractor considers that the Work, or a portion thereof which the Owner-Manager agrees to accept separately, is substantially complete, the Contractor shall prepare and submit to the Architect a comprehensive list of items to be completed or corrected prior to final ~~payment~~ payment, and in no event, later than thirty (30) days from the issuance of the Certificate of Substantial Completion, and a reasonable estimate of the cost to complete such items ("Punch List"). Failure to include an item on such list does not alter the responsibility of the Contractor to complete all Work in accordance with the Contract Documents.

**§ 15.6.3** Upon receipt of the Contractor's list, the ~~Architect~~ Architect, and the Manager (if Manager desires) will make an inspection to determine whether the Work or designated portion thereof is substantially complete. When the Architect ~~determines and the Manager determine~~ that the Work or designated portion thereof is substantially complete, the Architect will issue a Certificate of Substantial Completion which shall establish the date of Substantial Completion; establish responsibilities of the Owner-Manager and Contractor for security, maintenance, heat, utilities, damage to the Work and insurance; and ~~fix the time within which the Contractor shall finish all items on the list accompanying the Certificate. establish that all punch-list items will be completed within thirty (30) days.~~ Warranties required by the Contract Documents shall commence on the date of Substantial Completion of the Work or designated portion thereof unless otherwise provided in the Certificate of Substantial Completion.

**§ 15.6.4** The Certificate of Substantial Completion shall be submitted to the Owner and Manager and the Contractor for their written acceptance of responsibilities assigned to them in the Certificate. Upon such acceptance and consent of surety, if any, ~~the Owner and the Manager~~ shall make payment of retainage applying to the Work or designated portion thereof. ~~Such payment shall be adjusted for Work that is incomplete or not in accordance with the requirements of the Contract Documents thereof, provided the Manager reserves the right to withhold a value of up to one hundred fifty percent (150%) of the estimated cost of completing the Work on the Punch List, as such cost is reasonably estimated by the Contractor.~~

### **§ 15.7 Final Completion and Final Payment**

**§ 15.7.1** Upon receipt of the Contractor's notice that the Work is ready for final inspection and acceptance and upon receipt of a final Application for Payment, the ~~Architect~~ Architect, and the Manager (if Manager desires) will promptly make such inspection and, when the Architect finds the Work acceptable under the Contract Documents and the Contract fully performed, the Architect will promptly issue a final Certificate for Payment stating that to the best of the Architect's knowledge, information and belief, and on the basis of the Architect's on-site visits and inspections, the Work has been completed in accordance with the Contract Documents and that the entire balance found to be due the Contractor and noted in the final Certificate is due and payable. The Architect's final Certificate for Payment will constitute a further representation that conditions stated in Section 15.7.2 as precedent to the Contractor's being entitled to final payment have been fulfilled.

**§ 15.7.2** Final payment shall not become due until the Contractor has delivered to the Owner-Manager a complete release of all liens arising out of this Contract or receipts in full covering all labor, materials and equipment for which a lien could be filed, or a bond satisfactory to the ~~Owner to indemnify the Owner against such lien. Manager to indemnify the Manager against such lien and all other items required by Section 4.2.1.~~ If such lien remains unsatisfied after payments are made, the Contractor shall refund to the Owner-Manager all money that the Owner-Manager may be compelled to pay in discharging such lien, including costs and reasonable attorneys' fees.

**§ 15.7.3** The making of final payment shall constitute a waiver of claims by the Owner-Manager except those arising from

- .1 liens, claims, security interests or encumbrances arising out of the Contract and unsettled;
- .2 failure of the Work to comply with the requirements of the Contract Documents;
- .3 terms of special warranties required by the Contract Documents; or
- .4 audits performed by the Owner-Manager, if permitted by the Contract Documents, after final payment.

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

## ARTICLE 16 PROTECTION OF PERSONS AND PROPERTY

### § 16.1 Safety Precautions and Programs

The Contractor shall be responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the performance of the Contract. The Contractor shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury, or loss to

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

The Contractor shall comply with, and give notices required by, applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities bearing on safety of persons and property and their protection from damage, injury, or loss. The Contractor shall promptly remedy damage and loss to property caused in whole or in part by the Contractor, a Subcontractor, a sub-subcontractor, or anyone directly or indirectly employed by any of them, or by anyone for whose acts they may be liable and for which the Contractor is responsible under Sections 16.1.2 and 16.1.3. The Contractor may make a claim for the cost to remedy the damage or loss to the extent such damage or loss is attributable to acts or omissions of the Owner or Architect or by anyone for whose acts either of them may be liable, and not attributable to the fault or negligence of the Contractor. The foregoing obligations of the Contractor are in addition to the Contractor's obligations under Section 9.15.

### § 16.1.1 Safety Precautions and Programs

The Contractor shall be responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the performance of the Contract. The Contractor shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury, or loss to

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

The Contractor shall comply with, and give notices required by, applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities bearing on safety of persons and property and their protection from damage, injury, or loss. The Contractor shall promptly remedy damage and loss to property caused in whole or in part by the Contractor, a Subcontractor, a sub-subcontractor, or anyone directly or indirectly employed by any of them, or by anyone for whose acts they may be liable and for which the Contractor is responsible under Sections 16.1.2 and 16.1.3. The Contractor may make a claim for the cost to remedy the damage or loss to the extent such damage or loss is attributable to acts or omissions of the Manager or the Architect or by anyone for whose acts either of them may be liable, and not attributable to the fault or negligence of the Contractor. The foregoing obligations of the Contractor are in addition to the Contractor's obligations under Section 9.15. The Manager shall have the right and authority to clean up or correct any situation or condition that presents a hazard or unsafe condition or affects the Manager's use of the facility without notice to the Contractor and at the Contractor's expense.

