

GENERAL CONDITIONS

**OF THE DESIGN-BUILD AGREEMENT OF
PIONEER MANOR SKILLED NURSING FACILITY**

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GENERAL CONDITIONS OF THE DESIGN-BUILD AGREEMENT

ARTICLE 1

DEFINITIONS AND INTERPRETATION

1.1 Definitions:

- 1.1.1 Agreement: The term “Agreement” shall mean and refer collectively to: (i) that certain agreement, captioned “Design-Build Agreement” by and between Owner and Design-Builder (hereinafter referred to as the “Design-Build Agreement”), and (ii) this document, captioned “General Conditions of the Design-Build Agreement” (hereinafter referred to as the “General Conditions”).
- 1.1.2 Approved Substitute, Equal, Approved Equal, Contractor Approved, Acceptable, Approved, Required, Directed, Instructed, Selected: The terms “Approved Substitute,” “Equal,” “Approved Equal,” “Contractor Acceptable,” “Acceptable,” “Approved,” “Required,” “Directed” “Instructed,” “Selected” shall mean and refer to actions, opinions or interpretations by the Contractor.
- 1.1.3 Change Order: The term “Change Order” shall mean and refer to a written order signed by the Owner and the Contractor, issued after the execution of this Agreement authorizing a change in this Agreement, the Drawings and Specifications or other Contract Documents.
- 1.1.4 Contract Documents: The Agreement Documents comprising of the Design-Build Agreement between the Owner and the Contractor are listed in the Design-Build Agreement. With respect to each Subcontract, the term “Contract Documents” shall mean and refer to (i) the Subcontract; (ii) the documents incorporated in the Subcontract, as listed in the Subcontract; (iii) these General Conditions; and (iv) the provisions of the Design-Build Agreement applicable to the Subcontracted Work. A Modification is (1) a written amendment to this Agreement executed in accordance with the provisions hereof, (2) a Change Order, or (3) a written interpretation issued by the Architect when properly authorized pursuant to Section 2.2.7 hereof.
- 1.1.5 Contractor: The term “Contractor” shall mean and refer to the Design-Builder under the Design-Build Agreement.
- 1.1.6 Drawings: The term “Drawings” shall mean and refer to the portion of the construction Drawings and Specifications prepared by the Contractor and approved by the Owner in accordance with the Design-Build Agreement that give a graphic representation of the scope, location and arrangement of construction, materials and equipment. The term "Drawings" excludes, in all events, the

Owner's Project Criteria (Exhibit B to the Design-Build Agreement) and Design Development Documents (Exhibit C to the Design-Build Agreement).

- 1.1.7 Not-in-Contract: The terms "Not-in-Contract" and "N.I.C." shall mean and refer to work not covered by this Agreement.
- 1.1.8 Occurrence: The term "Occurrence" when used with respect to insurance, shall mean and refer to an event which occurs during the policy period, or a continuous or related exposure to condition(s) which result, during the policy period, in bodily injury, sickness or disease, or damage to, or destruction of property.
- 1.1.9 Owner's Separate Consultants: The term "Owner's Separate Consultants" has the meaning set forth in the Design-Build Agreement.
- 1.1.10 Owner's Separate Suppliers: The term "Owner's Separate Suppliers" has the meaning set forth in the Design-Build Agreement.
- 1.1.11 Product: The term "Product" shall mean and refer to any materials, systems and equipment incorporated or to be incorporated in the construction required by the Contract Documents.
- 1.1.12 Project: The term "Project" shall mean and refer to the various structures and improvements to be constructed on the Site in accordance with, and reasonably inferable from, the Drawings and Specifications, and all Work, whether on or off the Site necessary to carry it forward.
- 1.1.13 Provide: The term "Provide," where used in the Contract Documents in reference to Products, shall mean "furnish and install," and shall include, without limitation, all labor, materials, equipment, transportation services and other items required to complete the referenced tasks.
- 1.1.14 Separate Contractor: The term "Separate Contractor" shall mean a contractor engaged by the Owner to perform construction work in connection with the Project under a separate agreement with the Owner. The Contractor shall not be responsible for acts or omissions of the Separate Contractor(s).
- 1.1.15 Shown, Indicated: The terms "Shown" and "Indicated" shall mean "appearing on the Drawings."
- 1.1.16 Site: The term "Site" shall mean and refer to that certain real property identified in the Design-Build Agreement and more particularly described in the Site Plan for the Project, on which the Project is to be constructed.
- 1.1.17 Specifications: The term "Specifications" shall mean and refer to the written description of the requirements for the performance of the Work, which may be on the Drawings or in a separate document prepared by the Architect or Engineer.

1.1.18 Subcontractors: The term "Subcontractors" has the meaning set forth in Section 5.1.1 hereof.

1.1.19 Work: The term "Work" shall mean and refer to all labor necessary to produce the design and construction required by the Contract Documents and all materials and equipment incorporated or to be incorporated in the Project, whether on or off the Site and heretofore or hereafter furnished in connection with the Project.

1.2 Execution, Correlation, Intent and Interpretations:

1.2.1 The Agreement shall be signed in not less than triplicate by the Owner and the Contractor.

1.2.2 By executing this Agreement, the Contractor represents that it is financially solvent; that it is qualified to do business in the State of Wyoming, that it has or will obtain all required licenses and permits necessary in connection with performance by Contractor hereunder; that it has the expertise and authority to perform its obligations under this Agreement; that it has inspected the Site and familiarized itself with the local conditions (including, both all physical conditions and all local codes, laws and applicable regulations) under which the Work is to be performed; that it is familiar with all federal, state, municipal and county laws, ordinances and regulations which may, in any way, affect the Work or those employed therein, including, but not limited to, those particularly applicable to the Project; and that the Contract Sum, not to exceed the Guaranteed Maximum Price, is the agreed-upon amount for all the Work as defined herein.

1.2.3 The intention of this Agreement is to include all labor, materials, equipment and other items necessary for the proper execution and completion of the Work. It is intended that all work required for the construction and administration of the Project shall be supplied including all such Work that is in the Contract Documents or is reasonably inferable from the Drawings and Specifications and the Contract Documents as being necessary to produce the intended results. Lists of "Work Included," "Scope" or "Description of Work" are not intended to enumerate each and every item of Work or appurtenances required. Words which have well-known technical or trade meanings are used herein in accordance with such recognized meanings.

1.2.4 The Agreement and the other Contract Documents are intended to constitute a single agreement and every effort shall be made to construe such documents as being consistent and not contradictory. In the event of any conflict between the provisions of the Design-Build Agreement and the General Conditions, Drawings and Specifications, and any other documents whatsoever, the provisions of the Design-Build Agreement shall control and govern. In the event of any conflict between the provisions of the General Conditions and the Drawings and Specifications, the provisions of the General Conditions shall control and govern.

1.3 Ownership and Use of Documents:

- 1.3.1 The rights of the Owner and the Architect to the Drawings and Specifications are defined in the Design-Build Agreement.
- 1.3.2 Subcontractors will be furnished by Contractor with a reasonable number of copies of Drawings and Specifications.
- 1.3.3 The organization of the Specifications into divisions, sections and articles and the arrangement of Drawings shall not control Contractor in dividing the Work among Subcontractors or in establishing the extent of Work to be performed by any Subcontractors.
- 1.3.4 The Drawings shall not be scaled for rough-in measurements, nor serve as Shop Drawings.
- 1.3.5 Drawings and Specifications are complementary and what is called for by one shall be as binding as if called for both. Should the Drawings, Specifications and/or other instructions be contradictory in any particular or should there be any doubt as to the meaning of either, the Contractor shall review the matter with the Architect and consult with the Owner as to the appropriate course of action.
- 1.3.6 The Drawings and Specifications shall have equal authority and priority. In the event of any conflict between the Drawings and Specifications, bids shall be based on the most expensive combination of quality and guaranty of Work indicated and the appropriate Work shall be determined by the Contractor in consultation with the Owner. With respect to the Drawings and Specifications:
 - 1.3.6.1 Figures take precedence over scale measurements.
 - 1.3.6.2 Large-scale details take precedent over smaller scale details.
 - 1.3.6.3 Architectural Drawings take precedence in regard to dimensions when in conflict with Mechanical and Structural Drawings, except for the size of structural members.
 - 1.3.6.4 Specifically titled Drawings and sections of the Specifications take precedence over indication of the item in a collateral way.
 - 1.3.6.5 Existing conditions take precedence over Drawings and Specifications, provided, however, that adjustments to the Contract Sum due to concealed conditions shall be governed by the provisions of Section 3.7 of the Design-Build Agreement.

1.3.6.6 When multiple requirements are given for any item, all requirements that are not contradictory shall be met.

1.3.6.7 Terms such as "as shown," "as indicated" and "as noted" mean there are additional requirements given elsewhere in the Contract Documents.

ARTICLE 2

ARCHITECT

2.1 Definition:

2.1.1 The Architect is the person lawfully licensed to practice architecture, or an entity lawfully practicing architecture identified as such in the Design-Build Agreement. The term Architect means the Architect or its authorized representative.

2.1.2 In accordance with the Design-Build Agreement, the Contractor is responsible to the Owner for the design and construction of the Project. Accordingly, all services of the Architect shall be performed for the Contractor and at the direction of the Contractor. The Owner is the intended third-party beneficiary of all services of the Architect for the Contractor in connection with the Project.

2.2 Construction Phase Services:

2.2.1 The Architect will provide the Construction Phase Services described hereinafter:

2.2.2 The Architect shall cooperate with the Contractor in regard to any bulletins, changes or other instructions to Subcontractors, which require the Architect's expertise

2.2.3 During the Construction Phase the Architect shall make visits to the Site at intervals appropriate to the stage of construction to familiarize itself generally with the progress and quality of the Work and to determine in general if the Work is proceeding in accordance with the Contract Documents.

2.2.4 The Architect shall review and take appropriate action upon, the Contractor's submittals such as shop drawings, product data and samples for conformance with the design concept of the Project and for compliance with the information given in the Contract Documents. Such action shall be taken with reasonable promptness so as to cause no delay, and shall be deemed to be reasonably prompt if taken within fourteen (14) days of receipt by the Architect of properly submitted submittals, unless circumstances require a shorter or longer period of time for review.

- 2.2.5 The Contractor shall prepare change orders for the Owner's and Architect's review and the Owner's approval and execution in accordance with the Contract Documents. The Architect shall prepare drawings, specifications and support data and provide other services in connection with change orders. The Architect shall provide such services with reasonable promptness so as to cause no delay.

