

**Agreement Between  
Owner and Construction Manager at Risk**

**AGREEMENT**

Made this F1 day of F2 in the year of Two Thousand and F3.

BETWEEN The Owner: Durham Public Schools Board of Education

And the Construction Manager (hereinafter referred to as the "CM"): F4

For services in connection with the Project known as:

F5

As further described in Article 2:

F6

Design Consultant:

F7  
   
 

The Owner and CM, in consideration of their mutual covenants herein, agree as set forth below:

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## **ARTICLE 1**

### **RELATIONSHIP OF THE PARTIES**

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#### **1.1 Owner and Construction Manager**

The CM and the Owner shall perform as stated in this Agreement and each accepts the relationship between them that is established by this Agreement.

##### **1.1.1 Standard of Care**

The CM covenants with the Owner to furnish its skill and judgment with due care in accordance with applicable federal, state, and local laws and regulations that are in effect on the date of this Agreement first written above. The CM shall perform its services, including but not limited to the Basic Services and any Additional Services authorized in writing by the Owner, consistent with the professional skill and care ordinarily provided by CMs practicing in or around the Research Triangle Park, North Carolina area under the same or similar circumstances. The CM shall perform its services as expeditiously as is consistent with such professional skill and care and the orderly progress of the Project.

##### **1.1.2 CM Representations**

The CM represents and warrants that at the time of execution of this Agreement the CM has and will retain all licenses and certifications required of him to perform the work identified in this Agreement and associated contract documents. The CM shall keep this licensure in good standing without lapse throughout the term of this Agreement. The CM shall provide proof of this licensure to the Owner and/or Design Consultant upon request.

By execution of this Agreement, the CM warrants that (a) it is an experienced and duly licensed having the ability and skill necessary to perform all the work required of it under this Agreement in connection with the design and construction of a project having the scope and complexity of the Project contemplated herein; (b) it has the capabilities and resources necessary to perform its obligations hereunder; and (c) it is familiar with all current laws, rules and regulations which are applicable to the construction of the Project, and that the CM's work on the Project shall be performed in accordance with all such applicable laws, rules and regulations.

#### **1.2 Owner and Design Consultant**

The Owner shall contract separately with one or more Design Consultants to provide architectural and engineering design for the Project. The Project is defined in Article 2 of this Agreement. The Design Consultant's services shall be as stated in this Agreement and as defined in the form agreement between the Owner and Design Consultant attached as Appendix A.

#### **1.3 Owner and Contractors**

The Owner will require the CM to contract directly with such Contractors as may be necessary for construction or supply of the Project. All such contracts shall be issued consistent with the applicable provisions of this Agreement and N.C. Gen. Stat. § 143-128 to -132.

#### **1.4 Relationship of the CM to the Design Consultant and Other Project Participants**

In providing construction management services described in this Agreement, the CM shall maintain a working relationship with the Design Consultant. The Design Consultant is solely responsible for the Project design and shall perform in accordance with the Design Consultant Agreement with the Owner and nothing in this Agreement shall be construed to mean that the CM is responsible for the design of the Project or that the CM assumes any of the contractual or customary duties of the Design Consultant or any other persons or parties not specified by this Agreement.

## **ARTICLE 2**

### **PROJECT DEFINITION**

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The term "Project" when used in the Agreement shall mean the total construction of which the Work may be a whole or part of the Project. The term "Work" required for the "Project" used in this Agreement shall mean the various parts of total construction to be performed under this Agreement.

The Project name and locations are as follows:

F8

The Project is intended for use as:

F9

## **ARTICLE 3**

### **CONSTRUCTION MANAGER'S BASIC SERVICES**

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#### **3.1 CM Basic Services**

The CM shall perform the Basic Services described herein. It is not required that the Basic Services be performed in the sequence in which they are described.

#### **3.2 Design Phase – Project Management**

##### **3.2.1 Project Management**

##### **3.2.1.1 Construction Management Plan**

The CM shall prepare a Construction Management Plan for the Project within the time mutually established by the Owner and CM and shall make recommendations for revisions to the plan throughout the duration of the Project, as may be appropriate. In preparing the Construction Management Plan, the CM shall consider the Owner's schedule, budget, and design requirements for the Project. The CM shall then develop various alternatives for the sequencing and management of the Project and shall make recommendations to the Owner. The Construction Management Plan shall also include a description of the various bid packages recommended for the Project. The Construction Management Plan shall be presented to the Owner for acceptance. The CM shall develop a Master Schedule for the Project. The CM shall determine the appropriate bid packages based on the available resources. The CM shall familiarize itself with all available Project funding and work with the Owner and Design Consultant to maximize the scope and quality of the Project based upon the available funds. The CM shall make recommendations regarding communication among the parties in an effort to ensure the prompt and proper flow of Project information. The CM shall outline its plan for minority business enterprise participation goals required by state law and the Owner, including reporting all information required by state law on behalf of the Owner to the North Carolina Department of Administration, Office of Historically Underutilized Businesses. The CM shall include a Project safety plan covering all critical areas of the Project.

##### **3.2.2 Time Management**

##### **3.2.2.1 Master Schedule**

In accordance with the Construction Management Plan, the CM shall prepare a Master Schedule for the Project in accordance with the deadlines established by the Owner. The Master Schedule shall specify the proposed start and finish dates for each major Project activity. The CM shall submit the Master Schedule to the Owner for acceptance.

#### 3.2.2.2 Design Phase Milestone Schedule

After the Owner accepts the Master Schedule the CM shall prepare a Milestone Schedule for the Design Phase. The Design Phase Milestone Schedule may be used in the request for proposals and contract for the Design Consultant and shall be a method for judging progress during the Design Phase. The CM shall track the Design Consultant's progress during the design phase and alert the Owner of any delays in the Design Consultant's timely completion of its services.

### 3.2.3 Cost Management

#### 3.2.3.1 Construction Market Survey

The CM shall conduct a Construction Market Survey to provide current information regarding the general availability of local construction services, labor, materials and equipment cost and other economic factors related to the Project.

#### 3.2.3.2 Project and Construction Budget

Based on the Construction Management Plan and the Construction Market Survey, the CM shall prepare a Project and Construction Budget based on separate divisions of the Work required for the Project and shall identify contingencies for design and construction. The CM shall submit the Project and Construction Budget to the Owner for acceptance. The CM shall make recommendations to the Owner and Design Consultant regarding whether the Owner should conduct any additional geotechnical, environmental or other inspections of the Project site reasonably necessary for the CM to estimate the cost of the work and minimize change orders due to unforeseen conditions. If the Project involves renovation work, the CM shall perform inspections of the existing building and Project conditions and perform any destructive testing reasonably necessary for the Design Consultant to prepare a complete and accurate set of construction documents and allowing the CM to estimate the cost of the work in order to minimize change orders due to unforeseen conditions. The cost of any destructive testing shall be billed as a reimbursable and shall not be included in the CM's fee for basic services. The Project and Construction Budget shall be revised as directed by the Owner.

#### 3.2.3.3 Preliminary Estimate and Budget Analysis

The CM shall analyze and report to the Owner the cost of various design and construction alternatives, including CM's assumptions in preparing its analysis, a variance analysis between budget and preliminary estimate, and recommendations for any adjustments to the budget. As a part of the cost analysis, the CM shall consider costs relating to efficiency, usable life, maintenance, energy, and operation.

### 3.3 Design Phase – Design Support

#### 3.3.1 Project Management

##### 3.3.1.1 Revisions to the Construction Management Plan

During the Design Phase, the CM shall make the recommendations to the Owner regarding revisions to the Construction Management Plan. Revisions approved by the Owner shall be incorporated into the Construction Management Plan.

##### 3.3.1.2 Project Conference

At the start of the Design Phase, the CM shall conduct a Project conference attended by the Design Consultant, the Owner and others as necessary. During the Project Conference, the CM shall review the Construction Management Plan, the Master Schedule, the Design Phase Milestone Schedule, the Project and Construction Budget, and the MIS. The CM shall be responsible for tracking the progress of the design in relation to the Design Phase Milestone Schedule and shall promptly notify Owner of any delay. The CM shall make recommendations to the Owner, with a copy to the Design Consultant, regarding strategies for overcoming any delay in the design of the Project.

#### 3.3.1.3 Design Phase Information

The CM shall monitor the Design Consultant's compliance with the Construction Management Plan and the MIS and the CM shall coordinate and expedite the flow of information between the Owner, Design Consultant, and others as necessary.

#### 3.3.1.4 Progress Meetings

The CM shall conduct periodic progress meetings attended by the Owner, Design Consultant and others as necessary. Such meetings shall serve as a forum for the exchange of information concerning the Project and the review of design progress. The CM shall prepare and distribute minutes of these meetings to the Owner, Design Consultant and others. During the periodic progress meetings the CM shall update the Owner and Design Consultant regarding the estimated cost of the design and make recommendations to the Owner and Design Consultant regarding constructability, construction cost, sequence of construction, construction duration, possible means and methods of construction, time for construction, and any other information reasonably necessary to assist the Design Consultant with cost, budget and schedule requirements.

#### 3.3.1.5 Review of Design Documents

The CM shall review the design documents and any addenda or other information from the Design Consultant for clarity, consistency, constructability and coordination among the Contractors. If the Project is a prototype that has been previously constructed, the CM shall verify that all applicable change orders from previous Projects have been incorporated into the bidding documents. The results of the review shall be provided in writing as notations on the documents. The CM is not responsible for providing, nor does the CM control, the Project design and contents of the design documents. By performing the reviews described herein, the CM is not acting in a manner so as to assume responsibility or liability, in whole or in part, for all or any part of the Project design and design documents. The CM's actions in reviewing the Project design and design documents and in making recommendations as provided herein are for the use of the Owner and Design Consultant.

#### 3.3.1.6 Design Recommendations

The CM shall make recommendations to the Owner and Design Consultant with respect to constructability, construction cost, sequence of construction, construction duration, possible means and methods of construction, time for construction, and separation of the Project contracts for various categories of Work. In addition, the CM shall give to the Design Consultant all data of which it or the Owner is aware concerning patents or copyrights for inclusion in Contract Documents.

##### 3.3.1.6.1 On renovation Projects, the CM shall:

- .1 Conduct thorough evaluation of existing conditions of building(s), all building systems, site, and site infrastructure;
- .2 Conduct destructive and non-destructive testing as necessary to thoroughly evaluate existing conditions of the building(s), building systems, site, and site infrastructure (all testing, whether destructive or non-destructive, is to be approved in advance by the Owner and shall be coordinated to occur at a time that will reasonably allow the information to be

- used by the Design Consultant in the in the preparation of the contract documents);
- .3 Report to Owner and Design Consultant during design phase regarding findings of evaluation of existing building(s), building systems, site, and site infrastructure and make recommendations to the Owner and Design Consultant that will assist with establishing cost, budget, and schedule requirements;
- .4 Work with Owner and Design Consultant during design phase to create phasing plans that allow the work to be conducted in the most expedient manner while taking into account both cost and time;
- .5 Develop a plan to address the safety and security of all students, staff, visitors that will be on a site that is being used as a school during construction, including a plan that minimizes noise levels that would be disruptive to the educational environment without the prior approval of the Owner.

#### 3.3.1.7 Owner Design Reviews

The CM shall coordinate the Owner's design reviews by compiling and conveying the Owner's comments to the Design Consultant.

#### 3.3.1.8 Approvals by Regulatory Agencies

The CM shall monitor transmittal of documents to regulatory agencies for review and shall advise of potential problems in completing such reviews of which the CM is aware.

#### 3.3.1.9 General Conditions

The General Conditions for use in the contracts between the CM and the Contractors for construction of the Project shall be developed by the CM. Separate General Conditions for materials and equipment procurement shall be prepared by the CM to meet the specific requirements of the Project and all of the requirements of this Agreement.

In interpreting the requirements of this Agreement, anything shown on the Design Consultant's drawings and not mentioned in the specifications or mentioned in the specifications and not shown on the drawings shall have the same effect as if shown or mentioned respectively in both. The Design Consultant's technical specifications take priority over general specifications and detail drawings take precedence over general drawings. Any work shown on one drawing shall be construed to be shown in all relevant drawings, and the CM will coordinate the work and the drawings. If any portion of the Design Consultant's plans and specifications shall be in conflict with any other portion, the various documents comprising the contract documents shall govern in the following order of precedence: this Agreement; any addendum issued by the Design Consultant; the specifications; the drawings; as between schedules and information given on drawings, the schedules shall govern; as between figures given on drawings and the scaled measurements, the figures shall govern; as between large-scale drawings and small scale drawings, the larger scale drawings shall govern. Any such conflict or inconsistency between or in the drawings shall be submitted to the Design Consultant whose decision thereon shall be final and conclusive.

#### 3.3.1.10 Public Relations

The CM shall assist the Owner in public relations activities and shall prepare information for and attend public meetings regarding the Project.

#### 3.3.1.11 Project Funding

The CM shall assist the Owner in preparing documents concerning the Project and Construction Budget and for use in obtaining or reporting on Project funding. The documents shall be prepared in a form approved by the Owner.

#### 3.3.2 Time Management

#### 3.3.2.1 Revisions to Master Schedule

While performing the services provided in Paragraphs 3.3.1.1, 3.3.1.2 and as necessary throughout the Design Phase, the CM shall recommend revisions to the Master Schedule. The Owner shall issue change orders as needed to the appropriate parties to implement the Master Schedule revisions.

#### 3.3.2.2 Monitoring the Design Phase Milestone Schedule

While performing the services provided in Paragraphs 3.3.1.3, and 3.3.1.4, the CM shall monitor compliance with the Design Phase Milestone Schedule.

#### 3.3.2.3 Pre-Bid Construction Schedules

Prior to transmitting Contract Documents to bidders, the CM shall prepare a Pre-Bid Construction Schedule for each part of the Project and make the schedule available to the bidders during the Procurement Phase.

### 3.3.3 Cost Management

#### 3.3.3.1 Cost Control

Following the completion of each design phase milestone, the CM shall prepare an estimate of the construction cost for the Design Drawings and Specifications furnished by the Design Consultant. Each estimate shall be accompanied by a report to the Owner and Design Consultant identifying variances from the Project and Construction Budget as well as CM's assumptions in preparing the estimate. The CM shall coordinate the activities of the Owner and Design Consultant when changes to the design are required to remain within the Project and Construction Budget.

#### 3.3.3.2 Project and Construction Budget Revision

The CM shall make recommendations to the Owner concerning the design changes that may result in revisions to the Project and Construction Budget and divisions of the Work required for the Project.

#### 3.3.3.3 Value Engineering Studies

The CM shall provide value engineering recommendations to the Owner and Design Consultant for major construction components, including cost evaluations of alternative materials and systems.

### 3.3.4 Management Information System (MIS)

#### 3.3.4.1 Schedule Reports

In conjunction with the services provided by Paragraph 3.3.2.1, the CM shall prepare and distribute schedule maintenance reports that shall contrast actual progress against scheduled progress for the Design Phase and the overall Project and shall make recommendations to the Owner for corrective action.

#### 3.3.4.2 Project Cost Reports

The CM shall prepare and distribute Project cost reports that shall indicate estimated costs compared to the Project and Construction Budget and shall make recommendations to the Owner for corrective action.

#### 3.3.4.3 Cash Flow Report

The CM shall periodically prepare and distribute a cash flow report.



#### 3.3.4.4 Design Phase Change Order Report

The CM shall prepare and distribute Design Phase change order reports that shall list all Owner-approved change orders as of the date of the report and shall state the effect of the change orders on the Project and Construction Budget and the Master Schedule.

### 3.4 Procurement Phase

#### 3.4.1 Project Management

The CM shall procure bids in accordance with N.C. Gen. Stat. § 143-128 to-132. The CM shall prequalify all bidders in accordance with G.S. 143-135.8 and this Agreement. The CM shall ensure that all minority business participation goal requirements are followed in the solicitation and award of contracts. The CM shall report its efforts to solicit minority business participation to the Owner in writing. Unless approved otherwise by the Owner, a minimum of three bids shall be required for opening if bids are received in advance of the GMP having been established.

##### 3.4.1.1 Prequalifying Bidders

The CM shall develop lists of possible bidders and prequalify bidders. This service shall be performed in accordance with G.S. 143-128.1, 143-128.2 to -128.4, 143-135.8, and the Owner's prequalification of bidders for construction projects policy. The CM shall also prepare and transmit to the Owner a list of prequalified and disqualified bidders for each bid package. The CM shall provide the Owner with the reasons that any prospective bidders have been disqualified. The Owner shall notify the CM promptly of any reasonable objections to a proposed bidder, and the CM shall remove that bidder from the bidders list.

The CM shall provide the Owner with a list of all businesses in which the CM's Owners have any ownership interest if the business is engaged in the construction industry, including demolition and the supply of materials for construction, and the CM intends to solicit bids for any work on the Project from the business. The CM shall provide said list to the Owner prior to prequalifying bidders for the work. The Owner shall determine whether any business listed may submit a bid or perform any work on the Project.

##### 3.4.1.2 Bidder's Interest Campaign

The CM shall conduct a thorough campaign to create interest among qualified bidders. The CM shall provide written documents of these efforts to the Owner prior to bidding the work.

##### 3.4.1.3 Notices and Advertisements

The CM shall prepare and place notices and advertisements to solicit bids for the Project as prescribed by N.C. Gen. Stat. § 143-128.1, 143-128.2 to -128.4, and 143-135.8.