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

§ 16.1.3 The Manager or the Manager's inspectors may stop the Work until a condition deemed unsafe to persons is corrected. Should this occurrence delay the Work, the Contractor shall be responsible for any excess costs associated with the work stoppage and shall not be allowed an extension of time in which to perform. This provision does not relieve Contractor of its exclusive responsibility for safe Work practices nor impose upon the Manager any obligation to supervise Contractor's work practices.

## § 16.2 Hazardous Materials and Substances

§ 16.2.1 The Contractor is responsible for compliance with the requirements of the Contract Documents regarding hazardous materials or substances. If the Contractor encounters a hazardous material or substance not addressed in the Contract Documents, and if reasonable precautions will be inadequate to prevent foreseeable bodily injury or death to persons resulting from a material or substance, including but not limited to asbestos or polychlorinated biphenyl (PCB), encountered on the site by the Contractor, the Contractor shall, upon recognizing the condition, immediately stop Work in the affected area and notify the Owner and Manager and the Architect of the condition. When the material or substance has been rendered harmless, Work in the affected area shall resume upon written agreement of the Owner and Manager and the Contractor. By Change Order, the Contract Time shall be extended appropriately, and the Contract Sum shall be increased in the amount of the Contractor's reasonable additional costs of shutdown, delay, and start-up.

§ 16.2.2 To the fullest extent permitted by law, the Owner-Manager shall indemnify and hold harmless the Contractor, Subcontractors, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses, and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work in the affected area, if in fact, the material or substance presents the risk of bodily injury or death as described in Section 16.2.1 and has not been rendered harmless, provided that such claim, damage, loss, or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), except to the extent that such damage, loss, or expense is due to the fault or negligence of the party seeking indemnity or such party's failure to comply with the requirements of the Contract Documents.

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

## ARTICLE 17 INSURANCE AND BONDS

### § 17.1 Contractor's Insurance

§ 17.1.1 The Contractor shall purchase and maintain insurance of the types and limits of liability, containing the endorsements, and subject to the terms and conditions, as described in this Section 17.1 or elsewhere in the Contract Documents. The Contractor shall purchase and maintain the insurance required by this Agreement from an insurance company or insurance companies lawfully authorized to issue insurance in the jurisdiction where the Project is located. The Contractor shall maintain the required insurance until the expiration of the period for correction of Work as set forth in Section 18.4, unless a different duration is stated below:

« »

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

~~.1 — damages because of bodily injury, sickness or disease, including occupational sickness or disease, and death of any person;~~  
~~.2 — personal and advertising injury;~~  
~~.3 — damages because of physical damage to or destruction of tangible property, including the loss of use of such property;~~  
~~.4 — bodily injury or property damage arising out of completed operations; and~~  
~~.5 — the Contractor's indemnity obligations under Section 9.15. «one million dollars» (\$ «1,000,000») each occurrence, «two million dollars» (\$ «2,000,000») general aggregate, and «two million dollars» (\$ «2,000,000») aggregate for products-completed operations hazard. Commercial General Liability insurance on a per occurrence basis, shall include: (i) Broad form property damage; (ii) Contractual liability insurance, as part of the commercial general liability policy, insuring the Contractor's liabilities assumed under this Contract, including indemnification obligations under Section 8.12; and (iii) follow a form umbrella or excess liability with a limit of five million dollars (\$5,000,000.00).~~

§ 17.1.3 Automobile Liability covering vehicles owned by the Contractor and non-owned vehicles used by the Contractor, with policy limits of not less than ~~(\$ )~~ «one million dollars» (\$ «1,000,000») per accident, for bodily injury, death of any person, and property damage arising out of the ownership, Manager, maintenance, and use of

those motor vehicles along with any other statutorily required automobile coverage. [Automobile Liability insurance shall include coverage for automobile contractual liability.](#)

§ 17.1.4 The Contractor may achieve the required limits and coverage for ~~Commercial-Comprehensive~~ General Liability and Automobile Liability through a combination of primary and excess or umbrella liability insurance, provided [that such primary and excess or umbrella insurance policies result in the same or greater coverage as those required under Section 17.1.2 and 17.1.3, liability insurance policies result in not less than five million dollars \(\\$5,000,000\) coverage](#) and in no event shall any excess or umbrella liability insurance provide narrower coverage than the primary policy. The excess policy shall not require the exhaustion of the underlying limits only through the actual payment by the underlying insurers.

§ 17.1.5 Workers' Compensation at statutory limits.

§ 17.1.6 Employers' Liability with policy limits not less than ~~(\$ ) each accident, (\$ ) each employee, and (\$ ) policy limit, «one million dollars» (\$ «1,000,000») each accident, «one million dollars» (\$ «1,000,000») each employee, and «one million dollars» (\$ «1,000,000») policy limit.~~ [Employers' Liability insurance shall also include a Waiver of Subrogation in favor of AEG Management HCC, Hawai'i Tourism Authority, ASM Global, State of Hawai'i, and each of its and their respective boards, commissions, agents, Manager, members, shareholders, directors, officers, servants, employees, subsidiaries, and affiliates \(hereinafter referred to as "Manager Indemnitees"\), unless not permitted by applicable law. The Workers' Compensation and Employer's Liability policy shall provide a waiver of subrogation in favor of Manager and any other entity or individual required by the Contract. Contractor waives all rights against Manager, and their respective affiliates, agents, officers, directors and employees to the extent of any damages covered by such policy obtained by Contractor pursuant to this paragraph.](#)