ARTICLE 3

OWNER

- 3.1 **Definition:** The Owner is described in the Design-Build Agreement.
- 3.2 **Information and Services Required of the Owner:**
- 3.2.1 The Owner shall secure and pay for any necessary easements for permanent structures.
- 3.2.2 Information or services under the Owner's control shall be furnished by the Owner within the time required under the CPM Schedule, and if no time period is provided under the CPM Schedule, with reasonable promptness after written request to avoid delay in the orderly progress of the Work.
- 3.3 **Owner's Right to Stop the Work:**
- 3.3.1 If the Contractor fails to correct Work which is not in accordance with the Contract Documents, or fails to carry out the Work in accordance with the Contract Documents, the Owner may order the Contractor to stop the Work, or any portion thereof, until the cause for such order has been eliminated; however, this right of the Owner to stop the Work shall not give rise to any duty on the part of the Owner to exercise the right for the benefit of the Contractor or any other person or entity.
- 3.4 **Owner's Right to Carry Out the Work:**
- 3.4.1 If the Contractor defaults or neglects to carry out the Work in accordance with the Contract Documents and fails within a seven (7) day period after receipt of written notice from the Owner to commence and continue correction of such default or neglect with diligence and promptness, then the Owner may, after seven (7) days' additional written notice to Contractor and without prejudice to any other remedy the Owner may have, correct such deficiencies or otherwise rectify such situations to the satisfaction of the Owner. In such case, Owner shall deduct from the payments then or thereafter due the Contractor the cost of correcting such deficiencies or otherwise rectifying such situations to the satisfaction of the Owner, including compensation or the Architect's additional services made necessary by such default, neglect or failure. If the payments then or thereafter

due the Contractor are not sufficient to cover such amount, the Contractor shall pay the difference to the Owner.

ARTICLE 4

CONTRACTOR

- 4.1 Definition: The Contractor is the Design-Builder described in the Design-Build Agreement.
- 4.2 Review of Drawings and Specifications: The Contractor shall review the Drawings and Specifications as they are prepared by the Architect, as more particularly described in the Design-Build Agreement. Prior to initiating any of the Work, each Subcontractor shall carefully study and compare the Drawings and Specifications incorporated in the Contract Documents for its Subcontract and shall at once report to the Contractor any error, inconsistency or omission occurring therein that comes to the attention of the Subcontractor or would have come to its attention with the exercise of due care. If the Subcontractor performs, or allows any Subcontractor to perform, any of the Work knowing, or when with the exercise of due care it would have known, it to be subject to an error, inconsistency or omission in the Drawings and Specifications, or contrary to applicable laws, ordinances, rates, regulations, codes or orders of any public authority, and fails to give the Contractor notice thereof prior to performance thereof, the Subcontractor shall bear all costs arising there from. The Subcontractor shall not be responsible for any requirements of a discretionary nature required by any public agency.
- 4.3 Supervision and Construction Procedures:
- 4.3.1 The Contractor shall provide competent supervision, coordination and related services for construction of, and shall cause to be constructed, the Project. The Contractor shall be solely responsible for all construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Design-Build Agreement who are directly or indirectly under contract with the Design-Builder.
- 4.3.2 The Contractor shall be responsible to the Owner for the acts and omissions of the Design-Builder's employees, the Architect and other design professionals, subcontractors and their agents and employees, and other persons performing any portion of the Design-Builder's obligations under the Agreement.
- 4.3.3 The Contractor shall not be relieved from its obligations to perform the Work in accordance with the Contract Documents by the activities or duties of the Owner in its administration of the Contract, or by inspections, tests or approvals required or performed by persons other than the Contractor. No inspection performed by the Owner or the Architect hereunder shall be a waiver of any of the Contractor's

obligations hereunder or be construed as an approval or acceptance of the Work or any part thereof.

- 4.3.4 The Contractor shall contract with an independent testing agency to perform the quality control testing Owner deems necessary for the proper construction of the Project.

4.4 Labor and Materials:

- 4.4.1 Unless otherwise specifically noted in the Contract Documents, the Contractor shall provide and pay for all labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation and other facilities and services necessary for the proper execution and completion of the Work, whether temporary or permanent and whether or not to be incorporated in the Work. If new utility service connections are required, Design-Builder shall pay the metered utility charges for all services during construction. As areas of the buildings are Substantially Completed and occupied by the Owner, the utility usage bills shall be pro-rated between Design-Builder and the Owner based upon the ratio of unoccupied and occupied areas and the dates of occupancy by the Owner.

- 4.4.2 The Owner may, in writing; require the Contractor to remove from the Project any employee the Owner deems incompetent or careless and may require the Contractor to replace any such employee with suitable personnel. The Contractor shall at all times enforce strict discipline and good order among its employees and shall not employ on the Work any unfit person or anyone not skilled in the task assigned to him. All services under this Agreement shall be performed in a competent and professional manner. Contractor shall employ, and require its Subcontractors and Sub-Subcontractors employ, only compatible labor with the goal that the Work may proceed without interference by labor disputes caused by the Contractor or the Subcontractors and without undue embarrassment there from to Owner.

- 4.4.3 Contractor covenants that all Work shall be done in a good and workmanlike manner and that all materials furnished and used in connection therewith shall be new, except as otherwise expressly provided for in the Drawings and Specifications. If required by the Drawings and Specifications or if otherwise requested by the Owner, the Contractor shall furnish satisfactory evidence as to the kind, quality and performance values of materials and equipment as necessary to demonstrate the quality of such materials and equipment and compliance with the Contract Documents.

4.5 Substitutions:

- 4.5.1 After award of a Subcontract, if the Contractor shall determine that the substitution of a specified article, material or item of equipment with another

Product is in the best interest of the Owner, the Contractor shall make a written recommendation for such substitution to the Owner setting forth the benefit to the Owner and the credit or extra cost involved and shall provide all required supporting data and samples. Unless and until the Contractor's recommendation is accepted by the Owner, the Contractor shall perform the Work in accordance with the Contract Documents. The Contractor's recommendations shall be submitted within such time as will allow a reasonable time for consideration by Owner and shall not be justification for delay in the Work. The Contractor shall consult with the Architect regarding substitutions that may have an impact on the design of the Project.

- 4.5.2 All substitutions recommended by Contractor that require changes in the Work or redesign or other changes in the Contract Documents shall be subject to the prior approval of the Owner.
- 4.5.3 With respect to provisions of the Specifications requiring the Contractor to provide a specified item "or equal," the Architect's determination of whether a proposed item satisfies the "or equal" requirement shall not be deemed to be an evaluation of a substitution.

4.6 Warranty:

- 4.6.1 The Contractor warrants that the materials and equipment supplied by Contractor will be new and of good quality and free from defects and that all work done by Contractor will be in accordance with Contract Documents and free from defects in workmanship and material. This warranty shall be for two years after the later of (a) Substantial Completion or (b) such longer period as may be provided in the Drawings and Specifications or other Contract Documents. In addition, Contractor hereby agrees to repair and make good any damage, defects or fault in the Project that may appear within two (2) years after the later of (a) Substantial Completion or (b) such longer period as may be provided in the Drawings and Specifications or other Contract Documents, as the result of nonconforming or defective work or materials or equipment furnished by the Contractor or any Subcontractor. All materials and equipment furnished by or through the Contractor or installed by the Contractor (or any Subcontractor) shall be subject to a guaranty of two (2) years from the date of the latter of (a) Substantial Completion or (b) such longer period as may be provided in the Drawings and Specifications or other Contract Documents. Contractor hereby agrees to make promptly any and all repairs to the Project which may become necessary, during the warranty or guaranty period, on account of faulty materials or equipment furnished by or through the Contractor or faulty workmanship performed by the Contractor (or any Subcontractor), and further agrees to commence the repair and replacement of any and all damage to the Project caused thereby at any time or times during the warranty or guaranty period, within seven (7) days from receipt of written notice and to faithfully and diligently prosecute the same to conclusion, without cost to the Owner in accordance with the Contract Documents. For

purposes of this Section 4.6.1, the Contractor shall be deemed to have commenced the required repairs if the Contractor commences required preliminary steps, such as conducting an appropriate investigation of the cause of the defect and ordering replacement materials and equipment, and thereafter continues to diligently prosecute the completion of the repair work. All rights acquired by the Owner through guarantees by the Contractor shall inure to the benefit of the Owner, its successors and assigns. In addition to the foregoing, any equipment warranties and warranties from Subcontractors secured by the Contractor, including those in excess of two (2) years, and any additional bond or guaranty which may be required under the Drawings and Specifications, shall also inure to the benefit of the Owner's successors and assigns. Contractor shall require that each Subcontractor provide a similar warranty and guaranty for the benefit of Contractor and Owner. Contractor shall acquire, catalog and deliver to Owner all bonds and guarantees under Subcontracts and from material suppliers.

- 4.6.2 The Contractor, as a condition precedent to Final Payment, shall execute and deliver to the Owner an assignment to the Owner of all special warranties or guarantees from manufacturers required by the Contract Documents.
- 4.6.3 Contractor's express warranty in Section 4.6.1 herein shall be in addition to, and not in lieu of, any other warranties, guaranties or remedies Owner may have under the Contract Documents and this Agreement, at law, or in equity for defective work.
- 4.6.4 As more particularly provided in the Design-Build Agreement, the Contractor's warranty with respect to the Owner's reused equipment and the Owner Furnished Equipment is limited to warranty of the installation work performed by the Contractor (or its Subcontractors) and the Contractor does not warrant that such items are free from inherent defects. The Contractor shall perform such installation work so as to avoid violating the conditions of the warranties provided by others with respect to the reused equipment and the Owner Furnished Equipment.

4.7 Shop Drawings and Samples:

- 4.7.1 Shop Drawings are drawings, diagrams, illustrations, schedules, performance charts, brochures and other data which are prepared by Contractor or any-Subcontractor, manufacturer, supplier or distributor, and which illustrate some portion of the Work.
- 4.7.2 Product Data are illustrations, standard schedules, performance charts, instructions, brochures, diagrams and other information furnished by Contractor or any Subcontractor to illustrate a material, Product or system for some portion of the Work.

- 4.7.3 Samples are physical examples furnished by Contractor or any Subcontractor to illustrate materials, equipment or workmanship, and to establish standards by which the Work will be judged.
- 4.7.4 Contractor shall review, stamp with its approval and submit to the Owner and the Architect, with reasonable promptness and in orderly sequence so as to cause no delay in the Work or in the Work of any separate contractor, and pursuant to a schedule agreed upon in advance by the Contractor and the Architect and the Owner, all Shop Drawings, Product Data and Samples required by the Contract Documents or subsequently required by the Architect or Owner. Shop Drawings, Product Data and Samples shall be properly identified as specified. At the time of submission, Contractor shall inform the Architect and the Owner in writing of any deviation in the Shop Drawings, Product Data or Samples from the requirements of the Contract Documents and of any subsequent understanding of the Contractor and Architect with respect thereto.
- 4.7.5 By approving and submitting Shop Drawings, Product Data and Samples, Contractor thereby represents that it has (i) determined and verified all field measurements, field construction criteria, materials, catalog numbers and similar data, or will do so; (ii) checked and coordinated each Shop Drawing, Product Data and Sample with the requirements of the Work and of the Contract Documents; and (iii) brought to the attention of the Architect in writing, any known ambiguity with respect to the Architect's design intent.
- 4.7.6 The Architect will review and take appropriate action upon Shop Drawings, Product Data and Samples with reasonable promptness so as to cause no delay, but only for conformance with the design concept of the Project and with the information given in the Contract Documents. The Architect's action shall be deemed to be reasonably prompt if taken within fourteen (14) calendar days of receipt by the Architect of properly submitted submittals, unless circumstances require a shorter or longer period of time for review. The Architect's review of and action taken with respect to a separate item shall not indicate approval of an assembly in which the item functions.
- 4.7.7 All Shop Drawings, Product Data, Samples and other submittals required by the Contract Documents shall be submitted to the Owner for review and approval, which approval shall not be unreasonably withheld. The Owner will review Shop Drawings, Product Data, Samples and other submittals within the time required by the review schedule approved by the Owner and Contractor and, if no time period is provided in such schedule, within fourteen (14) calendar days after receipt of the submittal.
- 4.7.8 Shop Drawings and Samples that deviate from the requirements of the Contract Documents must be approved by the Owner as well as by the Architect. Contractor shall not be relieved from responsibility for errors or omissions in the

Shop Drawings, Product Data or Samples or other submittals by the Architect's and/or Owner's review thereof or by action taken by the Architect thereon.

