CONSTRUCTION AGREEMENT

THIS CONSTRUCTION AGREEMENT (this “Agreement”) is made as of May\_\_\_\_\_\_, \_\_\_,2014, by and between ACME INC., a Delaware corporation (“Owner”), and Construction Kings (Kitchener) Limited, an Ontario Canada corporation (“Contractor”), with respect to the demolition, preconstruction and construction services in connection with, and the construction by Contractor of, office and other areas**\_** to be located at 101 Main Street Kitchener Ontario and commonly known as the Construction Project (the “Project”). The architect for the Project is Larry Robinson (the “Architect”).

1. THE WORK TO BE DONE AND THE DOCUMENTS FORMING THE CONTRACT

The Contractor agrees to provide all services, labor, materials, supplies, appliances, tools, equipment, and supervision and to do all things necessary to construct and complete the Work (as defined below). Contractor and Owner agree that the Work is to be performed for the Guaranteed Maximum Price (as defined in Paragraph II.I below) and in accordance with the Construction Schedule (as defined in Paragraph III.B below). As used in this Agreement, the term “Work” shall mean the construction and services required by the Contract Documents (as defined below), whether completed or partially completed, and includes all other labor, materials, equipment and services provided or to be provided by the Contractor to fulfill the Contractor’s obligations. This Agreement, including all exhibits hereto, the Drawings and Specifications (as such terms are defined in Paragraph II.I below), and any addenda or amendments made in writing and executed by the parties hereto subsequent to the execution of this Agreement, together with all Change Orders (as such term is defined in Paragraph V.A below), are referred to collectively herein as the “Contract Documents” and together form the “Contract.”