§ 17.1.7 If the Contractor is required to furnish professional services as part of the Work, the Contractor shall procure Professional Liability insurance covering performance of the professional services, with policy limits of not less than ~~(\$ ) per claim and (\$ ) in the aggregate. «two million dollars» (\$ «2,000,000») per claim occurrence and «two million dollars» (\$ «2,000,000») in the aggregate.~~ [The Professional Liability/Errors & Omissions Insurance shall be for protection of claims arising out of negligent acts, professional services/errors, and omissions by or for the Contractor.](#)

§ 17.1.8 If the Work involves the transport, dissemination, use, or release of pollutants, the Contractor shall procure Pollution Liability insurance, with policy limits of not less than ~~(\$ ) per claim and (\$ ) «one million dollars» (\$ «1,000,000») each claim occurrence and «one million dollars» (\$ «1,000,000») in the aggregate.~~

§ 17.1.9 Coverage under Sections 17.1.7 and 17.1.8 may be procured through a Combined Professional Liability and Pollution Liability insurance policy, with combined policy limits of not less than ~~(\$ ) per claim and (\$ ) «three million dollars» (\$ «3,000,000») per claim and «three million dollars» (\$ «3,000,000») in the aggregate.~~

§ 17.1.10 The Contractor shall provide certificates of insurance acceptable to the ~~Owner-Manager or, at Manager's request, copies of policies~~ [evidencing compliance with the requirements in this Section 17.1 at the following times: \(1\) prior to commencement of the Work; \(2\) upon renewal or replacement of each required policy of insurance; and \(3\) upon the Owner's-Manager's written request. An additional certificate evidencing continuation of liability coverage, including coverage for completed operations, shall be submitted with the final Application for Payment and thereafter upon renewal or replacement of such coverage until the expiration of the period required by Section 17.1.1. The certificates will show the Owner-Manager as an additional insured on the Contractor's Commercial General Liability and excess or umbrella liability ~~policy-policy, and the Automobile Liability Policy.~~](#)

§ 17.1.11 The Contractor shall disclose to the ~~Owner-Manager~~ [any deductible or self-insured retentions applicable to any insurance required to be provided by the Contractor.](#)

§ 17.1.12 To the fullest extent permitted by law, ~~the Contractor shall cause the commercial liability coverage required by this Section 17.1 to include (1) the Owner, the Architect, and the Architect's Consultants as additional insureds for claims caused in whole or in part by the Contractor's negligent acts or omissions during the Contractor's operations; and (2) the Owner as an additional insured-AEG Management HCC, Hawai'i Tourism Authority, ASM Global and the State of Hawai'i shall be additional insureds on the Contractor's primary and excess insurance policies for Commercial General Liability, Automobile Liability and Pollution Liability for claims caused in whole~~

or in part by the Contractor's negligent acts or ~~omissions for which loss occurs during completed operations.~~ omissions. The additional insured coverage shall be primary and non-contributory to any of the Owner's Manager's general liability insurance policies and shall apply to both ongoing and completed operations. The policy limits applicable to the additional insureds shall be the same amount applicable to the named insured or, if the policy provides otherwise, policy limits not less than the amounts required under this Agreement. To the extent commercially available, the additional insured coverage shall be no less than that provided by Insurance Services Office, Inc. (ISO) forms CG 20 10 07 04, CG 20 37 07 04, and, with respect to the Architect and the Architect's Consultants, CG 20 32 07 04.

**§ 17.1.13** Within three (3) business days of the date the Contractor becomes aware of an impending or actual cancellation or expiration of any insurance required by this Section 17.1, the Contractor shall provide notice to the Owner-Manager of such impending or actual cancellation or expiration. Upon receipt of notice from the Contractor, the Owner-Manager shall, unless the lapse in coverage arises from an act or omission of the Owner-Manager, have the right to stop the Work until the lapse in coverage has been cured by the procurement of replacement coverage by the Contractor. The furnishing of notice by the Contractor shall not relieve the Contractor of any contractual obligation to provide any required coverage.

**§ 17.1.14 Other Insurance Provided by the Contractor**

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

Coverage	Limits
<u>Builders Risk</u>	<u>To cover the total value of the entire Project on a replacement cost basis.</u>
<u>Personal Property Insurance</u>	<u>Value of Contractor's personal property, tools, equipment and other property.</u>

- .1 The Contractor shall purchase and maintain, from an insurance company or insurance companies lawfully authorized to issue insurance in the jurisdiction where the Project is located, property insurance written on a builder's risk "all-risks" completed value or equivalent policy form and sufficient to cover the total value of the entire Project on a replacement cost basis. The Contractor's property insurance coverage shall be no less than the amount of the Contract Sum, plus the value of subsequent Modifications and labor performed or materials or equipment supplied by others. Such shall be maintained until Substantial Completion and thereafter as provided in this Section 17.1.14 unless otherwise agreed in writing by the parties to this Agreement. This insurance shall include the interests of the Manager, the Contractor, Subcontractors, and sub-subcontractors in the Project as insureds. This insurance shall include the interests of mortgagees as loss payees.
- .2 Unless the parties agree otherwise, upon Substantial Completion, the Contractor shall continue the insurance required by Section 17.1.14. or, if necessary, the Manager shall replace the insurance policy required under this Section 17.1.14 with property insurance written for the total value of the Project .
- .3 If the insurance required by this Section 17.1.14 is subject to deductibles or self-insured retentions, the Contractor shall be responsible for all loss not covered because of such deductibles or retentions as a Cost of the Work, unless such loss is due to the negligence or intentional misconduct of the Contractor, the Contractor shall be solely responsible for such loss.
- .4 Prior to commencement of the Work, the Contractor shall secure the insurance, and provide evidence of the coverage, required under this Section 17.1.14 and, upon the Manager's request, provide a copy of the property insurance policy or policies required by this Section 17.1.14. The copy of the policy or policies provided shall contain all applicable conditions, definitions, exclusions, and endorsements.