4.7.9 Contractor shall make any corrections required by the Architect or Owner and shall resubmit the required number of corrected copies of Shop Drawings, Product Data or new Samples until approved. For all Shop Drawings, Product Data and Samples that are re-submitted to the Architect and the Owner, the Contractor shall highlight specific changes in writing on resubmitted Shop Drawings, Product Data or Samples to revisions other than the corrections requested by the Architect or Owner on previous submissions.

4.7.10 The Architect's and Owner's review and approval of Shop Drawings, Product Data or Samples shall not relieve Contractor of responsibility for a deviation from the requirements of the Contract Documents unless Contractor has informed Architect and Owner in writing of such deviation at the time of submission and the Architect and the Owner have given written approval to the specific deviation, nor shall the Architect's or Owner's review and approval relieve Contractor from responsibility for errors or omissions in the Shop Drawings, Product Data or Samples.

4.7.11 Work requiring a Shop Drawing, Product Data or Sample submission shall not be commenced by Subcontractors until the submission has been reviewed and approved by the Architect and the Contractor and the Owner. All such portions of the Work shall be in accordance with such reviewed Shop Drawings, Product Data and Samples.

4.8 Use of Site:

4.8.1 Contractor shall confine operations at the Site to areas permitted by law, ordinances, permits and the Owner, and the Contractor shall not unreasonably encumber the Site with any materials or equipment.

4.9 Cutting and Patching of Work:

4.9.1 Contractor shall do all cutting, fitting or patching that may be required to complete the Work or to make its several parts fit together properly and shall take precautions as necessary to protect any Work affected by such cutting, excavating or other altering of the Work or any part thereof. The Contractor shall repair any damage caused by cutting, fitting or patching performed by the Contractor.

4.10 Cleaning Up:

4.10.1 Contractor, at all times, shall keep the premises free from accumulation of waste materials or rubbish caused by the Contractor or its Subcontractors or suppliers. At the completion of the Work, it shall remove all its waste materials and rubbish from and about the Project as well as all of its tools, construction equipment,

machinery and surplus materials, and shall clean all glass and other interior and exterior surfaces and leave the Work in a condition acceptable to Owner and governmental entities with jurisdiction over the facility being constructed, except as otherwise specified. The Owner shall be responsible for any additional cleaning required after completion of the Work due to Owner's move-in activities.

4.10.2 If Contractor fails to clean up after a written request from the Owner, the Owner may do so, and the cost thereof shall be charged to Contractor as provided in Section 3.4 hereof.

4.11 Communications:

4.11.1 Except as may be provided otherwise in the Design-Build Agreement, Contractor shall forward all communications directly to the Owner. All Subcontractor communications shall be through the Contractor.

4.12 Indemnification:

4.12.1 To the fullest extent permitted by law, the Contractor shall indemnify, defend and hold the Owner and its agents and employees (the "Indemnitees") harmless from all claims, loss, costs and expenses (including reasonable attorney fees) whether arising before or after completion of the services under this Agreement, to the extent caused by the (i) errors or omissions in the Project design or Drawings and Specifications; (ii) the performance of the services under this Agreement by the Contractor, its Architect and/or their agents and employees; (iii) the wrongdoing of Contractor, its Architect, its Subcontractors and/or its suppliers; and/or (iv) the breach of this Agreement by the Contractor, excepting claims, costs, expenses or liabilities to the extent caused by the gross negligence or willful and wanton misconduct of the Indemnitees. To the fullest extent permitted by law, the Contractor shall indemnify, defend and hold the Owner and its property harmless from all claims for nonpayment by the Architect, Subcontractors, Sub-Subcontractors, laborers, vendors and materialmen for services, labor or material provided by or through the Contractor, and shall indemnify, defend and hold the Owner harmless from any construction or mechanics lien or similar claims for work performed and/or labor or material furnished by or through the Contractor.

4.12.2 In any and all claims against the Owner or any of its officers, agents or employees by any employee of Contractor, any Subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, the indemnification obligation under this Section 4.12 shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for Contractor or any Subcontractor under worker's compensation acts, disability benefit acts or other employee benefit acts.

4.13 Schedule:

4.13.1 The Work shall be performed in accordance with the CPM Schedule prepared by the Contractor and approved by the Owner in accordance with the Design-Build Agreement as adjusted, from time to time, in accordance with the provisions of Article 8 and 12 hereof.

4.14 Taxes:

4.14.1 The Contractor shall pay all sales, consumer, use and other similar taxes on supplies, materials, machinery tools, utilities and other equipment and services used or incorporated in the construction of the Project which are required by laws that are in existence at the time the Design-Build Agreement is executed.

4.15 Permits, Fees and Notices:

4.15.1 The Contractor shall secure and pay for the building permit for the Project and shall secure and pay for, or include in the Subcontractor scope of work, all trade contractor permits and inspections. The Contractor shall be responsible for the compliance of the Project design with the requirements for issuance of a certificate of occupancy, and the Contractor shall post all bonds, secure and pay for all permits, and pay all fees necessary for the proper execution and completion of the Work which are legally required at the time the Design-Build Agreement is executed. The Owner shall pay other governmental fees, licenses and inspections required by the State of Wyoming to be provided by the entity which owns the Project.

4.15.2 The Contractor shall give all notices and comply with all laws, ordinances, rules, regulations, and lawful orders of any public authority bearing on the performance of the Work.

4.15.3 The Contractor shall be responsible to the Owner for the Drawings and Specifications as more particularly described in the Design-Build Agreement. If the Subcontractor performs, or allows any Sub-Subcontractor to perform, any of the Work knowing, or when, with the exercise of due care it would have known, such Work to be subject to an error, inconsistency or omission in the Drawings and Specifications, or contrary to applicable laws, ordinances, rules, regulations, codes or orders of any public authority, and fails to give the Contractor notice thereof prior to performance thereof, the Subcontractor shall bear all costs arising therefrom.

ARTICLE 5

SUBCONTRACTORS

5.1 Definition:

- 5.1.1 The term "Subcontractor" shall mean and refer to any person or organization (other than the Owner) who has a direct contract with Contractor to perform any labor or to supply any material or equipment in connection with the Project. The term "Subcontractor" excludes the Architect and the Contractor's other design and engineering Consultants. The term "Subcontractor" is referred to throughout the Agreement as if singular in number and masculine in gender and means a Subcontractor or an authorized representative thereof. The term "Subcontract" shall mean and refer to the contract of any Subcontractor whenever entered into during the term of this Agreement to perform Work at the Site including, without limitation, those entered into after the initial award of Subcontracts because of interfacing omissions between the various Work categories.
- 5.1.2 A Sub-Subcontractor is a person or organization who has a direct or indirect contract with a Subcontractor to perform any of the Work at the Site. The term Sub-Subcontractor is referred to throughout the Agreement as if singular in number and masculine in gender and means a Sub-Subcontractor or an authorized representative thereof.
- 5.1.3 Nothing contained in the Agreement shall create any contractual relation between the Owner or the Architect and any Subcontractor or Sub-Subcontractor.

5.2 Award of Subcontracts:

- 5.2.1 Subcontractors shall be subject to the reasonable objection of the Owner. Subcontracts shall be awarded in accordance with the Design-Build Agreement.

5.3 Subcontractual Relations:

- 5.3.1 All Subcontracts shall be between the Contractor and the appropriate Subcontractor, and shall provide that the Subcontractor consents to the assignment of the Subcontract to the Owner pursuant to Section 5.3.4 hereof, and agrees in the event such assignment becomes effective under Article 13 of the Design-Build Agreement or Section 14.1 hereof, to recognize the Owner as successor to the Contractor and to complete the Work under the Subcontract.
- 5.3.2 The Contractor shall cause all Subcontractors and vendors to agree to indemnify the Owner and hold it harmless from all claims for property damage and bodily injury that may arise from such Subcontractor's operations. Such provisions shall be in a form reasonably satisfactory to Owner.
- 5.3.3 The agreement between Contractors and the Subcontractors (and, where appropriate, between Subcontractors and Sub-Subcontractors) shall contain provisions that:

- 5.3.3.1 Preserve and protect the right of the Owner under this Agreement with respect to the Work to be performed under the Subcontract so that the subcontracting thereof will not prejudice such rights;
 - 5.3.3.2 Require that such Work be performed in accordance with the requirements of this Agreement;
 - 5.3.3.3 Require submission to Contractor of applications for payment under each Subcontract in reasonable time to enable Contractor to apply for payment in accordance with Article 3 of the Design-Build Agreement, all such applications to be in a form that fully complies with all requirements of the law and to demonstrate the foregoing;
 - 5.3.3.4 Require that the Subcontractor immediately notify the Contractor if the Subcontractor's work is being delayed for any reason. Require that all claims for additional costs or extensions of time with respect to subcontracted portions of the Work shall be submitted to Contractor (via any Subcontractor or Sub-Subcontractor where appropriate) within sufficient time so that Contractor may comply in the manner provided, if any, in the Design-Build Agreement for a like claim by Contractor upon the Owner;
 - 5.3.3.5 Waive all rights the contracting parties may have against one another for damages caused by fire or other perils covered by the property insurance described in Section 11.3 hereof;
 - 5.3.3.6 Contain such provisions as are required by the Design-Build Agreement; and
 - 5.3.3.7 Obligate each Subcontractor specifically to consent to the provisions of this Section 5.3.
- 5.3.4 Contractor hereby assigns to Owner, as security for Contractor's performance hereunder, all Subcontracts and all other contracts and agreements (except for the Design-Build Agreement) entered into in connection with the Project. Such assignment shall be operative, and the Owner shall be entitled to enforce said contracts according to their terms, only upon notice by Owner in the event of (i) default by, or termination of, Contractor under this Agreement; or (ii) termination of the Agreement under Article 13 of the Design-Build Agreement. All Subcontracts shall provide that the Subcontractor consents to such assignment. In the event that the Owner assumes one or more of the Subcontracts and/or other contracts under this Section 5.3.4, the Owner shall indemnify and hold harmless the Contractor for claims under such assumed Subcontract(s) and other contract(s) for payment for Work performed after the effective date of such assumption, subject to the Contractor's obligations to reimburse the Owner under Section 14.1 hereof. In addition to the Owner's obligation under the foregoing

sentence, in the event that the Owner assumes one or more of the Subcontractors and/or other contracts under this Section 5.3.4 in connection with termination of the Agreement under Article 13 of the Design-Build Agreement, the Owner shall indemnify and hold the Contractor harmless from claims and liability arising from claims of third parties against the Contractor with respect to work performed by the Subcontractors after the effective date of such assumption.