1. PRECONSTRUCTION SERVICES
   1. The services to be provided under this Article II, together with the services described on Exhibit A attached hereto, constitute Contractor’s “Preconstruction Phase” services. Contractor hereby acknowledges and agrees that, if the Owner so elects, construction of the Work in accordance with Article III below (the “Construction Phase”) may commence before the Preconstruction Phase is completed, in which case both phases will proceed concurrently. For the Preconstruction Phase services, Contractor’s compensation for its direct labor costs shall be as set forth in Exhibit B attached hereto and shall not exceed $173,700.00 in the aggregate. Payments shall be made monthly following presentation of the Contractor’s invoice and, where applicable, payments shall be in proportion to services performed. Payments for undisputed amounts shall be due and payable thirty (30) days after the date the Contractor’s invoice is received by the Owner. Costs for any design/assist or design/build subcontractors shall be added by Change Order
   2. The Contractor shall provide a preliminary evaluation of the Owner’s program and Project budget requirements, each in terms of the other. The Contractor shall jointly schedule and attend regular meetings with the Owner and Architect. The Contractor shall consult with the Owner and Architect regarding site use and improvements and the selection of materials, building systems and equipment. The Contractor shall provide recommendations on construction feasibility; actions designed to minimize adverse effects of labor or material shortages; time requirements for procurement, installation and construction completion; and factors related to construction cost, including estimates of alternative designs or materials, preliminary budgets and possible economies.
   3. When Owner’s Project requirements have been sufficiently identified, the Contractor shall prepare, and periodically update, a preliminary Project schedule consistent with the schedule of Project milestones attached as Exhibit C to this Agreement (the “Project Milestones”) for review by the Owner, the Architect and engineers or other consultants hired or retained directly by Owner (collectively, “Owner’s Consultants”), and for the Owner’s approval. The Contractor shall obtain approval of the Architect and Owner’s Consultants for the portion of the preliminary Project schedule relating to the performance of their respective services. The Contractor shall coordinate and integrate the preliminary Project schedule with the services and activities of the Owner, Architect, Owner’s Consultants and Contractor. As design proceeds, the preliminary Project schedule shall be updated to indicate proposed activity sequences and durations, milestone dates for receipt and approval of pertinent information, submittal of a Guaranteed Maximum Price proposal, preparation and processing of shop drawings and samples, delivery of materials or equipment requiring long-lead-time procurement, Owner’s occupancy and/or utilization requirements showing portions of the Project having occupancy and/or utilization priority, and proposed date of Substantial Completion (as defined in Article X). If preliminary Project schedule updates indicate that previously approved schedules may not be met, the Contractor shall make appropriate recommendations to the Owner and Architect.
   4. At Owner’s request, the Contractor shall make recommendations to the Owner and Architect regarding the phased issuance of Drawings and Specifications to facilitate phased construction of the Work, taking into consideration such factors as economies, time of performance, availability of labor and materials, and provisions for temporary facilities.
   5. When the Owner has sufficiently identified the Project requirements and the Architect has prepared other basic design criteria, the Contractor shall prepare, for the review of the Architect and Owner’s Consultants and approval of the Owner, a preliminary cost estimate utilizing 3D BIM modeling, area, volume or similar conceptual estimating techniques. When Schematic Design Documents have been prepared by the Architect and approved by the Owner, the Contractor shall prepare, for the review of the Architect and Owner’s Consultants and approval of the Owner, a more detailed estimate with supporting data. During the preparation of the Design Development Documents, the Contractor shall update and refine this estimate at appropriate intervals as designated by the Owner. When Design Development Documents have been prepared by the Architect, the Contractor shall prepare a detailed estimate with supporting data for review by the Architect and Owner’s Consultants and approval by the Owner. During the preparation of the Construction Documents, the Contractor shall update and refine this estimate at appropriate intervals as designated by the Owner. If any estimate submitted to the Owner exceeds previously approved estimates or the Owner’s budget or schedule, the Contractor shall make appropriate recommendations to the Owner and Architect to bring the project costs back to the approved budget and schedule.
   6. The Contractor shall seek to develop subcontractor interest in the Project and shall furnish to the Owner, Architect and Owner’s Consultants for their information a list of possible subcontractors, including suppliers who are to furnish materials or equipment fabricated to a special design, from whom proposals will be requested for each principal portion of the Work. The Owner or Architect will promptly reply in writing to the Contractor if the Architect, any of Owner’s Consultants or Owner has any objection to any such subcontractor or supplier. The receipt of such list shall not require the Owner, Architect or Owner’s Consultants to investigate the qualifications of proposed subcontractors or suppliers, nor shall it waive the right of the Owner, Architect or Owner’s Consultants later to object to or reject any proposed subcontractor or supplier. The Contractor shall take all reasonable steps necessary to pre-qualify proposed bidders and shall maintain adequate records representing the results of the Contractor’s pre-qualification process, which shall be made available to the Owner or its representatives upon request. Refer to Article IX for specific instructions and requirements related to subcontractor bidding protocols and procedures.
   7. Contractor shall prepare for Owner's approval a complete list of work packages by trade, CSI division or other such categorization as agreed with Owner, describing the proposed method and timing of sourcing for each work package. This Procurement Plan shall include for each work package a proposed plan to competitively bid or negotiate, a description of the compensation method (for example lump sum or unit cost), the Subcontractors recommended for competitive bidding or negotiated awards and identification of all proposed self-perform work. For work packages which Contractor does not plan to competitively bid and with estimated value greater than $50,000.00, Contractor shall provide in writing as part of the Procurement Plan the rationale for not competitively bidding. Contractor shall obtain Owner's approval of the Procurement Plan as the basis for the procurement strategy in accordance with Article XI of this Agreement.
   8. The Contractor shall recommend to the Owner, Architect and Owner’s Consultants a schedule for procurement of long-lead-time items which will constitute part of the Work as required to meet the Project schedule. If such long-lead-time items are procured by the Owner, they shall be procured on terms and conditions reasonably acceptable to the Contractor. Upon the Owner’s acceptance of the Contractor’s Guaranteed Maximum Price proposal, all contracts for such items shall be assigned by the Owner to the Contractor, who shall accept responsibility for such items as if procured by the Contractor. The Contractor shall expedite the delivery of long-lead-time items.
   9. The Contractor does not warrant or guarantee estimates and schedules except as may be included as part of the Guaranteed Maximum Price and the final Project schedule and Construction Schedule approved by the Owner. The recommendations and advice of the Contractor concerning design alternatives shall be subject to the review and approval of the Owner and the Owner’s professional consultants. It is not the Contractor’s responsibility to ascertain that the Drawings and Specifications are in accordance with applicable Laws (as defined in Paragraph VI.B below). However, it is understood that the Contractor shall provide a standard of care that is consistent with other similar contractors and the Contractor’s licenses. If the Contractor recognizes that portions of the Drawings and Specifications are at variance therewith, the Contractor shall promptly notify the Architect and Owner in writing.
   10. The “Drawings” are the graphic and pictorial portions of the Contract Documents showing the design, location and dimensions of the Work, generally including plans, elevations, sections, details, schedules and diagrams. The “Specifications” are that portion of the Contract Documents consisting of the written requirements for materials, equipment, systems, standards and workmanship for the Work, and performance of related services. The Contractor will be responsible for the coordination of any Design Build Documents to verify that those drawings and specifications are coordinated with each other as well as with the drawings and specifications of other design team members. When the Drawings and Specifications are approximately ninety percent (90%) complete, the Contractor shall propose a “Guaranteed Maximum Price”, which shall be the sum of the estimated Cost of the Work and the Contractor’s Fee. The target date for Contractor’s preparation of the Guaranteed Maximum Price proposal is September 19, 2014. As the Drawings and Specifications will not be fully complete at the time the Guaranteed Maximum Price proposal is prepared, the Contractor shall provide in the Guaranteed Maximum Price for further development of the Drawings and Specifications by the Architect that is consistent with the Contract Documents and reasonably inferable therefrom. Such further development does not include such things as material changes in scope, systems, kinds and quality of materials, finishes or equipment, all of which, if required, shall be incorporated by Change Order. The estimated Cost of the Work shall include a proposed Contractor’s contingency not to exceed 15%(as approved by the Owner and set forth in the Amendment, as such term is defined in Paragraph II.L below, the “Contingency”) which shall consist of a sum reasonably and in good faith established by the Contractor to cover (First) costs arising as a result of the further development of the Drawings and Specifications which are properly reimbursable as a Cost of the Work but are not the basis for a Change Order, and costs associated with concealed or latent conditions as described in Paragraph VI.D below, and over allowance amounts as described in Paragraph IV.B below (second) other costs that in good faith were not included in other areas of the GMP which are properly reimbursable as a Cost of the Work, other than General Conditions items but only to the extent that all savings from subcontractor, material buyouts and allowances have been fully expended (third) to the extent funds remain in the contingency, costs associated with mutually agreed upon changes in the scope of the Work as evidenced by Change Order (collectively, “Permitted Contingency Items”). Owner and Contractor shall jointly administer the Contingency, however Owner shall not unreasonably withhold approval of its use. For tracking and approval purposes by Owner, use of the Contingency and requests for the use of the Contingency shall be submitted by Contractor to the Owner in writing denoting a $0 cost to the GMP and defining the amount of Contingency remaining after the Contingency Usage has been approved.  **Notwithstanding the foregoing, the Contingency is not to be used for the convenience of Contractor in the ordinary scheduling or execution of the Work.** Contractor shall notify the Owner monthly in writing prior to submitting each Application for Payment of any cost that Contractor proposes be charged to the Contingency, together with an explanation of the reason such cost is to be incurred. No such cost shall be charged to the Contingency unless Owner approves the same in writing, which approval shall not be unreasonably withheld if such cost is properly chargeable to the Contingency in accordance with the terms and provisions of this Agreement. Contractor shall not unreasonably withhold its consent to any request by Owner to apply available Contingency funds to costs which might otherwise entitle Contractor to an increase in the Guaranteed Maximum Price (referred to herein as “Owner Utilized Contingency Funds”). Any agreement by Owner and Contractor with respect to Owner Utilized Contingency Funds shall be documented by a Change Order or other instrument signed by the parties. If, following the application of any Owner Utilized Contingency Funds, the remaining Contingency is insufficient to fund the costs of Permitted Contingency Items, Owner shall not unreasonably withhold its consent to any request by Contractor to restore the Contingency by the amount of any Owner Utilized Contingency Funds previously applied, to the extent necessary to increase the Contingency to an amount sufficient to fund the costs of Permitted Contingency Items.
   11. The Contractor shall include with the Guaranteed Maximum Price proposal a written statement of its basis, which shall include:
       1. A list of the Drawings and Specifications, including all addenda thereto, which were used in preparation of the Guaranteed Maximum Price proposal.
       2. A summary of all Subcontractor bids with a recommendation for the selected sub-trade.
       3. A Certificate of insurance from the recommended sub-trade with limits similar to those required in Article XIV below.
       4. A list of allowances and a statement of their basis.
       5. A list of the clarifications and assumptions reasonably and in good faith made by the Contractor in the preparation of the Guaranteed Maximum Price proposal to supplement the information contained in the Drawings and Specifications.
       6. The proposed Guaranteed Maximum Price, including a statement of the estimated cost organized by trade categories, allowances, Contingency, General Conditions, and other items and the Contractor’s Fee that comprise the Guaranteed Maximum Price.
       7. A Construction Schedule including coordination with Owners Vendors and the date of Substantial Completion upon which the proposed Guaranteed Maximum Price is based, and a schedule of the issuance dates of the Drawings and Specifications upon which the date of Substantial Completion and the Guaranteed Maximum Price are based.
       8. A Change Order to increase the contract amount to the total GMP amount.
   12. The Contractor shall meet with the Owner, Architect and, at Owner’s election, Owner’s Consultants to review the Guaranteed Maximum Price proposal and the written statement of its basis. In the event that the Owner or Architect discovers any inconsistencies or inaccuracies in the information presented, they shall promptly notify the Contractor, who shall make appropriate adjustments to the Guaranteed Maximum Price proposal, its basis, or both.
   13. Unless the Owner accepts the Guaranteed Maximum Price proposal in writing on or before the date specified in the proposal for such acceptance (which date shall in no event be earlier than thirty (30) days following Owner’s receipt of such proposal) and so notifies the Contractor, the Guaranteed Maximum Price proposal shall not be effective without written acceptance by both the Owner and the Contractor. Prior to the Owner’s acceptance of the Contractor’s Guaranteed Maximum Price proposal and issuance of a Notice to Proceed, the Contractor shall not incur any cost to be reimbursed as part of the Cost of the Work, except as the Owner may specifically authorize in writing. Upon acceptance by the Owner of the Guaranteed Maximum Price proposal, the Guaranteed Maximum Price and its basis, as well as the date by which the Contractor shall achieve Substantial Completion of the entire Work, shall be set forth in an amendment to this Agreement, substantially in the form of Exhibit D attached hereto, and executed by both the Owner and the Contractor (the “Amendment”).
   14. The Owner shall authorize and cause the Architect to revise the Drawings and Specifications to the extent necessary to reflect the agreed-upon assumptions and clarifications contained in the Amendment. Such revised Drawings and Specifications shall be furnished to the Contractor in accordance with schedules agreed to by the Owner, Architect and Contractor. The Contractor shall promptly notify the Architect and Owner if such revised Drawings and Specifications are inconsistent with the agreed-upon assumptions and clarifications.
2. CONSTRUCTION PHASE
   1. The Construction Phase shall commence on the earlier of:
      1. the Owner’s acceptance of the Contractor’s Guaranteed Maximum Price proposal and issuance of a Notice to Proceed, or
      2. the Owner’s first authorization to the Contractor to:
         1. award a trade subcontract to a subcontractor that starts to perform work on site, or
         2. undertake construction Work with the Contractor’s own forces, or
         3. issue a purchase order for materials or equipment required for the Work.
   2. Promptly after the Owner’s acceptance of the Guaranteed Maximum Price proposal, the Contractor shall prepare and submit for Owner’s approval a critical path method construction schedule for the entire Work (the “Construction Schedule”), which Construction Schedule shall be consistent with the Project Milestones and the Project schedule. The Construction Schedule shall be attached as an exhibit to the Amendment and shall be provided in Microsoft Project soft copy format if available. The Construction Schedule shall not exceed time limits current under the Contract Documents (including, without limitation, the date for Substantial Completion), shall define major construction milestones, their sequences and elapsed completion time from date of this Agreement, shall include order and delivery dates for all required shop drawings and all long lead time materials and equipment, shall be related to the entire Project to the extent required by the Contract Documents, shall be revised (with the Owner’s approval) at appropriate intervals as required by conditions of the Work and the Project and shall provide for expeditious and practicable execution of the Work. Contractor shall comply with the Construction Schedule, as such may be periodically updated, for the processing of all governmental approvals and permits, the pre-purchasing of materials and equipment and the attainment of designated milestones. In addition, Contractor shall prepare and keep current, for the Owner’s approval, a submittal schedule for all shop drawings, details, samples, equipment data and other submittal information required herein.
   3. The Contractor agrees to keep the Owner continually informed as to the progress of the Work, and the Contractor shall provide monthly written reports to the Owner and Architect on the progress of the entire Work. The Contractor shall maintain a daily log containing a record of weather, Subcontractors working on the site, number of workers, Work accomplished, problems encountered and other similar relevant data as the Owner may reasonably require. The log shall be available to the Owner and Architect. Throughout the performance of the Work, the Contractor will confer and cooperate with the Owner and will plan and execute the Work so as to ensure the timely and efficient completion thereof.
   4. The Contractor shall develop a system of cost control for the Work in a format acceptable to the Owner, including regular monitoring of actual costs for activities in progress and estimates for uncompleted tasks and proposed changes. The Contractor shall identify variances between actual and estimated costs and report the variances to the Owner and Architect at regular intervals.
   5. If Contractor shall be delayed at any time in the progress of the Work by any negligent or wrongful act of Owner or Architect, or any agent or employee of either, or by any contractor independently employed by Owner, or by changes in the Work ordered by Owner, or by labor disputes, fire, unusual delay in transportation, unavoidable casualties, or inclement weather, or by other causes beyond Contractor’s reasonable control, or by any other cause which Architect and Owner decide justify the delay in the critical path of the approved project schedule (collectively, events of “Excusable Delay”), then the time allowed for the Work to be Substantially Completed shall be extended by the period of such delay; provided, however, that Contractor shall deliver written notice to Architect and Owner, within five (5) business days after the cause of such delay is known, or reasonably should be known, to Contractor, of the fact and estimated extent of such delay, and Contractor shall cause its Subcontractors (as defined in Article IX below) to give similar notice of any such delay. In the case of a continuing cause of delay, only one claim is necessary as long as it is submitted within five (5) business days from the date that the cause first became known, or reasonably should have become known, to Contractor. Extensions of time for inclement weather plus impact days will not be granted unless the cumulative number of days of inclement weather exceeds the total average number of inclement weather days as reported by Environment Canada and such inclement weather causes a delay in the critical path of the Work.
   6. In accordance with the Project Milestones, the Construction Phase (inclusive of any applicable commissioning) shall have a duration of \_\_\_\_\_\_\_\_\_\_\_ (34\_\_) weeks, and Contractor shall Substantially Complete the Work on or before that date which is\_\_\_\_\_\_\_\_\_\_\_ (25\_\_) weeks following the commencement of the Construction Phase.
3. COST OF THE WORK
   1. Owner agrees to reimburse Contractor for the Cost of the Work (as defined in Paragraph IV.E below), and to pay to Contractor the Contractor’s Fee (as defined in Paragraph IV.C below). Contractor guarantees that the maximum price to the Owner for the Cost of the Work and the Contractor’s Fee (collectively, the “Contract Sum”), subject to authorized adjustments, shall not exceed the Guaranteed Maximum Price, hereinafter sometimes referred to as the “GMP.”
   2. Allowances for items of equipment and materials (each, an “Allowance”) are included in the Guaranteed Maximum Price to the extent the Contract Documents are not sufficiently specific to permit Subcontractor or vendor pricing for such items and only if listed in the GMP attachment “List of Allowances”. From time to time after commencement of performance of the Work, Owner shall cause Drawings and Specifications for the Allowances, or portions thereof, to be delivered to Contractor. Such Drawings and Specifications shall be deemed to be part of the Contract Documents. Contractor shall obtain bids or pricing as mutually agreed to between the Contractor and the Owner Representative for all Allowance items in accordance with the procedure set forth in Article IX below. If the actual Cost of the Work with respect to an item covered by an Allowance is greater than the Allowance, the Contractor shall be paid the actual Cost of the Work for such item, plus a fee equal to TBA\_\_\_% of the amount by which the actual Cost of the Work for that item exceeds the Allowance for the item (representing the increase in the Contractor’s Fee applicable thereto). The Guaranteed Maximum Price shall be increased by the aggregate amount of such excess costs and fees or the aggregate amount can be deducted from any remaining Contingency. If the actual Cost of the Work for an item is less than the Allowance for that item, the Guaranteed Maximum Price shall be decreased or the Contingency amount shall be increased by the aggregate of the difference between the Allowance and the actual Cost of the Work for such item, plus a fee equal to \_\_\_\_TBA\_\_\_\_% of the amount by which the Allowance for such item exceeds the actual Cost of the Work for the item (representing the decrease in the Contractor’s Fee applicable thereto). Use of the Allowances shall be approved by the Owner and requests for the use of the Allowances shall be submitted to the Owner in written format defining the cost of the Allowance Item and defining the amount of any allowance fund remaining. If the allowance usage results in an increase to the GMP the increase to the GMP shall be submitted in a Change Order Format as described in Article VI denoting the cost to the GMP. Any such increases or decreases in the Guaranteed Maximum Price if any and payments relating thereto shall be confirmed in a Change Order pursuant to the provisions of Article VI below.
   3. In consideration of the performance of this Agreement, Owner agrees to pay to Contractor in current funds as compensation for its Construction Phase services a Contractor’s fee equal to the amount set forth in the attached General Conditions Itemization & Fee Statement attached hereto, of the Cost of the Work as compensation for Contractors non reimbursable costs, overhead, and profit, except as such fee may be limited by the Guaranteed Maximum Price (the “Contractor’s Fee”). The Contractor’s Fee shall be payable in pro rata installments in accordance with the progress payment provisions of Article VIII (including provisions for retention).
   4. In the event the Cost of the Work plus the Contractor’s Fee shall equal a sum which is less than the Guaranteed Maximum Price, as adjusted pursuant to the terms of this Agreement, the resulting savings shall accrue in their entirety for the benefit of Owner.
   5. The term “Cost of the Work” shall mean only those costs actually, reasonably and necessarily incurred by Contractor in the proper performance of the Work at rates no higher than the standard paid at the place of the Project, including, without limitation the following:
      1. Application, permit, license, and testing fees required to commence and perform the Work, with the exception of testing fees related to defective or nonconforming Work.
      2. Losses, expenses, damages and costs reasonably sustained or incurred by Contractor in connection with the Work, including rebuilding or restoring the Work, when not compensated by insurance or otherwise and when not caused by the negligence or nonperformance of Contractor, any Subcontractor or any of their respective supervisory, administrative, managerial or other personnel.
      3. Rental charges of all machinery and equipment, exclusive of hand tools, used for the performance of the Work and not customarily owned by construction workers, whether rented from the Contractor or others, including installations, repairs and replacements, dismantling, removal, and costs of lubrication, transportation and delivery thereof. Notwithstanding the foregoing, any rented machinery or equipment shall be subject to the prior written approval of Owner. The rental rates for such machinery and equipment shall not exceed eighty percent (80%) of the blue book rates for such machinery and equipment, and the total rental charges shall not exceed the fair market value of such machinery and equipment.
      4. All sales, use, gross receipts and other taxes related to the Work or purchases made in connection therewith which are imposed by any governmental authority and for which Contractor is liable.
      5. Costs of insurance policies and bonds only to the extent they are required to be furnished by Contractor under the Contract, in the amounts specified in the Schedule of Values which is to be attached as an exhibit to the Amendment (the “Schedule of Values”) (Contractor’s umbrella liability insurance costs are set at TBD% of the Cost of the Work and Contractor’s bonding costs shall not exceed TBD% of the Cost of the Work; Contractor’s other insurance costs will be included in Contractor’s agreed billing rates). Insurance costs are as per the General Conditions Itemization & Fee Statement attached hereto.
      6. The following costs incurred by Contractor, as specified in the Schedule of Values:
         1. All hourly labor costs with respect to personnel in the direct employ of Contractor in the direct performance of the Work at agreed billing rates, as listed in Exhibit B, including such standard payroll burden costs such as union benefits, employee group insurance coverage, employer payroll taxes, workers’ compensation premiums, retirement plans, and other similar costs related thereto, in compliance with estimated rates approved in advance by Owner.
         2. Salaries and related standard fringe benefits of Contractor’s employees per the Contractor’s staffing plan as approved by the Owner at agreed billing rates stationed solely at the field office, either full-time or part-time and in whatever capacity employed, covering such portion of their actual time as they have devoted to the Work as reflected on the weekly time sheets. Except that during the Pre-construction Phase this would apply to Contractors staff devoted to the Work and identified on the staffing plan as approved by the Owner regardless of the location of that staff.
         3. Costs of all materials, supplies and equipment used in connection with or incorporated into the Work, including costs of transportation and storage thereof.
         4. Costs, including transportation and maintenance, of all materials, supplies, equipment, temporary facilities and, to the extent not actually or customarily owned by the Contractor’s or any Subcontractor’s own forces, hand tools which are employed or consumed in the performance of the Work. All purchases of such materials, supplies, equipment, temporary facilities and hand tools shall be recorded in a log maintained at the Project site or Contractor’s principal office and shall be subject to inspection by Owner upon demand. Any such materials, supplies, equipment or tools not owned by the workmen which are used, but not consumed, in the performance of the Work shall remain the property of the Contractor upon completion of the Work; provided, however, that with respect to any such equipment or tools which cost in excess of $500 and have a useful life of more than one year, the cost of same shall be adjusted as appropriate on the basis of their fair market value.
         5. Miscellaneous expenses such as facsimiles, telephone services, express mail, and similar petty cash items related to the Work and customarily incurred in projects of this nature, utility costs, connection fees, on-site computer usage costs, and security costs.
         6. Costs (excluding promotional expenses and costs of incentives) incurred in connection with job safety requirements for the performance of the Work such as handrails, ramps, barricades, warning lights, and required scaffolding, and costs incurred due to an emergency affecting the safety of persons or property.
         7. Costs of removal of debris and the final building clean up.
         8. Amounts due to all Subcontractors under subcontracts related to the performance of the Work.
         9. If Sub Guard is provided, ACME will accept a maximum charge of .65% of each subcontractor cost for Sub Guard as part of the Cost of Work**.**
         10. Contractor’s General Conditions costs for the Project shall be as described in Contractor’s Proposal dated \_March 20 2014\_\_ attached hereto and incorporate herein by reference as Exhibit F.
   6. The term Cost of the Work shall not include any of the following:
      1. Except as provided in IV.E.6(b), salaries of the off-site employees of Contractor.
      2. Overhead or general expenses of any kind, except as may be expressly provided otherwise in this Agreement.
      3. Contractor’s capital expenses, including interest on Contractor’s capital employed either in construction plants or in expenditures on the Work, except as may be expressly provided otherwise in this Agreement.
      4. Expenses of Contractor’s principal office and offices other than the site office.
      5. Rental costs of machinery and equipment, except as expressly provided in Paragraph IV.E above.
      6. Costs due to any warranty work required from Contractor or due to the fault or negligence of, or the breach of this Agreement or any other agreement related to the Work by, Contractor, any Subcontractor, anyone directly or indirectly employed by any of them, or anyone for whose acts any of them may be liable, including, but not limited to, costs for the correction of damaged, defective or nonconforming Work, disposal and replacement of materials and equipment incorrectly ordered or supplied, making good damage to property not forming part of the Work, or repair of casualty losses not included in Paragraph IV.E above.
      7. Fines, penalties, assessments and other costs related to the failure of Contractor or any Subcontractor to comply with any provision of this Agreement and with all applicable provisions of the Federal Occupational Safety and Health Act, any state equivalent thereof, federal and state fair employment laws, and federal and state wage and hours laws.
      8. Cost of overtime premium required to meet the Construction Schedule. Contractor may work overtime and be paid for overtime provided that such overtime does not require a Change Order or cause the Guaranteed Maximum Price to be exceeded, and provided further that such overtime shall not be a charge against the Contingency without Owner’s prior written approval in each instance. Contractor shall be reimbursed by Owner for overtime if requested by Owner to accelerate the Construction Schedule and/or to make up days lost by issues beyond Contractor’s or any Subcontractor’s control. Provided however in either case the Owner will only pay the premium time on the base rate costs of the over time worked.
      9. Cost of consultants unless approved by Owner in writing (with the exception of costs of design-build subcontractor consultants included in the applicable subcontract sums).
      10. Amounts to be paid by Contractor for federal, state or local income and franchise taxes.
      11. Salaries of corporate officers, directors, key administrators, or sales personnel of Contractor, except as expressly provided in Paragraph IV.E above.
      12. Any costs due to weather delays, except where the cumulative number of days of inclement weather exceeds the average number of inclement weather days as reported by the National Weather Service.
      13. Costs of General Conditions in excess of the amount set forth in the Schedule of Values, as such may be adjusted pursuant to Change Order.
      14. Costs that would cause the Guaranteed Maximum Price to be exceeded, or any cost not specifically and expressly described in Paragraph IV.E.
   7. The following items shall be credited against the Cost of the Work or shall be reimbursed by Contractor to Owner:
      1. Proceeds of any sale by Contractor of surplus materials, construction equipment, and temporary structures which have been charged to the Cost of the Work (other than as a rental charge), whether such sale is made to Owner, to Contractor, or to a third party, plus the fair market value of non-expendable tools purchased by the Contractor.
      2. Discounts, dividends, rebates, or refunds obtained on payments made by the Contractor shall accrue to the Owner, provided that either (a) before making the payment, the Contractor included the subject payment in an Application for Payment and received payment from the Owner, or (b) the Owner has deposited funds with the Contractor with which to make the payment. The Contractor shall obtain all possible trade and time discounts on bills for materials, supplies and equipment furnished, and shall pay said bills within the discount periods, provided that Owner timely pays Contractor pursuant to the terms of this Agreement.
      3. The full amount of any deposits originally funded by or charged to Owner, which have been returned to the Contractor.
   8. Contractor shall keep full and detailed accounts and exercise such controls as may be necessary for proper financial management under this Agreement, and Contractor’s accounting and control systems shall be satisfactory to Owner. Owner and Owner’s accountants shall have access to, and shall be permitted to copy and audit, Contractor’s records, books, correspondence, instructions, drawings, receipts, subcontracts, purchase orders, vouchers, memoranda and other data relating to this Agreement, and Contractor its affiliates, subsidiaries or other related entities shall preserve such items for a period of five (5) years after final payment, or for such longer period as may be required by applicable Law. The Contractor, its affiliates, subsidiaries or other related entities performing any Work on the Project shall make all records available for audit that may, in Owner’s reasonable judgment, pertain to any obligation of Contractor or any Subcontractor under the Contract Documents, and Owner, Owner’s representative and/or Owner’s accountants shall have the right, at Owners sole expense, that being those reasonable expenses of Contractor to facilitate Owner, acting reasonably, to audit all documentation related to the costs of all subcontracts, the costs of all materials and equipment, and the costs of all Change Orders, and to verify invoices and that performance of the Work is in compliance with the Contract Documents at all times both on the site and at the Contractors local or Corporate office; provided, however, that no decision by Owner to perform or not to perform any such audit shall be deemed a waiver of any of Owner’s rights or of Contractor’s obligations. If any such audit reveals any invoicing errors, Contractor shall promptly correct the same, make any invoice adjustments and refund any overpayments. Notwithstanding anything in the Agreement or any of the other Contract Documents to the contrary, Owner shall be entitled to review and audit all insurance, Sub Guard and bond costs, labor costs, amounts of fixed price subcontracts and amounts of lump sum Change Orders, provided that such audit right shall be for the purpose of reviewing relevant documentation and verifying that invoices are in compliance with the Contract Documents; such audit right shall not be deemed to permit Owner to dispute labor rates, insurance and bond rates, amounts of fixed price subcontracts or amounts of lump sum Change Orders to the extent the same have been agreed upon in advance by Owner pursuant to the terms of the Agreement, provided the same are correctly reflected in Contractor’s invoices.
   9. At any time during the first year of the Work following reconciliation of employee accrual amounts and annually thereafter and again following Substantial Completion of the Project (but not more than once every six (6) months, unless the Owner discovers a sufficient number or magnitude of overcharges in which case the Owner reserves the right in its reasonable discretion to audit more frequently), the Owner may elect to conduct an audit of the Contractor’s records as they pertain to the Work. If such audit discovers errors of overcharge totaling in the aggregate One Hundred Thousand dollars ($100,000) or more, the Contractor shall bear the cost of such audit which cost shall not be a “Cost of the Work” and the contractor shall refund to the Owner the amount of any such overcharge plus interest at a rate of Bank Of America prime plus one percent (1%). Any and all disputes between the parties with respect to the amount of any alleged error or overcharge shall be resolved pursuant to the dispute resolution procedures provided herein. All audits shall be conducted on a non-contingent basis by a qualified auditor with a minimum of three (3) years experience performing audits of a similar nature.