**§ 17.1.15** The Contractor shall be responsible for all deductibles required of the policies carried for the Project, without reimbursement as Cost of the Work.

**§ 17.1.16 Insurer.** The insurance shall be purchased from a company with an "A-:IX" or better rating from A.M. Best Company, where said insurance company is both lawfully able to provide insurance in the State of Hawai'i and that is satisfactory to the Company.

**§ 17.1.17 Additional Insureds Endorsements.** All insurance, except the workers compensation and professional liability insurance, shall include the Company Indemnitees as additional insureds under ISO Form CG 2010 and Form CG 2037 or their equivalents. These endorsements shall apply without regard to other provisions of this Agreement.

**§ 17.1.18 Primary Insurance.** The commercial general liability insurance under Section 17.1.2, the automobile liability insurance under Section 17.1.3 shall apply as primary insurance, without any right of contribution by any other insurance that may be carried by the Company regarding the Work under this Agreement. Any general liability or automobile liability insurance purchased by the Indemnitees is, or has been, specifically purchased as excess over any general liability or automobile liability purchased by the Contractor.

**§ 17.1.19 Severability of Interest.** The insurance shall include a severability of interest clause for all named insureds and additional insureds.

**§ 17.1.20 Duration.** Coverage shall be maintained, without interruption, from the date of commencement of the Contractor's Services under this Agreement and shall continue for a period of three (3) years beyond the expiration of this Agreement, to the effect that, should occurrences during the contract term give rise to claims made after expiration of the Agreement, such claims shall be covered by such claims-made policies. The insurance obligations shall survive the expiration or termination of this Agreement.

**§ 17.1.21 Notice of Cancellation, Etc.** The Contractor's insurer shall give the Company immediate written notice of any cancellation in accordance with the policy terms but shall provide at least ten (10) days' written notice for non-payment of premium. The Contractor shall be required to immediately notify Manager of any termination, of coverage or if its coverage no longer meets the requirements of this Agreement by registered or certified mail, return receipt requested.

**§ 17.1.22 Defense.** The insurance obtained by the Contractor, except for professional liability and workers compensation insurance, shall provide that the insurer shall defend any suit against the additional insureds, even if such suit is allegedly or actually frivolous or fraudulent. Defense costs shall apply in excess of any per occurrence limit of liability and shall not reduce any aggregate limits of liability applying under the policies.

**§ 17.1.23 Delivery of Certificates and Policies.** Original certificates of insurance and all requested endorsements, in a form acceptable to the Manager, must be filed with the Manager prior to commencement of the Contractor's Services. The Contractor's certificate of insurance shall be endorsed as follows: "*The Company Indemnitees (as defined in Section 5.1.5) are named as additional insureds for all insurance except the workers compensation and the professional liability insurance. This insurance is primary to and non-contributing with any and all insurance of the Company Indemnitees.*" The Certificate Holder box shall identify the name and address of the Manager listed on the first page of this Agreement. With respect to insurance coverage required to remain in force after final payment, the Contractor shall annually submit certificates of insurance evidencing continuation of such coverage. The Contractor shall submit copies of the policies within seven (7) days following a request from the Manager.

**§ 17.1.24 Lapse in Insurance.** Failure to maintain insurance shall constitute a material breach of this Agreement. Should any required insurance lapse during the term of this Agreement, requests for payments originating after such lapse shall not be processed until the Manager receives satisfactory evidence of reinstated coverage as required by this Agreement, effective as of the lapse date. If insurance is not reinstated, the Manager may, at its sole option, terminate this Agreement effective on the date of such lapse of insurance.

**§ 17.1.25 Subcontractors.** If the Contractor subcontracts a third-party sub-consultant to complete any portion of this Agreement, the Contractor shall ensure that the sub-consultant shall provide all necessary insurance and shall name the Company Indemnitees and the Contractor listed as additional insureds. The Contractor shall provide such insurance documents to the Company on behalf of sub-consultant.

**§ 17.1.26 Non-Waiver**

**PERMITTING THE CONTRACTOR TO START WORK OR RELEASING ANY PAYMENT PRIOR TO COMPLIANCE WITH THESE REQUIREMENTS SHALL NOT CONSTITUTE A WAIVER THEREOF.**

**§ 17.2 Owner's Insurance**~~Manager's Insurance~~

**§ 17.2.1 Owner's Liability Insurance**~~Manager's Liability Insurance~~

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

**§ 17.2.2 Property Insurance**~~Intentionally deleted.~~

**§ 17.2.2.1** The Owner shall purchase and maintain, from an insurance company or insurance companies lawfully authorized to issue insurance in the jurisdiction where the Project is located, property insurance written on a builder's risk "all risks" completed value or equivalent policy form and sufficient to cover the total value of the entire Project on a replacement cost basis. The Owner's property insurance coverage shall be no less than the amount of the initial Contract Sum, plus the value of subsequent Modifications and labor performed or materials or equipment supplied by others. The property insurance shall be maintained until Substantial Completion and thereafter as provided in Section 17.2.2.2, unless otherwise provided in the Contract Documents or otherwise agreed in writing by the parties to this Agreement. This insurance shall include the interests of the Owner, Contractor, Subcontractors, and Sub-subcontractors in the Project as insureds. This insurance shall include the interests of mortgagees as loss payees.

**§ 17.2.2.2** Unless the parties agree otherwise, upon Substantial Completion, the Owner shall continue the insurance required by Section 17.2.2.1 or, if necessary, replace the insurance policy required under Section 17.2.2.1 with property insurance written for the total value of the Project that shall remain in effect until expiration of the period for correction of the Work set forth in Section 18.4.

**§ 17.2.2.3** If the insurance required by this Section 17.2.2 is subject to deductibles or self-insured retentions, the Owner shall be responsible for all loss not covered because of such deductibles or retentions.