ARTICLE 6

SEPARATE CONTRACTS

6.1 Owner's Right to Award Separate Contracts:

6.1.1 The Owner reserves the right to perform work related to the Project with its own forces or to award Separate Contracts in connection with other portions of the Project under these or similar Conditions of the Contract, including, without limitation, Section 4.4.2 hereof.

6.1.2 The Contractor will provide for the coordination of the Work of the Owner's forces and of each Separate Contractor with the Work of the Contractor, who shall cooperate therewith as provided in Section 6.2 hereof.

6.2 Mutual Responsibility of Contractors:

6.2.1 Contractor and the Owner's Separate Contractors shall each afford the other reasonable opportunity for the introduction and storage of their materials and equipment and the execution of their Work, and shall properly connect and coordinate its Work with the work of the other.

6.2.2 If any part of Contractor's Work depends for proper execution or results upon the work of any other Separate Contractor, Contractor shall prior to proceeding with such work, inspect and promptly report to the Architect and the Owner any apparent discrepancies or defects in such work that render it unsuitable for such proper execution and results. Failure of Contractor to so inspect and report shall constitute an acceptance of the Separate Contractor's work as fit and proper to receive its Work, except as to defects not then reasonably discoverable.

6.2.3 The Contractor shall reimburse the Owner for costs incurred by the Owner which are payable to a Separate Contractor because of delays, improperly timed activities or defective construction of the Contractor. Delays to the Contractor's Work caused by a Separate Contractor shall be deemed to be delays caused by the Owner under Section 8.3 hereof, unless such delay results from failure of the Contractor to comply with the requirements of this Article 6.

6.2.4 The Contractor shall promptly remedy damage wrongfully caused by the Contractor to completed or partially completed construction or to property of the Owner or Separate Contractors as provided in Section 10.2 hereof.

6.3 Cutting and Patching Under Separate Contracts:

6.3.1 Contractor and the Owner's Separate Contractors each shall be responsible for any cutting, fitting and patching that may be required to complete its Work, except as otherwise specifically provided in this Agreement. Contractor shall not endanger any work of any Separate Contractors by cutting, excavating or otherwise altering any work and shall not cut or alter the work of any Separate Contractor except with the written consent of the Owner, which consent shall not be unreasonably withheld.

6.4 Owner's Right to Clean Up:

6.4.1 If a dispute arises between the Contractor and/or the Separate Contractors as to their responsibility for cleaning up as required by Section 4.10 hereof, the Owner may clean up and charge the cost thereof to the Contractor and/or Separate Contractors as the Owner shall reasonably determine to be just.

ARTICLE 7

MISCELLANEOUS PROVISIONS

7.1 Governing Law: This Agreement shall be governed by the laws of the State of Wyoming, and both the Contractor and Owner agree that any resort to litigation in connection with this Agreement will only be to state courts of applicable jurisdiction and venue located within Campbell County, State of Wyoming.

7.2 Successors and Assigns: The Owner and the Contractor, respectively, bind themselves, their successors, assigns and legal representatives to the other party to this Agreement and to the successors, assigns and legal representatives of such other party. The Contractor shall not assign, subcontract or transfer any interest in this Agreement without the prior written consent of the Owner. In the event of a sale or transfer of the Owner's facilities comprising the Project, Owner reserves the right to assign both the benefits and/or obligations of the Owner under this Agreement to any party reasonably capable of performing Owner's executory obligations under this Agreement at any time and, upon such assignment Owner shall have no further responsibility for the obligations so assigned hereunder which at that time remain executory provided (i) such party assumes such obligations and (ii) such party is financially capable of performing such obligations. In addition, the Owner reserves the right to assign this Agreement as security in connection with financing for the Project.

- 7.3 Notices: Any notice required to be given or which may be given to Owner pursuant to this Agreement and any other communications from Contractor to Owner relating to Project costs, completion dates, schedule, changes to the Work, or approvals of samples shall be forwarded in writing by personal delivery, telegram, facsimile transmission, or by certified mail, return receipt requested, to Campbell County Memorial Hospital, 501 S. Burma Avenue, Gillette, WY 82716, Attention: _____ until the Owner shall advise the Contractor otherwise in a writing complying with the provisions of this Section 7.3. Any notice required to be given or which may be given to the Contractor pursuant to the terms of this Agreement shall be forwarded in writing by personal delivery, telegram or by certified mail, return receipt requested, to _____ (*design builder*), until Contractor shall advise Owner otherwise in a writing complying with the provisions of this Section 7.3.
- 7.4 Claims for Damages: Should Contractor suffer injury or damage because of any act or omission of Owner or of its employees, agents or others for whose acts it is legally liable, Contractor shall make a claim in writing to the Owner within such time as may be provided in this Agreement, or if no time is so specified, within five (5) calendar days after the first observance of such injury or damage; otherwise, such claim is waived.
- 7.5 No Waiver: Except as expressly provided otherwise in the Contract Documents, no failure by the Owner insist upon strict performance of any covenant, agreement, term or condition of this Agreement or to exercise any right, term or remedy consequent upon a breach thereof shall constitute a waiver of any such breach or of such covenant, agreement, term or condition. No waiver by Owner of any breach by Contractor shall affect or alter this Agreement, but each and every covenant, agreement, term and condition of this Agreement shall continue in full force and effect with respect to any other then existing or subsequent breach thereof by Contractor.
- 7.6 Severability: If any provision of this Agreement or the application thereof to any person or circumstance shall, to any extent, be invalid or unenforceable, the remainder of the Agreement, or the application of such provisions to persons or circumstances other than those as to which it is invalid or unenforceable shall not be affected thereby, and each provision of this Agreement shall be valid and enforceable to the fullest extent permitted by law
- 7.7 No Joint Venture: The development of the Project is not, and shall not by virtue of this Agreement be deemed to be, a joint venture of Owner and Contractor, and the Contractor shall not have any rights by virtue of this Agreement in the Project or in the income or profits derived therefrom, except as expressly set forth in this Agreement. This Agreement shall inure solely to the benefit of the parties hereto and their successors and assigns as above provided, and is not intended to and shall not create rights of any nature in favor of any third parties.
- 7.8 Remedies in the Event of Bankruptcy: Owner and Contractor acknowledge and agree that successful design and construction within the time and financial parameters anticipated by this Agreement will require prompt continued administration and

performance by Contractor and the Subcontractors and that any delay therein for any reason including a bankruptcy proceeding respecting Contractor or any Subcontractor would create immediate and irreparable harm to Owner, Contractor and all Subcontractors. To that end, this Agreement contains, and all Subcontracts shall contain, a right to terminate in the event of bankruptcy of a contracting party, it being recognized that such action will be necessary to avoid and minimize such delay and consequent damage to all concerned.

7.8.1 If, as a matter of law, Owner does not have the right due to a bankruptcy proceeding involving Contractor to exercise the remedies provided for in this Agreement, then if Contractor, as debtor, or its trustee, wishes to assume this Agreement, in addition to curing or adequately assuring the cure of all Contractor's defaults (adequate assurance of curing default being defined below) existing under this Agreement on the date of filing of the proceedings or thereafter, Contractor, as debtor, or the trustee, must also furnish adequate assurances of future performance (adequate assurance of future performance being defined below) under this Agreement, "Adequate assurance of curing default" means the posting with Owner of a sum of cash sufficient to cure such default. "Adequate assurance of future performance" means, at a minimum:

7.8.1.1 Posting with the Court, to be held in a segregated account upon the acceptance of this Agreement and on the first day of each month thereafter, of a sum of cash sufficient to meet all payments expected to become due from Contractor to Subcontractors, Sub-Subcontractors, laborers, trade unions, vendors, suppliers, materialmen and equipment lessors within sixty (60) days of the date of assumption of this Agreement, less sums expected to become due from the Owner to the Contractor during such period, with respect to the initial deposit required to be made upon acceptance of this Agreement, and within thirty (30) days with respect to each monthly deposit required to be made thereafter;

7.8.1.2 Establishing a line of credit or other financing arrangement sufficient to provide financing of all costs and expenses expected to be required for the performance of the Contractor's remaining obligations under this Agreement;

7.8.1.3 Obtaining the written consent and acquiescence of the surety issuing the Contractor's payment and performance bonds, to such assumption and the acknowledgement of such surety that such assumption will not affect, alter or diminish the surety's obligations under such bonds;

7.8.1.4 Obtaining an additional bond(s) securing any increased costs or expenses to the Owner as a result of such assumption, including, without limitation, delay claims, interference claims and construction, builder's' trust and mechanics lien claims by other contractors or Subcontractors and loss of use to the Owner in the event the Work is not completed and the Project is

not ready for occupancy by Owner within the time originally scheduled therefore; and

7.8.1.5 Providing evidence, reasonably satisfactory to the Owner, that the Contractor, as debtor, or its trustee, has reestablished satisfactory business and credit arrangements with its vendors, suppliers, materialmen and equipment lessors and satisfactory employee and union arrangements with its work force.

7.8.2 Because of the immediate and irreparable harm to the Owner, Subcontractors and Sub-Subcontractors which will result from any delay in the prompt and continued administration and performance by Contractor, the debtor or trustee, in a reorganization under Chapter 11 of the Bankruptcy Code, must assume this Agreement promptly so as to avoid any work stoppage or delay in the work of the Subcontractors or Sub-Subcontractors, or he shall be deemed to have rejected this Agreement.

7.9 Rights and Remedies: The duties and obligations imposed by this Agreement and the rights and remedies available thereunder to Owner shall be in addition to and not a limitation of any duties, obligations, rights and remedies otherwise imposed or available by law. If Contractor defaults, Contractor will pay all costs and expenses incurred by Owner in enforcing this Agreement, including without limitation, attorney fees and expert witness fees.

7.10 Tests: The Contractor shall provide all quality control testing which Owner deems necessary for the proper construction of the Project and shall provide all other testing required by applicable laws, ordinances, building permits, and/or the Specifications, except as provided otherwise in the Contract Documents.

7.10.1 If the Agreement or any laws, ordinances, rules, regulations or orders of any public authority having jurisdiction require any Work to be inspected, tested or approved by the Architect and/or Building Inspector, Contractor shall give the Owner timely notice of its readiness and of the date arranged so they may observe such inspection, testing or approval. Should there be a requirement by any laws, ordinances, rules, regulations or orders of any public authority having jurisdiction for special inspections by persons other than the Architect and/or Building Inspector, Contractor shall employ the services of a qualified special inspector who will provide selective or continuous inspection on the construction and Work requiring his employment. Subcontractors shall pay for inspections required in connection with trade permits and otherwise required by the Specifications. The Contractor shall provide and pay for other inspections, testing and approvals, except as provided otherwise in the Contract Documents.

7.10.2 If, after the commencement of the Work, the Owner determines that any work requires special inspection, testing or approval which Section 7.10.1 hereof does not include, the Owner will instruct Contractor to order such special inspection,

testing or approval, and Contractor shall give notice as provided in Section 7.10.1 hereof. If such special inspection or testing reveals a failure of the Work to comply (1) with the requirements of the Contract Documents or (2) with laws, ordinances, rules, regulations or orders of any public authority having jurisdiction, Contractor shall bear all costs thereof including the Architect's additional services made necessary by such failure; otherwise, the Owner shall bear such costs and an appropriate Change Order shall be issued.