##### 3.4.1.4 Delivery of Bid Documents

The CM shall expedite the delivery of bid documents to the bidders. The CM shall obtain documents from the Design Consultant and arrange for printing, binding, wrapping and delivery to the bidders. The CM shall maintain a record of bidders receiving documents. The CM shall notify the Owner in advance, in writing, of the anticipated number of bid documents to be produced. The Owner shall reimburse the CM for the actual cost of bid documents.

##### 3.4.1.5 Pre-Bid Conference

In conjunction with the Design Consultant, the CM shall conduct a Pre-Bid Conference. These conferences shall be forums for the CM and Design Consultant to explain to the bidders the Project requirements, including information concerning schedule requirements, time and cost control requirements,

access requirements, contractor interfaces, the Project administrative requirements and technical information.

#### 3.4.1.6 Information to Bidders

The CM shall develop and coordinate procedures to provide answers to bidders' questions.

##### 3.4.1.6.1 Site Access for Bidders

In the event bidders require access to the site in order to gain information necessary to prepare their bids, the CM shall be responsible for coordinating access with the Owner. Any access shall be during regular business hours or otherwise at a time that would not unreasonably disturb the adjacent property Owners or interfere with the school day. If the information sought by the bidders requires any alteration to the existing building or site or destructive testing, the CM shall notify the Owner in advance and coordinate said work so that it does not cause any disruption to the current use of the site or building. The CM shall ensure that any disturbed areas are repaired if the building is currently being used by the Owner. In all situations, the CM shall ensure that the site or building is left in a safe and secure condition and that the disturbed area is cleaned of any debris resulting from the access. In the event that the bidders' access disturbs any adjacent property, including depositing dirt, soil or debris on the roads adjacent to the site, the CM shall promptly clean any and all areas and be responsible for any claims, fines or penalties resulting from said access.

##### 3.4.1.7 Addenda

The CM shall receive from the Design Consultant a copy of all addenda. The CM shall review addenda for clarity, consistency and coordination. By performing the reviews described herein, the CM is not acting in a manner so as to assume responsibility or liability, in whole or in part, for all or any part of the Project design. The CM shall also distribute a copy of all addenda to each bidder receiving documents.

##### 3.4.1.8 Bid Opening

The CM shall act as the fiduciary of the public entity in handling and opening bids. All bids shall be received and opened in a manner agreed upon by the Owner. The CM shall conduct bid openings and shall evaluate the bids to determine the lowest responsive and responsible bidder, taking into consideration quality, performance, and time specified to perform. The contracts shall be awarded in accordance with N.C. Gen. Stat. § 143-128.1.

##### 3.4.1.9 Construction Contracts

The CM shall prepare, execute, and deliver the contract documents between the CM and the Contractors. The contract documents shall consist of the plans and specifications, any addendum, the general conditions, the form of Agreement between the CM and the contractor, and any other documents incorporated by the CM. The CM shall also issue the notices to proceed. The CM shall not issue contract documents or notices to proceed with the work to the contractors until the Owner and CM have agreed upon the amount of the GMP and the Owner has notified the CM that it can proceed with the work.

##### 3.4.1.10 Permits, Insurance and Labor Affidavits

The CM shall verify that the Contractors have secured the required building permits, bonds, insurance, labor affidavits, and waivers.

#### 3.4.2 Time Management

##### 3.4.2.1 Pre-Bid Construction Schedule

The CM shall inform the bidders of their responsibilities regarding the Pre-Bid Construction Schedule specified in the Instructions to Bidders or Contract Documents. The CM shall inform the bidders of the Owner's requirements for scheduling and communication between the parties.

#### 3.4.2.2 Construction Schedule

The CM shall provide a copy of the Master Schedule to the bidders. The CM shall prepare a Construction Schedule and all updates in accordance with the Owner's scheduling requirements. The Owner shall provide the CM with its scheduling requirements prior to receipt of bids for the Project.

#### 3.4.3 Cost Management

##### 3.4.3.1 Estimates for Addenda

Unless the Owner has elected to establish the GMP after bids have been received, the CM shall prepare an estimate of costs for all addenda and shall submit the estimates to the Owner for approval. After approval by the Owner, the addenda shall be transmitted to bidders and the Guaranteed Maximum Price and the CM's compensation shall be adjusted as provided in this Agreement.

3.4.3.2 Analyzing Bids: Upon receipt of bids, the CM shall evaluate the bids, including alternate prices and unit prices.

#### 3.4.4 Management Information System (MIS)

##### 3.4.4.1 Schedule Maintenance Reports

The CM shall prepare and distribute schedule maintenance reports during the Procurement Phase. The reports shall compare the actual bid and award dates to scheduled bid and award dates and shall summarize the progress of the Project.

##### 3.4.4.2 Project Cost Reports

The CM shall prepare and distribute the Project cost reports during the Procurement Phase. The reports shall specify the actual award prices and construction costs for the Project, compared to the Project and Construction Budget. The CM shall provide updated Project cost reports to the Owner, with a copy to the Design Consultant, on at least a monthly basis.

##### 3.4.4.3 Cash Flow Reports

The CM shall prepare and distribute cash flow reports during the Procurement Phase. The reports shall be based on actual award prices and construction costs for the Project and the reports shall specify the actual cash flow compared to the projected cash flow.

#### 3.5 Construction Phase

##### 3.5.1 Project Management

###### 3.5.1.1 Pre-Construction Conference

In connection with the Design Consultant, the CM shall conduct a Pre-Construction Conference during which the CM shall review the reporting procedures, site operations and other contractual requirements.

###### 3.5.1.2 Onsite Management and Construction Phase Communication Procedures

The CM shall provide and maintain a management team on the Project site to provide contract administration and the CM shall establish and implement coordination and communication procedures among the CM, Owner, Design Consultant, and Contractors. The CM's Project manager and superintendent shall be approved by the Owner. The Owner reserves the right to require the removal of a particular PM or superintendent at any time the Owner reasonably believes the PM or superintendent is adversely impacting the Project. A PM or superintendent approved by the Owner shall not be reassigned by the CM unless they cease to be on the CM's payroll or the Owner otherwise agrees the CM shall observe the work as required for general conformance with the contract documents. The CM shall be responsible for Project site safety and the means and methods for the construction of the Project.

#### 3.5.1.3 Contract Administration Procedures

The CM shall establish and implement procedures for expediting and processing requests for information, shop drawings, material and equipment sample submittals, Contractor schedule adjustments, change orders, substitutes, payment requests and the maintenance of logs. The CM shall maintain daily job reports. The CM shall be the party to whom requests for information, submittals, Contractor schedule adjustments, substitutes, change order requests and payment requests shall be submitted. The CM shall provide periodic reports to the Owner, with a copy to the Design Consultant, updating the status of the Project. The reports shall be provided not less than bi-weekly. The Owner shall have no duty to respond to any information in the periodic reports, unless the CM specifically requests a response or action by the Owner in writing in a separate document.

#### 3.5.1.4 Project Site Meetings

Periodically the CM shall conduct meetings at the Project site with each Contractor and the CM shall conduct coordination meetings with all Contractors, the Owner and Design Consultant. The CM shall conduct weekly progress meetings with the Owner and Design Consultant. The CM shall record, transcribe and distribute minutes to all attendees, the Owner and Design Consultant.

#### 3.5.1.5 Coordination of Other Independent Consultants

Technical inspection and testing provided by the Design Consultant or others shall be coordinated by the CM. The CM shall be provided with a copy of all inspection and testing reports on the day of the inspection or test or when issued. The CM is not responsible for providing, nor does the CM control, the actual performance of technical inspection and testing. The CM is performing a coordination function and is not acting in a manner so as to assume responsibility, in part or in whole, for all or any part of such inspection and testing.

#### 3.5.1.6 Review of Requests for Changes to the Contract Time and Price

The CM shall review the contents of a request for changes to the construction contract time or price submitted by a Contractor, assemble information concerning the request and endeavor to determine the cause of the requests. In instances where the CM's analysis reveals that the request is valid, the CM shall prepare a detailed report to the Owner and Design Consultant for review. If the Owner approves the change, the Design Consultant shall prepare the necessary change order documents for signing by the CM and Owner. The CM shall prepare the necessary change order documents for execution by the CM and contractors.

#### 3.5.1.7 Quality Review

The CM shall establish and implement a program to monitor the quality of construction. The CM shall observe the work as required for general conformance with the contract documents. The purpose of the program shall be to guard the Owner against defects and deficiency in the work of the Contractor. The CM shall transmit to the Contractor a notice of nonconforming work and may reject work when it is the opinion of the CM that the work does not conform to the requirements of the Contract Documents. Except for minor variations as stated herein, the CM is not authorized as part of this service to change, evoke, enlarge, relax, alter, or to release any requirement of the Contract Documents or to approve or accept any portion of

the Work not performed in accordance with the Contract Documents. The Design Consultant shall have the final authority to decide the acceptability of the work.

#### 3.5.1.8 Operation and Maintenance Materials

The CM shall receive from the Contractors operation and maintenance manuals, warranties and guarantees for materials and equipment installed in the Project, in accordance with the Contract Documents.

#### 3.5.1.9 Substantial Completion

The date of substantial completion of the work or designated portion thereof is the date certified by the Design Consultant when the work or a designated portion thereof is sufficiently complete, in accordance with the contract documents, so the Owner can fully occupy and utilize the work or designated portion thereof for the use for which it is intended, with all of the Project's parts and systems operable as required by the contract documents, including a preliminary test and balance report for the mechanical system. The CM acknowledges and agrees that the intercom, telephone, data, security, building automation system (including functional graphics at the site), MATV, and other educational operational systems are required for the Owner's use of the building for its intended purpose. The CM shall provide operation & maintenance manuals to the Owner as required by the contract documents prior to substantial completion and shall provide the required training on the operation of the equipment and systems within two weeks of substantial completion of the Project. The Owner's occupancy of incomplete work shall not alter the CM's responsibilities pursuant to this paragraph. Only incidental corrective work and any final cleaning beyond that needed for the Owner's full use may remain for final completion. The issuance of a temporary or final certificate of occupancy shall not, in itself, constitute substantial completion.

When the CM considers that the work, or a designated portion thereof which is acceptable to the Owner, is substantially complete as defined above, the CM shall prepare for and submit to the Design Consultant and Owner a list of all items which in the CM's opinion are to be completed or corrected and shall attach it to a request in writing that the Design Consultant perform a substantial completion inspection. The Owner's occupancy of incomplete work shall not alter the contractor's responsibilities. The Design Consultant shall review the CM's list and shall compile a punch list of items to be corrected and completed. The failure to include any items on such list does not alter the responsibility of the CM to complete all work in accordance with the contract documents. When the Design Consultant and CM on the basis of an inspection jointly determine that the work or designated portion thereof is substantially complete, the Design Consultant will then prepare a certificate of substantial completion which shall establish the date of substantial completion, shall state the responsibilities of the Owner and the CM for security, maintenance, heat, utilities, damage to the work, and insurance, and shall signify the beginning of the time within which the CM shall complete the items listed therein. Warranties required by the contract documents shall commence on the date of substantial completion of the work or designated portion thereof, unless otherwise provided in the certificate of substantial completion. The certificate of substantial completion shall be submitted to the Owner and the CM for their written acceptance of the responsibilities assigned to them in such certificate.

Upon substantial completion of the work or designated portion thereof and upon application by the CM and certification by the Design Consultant, the Owner shall make payment, except retainage held pursuant to the contract documents and state law, for such work or portion thereof as provided in the contract documents.

The acceptance of final payment shall constitute a waiver of all claims by the CM and its contractors, except those previously made in writing and identified by the CM as unsettled at the time the CM submits the application for payment for substantial completion, and except for the retainage sums due at final acceptance. The CM shall indemnify and hold the Owner harmless against any claims by the contractors that are waived because they were not made in writing and identified by the CM as unsettled when the CM submitted the application for payment for substantial completion.

The Owner shall have the option to correct or complete any and all punch list items not completed by the CM to the satisfaction of the Design Consultant and the Owner within the time specified for final completion by utilizing its own forces or by hiring others. The cost of such correction of remaining punch list items by the Owner or others shall be deducted from the final payment to the CM. If CM does not complete certain punch list items within the required time period, all warranties and guarantees for such incomplete punch list items shall become effective upon issuance of final payment for the Project.

The issuance of the certificate of substantial completion does not indicate final acceptance of the Project by the Owner, and the CM is not relieved of any responsibility for the Project except as specifically stated in the certificate of substantial completion.

Should the Design Consultant and the Owner determine that the work or a designated portion thereof is not substantially complete, they shall provide the CM with written notice stating why the Project or designated portion is not substantially complete. The CM shall expeditiously complete the work and shall re-request in writing that the Design Consultant perform another substantial completion inspection. Costs, if any, associated with such re-inspection shall be assessed to the CM at the rate specified in the Design Consultant's contract.

#### 3.5.1.10 Final Completion

In consultation with the CM and Owner, the Design Consultant shall determine when the Project and the contractors' work is finally completed and, following completion of corrections, the Design Consultant shall issue a certificate of final completion to the Owner. The date of final completion of the work is the date certified by the Design Consultant and the Owner when the work is totally complete, to include punchlist work, in accordance with the contract documents and the Owner may fully occupy and utilize the Project for the use for which it is intended. The issuance of a temporary or final certificate of occupancy shall not, in itself, constitute final completion. If more than two (2) final completion inspections are required by the Design Consultant due to the CM's failure to complete the work, the additional inspections shall be charged to the CM at the rate specified in the Design Consultant's contract all punch list work shall be complete. If any change order is issued for work to be performed after the substantial completion certificate is issued, the completion date for that work shall be established separately and shall not prevent the Project from achieving final completion for purposes of Sections 7.6 and 7.7 of this Agreement. Following the receipt of payment from the Owner, the CM shall make all payments due to contractors within ten (10) days.

For multi-phased projects, final completion of each phase shall include the completion of all work for the phase with the exception of any system that is required to be integrated into a phase that has a later contract date for final completion. This exception might apply to the HVAC, data, intercom, or similar systems. Notwithstanding the above, complete and proper operation of all systems shall be required for the Project to achieve final completion.

#### 3.5.2 Schedule

##### 3.5.2.1 Master Schedule

The CM shall adjust and update the Master Schedule and distribute copies to the Owner and Design Consultant. All adjustments to the Master Schedule shall be made for the benefit of the Project.

##### 3.5.2.2 Construction Schedule

The CM shall adjust and update the Construction Schedule and shall verify that the schedule is prepared in accordance with the requirements of the Owner noted in Paragraph 3.4.2.2 and that it establishes completion dates that comply with the requirements of the Master Schedule. The CM agrees that the construction schedule is for the benefit of the entire Project team and by execution of this Agreement gives permission and direction to its scheduler to provide copies of the schedule in a format as required by the Owner.

#### 3.5.2.3 Construction Schedule Report

The CM shall review the progress of construction of each Contractor on a monthly basis, shall evaluate the percentage complete of each construction activity as indicated in the Construction Schedule and shall review such percentages with the Contractor. This evaluation shall serve as data for input to the periodic Construction Schedule report that shall be prepared and distributed to the Contractor, the Owner and Design Consultant. The report shall indicate the actual progress compared to scheduled progress and shall serve as the basis for the progress payment to the Contractor. The CM shall determine and implement alternative courses of action that may be necessary to achieve contract compliance by the Contractor.

#### 3.5.2.4 CM Review of Time Extension Requests

The CM shall, prior to the issuance of a change order, determine the effect on the construction and Master Schedules of time extensions requested by the Contractor.

#### 3.5.2.5 Recovery Schedules

The CM shall prepare and submit a recovery schedule in accordance with the Owner's scheduling requirements specified in Appendix B.

### 3.5.3 Cost Management

#### 3.5.3.1 Schedule of Values (Each Contract)

The CM shall, in participation with the Contractors, determine a Schedule of Values for each of the construction contracts. The Schedule of Values shall be the basis for payment to the contractors.

#### 3.5.3.2 Change Order Control

The CM shall establish and implement a change order control system that is approved by the Owner.

3.5.3.2.1 All proposed Owner-initiated change orders shall first be described in detail in writing. In response to the request for a proposal, the Contractor shall submit to the CM for evaluation detailed information concerning the costs and time adjustments, if any, necessary to perform the proposed change order work. The CM shall review the Contractor's proposal, shall discuss the proposed change order with the Contractor and endeavor to determine the Contractor's basis for the cost and time to perform the Work and, as applicable, the effect, if any, on the Guaranteed Maximum Price. The CM shall present its findings to the Owner and, following Owner acceptance, the Design Consultant shall prepare the change order documents for signature by the CM and Owner. Upon execution of the change order documents between the CM and Owner, the CM shall prepare change order documents for signature by the affected Contractor. The CM shall verify that the Work, and any adjustment of time required by approved change orders has been incorporated into the Contractor's Construction Schedule.

3.5.3.2.2 The CM shall review the contents of all Contractor-requested changes to the contract time or price, endeavor to determine the effect, if any, on the Guaranteed Maximum Price. The CM shall provide the Design Consultant a copy of each change request, and the CM shall, in its evaluations of the Contractor's request, consider the Design Consultant's comments regarding the proposed changes. The CM shall present its findings to the Owner regarding the proposed changes and at the Owner's direction, shall prepare the change order documents for signature by the CM and Owner. Upon execution of the change order documents between the CM and Owner, the CM shall prepare change order documents for signature by the affected contractor.