**§ 17.2.2.4** If the Work involves remodeling an existing structure or constructing an addition to an existing structure, the Owner shall purchase and maintain, until the expiration of the period for correction of Work as set forth in Section 18.4, "all risks" property insurance, on a replacement cost basis, protecting the existing structure against direct physical loss or damage, notwithstanding the undertaking of the Work. The Owner shall be responsible for all co-insurance penalties.

**§ 17.2.2.5** Prior to commencement of the Work, the Owner shall secure the insurance, and provide evidence of the coverage, required under this Section 17.2.2 and, upon the Contractor's request, provide a copy of the property insurance policy or policies required by this Section 17.2.2. The copy of the policy or policies provided shall contain all applicable conditions, definitions, exclusions, and endorsements.

**§ 17.2.2.6** Within three (3) business days of the date the Owner becomes aware of an impending or actual cancellation or expiration of any insurance required by this Section 17.2.2, the Owner shall provide notice to the Contractor of such impending or actual cancellation or expiration. Unless the lapse in coverage arises from an act or omission of the Contractor: (1) the Contractor, upon receipt of notice from the Owner, shall have the right to stop the Work until the lapse in coverage has been cured by the procurement of replacement coverage by either the Owner or the Contractor; (2) the Contract Time and Contract Sum shall be equitably adjusted; and (3) the Owner waives all rights against the Contractor, Subcontractors, and Sub-subcontractors to the extent any loss to the Owner would have been covered by the insurance had it not expired or been cancelled. If the Contractor purchases replacement coverage, the cost of the insurance shall be charged to the Owner by an appropriate Change Order. The furnishing of notice by the Owner shall not relieve the Owner of any contractual obligation to provide required insurance.

**§ 17.2.2.7 Waiver of Subrogation**

**§ 17.2.2.7.1** The ~~Owner and Contractor~~ waive all rights against (1) each other and any of their subcontractors, sub-subcontractors, agents, and employees, each of the other; (2) the Architect and Architect's consultants; and (3) Separate Contractors, if any, and any of their subcontractors, sub-subcontractors, agents, and employees, for damages caused by fire, or other causes of loss, to the extent those losses are covered by property insurance required by this Agreement or other property insurance applicable to the Project, except such rights as they have to proceeds of such insurance. The Owner or Contractor, as appropriate, shall require similar written waivers in favor of the individuals and entities identified above from the Architect, Architect's consultants, Separate Contractors,



subcontractors, and sub-subcontractors. The policies of insurance purchased and maintained by each person or entity agreeing to waive claims pursuant to this Section 17.2.2.7 shall not prohibit this waiver of subrogation. This waiver of subrogation shall be effective as to a person or entity (1) even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, (2) even though that person or entity did not pay the insurance premium directly or indirectly, or (3) whether or not the person or entity had an insurable interest in the damaged property. CM/PM and the Company waive all rights of recovery against each other and the Company Indemnitees for any losses covered by insurance with the exception of the Professional Liability policy. The CM/PM agrees to defend and indemnify the Indemnitees from all such subrogation claims.

§ 17.2.2.7.2 If during the Project construction period the Owner-Manager insures properties, real or personal or both, at or adjacent to the site by property insurance under policies separate from those insuring the Project, or if after final payment property insurance is to be provided on the completed Project through a policy or policies other than those insuring the Project during the construction period, to the extent permissible by such policies, the Owner-Manager waives all rights in accordance with the terms of Section 17.2.2.7.1 for damages caused by fire or other causes of loss covered by this separate property insurance.

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

§ 17.2.3 Other Insurance Provided by the Owner Other Insurance Provided by the Manager  
(List below any other insurance coverage to be provided by the Owner-Manager and any applicable limits.)

Coverage	Limits

### § 17.3 Performance Bond and Payment Bond

§ 17.3.1 The Owner shall have the right to require the Contractor to furnish bonds covering faithful performance of the Contract and payment of obligations arising thereunder as stipulated in the Contract Documents on the date of execution of the Contract. Intentionally deleted.

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

§ 17.3.3 The Contractor shall provide surety bonds as follows:  
Performance and Payment Bond. The Contractor shall obtain and maintain, in advance and subject to approval by the Manager, a payment and performance bond in the amount of the Contract Sum. The Manager shall be named as obligees on all bonds. Bonds to be provided by the Contractor, subcontractors, and sub-subcontractor(s) must be conditioned (1) that prompt payment shall be made for all amounts lawfully due to all contractors, subcontractors, and persons or entities furnishing labor or materials used in the prosecution of the Work on any phase of the Project; and (2) as guarantee of the obligation to complete the Project as provided in this Agreement. The dollar amount of such bonds shall be modified, as needed, to reflect any approved change orders that modify the total value of the Project or part of the Project. Failure to comply with the requirements of this section shall be legal grounds under this Agreement for Work to be ordered to cease or to be restricted, as deemed appropriate by the Manager, until compliance is achieved, and any unpaid claims are resolved to the reasonable satisfaction of the Manager.

### ARTICLE 18 CORRECTION OF WORK

§ 18.1 The Contractor shall promptly correct Work rejected by the Architect or failing to conform to the requirements of the Contract Documents, whether discovered before or after Substantial Completion and whether or not fabricated, installed, or completed. Prior to final completion, upon discovery by the Architect, the Manager's Representative of any material deviation from the Plans and Specifications or of defective or unworkmanlike labor or materials being used in the construction of the Work, the Architect or the Manager's Representative may immediately order stoppage of construction and demand that any unsatisfactory work be replaced and that the condition be corrected.

whether or not any unsatisfactory work has already been incorporated into the Work. After issuance of such an order in writing, the condition shall be corrected within fifteen (15) days from the date of stoppage. The Manager shall have the right to withhold all further payment until the condition is corrected, and no other Work shall be done without the prior written consent of the Manager unless, and until, such condition has been fully corrected. Costs of correcting such rejected Work, including additional testing and inspections, the cost of uncovering and replacement, and compensation for the Architect's services and expenses made necessary thereby, shall be at the Contractor's expense, unless compensable under Section A.1.7.3 in Exhibit A, Determination of the Cost of the Work expense.