7.10.3 Required certificates of inspection, testing or approval shall be secured by Contractor and promptly delivered by it to the Owner, except as provided otherwise in the Contract Documents.

7.10.4 If the Owner wishes to observe the inspections, tests or approvals required by this Section 7.10, he will do so promptly and, where practicable, at the source of supply.

7.10.5 Neither the observations of the Owner or the Architect in his administration of this Agreement, nor inspections, tests or approvals by persons other than Contractor shall relieve Contractor from its obligation to perform the Work in accordance with the Contract Documents. No inspection performed or failed to be performed by Owner or Architect hereunder shall be a waiver of any of the Contractor's obligations hereunder or be construed as an approval or acceptance of the Work or any part thereof.

7.11 Equal Opportunity: Contractor shall comply with all applicable laws with respect to equal employment opportunity and non-discrimination in employment.

ARTICLE 8

TIME

8.1 Definitions:

8.1.1 Unless otherwise provided, the Contract Time is the period of time allotted in the Contract Documents for Substantial Completion of the Work, as "Substantial Completion of the Work is defined in this Article, including authorized adjustments thereto.

8.1.2 The date of commencement of the Work is established in the Design-Build Agreement.

8.1.3 The Date of Substantial Completion of the Work, or designated portion thereof as designated in the Design-Build Agreement, is the Date upon which both of the following conditions have been satisfied: (i) the Architect shall have certified, and the Owner shall have agreed, that construction is sufficiently complete, in

accordance with the Contract Documents, so the Owner can occupy or utilize the Work or designated portion thereof for the use for which it is intended, and (ii) either (a) a temporary certificate of occupancy and all other governmental approvals shall have been issued for the Project subject to such conditions as may be reasonably acceptable to Owner, or (b) the Owner is using Project for its intended use and is deriving revenue from such use. For purposes of subpart (b) above, the Owner's normal business operations shall be deemed to be the intended use of the Project, and activities to prepare for such operations, including staff training and practice activities, shall not constitute use of the facilities by the Owner. Upon Substantial Completion, the Architect shall prepare, for the Owner's review and approval, a punchlist of work items to be completed and/or corrected by the Contractor and a Certificate of Substantial Completion setting forth the obligations of the Contractor and the Owner relative to insurance, utilities and similar matters, consistent with the Design-Build Agreement.

8.1.4 The Date of Final Completion of the Work or designated portion thereof is the Date on which the Work shall be fully, completely and finally completed in accordance with the Contract Documents, and all requirements set forth in the Design-Build Agreement and Section 4.6.2 hereof shall have been satisfied.

8.1.5 The term day as used in the Contract Documents shall mean calendar day unless otherwise specifically designated.

8.2 Progress and Completion:

8.2.1 All time limits stated in the Contract Documents are of the essence of the Contract.

8.2.2 The Contractor shall begin the Work on the date of commencement as defined in Section 8.1.2 hereof. He shall carry the Work forward expeditiously with adequate forces, shall at all times adhere to the CPM Schedule prepared and updated by the Contractor in accordance with the Design-Build Agreement, and shall achieve Substantial Completion within the Contract Time.

8.2.3 The Owner shall not commence staff training and practice activities and other activities of its employees in completed Project areas until the Contractor has confirmed in writing that the facility is ready for such activities.

8.3 Suspension and Delay by Owner:

8.3.1 The Owner may order the Contractor in writing to suspend, delay or interrupt all or any part of the Work on the Project for such period of time as it may determine to be appropriate for the convenience of the Owner.

8.3.2 If the performance of all or any part of the Work on the Project is suspended, delayed or interrupted by an act of the Owner in the administration of the Project,

or by the failure of the Owner's Separate Contractor(s), Owner's Separate Consultants, or Owner's Separate Suppliers to comply with the CPM Schedule, as adjusted, and such suspension, delay or interruption was not caused by Contractor or Subcontractors and where and to the extent that such act continues after the Contractor's notice to the Owner of such interference:

8.3.2.1 If such act delays an activity that is on the critical path, or, because of such delay will become a critical path activity, as substantiated by the CPM Schedule, then the scheduled duration for the delayed activity on the CPM Schedule and the date for Substantial Completion shall be adjusted as necessary to compensate for such delay; and

8.3.2.2 An equitable adjustment shall be made in the time for Contractor to complete performance under the Agreement. Contractor shall make no claim for an increase in the Guaranteed Maximum Price or Contract Sum or for damages for delay, and Contractor agrees that such delays shall be fully compensated for by an extension of time to complete performance.

8.3.3 The Contractor shall notify the Owner in writing of any delay to the Work under Section 8.3.2 hereof no more than five (5) business days after the commencement of the delay; otherwise claims arising from the delay shall be waived. In the case of a continuing cause of delay, only one claim is necessary. After notice of the delay has been given as provided above, any claims for pursuant to Section 8.3.2 shall be made in writing no more than five (5) calendar days after the end of the delay; otherwise, all of Contractor's claims arising from the delay shall be waived. Any isolated delays of less than twenty-four (24) hours duration shall not be justification for adjusting the CPM Schedule. The Contractor shall be responsible to substantiate any claimed delays under Section 8.3.2 by substantiating the impact of the delay to activities on the critical path of the CPM Schedule.

8.3.4 The Contractor shall reduce the size of his Site staff, upon notice from the Owner of any Owner caused delay or interruption which is likely to exceed thirty (30) days, to reduce costs and expenses to the Owner. Upon the termination of the delay or as otherwise directed by the Owner, the Contractor shall restore the Site staff to its former size as soon as reasonably possible, subject to the availability of staff members.

8.3.5 No adjustments shall be made under this Section 8.3 for any suspension, delay or interruption (i) to the extent that performance would have been so suspended, delayed or interrupted by any other cause, including the fault or negligence of the Contractor, or (ii) for which an equitable adjustment is provided or excluded under any other provision of this Agreement. The Owner's exercise of any of its rights under this Agreement, Change Orders, regardless of the extent or numbers of such changes (time extensions in connection with changes shall be governed by Article 12 hereof), or Owner's requirement of correction or re-execution of any

defective Work in accordance with the Contract Documents, shall not, under any circumstances, be construed as interference with the Contractor's performance of the Work.

8.3.6 In accordance with Section 12.1.2, changes to the Work directed by the Owner that delay the Work shall be deemed to be delays by the Owner under this Article 8.

8.4 Force Majeure Delays and Extensions of Time:

8.4.1 If the Contractor shall be delayed by: (1) the combined action of workmen (either those employed on the Work or in any industry essential to the conduct of the Work) in no way caused by or resulting from the fault or collusion on the part of the Contractor, (2) by strikes, lockouts, embargoes, fire, unavoidable casualties, unusual delays in transportation, national emergency, unusually severe and adverse weather conditions not reasonably anticipatable, or (3) by any other causes which the Contractor could not reasonably control or circumvent, and if such delay affects an activity that is on the critical path or, because of such delay will become a critical path activity, as substantiated by the CPM Schedule, then the scheduled duration for the delayed activity on the CPM Schedule and the date for Substantial Completion shall be adjusted as necessary to compensate for such delay.

8.4.2 The Contractor shall notify the Owner in writing of any delay under Section 8.4.1 hereof no more than five (5) calendar days after the commencement of the delay; otherwise claims for such delay shall be waived. In the case of a continuing cause of delay only one notice is necessary. All claims for extension of time pursuant to Section 8.4.1 hereof shall be made in writing no more than five (5) calendar days after the end of the delay. Any isolated delay of less than twenty-four (24) hours duration shall not be justification for adjusting the CPM Schedule. The Contractor shall be responsible to substantiate any claimed delays under Section 8.4.1 by substantiating the impact of the delay to activities of the critical path of the CPM Schedule.

8.4.3 No adjustments shall be made under this Section 8.4 for any suspension, delay or interruption (i) to the extent that performance would have been so suspended, delayed or interrupted by any other cause, including the fault or negligence of the Contractor, or (ii) for which an equitable adjustment is provided or excluded under any other provision of this Agreement. The Owner's exercise of any of its rights under this Agreement, Change Orders, regardless of the extent or numbers of such changes (time extensions in connection with changes shall be governed by Article 12 hereof), or the Owner's requirement of correction or re-execution of any defective Work shall not, under any circumstances, be construed as interference with the Contractor's performance of the Work.

- 8.5 Acceleration of Performance: If the Owner notifies the Contractor that the Owner desires the Work of the Contractor hereunder to be performed with greater speed than is herein contracted for, the Contractor shall submit a written proposal for the costs to accelerate the Work, which proposal shall be consistent with the provisions of this Section 8.5. If the Contractor determines that the performance of Work on an accelerated basis as requested by the Owner will result in an unreasonable loss of productivity for the affected Subcontractors, the Contractor's proposal shall set forth the impact of such loss of productivity on the Project and the basis for such determination. If the Owner directs the Contractor in writing to proceed with the acceleration of the Work, the Contractor shall, without affecting or abridging the rights of the Owner set forth in this Agreement, employ overtime work as so ordered. Only the actual additional costs incurred by the Contractor, including premium cost of such overtime work (including supervision), as shown on the time slips checked and approved each day by the Owner, shall be paid by the Owner to the Contractor, together with the mark-ups permitted under Article 12 for overhead and profit for changed Work. The Contractor shall not be entitled to recover any costs to accelerate performance hereunder unless such costs have been identified by the Contractor in its proposal and agreed to by the Owner and Contractor in advance in writing. This provision shall not apply to acceleration of performance caused by the Contractor's default, the cost of which shall be borne solely by the Contractor.

ARTICLE 9

PAYMENT AND COMPLETION

- 9.1 Contract Sum:
- 9.1.1 The Contract Sum is stated in the Design-Build Agreement and, including authorized adjustments thereto, strictly in accordance with the terms hereof, is the total amount payable by the Owner to Contractor for the performance of the Work under the Agreement.
- 9.2 Schedule of Values:
- 9.2.1 Based on the Subcontracts and Purchase Orders awarded by the Contractor under the Design-Build Agreement and the amounts under the Design-Build Agreement for the Design Fee, General Conditions Costs, Design-Builder's Fee, and Pre-Construction Services Fee, the Contractor shall prepare, and submit to the Owner for approval, a Schedule of Values of the various portions of the Work, aggregating the total Contract Sum. This Schedule of Values shall be used as a basis for Contractor's Applications for Payment. The line item amounts in the Schedule of Values shall be reasonably adjusted as Subcontracts are bid and awarded by the Contractor subject to Owner's approval.

9.3 Applications for Payment:

- 9.3.1 Payments may be made on account of materials or equipment not incorporated in the Work but delivered and suitably stored at the Site or some location other than the Site, only with the prior written approval of the Owner and shall be conditioned upon submission by Contractor of the following: (i) the notarized bill of sale to Owner, executed by an officer of the selling corporation; (ii) a certificate of insurance covering the material for fire, theft and vandalism naming the Owner as the insured party if such material is stored at some location other than the site; (iii) an affidavit from an officer of the selling corporation stating that he is an officer and giving the complete address of the specific location where the material is stored; (iv) a certification authorizing inspection by Owner or his representative at the storage location; and (v) such other evidence as Owner may reasonably require demonstrating that it is the owner of such material free and clear of all rights in others.
- 9.3.2 Contractor warrants and guarantees that title to all Work, materials and equipment covered by an Application for Payment, whether incorporated in the Project or not, will pass to the Owner upon the receipt of such payment by Contractor, free and clear of all liens, claims, security interests, encumbrances or rights in others, hereinafter referred to in this Article 9 as “liens”; and that no Work, materials or equipment covered by an Application for Payment will have been acquired by Contractor or by any other person performing the Work at the Site or furnishing materials and equipment for the Project subject to an agreement or perfected or unperfected right under which an interest therein or an encumbrance thereon is retained by the seller or otherwise imposed by Contractor or such other person.
- 9.3.3 The Contractor shall submit monthly, on the Payment Application Submittal Date the documents required by Section 4.3 of the Design-Build Agreement.