#### 3.5.3.3 Cost Records

In instances where a lump sum or unit price is not determined prior to performing Work described in a request for proposal as provided in Paragraph 3.5.3.2, the CM shall request from the Contractor records of

the cost of payroll, materials and equipment and the amount of payments to subcontractors incurred by the Contractor in performing the Work.

#### 3.5.3.4 Trade-Off Studies

The CM shall provide trade-off studies for various minor construction components. The results of the trade-off studies shall be in report form and distributed to the Owner and Design Consultant.

#### 3.5.3.5 Progress Payments

In consultation with the Design Consultant, the CM shall inspect the work in order to ensure compliance with the contract documents, review the payment applications submitted by each contractor and determine whether the amount requested reflects the progress of the Contractor's Work. The CM shall make appropriate adjustments to each payment application and shall prepare and forward to the Owner a progress payment report. The report shall state the total contract price, payments to date, current payment requested, retainage and actual amounts owed for the current period. Included in this report shall be a certificate of payment that shall be signed by the CM and delivered to the Owner. The CM shall make payments that are due to all contractors, suppliers, and material men within ten (10) days following the receipt of payment for the work from the Owner. In addition, the CM shall keep the Project and the site on which Work is performed free and clear of all liens from Contractors, subcontractors, or suppliers. The CM shall provide sales tax information using the form attached as Appendix C with each payment application.

Payments may be made by the Owner, at its sole discretion, on account of materials or equipment not incorporated in the work but delivered and suitably stored at the site or in a bonded warehouse by the CM or contractor. Payments for materials or equipment stored shall only be considered upon submission by the CM of satisfactory evidence (for example, releases or paid invoices from the seller) that the CM or the contractor has acquired title to such material, that it will be utilized on the work under this contract and that it is satisfactorily stored, protected, and insured or that other procedures satisfactory to the Owner that will protect the Owner's interests have been taken. In the event the materials are stored in a bonded warehouse that is not located in the county of the Project, the CM shall reimburse the travel cost and hourly billing expenses incurred by the Design Consultant for travel to view and assess whether the materials meet the requirements of the contract documents. Materials once paid for by the Owner become the property of the Owner and may not be removed from the work site or bonded warehouse, other than to be delivered from the warehouse to the site, without the Owner's written permission. Responsibility for such stored materials and equipment shall remain with the CM and the contractor regardless of Ownership.

The Owner will retain five percent of the amount for each progress payment on the Project, excluding the amount billed for general conditions, for as long as is authorized by G.S. 143-134.1. At all times during the Project, the Owner shall retain the maximum funds allowed by G.S. 143-134.1. The Owner specifically reserves the right to withhold additional funds as authorized by this Agreement or G.S. 143-134.1.

#### 3.5.3.6 Decisions to Withhold Payment

The Design Consultant may withhold a certificate for payment in whole or in part, to the extent reasonably necessary to protect the Owner. If the Design Consultant is unable to certify payment in the amount of the application, the Design Consultant will notify the CM and the Owner in writing. If the CM and Design Consultant cannot agree on a revised amount, the Design Consultant will promptly issue a certificate for payment for the amount for which the Design Consultant is able to make such representations to the Owner. The Design Consultant may also withhold a certificate for payment, in whole or in part, to such extent as may be necessary in the Design Consultant's opinion to protect the Owner from loss for which the CM or the contractor(s) is responsible, including loss resulting from acts and omissions, because of:

- .1 Defective work not remedied;
- .2 Third party claims filed or reasonable evidence indicating probable filing of such claims unless security acceptable to the Owner is provided by the CM;



- .3 Failure of the CM or contractor(s) to make payments properly to sub-contractors or for labor, materials or equipment;
- .4 Reasonable evidence that the work cannot be completed for the unpaid balance of the contract sum;
- .5 Damage to the Owner or another contractor;
- .6 Reasonable evidence that the work will not be completed within the contract time, and that the unpaid balance would not be adequate to cover actual or liquidated damages for the anticipated delay;
- .7 Failure to carry out the work in accordance with the contract documents;
- .8 Failure to provide sales tax documentation as required by the Owner;
- .9 Failure or refusal of the contractor to submit the required information on minority business enterprises;
- .10 Any other reason deemed necessary by the Design Consultant to protect the Owner; or
- .11 Subsequently discovered evidence that work previously approved was not performed in accordance with the contract documents.

3.5.3.7 When the above reasons for withholding certification are removed, certification will be made for amounts previously withheld.

3.5.3.8 No interest shall be added to any amounts withheld pursuant to Paragraph 3.5.3.6.

#### 3.5.4 Management Information System (MIS)

##### 3.5.4.1 Schedule Maintenance Reports

The CM shall prepare and distribute monthly schedule maintenance reports during the Construction Phase. The reports shall compare the actual construction dates to scheduled construction dates of each separate construction contract and to the Master Schedule for the Project.

##### 3.5.4.2 Project Cost Reports

The CM shall prepare and distribute monthly Project cost reports during the Construction Phase. The reports shall specify actual Project and construction costs compared to the Project and Construction Budget.

##### 3.5.4.3 Project and Construction Budget Revisions

The CM shall make recommendations to the Owner concerning construction changes that may result in revisions to the Project and Construction Budget or Guaranteed Maximum Price.

##### 3.5.4.4 Cash Flow Reports

The CM shall prepare and distribute cash flow reports during the Construction Phase. The reports shall specify actual cash flow as compared to projected cash flow.

##### 3.5.4.5 Progress Payment Reports (Each Contract)

The CM shall prepare and distribute the progress payment reports. The reports shall state the total construction contract price, payment to date, current payment requested, retainage, sales tax paid, and actual amounts owed this period. A portion of this report shall be a certificate of payment that shall be signed by the CM certifying that the work complies with the contract documents and delivered to the Owner for use by the Owner in making payments to the CM.

#### 3.5.4.6 Change Order Reports

The CM shall periodically prepare and distribute change order reports during the Construction Phase. The report shall list all Owner-approved change orders by number, a brief description of the change order work, the cost established in the change order and percent of completion of the change order work. The report shall also include similar information for potential change orders of which the CM may be aware. The report shall also include a summary of the impact of the change orders on the Project schedule and completion dates.

#### 3.5.4.7 Contractor's Safety Program

The CM shall review the safety programs of each Contractor and confirm that each Contractor has established safety programs as required by the Contract Documents.

### 3.6 Post Construction Phase

#### 3.6.1 Project Management

##### 3.6.1.1 Record Documents

The CM Project superintendent shall maintain a field set of drawings for the duration of the construction period. The CM Project manager shall review the superintendent's field set to confirm that all addenda and bulletin drawings have been accurately incorporated. During construction the field set shall be updated to include all RFI responses, approved change orders and any minor plan clarifications made by the Design Consultant during site visits. The CM shall provide evidence to the Design Consultant on a monthly basis that it is maintaining an accurate and complete copy of all changes in the work in a form that will facilitate the prompt and accurate creation of record drawings. Within 30 days of substantial completion, the field set (including general, plumbing, mechanical and electrical as-built drawings) shall be delivered to the architect for preparation of record drawings. Prior to delivery, the CM Project manager shall thoroughly review the as-built field set for completeness and transmit said drawings to the Design Consultant with a letter stating that the drawings are complete and accurately reflect the construction.

##### 3.6.1.2 Organize and Index Operations and Maintenance Materials

Prior to substantial completion of the Project, the CM shall compile manufacturers' operations and maintenance manuals, warranties and guarantees and bind such documents in an organized manner. A minimum of three (3) copies of this information shall then be provided to the Owner.

##### 3.6.1.3 Occupancy Permit

The CM shall be responsible for obtaining the final occupancy permit by accompanying governmental officials during inspections of the Project, preparing and submitting documentation to governmental agencies and coordinating final testing and other activities.

##### 3.6.1.4 Closeout Documents and Test Reports

The CM shall organize and provide the Owner all closeout documents and test reports that the contractors are required to provide for the Project.

##### 3.6.1.5 Owner Training

The CM shall coordinate or provide all training of the Owner's personnel required by the contract documents.

### 3.6.2 Time Management

3.6.2.1 Occupancy Plan the CM shall prepare an Occupancy Plan for the Project. This plan shall be provided to the Owner. The plan shall include early access, training on the use of equipment and systems, delivery of furniture and any other activities requested by the Owner. The plan shall comply with all deadlines provided by the Owner.

### 3.6.3 Cost Management

#### 3.6.3.1 Change Orders

The CM shall continue to provide services related to change orders as specified in Paragraph 3.5.3.3.

### 3.6.4 Management Information System (MIS)

#### 3.6.4.1 Closeout Reports

At the conclusion of the Project, the CM shall prepare final Project accounting and closeout reports.

#### 3.6.4.2 Reports for Move-in and Occupancy

The CM shall prepare and distribute reports associated with the Occupancy Plan.

### 3.7 Additional Services

3.7.1 At the request of the Owner, the CM shall perform the following Additional Services and shall be compensated for same as provided in Article 7 of this Agreement, unless the need for the service is due to the CM's actions or inactions on the Project, and regardless Paragraphs 3.7.1.2, 3.7.1.7, 3.7.1.8, 3.7.1.10, 3.7.1.12, 3.7.1.15, 3.7.1.16 and 3.7.1.17 shall be provided as part of the basic services. The CM shall perform Additional Services only after the Owner and CM have executed a written change order to this Agreement providing for such services. Additional Services may include:

3.7.1.1 Services related to investigation, appraisal, or evaluation of existing conditions, facilities, or equipment or determination of the accuracy of existing drawings or other information furnished by the Owner that are not required to be performed by the CM in the basic services;

3.7.1.2 Services related to procurement, storage, maintenance and installation of Owner-furnished equipment, materials, supplies and furnishings;

3.7.1.3 Services related to determination of space needs;

3.7.1.4 Preparation of space programs;

3.7.1.5 Services related to building site investigations and analyses that are not required to be performed by the CM in the basic services;

3.7.1.6 Services for tenant or rental spaces;

3.7.1.7 Preparation of a Project financial feasibility study;

3.7.1.8 Preparation of financial, accounting or MIS reports not provided under Basic Services;

3.7.1.9 Performance of technical inspection or testing;

3.7.1.10 Preparation of an Operations and Maintenance Manual for all materials and equipment reasonably required for the Owner's use of the Project;

3.7.1.11 Services related to recruiting and training of maintenance personnel;

3.7.1.12 Performance of warranty inspections and correction of warranty items during the warranty period of the Project;

3.7.1.13 Services related to interfacing or working with the Design Consultant or other consultants that are beyond the scope of this Agreement;

3.7.1.14 Consultation regarding replacement of work damaged by fire or other cause during construction and furnishing services in connection with the replacement of such work;

3.7.1.15 Preparation for and serving as a witness regarding the CM's observations on the Project in connection with any public or private hearing or arbitration mediation or legal proceeding;

3.7.1.16 Assisting the Owner in public relations activities and preparing information for and attending public meetings; and

3.7.1.17 Services related to move-in, including preparing and soliciting responses to requests for proposals, preparing and coordinating the execution of contracts, conducting pre-moving conferences, administering the contract for moving activities in conjunction with the move-in for the Project and providing on-site personnel to oversee the relocation of furniture and equipment by the movers while actual move-in is in progress.

### 3.8 Warranty

3.8.1 The CM warrants to the Owner and the Design Consultant that all materials and equipment furnished under this Agreement will be new unless otherwise specified, and that all workmanship will be in accordance with generally accepted industry standards, free from faults and defects and in conformance with the contract documents and all other warranties and guarantees specified therein. Where no standard is specified for such workmanship or materials, they shall be the best of their respective kinds. All work not conforming to these requirements, including substitutions not properly approved and authorized, may be considered defective. If required by the Owner or the Design Consultant, the CM shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

3.8.2 The CM will be required to complete the work specified and to provide all items needed for construction of the Project, complete and in good order.

3.8.3 The warranties set forth in this section and elsewhere in the contract documents shall survive final completion of the work.

3.8.4 The CM guarantees and warrants to the Owner all work as follows:

- .1 that all materials and equipment furnished under this Agreement will be new and the best of its respective kind unless otherwise specified;
- .2 that all work will be in accordance with generally accepted industry standards and free of omissions and faulty, poor quality, imperfect and defective material or workmanship;
- .3 that the work shall be entirely watertight and leak proof in accordance with all applicable industry customs and practices, and shall be free of shrinkage and settlement;

- .4 that the work, including but not limited to, mechanical and electrical machines, devices and equipment, shall be fit and fully usable for its intended and specified purpose and shall operate satisfactorily with ordinary care;
- .5 that consistent with requirements of the contract documents, the work shall be installed and oriented in such a manner as to facilitate unrestricted access for the operation and maintenance of fixed equipment;
- .6 that the work will be free of abnormal or unusual deterioration which occurs because of poor quality materials, workmanship or unsuitable storage; and
- .7 that the products or materials incorporated in the work will not contain asbestos.

3.8.5 All work not conforming to guarantees and warranties specified in the contract documents, including substitutions not properly approved and authorized, may be considered defective. If required by the Design Consultant or Owner, the CM shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

3.8.5.1 The CM will submit a written affidavit certifying that none of the materials incorporated in the Project contain asbestos.

3.8.6 If, within one (1) year after the date of substantial completion of the work or designated portion thereof or within such longer period of time as may be prescribed by law or by the terms of any applicable special warranty required by the contract documents, any of the work is found to be defective, not in accordance with the contract documents, or not in accordance with the guarantees and warranties specified in the contract documents, the CM shall correct it within five (5) working days or such other period as mutually agreed, after receipt of notice from the Owner to do so. The Owner shall give such notice with reasonable promptness after discovery of the condition. For items that remain incomplete or uncorrected on the date of substantial completion, the one (1) year warranty shall begin on the date of final completion of the work or upon correction of the defective work.

3.8.7 If at any time deficiencies in the work are discovered which are found to have resulted from fraud or misrepresentation, or an intent or attempt to or conspiracy to defraud the Owner by the CM, any contractor or supplier, the CM will be liable for replacement or correction of such work and any damages which Owner has incurred related thereto, regardless of the time limit of any guarantee or warranty.

3.8.8 Any materials or other portions of the work, installed, furnished or stored on site which are not of the character or quality required by the specifications, or are otherwise not acceptable to the Design Consultant or the Owner, shall be immediately removed and replaced by the CM to the satisfaction of the Design Consultant and Owner, when notified to do so by the Design Consultant or Owner.

3.8.9 If the CM fails to correct defective or non conforming work as required, or if the CM fails to remove defective or non conforming work from the site, the Owner may elect to either correct such work or remove and store materials and equipment at the expense of the CM. If the CM does not pay the cost of such removal and storage within ten (10) days thereafter, the Owner may upon ten (10) additional days written notice, 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 the CM, including compensation for the Design Consultant's additional services and Owner's reasonable attorney's fees made necessary thereby. If such proceeds of sale do not cover all costs, which the CM should have borne, the difference shall be charged to the CM and an appropriate change order shall be issued. If the payments then or thereafter due the CM are not sufficient to cover such amount, the CM shall pay the difference to the Owner.

3.8.10 The CM shall bear the cost of making good all of the work of the Owner, separate contractors or others, destroyed or damaged by such correction or removal required under this section or elsewhere in the contract documents.

**ARTICLE 4**  
**DURATION OF THE CONSTRUCTION MANAGER'S SERVICES**

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4.1 The duration of the CM's Basic services under this Agreement shall be from the date of this Agreement through the issuance of final payment. The CM shall provide any warranty phase services at no additional cost to the Owner.

4.1.1 The commencement date for the CM's Basic Services shall be the date of execution of this Agreement by the Owner as stated herein or the date on which the Owner issues to the CM a written instruction to proceed with Basic Services, whichever is earlier.

4.1.2 The CM's Basic Services shall be performed for the periods of time indicated in this Agreement. If portions of design and construction occur simultaneously, some of the phase durations may overlap.

4.1.2.1 The CM's Basic Services during the Pre-Design Phase shall be performed as required during the pre-design phase.

4.1.2.2 The CM's Basic Services during the Design Phase shall be performed as required during the design phase.

4.1.2.3 The CM's Basic Services during the Procurement Phase shall be performed as required during the procurement phase.

4.1.2.4 The CM's Basic Services during the Construction Phase shall be performed as required during the construction phase.

4.1.3 The CM's Basic Services during the Post-Construction Phase shall be performed as required during the post-construction phase.

4.1.4. The CM shall achieve substantial completion of the Project on or before **F10**, unless the Owner and CM agree to a different date in writing. The date for final completion shall be thirty (30) days after substantial completion.

4.2 Delays and Extensions of Time

4.2.1 The time during which the CM or any of the contractors is delayed in the performance of the work by the issuance of any required permits, acts of god, excessive inclement weather, fires, floods, epidemics, quarantine restrictions, strikes, riots, civil commotions or freight embargoes, or other conditions beyond the CM's or the contractors' control and which the CM or the contractors could not reasonably have foreseen and provided against, except for delays caused solely by the Owner, Design Consultant or their consultants, shall be added to the time for completion of the work stated in the Agreement. Neither the Owner nor the Design Consultant shall be obligated or liable to the CM or the contractors for indirect or direct damages, costs or expenses of any nature which the CM, the contractors, or any other person may incur as a result of any of the delays, interferences, or changes in sequence in the work included in this section 4.2.1. The CM hereby expressly waives any claims against the Owner and the Design Consultant on account of any indirect or direct damages, lost profits, costs or expenses of any nature which the CM, the contractors or any other person may incur as a result of any delays, interferences, changes in sequence or the like, and it is understood and agreed that the CM's sole and exclusive remedy in any such events shall be an extension of the contract time in accordance with the contract documents

4.2.2 In the event Project delays arise from or out of any act or omission of the Owner, Design Consultant or their consultants, the time during which the Project is delayed shall be added to the Agreement and the

CM may be reimbursed for its direct Project damages, excluding general overhead expenses and indirect costs, if the CM strictly complies with this Article 4.2. Notwithstanding the previous sentence, if the CM, a contractor and/or subcontractor in any way shares in responsibility for the delay, neither the Owner nor the Design Consultant shall be obligated or liable to the CM or the contractors for indirect or direct damages, costs or expenses of any nature which the CM, the contractors, or any other person may incur as a result of any of the delays, interferences, changes in sequence of the work, and the CM's sole remedy, if any, shall be an extension of the contract time.