**§ 18.2** In addition to the Contractor's obligations under Section 9.4, if, within one year after the date of Substantial Completion of the Work or designated portion thereof or after the date for commencement of warranties established under Section 15.6.3, or by terms of an applicable special warranty or extended warranty required by the Contract Documents, any of the Work is found to be not in accordance with the requirements of the Contract Documents, the Contractor shall correct it promptly after receipt of notice from the Owner-Manager to do so unless the Owner-Manager has previously given the Contractor a written acceptance of such condition. The Owner-Manager shall give such notice promptly after discovery of the condition. During the one-year period for correction of Work, if the Owner-Manager fails to notify the Contractor and give the Contractor an opportunity to make the correction, the Owner-Manager waives the rights to require correction by the Contractor and to make a claim for breach of warranty.

**§ 18.3** If the Contractor fails to correct nonconforming Work within a reasonable time, the Owner but in any event within ninety (90) days following receipt of notice from the Manager, the Manager may correct it in accordance with Section 8.3.

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

**§ 18.5** The one-year period for correction of Work shall not be extended by corrective Work performed by the Contractor pursuant to this Article 18.

**§ 18.6** Manufacturer's warranties and subcontractor's warranties shall not relieve the Contractor of any of its warranty obligations under the Contract Documents. All such manufacturer's and subcontractor's warranties shall be assigned by the Contractor to the Manager as a condition of final payment by the Manager.

**§ 18.7** Because Work required on warranty is the complete, rework, repair or replacement of Work not properly performed, or the result of defective material or workmanship, the Manager will not compensate the Contractor or Subcontractors and material and equipment suppliers for the warranty Work.

**§ 18.8** All warranty items are the responsibility of the Contractor. When warranty items occur, the Manager will notify the Contractor or appropriate Subcontractor. The Contractor shall cause Work to commence on any warranty items within seven (7) days. If the warranty item(s) are impacting safety or rendering the Project or a portion of the Project unfit for its intended use, the Contractor shall take any and all measures to resolve the warranty item(s) immediately and in no event more than 24 hours after notification to the Contractor of the same. Resolution shall include the acceleration of labor, material and equipment, all to implement the resolution, regardless of cost. All such costs associated with the resolution of the warranty issue(s) shall remain the responsibility of the Contractor.

## **ARTICLE 19 MISCELLANEOUS PROVISIONS**

### **§ 19.1 Assignment of Contract**

*(Intentionally Deleted)*

~~Neither party to the Contract shall assign the Contract without written consent of the other, except that the Owner may, without consent of the Contractor, assign the Contract to a lender providing construction financing for the Project if the lender assumes the Owner's rights and obligations under the Contract Documents. The Contractor shall execute all consents reasonably required to facilitate such assignment. The Manger is currently operating the Hawaii Convention Center pursuant to a Management Agreement with the Hawai'i Tourism Authority ("HTA"). In the event that the Manager's Management Agreement with HTA is terminated for any reason, or expires pursuant to its terms, then the Contractor agrees to enter into an assignment from Manager to either (1) HTA, or (2) the new manager of the Hawaii Convention Center. In the event of an assignment from Manager to the HTA or the new~~

~~manager, the Contractor agrees to continue providing the goods and services required by this Agreement, and continues to be bound by all the terms and provisions herein. In the event on this Agreement is assigned to the HTA, the Contractor agrees that the assignment will add requirements that the Contractor must follow State contracting laws, including, but not limited to, the Hawaii State Procurement Code.~~

### § 19.2 Governing Law and Compliance with Law

~~The This Contract shall be governed by the law of the place where the Project is located, laws of the State of Hawaii, excluding that jurisdiction's choice of law rules. If the parties have selected arbitration as the method of binding dispute resolution, the Federal Arbitration Act shall govern Section 21.6. The Contractor shall comply with all applicable Federal, State and Local laws, codes, ordinances, and regulations (including the obtaining of licenses and permits). The Contractor shall assure that all operations incident to the Work contemplated under this Contract shall be performed with qualified personnel, properly licensed and trained in accord with established regulatory standards, laws, ordinances and regulations.~~

### § 19.3 Tests and Inspections

Tests, inspections, and approvals of portions of the Work required by the Contract Documents or by applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities shall be made at an appropriate time. Unless otherwise provided, the Contractor shall make arrangements for such tests, inspections, and approvals with an independent testing laboratory or entity acceptable to the Owner, Manager, or with the appropriate public authority, and shall bear all related costs of tests, inspections, and ~~approvals, approvals~~ as a Cost of the Work. The Contractor shall give the Architect timely notice of when and where tests and inspections are to be made so that ~~the Architect they~~ may be present for such procedures. ~~The Owner shall bear costs of tests, inspections, or approvals that do not become requirements until after bids are received or negotiations concluded. The Owner Manager shall bear costs of any independent tests, and inspections conducted in the Manager's discretion. The Manager shall~~ directly arrange and pay for any such tests, inspections, or approvals where building codes or applicable laws or regulations so require.