9.4 Progress Payments:

- 9.4.1 The Contractor’s Application for Payment shall contain the Contractor's and Architect's written certification that the Work has progressed to the point indicated; that the quality of the Work is in accordance with the Contract Documents (subject to the results of any subsequent tests required by the Contract Documents, to minor deviations from the Contract Documents correctable prior to completion, and to any specific qualifications stated in the Certificate for Payment); that the Subcontractors are entitled to payment in the amounts indicated respectively in the Contractor's Application for Payment; and that the Contractor is entitled to payment in the amount requested. Applications for Payment certified by the Contractor and the Architect shall be submitted to the Owner for review and approval.
- 9.4.2 Subject to the provisions of Section 9.5, after the Contractor has submitted an Application for Payment, the Owner shall review it. The Owner shall make

payment in the manner and within the time provided in the Agreement upon, and only upon, receiving an Application for Payment which complies with the Contract Documents.

9.4.3 The Owner shall retain, from each such Certificate for Payment, ten (10%) percent of the amount due under the Certificate for Payment.

9.4.4 No certificate for a progress payment, nor any progress payment, nor approval of either by Owner, or any partial or entire use or occupancy of the Project by the Owner, shall constitute an acceptance of any Work not in accordance with the Contract Documents.

9.5 Payment Withheld:

9.5.1 The Architect may withhold Certification, and the Owner may withhold the applicable portion of a payment, or, because of subsequently discovered evidence or subsequent observations, the Architect or the Owner may nullify the whole or any part of any previous payment, to such extent as may be reasonably necessary to protect the Owner from loss because:

9.5.1.1 The Contractor is in default of any of its obligations under this Agreement or otherwise is in default under any of the Contract Documents;

9.5.1.2 Any part of such payment is attributable to Work which is defective or not performed in accordance with the Contract Documents, as determined by the Owner; provided, however, such payment shall be made as to the part thereof attributable to Work which is performed in accordance with the Contract Documents and is not defective, reserving, however, such amount as the Owner shall determine necessary to protect the Owner with respect to defective Work;

9.5.1.3 The Contractor has failed to make payments promptly to Contractor's Architect, engineers, consultants, Subcontractors, Sub-subcontractors, laborers or material-men or for material or labor used in the Work;

9.5.1.4 Any part of such payment is attributable to Work with respect to which any party has filed an un-discharged lien or with respect to which the Owner has been notified of a claim or dispute or has received reasonable evidence indicating the existence of such a claim or dispute, provided, however, that payment shall not be withheld with respect to (i) liens resulting from failure to pay the Contractor amounts properly due to the Contractor; or (ii) a portion of the Work with respect to which a party has filed an undischarged lien to obtain payment of retainage if the respective portion of the Work has been finally completed and if no other grounds exist for withholding payment with respect to the respective portion of the Work;

9.5.1.5 The Owner has reasonable indication that the Work will not be completed within the Contract Time due to Design-Builders delay; or

9.5.1.6 If the Owner determines that the portion of the Contract Sum then remaining unpaid together with the Contingency will not be sufficient to complete the Work in accordance with the Contract Documents, whereupon no additional payments will be due the Contractor hereunder unless and until the Contractor, at no cost to the Owner, performs, and pays in full for, a sufficient portion of the Work so that such portion of the Contract Sum then remaining unpaid together with the Contingency is determined by the Owner to be sufficient to so complete the Work.

9.6 Failure of Payment:

9.6.1 The Contractor shall carry on the Work and maintain its progress during the existence of any payment disputes and the Owner shall continue to make payments to the Contractor over which there is no dispute.

9.7 Substantial Completion and Final Payment:

9.7.1 When the Contractor determines that the Work (or a designated portion thereof as designated in the Design-Build Agreement) acceptable to the Owner, is Substantially Complete as defined in Section 8.1.3 hereof; the Contractor shall prepare for submission to the Architect and Owner for approval a list of items to be completed or corrected. The list shall be revised as reasonably requested by the Owner. The failure to include any items on such list does not alter the responsibility of the Contractor to complete all Work in accordance with the Contract Documents. When the Architect, on the basis of its observations, determines that the Work is Substantially Complete, he will then prepare and execute a Certificate of Substantial Completion which shall establish the Date of Substantial Completion, subject to Owner's approval, after which the Owner shall be responsible for security, maintenance, heat and utilities, and shall fix the time within which the Contractor shall complete the items listed therein. The Certificate of Substantial Completion shall be submitted to the Owner and the Contractor for their written acceptance of the responsibilities assigned to them in such Certificate.

9.7.2 When all Work (including Punchlist Work) has been satisfactorily completed under the Contract Documents and this Agreement has been fully performed, the Contractor shall submit a Final Request to the Owner complying with the requirements of Section 4.6 of the Design-Build Agreement. The Final Request shall include the Contractor's written certification that the Work has been completed in accordance with the terms and conditions of the Contract Documents and this Agreement and that the entire balance requested in the Final

Application for Payment is due and payable. The Owner shall make Final Payment as provided in the Design-Build Agreement.

- 9.7.3 The making of Final Payment shall not constitute a waiver of claims by the Owner. Acceptance of final payment by the Contractor shall constitute a waiver of all claims by the Contractor against Owner.

ARTICLE 10

PROTECTION OF PERSONS AND PROPERTY

10.1 **Safety Precautions and Programs:**

10.1.1 The Contractor shall develop and implement a safety program for the Work for the Project. Contractor shall require each separate Subcontractor to adhere to such program. (The performance of such services by the Contractor shall not relieve the separate Subcontractors of their responsibilities for the safety of persons and property, in compliance with all statutes, rules, regulations and orders applicable to the conduct of the Work.) The Contractor shall appoint a safety officer who shall be responsible for administering the comprehensive safety program.

10.2 **Safety of Persons and Property:**

10.2.1 Contractor and all Subcontractors shall take all reasonable precautions for the safety of, and shall provide all reasonable protection to prevent damage, injury or loss to:

10.2.1.1 All employees on the Work and all other persons who maybe affected thereby;

10.2.1.2 All the Work and all materials and equipment to be incorporated therein, whether in storage on or off the Site, under the care, custody or control of Contractor or any of its Subcontractors or Sub-Subcontractors or others;

10.2.1.3 Other property at the Site or adjacent thereto, including trees, shrubs, lawns, walks, pavements, roadways, structures and utilities not designated for removal, relocation or replacement in the course of construction; and

10.2.1.4 The Owner's equipment and employees, agents and separate contractors.

The foregoing obligations of the Contractor run solely to the Owner and shall not relieve the separate Subcontractors of their responsibility for the safety of persons and property,

in compliance with all statutes, rules, regulations and orders applicable to the conduct of the Work.

10.2.2 Contractor shall comply with all applicable laws, ordinances, rules, regulations and lawful orders of any public authority having jurisdiction for the safety of persons or property or to protect them from damage, injury or loss. Contractor shall erect and maintain, as required by existing conditions and progress of the Work, all reasonable safeguards for safety and protection, including barriers and the posting of danger signs and other warnings against hazards, promulgating safety regulations and notifying owners and users of adjacent utilities.

10.2.3 If the use or storage of hazardous materials or equipment is necessary for the execution of the Work, Contractor shall exercise the utmost care and shall carry on such activities under the supervision of properly qualified personnel.

10.2.4 All damage or loss to any property referred to in Sections 10.2.1.2 and 10.2.1.3 hereof caused in whole or in part by Contractor, any Subcontractor, any Sub-Subcontractor, or anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable, shall be remedied by Contractor, except damage or loss attributable to the acts or omissions of the Owner or anyone employed by the Owner or for whose acts the Owner may be liable and not attributable, at least in part, to the fault or negligence of Contractor.

10.2.5 The Contractor shall develop an overall site logistics plan for all work activities for the Project (including work activities of the Owner's Separate Suppliers and Separate Contractors), which plan shall prevent the overloading of any portion of this Project. Contractor and its Subcontractors shall comply with the site logistics plan and shall not load any part of the Work in a manner that endangers its safety. The Contractor shall not be responsible for the failure of the Owner's Separate Suppliers and/or Separate Contractors to comply with the site logistics plan properly prepared and issued by the Contractor.

10.2.6 Upon completion of the Work and as a condition of Final Payment, the Contractor shall restore the Project Site to its original condition prior to start of the Work, except modifications to the Project Site required by the Drawings and Specifications.

10.3 Emergencies:

10.3.1 In any emergency affecting the safety of persons or property, Contractor shall act, at its discretion, to prevent threatened damage, injury or loss.

10.4 Hazardous Materials:

10.4.1 The Contractor shall not be required to perform without consent any work relating to hazardous materials or contaminated substances, if any, already existing at the

Site prior to the start of the Contractor's operations and which were not disclosed to or discoverable by Contractor before commencing work. In the event the Contractor encounters on the Site such materials reasonably believed to be hazardous materials or contaminated substances the Contractor shall immediately stop work in the affected area and report the condition to the Owner.

- 10.4.2 The Contractor shall comply with all applicable laws, statutes and governmental regulations with respect to hazardous materials or contaminated substances brought onto the Site by the Contractor (or any Subcontractor). To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner and its agents and employees from and against all costs, claims and damages (including reasonable attorneys fees) resulting from hazardous materials or contaminated substances brought onto the Site by the Contractor (or any Subcontractor), except injury to person or damage to property to the extent due to the gross negligence or willful and wanton misconduct of the Owner or any agent or employee of the Owner.

ARTICLE 11

INSURANCE

11.1 Insurance of Contractor:

- 11.1.1 Until completion and final acceptance of the Work, the Contractor shall purchase and maintain Worker's Compensation Insurance, Employer's Liability Insurance, Direct Liability Insurance for Contractor's own operations, Contingent Liability Insurance for the operations of Subcontractors and Contractual Liability Insurance to insure the indemnifying portions of this Agreement, such insurance to include Bodily Injury Liability and Property Damage Liability. If requested by the Owner, the Contractor shall file copies of policies with the Owner. The Contractor shall also furnish insurance in the amounts and of the types indicated in the Design-Build Agreement. The Contractor's insurance coverage shall comply with the following, all with at least the amounts indicated in the Design-Build Agreement:

- 11.1.1.1 The Contractor shall maintain adequate General Liability insurance coverage to protect the Contractor and the Owner. Comprehensive (or Commercial) General Liability shall include Premises-Operations; Independent Contractors' Protective; Products and Completed Operation; Broad Form Property Damage; Products and Completed Operations shall be maintained for three (3) years after final payment. Property Damage Liability Insurance will provide X, C or U Coverage as applicable. The Contractor's General Liability coverage shall include Contractual Liability coverage.