.RELATED PARTY TRANSACTIONS

* 1. For purposes of Article VI, the term “related party” shall mean a parent, subsidiary, affiliate or other entity having common ownership or management with the Contractor; any entity in which any stockholder in, or management employee of, the Contractor owns any interest in excess of ten percent in the aggregate; or any person or entity which has the right to control the business or affairs of the Contractor. The term “related party” includes any member of the immediate family of any person identified above.
  2. If any of the costs to be reimbursed arise from a transaction between the Contractor and a related party, the Contractor shall notify the Owner of the specific nature of the contemplated transaction, including the identity of the related party and the anticipated cost to be incurred, before any such transaction is consummated or cost incurred. If the Owner, after such notification, authorizes the proposed transaction in writing then the cost incurred shall be included as a cost to be reimbursed, and the Contractor shall procure the Work, equipment, goods or service from the related party, as a Subcontractor. If the Owner fails to authorize the transaction, the Contractor shall procure the Work, equipment, goods or service from some person or entity other than a related party.

1. CHANGES IN THE WORK
   1. Owner may from time to time, by written instructions or drawings issued to the Contractor, make changes in the Work, issue additional instructions, require additional work, or direct the omission of work previously ordered, and the provisions of this Agreement shall apply to all such changes, modifications, additions and omissions with the same effect as if they were embodied in the original Drawings and Specifications. Any such change, modification, addition or omission shall be documented by a “Change Order.” A Change Order shall consist of a written document signed by Owner and Contractor describing the change in the Work, the amount of adjustment, if any, to the Guaranteed Maximum Price and the adjustment, if any, to the date of Substantial Completion.
   2. Owner may request changes in the Work by giving Contractor a written Change Order request (“Change Order Request”), setting forth the nature of the requested change. Upon receipt of a Change Order Request, Contractor shall promptly furnish to Owner a statement setting forth in detail (with a labor and material breakdown by trade and work classification) Contractor’s good faith estimate of (i) the changes, be they additive or deductive in nature, in the Guaranteed Maximum Price attributable to the changes set forth in such Change Order Request, and (ii) the adjustment, if any, to the date of Substantial Completion resulting from such Change Order Request. Upon approval by Owner, a Change Order shall be issued and the Guaranteed Maximum Price and, if applicable, the date of Substantial Completion shall be adjusted as set forth in such Change Order.
   3. If a Change Order results in additional costs in order to prosecute the Work, Owner shall pay to Contractor the amount of such additional costs and the Guaranteed Maximum Price specified in Article IV shall be increased by the amount of such additional costs; provided, however, if such additional costs are Permitted Contingency Items, they may be charged against the Contingency and the Guaranteed Maximum Price shall not be increased. If a Change Order results in a decrease in the Cost of the Work, the Guaranteed Maximum Price shall be decreased by the amount of the decrease. Additional costs shall be limited to (a) costs of labor; (b) costs of materials, supplies and equipment; (c) rental costs of machinery and equipment, exclusive of hand tools; and (d) additional costs of supervision and field office personnel directly attributable to the change provided that the change has an impact on the critical path of the approved project schedule. In connection with calculating the amount allowed for additional costs for Change Orders, the Subcontractor performing the Change Order Work may include a maximum mark-up of ten percent (10%) for overhead and five percent (5%) for profit. A maximum of 5% mark-up will be allowed by the Subcontractor for any work that is subcontracted under the subcontractor. Such permitted mark-up for Subcontractor overhead and profit shall be deemed to cover all costs and expenses of any nature whatsoever, including without limitation those for general conditions items such as administration, clean-up, protection, supervision, estimating, field operations, small tools and security, which such Subcontractor may incur in the performance of or in connection with a change in the Work and which are not otherwise specifically recoverable pursuant to clauses (a), (b) and (c) above. Except as expressly set forth in this Agreement, elements of Subcontractor Change Orders shall be consistent with such Subcontractor’s Schedule of Values. Contractor shall make available to Owner for review all scope of work packages, estimates, schedules and other relevant details with respect to Change Orders in order to ensure competitive pricing and to avoid execution of Change Orders that are duplicative of Work that is included in the then-existing Contract Documents (and therefore not the proper subject of a Change Order). Contractor shall be paid in accordance with Article VIII for Work done pursuant to a Change Order as such Work progresses, said payments to include a pro rata portion of the overhead and profit fee based on the percentage of completion of the Work done under the Change Order. Retention will be held on any such Change Order Work in accordance with Article VIII. For changes in the Work, the Contractor’s Fee shall be adjusted as follows: in the event the sum of the changes in the Work results in a net decrease in the Cost of the Work, the Contractor’s Fee shall be reduced by an amount equal to percent (3.5%) of the net decrease; however, in the event the sum of the changes in the Work results in a net increase in the Cost of the Work, the Contractor’s Fee shall be increased by an amount equal to percent (3.5%) of the net increase.
   4. Should concealed or latent conditions be encountered in performance of the Work, or should concealed or unknown conditions be at variance with the conditions indicated on the Drawings and Specifications, or should unknown physical conditions or concealed or unknown conditions of an unusual nature which differ materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in this Agreement be encountered, then, subject to Owner’s approval of Architect’s confirmation of such concealed or latent conditions (which approval will not be unreasonably withheld), Contractor shall be compensated for any additional costs resulting from any such conditions from the Contingency (but in no event to exceed an amount equal to ten percent (10%) of the Contingency) and then by Change Order in accordance with this Article VI (and the Guaranteed Maximum Price shall be adjusted accordingly), and the time for completion of the Work shall be equitably adjusted upon claim by either party made within twenty (20) days after the first observance of the conditions. Notwithstanding anything to the contrary contained herein, Contractor shall not be compensated for additional costs resulting from any conditions that Contractor discovers if, following such discovery, Contractor proceeds with the Work without first notifying Owner of such conditions and receiving written notice from Owner to proceed with the Work. Contractor shall promptly report errors, inconsistencies or omissions discovered by Contractor to Architect and Owner.
2. CONTRACTOR’S DUTIES AND STATUS
   1. Contractor recognizes the relationship of trust and confidence established between Contractor and the Owner by this Agreement. Contractor covenants with the Owner to furnish its best skill and judgment and to cooperate with the Architect in promoting the interest of the Owner. Contractor agrees to (a) furnish efficient business administration and superintendence, (b) keep upon the Work at all times an adequate supply of skilled and qualified workmen and materials; (c) secure the execution of the Work in an expeditious and economical manner; and (d) maintain quality standards commensurate with nationally known contractors. Owner and Architect shall at all times have access to the Work for review thereof. In addition to the obligations set forth in Article III above and this Article VII, Contractor’s Construction Phase services shall include those set forth on Exhibit E attached hereto.
   2. The Contractor shall carefully study and compare the Contract Documents with each other and with information furnished by the Owner and shall at once report to the Architect and Owner errors, inconsistencies or omissions discovered, including, without limitation, any variance from applicable laws, statutes, ordinances, building codes, rules, regulations or lawful orders of public authorities or from any recorded covenants of which the Contractor has knowledge (all of the foregoing, collectively, “Laws”). The Contractor will assist in the coordination of the Contract Documents and to the greatest extent possible shall utilize BIM modeling to help coordinate, discover and resolve conflicts in the documents. The Contractor shall not be liable to the Owner or Architect for damage resulting solely from errors, inconsistencies or omissions in the BIM model or Contract Documents unless the Contractor recognized (or, utilizing a standard of due care and diligence, should have recognized) such error, inconsistency or omission and knowingly failed to report it to the Architect and Owner. If the Contractor performs any construction activity knowing it involves a recognized error, inconsistency or omission (including, without limitation, any variance from applicable Laws) in the Contract Documents without such notice to the Architect and Owner, the Contractor shall assume appropriate responsibility for such performance and shall bear the attributable costs for correction. Nothing in this paragraph shall relieve the Contractor from responsibility to use good faith efforts in its examination and review of the existing conditions at the Project site, the Construction Schedule, and the Contract Documents, to the end that errors, omissions or inconsistencies in the Contract Documents that are discovered by the Contractor in the course of the Contractor’s required duties hereunder shall be promptly reported to the Architect and Owner.
   3. Contractor shall review all specified items of the design build subcontractors with the ACME Red List and to the greatest extent possible conform to the requirements of the Red List. The Contractor shall make all subcontractors aware of the ACME Red List requirements and to the greatest extent possible include this in subcontractor contracts.
   4. Before ordering any materials or doing any Work, Contractor and each of its Subcontractors shall verify all measurements at the site and shall be responsible for the correctness of same. It shall be understood as part of this Agreement that Contractor and each of its Subcontractors visited the site and examined the environs and satisfied themselves as to the conditions under which they would be required to perform the Work. No allowance shall be made on behalf of Contractor or any Subcontractor for any failure to so acquaint themselves with working conditions except concealed and unforeseeable conditions.
   5. The Contractor shall supervise and direct the Work, using the Contractor’s best skill and attention. The Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract, unless the Contract Documents give other specific instructions concerning these matters.
   6. The Contractor shall be responsible to the Owner for acts and omissions of the Contractor’s employees, Subcontractors and their agents and employees, and any other persons performing portions of the Work under a contract with or through the Contractor or claiming by, through or under the Contractor and for any damages, losses, costs and expenses resulting from such acts or omissions.
   7. The Contractor shall not be relieved of obligations to perform the Work in accordance with the Contract Documents either by activities or duties of the Architect in the Architect’s administration of the Contract, or by tests, inspections or approvals required or performed by persons other than the Contractor. Contractor obligations to perform Work may be suspended where the Architect is the material contributor to a delay or defect, which impairs Contractors ability to perform Work. Contractor obligations shall recommence once the defect or delay referred to herein is remedied substantially enough to enable Contractor to recommence.
   8. Contractor shall comply with all site regulations and directives that may be issued or updated from time to time by Owner, including, without limitation, access, the current version of ACME’s background check guidelines, attached hereto and incorporated herein by reference as Exhibit \_\_\_\_\_\_, safety, security, guarding and other similar practices and standards of Owner. Contractor acknowledges that neither the implementation of such practices and standards nor the absence thereof shall limit the liabilities and obligations of Contractor hereunder. If the Owner issues a new or modified site regulation or directive, for which the Contractor would incur costs not originally contemplated, then Owner shall issue a Change Order and the parties will agree on the applicable costs related thereto.
   9. Contractor shall ensure that it is represented at the weekly site meetings by a representative of its company duly authorized to ensure compliance with the decisions taken, whether of a technical, administrative or financial nature. Contractor shall be responsible for reporting to Owner in the following manner:
      1. Daily reports that include information that will be communicated by Contractor to Owner, in a format acceptable to Owner. Weekly reports that include information that will be communicated by Contractor to Owner, in a format acceptable to Owner. Contractor shall submit weekly reports via email to all parties designated by Owner;
      2. Monthly reports that include information that will be communicated by Contractor to Owner, in a format acceptable to Owner. Contractor shall submit monthly reports via email to all parties designated by Owner;
      3. Digital photographs and digital video of manufacturing processes, construction activities and illustrative situations that describe the daily advancement of the Project. If requested Contractor shall submit daily digital photographs and digital video reports via email to all parties designated by Owner, in such quantity and format as designated by Owner; and
      4. Any other communication as may be reasonably requested by Owner.
   10. The Contractor shall be responsible for inspection of portions of Work already performed under the Contract to determine that such portions are in proper condition to receive subsequent Work. If any of the Work is required to be inspected or approved by any public authority, the Contractor shall cause such inspection or approval to be performed. No inspection performed or not performed by the Owner shall be a waiver of any of the Contractor’s obligations hereunder or be construed as an approval or acceptance of the Work or any part thereof.
   11. Unless otherwise provided in the Contract Documents, the Contractor shall provide and pay for labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, and other facilities and services necessary for proper execution and completion of the Work, whether temporary or permanent in nature and whether or not incorporated or to be incorporated in the Work. Without limiting the generality of the foregoing, unless otherwise directed by Owner in writing, Contractor shall be responsible for all required infrastructure and utility connections with respect to the Work (including, without limitation, water, gas, electrical and sewer) and for procuring all applicable governmental authorizations and approvals in connection with the same.
   12. The Contractor shall enforce strict discipline and good order among the Contractor’s employees and other persons carrying out the Contract. The Contractor shall not permit employment of unfit persons or persons not skilled in tasks assigned to them. By notice to the Contractor, the Owner shall have the right to require the Contractor to remove and replace any personnel assigned to the Project which are unacceptable to Owner. Any substituted personnel, whether due to termination of employment, request of Owner or otherwise, shall be subject to Owner’s prior written approval.
   13. Owner shall notify Contractor if at any time the work of any Subcontractor is unsatisfactory to Owner or Owner believes that any Subcontractor is careless, incompetent, unskilled or otherwise objectionable; and Contractor, upon Contractor’s reasonable determination that Owner’s concerns are valid and cannot otherwise be remedied, shall dismiss such Subcontractor in accordance with standard construction industry labor practices.
   14. Contractor shall construct and complete the Project in accordance with the Contract Documents. Contractor represents and warrants that it is an experienced general contractor and that it has inspected and is familiar with all visible conditions at the Project site. It shall be the obligation of Contractor to review the Contract Documents to determine and to notify the Owner and the Architect of any discrepancy with building codes and regulations of which the Contractor has knowledge. The Contractor shall not violate any zoning, setback or other locational requirements of applicable Laws. If the Contractor observes that portions of the Contract Documents are at variance with applicable Laws, the Contractor promptly shall notify the Owner and Architect in writing, and necessary changes shall be accomplished by appropriate Change Order. If Contractor performs any Work, which it knows is contrary to applicable Laws, the Contractor shall assume appropriate responsibility therefor and shall bear the costs and expenses attributable thereto.
   15. Contractor shall prepare or cause to be prepared as part of the Work a BIM model of the project as described by the BIM Execution Plan, all shop and other detailed drawings that are required to enable Contractor to perform the Work. Before submitting shop drawings for review, Contractor shall check drawings of all Subcontractors for conformity with Contract requirements, and Contractor shall see that all work contiguous with and having bearing on the Work indicated on the shop drawings is accurately and distinctly illustrated. Contractor shall stamp the drawings as evidence that such drawings have been checked, approved or corrected. Such stamp shall constitute Contractor’s warranty to Owner and Architect that (a) Contractor has utilized reasonable efforts expected of highly experienced contractors to insure that such drawings are in strict conformity with the Drawings and Specifications, and (b) such submitted shop and other drawings have been coordinated with other components of the Work. Architect will review and approve shop drawings and other submissions for general conformance with the design concept only and such review shall not relieve Contractor and each Subcontractor from the responsibility for adherence to this Agreement concerning quantity and quality of materials and workmanship, nor shall it relieve Contractor of the responsibility for the accuracy and completeness of other details, such as dimensions and tolerance, or for proper assembly, installation and performance.
   16. Owner reserves the right to perform construction or operations related to the Project with Owner’s own forces, and to award separate contracts in connection with other portions of the Project or other construction or operations on the site; provided, however, that Owner shall use all reasonable efforts to ensure that the exercise of such right does not interfere with the Construction Schedule or create labor disputes. The Contractor shall coordinate Owners forces into the Construction Schedule to best coordinate with the Contractors work and to maintain the date of Substantial Completion.
   17. The Contractor shall comply with and give notices required by applicable Laws bearing on performance of the Work.
   18. Notwithstanding the fact that a dispute, controversy or question shall have arisen in the interpretation of any provision of this Agreement or any of the other Contract Documents, the performance of any Work, the delivery of any material, the payment of any monies to Contractor, or otherwise, Contractor agrees that it will not directly or indirectly stop or delay the Work, or any part thereof, or stop or delay the delivery of any materials on its part required to be furnished under this Agreement, pending the determination of such dispute or controversy. Owner shall continue to make payments for Work that is not the subject of a dispute.
   19. Contractor at all times shall keep the Project free from accumulation of waste materials or rubbish caused by its operations. Contractor shall document the disposal or recycling of all waste consistent with LEED requirements for the Project and shall submit documentation showing compliance to the Owner for submission consistent with LEED requirements. Contractor shall be responsible for all waste generated by the Work, including, without limitation, the management, treatment, neutralization, removal and recycling or disposal of such waste in accordance with all applicable Laws. At the completion of the Work, Contractor shall remove all of Contractor’s waste materials and rubbish from and about the Project, as well as all of Contractor’s tools, construction equipment, machinery and surplus materials, and shall leave the Work clean and ready for use and occupancy in accord with the standards of a first class facility. If the Contractor fails to clean up as provided in the Contract Documents, the Owner, upon three (3) business days notice to Contractor, may do so and the cost thereof shall be charged to the Contractor who shall pay such cost immediately upon demand by Owner.
   20. The Contractor shall maintain a neat, clean, and complete set of Drawings and Specifications on the job, which shall be kept current on a regular basis, for the purposes of marking in all deviations from the original Drawings and Specifications and creating a detailed and accurate set of Drawings and Specifications reflecting the as-built condition of the Work (the “As-Built Drawings and Specifications”). There shall be noted therein the actual locations of underground lines, stub outs, and similar items. Contractor shall deliver to Owner copies of the As-Built Drawings and Specifications in accordance with Paragraph X.D below, and the As-Built Drawings and Specifications shall constitute the sole property of Owner.
   21. The Contractor shall Construct the Project and maintain records to allow the project to be LEED certified at the level established by the Owners Project Requirements.
   22. Contractor shall take all necessary precautions required in order not to jeopardize the health and/or safety of Contractor's personnel or property, Owner’s or other contractors' personnel or property, or members of the general public or their property. Contractor shall handle and store equipment and materials in a safe and orderly manner and so as not to hinder access to other portions of the Project site. Contractor shall perform the Work in accordance with all applicable Laws relating to health and/or safety of persons or property (including, without limitation, the occupational health and safety legislation applicable to the place of the Work, and the standards and regulations issued thereunder), shall implement all practices, procedures and programs customarily implemented by construction contractors for projects of a similar nature, and shall take such other actions as may be deemed prudent by Owner or Owner’s insurance carriers to protect the health and/or safety of persons and property; provided that, to the extent the requirements of applicable Laws and the requirements of Owner differ, the more stringent shall apply. The Contractor further agrees, in addition to the obligations set forth herein and elsewhere in the Contract, to comply with all applicable Laws and practices pertaining to employment standards, human rights, occupational health and safety, labor relations, workers’ compensation, pay equity and employment equity and all other Laws applicable to its employees.
   23. The Contractor is responsible for compliance with the Contract Documents regarding Hazardous Substances (as defined below). If Contractor encounters a Hazardous Substance not addressed in the Contract Documents, and if reasonable precautions will be inadequate to prevent foreseeable bodily injury or death to persons resulting from such Hazardous Substance, Contractor shall immediately stop Work in the affected area and report the condition to Owner and Architect in writing. Work in the affected area shall resume upon written notice by Owner to Contractor that such Hazardous Substance has been removed or otherwise mitigated. Notwithstanding anything to the contrary contained in this Agreement, the Contractor will develop and follow procedures for the storage, use and disposal of Hazardous Substances, which procedures are to be in accordance with all applicable environmental Laws and the Owner’s reasonable instructions provided to the Contractor from time to time. The Contractor will perform monitoring activities and file environmental test results as required by Law and maintain a copy of such results at the place of the Work for the Owner’s review upon request. Unless the Owner notifies the Contractor otherwise, the Contractor must obtain the Owner’s prior written approval before bringing on to the place of the Work any Hazardous Substance or causing any hazardous condition at the place of the Work. The Contractor will request the Owner’s prior written approval by submitting to the Owner a Material Safety Data Sheet (“MSDS”) for the place of the Work listing the types and volumes of the Hazardous Substances the Contractor intends to bring to the place of the Work and the types of hazardous conditions the Contractor intends to cause at the place of the Work. The Contractor will inform the Owner of any changes in the components of the controlled substances through the issuance of an updated MSDS. All MSDS’s on file with the Owner will be updated as required by Law, regardless of whether the substances have changed or not.