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

«Teri Orton, Chief Procurement Officer»  
«AEG Management HCC, LLC a Delaware Limited Liability Company»  
«1801 Kalakaua Avenue»  
«Honolulu, Hawaii 96815»  
«Email: hccrfp@hccasm.com»

«With a copy to:  
Project and Construction Manager for AEG / HCC (CM/PM) - Mr. Andrew Tanton  
Cumming Management Group, Inc.  
841 Bishop Street – Suite 725  
Honolulu, Hawaii 96813  
Email: atanton@cumming-group.com»

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

«TBD Name, TBD Title»  
«TBD»  
«TBD»  
«TBD»  
«TBD»  
«Email: TBD»

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

### § 19.7 OTHER PROVISIONS

§ 19.7.1 The Manager shall have the right to approve any and all management and supervisory staff of the Contractor assigned to the Project, which approval shall not be unreasonably withheld. The Contractor shall not change its representatives without the Manager's prior written consent, unless such representative leaves the employment of the Contractor. In this event, the Contractor shall notify the Manager immediately, and submit replacement candidate resumes to the Manager for review. All management and supervisory staff replacements will require approval in writing by the Manager prior to replacement. Neither the Manager's nor the Contractor's representatives shall be changed without ten (10) days written notice to the other party. The Manager shall not compensate the Contractor for any added costs associated with the Contractor's replacement of staff.

§ 19.7.2 No publications or advertisements concerning the subject matter of the Contract or photographs of various portions of the Work shall at any time be made by or on behalf of the Contractor, its subcontractors or suppliers, unless prior written authorization therefor is obtained from the Manager.

§ 19.7.3 Unless otherwise specifically provided herein, the Contractor shall communicate with the Manager through, and all submittals required hereunder shall be submitted to, the Manager's Representative, unless otherwise specifically requested or directed by the Manager in writing. Other communications protocols including, but not limited to additional recipients of the Contractor's submittals and reports and Project meeting attendance, will be as determined from time to time by the Contractor, the Architect, and the Manager's Representative.

§ 19.7.4 Intentionally deleted.

## **ARTICLE 20 TERMINATION OF THE CONTRACT**

### **§ 20.1 Termination by the Contractor**

If the Architect fails to certify payment as provided in Section 15.4.1 for a period of ~~30~~thirty (30) days through no fault of the Contractor, or if the ~~Owner-Manager~~ fails to make payment as provided in Section 4.1.3 for a period of ~~30~~thirty (30) days, the Contractor may, upon ~~seven~~twenty-one (21) additional days' notice to the ~~Owner-Manager~~ and the Architect, terminate the Contract and recover from the ~~Owner payment for Work executed, including reasonable overhead and profit, costs incurred by reason of such termination, and damages.~~Manager payment for Work executed.

### **§ 20.2 Termination by the Owner for Cause Termination by the Manager for Cause**

**§ 20.2.1** The ~~Owner-Manager~~ may terminate the Contract if the Contractor

- .1 repeatedly refuses or fails to supply enough properly skilled workers or proper materials;
- .2 fails to make payment to Subcontractors for materials or labor in accordance with the respective agreements between the Contractor and the Subcontractors;
- .3 repeatedly disregards applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of a public authority; or
- .4 abandons the Work to be performed under the Contract;
- .5 assigns the Contract without the prior written consent of the Manager;
- .6 is adjudged bankrupt;
- .7 makes a general assignment of the Contractor's assets for the benefit of its creditors;
- .8 has a receiver appointed for it or any of its property;
- .9 fails to timely perform the services required;
- .10 fails to perform any other requirements of the Contract or upon determination of the Manager that the Contractor executed this Agreement in bad faith;
- .11 otherwise is guilty of substantial breach of a provision of the Contract Documents.

**§ 20.2.2** When any of the reasons described in Section 20.2.1 exists, the ~~Owner, upon certification by the Architect that sufficient cause exists to justify such action, may,~~Manager, without prejudice to any other remedy the ~~Owner~~Manager may have and after giving the Contractor ~~seven~~five (5) days' notice, terminate the Contract and take possession of the site and of all materials, equipment, tools, and construction equipment and machinery thereon owned by the Contractor and may finish the Work by whatever reasonable method the ~~Owner-Manager~~ may deem expedient. Upon request of the Contractor, the ~~Owner-Manager~~ shall furnish to the Contractor a detailed accounting of the costs incurred by the ~~Owner in finishing~~Manager in completing the Work.

**§ 20.2.3** When the ~~Owner-Manager~~ terminates the Contract for one of the reasons stated in Section 20.2.1, the Contractor shall not be entitled to receive further payment until the Work is finished.

**§ 20.2.4** If the unpaid balance of the Contract Sum exceeds costs of finishing the Work, including compensation for the Architect's ~~services~~ services, and any other excess costs and expenses made necessary thereby, and other damages incurred by the ~~Owner-Manager~~ and not expressly waived, such excess shall be paid to the ~~Contractor-Manager~~. Manager. If such costs and damages exceed the unpaid balance, the Contractor shall pay the difference to the ~~Owner-Manager~~. The amount to be paid to the ~~Contractor or Owner, as the case may be, Manager~~, shall be certified by the Architect, upon application, and this obligation for payment shall survive termination of the Contract. The Manager shall not be obligated to assume any contracts or other obligation of the Contractor pursuant to this provision.

**§ 20.2.5** In the event of such termination, if a performance bond has been executed, the surety shall have the right to take over and complete the Work, provided that if the surety does not commence performance within thirty (30) calendar days, the Manager may take over the Work, as specified in the preceding paragraph, and the Contractor and the Contractor's surety shall be liable to the Manager for the excess costs sustained by the Manager.

**§ 20.2.6** If, after termination, it is determined that the Contractor was not in default, or that the default was excusable, the rights and obligations of the parties shall be the same as if the Contractor had been terminated by the Manager for convenience in accordance with Section 20.3.