4.2.3 In the event Project delays arise solely from or out of any act or omission of the CM, contractors, subcontractors or their agents, the CM shall not be entitled to extension of the contract time and shall be subject to the payment of liquidated damages as provided in this Agreement.

4.2.4 The contract time shall be adjusted only for changes authorized pursuant to this Agreement, suspension or the work by the Owner, and excusable delays pursuant to section 4.2.4.2. In the event the CM requests an extension of the contract time or files a claim related to any form of delay, it shall furnish such justification and supporting evidence as the Owner may deem necessary for a determination of whether or not the CM is entitled to an extension of time under the provisions of the contract, and shall further outline the alleged impact on the schedule's critical path. The burden of proof to substantiate a claim shall rest with the CM, including evidence that the cause was beyond its control. The Owner shall base its findings of fact and decision on such justification and supporting evidence, including a finding that the alleged delay impacted the Project's critical path, and shall advise the CM in writing thereof. If the Owner finds that the CM is entitled to any extension of the contract time, the Owner's determination of the total number of days extension shall be based upon the currently approved progress schedule and on all data relevant to the extension. Such data will be incorporated into the schedule in the form of a revision thereto, accomplished in a timely manner. The CM acknowledges and agrees that actual delays (due to said changes, suspension of work or excusable delays) in activities which, according to the schedule, do not affect the contract time, do not have any effect upon the contract time and therefore will not be the basis for a change therein. The CM acknowledges and agrees that time extensions will be granted only to the extent that excusable delays exceed the available float in the critical path activities in the currently approved schedule.

4.2.4.1 Extensions in the contract time by change orders are subject to extension-in-time audit by the Owner as follows:

4.2.4.1.1 The CM agrees that, even though the Owner, CM and Design Consultant have previously signed a change order containing an extension-in-time resulting from a change in or addition to the work that said extension in the contract time may be adjusted by an audit after the fact by the Owner. If such an audit is to be made, the Owner must undertake the audit and make a ruling within 30 days after the completion of the work under the change order.

4.2.4.1.2 The CM agrees that any extension of the contract time to which it is entitled arising out of a change order undertaken on a force accounting (labor and materials) basis, shall be determined by an extension-in-time audit by the Owner after the work of the change order is completed. Such rulings shall be made by the Owner within 30 days after a request for same is made by the CM or Design Consultant, except said 30 days will not start until the work under the change order is completed.

4.2.4.1.3 Should a time extension be granted for substantial completion the date for final completion shall be appropriately adjusted unless specifically stated otherwise.

4.2.4.2 Subject to other provisions of the contract, the CM may be entitled to an extension of the contract time (but no increase in the GMP) for delays arising from unforeseeable causes beyond the control and without the fault or negligence of the CM, the contractors or suppliers as follows:

4.2.4.2.1 Labor disputes and strikes (including strikes affecting transportation), that do, in fact, directly delay the progress of the work on the critical path; however, an extension of contract time on account of an individual labor strike shall not exceed the number of days of said strike;

4.2.4.2.2 Acts of god: tornado, fire, hurricane, blizzard, earthquake, or flood that damage completed work or stored materials and affecting the critical path;

4.2.4.2.3 Excessive inclement weather; however, the contract time will not be extended due to reasonably anticipated inclement weather or for delays in the aftermath of inclement weather, reasonably anticipated or excessive. The time for performance of this contract, as stated in this Agreement, includes an allowance for calendar days which may not be available for construction out-of-doors; for the purposes of this contract, the CM agrees that the number of calendar days per month stated below are to be considered reasonably anticipated inclement weather and planned for in the construction schedule. Unless the CM can substantiate to the satisfaction of the Owner that there was greater than the reasonably anticipated inclement weather considering the time from the notice-to-proceed until the building is enclosed using data from the national weather service station at Raleigh Durham Airport (RDU) or a weather station acceptable to the Owner and that such alleged greater than reasonably anticipated inclement weather actually delayed the work or portions thereof which had an effect upon the contract time, the CM shall not be entitled to an extension of time.

For the purpose of this contract, the CM agrees to anticipate and plan for inclement weather for the number of calendar days in accordance with the following table:

Planned Days/Month	
Jan	8
Feb	8
Mar	8
Apr	7
May	8
Jun	8
Jul	10
Aug	9
Sep	8
Oct	6
Nov	7
Dec	8

Also the CM agrees that the calculation of the number of excessive inclement weather days shall be the number of days in excess of those shown for each month in the table above, in which precipitation exceeded .10 inch, or in which the highest temperature was 32 degrees F. Or less as recorded at the approved weather station. Rain days from hurricanes not causing damage in Durham County shall be deemed inclement weather days.

If the total accumulated number of calendar days lost to excessive inclement weather, from the notice-to-proceed until the building is enclosed, exceeds the total accumulated number to be reasonably anticipated for the same period from the table above, time for completion will be extended by the number of calendar days needed to include the excess number of calendar days lost. No extension of time will be made for days due to excessive inclement weather occurring after the building is enclosed. For the purpose of this contract, the term "enclosed" is defined to mean when the building is sufficiently roofed and sealed, either temporarily or permanently, to permit the structure to be heated and the plastering and dry-wall trades to work. The Design Consultant shall determine when the structure is "enclosed". Upon the request of either party, the Design Consultant shall issue a letter certifying to the Owner, with a copy to the CM, stating the date the building became enclosed. No change in GMP will be authorized because of adjustment of contract time due to excessive inclement weather; and

4.2.4.2.4 Delays in the issuance of a required permit, acts of the public enemy, acts of the state, federal or local government in its sovereign capacity, and acts of another contractor in the performance of a contract with the Owner relating to the Project.



4.2.5 If the CM shall neglect, fail or refuse to complete the work within the time herein specified, or any proper extension thereof granted by the Owner, then the CM does hereby agree, as a part consideration for the awarding of this contract, to pay the Owner the amount specified in the contract, not as a penalty but as liquidated damages for such breach of contract as hereinafter set forth, for each and every calendar day that the CM shall be in default after the time stipulated in the contract for completing the work. The said amount is fixed and agreed upon by and between the CM and the Owner because of the impracticability and extreme difficulty of fixing and ascertaining the actual damages the Owner would in such event sustain, and said amount is agreed to be the amount of damages which the Owner would sustain and said amount shall be retained from time to time by the Owner from current periodical estimates.

4.2.6 The CM and the contractors shall not be entitled to and hereby expressly waive any extension of time resulting from any condition or cause unless said claim for extensions of time is made in writing to the Owner within ten (10) days of the first instance of delay for all delays, except excessive inclement weather which shall be made in writing to the Owner within forty-five (45) days after the date the structure is enclosed. Circumstances and activities leading to such claim shall be indicated or referenced in a daily field inspection report for the day(s) affected. In every such written claim, the CM shall provide the following information:

4.2.6.1 Nature of the delay;

4.2.6.2 Date (or anticipated date) of commencement of delay;

4.2.6.3 Activities on the progress schedule affected by the delay, and/or new activities created by the delay and their relationship with existing activities;

4.2.6.4 Identification of person(s) or organization(s) or event(s) responsible for the delay;

4.2.6.5 Anticipated extent of the delay; and

4.2.6.6 Recommended action to avoid or minimize the delay.

4.2.7 If no schedule or agreement is made stating the dates upon which written interpretations shall be furnished, then no claim for delay shall be allowed on account of failure to furnish such interpretations until twenty (20) days after request is made for them, and not then unless such claim is reasonable.

4.2.8 No claim by the CM for an extension of time for delays will be considered unless made in strict compliance with the requirements of this Article. All claims not filed in accordance with this Paragraph shall be waived by the CM.

## **ARTICLE 5**

### **CHANGES IN THE CONSTRUCTION MANAGER'S BASIC SERVICES AND ADDITIONAL COMPENSATION**

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#### **5.1 Changes - Preconstruction Basic Services**

5.1.1 The Owner, without invalidating this Agreement, may make changes in the CM's Basic Services specified in Paragraphs 3.2, 3.3 and 3.4 of this Agreement. The CM shall promptly notify the Owner of changes which increase or decrease the CM's compensation, the duration of the CM's Basic Services, or both.

#### **5.1.2 Additional Compensation and Extended Duration**

The CM shall be entitled to receive additional compensation and additional time when the scope of Paragraphs 3.2, 3.3 and 3.4 is increased or extended through no fault of the CM. If the scope of these Basic Services is increased or the duration of these Basic Services is extended or the duration of the Basic Services to be performed within a phase duration specified in Article 4 is extended, the CM shall be entitled

to receive additional compensation, and the duration of the Agreement shall be extended. A written request for additional compensation shall be given by the CM to the Owner within ten (10) days of the occurrence of the event giving rise to such request. The amount of additional compensation to be paid and the amount of extension of the duration of this Agreement shall be determined on the basis of the CM's cost, a customary and reasonable adjustment in the CM's fixed or lump sum fee consistent with the provisions of this Agreement, and a determination of the length of the extensions of the duration of this Agreement.

#### 5.1.3 Changes in the CM's Basic Services

Changes in the CM's Basic Services in Paragraphs 3.2, 3.3 and 3.4 and entitlement to additional compensation shall be made by a written change order to this Agreement executed by the Owner and the CM. The change order shall be executed by the Owner and CM prior to the CM performing the services required by the change order. The CM shall proceed to perform the services required by the change order only after receiving notice directing the CM to proceed. The CM shall not be entitled to compensation for work performed without a written change order.

#### 5.1.4 Payment of Additional Compensation

The CM shall submit invoices for additional compensation with its invoice for Basic Services and payment shall be made pursuant to the provisions of Article 7 of this Agreement.

### 5.2 Changes to the Work or Construction Phase Basic Services

The Owner may, at any time, by written order designated or indicated to be a change order, make any change or modification in the work or add to the work within the general scope of the contract, including, but not limited to changes: (1) in the specifications or drawings; (2) in the sequence, method or manner of performance of the work; (3) in the Owner-furnished facilities, equipment, materials, services or site; or (4) directing acceleration in the performance of the work.

The parties agree that notwithstanding any language to the contrary in Paragraphs 5.2.1 through 5.2.4, the CM's fee on any additional work and the fee reduction for any work or allowances removed from the scope of work shall be based on the same percentage fee specified in Paragraph 7.4.1, unless the CM performs the work with its own forces as allowed in this Agreement. The parties agree that Paragraphs 5.2.1.1 through 5.2.1.3 are intended to govern payment to the contractors and their subcontractors for performing work associated with a change, unless the CM performs the work with its own forces as allowed in this Agreement. If the CM performs the work with its own forces, the CM shall also be referred to by the term "contractor" in Paragraphs 5.2.1.1 through 5.2.1.3. The parties specifically agree that any adjustment to the amount that could be reimbursed for general conditions, if any, shall be negotiated in good faith between the parties based upon the additional work actually required to be performed by the CM as a result of the change.

#### 5.2.1 Owner Directed Changes to the Work Requiring an Increase in GMP

If the change in or addition to the work will result in an increase in the Guaranteed Maximum Price, the Owner shall have the right to require the performance thereof on a lump sum basis, a unit price basis or a time and material basis, all as hereinafter more particularly described (the right of the Owner as aforesaid shall apply with respect to each such change in the work).

5.2.1.1 If the Owner elects to have the change in the work performed on a lump sum basis, its election shall be based on a lump sum proposal which shall be submitted by the CM to the Owner within ten (10) days of the CM's receipt of a request therefor (but the Owner's request for a lump sum proposal shall not be deemed an election by the Owner to have the change in the work performed on a lump sum basis). The CM's proposal shall be itemized and segregated by labor and materials for the various components of the change in or addition to the work (no aggregate labor total will be acceptable) and shall be accompanied by signed proposals of any contractors who will perform any portion of the change in, or addition to, the work and of

any persons who will furnish materials or equipment for incorporation therein. The proposal shall also include the CM's estimate of the time required to perform said changes or additional work.

5.2.1.1.1 The portion of the proposal relating to labor, by the forces of any of the contractors, may include: reasonably anticipated gross wages of job site labor, including foremen, who will be directly involved in the change in the work (for such time as they will be so involved), plus premium costs of overtime time, if overtime is anticipated; a maximum labor burden of thirty nine percent (39%) of the actual cost of labor by any such contractor in connection with such labor; and up to fifteen percent (15%) of such anticipated gross wages, as overhead and profit for any such contractor, as applicable (said overhead and profit to include all extended general conditions and supervision, but it shall not include the labor burden).

5.2.1.1.2 The portion of the proposal relating to materials may include the reasonably anticipated direct costs to the contractor or to any of its subcontractors of materials to be purchased for incorporation in the change in the work, plus transportation and applicable sales and use taxes and up to fifteen percent (15%) of said direct material costs as overhead and profit for the contractor or any of its subcontractors (said overhead and profit to include all small tools), and may further include the contractor's and any of its subcontractor's reasonably anticipated rental costs in connection with the change in the work (either actual or discounted local published rates), plus up to eight percent (8%) thereof as overhead and profit for any of the contractors, as applicable (said overhead and profit to include all extended general conditions and supervision, except it shall not be applied to any sales tax paid for any purpose or shipping costs incurred by the contractor or any subcontractor). If any of the items included in the lump sum proposal are covered by unit prices contained in the contract documents, the Owner may, if it requires the change in the work to be performed on a lump sum basis, elect to use these unit prices in lieu of the similar items included in the lump sum proposal, in which event an appropriate deduction will be made in the lump sum amount prior to the application of any allowed overhead and profit percentages. No overhead and profit shall be applied to any unit prices.

5.2.1.1.3 The CM shall provide any documentation that may be requested by the Owner to support the change proposal including payroll records, insurance rates, material quotes or rental quotes. The CM shall also provide an itemized breakdown of all transportation and shipping costs, including receipts documenting the expenses.

5.2.1.1.4 The lump sum proposal may include up to eight percent (8%) of the amount which the contractor will pay to any of its subcontractors for the change in the work as a commission to the contractor. The change proposal form attached to this Agreement as Appendix D-1 shall be used to submit the change proposal to the Owner.

5.2.1.1.5 In the event that the CM fails to submit his proposal within the designated period, the Owner may order the CM to proceed with the change or addition to the work and the CM shall so proceed. The Owner shall unilaterally determine the reasonable cost and time to perform the work in question, which determination shall be final and binding upon the CM.

5.2.1.1.6 In the event that the parties are unable to agree as to the reasonable cost and time to perform the change in or addition to the work based upon the CM's proposal and the Owner does not elect to have the change in the work performed on a time and material basis, the Owner may choose to make a determination of the reasonable cost and time to perform the change in the work, based upon their own estimates, the CM's submission or a combination thereof, except for a change order initially establishing the GMP for the Project or initially establishing a partial GMP for a portion of the work included in the original Project scope. A change order shall be issued in this case for the amounts of cost and time determined by the Owner and shall become binding upon the CM unless the CM submits its protest in writing to the Owner within thirty (30) days of the issuance of the change order. Owner has the right to direct in writing the CM to perform the change in the work, which is the subject of such change order. Failure of the parties to reach agreement regarding the cost and time of the performing the change in the work and/or any pending protest, shall not relieve the CM from performing the change in the work promptly and expeditiously.

5.2.1.1.7 The Owner reserves the right to reject the CM's proposal for a change in the work and to elect to perform said work using a separate contractor. Under such circumstances, the CM shall coordinate the performance of the work.

5.2.1.2 If the Owner elects to have the change in the work performed on a time and material basis, the same shall be performed, by the forces of any of the contractors, at actual cost to the entity performing the change in the work. The change proposal form attached as Appendix D-2 shall be used to submit the initial change proposal to the Owner for approval to proceed. The CM shall maintain records to submit to the Owner such as daily time and material tickets, to include the identification number assigned to the change in the work, the location and description of the change in the work, the classification of labor employed (and names and employee numbers), the materials used, the equipment rented (not tools) and such other evidence of cost as the Owner may require. The Owner may require authentication of all time and material tickets and invoices by persons designated by the Owner for such purpose. The failure of the CM to secure any required authentication shall, if the Owner elects to treat it as such, constitute a waiver by the CM of any claim for the cost of that portion of the change in the work covered by a non-authenticated ticket or invoice; provided, however, that the authentication of any such ticket or invoice by the Owner shall not constitute an acknowledgment by the Owner that the items thereon were reasonably required for the change in the work.

The change proposal form attached as Appendix D-1 shall be used to submit the final change proposal to the Owner after the work is complete. The final change proposal shall document all costs and expenses. Appendix D-1 shall be filled out in accordance with the instructions in Paragraph 5.2.1.1, and its subparagraphs.