The Contractor will immediately notify the Owner of any notice it receives from any governmental authority of any actual or potential violation of any environmental Law and will cooperate with the Owner in responding to such notice and in correcting or contesting such violation.

For purposes of this Agreement, “Hazardous Substances” means any and all substances, materials and/or wastes now or hereafter identified as hazardous or toxic by any federal, state or local Law related to the protection of the environment or worker safety and health and applicable to the Work, including without limitation all explosive or regulated radioactive materials, toxic substances, petroleum (including crude oil or any faction thereof) or petroleum distillates, insecticides, pesticides, special wastes, including asbestos, industrial substances or wastes, polychlorinated biphenyls and any constituent of any such substances or wastes.

1. PROGRESS PAYMENTS

Owner agrees to make progress payments to Contractor for the Construction Phase services according to the following procedures.

* 1. The Schedule of Values shall be used as a basis for Contractor’s Applications for Payment (as defined in Paragraph VII.B below).
  2. Contractor, on or before the first day of each month during the Construction Phase, shall deliver to Owner and Architect an application for payment (“Application for Payment”) showing as of the end of the month covered by the Application for Payment the percentage of completion of the Work performed under this Agreement, the value of said completed Work based on the Schedule of Values, and the amount due and owing to Contractor under the terms of this Agreement, including amounts due under any fully executed Change Orders. Each Application for Payment shall be submitted on AIA forms G702 and G703, or such other form as Owner shall have approved in advance, and shall contain such supporting data as Owner may reasonably require including, but not limited to copies of subcontractor invoices and/or pay applications to support the amounts requested for each trade. Without limiting the generality of the foregoing, the Contractor shall provide an invoice preview on or about the 25th of the month of the Application for Payment for review by the Owner and with each Application for Payment Contractor shall submit any other evidence (such as, but not limited to, payrolls, petty cash accounts, receipted invoices and/or invoices with check vouchers attached) required by Owner or Architect to demonstrate that cash disbursements already made by Contractor on account of the Cost of the Work equal or exceed (1) progress payments already received by Contractor; less (2) that portion of those payments attributable to the Contractor’s Fee; plus (3) payrolls for the period covered by the present Application for Payment; plus (4) retainage applicable to prior progress payments. In addition, Contractor’s Applications for Payment shall be submitted together with: (a) conditional waivers and releases of liens, stop notices and bond rights for the current Application for Payment, unconditional waivers and releases of liens, stop notices and bond rights for all prior payments from Contractor, and unconditional waivers and releases of liens, stop notices and bond rights for all payments received at least 30 days prior to the current Application for Payment, from all Subcontractors, and anyone having lien rights, stop notice rights or rights against a bond for the Project, all of which waivers and releases shall be on forms approved by Owner and in compliance with applicable Laws; (b) Contractor’s Declaration to Procure Payment, in a form approved by Owner, listing all persons and firms who have furnished subcontract work, equipment or materials to the Contractor for the Project and stating that full payment for all such work, equipment and materials has been made except as otherwise stated therein; and (c) such additional documents as the Owner may reasonably require. Materials and equipment not yet incorporated into the Work but delivered, clearly marked as Owner’s property, and suitably stored at the site of the Project shall be considered completed items of Work for purposes of an Application for Payment, and may be included therein. Contractor shall not make advance payments to Contractor’s Subcontractors (including, without limitation, materialmen or suppliers) without Owner’s prior written approval.
  3. Within thirty (30) days after receipt by Owner of an approved Application for Payment, and provided Contractor is not in default under this Agreement, Owner shall pay to Contractor the amount approved for payment; provided, however, that if any item on the Application for Payment is disputed, Contractor promptly shall be notified of such dispute and shall submit verification of such item or a revised Application for Payment. This procedure, however, shall not be deemed cause for any delay in making a progress payment within thirty (30) days of the Application for Payment with regard to all undisputed items.
  4. There shall be a ten percent (10%) retention on progress payments for the Work. All funds retained shall be released in accordance with Article XI.
  5. Should Contractor neglect or refuse to pay, within thirty (30) days after it falls due, any bill legitimately incurred and due by it hereunder which has been paid on a progress payment basis, Owner, after giving five (5) days written notice to Contractor of its intention to do so, shall have the right but not the obligation to pay such bill directly. In such event, said payment shall be treated as a progress payment made for the benefit of Contractor.
  6. Contractor shall promptly pay each Subcontractor (including, without limitation, any materialman and supplier), upon receipt of payment from Owner, out of the amount paid to Contractor on account of such Subcontractor’s portion of the Work, the amount to which such Subcontractor is entitled, reflecting percentages actually retained from payments to Contractor on account of such Subcontractor’s portion of the Work. Contractor shall, by appropriate agreement with each Subcontractor, require such Subcontractor to make payments to sub-subcontractors in similar manner.
  7. Each Application for Payment shall show the percentage of completion of each portion of the Work as of the end of the period covered by the Application for Payment. The percentage of completion shall be the lesser of (a) the percentage of that portion of the Work which has actually been completed; or (b) the percentage obtained by dividing (i) the expense that has actually been incurred by the Contractor on account of that portion of the Work for which the Contractor has made or intends to make actual payment prior to the next Application for Payment, by (ii) the share of the Guaranteed Maximum Price allocated to that portion of the Work in the Schedule of Values. Subject to other provisions of the Contract Documents, the amount of each progress payment shall be computed as follows:
     1. Take that portion of the Guaranteed Maximum Price properly allocable to completed Work as determined by multiplying the percentage of completion of each portion of the Work by the share of the Guaranteed Maximum Price allocated to that portion of the Work in the Schedule of Values, less retainage of ten percent (10%) in accordance with Paragraph VII.D above.
     2. Add that portion of the Guaranteed Maximum Price properly allocable to materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work, less retainage of ten percent (10%).
     3. Add the Contractor’s Fee, less retainage of ten percent (10%). The amount of the Contractor’s Fee shall be computed upon the Cost of the Work described in the two preceding clauses at the rate stated in Article IV.
     4. Subtract the aggregate of previous payments made by Owner.
     5. Subtract the shortfall, if any, indicated by Contractor in the documentation required to substantiate prior Applications for Payment, or resulting from errors subsequently discovered by the Owner’s accountants in such documentation.
     6. Subtract amounts, if any, for which Architect or Owner has withheld or nullified a Certificate for Payment.
  8. Except with Owner’s prior approval, payments to Subcontractors included in Contractor’s Applications for Payment shall not exceed an amount for each Subcontractor calculated as follows:
     1. Unless otherwise agreed by Owner, the Contractor shall take that portion of the subcontract sum properly allocable to completed Work as determined by multiplying the percentage of completion of each portion of the Subcontractor’s Work by the share of the total subcontract sum allocated to that portion of the Work in the Subcontractor’s Schedule of Values, less retainage of ten percent (10%).
     2. Add that portion of the subcontract sum properly allocable to materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work, less retainage of ten percent (10%).
     3. Subtract the aggregate of previous payments made by Contractor to the Subcontractor.
     4. Subtract amounts, if any, for which Architect or Owner has withheld or nullified a Certificate for Payment by Owner to Contractor for reasons that are the fault of the Subcontractor.
     5. Add, upon Substantial Completion of the entire Work of Contractor, a sum sufficient to increase the total payments to the Subcontractor to one hundred percent (100%) of the subcontract sum, less amounts, if any, for incomplete Work and unsettled claims. The subcontract sum is the total amount stipulated in the subcontract to be paid by Contractor to the Subcontractor for the Subcontractor’s performance of the subcontract.

Contractor shall ensure that Subcontractors do not “front-load” or otherwise materially misrepresent the cost of performance of any portion of the Work. Concurrently with the submission of each Application for Payment, Contractor shall notify Owner of any Subcontractor costs that have been incurred but are not reflected in such Application for Payment (whether due to delinquent billing by any Subcontractor, any billing dispute between Contractor and any Subcontractor or otherwise). Owner shall have the right to audit all relevant records of Contractor and any and/or all Subcontractors to confirm the accuracy of payment requests, including the calculation of sales tax amounts.

* 1. Nothing contained in this Article VIII shall be construed to affect the right to reject in whole or in part any of the Work, should such Work later be found not to comply with the provisions of this Agreement or any of the other Contract Documents. All progress payments are subject to review and correction on subsequent progress payments and/or on the final payment, to such extent as may be necessary in the reasonable opinion of Owner to protect Owner from loss arising from the default of Contractor or the existence of claims. Payment by Owner and acceptance by Contractor of progress payments based on periodic estimates of quantities of Work performed shall not, in any way, constitute acceptance of the estimated quantities used as the basis for computing the amounts of the progress payments.

1. SUBCONTRACTORS

All portions of the Work shall be performed by Contractor or under subcontracts entered into by Contractor. As used herein, the term “Subcontractor” shall mean a person or entity who has a contract with or through the Contractor to perform a portion of the Work, or to supply materials or equipment with respect to the Work, and includes subcontractors at every tier, including design-build subcontractors, material and equipment suppliers, vendors and sub-subcontractors, but does not include a separate contractor of Owner or subcontractors of any such separate contractor. Owner shall have the right to approve all Subcontractors. The Contractor shall require each Subcontractor, of whatever tier, to agree in writing to be bound by the terms of the Contract Documents insofar as they apply to such Subcontractor’s performance of the Work. Each subcontract, whether between Contractor and a Subcontractor or between any Subcontractor and a lower-tier Subcontractor, shall state that the Owner and its successors and assigns are intended third-party beneficiaries of such subcontract and shall contain an indemnity and hold harmless in favor of the Owner and its officers, employees, agents, successors and assigns against all claims, damages, losses, costs and expenses, including reasonable attorneys’ fees, caused by the negligent acts or omissions of the Subcontractor or its employees, agents or consultants in connection with the Work. Contractor shall be fully responsible for all portions of the Work performed by Subcontractors, and Contractor shall be liable for all acts and omissions of any Subcontractor. Contractor shall use its best efforts working together with the Owner, Architect, Design-Assist Engineers and other parties contracted by Owner to define details of the scope included in Subcontractor bid packages and thereby minimize the adjustments required during the analysis of bids received. Unless otherwise approved by the Owner, Contractor shall obtain a minimum of three (3) responsive bids from Subcontractors, including suppliers of materials or equipment fabricated especially for the Work (except that work normally done by the Contractor may be negotiated with Owner at Owner’s request), all of which bids shall be presented to the Contractor as sealed bids and, if requested by Owner, shall be delivered to the Architect. Such bids shall be opened and tabulated in the presence of the Owner and Contractor or submitted electronically in a format approved by Owner. Each bidder shall be required to furnish its hourly billing rates for regular and overtime labor (including full labor burden) with its bid complete with all relevant supporting documentation for review and approval by both the Contractor and the Owner. Contractor shall summarize the bid results for each component of the Work in a spreadsheet format, including all analysis and adjustments necessary to permit a meaningful comparison among bidders and against the most recent itemized budget for the Work approved by Owner. Contractor’s summary of bid results, adjustments to normalize scopes among bidders and the detailed basis of these adjustments shall be subject to review by Owner and/or Owner’s representative. All communications between Contractor and bidders, whether oral or otherwise, shall be documented by Contractor and such documentation shall be made available to Owner and/or Owner’s representative for review. Contractor shall also provide, as appropriate, comments concerning each Subcontractor under consideration, including financial strength, past performance, current workload and other relevant factors, and a recommendation as to Subcontractor selection. If Contractor recommends the selection of a Subcontractor other than the low bidder, Contractor shall include as part of the bid results summary the rationale for the recommendation, including the evaluation criteria and the bidders’ performance against the criteria. The Owner will then determine which bids will be accepted. The Owner may designate specific persons or entities from whom the Contractor shall obtain bids and reserves the right to reject any Subcontractor proposals. If a specific bidder among those whose bids are delivered by the Contractor (1) is recommended to the Owner by the Contractor; (2) is qualified to perform that portion of the Work; and (3) has submitted a bid which conforms to the requirements of the Contract Documents without reservations or exceptions, but the Owner requires that another bid be accepted, then the Contractor may require that a Change Order be issued to adjust the Guaranteed Maximum Price by the difference between the bid of the person or entity recommended to the Owner by the Contractor and the amount of the subcontract or other agreement actually signed with the person or entity required by the Owner. Owner shall have, at Owner’s request, the right to review the bid invitations and bid packages prepared by Contractor. With the approval of the Owner, the Contractor may negotiate with selected Subcontractors. All negotiated prices and scope must be approved in advance by the Owner. Contractor will receive warranties from all Subcontractors in accordance with the Contract Documents and contractor licensing requirements. Each subcontract agreement is assigned by Contractor to Owner, provided that such assignment shall be effective only after any termination of this Agreement pursuant to Article XV below and only for those subcontract agreements that Owner accepts by notifying the Subcontractor in writing. In connection with any such assignment, Owner shall not assume any obligation of Contractor to the Subcontractor incurred prior to the effective date of the assignment. Subject to Owner’s approval, for portions of the Work that Contractor desires to perform using its own forces, Contractor shall be permitted to participate in competitive bids pursuant to the requirements in this Article IX, except that bids shall be submitted to Owner directly, communications with bidders and analysis of the bids received shall be conducted by the Owner and/or Owner’s representative, and selection shall be determined by the Owner.