### **§ 20.3 Termination by the Owner for ConvenienceTermination by the Manager for Convenience**

The ~~Owner-Manager~~ may, at any time, terminate the Contract for the ~~Owner's-Manager's~~ convenience and without cause. The ~~Owner-Manager~~ shall pay the Contractor for Work executed; and costs incurred by reason of such termination, including costs attributable to termination of ~~Subcontracts; and a termination fee, if any, as follows;~~ Subcontracts. Costs incurred by reason of termination must be justified by documentation substantiating amounts expended. The Contractor shall not be entitled to loss of anticipated profit under this provision. No other sums shall be paid by the Manager to the Contractor upon a termination for convenience.

*(Insert the amount of or method for determining the fee payable to the Contractor by the ~~Owner-Manager~~ following a termination for the ~~Owner's-Manager's~~ convenience, if any.)*

«None»

## **ARTICLE 21 CLAIMS AND DISPUTES**

**§ 21.1** Claims, disputes, and other matters in question arising out of or relating to this ~~Contract~~ Contract ("Claims"), including those alleging an error or omission by the Architect but excluding those arising under Section 16.2, shall be referred initially to the Architect for decision. Such matters, except those waived as provided for in Section 21.11 and Sections 15.7.3 and 15.7.4, shall, after initial decision by the Architect or ~~30~~ thirty (30) days after submission of the matter to the Architect, if the parties mutually agree at the time any such Claim arises, be subject to mediation as a condition precedent to binding dispute resolution.

### **§ 21.2 Notice of Claims**

**§ 21.2.1** Claims by either the ~~Owner or Manager or the~~ Contractor, where the condition giving rise to the Claim is first discovered prior to expiration of the period for correction of the Work set forth in Section 18.2, shall be initiated by notice to the Architect within ~~21~~ twenty-one (21) days after occurrence of the event giving rise to such Claim or within ~~21~~ twenty-one (21) days after the claimant first recognizes the condition giving rise to the Claim, whichever is later.

**§ 21.2.2** Claims by either the ~~Owner or Manager or the~~ Contractor, where the condition giving rise to the Claim is first discovered after expiration of the period for correction of the Work set forth in Section 18.2, shall be initiated by notice to the other party.

### **§ 21.3 Time Limits on ClaimsContinuing Contract Performance**

The Owner and Contractor shall commence all claims and causes of action against the other and arising out of or related to the Contract in accordance with the requirements of the final dispute resolution method selected in this Agreement whether in contract, tort, breach of warranty, or otherwise, within the period specified by applicable law, but in any case not more than 10 years after the date of Substantial Completion of the Work. The Owner and Contractor waive all claims and causes of action not commenced in accordance with this Section 21.3.Pending final

resolution of a Claim, except as otherwise agreed in writing, the Contractor shall proceed diligently with performance of the Contract and the Manager shall continue to make payments in accordance with the Contract Documents.

**§ 21.4 If a claim, dispute or other matter in question relates to or is the subject of a mechanic's lien, the party asserting such matter may proceed in accordance with applicable law to comply with the lien notice or filing deadlines.**  
**Waiver of Claims for Consequential Damages**

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

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

This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination in accordance with Article 20. Nothing contained in this Section 21.4 shall be deemed to preclude an award of liquidated damages, when applicable, in accordance with the requirements of the Contract Documents.

~~§ 21.5 The parties shall endeavor to resolve their disputes by mediation which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with their Construction Industry Mediation Procedures in effect on the date of this Agreement. A request for mediation shall be made in writing, delivered to the other party to this Agreement, and filed with the person or entity administering the mediation. The request may be made concurrently with the binding dispute resolution but, in such event, mediation shall proceed in advance of binding dispute resolution proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order. If an arbitration is stayed pursuant to this Section, the parties may nonetheless proceed to the selection of the arbitrator(s) and agree upon a schedule for later proceedings. Except as specifically provided in this contract, neither the inspection by the Manager nor any of its officials, employees, nor agents, nor any order by the Manager for payment of money, nor any payment for, nor acceptance of, the whole or any part of the Work by the Manager, nor any extension of time, nor any possession taken by the Manager, nor its employees, shall operate as a waiver of any provision of this Contract, nor any power herein reserved to the Manager, nor any right to damages herein provided, nor shall any waiver of any breach in this Contract be held to be a waiver of any other or subsequent breach.~~

~~§ 21.6 If the parties have selected arbitration as the method for binding dispute resolution in this Agreement, any claim, subject to, but not resolved by, mediation shall be subject to arbitration which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association, in accordance with the Construction Industry Arbitration Rules in effect on the date of this Agreement. Demand for arbitration shall be made in writing, delivered to the other party to the Contract, and filed with the person or entity administering the arbitration. The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof. The Contract is a negotiated contract between parties represented by legal counsel and shall not be construed against either party as the drafter of the Contract.~~

~~§ 21.7 Subject to the rules of the American Arbitration Association or other applicable arbitration rules, either party, at its sole discretion, may consolidate an arbitration conducted under this Agreement with any other arbitration to which it is a party provided that (1) the arbitration agreement governing the other arbitration permits consolidation; (2) the arbitrations to be consolidated substantially involve common questions of law or fact; and (3) the arbitrations employ materially similar procedural rules and methods for selecting arbitrator(s). Each of the persons signing and executing this Agreement on behalf of each of the parties do hereby warrant and guarantee that the signatory has been fully authorized to execute this Agreement on behalf of such party and to validly and legally bind such party to the terms and conditions hereof.~~

~~§ 21.8 Subject to the rules of the American Arbitration Association or other applicable arbitration rules, any party to an arbitration may include by joinder persons or entities substantially involved in a common question of law or fact whose presence is required if complete relief is to be accorded in arbitration provided that the party sought to be~~