5.2.1.3 Changes in the work to be completed on a unit price basis shall be quantified by the Design Consultant or an independent third party and shall be completed at an all inclusive rate established in the bid proposal, unless a mutually agreed upon price is established by the Owner and CM. The unit prices include the cost of all materials, taxes, shipping and delivery charges, labor and labor burden, insurance, supervision, overhead and profit. Time to complete any work done on a unit price basis for quantities within the base bid allowance amount is included in the base bid. The unit price does not include bonds. Procedures for quantifying units of measure shall be proposed by the Design Consultant and agreed to by the CM and Owner prior to the commencement of the work to be completed on a unit base price. Work performed without such agreement in place shall be deemed to have been done at the sole risk and expense of the CM. Time for quantities exceeding the base bid allowance will be evaluated based on the effect of the change in the work on the critical path of the Project.

5.2.1.3.1 No overhead and profit will be paid by the Owner on account of a change in the work except as specifically provided in this section. Overhead and profit, as allowed in this section, shall be deemed to include all costs and expenses which the CM or any of the contractors may incur in the performance of a change in the work and which are not otherwise specifically recoverable by them pursuant to this section.

5.2.1.4 The Owner may direct in writing the CM to begin changes in the work prior to the issuance of a formal change order. The CM shall promptly perform the changes in the work directed by the Owner in a manner that shall result in minimum impact on the critical path.

## 5.2.2 CM Notice of Change

If the CM or any of the contractors asserts that any event or occurrence has caused a change in or addition to the work which change causes an increase or decrease in the GMP or the time required for the performance of any part of the work under the contract, including work not affected directly by the change, the CM shall, within ten (10) days of such event unless such event was not discovered in the exercise of reasonable diligence, in which event the ten (10) day notice period shall commence upon discovery or when the CM should have discovered such event, give the Owner written notice as herein required. Said notice shall include the instructions or circumstances that are the basis of the claim and the CM's best estimate of the cost and time involved.

If the CM intends to assert a claim under this section, he must, within ten (10) days after the furnishing of a written notice as outlined above, submit to the Owner a written statement setting forth the specific nature and anticipated cost of such claim, unless this period is extended by the Owner. The statement of claim hereunder may be included in the notice required above. The statement of claim shall include all direct, indirect and impact costs associated with the change, as well as the CM's estimate of the schedule impact of the change, if any. The CM and the contractors shall not be entitled to reimbursement or an increase in the GMP for any claims that are not filed in strict conformance with this section. The CM shall indemnify and hold the Owner harmless against any claims by the contractors that are waived because they are not filed in strict conformance with this section.

If the parties are unable to agree to the reasonable cost and time to perform the change, or are unable to agree as to whether a change occurred, the Owner shall make a unilateral determination as described in this section. The CM shall proceed with the work pursuant to the provisions of this section.

### 5.2.3 General Provisions Related to Changes

The CM shall not be entitled to any amount for indirect costs, damages or expenses of any nature, including, but not limited to, so-called "impact" costs, labor inefficiency, wage, material or other escalations beyond the prices upon which the proposal is based and to which the parties have agreed pursuant to the provisions of this section, and which the CM, the contractors or any other person may incur as a result of delays, interferences, suspensions, changes in sequence or the like, for whatever cause, whether reasonable or unreasonable, foreseeable or unforeseeable, or avoidable or unavoidable, arising from the performance of any and all changes in the work performed pursuant to this section, unless the delay is caused solely by the Owner or Design Consultant. It is understood and agreed that the CM's and the contractors' sole and exclusive remedy in such event shall be recovery of direct costs as compensable hereunder and an extension of the contract time, but only in accordance with the provisions of the contract documents. No claim by the CM hereunder shall be allowed if asserted after final payment for the construction or the Project under this Agreement. No claim relating to or flowing from a particular change shall be allowed after execution of the change order relating to that change or commencement of the change by the CM, except as specifically provided in this section.

If any dispute should arise between the parties with respect to an increase or decrease in the GMP or an expansion or contraction in the contract time as a result of a change in the work, the CM shall not suspend performance of a change in the work or the work itself unless otherwise so ordered by the Owner in writing. The Owner shall, however, pay to the CM up to the Owner's reasonable estimated value of the change in the work, regardless of the dispute, if said change in the work results in an increase in the contract sum; and the Owner shall have the right to decrease the contract sum up to the Owner's reasonable estimated value of the change in the work, regardless of the dispute, if said change in the work results in a decrease in the contract sum. The CM's acceptance of payment following a unilateral decision by the Owner shall not constitute a waiver of any claim the CM may have for additional compensation or time. However, any claim the CM may have shall be filed in strict conformance with the contract documents.

5.2.4.1 If the change in the work will result in a decrease in the contract sum, the CM shall provide a quotation detailing the proposed amount of such decrease. The portion of the proposal relating to labor, whether by the CM's forces or the forces of any of the contractors, shall include reasonably anticipated gross wages of job site labor, including foremen, who would have been directly involved in the work that has been deleted from the contract (for such time as they would have been so involved), plus payroll costs (including premium costs of overtime time, if overtime was anticipated, social security, federal or state unemployment insurance taxes and fringe benefits required by collective bargaining Agreements entered into by the contractor or any subcontractor in connection with such labor) and seven percent (7%) of such anticipated gross wages, but not payroll costs, as overhead and profit not incurred or earned by the contractor or any subcontractor, as applicable (said overhead and profit to include all supervision except foremen). If applicable, the fee percentage to be applied to the CM's forces shall be the percentage stated in section 7.4.1.

5.2.4.2 The portion of the proposal relating to materials shall include the reasonably anticipated direct costs which would have been incurred by the contractor or to any subcontractors for materials which would have been purchased or incorporation in the work but which has been deleted from the contract, plus transportation and applicable sales and use taxes which will be avoided, and seven percent (7%) of said direct material costs incurred by the contractor or subcontractor (excluding transportation and sales and use taxes) as overhead and profit not incurred or earned by the contractor or any subcontractor (said overhead and profit to include all small tools), and shall further include the contractor's and subcontractor's reasonably anticipated rental costs which will be avoided (either actual or discounted local published rates), plus five percent (5%) thereof as overhead and profit not incurred or earned by the contractor or subcontractor, as applicable. If any of the items included in the lump sum proposal are covered by unit prices contained in the contract documents, the Owner may elect to use these unit prices in determining the amount of reduction to the GMP as a result of a deletion of work from the contract. No overhead and profit shall be applied to any unit prices for purposes of calculation such reduction in the contract sum. The lump sum proposal for work which would have been performed by any subcontractors shall include four percent (4%) of that amount as an estimate of the contractor's overhead and profit that will not be earned by contractor due to the decrease in the contract sum. In the event the construction work would have been performed by the CM in the limited circumstances allowed in this contract, the fee percentages stated in this section shall apply to the work that would have been performed by the CM as the contractor and its subcontractors.

5.2.4.3 The CM's quotation shall be forwarded to the Owner within ten (10) days of the Owner's request and, if acceptable to the Owner, shall be incorporated in a change order. If not acceptable, the parties shall make every reasonable effort to agree as to the amount of such decrease, which may be based on a lump sum properly itemized, on unit prices stated in the contract documents and/or on such other basis as the parties may mutually determine. If the parties are unable to so agree, the amount of such decrease shall be the total of the estimated reduction in actual cost of the work, as determined by the Owner in its reasonable judgment, plus overhead and profit as stated above the CM's acceptance of payment following a unilateral decision by the Owner shall not constitute a waiver of any claim the CM may have for additional compensation. However, any claim the CM may have shall be filed in strict conformance with the contract documents.

#### 5.2.5. Minor Changes in the Work

The Owner shall have authority to order minor changes in the work not involving an adjustment in the contract sum or an extension of the contract time and not inconsistent with the intent of the contract documents. Such changes shall be effected by written order, and shall be binding on the Owner and the CM. The CM shall carry out such written orders promptly.

The CM shall not perform any changes in the work unless authorized in writing by the Design Consultant or Owner. The CM's performance of minor changes pursuant to this Section shall not constitute a waiver of any claim the CM may have for additional compensation or time. However, any claim the CM may have shall be filed in strict conformance with the contract documents.

#### 5.2.6 Differing Site Conditions

Should the CM encounter subsurface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications or differing materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in this contract, he shall immediately give notice to the Owner of such conditions before they are disturbed. The Owner and the Design Consultant shall thereupon promptly investigate the conditions and if they find that they materially differ from those shown on the drawings or indicated in the specifications, they shall at once make such changes in the drawings and/or specifications as they may find necessary. Any increase or decrease of cost resulting from such changes shall be adjusted in the manner provided herein for adjustments as to extra and/or additional work and changes. However, neither the Owner nor the Design Consultant shall be liable or responsible for additional work, costs or changes to the work that could have been reasonably determined from any geotechnical, soils and other reports, surveys and analyses made available for the CM's review or that could of been discovered by the CM through the performance of its obligations pursuant to this Agreement.

5.3 General Provisions Regarding Changes in Contractor Work. In the event the work included in the original contract issued to a contractor is changed, or new contracts are issued, the CM shall notify the Owner of the change or the new contract, including the nature and reason for the change or new contract and the associated cost. Regardless of whether the change or new contract is believed to result in an increase or decrease in the GMP. The Owner and CM shall review all changes or new contracts that were not incorporated into a change order between the Owner and CM or resulted in the use of either of the CM's contingencies at the conclusion of the Project in order to determine whether the Owner is entitled to a reduction in the cost of work portion of the GMP as it is defined in Paragraph 7.4.1.

## **ARTICLE 6**

### **OWNER'S RESPONSIBILITIES**

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6.1 The Owner shall provide to the CM complete information regarding the Owner's requirements for the Project.

6.2 The Owner shall examine information submitted by the CM and shall render decisions thereto promptly.

6.3 The Owner shall contract with a Design Consultant to furnish design counseling services as may be necessary for the Project.

6.4 The Owner shall furnish insurance for the Project only as specified in Article 8.

6.5 If the Owner observes or otherwise becomes aware of any fault or defect in the Project or nonconformity with the Contract Documents, the Owner shall give prompt written notice thereof to the CM.

6.6 The Owner shall furnish required information and approvals and perform its responsibilities and activities in a timely manner to facilitate orderly progress of the Work in cooperation with the CM, consistent with this Agreement, and in accordance with the planning and scheduling requirements and budgetary restraints of the Project as determined by the CM.

6.7 The Owner shall retain a Design Consultant whose services, duties and responsibilities shall be described in a written Agreement between the Owner and Design Consultant. The services, duties, and responsibilities of the Design Consultant set out in the agreement between the Owner and Design Consultant shall be compatible and consistent with this Agreement and the Contract Documents. The Owner shall, in its agreement with the Design Consultant, require that the Design Consultant perform its services in cooperation with the CM, consistent with this Agreement and in accordance with the planning, scheduling and budgetary requirements of the Project as determined by the Owner and documented by the CM.

6.8 The Owner shall approve the Project and Construction Budget and any subsequent revisions as provided in Paragraph 3.2.3.2 of this Agreement.

6.9 If the Owner contracts separately with any other parties, the Owner shall cause all such Agreements to be compatible and consistent with this Agreement.

6.10 At the request of the CM, sufficient copies of interim and bidding drawings, specifications and contract documents shall be furnished to or printed by the CM at the Owner's expense. The CM shall be solely responsible for the cost of any drawings, specifications and contract documents required after bidding the Project.

6.11 The Owner or Design Consultant shall in a timely manner secure, submit and pay for necessary approvals, easements, assessments, permits and charges required for the construction, use or occupancy of permanent structures, or for permanent changes in existing facilities.

6.12 The Owner shall furnish evidence satisfactory to the CM that sufficient funds are available and committed for the entire cost of the Project. The Owner may authorize the CM to proceed with the work on the Project in discrete phases if all of the funds required for the entire Project are not identified at the time this Agreement is executed by the parties.

6.13 The Owner, its representatives and consultants, including Design Consultants, shall endeavor to communicate with the Contractors only through the CM.

6.14 The Owner shall send to the CM and shall require the Design Consultant to send the CM copies of all notices and communications sent to or received by the Owner or Design Consultant relating to the Project.

6.15 The Owner shall designate, in writing, an officer, employee or other authorized representatives to act in the Owner's behalf with respect to the Project. This representative shall be available during working hours and as often as may be required to render decisions and furnish information so as not to delay the Project. The CM acknowledges that some changes in the scope of the Project may require approval by the Board of Education. The CM shall notify the Owner in writing of any deadlines for responses and how the Owner's failure to respond by the stated deadline will impact the Project schedule.

6.16 The Owner shall make payments to the CM on the basis of the Contractors' payment applications that are certified by the CM and on the basis of the CM's invoices for its services performed. Prior to payment by the Owner, the Design Consultant shall review and approve the contractors' pay applications in accordance with Paragraphs 3.5.3.5 and 3.5.3.6.

## **ARTICLE 7**

### **COMPENSATION FOR CM SERVICES AND PAYMENT**

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#### **7.1 Guaranteed Maximum Price**

7.1.1 The Owner and CM agree that the Guaranteed Maximum Price shall be F11 dollars (\$ F12) for this Project. The parties further agree that in the event the bids received by the CM for the work, including all of the alternates accepted by the Owner, pursuant to Article 3.4 of this Agreement exceed the line item in the GMP for the cost of the work, the CM shall be solely responsible for the additional cost of the work, unless this Agreement is terminated by the CM pursuant to Paragraph 7.1.1.1. In the event that the bids received by the CM for the work, including all alternatives accepted by the Owner, are less than the line item in the GMP for the cost of the work, the remaining funds shall be added to the Owner's contingency. The scope of work included in the bid documents, including any alternates accepted by the Owner, shall form the basis of the work to be performed by the CM. The CM and Owner agree that the line items in the GMP shall consist of the cost of the work, CM's contingency, and general conditions, CM's fee. The CM and Owner further agree that the dollar values for the line items in the GMP stated above consist of the:

Cost of Work	\$ <u>F13</u>
CM construction contingency	\$ <u>F14</u>
General Conditions	\$ <u>F15</u>
CM's fee for preconstruction services	\$ <u>F16</u>
Construction and post-construction services	\$ <u>F17</u>

7.1.1.1 The parties agree that in the event the bids received by the CM for the work, including all of the alternates accepted by the Owner, pursuant to Article 3.4 of this Agreement exceed the line item in the GMP for the cost of the work, then the CM shall have the right to terminate this Agreement. The CM shall provide the Owner with notice of intent to terminate pursuant to this provision within fifteen (15) days of the CM's receipt of bids for the Project. Prior to a termination pursuant to this provision becoming effective, the Owner and CM will review the list of alternates, other modifications or value engineering requests in order to determine whether an Agreement can be reached between the Owner and CM regarding a modified scope of



work or an adjustment to the GMP. In the event an Agreement regarding the modified scope of the work and/or a revision to the GMP cannot be reached within fifteen (15) days of the Owner's receipt of notice of intent to terminate pursuant to this section, then the termination shall become immediately effective.

7.1.1.2 The parties specifically agree that none of the provisions in Article 10 shall apply to any termination of this Agreement pursuant to section 7.1.1.1, but the CM shall be entitled to payment for work actually performed through the procurement phase (section 3.4) pursuant to the compensation set forth in Paragraph 7.4.1; however, CM shall not be compensated for any services provided after the date of termination. In the event a modified scope of work and/or a revision to the GMP is agreed upon by the parties, the modified scope shall form the basis of the work to be performed by the CM for the established GMP. The CM construction contingency, general conditions, and/or CM's fee for construction may be reduced by mutual consent of both parties in order to provide funding for the Project. The CM and Owner shall document any changes to the GMP, scope of work, cost of the work, general conditions, CM fee, or CM contingency prior to the Owner issuing notice to proceed with the work. Any reduction in the cost of the work as a result of a modification of the Project scope shall be added to the Owner's contingency

7.1.1.3 In the event the Owner does not request the CM to establish a Guaranteed Maximum Price or does not accept the CM's Guaranteed Maximum Price, but chooses to proceed with the Project, then all provisions of this Agreement regarding the Guaranteed Maximum Price and adjustments thereto shall become null and void. In the event this Agreement is terminated pursuant to this provision, the CM shall only be entitled to receive compensation for services as outlined in Article 10. All other provisions of this Agreement shall remain in full force and effect, with all Project costs being reimbursed to the CM by the Owner in accordance with this Agreement without the limitations imposed by Paragraph 12.1.5 thereof.

7.1.1.4. In the event that the Guaranteed Maximum Price is accepted by the Owner, a change order shall be completed and executed by both parties to this Agreement and the CM shall become responsible for the means, methods, sequences, and procedures used in the construction of the Project and shall proceed with the CM's basic services.

7.1.1.5 Construction contracts for the Work required for the Project shall be between the CM and Contractors. The CM shall request and receive bids for each contract and shall solicit and award the contracts in accordance with N.C. Gen. Stat. § 128.1, 143-128.2 to -128.4 and 143-135.8. The contractor and CM shall comply in all respects with the Owner's MBE policies, rules and regulations. The CM shall enter into contracts with the lowest responsible and responsive bidders within sixty (60) days after notice of approval of the GMP by the Owner; however, the CM shall not be entitled to additional time to complete the Project due to any delay in entering into contracts with a bidder unless the delay is due solely to the actions or inactions of the Owner.