1. TITLE TO THE WORK

Owner shall have title to all completed Work and all materials, equipment, tools and supplies for which payment has been made by Owner under the terms of this Agreement. The Contractor warrants that title to all such Work, materials, equipment, tools and supplies shall pass to the Owner upon the earlier of incorporation into the Work or the time of payment therefore by Owner. The Contractor further warrants that upon submittal of an Application for Payment all Work for which Certificates of Payment have been previously issued and payments received from the Owner shall, to the best of the Contractor’s knowledge, information and belief, be free and clear of liens, claims, security interests or encumbrances in favor of the Contractor, Subcontractors (including, without limitation, material suppliers), or other persons or entities making a claim by reason of having provided labor, materials and/or equipment relating to the Work.

1. ACCEPTANCE AND FINAL PAYMENT
   1. When the Work is Substantially Complete and Contractor has obtained a temporary certificate of occupancy for the Project, the Contractor will notify Owner and Architect that the Project is ready for final inspection and acceptance. Owner and Architect shall, within ten (10) days following receipt of Contractor’s notice, make such inspection. In the event that Architect and Owner shall find the Work to have been performed in accordance and in conformity with this Agreement and the other Contract Documents, Architect shall promptly issue a Certificate of Substantial Completion which shall set forth:
      1. A statement that the Work has been performed and is Substantially Completed in accordance and in conformity with this Agreement and has been accepted by the Owner and the Architect. For the purposes of this Agreement, “Substantially Completed” or “Substantial Completion” means completion of the Work in accordance with this Agreement and the other Contract Documents, including common service areas, mechanical equipment, and all utilities so as to permit occupancy and use of the Project for its intended use, subject only to minor corrective work or “punch list” work (“Punch List Work”) not rendering the premises unfit for occupancy, such as replacements of broken or defective materials, adjustments to mechanical system or elevators, and the like. All Punch List Work shall be completed within thirty (30) days after issuance of the Certificate of Substantial Completion, or such other period as Owner and Contractor may mutually agree (the “Punch List Period”). If any Punch List Work remains uncompleted at the expiration of the Punch List Period, then, in Owner’s sole discretion, Owner may elect to complete the Punch List Work and, upon such election, shall retain any retention amount Owner then holds to pay for the completion of the Punch List Work.
      2. The total unpaid balance of the amount due to Contractor hereunder, including any amounts due under Change Orders, the contingency fund and any retained amounts.
   2. If the inspection by Architect and Owner discloses any item that is not in accordance with the requirements of this Agreement or any of the other Contract Documents, Contractor shall, before issuance of the Certificate of Substantial Completion, complete or correct such item(s) upon notification from Architect or Owner. Contractor shall then submit a request for another inspection by Architect and Owner to determine Substantial Completion. All warranties shall commence on the date of Substantial Completion of the Work unless otherwise provided in the Certificate of Substantial Completion.
   3. Within thirty (30) days following issuance of the Certificate of Substantial Completion, and provided Contractor has completed the Punch List Work, has delivered the Close-out Package and is not in default under this Agreement, Owner shall pay to Contractor such amount as is shown by the Certificate of Substantial Completion to be the unpaid balance of the Cost of Work, the Contractor’s Fee and any amounts due under Change Orders, including any retained amounts, and any other amounts due hereunder; provided however, that:
      1. If any mechanic’s or materialman’s lien has at that time been recorded, Owner may withhold one and one-half (1-1/2) times the amount thereof until the lien or claim is removed and released of record or until the Owner is indemnified against such claim by bond or other means reasonably satisfactory to Owner; and
      2. So long as any Work remains uncompleted hereunder, Owner shall retain an amount equal to two hundred percent (200%) of the value of such uncompleted Work based on the Schedule of Values and Architect’s certification, which shall be paid only when such Work is completed to the reasonable satisfaction of Architect and Owner; and
      3. As a condition precedent to payment to Contractor under this paragraph, Contractor shall deliver to Owner (a) such evidence of Contractor’s full payment of all Subcontractors (with the exception of retentions and final payments which are to be paid out of the final payment by Owner to Contractor) and the absence of any liens generated by the Work as may be required by Owner, including, without limitation, conditional waivers and releases of lien upon final payment, in a form acceptable to Owner and in compliance with applicable Laws, from Contractor and all Subcontractors (including, without limitation, suppliers and vendors) with remaining lien rights respecting the Project, (b) maintenance and operating manuals for all equipment, (c) all warranties and guaranties in connection with the Work, and (d) as-built drawings for the Project. Final payment, at Owner’s option, may be made in the form of checks made jointly payable to Contractor and any Subcontractor entitled to payment out of the funds provided by the final payment. Contractor shall provide evidence satisfactory to Owner establishing the identities of such persons and the amounts of the final payment to which they are respectively entitled.
      4. Owner reserves the right to request that Contractor submit a Statement of Final Cost, which shall be reviewed by the Owner and/or its representative of a third party designated by the Owner to perform a close-out audit of the contract. The close-out audit shall be conducted by the Owner or its designated representative in a timely manner and shall be completed no later than 30 days after receipt of all requested project books and records.
   4. All plans and specifications, drawings, BIM Models, computations, sketches, test data, survey results, models, photographs, renderings, plans, shop and proposal drawings and material relating to the Work and prepared by Architect, any of Architect’s consultants, any separate consultants of Owner, Contractor or any other person or entity under Contractor (i) are the property of Owner, (iii) shall be delivered to Owner consolidated into a complete Close-out Package together with Record Drawings, Warrantees, Operations and Maintenance Manuals and records of training sessions Owner (and Contractor shall see that all such material is obtained from Subcontractors and delivered to Owner) and (iv) shall not be used by Contractor or any other person or entity under Contractor (including, without limitation, any Subcontractor) in any way connected with any other work. Prior to final payment by Owner, Contractor shall deliver to Owner two complete sets of coordinated and bound As-Built Drawings and Specifications covering all of the Work, and a complete set of Record Drawings and Specifications in electronic format approved in advance by Owner, plus all operating manuals and warranties relating to the Work.
   5. Acceptance of final payment by the Contractor or any Subcontractor shall constitute a waiver of all claims by that payee except those previously made in writing and identified by that payee as unsettled at the time of the final Application for Payment.
2. LIENS

Contractor agrees to make prompt payment to all Subcontractors (including, without limitation, laborers, materialmen and suppliers) performing labor upon or furnishing materials for the Work, subject only to receipt of timely payment from Owner for such labor and materials through the progress payments to which Contractor is then entitled. Contractor agrees to keep the Project and the Project site free and clear of any and all liens and claims of such Subcontractors, laborers, materialmen and suppliers, subject to Owner’s performance of its own payment obligations; and if any such lien shall be filed at any time during the progress of the Work, Owner may withhold one and one-half (1-1/2) times the amount of such lien from payments otherwise due Contractor until the same is discharged and released of record or until the Owner is indemnified by bond or other means reasonably satisfactory to Owner. At Owner’s request, Contractor shall bond any lien filed against the Project or the Project site by any Subcontractor. Contractor will indemnify Owner from and hold Owner harmless against all liens and claims of liens for such materials, equipment, labor and other costs, or any of them, filed against the Project or the Project site or any part thereof, and from and against all expense and liability in connection therewith, including, but not limited to, court costs and reasonable attorneys’ fees resulting or arising therefrom. The foregoing indemnity shall survive any termination of the Contract.

1. OWNER’S OCCUPANCY BEFORE COMPLETION OF WORK

Owner shall have the right to occupy any part or parts of the Project, and to install its own fixtures and equipment thereon prior to completion of the Work by Contractor, provided, however, that any such occupancy or use of a portion or portions of the Work shall not constitute acceptance of Work not complying with the requirements of this Agreement. Any such occupancy shall be consistent with the Contractor’s sequence for completing the Work in the occupied part or parts or in other areas of the Project, and shall not materially interfere with the completion of such Work. Contractor shall coordinate its efforts with any occupancy prior to completion of the Work, and shall give reasonable notice to Owner of any damage or delay likely to arise as a result of such occupancy; Owner shall assume the risk of any such damage or delay as set forth in Contractor’s notice.

1. INSURANCE
   1. Contractor’s Safety Responsibility. Contractor shall take all reasonable and legally required precautions for the safety of employees and all other persons in or about the Project and at any other location where any portion of the Work is being performed, including, without limitation, the maintenance of fences, barricades, warning lights, scaffolds, walkways and ladders which are adequate for safety of such employees and other persons. Contractor shall also exercise due care in order to protect all work and material against loss, injury or destruction and shall take all precautionary measures reasonably required for such purpose.
   2. Loss or Damage to Work. With the exception of any loss or damage to the Work for which Owner is reimbursed under the insurance coverage described in Paragraph XIII.E.2(a) below, Contractor shall be responsible for any loss or damage to the Work to be performed and furnished under this Agreement however caused, until final acceptance and payment by Owner. Contractor shall be responsible for loss of or damage to materials, tools, equipment, appliances or other personal property owned, rented or used by Contractor or any Subcontractor or anyone employed or retained by them in the performance of the Work from whatever cause.
   3. Contractor’s Indemnification and Insurance.
      1. Indemnification. Contractor agrees to indemnify, defend (with counsel reasonably satisfactory to Owner), and hold Owner, its Affiliates (as defined in Section XVII.L below) and their respective officers, directors, members, partners, agents and employees harmless from and against all liability, claims, demands, causes of action, damages, losses, or expenses (including, without limitation, reasonable attorneys’ fees) of any kind or nature (including, without limitation, property damage except to the Work itself, personal injury or death) arising out of or resulting from or in connection with (a) the performance of the Work, except to the extent arising from the negligence or willful misconduct of Owner or its agents, (b) any breach or default by Contractor under the Contract Documents (including, without limitation, any breach of any of Contractor’s representations or warranties), or (c) the negligence, willful misconduct, fraud, misrepresentation or violation of Law by Contractor or any of its Subcontractors. Contractor agrees that Owner shall have the right to control and participate in the defense of any such claim, demand, suit or cause of action, and that such suit will not be settled without Owner’s prior written consent, which consent shall not be unreasonably withheld. If, in Owner’s reasonable judgment, a conflict exists in the interests of Owner and Contractor in such demand, suit or cause of action, Owner may retain its own counsel whose reasonable fees shall be paid by Contractor. The indemnification set forth herein shall survive any termination of the Contract.
      2. Contractor’s Insurance. Contractor and its Subcontractors shall price all Work with the insurance coverage required pursuant to this Paragraph XIII.C.2 and Paragraph XIII.C.3 below, as applicable. Prior to the commencement of the Work, or any portion thereof, Contractor shall procure the following insurance coverage, or other such coverage as agreed by the Owner, with respect to performance of the Work. Such insurance shall be issued by insurance carriers satisfactory to Owner and rated at least A- / IX in the current edition of Best’s insurance guides, with minimum limits as set forth below. Such insurance shall be maintained in full force and effect until Substantial Completion and final acceptance and payment by Owner:
         1. Statutory Workers’ Compensation Insurance as required by state law and Employer’s Liability Insurance with a minimum limit of $1,000,000. A waiver of subrogation shall apply in favor of Owner.
         2. Commercial General Liability Insurance including Completed Operations and Contractual Liability Insurance against the liability assumed in this Agreement with the following minimum limits for bodily and personal injury and property damage on an occurrence basis:

$5,000,000 per occurrence;

$5,000,000 aggregate per project.

* + - 1. Comprehensive Automobile Liability Insurance covering owned, non-owned and hired automobiles used in connection with the Work covering bodily injury and property damage with a minimum limit of $1,000,000 per accident.
      2. Commercial Umbrella Insurance providing excess limits for the Employer’s Liability, Commercial General Liability and Automobile Liability policies, with a minimum limit of $5,000,000 each occurrence and $25,000,000 annual aggregate.
      3. Professional Liability Insurance for any portion of the Work to be performed on a design/build basis, with a minimum limit of $5,000,000 per claim.

Prior to commencing the Work, the Contractor shall furnish a certificate, satisfactory to Owner, from each insurance company showing that the above insurance is in force, stating policy numbers, dates of expiration and limits of liability, and further providing that the insurance will not be canceled or changed until the expiration of at least thirty (30) days after written notice of such cancellation or change has been mailed to and received by Owner. Owner shall be named as an additional insured under the Commercial General Liability and Commercial Umbrella policies. Further, the certificate shall show that the Contractor’s insurance is primary.

Contractor shall provide Owner with evidence that the Completed Operations insurance is maintained in effect covering loss sustained during a period of four (4) years following Substantial Completion. In addition, the Professional Liability insurance shall be kept in force for a period of four (4) years following Substantial Completion.

Contractor’s insurance policies shall include a severability of interest or cross-liability endorsement and provide that an act or omission of one of the named or additional insureds shall not reduce or void coverage to another named or additional insured. With the exception of the Professional Liability policy (which may be issued on a claims-made basis), such insurance shall afford coverage for all claims based on any act, omission, injury or damage from which a claim occurred or arose (or the onset of which occurred or arose) in whole or in part during the policy period. Contractor’s insurance policies shall also contain endorsements: (i) deleting any employee exclusion on personal injury coverage, (ii) including employees as additional insureds, and (iii) providing host liquor liability coverage. Contractor’s insurance policies shall be primary and any insurance maintained by Owner shall be excess insurance only. If Contractor fails to procure and maintain the insurance required herein, or any portion thereof, then Owner shall have the right, but not the obligation, to procure and maintain the required insurance for and in the name of Contractor, and Contractor shall pay the cost thereof and shall furnish all information necessary to acquire and maintain such insurance. Contractor shall not violate or knowingly permit any violation of any conditions or terms of the policies of insurance described herein.

* + 1. Subcontractors’ Insurance. Contractor shall be responsible to ensure that all Subcontractors have procured Workers Compensation Insurance, Commercial General Liability Insurance, Comprehensive Automobile Liability Insurance and, with respect to design/build Subcontractors, Professional Liability Insurance for losses arising out of the performance of their work. Contractor shall obtain and deliver to Owner a certificate from each Subcontractor’s insurance company showing that the above insurance is in force, stating policy numbers, dates of expiration and limits of liability, and further providing that the insurance will not be canceled or changed until the expiration of at least thirty (30) days after written notice of such cancellation or change has been mailed and received by Owner. Contractor shall ensure that Owner is named as an additional insured the Commercial General Liability policies. Subcontractor limits will be as follows:
       1. Statutory Workers’ Compensation Insurance as required by state law and Employer’s Liability Insurance with a minimum limit of $500,000.
       2. Commercial General Liability Insurance with the following minimum limits for bodily and personal injury and property damage on an occurrence basis:

$1,000,000 per occurrence;

$1,000,000 aggregate per project.