11.1.1.2 The Contractor shall maintain adequate Comprehensive Automobile Liability coverage to protect the Contractor and the Owner.

11.1.1.3 Subcontractor's Public Liability and Property Damage Insurance and Vehicle Liability Insurance: The Contractor shall either;

- (i) Certify to the Owner that he has obtained similar Certificates of insurance from each of his Subcontractors before their work is commenced; provided, however, the limits of liability of such insurance may be in a lesser amount provided such lesser amount is approved by Contractor as being the highest coverage reasonably obtainable from such Subcontractor; or
- (ii) Insure the activities of its Subcontractors in its policy as specified herein.

11.1.2 Minimum insurance limits provided by the Contractor will be as follows:

- Worker's Compensation: (statutory)
- General Liability: \$2,000,000 per location aggregate
- Automotive Liability: \$1,000,000
- Excess Liability: \$9,000,000

11.1.3 All such insurance shall include the Owner as additional insured except for professional policy or Workers Compensation policy. Each such policy shall contain the following cross-liability wording: "In the event of a claim being made hereunder by one insured for which another insured is or may be liable, then this policy shall cover such insured against whom a claim is or may be made in the same manner as if separate policies had been issued to each insured hereunder. All such insurance shall be primary and any similar or additional insurance maintained by Owner shall be secondary and excess to that carried by Contractor or any Subcontractor." Before commencing the Work, the Contractor shall furnish a certificate from its insurance carrier showing that it has complied with the provisions of this Section 11.1, and providing that the said insurance policies will not be changed or cancelled during their term until after at least thirty (30) days prior notice by registered mail to the Owner. In the event of failure of the Contractor to furnish and maintain such insurance or to furnish a satisfactory certificate thereof, the Owner shall have the right to take out and maintain the said insurance for and in the name of the Contractor, and the Contractor agrees to furnish all necessary information to permit the Owner to take out and maintain such insurance for the account of the Contractor and to pay the cost thereof to the Owner immediately upon presentation of a bill. Compliance by the Contractor with the foregoing requirements as to carrying insurance and furnishing certificates, shall not relieve the Contractor from liability under this Agreement. In lieu of the foregoing, the Contractor may provide an Owner/Contractor Protective Policy providing equivalent coverage.

- 11.2 Insurance of Owner: The Owner may purchase and maintain "builder's risk" property insurance on the entire Project for one hundred percent (100%) of the cost of replacement as of the time of any loss. This insurance may include the interests of the Contractor and its Subcontractors and Sub-Subcontractors (but shall not cover tools, equipment, general conditions items and other property used or consumed on the Site but not incorporated into the Project) and may insure against loss from theft, fire, vandalism, malicious mischief and extended coverage perils.
- 11.3 Waiver of Subrogation: The Contractor waives all rights against Owner for damages caused by fire or other perils to the extent covered by insurance provided under this Article 11. Contractor shall require similar waivers by Subcontractors and Sub-Subcontractors. All such waivers of subrogation shall be valid to the extent recognized under applicable insurance policies.
- 11.4 Boiler: The Owner may provide Boiler and Machinery Coverage. Boilers may be covered to the extent that they are not covered by warranty.

ARTICLE 12

CHANGES IN THE WORK

- 12.1 Change Orders:
- 12.1.1 Definition: A Change Order is a written order to the Contractor signed by the Owner, issued after execution of the Contract authorizing a change in the Work or an adjustment in the Contract Sum and the Guaranteed Maximum Price or the Contract Time. The Contract Sum, the Guaranteed Maximum Price and the Contract Time may be changed only by Change Order. A Change Order signed by the Contractor indicates its agreement therewith, including the adjustment in the Contract Sum, Guaranteed Maximum Price and the Contract Time, as full compensation for the time and cost of the additional or deleted work and for any delays caused thereby and any claims arising therefrom.
- 12.1.2 General: The Owner, without invalidating the Contract, may order changes in the Work at any time within the general scope of the Contract consisting of additions, deletions or other revisions. All such changes in the Work shall be authorized by Change Order, and shall be performed under the applicable conditions of the Contract Documents. In all events, all adjustments to the Contract Sum shall be governed by the provisions of Article 3 of the Design-Build Agreement. If a change to the Work ordered by the Owner delays the Work, such change shall be deemed to be a delay caused by the Owner under Section 8.3 hereof.
- 12.1.3 Procedure:

- 12.1.3.1 If the Owner desires a change in the Work or is considering a change in the Work, the Owner shall notify the Contractor. With reasonable promptness after receipt of such notice, the Contractor shall submit to the Owner a budget amount for the adjustment to the Construction Cost and General Conditions Costs in respect of the proposed change to the Work and proposed not-to-exceed amounts for the additional Design Fee and Design Reimbursable Expenses to prepare revisions to the Drawings and Specifications for such proposed change if the Contractor is entitled to payment of such General Conditions Costs and additional Design Fee and Design Reimbursable Expenses under Article 3 of the Design-Build Agreement. The adjustment to the Design Fee shall be based on the actual additional services of the Architect and Consultants required and not on a percentage of the construction cost for the change.
- 12.1.3.2 At the written direction of the Owner, the Contractor (through the Architect) shall prepare and submit to the Owner for approval, revised Drawings and Specifications for the change to the Work requested by the Owner. With reasonable promptness, based on the revised Drawings and Specifications for the change approved by the Owner, the Contractor shall submit to the Owner a detailed line item statement showing the proposed adjustment to the Construction Cost and Contract Sum and Guaranteed Maximum Price in respect of the proposed change in the Work computed in accordance with Section 12.1.4 hereof and the adjustment in the Contract Time and the CPM Schedule, if any, such change would entail. The amount and adjustment of time set forth in such statement shall be deemed to cover all costs and delays to Contractor associated with the changed work, including impact costs and delays and no further or subsequent adjustments to the Construction Cost, Guaranteed Maximum Price, Contract Sum, Contract Time or the CPM Schedule shall be allowed on account thereof.
- 12.1.3.3 The Owner shall promptly notify the Contractor whether the proposed adjustment is acceptable and, if it is, the Owner and Contractor shall execute a Change Order approving the change and authorizing the work to be done for the change. Owner reserves the right to reject any such proposal and to have the Work done by others. If the Owner rejects the change, the Owner shall compensate the Contractor for the additional fees and reimbursable costs charged by the Architect to prepare the revised Drawings and Specifications for the change being considered by the Owner, not to exceed the amount approved by the Owner under Section 12.1.3.1 hereof, unless the Contractor is not entitled to reimbursement of such fees and reimbursable costs under Article 3 of the Design-Build Agreement.

12.1.4 Calculation of Adjustment to Construction Cost and Guaranteed Maximum Price:
The Owner shall, at all times, have the right to order changes in the Work to be

performed on the basis of (a) a Lump Sum; (b) a Unit Price Basis; or (c) a Time-and-Material Basis. The Owner's choice of the manner in which the changed Work is to proceed is described as follows:

12.1.4.1 Lump Sum Amount: Should the Owner elect to have changed Work performed on a Lump Sum basis, the Contractor's Proposal shall be based solely upon the affected Subcontractors' firm net cost for labor and materials plus the percentages for overhead and profit as hereinafter set forth. This Proposal shall be itemized and segregated by labor and material for the various components of the changed Work and no aggregate figures for labor and material will be acceptable. The Contractor shall furnish, with his Proposal, supporting data consisting of Subcontractor, Sub-Subcontractor and vendor executed proposals. The following items define costs and fees permitted to be included in the Lump Sum Proposal:

- .1 the cost of all materials required for the change;
- .2 the cost [including all fringe benefits, payroll taxes and insurance] of the Subcontractor's labor required for this change, including working foremen;
- .3 the Subcontractor's cost of equipment rentals but only to the extent such equipment is required for the changed Work and is not otherwise being used at the Project Site;
- .4 the cost of Subcontractor's additional site supervision (excluding working foremen) and other Subcontractor's general conditions items incurred by the Subcontractor attributable to this change but only to the extent required for the changed Work and not otherwise present at the Project Site;
- .5 if and to the extent the CPM Schedule is extended under Article 8 hereof due to the change in the Work, the cost of the Subcontractor's additional site supervision and other general conditions items incurred by the Subcontractor, but only to the extent required for the changed Work or other Work identified to the Owner by the Contractor in advance in writing as unavoidably delayed as a direct result of the change to the Work, and not otherwise present at the Project Site and not otherwise included in the items listed above.
- .6 the additional premium cost paid for Subcontractor payment and performance bonds for the net changed Work, after adding amounts for additional work and subtracting credits for deleted work.

The Subcontractor actually performing the changed Work shall be permitted ten percent (10%) for overhead (including supervision) and profit on Subcontractor's labor and material costs for changed Work performed by the Subcontractor. The Subcontractor shall be permitted a handling charge of five percent (5%) on changed Work performed by Sub-Subcontractors. The Subcontractor may include in his labor proposal only those workmen directly involved in the changed Work. Subcontractors will be entitled to payment for union fringe benefits, insurance, unemployment insurance, Social Security and taxes paid on labor, and such items shall be included in the Subcontractor's costs for the Changed Work. Material costs may include invoiced costs, transportation and applicable sales or use taxes. Use of small tools is included in the overhead and profit. The mark-ups for Subcontractors, overhead and profit, as outlined above, includes all other costs whatsoever beyond those enumerated. If any of the changed Work included in the Lump Sum Proposal is covered by Subcontract Unit Prices, the Owner may elect to use these Unit Prices within the Lump Sum Proposal. No overhead and profit may be applied to these Unit Prices. If any of the changed Work is covered by a Contract Alternate Price, the Alternate Price shall apply to determine the adjustment to the Contract Sum and Guaranteed Maximum Price, and no overhead or profit shall be applied to the Alternate Prices. Credits for deductions from the Work shall be determined on the same basis as charges for additions to the Work except that the percentage allowed Subcontractors for overhead and profit shall be mutually determined by the Owner and the Contractor and the Contractor and Subcontractors shall be allowed any restocking or material and equipment cancellation charges payable to suppliers and vendors for the purpose of computing the credit resulting from deductions from the Work.

- 12.1.4.2 Unit Price: Should the Owner elect to have changed Work performed on a Unit Price Basis, the Contractor will submit, with reasonable promptness after receipt of a Bulletin, a written proposal itemizing the quantities of each item of changed Work for which there is an applicable Unit Price contained in the applicable Subcontract. The quantities must be itemized in relation to each specific item in the Contract Documents. The Unit Prices will be applied to net increases in quantities of the same item. With respect to net decreases in quantities of the same item: either (i) if the Subcontract includes separate Unit Prices for decreases in the Work quantities, such separate Unit Prices shall apply; or (ii) if the Subcontract does not specify separate Unit Prices for decreases in the Work, then the Unit Prices in the Subcontract will also be applied to net decreases in quantities of the same item; provided, however, the Contractor shall be entitled to reasonable administrative expenses (including any restocking charges which may be payable by the

Contractor to suppliers) in processing any such deductions from the Work.