7.1.1.6 The CM may perform a portion of the work only if (1) bidding produces no responsible, responsive bidder for that portion of the work, the lowest, responsive, responsible bidder will not execute a contract for the bid portion of the work, or a contractor defaults and a pre-qualified replacement cannot be obtained in a timely manner, and (2) the Owner approves of the CM's self-performing of the work. In the event the CM self-performs a portion of the work pursuant to either method noted above, it shall be paid for the direct cost of the work with no reimbursement for office overhead or for any other work otherwise included in the general conditions. The fee for the work will be at the same CM fee percentage stated in 7.4.1. This paragraph shall not govern compensation for work self-performed by the CM pursuant to Paragraph 5.2.

7.1.1.7 The Guaranteed Maximum Price is the total cost of the Project, as defined herein. The Guaranteed Maximum Price includes the cost of labor, equipment, supplies, materials, services and allowances to complete the Project. The cost data shall be directly correlated to the specific design drawings and specifications in existence at the time the Guaranteed Maximum Price is prepared. The assumptions used in the preparation of the Guaranteed Maximum Price shall be identified by the CM as part of the Guaranteed Maximum Price documentation, and incorporated into the change order establishing the GMP.

The GMP shall include the cost of the work, CM's general conditions, bonds/insurance, the CM's fee for construction and post-construction phase basic services. The GMP shall also include a CM construction

contingency fund. The CM construction contingency fund and the Owner's contingency fund shall only be utilized as outlined in Paragraphs 7.1.1.7.1, and 7.1.1.7.2. The CM's fee shall be paid pursuant to Section 7.4. The general conditions shall be reimbursed as described in 7.1.1.7.3.

7.1.1.7.1 Unless otherwise agreed in writing, the CM's construction contingency may be used by the CM to expedite the work, address scheduling and coordination problems, respond to a default by a non-bonded contractor, and repair damaged work in place where the responsible contractor cannot be identified by the CM after reasonable efforts to identify the responsible party. The CM's construction contingency may also be used by the CM to correct design issues that reasonably should have been discovered by the CM during the performance of its obligations pursuant to Paragraphs 3.3.1.5 and 3.3.1.6, correct scope gaps in the bidding of the Project, correct code, regulatory and other items identified by the Owner in writing prior to bidding the Project, correct items identified in change orders or request for information arising on previous uses of the same prototype design, and any issues that are the fault of the CM. The CM's use of the CM's construction contingency fund shall be documented in writing by the CM and approved by the Owner in writing prior to the CM billing for the work. The CM shall not be entitled to receive any fee for the use of the CM's contingency. In the event of a default by a contractor, the CM shall not use the CM's contingency to cover any costs covered by a performance or payment bond provided by the contractor or covered by a program paid for by the CM to insure the performance of the contractors. The CM shall vigorously pursue reimbursement of all expenses from the contractor's surety or through the program provided by the CM.

7.1.1.7.2 Unless otherwise agreed in writing, the Owner's contingency fund shall be used to correct any design issues that could not reasonably have been discovered by the CM during the performance of its obligations during the design and bidding phases, and any changes requested by the Owner. The use of the Owner's contingency fund shall be documented in writing by the CM and approved by the Owner in writing prior to the CM billing for the work.

7.1.1.7.3 The General Conditions shall be paid as a reimbursable expense in an amount that shall not exceed the amount included in the GMP. The Owner and CM agree that the items to be reimbursed as general conditions are indicated in Appendix E. The Owner reserves the right to take Ownership and possession of any equipment or other item purchased by the CM as part of general conditions at the conclusion of the Project. The CM shall be notified of the Owner's intent to take possession of any such items prior to final payment.

7.1.1.8 The Guaranteed Maximum Price shall include those taxes applicable to the Project. Any sales tax refunds paid to the Owner shall be exclusively for the Owner's use and shall not in any way reduce the cost of the Project or impact the Guaranteed Maximum Price.

7.1.1.9 The Owner may change the scope of the Project or a part thereof and the Guaranteed Maximum Price shall then be adjusted as provided in Paragraph 7.1.3.

7.1.1.10 In the event that the cost of the Project exceeds the Guaranteed Maximum Price and any adjustments therein (such as allowances, architectural errors, or Owner requested changes) as may be due pursuant to the terms hereof, the CM shall continue to perform at no additional cost to the Owner until the Project, defined by this Agreement and attachments hereto, is complete and achieves final completion. The CM shall be responsible for paying all costs and expenses, in accordance with the terms of this Agreement, that may be necessary to complete the Project, even if such amounts are in excess of the Guaranteed Maximum Price.

## 7.1.2 Cost of the Project

The term "cost of the Project" shall include all amounts paid by the Owner to the CM for construction and post-construction phase basic services provided by the CM in Paragraphs 3.5 and 3.6 and payment to all separate Contractors, suppliers and equipment lessors for all work, material, and equipment supplied to the Project including general conditions items.

7.1.2.1 The cost of the Project shall not include the following:

7.1.2.1.1 The CM's fee for Basic Services;

7.1.2.1.2 All professional fees paid by the Owner to the Design Consultant or other consultants retained directly by the Owner;

7.1.2.1.3 All costs paid directly by the Owner to contractors or suppliers retained directly by the Owner and outside the scope of the Guaranteed Maximum Price;

7.1.2.1.4 All Additional Services costs as defined herein; or

7.1.2.1.5 All other costs identified as being not within the Guaranteed Maximum Price.

7.1.2.2 The cost of the Project may be further defined in the change order identifying the scope of the work and the final Guaranteed Maximum Price. If the requirements of this Paragraph 7.1.2 and the documentation required by the change order establishing the Guaranteed Maximum Price differ, then the CM shall identify and explain the difference, but the documentation provided in accordance with change order establishing the final Guaranteed Maximum Price shall be the basis for determining the scope of the Guaranteed Maximum Price.

### 7.1.3 Adjustments to the Guaranteed Maximum Price

The CM understands, confirms and agrees that its responsibility hereunder is to construct the Project in accordance with the drawings and specifications. It is recognized that the Guaranteed Maximum Price may be determined based upon incomplete design documents and in those instances in which the drawings and specifications are not complete at the time the Guaranteed Maximum Price is established, the CM shall exercise reasonable care and judgment to determine the intent of the design and shall calculate the Guaranteed Maximum Price on the basis of the quality of construction, materials, and finishes that can be reasonably inferred from the design documents or other specified sources. The CM shall determine unit prices and the cost of the Project and shall make those assumptions regarding the Project scope and the quality of the intended construction as may be necessary to fully document the Guaranteed Maximum Price. The Owner and CM shall use the most recently approved Project scope in determining whether or not the scope of the Project or a part thereof has been changed and in determining entitlement to an adjustment to the Guaranteed Maximum Price. A determination regarding all requests for adjustment to the Guaranteed Maximum Price shall be made in writing within thirty (30) days from the date of a written request for an adjustment.

7.1.3.1 The amount of adjustment to increase or decrease the Guaranteed Maximum Price resulting from a change in the Project shall be determined in one or more of the following ways:

7.1.3.1.1 By mutual acceptance of a lump sum, properly itemized and supported by cost data; or

7.1.3.1.2 By unit prices defined and listed in the GMP documentation; or

7.1.3.1.3 If neither of the methods set forth in 7.1.3.1.1 or 7.1.3.1.2 is agreed upon by the Owner, the CM provided it receives a written order signed by the Owner, shall promptly proceed with the work involved. The cost of such work shall then be determined on a time and material basis pursuant to Article 5. Choice of this method shall not restrict the Owner or the CM from disputing the justification or right of the CM to an increase in the Guaranteed Maximum Price due to such work. In such case, the CM shall keep and present in such form as may be agreeable to the Owner an itemized accounting together with appropriate supporting data of the actual cost of the Project.

7.1.3.2 If the unit prices are stated and if the quantities originally contemplated by the CM are so changed in a proposed change order or as a result of several change orders that application of the agreed unit prices to the quantities or work proposed cause substantial inequity to the Owner or the CM, the applicable unit prices and Guaranteed Maximum Price shall be adjusted.

7.1.3.3 Should concealed or unknown physical conditions be encountered that differ materially from those identified in the drawings or specifications, the Guaranteed Maximum Price may be adjusted by change order in accordance with Paragraph 5.2.2.

7.1.3.4 The Design Consultant shall have the authority to order minor changes in the Project consistent with the intent of the drawings and specifications and not involving an adjustment in the Guaranteed Maximum Price or change of the construction completion date. Such changes may be affected by written order only and shall be signed by the Owner and the CM prior to the work being performed.

7.1.3.5 In the event that the bids for the construction of the Project are less than the line item(s) in the GMP for the construction of the Project, the GMP shall be reduced dollar for dollar to reflect the savings. The parties agree that any savings based upon the receipt of bids shall be retained solely by the Owner.

#### 7.1.4 Unused Funds

7.1.4.1 In the event that there are any funds remaining in any contingency, those funds shall be retained solely by the Owner.

7.1.4.2 In the event that all of the funds allocated for the CM's general conditions are not used, the Owner shall retain all of those funds.

7.1.4.3 In the event that there are unused allowances or other cost of work funds, all of those funds, plus the associated CM fee, shall be retained by the Owner.

7.1.4.4 In the event that the bids for the construction of the Project are less than the line item(s) in the GMP for the construction of the Project, the Owner's contingency shall be increased dollar for dollar to reflect the savings. The parties agree that any savings based upon the receipt of bids shall be retained solely by the Owner

#### 7.4 Lump Sum

The Owner shall compensate the CM for Basic Services on the basis of a Lump Sum in accordance with the terms and conditions of this Agreement as follows:

##### 7.4.1 Compensation for Basic Services

The CM shall be compensated for performing Basic Services described in the pre-design phase (Paragraph 3.2), design phase (Paragraph 3.3) and the procurement phase (Paragraph 3.4) for a total lump sum in the amount of F18 dollars (\$ F19) that shall be divided by the number of months scheduled for the basic services in Paragraphs 3.2, 3.3 and 3.4 and paid in equal monthly installments as the services are performed. The CM shall be compensated for performing basic services described in the construction phase (Paragraph 3.5) and post-construction phase (Paragraph 3.6) for a total lump sum in the amount of F20 dollars (\$ F21). In the event there are changes in the work that require an adjustment in the CM's construction/post-construction fee, the fee adjustment shall be based upon F22 % of the cost of the work added or deleted from the Project. The fee for these phases shall be paid in proportion to the percentage of the actual cost of the work paid by the Owner. The cost of the work as used in this section shall be the total dollar amount of the construction contracts awarded by the CM to contractors for the performance of the work, minus any unused allowances or other deductive change orders. The CM's contingency shall not be included in the calculation or payment of the CM's fee. Progress payments for the work performed by the contractors shall be paid as the work is performed and approved in accordance with this Agreement. The CM acknowledges that the Owner only has funds for the basic services in Paragraphs 3.2, 3.3, and 3.4 at the time this Agreement is being executed and that the CM is not authorized to perform any services in Paragraphs 3.5 and 3.6 or any other provisions of this Agreement without the express written permission of the Owner.

#### 7.4.2 Payments

Payments to the CM shall be made monthly, not later than forty-five (45) days after receipt of the CM's Invoice by the Owner.

7.4.2.2 Payments due to the CM that are unpaid for more than forty-five (45) days from the due date of the CM's invoice shall not bear interest from the due date.

#### 7.4.3 Compensation for Additional Services

The CM shall be compensated, and payments shall be made for performing Additional Services in an amount and on terms mutually agreeable between the Owner and CM.

#### 7.4.4 Auditing Rights

The CM shall keep all records and supporting documentation which concern or relate to the work, general conditions, or other monies paid hereunder for a minimum of three (3) years from the date of termination of this Agreement or the date the Project achieves final completion. The CM shall require all of its subcontractors to likewise retain all of their Project records and supporting documentation. The Owner, and any duly authorized agents or representatives of the Owner, shall be provided access to all such records and supporting documentation during normal business hours upon reasonable request by the Owner. Further, the Owner, and any duly authorized agents or representatives of the Owner, shall have the right to audit, inspect and copy all of the CM's and any contractor's Project records and documentation. The access, inspection, copying and auditing rights shall survive the termination of this Agreement.

#### 7.5 Adjustments to the CM's Compensation

The CM shall notify the Owner as specified in this Agreement when material changes to the scope of the Project or a part thereof or when delays caused in whole or in part by the Owner or Design Consultant are expected to increase or extend the Project's critical path or the scope or duration of the CM's services. If the change results in a delay to the Project's critical path or a material increase in the Project's scope, the CM shall be entitled to receive an increase in the duration of this Agreement and/or additional compensation for the change in accordance with this Agreement.

#### 7.6 Liquidated Damages

7.6.1 Should the CM fail to substantially complete the Project or phase on or before the date stipulated for substantial completion of the Project (or such later date as may result from extension of time granted by Owner), the CM shall pay or the Owner may retain from the funds otherwise to be paid to the CM the sum of \$ **F23** as substantial completion liquidated damages for each consecutive calendar day beyond the date established in this Agreement that Project fails to achieve substantial completion as defined in this Agreement, which sum is agreed upon as a reasonable and proper measure of damages which the Owner will sustain per day by failure of the CM to complete work within time as stipulated; it being recognized by the Owner and the CM that the injury to the Owner which could result from a failure of the CM to complete on schedule is uncertain and cannot be computed exactly. This amount is the minimum measure of damages the Owner will sustain due to delay in the completion of the work, which shall include but not be limited to the loss of use of the facilities, the relocation of students and services, the cost of Owner's time and resources, damage to Owner's reputation, and storage of furniture and other materials. The inability of the Owner to quantify actual damages shall not prevent the recovery of liquidated damages.

7.6.2 For each consecutive calendar day that the work remains incomplete after the date established for final completion of the Project, the CM shall pay or Owner will retain from the compensation otherwise to be paid to the CM the sum of \$ **F24** as final completion liquidated damages. This amount is agreed upon as a reasonable and proper measure of damages the Owner will sustain due to the delay in the completion of all remedial work, the delay in the correction of the deficient work, the disruption to the school and the learning environment, the cost of Owner's time and resources, damage to Owner's reputation, and the inability to use

the facilities fully. This amount is in addition to the liquidated damages prescribed above for substantial completion.

7.6.3 The amount of liquidated damages set forth in Paragraphs 7.6.1 and 7.6.2 hereinabove shall be assessed cumulatively. The items of cost included in the assessment of liquidated damages are defined above. This provision of liquidated damages does not bar Owner's right to enforce other rights and remedies against CM, including but not limited to, specific performance or injunctive relief. In no way shall costs for liquidated damages be construed as a penalty to the CM.

7.6.4 Notwithstanding any other provisions of the Agreement, if there is concurrent delay in the completion of the work, the CM shall be liable for liquidated damages as specified in this Agreement during such period of concurrent delay. For the purpose of this section 7.6, concurrent delay means (a) a delay event caused in part by the Owner or its agent and in part by the CM or its contractors, subcontractors, sub-subcontractors, or (b) one or more delay event caused solely by the Owner, its agents, or the Design Consultant, and one or more delay event caused in part by the CM, subcontractors, sub-subcontractors or agents, each of which would have resulted in a delay without the other and which delays run concurrently, or at the same time. In the event that the foregoing provision making the CM liable for liquidated damages during a period of concurrent delay is found to be unenforceable, then the parties agree that in the event of a concurrent delay, the extent of the delay will be apportioned between the Owner and the CM, and the CM will be responsible for liquidated damages as set forth in the section 7.6 for those portions of the delay which are apportioned to the CM, its subcontractors, sub-subcontractors, agents or material suppliers.

7.6.5 The amount of liquidated damages set forth in Paragraphs 7.6.1 and 7.6.2 hereinabove shall not include additional legal or design professional costs that may result from the CM's default. If such legal or design professional costs are incurred by the Owner, the CM shall be liable to the Owner for those costs in addition to the liquidated damages amount set forth hereinabove and in 7.7 Summary of Monetary Amounts.

7.7 The following summary is intended to provide a single location for all relevant monetary amounts included in this Agreement as of the date of execution of the Agreement. The following list shall take precedence over any inconsistencies in the amounts otherwise incorporated into this Agreement. The amounts in this Agreement shall only be revised by written agreement between the parties. The monetary amounts follow:

GMP	\$ F25
Cost of Work	\$ F26
CM Preconstruction Fee	\$ F27
CM Construction Fee	\$ F28
CM Construction Contingency	\$ F29
Owner Contingency	\$ F30
General Conditions	\$ F31
Liquidated Damages-Substantial	\$ F32 /Day
Liquidated Damages – Final	\$ F33 /day

## **ARTICLE 8**

### **INSURANCE AND MUTUAL INDEMNITY**

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#### **8.1 CM's Liability Insurance**

8.1.1 The CM shall purchase at their own expense and maintain in companies properly licensed by the department of insurance of the State of North Carolina and rated "a" or better by a.m. best company as will protect it, the Owner, the Design Consultant and their agents, representatives, and employees from claims as set forth below which may arise out of or result from the CM's operations under the Agreement, whether such

operations be by itself or by any contractor or subcontractor or by anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be legally liable:

8.1.1.1 Worker's compensation, including occupational disease and employer's liability insurance.

8.1.1.1.1 Statutory coverage as required by the State of North Carolina worker's compensation laws.

8.1.1.1.2 Employer's Liability - at least \$1,000,000 each accident, \$1,000,000 disease - each employee, \$1,000,000 disease - policy limit (or sufficient limits to meet the requirements of the umbrella insurance).