* + - 1. Comprehensive Automobile Liability Insurance covering owned, non-owned and hired automobiles used in connection with the Work covering bodily injury and property damage with a minimum limit of $1,000,000 per accident.
      2. Professional Liability Insurance for design/build Subcontractors with a minimum limit of $5,000,000 per claim.
  1. Owner’s Liability Insurance. Owner shall be responsible for purchasing and maintaining the Owner’s usual liability insurance. Optionally, Owner may purchase and maintain other insurance for self-protection against claims which may arise from operations under this Agreement. Contractor shall not be responsible for purchasing and maintaining this optional Owner’s liability insurance unless specifically required by the Contract Documents.
  2. Property Insurance.
     1. Loss of Use Insurance. Owner, at its option, may purchase and maintain such insurance as will insure Owner against loss of use of Owner’s property during construction due to fire or other hazards, however caused, prior to Substantial Completion and final acceptance and payment. Owner waives all rights of action against Contractor for loss of use of Owner’s property prior to Substantial Completion, including consequential losses due to fire or other hazards, however caused, to the extent of proceeds received by Owner under such insurance and provided Owner’s insurance company agrees to such waiver.
     2. Builder’s Risk Coverage.
        1. Owner shall obtain builder’s risk insurance on an “all risk” policy form, in an amount not less than one hundred percent (100%) of the completed insurable value of the Work being performed, including, to the extent not covered by other insurance, the structures upon and in which the Work is being done and all Work in progress including materials to be incorporated in the Work which qualify for payment under the terms of this Agreement. Such insurance shall cover the interests of both Owner and Contractor in the Work as their interests may appear.
        2. Contractor shall assist Owner in filing and pursuing any claim and collecting any amounts payable under the builder’s risk coverage described above. All sums payable under such builder’s risk coverage shall be paid to Owner for the purpose of paying the cost, in whole or in part, of restoring or rebuilding the Work. Owner shall have the authority to adjust and settle any loss with the insurers. To the extent of insurance proceeds received under the builder’s risk coverage, costs incurred in connection with restoring or rebuilding the Work shall be treated as a Change Order within the meaning of Article VI of this Agreement, and the Guaranteed Maximum Price shall be adjusted accordingly.
  3. Waivers of Subrogation. The Owner and Contractor waive all rights against each other and any of their respective Subcontractors, consultants, agents, and employees, each of the other, for damages caused by fire or other perils to the extent of insurance proceeds received under property insurance obtained pursuant to this Agreement or any of the other Contract Documents or other property insurance applicable to the Work, except such rights as they have to proceeds of such insurance held by the Owner as a fiduciary. Each policy of property insurance shall provide such waivers of subrogation by endorsement or otherwise. A waiver of subrogation shall be effective as to a person or entity even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, did not pay the insurance premium directly or indirectly, and whether or not the person or entity had an insurable interest in the property damaged.
  4. Bonds. If Owner requests the same, Contractor shall furnish to Owner performance and/or payment bonds in the amount of the Guaranteed Maximum Price. Further, if Owner requests such bonds from any of Contractor’s Subcontractors, Contractor will be responsible for ensuring that such Subcontractors provide same to Owner. Contractor will review such requests with the Owner prior to securing any such bonds. The cost of such bonds shall be part of the GMP or shall be added by Change Order.

1. TERMINATION OF AGREEMENT
   1. Termination Prior to Establishing Guaranteed Maximum Price.
      1. Prior to execution by both parties of the Amendment, (a) the Owner may terminate the Contract at any time without cause, and (b) the Contractor may terminate the Contract if, through no act or fault of Contractor or anyone employed by or acting through Contractor, Owner, without justification under the provisions of this Agreement, orders the Work to be stopped for a period in excess of ninety (90) consecutive days.
      2. If the Owner or Contractor terminates the Contract pursuant to Paragraph XIV.A.1 prior to commencement of the Construction Phase, the Contractor shall be equitably compensated for Preconstruction Phase services properly performed prior to receipt of notice of termination; provided, however, that the compensation for such services shall not exceed the compensation set forth in Paragraph II.A above.
      3. If the Owner or Contractor terminates the Contract pursuant to Paragraph XIV.A.1 after commencement of the Construction Phase, the Contractor shall, in addition to the compensation set forth in Paragraph XIV.A.2 above, be paid an amount calculated as follows:
         1. Take the Cost of the Work for Work satisfactorily completed to the date of termination.
         2. Add the Contractor’s Fee computed upon the Cost of the Work for Work satisfactorily completed to the date of termination at the rate stated in Paragraph IV.C above.
         3. Subtract the aggregate of previous payments made by the Owner on account of the Construction Phase.

To the extent that Owner elects to take legal assignment of subcontracts and purchase orders (including rental agreements) pursuant to this Paragraph XIV.A or Paragraph XIV.C below, Contractor shall execute and deliver all such assignment documentation and take all such steps as Owner may require for the purpose of fully vesting in the Owner the rights and benefits of the Contractor under such subcontracts or purchase orders, and the same shall be a condition precedent to Contractor’s receipt of any additional payments that may be required hereunder. Subcontracts, purchase orders and rental agreements entered into by the Contractor shall contain provisions permitting assignment to the Owner as described herein. In connection with any such assignment, Owner shall not assume any obligation of Contractor to the Subcontractor incurred prior to the effective date of the assignment. If the Owner elects not to accept the assignment of any such subcontract, purchase order or rental agreement, the Contractor shall terminate such subcontract, purchase order or rental agreement.

* 1. Termination by Contractor Subsequent to Establishing Guaranteed Maximum Price.
     1. Subsequent to execution by both parties of the Amendment, the Contractor may terminate the Contract in accordance with the provisions of this Paragraph XIV.B. If through no act or fault of Contractor or any of its Subcontractors, or anyone employed by any of them, Owner, without justification under the provisions of this Agreement, orders the Work to be stopped for a period in excess of ninety (90) consecutive days, Contractor, upon thirty (30) days’ written notice to Owner, may elect to terminate the Contract. If Owner shall not make any payment of undisputed amounts due to Contractor hereunder within sixty (60) days after the due date of such payment as provided herein, and provided Contractor is not in default under this Agreement or any of the other Contract Documents, Contractor, at its option, may suspend the Work upon ten (10) business days’ prior written notice to Owner. Owner shall be liable to Contractor for the amount of Contractor’s actual, reasonable costs of shut-down, delay and start-up occasioned by a stoppage or a suspension of the Work pursuant to this paragraph.
     2. If through no act or fault of Contractor or any of its Subcontractors, construction of the Work shall be stopped pursuant to court order, or other governmental act or regulation, fire, or action of the elements, national emergency, or any other cause beyond Contractor’s reasonable control, Contractor, after seven (7) days’ written notice to Owner, may temporarily cease construction of the Work. If the cause of such stoppage of the Work is removed within sixty (60) days after Contractor so ceases construction, Contractor shall resume construction and proceed with the Work, provided, however, that the amount payable to Contractor hereunder and the Guaranteed Maximum Price shall be subject to adjustment as provided in Article VI. If the cause of such stoppage of work cannot be removed for a period of six (6) months, then either the Contractor or the Owner may elect to terminate the Contract.

If the Contract should be terminated as provided in Subparagraph 1 or 2 above, Contractor shall be entitled to receive payment for Work satisfactorily completed and the portion of Contractor’s Fee equal to the percentage of the Work satisfactorily completed as of the effective date of such termination, but in no event to exceed the amount Contractor would have been entitled to receive pursuant to Paragraphs XIV.A.2 and XIV.A.3 above, and subject to the Guaranteed Maximum Price.

* 1. Termination by Owner Subsequent to Establishing Guaranteed Maximum Price.
     1. If the Contractor should be adjudged as bankrupt, or if Contractor should make a general assignment for the benefit of its creditors, or if a receiver should be appointed on account of Contractor’s insolvency, or if Contractor should refuse or should fail to supply enough properly skilled workmen or proper materials to prosecute the Work as provided herein, or if Contractor should fail to make prompt payment of amounts properly due to its Subcontractors or for materials or labor after receiving payments from Owner, or if Contractor should disregard applicable Laws or otherwise be guilty of a material breach of any provision of this Agreement or any of the other Contract Documents (including, without limitation, any breach of any of Contractor’s representations or warranties), or if Contractor should fail to remove a mechanic’s lien on the Project for which Contractor is responsible in the manner required under this Agreement, then Owner shall have the right to terminate the Contract immediately upon written notice to Contractor. Upon any such termination, Owner may take possession of the Project site, materials, supplies, equipment and tools and finish the Work by whatever method Owner may deem expedient, and, at Owner’s option, take an assignment of any or all subcontracts and purchase orders (including rental agreements) entered into by Contractor hereunder. In connection with any such assignment, Owner shall not assume any obligation of Contractor to the Subcontractor incurred prior to the effective date of the assignment. If the Owner elects not to accept the assignment of any such subcontract, purchase order or rental agreement, the Contractor shall terminate such subcontract, purchase order or rental agreement.
     2. Owner may, without cause, order Contractor in writing to suspend, delay or interrupt the Work in whole or in part for such period of time as Owner may determine. Should Owner choose to suspend, delay or interrupt the Work, an adjustment shall be made for increases in the cost of performance of the Contract caused by such suspension, delay or interruption. No adjustment shall be made to the extent that performance is, was or would have been so suspended, delayed or interrupted by another cause for which Contractor is responsible, or if an equitable adjustment is made under another provision of this Agreement.
     3. If Contractor defaults or neglects to carry out the Work in accordance with this Agreement or any of the other Contract Documents and, provided that Owner does not terminate the Contract as set forth above, if Contractor fails within a seven (7) day period after receipt of written notice from Owner to commence and continue correction of such default or neglect with diligence and promptness, Owner shall have the right, without prejudice to other remedies Owner may have, to correct such deficiencies. In such case an appropriate Change Order shall be issued deducting from payments then or thereafter due Contractor the cost of correcting such deficiencies, including compensation for Architect’s additional services and expenses made necessary by such default, neglect or failure. If payments then or thereafter due Contractor are not sufficient to cover such amounts, Contractor shall pay the difference to Owner on demand.
     4. If the Contract shall be terminated by Owner pursuant to Subparagraph XIV.C.1 above, Owner shall have the right to recover from Contractor any costs in excess of the GMP incurred due to Contractor’s non-performance, default or negligence (including, without limitation, compensation for architectural services and expenses made necessary thereby and other damages incurred by Owner). Contractor shall execute and deliver all papers and take all steps, including assignment of contractual rights, as Owner may reasonably require to permit Owner to complete the Work.
     5. Owner may, at any time, terminate the Contract for Owner’s convenience and without cause. Upon receipt of written notice from Owner of any such termination, Contractor shall (a) cease operations as directed by Owner in the notice, vacate the Project site, and remove all equipment and materials therefrom; (b) take actions necessary, or that Owner may direct, for the protection and preservation of the Work; and (c) except for Work directed to be performed prior to the effective date of termination stated in the notice, terminate all existing subcontracts and purchase orders and enter into no further subcontracts or purchase orders. In the case of such termination for Owner’s convenience, Contractor shall be entitled to receive payment for Work satisfactorily completed and the portion of Contractor’s Fee equal to the percentage of the Work satisfactorily completed as of the effective date of such termination, but in no event to exceed the amount Contractor would have been entitled to receive pursuant to Paragraphs XIV.A.2 and XIV.A.3 above, and subject to the Guaranteed Maximum Price.

1. CONTRACTOR’S WARRANTIES
   1. Contractor warrants that (i) Contractor is a duly licensed contractor in compliance with all applicable Laws, Contractor will exercise due care and diligence in the construction of the Work and the Work shall be performed in accordance with this Agreement and the other Contract Documents, (ii) Contractor has fully acquainted itself with the existing conditions at the Project site and its surroundings, (iii) Contractor has made all investigations essential to a full understanding of the performance of the Work and hereby assumes full and complete responsibility for construction of the Work, (iv) all of the Work and services to be performed by Contractor pursuant to this Agreement shall be of the standard and quality specified in the Contract Documents, and (v)  performance of the Work shall comply with the Contract Documents and all applicable Laws. Wherever the Drawings and Specifications specify use of certain materials and equipment, Contractor, upon prior written approval by Architect and Owner, which approval may be withheld in their sole discretion, may use equivalent materials or equipment. The Contractor shall also have the right to employ alternate methods of construction upon prior written approval of Architect and Owner to the extent that the scope of the Work and the standards of quality set forth in the Drawings and Specifications are not adversely affected. Contractor shall be solely responsible for the adequacy of design executed by Contractor or its Subcontractors in employing any such alternate methods or materials.
   2. Contractor warrants, for one (1) year from the date of issuance of the Certificate of Substantial Completion or such longer period of time as may be specified in the Contract Documents for all or any portion of the Work (the “Warranty Period”), on behalf of the Contractor and its Subcontractors (including, without limitation, all materialmen and suppliers), that the Work performed under this Agreement shall be of good quality and free from defects in workmanship and materials. All warranties procured by Contractor from its Subcontractors shall be properly executed on a form approved by Owner and shall be submitted to Owner prior to the final acceptance of the Work. Contractor shall cause such warranties to be made directly to Owner, or if the same shall be made to Contractor, Contractor, if possible, shall assign same to Owner. During the Warranty Period, upon written request from Owner, such warranties as may not be assignable shall be enforced by Contractor for the Owner’s benefit. Contractor shall also deliver to Owner all operating manuals for equipment installed as part of the Work.
   3. Contractor shall to Owner’s satisfaction (i) re-execute any parts of the Work that fail to conform with the requirements of this Agreement or any of the other Contract Documents and that become apparent during the progress of the Work, (ii) remedy any defects in the Work due to faulty materials or workmanship that become apparent within the Warranty Period, and (iii) replace, repair or restore any other parts of the Work or furniture, fixtures, equipment or other items placed therein (whether by Owner or any other party) that are injured or damaged by any parts of the Work that do not conform to the requirements of this Agreement or any of the other Contract Documents or as a result of defects in the Work. The cost to Contractor of performing any of Contractor’s obligations under this Article XVI shall not be included in the Cost of the Work, and all corrective work shall be at no cost to Owner. If Contractor fails to proceed within ten (10) days after written notice from Owner to comply with the terms of this paragraph, Owner may correct any defects in the Work and Contractor shall be liable for all reasonable costs of such corrective work.
   4. Contractor’s express warranty in this Article XVI shall be in addition to, and not in lieu of, any other remedies Owner may have under this Agreement, at law, or in equity for defective Work, and nothing contained in this Article XVI shall be construed to establish a period of limitation with respect to other obligations which the Contractor might have under the Contract Documents or to limit any other warranties required by the Contract Documents. Establishment of the Warranty Period relates only to the specific obligation of the Contractor to correct the Work and has no relationship to the time within which the Contractor’s obligation to comply with the Contract Documents may be sought to be enforced, nor to the time within which proceedings may be commenced to establish the Contractor’s liability with respect to the Contractor’s obligations, other than specifically to correct the Work. No payment made by Owner to Contractor, nor any acceptance, use or occupancy of the Work by Owner or any other person or entity, shall constitute acceptance of any defective Work or any Work not in compliance with this Agreement or any of the other Contract Documents.
2. OWNER’S REPRESENTATIVE; INSPECTION OF WORK
   1. Whenever a right to approve or make a determination or other right is reserved hereunder to Owner, it is understood that Owner may delegate the exercise of such right to Architect, Owner’s representative, or any other entity in writing, and Contractor may rely upon any action taken by such representative in the exercise of such right, unless Contractor is earlier notified in writing by the Owner to the contrary. Architect shall have authority to review and approve shop drawings for the Work and, upon prior approval of Owner, Architect also shall have authority to stop the Work whenever such stoppage may be necessary in Architect’s reasonable opinion to ensure proper performance of this Agreement.
   2. Reexamination of questioned Work may be ordered by the Architect or Owner and, if so ordered, the Work must be uncovered by Contractor. If such Work is found not to be substantially in accordance with the requirements of this Agreement or any of the other Contract Documents, Contractor shall pay the cost of uncovering the Work. If the Work is found satisfactory, Owner shall pay said cost. Contractor shall promptly correct all Work rejected by Architect or Owner or failing to conform to the requirements of this Agreement or any of the other Contract Documents, whether observed before or after Substantial Completion and whether or not fabricated, installed or completed. Contractor shall bear the costs of correcting such rejected or non-conforming Work, including additional testing and inspections and compensation for Architect’s services and expenses made necessary thereby.
   3. Should errors, omissions, or discrepancies be discovered by Contractor in or between the Drawings and/or Specifications, or in the work done by others affecting the Work, the Contractor shall notify the Owner and the Architect at once and the Architect, subject to Owner’s approval, shall instruct the Contractor regarding the manner in which Contractor is to proceed with respect to the Work so affected. If the Contractor discovers any such errors, omissions or discrepancies yet proceeds with the affected Work without instructions from the Architect, Contractor shall be responsible for, and shall make good, any resulting damage or defect.
   4. Contractor shall at all times inform Owner and Architect of the existence of any defects and/or bad workmanship and shall submit proposals to Owner for the acceptance, repair or removal of the defective materials, elements or construction. Owner and Architect have the right to inform Contractor in writing of any. Any materials, elements or construction not in compliance with the Contract Documents.. Such refused materials, elements or construction shall be removed, transported from the Project site and replaced by Contractor at its own expense, which shall not be included in the Cost of the Work. In the absence thereof, Owner may suspend the Work and arrange for the replacement of the refused materials, elements or construction, at the expense of Contractor.
3. GENERAL PROVISIONS
   1. Assignment: Contractor shall not assign this Agreement, nor shall Contractor assign any monies due or to become due to Contractor hereunder, without the prior written consent of Owner, which consent may be withheld in Owner’s sole discretion. Owner may assign this Agreement to any third party, including, without limitation, an institutional lender providing financing for the Project. Upon an assignment by Owner to any third party, other than an assignment to a lender as security in connection with the financing of the Project, Owner shall be automatically released from its executory obligations under this Agreement. Contractor shall execute all consents reasonably required to facilitate any assignment by Owner. In addition, Contractor shall execute such other reasonable documentation required by any lender for the Project.
   2. Notices: All notices hereunder shall be in writing, shall be sent by registered or certified mail, return receipt requested, or by personal delivery or nationally recognized overnight courier service with a request for an acknowledgment of receipt, and shall be effective on receipt. Notices shall be sent to or delivered to the following addresses or such other address(es) as a party may designate by notice given in the manner provided herein:

In the case of the Owner to:

ACME Inc.   
1600 Amphitheatre Parkway   
Mountain View, Ca 94943   
Attn: REWS / Construction Matters - North America

with a copy to:

ACME Inc.   
1600 Amphitheatre Parkway   
Mountain View, CA 94043   
Attn: Legal Department / RE matters

and in the case of the Contractor to:

SG Cunningham (Kitchener) Limited   
745 Bridge Street West, Unit 6   
Waterloo, Ontario, N2V 2G6   
Attn: Georgia Bolger

and in the case of the Architect to:

Attn:

* 1. Complete Agreement: This Agreement, including all exhibits hereto, represents the full and complete understanding of the parties and supersedes any previous agreements, representations, or understandings, oral or written, with respect to the subject matter hereof. This Agreement may be modified or altered only by a written instrument signed by the parties. Notwithstanding the fact that this Agreement is executed as of the date first set forth above (which date is for reference purposes only), the parties hereby acknowledge and agree that a portion of the Work may have been performed prior to such date, all of which Work shall be governed by the terms and conditions of this Agreement and shall be deemed to be a part of the Work to be performed hereunder. Contractor shall not be entitled to any compensation for such Work except as expressly provided in this Agreement. Without limiting the foregoing, all of Contractor’s liabilities and obligations under this Agreement shall apply to all such Work performed or provided prior to the date of this Agreement, notwithstanding the fact that the same may have been performed or provided pursuant to prior negotiations, proposals, letter agreements, understandings or otherwise.
  2. Successors: This Agreement shall inure to the benefit of and shall be binding upon the successors and assigns of Owner and upon the permitted successors and assigns of Contractor.
  3. Owner’s Additional Costs: Unless otherwise agreed in writing, Owner at its own expense shall furnish all surveys, testing and inspection, civil and soil engineering tests and rights-of-way and easements for permanent structures or permanent changes in existing facilities, and shall pay all architectural, structural engineering and civil engineering fees associated therewith.
  4. Governing Law: This Agreement shall be governed by and interpreted under the laws of the Province of Ontario.
  5. Remedies: Duties and obligations imposed by this Agreement and, except as expressly provided otherwise herein, rights and remedies available hereunder shall be in addition to and not a limitation of duties, obligations, rights and remedies otherwise imposed or available at law or in equity.
  6. Disputes: For purposes of this Section XVII.H, "Disputes" shall mean all unresolved claims, counterclaims, disputes, controversies, disagreements or other matters in question between Contractor and Owner arising out of or relating to this Agreement.
     1. Performance of Parties to Continue. Unless otherwise agreed in writing by the parties, during the period in which any Dispute is outstanding each of Contractor and Owner shall continue to perform its services and carry out its other responsibilities in accordance with this Agreement.
     2. Arbitration. Unless the parties mutually agree otherwise, Disputes shall be resolved in the county in which the applicable Project is located by arbitration through the Judicial Arbitration and Mediation Service ("JAMS") or other alternative dispute resolution agency mutually acceptable to the parties, before a retired judge or justice of the courts of the state in which the applicable Project is located. Unless otherwise agreed in writing by the parties, such arbitration shall be in accordance with the JAMS Comprehensive Arbitration Rules & Procedures currently in effect.
        1. Within fifteen (15) business days following the forty-five (45) day period allowed for mediation, the initiating party shall file a demand for arbitration with the other party to this Agreement and with JAMS. In no event shall such demand for arbitration be made after the date when institution of legal or equitable proceedings based on such Dispute would be barred by the applicable statute of limitations.
        2. Owner and Contractor each hereby stipulates to the consolidation or joinder of any and all arbitration proceedings involving or arising out of Work. The foregoing agreement to arbitrate and other agreements to arbitrate under other applicable Project agreements shall be specifically enforceable under applicable law in any court having jurisdiction thereof.
        3. The party filing a notice of demand for arbitration must assert in the demand all Disputes then known to that party on which arbitration is permitted to be demanded. The parties shall thereafter cooperate in the voluntary, prompt and informal exchange of all non-privileged documents and other information relevant to the Dispute and demand for arbitration. Unless the parties mutually agree otherwise, discovery shall be limited to ninety (90) days and each party shall be entitled to take no more than four (4) depositions.
        4. The arbitration shall be conducted by a single arbitrator selected by the parties. If the parties cannot agree on the arbitrator, JAMS shall attempt to facilitate agreement among the parties regarding selection of the arbitrator under its applicable arbitrator selection rules.
        5. The award rendered by the arbitrator shall be final, and judgment confirming such award may be entered in accordance with applicable law in any court having jurisdiction thereof.
        6. In the event of any arbitration hereunder or any action or proceeding to enforce any arbitration award hereunder, the prevailing party, as determined by the arbitrator or court confirming such award, shall be entitled to recover from the other party all costs and expenses, including court costs, arbitration fees, expert witness fees and reasonable attorney's fees, incurred by the prevailing party in connection with such arbitration, action or proceeding.
  7. Contractor promises and agrees that the provisions of this Section XVII.H shall be included in all subcontracts and other agreements related to the Work, and that if any Dispute subject to arbitration under this Section XVII.H involves such subcontract or agreement, the rights and liabilities of Owner, Contractor, and any subcontractors, architects, engineers and suppliers who may be involved shall be determined in the single arbitration proceeding.
  8. Governing Contract Documents: The Contract Documents are complementary, and what is required by one shall be as binding as if required by all. In general, Specifications indicate qualities of materials and workmanship, and Drawings indicate dimensions, locations, quantities, and details of construction. Detailed Drawings and Specifications shall take precedence over general Drawings and Specifications. Supplementary or revised details and instructions, if approved by Owner, shall take precedence over original documents, information and earlier addenda to which they refer. Any item of Work mentioned in Specifications but not shown on Drawings or shown on Drawings but not mentioned in Specifications, shall be provided as if shown and mentioned in both.
  9. Licensing Requirements: Contractor shall comply with all licensing requirements imposed by applicable Laws.
  10. No Waiver: No consent or waiver either expressed or implied by either Owner or Architect to any breach by Contractor of any covenant, obligation, or liability shall be construed as a waiver of right or consent to any other breach of the same or any other covenant, obligation, or duty.
  11. Compliance With Anti-Corruption Laws: Contractor (including its subsidiaries and affiliates and any directors, officers and employees of each such entity) represents and warrants that it has complied, and will continue to comply, with all applicable anti-corruption Laws in connection with its work and services under the Contract.

Contractor hereby represents and warrants that it has not taken and will not take any actions in furtherance of an offer, payment, promise to pay, or authorization of the payment or giving of money, or anything else of value, to any government official (including any officer or employee of a government or government-controlled entity or of a public international organization, or any person acting in an official capacity for or on behalf of any of the foregoing, or any political party or official thereof, or candidate for political office, all of the foregoing being referred to as “Government Officials”) or to any other person for the purpose of influencing official action, to obtain or retain business or to secure any other improper commercial advantage related to this Scope of Work. Neither Contractor nor any owner, partner, officer or director of Contractor or of any affiliate company of Contractor is or will become a Government Official in a jurisdiction having authority over this Project during the term of the Contract without the prior written consent of Owner.

Contractor warrants that it will maintain accurate and complete books, records and accounts (including, but not limited to, receipts, invoices, requests for reimbursement with supporting receipts and substantiation, original entry records, and records of all payments made to or benefits conferred on third parties by Contractor) in connection with its work under the Contract. If Owner has reason to believe that a breach of any of the representations and warranties in this Paragraph XVII.K has occurred or may occur, Owner may audit Contractor’s books and records pertaining to the performance of services under the Contract and Contractor agrees to cooperate fully with any such audit, and Owner may withhold further payments under the Contract until such time as it has received confirmation to its satisfaction that no breach has occurred or will occur.

In the event of a breach of any of the representations and warranties in this Paragraph XVII.K, to the extent permitted by applicable Law, any claims for payment by the Contractor with regard to any transaction for which a breach of the representations has occurred, including claims for sales or services previously rendered, will be void and all payments previously paid will be refunded by Contractor to Owner.

All payments due to Contractor under the Contract will be made by check or bank transfer, and no payments will be made in cash or bearer instruments. No payments which are owed to Contractor hereunder will be made to a third party instead, and all payments will be made in the place where the Contractor resides or performs the services.

The Owner will not be obligated under the Contract to take any action or omit to take any action that it believes, in good faith, would cause it to be in violation of any Laws of the country where Contractor resides or performs services or any other applicable jurisdiction (including, without limitation, the U.S. Foreign Corrupt Practices Act or other U.S. Laws).

Contractor agrees to sign an anti-bribery certification on an annual basis in a form to be provided by Owner.

Contractor agrees that if it delegates, subcontracts, assigns or in any other way engages any third party to perform any work or tasks in connection with Contractor’s performance under the Contract, Contractor will (1) enter into a written agreement with such third party memorializing the terms of such engagement and (2) ensure that such agreement contains representations and warranties identical to those in this Paragraph XVII.K. Contractor will perform due diligence on any such third party sufficient to determine that the third party is reputable.

* 1. Confidentiality; No Publicity: Contractor acknowledges and agrees that, in connection with the Contract, it may have access to the Owner’s (and its Affiliates’) confidential or proprietary information and material pertaining to Owner’s (and/or its Affiliates’) business and facilities (“Owner Confidential Information”). Owner Confidential Information may include, without limitation, tangible, intangible, visual, electronic, present, or future information such as: (i) trade secrets; (ii) financial information, including pricing; (iii) technical information, including research, development procedures, algorithms, data, designs, methods and know-how; (iv) business information, including customers, projects, plans, operations, planning, marketing interest and products; (v) terms of any agreement entered into between Owner (or an Affiliate of Owner) and any other party and the discussions, negotiations and proposals relating thereto; and (vi) information acquired during access to facilities of Owner (or its Affiliates). Contractor hereby acknowledges that the facilities of Owner and its Affiliates contain valuable Owner Confidential Information and intellectual property. Owner vigorously protects its Confidential Information and intellectual property rights and Contractors acquires no intellectual property rights under the Contract (including but not limited to patent, copyright, and trademark rights). If Contractor either directly or inadvertently receives Owner Confidential Information, the Contractor will hold it in the strictest confidence, and acknowledges, represents and warrants that it will use its best efforts to protect the confidentiality of Owner Confidential Information, and may use it only for purposes of performing Contractor’s obligations under the Contract.

Contractor agrees that, without the prior written consent of Owner (or an Affiliate of Owner), Contractor may not use, copy or divulge to third parties or otherwise use except in accordance with the terms of the Contract, any Owner Confidential Information obtained from or through Owner or its Affiliates in connection with the Contract, unless: (a) the information is known to Contractor, without restriction, prior to obtaining the same from Owner or its Affiliates; (b) the information is, at the time of disclosure to Contractor, publicly available through no fault of Contractor; (c) the information is rightfully received by Contractor from a third party who did not receive the same with a duty of confidentiality; or (d) the information is independently developed by Contractor without reference to any Owner Confidential Information. Contractor further agrees that Contractor will not, without the prior written consent of Owner or an Affiliate of Owner, disclose to any third party any Owner Confidential Information developed or obtained by Contractor in connection with the Contract, except to the extent that said information falls within one of the categories described in clause (a), (b), (c) or (d) of the immediately preceding sentence.

Contractor may disclose Owner Confidential Information when compelled to do so by applicable mandatory Law if it provides reasonable prior notice to Owner.

Upon Owner's (or any of its Affiliate’s) written request or upon expiration or termination of the Contract for any reason, the Contractor will promptly:

* + 1. return or destroy, at Owner's (or its Affiliate’s) option, all originals and copies of all documents and materials it has received containing Owner Confidential Information;
    2. deliver or destroy, at Owner's (or its Affiliate’s) option, all originals and copies of all summaries, records, descriptions, modifications, negatives, drawings, adoptions and other documents or materials, whether in writing or in machine-readable form, prepared by Contractor or under its direction or at its request, from the documents or materials referred to in subparagraph (1) above; and
    3. provide a written statement to Owner (or its Affiliate, if applicable) certifying that all documents and materials referred to in subparagraphs (1) and (2) above have been delivered to Owner (or its Affiliate) or destroyed, as requested by Owner (or its Affiliate).

Without the prior written approval of the other party, neither Owner nor Contractor shall issue any public statements or promotional materials disclosing the existence of the Contract. Owner and Contractor will consult each other and agree on the time and manner in which any announcement/notice of the Contract will be given to employees, customers, suppliers and to the press.

Contractor shall cause all Subcontractors to enter into non-disclosure agreements with Owner (or an Affiliate of Owner, if applicable) with terms and conditions customarily applied by Owner (or an Affiliate of Owner, if applicable); or, if entering into such non-disclosure agreements with Owner (or an Affiliate of Owner, if applicable) is not feasible or practical for certain Subcontractors, Contractor shall cause such Subcontractors to enter into non-disclosure agreements with Contractor with terms and conditions substantially similar to those of the non-disclosure agreements currently in force between Owner (or an Affiliate of Owner) and Contractor. Contractor shall ensure that all non-disclosure agreements with Subcontractors as referred to in this paragraph are entered into prior to the time that Contractor exercises any rights and/or fulfils any obligations under the Contract.

As used in this Agreement, the term “Affiliate” shall mean any person or entity that, directly or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, Owner, and the term “control” (including the terms “controlled by” and “under common control with”) means, with respect to (i) a U.S. corporation, the ownership, directly or indirectly, of fifty percent (50%) or more of the voting power to elect directors thereof; (ii) a non-U.S. corporation, the ownership, directly or indirectly, of fifty percent (50%) or more of the voting power to elect directors thereof; or, if the voting power to elect directors thereof is less than fifty percent (50%), the maximum amount allowed by applicable Law; and (iii) any other entity, fifty percent (50%) or more ownership interest in said entity, or the power to direct the management of such entity.