12.1.4.3 Time and Material: Should the Owner elect to have any changed Work performed on a Time and Material Basis, the Contractor shall in the case of changed Work required to be performed under a Subcontract, cause the Subcontractor to perform such changed Work at actual cost, plus the mark-ups for overhead and profit permitted under Section 12.1.4.1 hereof. Actual cost shall be the following:

- .1 the cost of all materials required for the change;
- .2 the cost [including all fringe benefits, payroll taxes and insurance] of the Subcontractor's labor required for this change, including working foremen;
- .3 the Subcontractor's cost of equipment rentals but only to the extent such equipment is required for the changed Work and is not otherwise being used at the Project Site;
- .4 the cost of Subcontractor's additional site supervision (excluding working foremen) and other general conditions items incurred by the Subcontractor attributable to this change but only to the extent required for the changed Work and not otherwise present at the Project Site;
- .5 if and to the extent the CPM Schedule is extended under Article 8 hereof due to the change in the Work, the cost of the Subcontractor's additional site supervision and other general conditions item incurred by the Subcontractor, but only to the extent required for the changed Work or other Work identified to the Owner by the Contractor in advance in writing as unavoidably delayed as a direct result of the change to the Work, and not otherwise present at the Project Site and not otherwise included in the items listed above.
- .6 the additional premium cost paid for Subcontractor payment and performance bonds for the net changed Work, after adding amounts for additional work and subtracting credits for deleted work.

The Subcontractor may include in his labor cost only those workmen directly involved in the Changed Work including foremen who work with their tools. Subcontractor will be entitled to payment for union fringe benefits, insurance, unemployment insurance, Social Security and taxes paid on labor required for changed Work. The Contractor will

submit to the Owner daily time and material tickets for all changed Work. These tickets will include the identification number assigned to this Work, the location and description of the changed Work, the classification of labor employed including the applicable Subcontractor, workers' names and social security numbers, the materials used, the equipment rented (not tools) and any other information ordered by the Owner.

12.1.5 Calculation of Other Adjustments to the Contract Sum and Guaranteed Maximum Price:

12.1.5.1 Design Fee and Design Reimbursable Expense: The Contractor shall be entitled to reimbursement of the fees and reimbursable costs payable to the Architect for additional services performed in connection with the approved change to the Work, not to exceed the amount for such services proposed by the Contractor and approved by the Owner under Section 12.1.3 above.

12.1.5.2 General Conditions Costs: The Contractor shall be entitled to reimbursement of additional General Conditions Costs to the extent incurred solely due to the approved change to the Work and not otherwise provided at the Site, not to exceed the amount proposed by the Contractor and approved by the Owner under Section 12.1.3 above, subject to Article 3 of the Design-Build Agreement.

12.1.5.3 Design-Builder Fee: For approved changes to the Work, the Contractor shall be entitled to additional Design-Builder's Fee in an amount equal to _____(%) percent of the amounts under Sections 12.1.4, 12.1.5.1 and 12.1.5.2, subject to Article 3 of the Design-Build Agreement.

12.1.6 Audit: Where any such changed Work is authorized by the Owner to be performed on a Time and Material Basis as provided in Section 12.1.4.3 of this Agreement, the Contractor shall, for such purposes, require all Subcontractors to permit Owner to audit their books as required to substantiate the additional costs incurred and fees charged for the changed Work. The Contractor shall produce, and shall cause any Subcontractors to produce, any and all data which the Owner may request for the purpose of determining the correctness of the charges. The Contractor shall keep, and shall cause all Subcontractors to keep, such full and detailed accounts as may be necessary to reflect its operations with respect to such charges and extras, and the system adopted shall be such as is satisfactory to the Owner. The Owner, Contractor, their agents and employees, shall be afforded access at all reasonable times to the Subcontractors' books, correspondence, instructions, receipts, vouchers, memoranda and records of all kinds, relating to all changed Work performed on a Time and Material Basis under this Agreement as well as to such charges and extras. In regard to the foregoing and generally, the Contractor hereby authorizes the Owner, to check directly with its suppliers of

labor and materials the charges for such labor, material and other items appearing in the Contractor's bills rendered to the Owner, to confirm balances due and obtain sworn statements and waivers of lien.

12.1.7 Miscellaneous:

12.1.7.1 In the case of disagreement as to the amount to be adjusted, credited, or paid for changed Work, if directed by the Owner in writing, the Contractor shall promptly proceed with the change to the Work directed by the Owner and the adjustment to the Contract Sum and Contract Time shall be subject to resolution in accordance with the provisions of Sections 12.1.3, 12.1.4 and 12.1.5 above and Article 3 of the Design-Build Agreement.

12.1.7.2 Unless and until Owner shall elect either the Lump Sum Proposal, the Unit Price Basis or the Time and Material Basis, the Contractor shall maintain and submit daily records of labor, material and equipment used in the changed Work which have been acknowledged thereon daily by the Owner's Representative. In any event Owner shall have the right to order such changes in the Work to proceed promptly prior to the submission of a Lump Sum Proposal and/or Owner's election of the method by which the cost of the changed Work shall be determined.

12.1.7.3 If the Owner elects to have changed work performed by Subcontractors on a time and material basis under Section 12.1.4.3 above, the Contractor shall provide special supervision to ensure that such Subcontractors plan their work carefully and that they are held accountable to their schedules. The Contractor shall establish procedures for verifying the hours worked by these Subcontractors on a daily basis.

12.2 Concealed Conditions:

12.2.1 Adjustments to the Contract Sum under the Design-Build Agreement on account of concealed conditions are governed by Article 3 of the Design-Build Agreement.

12.2.2 If the Contractor wishes to make a claim for an increase in the Contract Sum pursuant to Article 3 of the Design-Build Agreement, it shall give the Owner written notice thereof no later than five (5) calendar days following the occurrence of the event giving rise to such claim. In all events, this notice shall be given by the Contractor before proceeding to execute the Work, except in an emergency endangering life or property in which case the Contractor shall proceed in accordance with Section 10.3. No such claim shall be valid unless so made.

ARTICLE 13

CORRECTION OF WORK

13.1 Uncovering of Work:

13.1.1 If any Work should be covered contrary to the written request of either the Architect or the Owner, it must, if required by either, be uncovered by the Contractor for observation by the Architect and replaced at Contractor's expense.

13.1.2 If any other Work has been covered which the Owner has not specifically requested to observe prior to being covered, the Owner may request to see such Work and it shall be uncovered by Contractor. If such Work be found in accordance with the Contract Documents, the cost of uncovering and replacement shall, by appropriate Change Order, be charged to the Owner. If such Work be found not in accordance with the Contract Documents, Contractor shall pay such costs unless it be found that this condition was caused by a Separate Contractor employed as provided in Article 6 hereof, and in that event the Owner shall be responsible for the payment of such costs.

13.2 Correction of Work:

13.2.1 Upon receipt of written notice from the Owner, Contractor shall promptly correct all Work that is defective or fails to conform to the Contract Documents whether observed before or after Substantial Completion and whether or not fabricated, installed or completed. Contractor shall bear all costs of correcting such defective and/or non-conforming Work, including the cost of the Architect's additional services thereby made necessary.

13.2.2 All corrective Work shall be at no additional cost to Owner. If, however, Owner and Contractor deem it inexpedient to require the correction of Work damaged or not done in accordance with the Contract Documents, or the Owner prefers to accept defective or non-conforming Work, a reasonable deduction from the Contract Sum shall be made by Owner. Until such settlement, the Owner may withhold a reasonable sum from monies, if any, due Contractor.

13.2.3 All such defective or nonconforming Work under Sections 4.6.1 and 13.2.1 hereof shall be removed from the Site if necessary, and the Work shall be corrected to comply with the Contract Documents without cost to the Owner.

13.2.4 Contractor shall bear the cost of making good all of its Work, the Work of separate contractors and any other facilities destroyed or damaged by such deficiencies and their removal or correction.

- 13.2.5 If Contractor does not remove such defective or non-conforming Work within a reasonable time fixed by written notice from the Owner, the Owner may remove it and may store the materials or equipment at the expense of Contractor. If Contractor does not pay the cost of such removal and storage within fifteen (15) days thereafter, the Owner may sell such Work at auction or at private sale and shall account for the net proceeds thereof, after deducting all the costs that should have been borne by Contractor, including compensation for additional architectural services. If such proceeds of sale do not cover all costs, which Contractor should have borne, the difference shall be charged to Contractor. If the payments then or thereafter due Contractor are not sufficient to cover such amount, Contractor shall pay the difference to the Owner.
- 13.2.6 If Contractor fails to correct such defective or non-conforming Work, the Owner may correct it in accordance with Section 3.4 hereof.
- 13.2.7 Nothing contained in this Section 13.2 shall be construed to establish a period of limitation with respect to any other obligation which Contractor might have under the Contract Documents, including Section 4.6 hereof. The establishment of the time period after the date of Substantial Completion or such longer period of time as may be prescribed by law or by the terms of any warranty required by the Contract Documents relates only to the specific obligation of Contractor to correct the Work, and has no relationship to the time within which its obligation to comply with the Contract Documents may be sought to be enforced, nor to the time within which proceedings may be commenced to establish Contractor's liability with respect to its obligations.

ARTICLE 14

TERMINATION OF THE CONTRACT

- 14.1 **Records**: In the event of any termination of this Agreement, all finished or unfinished documents, contracts, applications for payment, certifications, data studies, surveys, drawings, maps, models, photographs, programs, files, materials, equipment, tools, supplies, designs, graphs, notes and reports or other material prepared by the Contractor under this Agreement shall become Owner's property whether or not in the Contractor's possession, and shall, upon the Owner's request, be delivered to the Owner.

ARTICLE 15

AUDIT

- 15.1 **Owner's Access to Contractor's Records**: To the extent required by any applicable law, such Act, the Contractor agrees that the Owner or any of his duly authorized representatives shall, until the expiration of seven (7) years after final payment under this

Agreement and such longer period as may be required by law or governmental regulation, have access to and the right to examine and audit any directly pertinent books, documents, papers and records of the Contractor involving transactions related to this Agreement. To that end, the Contractor agrees as follows:

- 15.1.1 The Contractor shall include in the Subcontracts a provision to the effect that the Subcontractor agrees that the Owner or any of his duly authorized representatives shall, until the expiration of seven (7) years after final payment under this Agreement (or longer period), have access to and the right to examine any directly pertinent books, documents, papers and records of such Subcontractor, involving transactions related to the contract.
- 15.1.2 The periods of access and examination described in this Section 15.1 for records which relate to (i) litigation or the settlement of claims arising out of the performance of this Agreement; or (ii) costs and expenses of this Agreement as to which exception has been taken by the Owner or any of his duly authorized representatives, shall continue until such appeal, litigation, claim or exception has been disposed of.
- 15.2 Audit: In addition to the requirements of Section 15.1 above, throughout the design and construction of the Project and for a period of three (3) years after Final Completion, the Owner and the Owner's representative shall have the right to audit all books and records of the Contractor pertaining to the Project as required by the Owner to substantiate the actual cost to the Contractor.
- 15.3 Government Access: If this Agreement is subject to the provisions of 42 U.S.C.A. 1301, et seq, the Social Security Act, and the regulations promulgated in implementation thereof, Contractor shall allow the Comptroller General of the United States, the United States Department of Health and Human Services or other federal or state agency with proper authority to demand access or review of this contract, books, documents and records until the expiration of four (4) years after termination of this Agreement.