8.1.1.2 Commercial General Liability Insurance - the CM shall obtain and maintain during the life of this Agreement such commercial general liability insurance as shall protect it and any contractor or subcontractor performing work under this Agreement from claims for damages for bodily injury, including accidental death, as well as from claims for property damage which may arise either from the operations or from a contractor or subcontractor or by anyone directly or indirectly employed by them. The CM shall procure insurance coverage for direct operations, sublet work, elevators, contractual liability and completed operations with limits not less than those stated below:

8.1.1.2.1 Bodily Injury & Property Damage Liability: \$1,000,000 each occurrence

8.1.1.2.2 Personal Injury & Advertising Liability - \$1,000,000 each occurrence

8.1.1.2.3 General Aggregate - \$2,000,000

8.1.1.2.4 Products/completed operations aggregate - \$2,000,000

8.1.1.2.5 Aggregate limits shall be endorsed to apply on a 'per Project' basis as respects this Agreement.

8.1.1.2.6 Completed Operations Liability: continuous coverage shall be maintained in force for a period of six (6) years following the date of final completion of the work.

8.1.1.3 Business Automobile Liability Insurance, including coverage for owned, non-owned and hired vehicles (symbol 1) - with limits not less than those stated below:

8.1.1.3.1 Combined single limit for bodily injury & property damage \$1,000,000 each accident.

8.1.1.4 Excess/Umbrella Liability Insurance: policy to "pay on behalf of the insured"

Limits of liability: the following shall apply based upon the original Projected GMP:

GMP: < \$25,000,000	\$5,000,000
GMP: > \$25,000,000	\$10,000,000

Umbrella shall schedule as underlying coverage employer's liability, business auto liability, and commercial general liability at limits required in Section 8.1.1 above.

8.1.1.5 Required limits may be met in total by any combination of primary and excess/umbrella limits.

8.1.1.6 Contractor's Professional Liability

CM shall obtain and maintain in effect during the term of this Agreement contractor's professional liability in the minimum amount of \$2,000,000 each claim, \$2,000,000 policy aggregate. Coverage may be placed via combined contractor's professional and pollution liability policy or by separate policy. Continuous coverage shall be maintained in force for a period of six (6) years following the date of final completion of the work. CM is responsible for any applicable deductible.

8.1.1.7 Contractor's Pollution Liability

CM shall obtain and maintain in effect during the term of this Agreement a policy of pollution liability in the minimum amount of \$5,000,000 each claim, \$5,000,000 policy pollution policy aggregate. This coverage may be placed via combined contractor's professional and pollution liability policy, separate contractor's pollution liability policy or by use of the limited jobsite pollution liability endorsement to the commercial general liability policy. Continuous coverage shall be maintained in force for a period of six (6) years following the date of final completion of the work. CM is responsible for any applicable deductible.

8.1.1.8 If the Project includes any environmental abatement or remediation work (e.g. asbestos, mold, lead paint, or UST), the CM shall obtain and maintain in effect during the term of this Agreement policies for pollution liability covering this specific type of work, which policies shall protect the Owner and CM from claims in an amount not less than \$5,000,000 for each claim. Coverage may be procured directly by the CM or through policy placed on behalf of the environmental abatement subcontractor.

8.1.2 CM's business, auto, commercial general liability, builder's risk and excess/umbrella policies shall include an endorsement naming the Owner as additional insured. The additional insured endorsement for commercial liability shall specify coverage on a primary and non-contributory basis and included completed operations. All insurance policies shall be endorsed to provide for waiver of subrogation in favor of Owner. All insurance policies shall contain an endorsement providing the coverage afforded under the policies will not be canceled until at least thirty (30) days' prior written notice has been given to the Owner. Endorsements above may be provided on a Project specific or blanket basis as required by written contract.

8.1.3 Certificates of insurance acceptable to the Owner shall be filed with the Owner by the start date established in the master schedule and thereafter on renewal or replacement of each required policy of insurance. The certificate of insurance shall certify the existence of all required policies which satisfy the requirements listed in Section 8.1 above. The following language shall be typed into the section of the certificate of insurance labeled description of operations/locations/vehicles/special items: "policies certified on this certificate have been amended by specific or blanket endorsement to provide 30 days prior notice of cancellation to Owner." Updated certificates of insurance shall be maintained on file with Owner and by CM throughout the term of the work and for a period of six (6) years from the date of final completion of the work.

Notwithstanding any provision above, contractor shall provide at least five (5) business days direct prior notice to Owner of the cancellation, non-renewal (without replacement), or the material reduction of coverage or limits of any policy of insurance required by Section 8.1.1 above and for a term of six (6) years following the date of final completion of the work.

8.1.4 The CM shall not allow any contractor or subcontractor to commence work on its contract until all similar insurance required of the contractor or subcontractor has been so obtained and a certificate of insurance has been filed with the CM. CM shall determine and approve the excess/umbrella liability insurance requirements and the term for certification of completed operations liability (following the date of final completion) for all contractors and subcontractors. Approval of the insurance by the Owner shall not relieve or decrease the liability of the CM hereunder. Failure of the CM to provide all required certificates could delay the issuance of notice to proceed. Such delay shall not entitle the CM to an extension of any milestone or completion dates required by the master schedule.

## 8.2 Builder's Risk Insurance

8.2.1 The CM shall purchase and at all times maintain such insurance as will protect the CM, the Owner, the Owner's representatives, agents and employees, the Design Consultant, contractors and subcontractors from loss or damage to work or property in the course of construction, including all machinery, materials and supplies on the premises, in storage or in transit and intended to become a part of the finished work until final payment has been made or until no person or entity other than the Owner has an insurable interest in the property to be covered by this insurance, whichever is sooner. This insurance shall be in the form of "builder's risk" policy insuring "risks of direct physical loss except those as specifically excluded by the policy", or equivalent. The policy shall not exclude the perils of fire, lightning, explosion, windstorm, hail, smoke, aircraft, vehicles, vandalism, theft, malicious mischief, riot, debris removal, flood, water damage,



earthquake, earth movement, testing, architect's and engineering fees, mechanical or electrical breakdown, collapse however caused, and/or damage resulting from defective design, workmanship or material. Limits shall be written for the value of the GMP and insure the full cost of replacement at the time of loss. Sub-limits for flood or earthquake are subject to approval by Owner. The CM shall cause such policy or policies of insurance required under this subparagraph to be endorsed so as to provide that the insurer or insurers waive any right of subrogation against the Owner. Notwithstanding any deductible provision, the CM shall remain solely liable for the full replacement cost of any item covered by such insurance, including any applicable deductible or co-insurance penalty. Prior to commencement of work, CM shall provide to Owner a copy of the builder's risk policy obtained in compliance with Section 8.2.1.

8.2.2 All insurance companies providing the above insurance shall be properly licensed by the department of insurance of the State of North Carolina and rated "a" or better by a.m. best company.

8.2.3 Any loss insured under subparagraph 8.2.1 is to be adjusted with the Owner and made payable to the Owner as trustee for the insured, as their interests may appear, subject to the requirements of any applicable mortgagee clause and of subparagraph 8.2.5. The CM shall pay each contractor and/or subcontractor a just share of any insurance moneys received by the CM, and by appropriate agreement, written where legally required for validity, shall require each contractor or subcontractor to make payments in similar manner.

8.2.4 The Owner and CM waive all rights against each other for damages caused by fire or other perils to the extent covered by insurance obtained pursuant to this Paragraph 8.2, or any other property insurance applicable to the work, except such rights as they may have to the proceeds of such insurance held by the Owner as trustee. The CM shall require, by appropriate agreement, written where legally required for validity, similar waivers in favor of the Owner and the CM by contractors and subcontractors. With respect to the waiver of rights of recovery, the term Owner shall be deemed to include, to the extent covered by property insurance applicable thereto, its consultants, employees, and agents and representatives. The CM waives as against any separate contractor all rights for damages caused by fire or other perils in the same manner as is provided above as against the Owner. The Owner shall require, by appropriate agreement, written where legally required for validity, similar waivers in favor of the CM by any separate contractor and its subcontractors.

8.2.5 If required in writing by any party in interest, the Owner as trustee shall, upon the occurrence of an insured loss, give bond for the proper performance of its duties. It shall deposit in a separate account any money so received, and it shall distribute it in accordance with such agreement as the parties in interest may reach, or in accordance with a court order or award. If after such loss no other special agreement is made, replacement of damaged work shall be covered by an appropriate change order.

8.2.6 The Owner as trustee shall have power to adjust and settle any loss with the insurers unless one of the parties in interest shall object in writing within five (5) days after the occurrence of loss to the Owner's exercise of this power, and if such objection is made, the matter shall be decided by a court of competent jurisdiction or as the parties in interest otherwise agree. The Owner as trustee shall, in that case, make settlement with the insurers in accordance with the orders of the court or as otherwise agreed by the parties in interest.

8.2.7 If the Owner finds it necessary to occupy or use a portion or portions of the work prior to substantial completion thereof, such occupancy or use shall not commence prior to a time mutually agreed to by the Owner and CM and to which the insurance company or companies providing the property insurance have consented by endorsement to the policy or policies. This insurance shall not be canceled or lapsed on account of such partial occupancy or use. Consent of the CM and of the insurance company or companies to such occupancy or use shall not be unreasonably withheld.

### 8.3 Indemnity

8.3.1 To the fullest extent permitted by law, the CM shall, at its sole cost and expense, indemnify, defend, and hold harmless the Owner and Design Consultant and their agents, representatives, and employees from

and against all claims, actions, judgments, costs, liabilities, penalties, damages, losses and expenses, including but not limited to attorneys' fees, arising out of and/or resulting from the performance of the work by the CM, any contractor or subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be legally liable. The above obligation shall not be construed to negate, abridge, or otherwise reduce any other right or obligation of indemnity which would otherwise exist as to any party or person described in this Paragraph 8.3.1. The parties agree that this indemnification clause is an "evidence of indebtedness" for purpose of N.C. Gen. Stat. § 6-21.2. The parties also specifically acknowledge that the Owner is a public body and it is the intent of the parties that the Owner not incur any expenses when the contractor is solely responsible for the claims.

8.3.2 In any and all claims against the Owner or the Design Consultant or any of their agents, representatives, or employees by any employee of the CM, any contractor or 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 Paragraph 8.3.1 shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for the CM or any contractor or subcontractor from any of the insurance coverage required in Section 8.1 herein.

8.3.3 The Owner hereby indemnifies and holds harmless the CM and its employees, agents, and representatives from and against any and all claims, demands, suits and damages for bodily injury and property damage caused solely by the Owner that arise out of or result solely from breach of this Agreement or from negligent acts, errors or omissions of the Owner, and its employees.

8.3.4 The CM shall cause each contractor and subcontractor to indemnify and hold harmless the Owner, CM, and Design Consultant from and against any and all claims, demands, suits, damages resulting from bodily injury, personal injury, damage to tangible property (including loss of use), costs, and expenses and fees that are asserted against the Owner, CM, and the Design Consultant and that arise out of or result from negligent acts, errors or omissions or the breach of the construction contract by the contractor or subcontractor, its employees, agents, and representatives in performing the work.

#### 8.4 Performance and Payment Bonds

8.4.1 Within 10 days of the establishment of the final GMP via change order, the CM shall provide a performance bond and payment bond each in the amount of the GMP, minus the Owner's contingency if the Owner's contingency is included in the GMP. The amount of the performance and payment bonds may be adjusted if the Guaranteed Maximum Price is reduced after the bids are received.

8.4.2 All insurance companies providing the above bonds shall be properly licensed by the Department of Insurance of the State of North Carolina and rated "A" or better by a.m. best company. The bonds shall be in the form approved by the Owner and attached hereto as Appendix F.

### **ARTICLE 9 SUSPENSION**

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#### 9.2 Suspension

9.2.1 The Owner may order, in writing, the CM to suspend all or any part of the CM's services for the Project for the convenience of the Owner or for work stoppage beyond the control of the Owner or the CM. If the performance of all or any part of the services for the Project is suspended, the Owner and CM may negotiate an adjustment in the CM's compensation for the CM's performance of this Agreement caused by such suspension and this Agreement may be modified in writing accordingly.

9.2.2 In the event the CM's services on the Project are suspended, the Owner shall reimburse the CM for all of the costs of its construction site staff, assigned Project home office staff and other costs provided for by

this Agreement for the first seven (7) days of such suspension. The CM shall reassign the staff for the remainder of the suspension period unless directed otherwise by the Owner in writing and if the Owner directs the CM to maintain all or part of its staff, the Owner shall reimburse the CM for all costs of staff remaining dedicated to the Project. Upon cessation of the suspension, the CM shall restore the construction site and home office staff to its former size.

9.2.3 Persons assigned to another Project during such suspension or period and not available to return to this Project upon cessation of the suspension shall be replaced. The Owner shall reimburse the CM for costs incurred in relocating staff persons returning to the Project or new persons assigned to the Project.

9.2.4 If the Project is resumed after being suspended, the CM shall have the right to request that its compensation, including rates and fees, be renegotiated. Subject to the provisions of this Agreement relating to termination, a delay or suspension of the Project does not void this Agreement.

## **ARTICLE 10**

### **TERMINATION**

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#### **10.1 Termination by the CM**

10.1.1 If the work is stopped for a period of one hundred eighty (180) days by the Owner or under an order of any court or other public authority having jurisdiction, or as a result of an act of government, such as a declaration of a national emergency making materials unavailable, and through no act or fault of the CM or a contractor or their agents or employees or any other persons performing any of the work under a contract with the CM, then the CM may, upon seven (7) additional days' written notice to the Owner and the design consultant, terminate the contract and recover from the Owner payment for all work executed. The CM shall not be entitled to collect and hereby expressly waives any profit on work not performed and any damages related to that portion of the contract which has been terminated.

#### **10.2 Termination for Convenience of the Owner**

10.2.1 The Owner may, at any time upon ten (10) days' written notice to the CM and to the CM's surety, which notice shall specify that portion of the work to be terminated and the date said termination is to take effect, terminate (without prejudice to any right or remedy of the Owner) the whole or any portion of the work for the convenience of the Owner. The CM's sole remedy, in the event of such termination, will be the allowable termination costs permitted by Paragraph 10.4. CM shall include termination clauses identical to Article 10 in each of his subcontracts.

#### **10.3 Default Termination**

10.3.1 Ten (10) days' after written notice is mailed to the CM and to the CM's surety, the Owner may terminate (without prejudice to any right or remedy of the Owner or any subsequent buyer of any portion of the work) the employment of the CM and his right to proceed either as to the whole or any portion of the work required by the contract documents and may take possession of the work and complete the work by contract or otherwise in any one of the following circumstances:

- .1 If the CM or its surety refuses or fails to prosecute the work or any separable part thereof with such diligence as will ensure the substantial or final completion of the work within the contract time or fails to complete the work or remedy a default within said period;
- .2 If the CM is in material default in carrying out any provisions of the contract for a cause within his control;

- .3 If the CM fails to supply a sufficient number of properly skilled workmen or proper equipment or materials;
- .4 If the CM fails to make payment to the contractors or for materials or labor when due, unless he otherwise provides the Owner reasonable evidence that payment is not legally or contractually due;
- .5 If the CM disregards laws, permits, ordinances, rules, regulations or orders of any public authority having jurisdiction, or fails to follow the reasonable instructions of the Owner;
- .6 If the CM substantially violates any provisions of the contract documents; or
- .7 If the CM refuses or fails to properly schedule, plan, coordinate and execute the work, as specified herein, so as to perform the work within the specified milestone and completion dates, or to provide scheduling or related information, revisions and updates as required by the contract documents.

10.3.2 The right of the CM to proceed shall not be so terminated under this Paragraph 10.3 if the delays in the completion of the work are due to causes beyond the control and without the fault or negligence of the CM or the contractors.

10.3.3 If, after the CM has been terminated for default pursuant to Paragraph 10.3, it is determined that none of the circumstances set forth in Paragraph 10.3.1 exist, then such termination shall be considered a termination for convenience pursuant to Paragraph 10.2. In such case, the CM's sole remedy will be the costs permitted by Paragraph 10.4.

10.3.4 If the Owner so terminates the employment of the CM, the CM shall not be entitled to receive any further payment until the work is finished. If the unpaid balance of the compensation that would have been paid to the CM for the actual work completed, excluding the CM's unused contingency, shall exceed the expense of so completing the work (including compensation for additional construction management, managerial, administrative, consultant, legal, design and inspection services and any damages for delay) such excess shall be paid to the CM.

10.3.5 If such expenses shall exceed the unpaid balance, the CM and his sureties shall be liable to the Owner for such excess. If the right of the CM to proceed with the work is partially or fully terminated, the Owner may take possession of and utilize in completing the work such materials, appliances, supplies, plant and equipment as may be on the site of the terminated portion of the work and necessary for the completion of the work. If the Owner does not fully terminate the right of the CM to proceed, the CM shall continue to perform the part of the work that is not terminated.

10.3.6 If the Owner terminates the whole or any part of the work pursuant to Paragraph 10.3, the Owner may procure, upon such terms and in such manner as the Owner may deem appropriate, supplies or services similar to those so terminated, and the CM shall be liable to the Owner for any excess costs for such similar supplies or services. The CM shall continue the performance of the contract to the extent not terminated hereunder.

#### 10.4 Allowable termination costs

10.4.1 If the Owner terminates the whole or any portion of the work pursuant to Paragraph 10.2, then the Owner shall only be liable to the CM for those costs reimbursable to the CM in accordance with Paragraph 10.4.2, plus a markup of ten percent for profit and overhead on the actual fully accounted costs paid by the Owner under 10.4.2; provided however, that if there is evidence that the CM would have sustained a loss on the entire contract had it been completed, no profit shall be included or allowed hereunder for the work performed and an appropriate adjustment shall be made reducing the amount of the settlement to reflect the indicated rate of loss. Under no circumstances shall the CM be entitled to any loss profit or fee on the work terminated pursuant to section 10.2.

10.4.1.1 After receipt of a notice of termination, the CM shall submit to the Owner his termination claim, in the form and with certification prescribed by the Owner. Such claim shall be submitted promptly, but in no event later than thirty (30) days from the effective date of termination, unless one or more extensions in writing are granted by the Owner upon request of the CM made in writing within such thirty (30) day period or authorized extension thereof. However, if the Owner determines that the facts justify such action, he may receive and evaluate any such termination claim at any time after such thirty (30) day period or any extension thereof. Upon failure of the CM to submit his termination claim within the time allowed, the Owner may determine, on the basis of information available to him, the amount, if any, due to the CM by reason of the termination.

10.4.2 If the Owner terminates the whole or any portion of the work pursuant to section 10.2, the Owner shall pay the CM an amount for supplies, services, or property accepted by the Owner, and which is in accordance with the contract documents, in an amount as if the Agreement had not been terminated. In addition, in such event, the Owner shall pay to CM an amount representing CM's actual cost, excluding any overhead and profit for the items and things specified in subparagraph 10.5.1.6 and not heretofore paid for, appropriately adjusted for any saving of freight or other charges. Under no circumstances, shall the CM be entitled to any loss profit or fee on the work terminated pursuant to section 10.2.

10.4.2.1 The CM agrees that neither the Owner nor the Design Consultant will be liable for payments to contractors or subcontractors pursuant to Paragraph 10.4.2 unless each contract or subcontract contains termination provisions identical to those set forth in this Article 10. The Owner and the design consultant will not be liable to the CM or any of the contractors or subcontractors for any costs associated with termination if the contract or subcontract of the party involved does not include the required termination language.

10.4.3 In arriving at any amount due the CM pursuant to Paragraph 10.4, there shall be deducted the following:

- .1 All unliquidated advance or other payments on account theretofore made to the CM applicable to the terminated portion of the contract;
- .2 Any amount which the Owner reasonably believes the CM or any of the contractors owes to the Owner;
- .3 Such amount as the Owner determines to be necessary to protect the Owner against loss because of outstanding or potential liens or claims; and
- .4 The agreed price for, or the proceeds of sale of, any materials, supplies or other things acquired by the CM or sold, pursuant to the provisions of Paragraph 10.5.1.7, and not otherwise recovered by or credited to the Owner.

10.4.4 The total sum to be paid to the CM under Paragraph 10.4 shall not exceed the contract sum as reduced by the amount of payments otherwise made or to be made for work not terminated and as otherwise permitted by the contract. Except for normal spoilage, and except to the extent that the Owner shall have otherwise expressly assumed the risk of loss, there shall be excluded from the amounts payable to the CM, as provided in Paragraph 10.4.2, the replacement cost of property which is destroyed, lost, stolen or damaged so as to become undeliverable to the Owner, or to a buyer pursuant to Paragraph 10.5.1.7.

## 10.5 General Termination Provisions

10.5.1 After receipt of a notice of termination from the Owner, pursuant to Paragraph 10.2 or 10.3, and except as otherwise directed by the Owner, the CM shall:

- .1 Stop work under the contract on the date and to the extent specified in the notice of termination;

- .2 Place no further orders or subcontracts for materials, services or facilities, except as may be necessary for completion of such portion of the work under the contract as is not terminated;
- .3 Terminate all orders and subcontracts to the extent that they relate to the performance of work terminated by the notice of termination;
- .4 At the option of the Owner, assign to the Owner in the manner, at the times and to the extent directed by the Owner, all of the rights in the contracts so terminated, in which case the Owner shall have the right, at his discretion, to settle or pay any or all claims arising out of the termination of such orders and subcontracts;
- .5 Settle all outstanding liabilities and all claims arising out of such termination or orders and subcontracts, with the approval or ratification of the Owner, to the extent he may require, which approval or ratification shall be final for all the purposes of this article;
- .6 Transfer title and deliver to the entity or entities designated by the Owner, in the manner, at the times and to the extent directed by the Owner to the extent specifically produced or specifically acquired by the CM for the performance of such portion of the work as had been terminated, the following:
  - (1) The fabricated or unfabricated parts, work in process, partially completed supplies and equipment, materials, parts, tools, dies, jigs and other fixtures, completed work, supplies and other material produced as part of, or acquired in connection with the performance of, the work terminated by the notice of termination; and
  - (2) The completed or partially completed plans, drawings, information, releases, manuals and other property related to the work and which, if the contract had been completed, would have been required to be furnished to the Owner;
- .7 Use commercially reasonable efforts to sell, in the manner, at the times, to the extent and at the price or prices directed or authorized by the Owner, any property of the types referred to in Paragraph 10.5.1.6; provided, however, that the CM:
  - (1) Shall not be required to extend credit to any buyer, and
  - (2) May acquire any such property under the conditions prescribed by and at a price or prices approved by the Owner; and provided further that the proceeds of any such transfer or disposition shall be applied in reduction of any payments to be made by the Owner to the CM under the contract or shall otherwise be credited to the contract sum covered by the contract or paid in such other manner as the Owner may direct;
- .8 Complete performance of such part of the work as shall not have been terminated by the notice of termination; and
- .9 Take such action as may be necessary, or as the Owner may direct, for the protection and preservation of the property related to the contract which is in the possession of the CM and in which the Owner has or may acquire an interest.

10.5.2 The CM shall, from the effective date of termination until the expiration of three (3) years after final settlement under the contract, preserve and make available to the Owner, at all reasonable times at the office of the CM, but without direct charge to the Owner, all his books, records, documents and other evidence bearing on the costs and expenses of the CM under the contract and relating to the work terminated hereunder, or, to the extent approved by the Owner, photographs, micro-photographs or other authentic reproductions thereof.

10.5.3 If the termination, pursuant to Paragraph 10.2, be partial, the CM may file with the Owner a claim for an equitable adjustment of the price or prices specified in the contract relating to the continued portion of the contract (the portion not terminated by the notice of termination), and such equitable adjustment as may be agreed upon shall be made in such price or prices. Any claim by the CM for an equitable adjustment under this Paragraph must be asserted within six (6) months from the effective date of the notice of termination.

10.5.4 The CM shall refund to the Owner any amounts paid by the Owner to the CM in excess of costs reimbursable under Paragraph 10.4.

10.5.5 The CM shall be entitled to only those damages and that relief from termination by the Owner as specifically provided in Article 10.

## **ARTICLE 11**

### **ADDITIONAL PROVISIONS**

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#### **11.1 Limitation and Assignment**

11.1.1 The Owner and the CM each bind itself, its successors, assigns, insurers, and legal representatives to the terms of this Agreement.

11.1.2 Neither the Owner nor the CM shall assign or transfer its rights or interest in this Agreement without the written consent of the other, except that the CM may assign accounts receivable to a commercial bank for securing loans without approval of the Owner, and the Owner may assign the Agreement to Durham County for any reason without the consent of the CM. However, nothing contained in this paragraph can prevent the CM from employing contractors or such consultants, associates or subcontractors as the CM may deem appropriate to assist in performance of the services and of the Work hereunder.

#### **11.2 Governing Law**

11.2.1 This Agreement shall be governed by the laws of the State of North Carolina.

11.2.2 CM shall comply with all applicable laws and regulations in providing services under this Agreement. CM shall not employ any individuals to provide services to the Owner who are not authorized by federal law to work in the United States. CM represents that it is aware of and in compliance with the immigration reform and control act and North Carolina law (Article 2 of chapter 64 of the North Carolina General Statutes) requiring use of the e-verify system. CM further warrants that it will use the e-verify system to verify employment eligibility of all its employees throughout the term of this Agreement, and that it will remain in compliance with all i-9 requirements throughout the term of this Agreement. CM shall also ensure that any subcontractors use the e-verify system at all times while providing subcontracted services in connection with this Agreement.

11.2.3 Lunsford Act/Criminal Background Checks. The CM shall conduct or arrange to have conducted at its own expense sexual offender registry checks on each of its employees, agents, ownership personnel, or contractors ("contractual personnel") who will engage in any service on or delivery of goods to Owner property or at a school-system sponsored event, except checks shall not be required for individuals who are solely delivering or picking up equipment, materials, or supplies at: (1) the administrative office or loading dock of a school; (2) non-school sites; (3) schools closed for renovation; or (4) school construction sites. The checks shall include at a minimum checks of the state sex offender and public protection registration program, the state sexually violent predator registration program, and the national sex offender registry ("the registries"). For the CM's convenience only, all of the required registry checks may be completed at no cost by accessing the united states department of justice sex offender public website at <http://www.nsopw.gov/>. The CM shall provide certification on the sexual offender registry check certification form (Appendix G) that the registry checks were conducted on each of its contractual personnel providing services or delivering goods under this Agreement prior to the commencement of such services or the delivery of such goods. The

CM shall conduct a current initial check of the registries (a check done more than 30 days prior to the date of this Agreement shall not satisfy this contractual obligation). In addition, CM agrees to conduct the registry checks and provide a supplemental certification form before any additional contractual personnel are used to deliver goods or provide services pursuant to this Agreement. CM further agrees to conduct annual registry checks of all contractual personnel and provide annual certifications at each anniversary date of this Agreement. CM shall not assign any individual to deliver goods or provide services pursuant to this Agreement if said individual appears on any of the listed registries. CM agrees that it will maintain all records and documents necessary to demonstrate that it has conducted a thorough check of the registries as to each contractual personnel, and agrees to provide such records and documents to the Owner upon request. CM specifically acknowledges that the Owner retains the right to audit these records to ensure compliance with this section at any time in the Owner's sole discretion. Failure to comply with the terms of this provision shall be deemed a material breach of the agreement. In addition, the Owner may conduct additional criminal records checks at the school system's expense. If the Owner exercises this right to conduct additional criminal records checks, CM agrees to provide within seven (7) days of request the full name, date of birth, state of residency for the past ten years, and any additional information requested by the Owner for all contractual personnel who may deliver goods or perform services under this Agreement. CM further agrees that it has an ongoing obligation to provide the Owner with the name of any new contractual personnel who may deliver goods or provide services under the Agreement. Owner reserves the right to prohibit any contractual personnel of CM from delivering goods or providing services under this Agreement if Owner determines, in its sole discretion, that such contractual personnel may pose a threat to the safety or well-being of students, school personnel or others.

11.2.4 The CM represents that as of the date of this Agreement, the CM is not included on the final divestment list created by the North Carolina state treasurer pursuant to N.C. Gen. Stat. § 147-86.58. The CM also represents that as of the date of this Agreement, the CM is not included on the list of restricted companies determined to be engaged in a boycott of Israel created by the North Carolina state treasurer pursuant to N.C. Gen. Stat. § 147-86.81.

11.2.5 Anti-Nepotism. The CM warrants that, to the best of its knowledge and in the exercise of due diligence, none of its corporate officers, directors, or trustees and none of its employees who will directly provide services under this Agreement are immediate family members of any member of the Owner's Board of Education or of any principal or central office staff administrator employed by the Owner. For purposes of this provision, "immediate family" means spouse, parent, child, brother, sister, grandparent, or grandchild, and includes step, half, and in-law relationships. Should the CM become aware of any family relationship covered by this provision or should such a family relationship arise at any time during the term of this Agreement, the CM shall immediately disclose the family relationship in writing to the superintendent. Unless formally waived by the Owner, the existence of a family relationship covered by this Agreement is grounds for immediate termination by Owner without further financial liability to the CM.

11.2.6 Sales and Use Tax. CM shall be responsible for complying with any applicable sales and use tax obligations imposed by chapter 105, Article 5 of the North Carolina General Statutes. Where CM has been contracted with to oversee "new construction" or "reconstruction" as defined in G.S. 105-164.4h, CM shall be responsible for issuing and maintaining an "affidavit of capital improvement."

11.2.7 The CM shall comply with the above listed and all applicable laws and regulations in providing services under this Agreement.

### 11.3 Extent of Agreement

11.3.1 This Agreement represents the entire and integrated agreement between the Owner and the CM and supersedes all prior negotiations, representations or agreements, either written or oral. This Agreement may be modified or amended only by written instrument signed by both the Owner and the CM. Nothing contained in this Agreement is intended to benefit any third party. The Contractors and Design Consultant are not intended third party beneficiaries of this Agreement. This Agreement shall not be construed more strictly against one party than the other merely by virtue of the fact that it has been prepared initially by the Owner, it being recognized that both parties and their respective counsel have had a full and fair opportunity



to negotiate and review the terms and provisions of this Agreement and to contribute to its substance and form.

#### 11.4 Severability

11.4.1 If any provision of this Agreement is held as a matter of law to be unenforceable, the remainder of this Agreement shall be enforceable without such provision.

#### 11.5 Meaning of Terms

11.5.1 References made in the singular shall include the plural and the masculine shall include the feminine or neuter.

#### 11.6 Notices

11.6.1 Whenever any provision of the Contract Documents requires the giving of written notice, it shall be deemed to have been validly given if delivered in person to the individual or to a member of the firm or to an officer of the corporation for whom it is intended or if delivered or sent by registered or certified mail, postage prepaid, or by facsimile, addressed as follows:

To the Owner:

F34

With a copy to:

F35

To the CM:

F36

#### 11.7 Compliance with Board Policies and Procedures

11.7.1 The CM acknowledges that the Owner's policies governing conduct on the Owner's property are available for review on the Owner's website at [www.dpsnc.net](http://www.dpsnc.net) In addition to complying with the Owner's policies, the CM agrees to comply with the following:

11.7.2 The CM, the contractors and their employees shall not possess or carry, whether openly or concealed, any gun, rifle, pistol, or explosive on any property owned by the Owner. This includes firearms locked in containers, vehicles or firearm racks within vehicles. The CM, the contractors and their employees shall not cause, encourage or aid a minor, who is less than 18 years old to possess or carry, whether openly or concealed, any weapons on any property owned by the Owner.

11.7.3 The CM, the contractors and their employees, are prohibited from profane, lewd, obscene or offensive conduct or language, including engaging in sexual harassment.

11.7.4 The CM and the contractors shall not manufacture, transmit, conspire to transmit, possess, use or be under the influence of any alcoholic or other intoxicating beverage, narcotic drug, hallucinogenic drug, amphetamine, barbiturate, marijuana or anabolic steroids, or possess, use, transmit or conspire to transmit drug paraphernalia on any property owned by the Owner.

11.7.5 The CM and the contractors may not at any time use or display tobacco or nicotine-containing products, including but not limited to electronic cigarettes (e-cigarettes), on school premises, both indoor and outdoor. The prohibition of the display of tobacco or nicotine products shall not extend to a display that has a legitimate instructional or pedagogical purpose. For purposes of this Agreement, "tobacco product" is defined to include cigarettes, cigars, blunts, bidis, pipes, chewing tobacco, snuff, and any other items containing or reasonably resembling tobacco, tobacco products, or any facsimile thereof. "Tobacco use" includes smoking, chewing, dipping, or any other use of tobacco products.

11.7.6 The CM, the contractors and their employees shall not solicit from or sell to students or staff within the Owner's facilities or campuses, and shall not give gifts of any value to school system employees.

11.7.7 Operators of all commercial vehicles on any property owned by the Owner shall be subject to post-accident, random, reasonable suspicion and follow-up testing for drugs and alcohol.

11.7.8 The CM, the contractors and their employees are prohibited from using access to the site pursuant to this Agreement as a means to date, court, or enter into a romantic or sexual relationship with any student enrolled in the Owner's schools. The CM agrees to indemnify the Owner for claims against the Owner resulting from relationships which have occurred or may occur between a student and an employee of the CM or the contractors.

11.7.9 The CM, the contractors and their employees shall not interact with any students. Nothing in this Paragraph shall be construed to prevent the CM, the contractors and their employees from taking necessary measures to protect students, staff or other employees.

11.7.10 The CM shall at all times enforce strict discipline and good order among its employees and shall not employ any unfit person or anyone not skilled in the task assigned to it. The Owner may require the CM to remove any employee, contractor or subcontractor the Owner deems incompetent, careless or otherwise objectionable.

11.7.11 All agents and workers of the CM and the contractors shall wear identification badges provided by the CM at all times they are on the Owner's property. The identification badges shall at a minimum display the company name, telephone number, employee name and a picture of the employee. The CM and the contractors shall comply with the Owner's site or school building access procedures when working on any existing school campus.

## 11.8 Construction Project Policies

The CM acknowledges the Owner's dispute resolution policy, minority business participation policy, and prequalification of bidders for construction Projects, including their regulations and procedures, attached as Appendixes H, I and J be incorporated into this Agreement.

This Agreement is executed the day and year first written above.

**OWNER:**

**DURHAM PUBLIC SCHOOLS BOARD OF  
EDUCATION**

\_\_\_\_\_  
Chair F38

Attest:

\_\_\_\_\_  
[Corporate Seal]

**CONSTRUCTION MANAGER:**

\_\_\_\_\_  
F37

\_\_\_\_\_, President  
F39

Attest:

\_\_\_\_\_  
Corporate Secretary  
[Corporate Seal]

This instrument has been pre-audited in the manner required by the School Budget and Fiscal Control Act.

\_\_\_\_\_  
F40  
\_\_\_\_\_, Finance Officer