* 1. Ownership of Contract Documents: All Contract Documents, whether finished or unfinished, prepared by Contractor or any Subcontractor, shall be treated by Contractor and all Subcontractors as confidential, shall not be released to any third party without the permission of Owner and shall at all times be the property of Owner. Owner shall be entitled to use any and all Contract Documents for any purpose, provided that Owner shall indemnify and defend Contractor from any claims of losses by third parties arising out of any unauthorized use of such documents for any purpose other than the project for which they were designed.. Upon termination of the Contract for any reason, Contractor shall: (i) promptly and peaceably assign and deliver to Owner all Contract Documents and other materials in the possession or control of Contractor which relate to the Project and any contract rights regarding the Project which Owner requests be assigned for the purpose of completing the Project; and (ii) deliver to Owner all instruments and documents, including formal written assignments of contractual rights, as Owner may require for the purpose of fully vesting in Owner the ownership rights and benefits of Contractor under the Contract Documents and things so delivered and assigned. If Contractor fails to do so, Owner is hereby granted the power and interest to act as Contractor’s attorney-in-fact to execute those documents. Contractor will not assert, otherwise waives, and hereby assigns to Owner any “moral rights” in all work product related to this Agreement.
  2. Attorneys’ Fees: If either party becomes involved in litigation or arbitration in connection with the Contract Documents, the prevailing party in such action shall be entitled to recover its reasonable attorneys' fees, experts' fees, costs and expenses of such arbitration or litigation.
  3. Key Project Personnel: Contractor’s preconstruction manager, lead Project manager, lead Project superintendent, Project engineers, and field engineer for the Project (collectively, “Contractor’s Key Personnel”) shall be individuals approved in advance by Owner. Contractor shall cause the lead Project manager or lead Project superintendent to be on the Project site at all times during the course of the Work (including, without limitation, completion of all Punch List Work). Contractor’s Key Personnel shall be assigned to the Project for the duration of the Work. In the event Contractor desires to change any of Contractor’s Key Personnel during the course of the Work, any substitutions shall be subject to the prior written approval of Owner.
  4. Access to Site: Owner shall have at all times, and Contractor shall provide, access to the Project site.
  5. Labor Disputes: The Contractor will utilize good faith and commercially reasonable efforts to promote and maintain labor harmony on the Project and to prevent labor disputes. In the event of a labor dispute, the Contractor shall utilize commercially reasonable efforts to promptly resolve the dispute and to mitigate its impact on the Project.
  6. Time of the Essence: Contractor acknowledges and agrees that it has reviewed and negotiated the various time limits or periods set forth in the Contract Documents and that any changes in such time limits or periods made in accordance with the terms of the Contract Documents will be similarly reviewed and negotiated by it. Contractor agrees to perform its obligations with due diligence within such time limits and periods in accordance with the terms of the Contract Documents, acknowledging that in the event it fails to do so Owner will suffer damages, costs and expenses by reason of such failure of performance, including, without limitation, consequential damages.
  7. Limitation of Liability: Contractor agrees to look solely to the interest of Owner in the Project for the enforcement of any claims against Owner, and Contractor further agrees that none of the officers, directors, employees, vendors, partners, members or shareholders of Owner assume any personal liability for any of the obligations under the Contract Documents. Notwithstanding any provision to the contrary contained in any of the Contract Documents, Owner’s liability to Contractor shall in no event exceed an aggregate amount equal to the Guaranteed Maximum Price, and Owner shall not be liable under any circumstances for any indirect or consequential damages or any injury to, or interference with, Contractor’s business, including but not limited to loss of profits (other than the Contractor’s Fee, to the extent Owner is obligated to pay the same pursuant to the provisions of the Contract Documents), loss of revenues, loss of business opportunity, loss of goodwill or loss of financing, in each case however occurring. Contractor limitation of liability arising out of this Agreement to Owner is \_\_\_\_\_TBA\_\_\_\_\_\_\_. Contractor shall not be liable for indirect, consequential or special damages, unless same are foreseeable and are the direct cause of Contractors gross negligence, or willful misconduct.
  8. Performance by Contractor: Contractor agrees that it shall perform its obligations hereunder in a manner consistent with that of a first class construction firm, experienced in performing sophisticated and complex work similar to the Work required for the Project, and Contractor shall observe and abide by and perform all of its obligations hereunder in accordance with applicable Laws. With respect to any portions of the Project which are leased by Owner, Contractor shall assist Owner in complying with the applicable terms and provisions of the lease documents to the extent the same relate to the performance of Contractor’s obligations under this Agreement. To the extent of any conflict between the requirements of the lease documents and the requirements of this Agreement, the stricter requirements shall govern. At Contractor’s request, Owner shall provide Contractor with copies of such lease documents, which copies may be redacted to exclude financial and other sensitive terms not relevant to Contractor’s obligations hereunder.
  9. Rules of Construction: The headings of the Contract Documents are used herein for reference purposes only and shall not govern, limit, or be used in construing the Contract Documents or any provision hereof. Where the context of the Contract Documents so requires, the use of the neuter gender shall include the masculine and feminine genders, the masculine gender shall include the feminine and neuter genders, and the singular number shall include the plural and vice versa. Each party hereto acknowledges that (i) each party hereto is of equal bargaining strength; (ii) each such party has actively participated in the preparation, and negotiation of the Contract Documents; (iii) each such party has had the opportunity to consult with such party’s attorneys and advisors relative to entering into the Contract Documents, and (iv) any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not apply in the interpretation of the Contract Documents, any portion thereof, any amendments thereto, or any exhibits attached thereto. In the event of any conflict between any of the exhibits attached hereto and the provisions contained in the body of this Agreement, the provisions contained in the body of this Agreement shall govern.
  10. Counterparts: The Contract Documents may be executed in one or more counterparts, each of which shall be deemed an original, and all of which together shall constitute one and the same instrument.
  11. Invalidity: If any provision of the Contract Documents, or any application of any such provision to any person or circumstances, shall be determined by any court of competent jurisdiction to be invalid or unenforceable to any extent, this Agreement shall be interpreted as if such provision were not included herein (to the extent such provision is determined to be invalid or unenforceable). In such event, the remainder of the Contract Documents or the application of such provision to any person or circumstances, other than the application as to which such provision is determined to be invalid or unenforceable, shall not be affected thereby, and each provision shall be valid and shall be enforceable to the fullest extent permitted by law.

IN WITNESS WHEREOF, the Owner and Contractor have executed this Agreement as of the date first written above.

|  |  |
| --- | --- |
| OWNER:  ACME INC.,  a Delaware corporation  By:  Name:  Title: | CONTRACTOR:  SG Cunningham (Kitchener) Limited ,  An Ontario Corporation  By:  Name: Georgia Bolger  Title: VP, CFO |

Exhibit A

Preconstruction Phase Services

FROM RFP DATED December 20, 2013

## **Pre-Construction**

Your pre-construction services are to include:

* + 1. Participation of appropriate resources in project coordination meetings with Owner, C&W, Architect as needed (minimum of once/week) and be an active and engaged participant in the design development process.
    2. Participate in design development meetings and calls with C&W, the Architect and MEP Engineering firms directly to assist with specification and sourcing of available materials and equipment.
    3. Active participation in ACME Green Rews process to work with Architect and MEP teams on the selection of ACME approved red-list free sustainable products and materials.
    4. Ensure that specified materials and design details are suitably constructible by the sub-trades and are aligned with overall project budget and schedule targets.
    5. Develop a detailed system of cost estimates (through SD & DD specifically) and cost control methods and assist in setting budgets and multiple pricing options to achieve the project objectives of quality and competitive pricing. Present budget updates and pricing options regularly as part of the weekly coordination meetings.
    6. Where anticipated costs are a potential risk or concern, provide optional pricing for alternative construction methods and items as identified by the Design and Engineering team through value engineering exercises.
    7. Prepare a detailed construction schedule (inclusive of all key milestones, long lead items, bidding timelines and permitting), aligned to the target dates provided by C&W. Identify any risks or concerns that require immediate attention and continue to monitor and update the schedule accordingly as the design, tendering and construction proceeds.
    8. Assist Owner, C&W and the consulting team in developing an appropriate phasing strategy for the execution of the construction, identifying requirements for any temporary hoarding, security, access as per code, phased occupancy, etc. so that all such work is appropriately identified in drawings and details issued for tender.
    9. Contractor shall provide full participation in code review process during the design phases and should advise the Owner, C&W and Architect of any issues regarding constructability, permitting approvals and final inspection signoffs related to occupancy of designated spaces by ACME.
    10. As part of scheduling requirements, identify all long term delivery items and commence with pre-ordering requirements immediately upon award of contract and ensure alignment and tracking of pre-ordered items within established budget.
    11. Participate in identification of relevant tenant work that would be best completed through base building forces and work with Owner, C&W and consulting team to establish scope of work and review and comment on any final pricing provided by Landlord forces to complete such work.
    12. Participate in general Landlord coordination meetings over the course of Pre-Construction to keep informed of progress, any risks to timing outlined in lease, any changes in on-site work which may impact developing tenant designs and details, etc.

## **Permitting and Bidding**

The project will be permitted through the City of Kitchener Building and Planning Departments.

* + 1. Identify and expedite with C&W and the Consulting Team the various requirements and paperwork needed for the permit application process and oversee the process. **Note –** It is expected that the selected firm will have good working relationships with the City Officials and will be in a position to expedite the permit approval process as much as possible in order to increase time allocated for the physical construction of the space.
    2. Contractor shall prepare a Procurement Plan coordinated with the overall construction goals and schedule (GC will coordinate their bidding process with ACME’s electronic bidding platform for selected contractors and subcontractors at ACME’s direction/election).
    3. Develop subcontractor interest in the project for effective competitive bidding of subcontracted work.
    4. Provide a proposed subcontractor bidders list and qualifications for pre-approval by Owner, C&W and Architect prior to bid.
    5. Ensure that any of the Landlord’s mandatory Subcontractors identified in the Tenant Manual and the Owner’s preferred Subcontractors are included in the tender process.
    6. Single source bids and self-performed work will all be identified and approved in advance by ACME.
    7. Prepare and issue all necessary competitive tender packages for all subcontracts. (Copies of sub-trade tender package to be provided to Owner, C&W and Architect for review prior to issue).
    8. Contractor will obtain a minimum of three subcontractor bids for each trade or discipline comprising the scope of the construction work.
    9. Receive bids for all subcontracts and open in presence of C&W and Architect.
    10. Review and analyze each tender to ensure that the full scope of work has been addressed in the bids. Identify any omissions or alternate proposals.
    11. Allowances for defined or undefined work will need to be sufficient in detail related to the scope to address how risks associated with allowances vs. bids are to be handled for the project.
    12. Copies of bids and analysis will be assembled by the Contractor and presented for final approval to C&W for Owner approval prior to award of contracts.
    13. Upon award of contract, the Contractor shall not change a Subcontractor without prior approval from the Owner.
    14. Provide recommendations to C&W and the Owner with respect to bonding of subcontractors.
    15. Work with the Landlord’s representatives and ensure that all necessary paperwork (WSIB, Insurance, Contacts – as outlined in the Tenant Manual) are provided so as not to unnecessarily delay intended construction start dates.

Exhibit B

Compensation for Preconstruction Phase Services

FROM PROPOSAL DATED \_\_\_March 20, 2014

Pre-Construction Compensation: $173,700.00.

Refer to exerpt below of Preconstruction Fees outlined in General Conditions and Itemization Fee Statement.

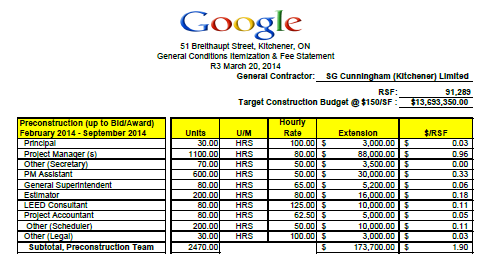


Exhibit C

Project Milestones

SEE ATTACHED PROPOSED MILESTONE SCHEDULE  
From RFP Dated December 20, 2013

Exhibit D

Form of Amendment

**[FIRST]** AMENDMENT TO CONSTRUCTION AGREEMENT

THIS **[FIRST]** AMENDMENT TO CONSTRUCTION AGREEMENT (this “Amendment”) is made and entered into as of \_\_\_\_\_\_\_\_\_\_\_\_\_\_, 20\_\_, by and between \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, a \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (“Owner”), and \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, a \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (“Contractor”), with reference to the following facts:

A. Owner and Contractor have previously entered into that certain Construction Agreement dated as of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, 20\_\_ (the “Agreement”), pursuant to which Contractor has agreed to perform certain preconstruction and construction services in connection with the Project to be located at 51 Breithaupt Street, Kitchener, Ontario. Capitalized terms used but not defined herein shall have the respective meanings ascribed to them in the Agreement.

B. In accordance with Paragraph II.L of the Agreement, the Guaranteed Maximum Price and the date of Substantial Completion of the entire Work have been established, and Owner and Contractor desire to enter into this Amendment to document the same.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Owner and Contractor hereby agree as follows:

Exhibit A TBA – Drawings and Specifications

Exhibit B TBA – Schedule of Values

Exhibit C TBA – Allowance Items

Exhibit D TBA – Assumptions and Clarifications

Exhibit E TBA – Alternate Prices

Exhibit F TBA – Unit Prices

Exhibit G TBA – Construction Schedule

Exhibit H TBA – Subcontractor Bid Summary

Exhibit G TBA – Subcontractor Insurance Certificates

2. Date of Substantial Completion. The date of Substantial Completion for the Work is \_\_\_\_TBD\_\_\_\_\_\_\_\_\_\_\_\_\_.

3. Counterparts. This Amendment may be executed in separate counterparts, each of which shall constitute an original and all of which together shall constitute one and the same instrument.

4. Effectiveness. The terms, covenants and conditions of the Agreement shall remain in full force and effect, as expressly modified herein.

IN WITNESS WHEREOF, the Owner and Contractor have executed this Amendment as of the date first written above.

|  |  |
| --- | --- |
| OWNER:  ,  a  By:  Name:  Title: | CONTRACTOR:  ,  a  By:  Name:  Title: |

Exhibit E

Construction Phase Services

FROM RFP DATED \_\_December 20, 2013

## **Construction**

* + 1. Comply with Ontario Building Code (latest edition) and all other applicable laws, regulations, binding policies and guidelines having jurisdiction shall govern all work.
    2. Complete work in accordance with the Occupational Health & Safety Act and regulations for construction projects; A certificate of Clearance from the Workplace Safety & Insurance Board (Worker’s Compensation) must be provided;
    3. Comply with Landlord regulations regarding Tenant Work (Landlord Tenant Construction Manual)
    4. Contractor will be responsible for the security of the place of work and for preventing access by non-workers. Neither the Owner or any of its partners, accepts responsibility for losses, damage or theft of contractor’s and subcontractors tools, equipment, products or work;
    5. Provide adequate insurance as outlined in the formal contract documents.
    6. Obtain sub-trade bonds as may be requested by Owner.
    7. Inform C&W and Consulting Team immediately of any instructions or orders received from authorities having jurisdiction;
    8. No signs, public announcement or publications concerning any aspect of this project will be allowed without the prior written approval of the Owner, the only exception being the signs related to safety of the workplace as required by law;
    9. Establish clear communication and reporting channels with C&W and Architect;
    10. Regularly update and distribute the construction schedule;
    11. Coordinate, supervise, direct and implement all the work shown and specified, including construction facilities. Contractor shall have complete responsibility for the proper completion of all work and for compliance with the full intent of the contract documents;
    12. Confirm all site conditions and identify any irregularities or variance from contract documents;
    13. Review and coordinate all shop drawings and samples and maintain a control system so that necessary timelines are established and met by all parties;
    14. Regularly inspect the work to ensure that all subcontractors are in accordance with the contract documents;
    15. Identify all issues requiring decisions by the Owner and bring forward for review to C&W in a timely manner;
    16. Ensure that subcontractors order materials and components in a timely manner and obtain delivery commitments including evidence of purchase orders from suppliers when required by C&W;

**Contractor Personnel**

* + 1. Contractor to include for full-time site supervisor hours for the entire duration of the site work for the project, up to and including final completion of deficiencies post-occupancy. The cost of the Site Supervisor shall be included within the overall General Conditions figure that is being provided under Attachment 1 – GC Fee Itemization & Fee Statement.
    2. Contractor shall not charge for Site Supervisor time on Change Orders that are issued through the course of the project unless they specifically require after-hours and/or weekend time on the part of the assigned full-time Supervisor.
    3. Contractor to provide the dedicated Site Supervisor with all the necessary means to communicate with the project team and Contractor’s main office. Phone, fax machine, and **access to internet** will be required for prompt response.
    4. Contractor shall not substitute members of the Project team without prior written consent by the Owner.

**Site Meetings & Reviews**

* + 1. Provide facilities (tables, chairs etc.) for weekly site meetings;
    2. Coordinate and chair regular weekly site meetings upon commencement of Work with all Subcontractors, Owner, C&W and the Consulting Team;
    3. Record and issue Minutes of site meetings within two (2) business days;
    4. Give the Consulting Team reasonable notice of required inspections and site approvals, so as not to delay progress of the Work;

**Modifications to Contract**

* + 1. Review, coordinate and process all Contemplated Change Notices (CCN’s) in a timely manner and in accordance with an agreed upon process that shall be established prior to commencement of construction;
    2. Contractor shall not proceed with any Work involving extra costs or time without written authorization from the Owner and/or in accordance with an agreed upon process for authorizing such Work;
    3. Ensure that all contract documents are updated regularly to reflect any changes and instructions issued by Consulting Team as the work progresses;
    4. Maintain copies of all contract documents, change orders and site instructions on site for use by C&W and the Consulting Team;

**Invoicing and Payment Procedures**

* + 1. Cost tracking and invoicing structures to be reviewed with C&W to ensure the Owner’s requirements for cost tracking will be met;
    2. Contractor’s progress billings are to be submitted in a format acceptable to C&W and the Owner;
    3. All progress invoices are to be accompanied by a WSIB clearance certificate;
    4. All progress invoices will be reviewed by appropriate design and engineering consultants who will provide their review and acceptance/rejection of draw amounts requested. The Contractor will be forwarding their progress draw values directly to the appropriate consultants for their review and approval – which they are responsible for forwarding directly to C&W upon approval;
    5. Second and subsequent progress invoices are to be accompanied by a Statutory Declaration (CCDC form 9B);

**Landlord Requirements and Site Access**

* + 1. Coordinate with Landlord’s designated representatives on the site to make all necessary arrangements for shipping, receiving, elevator use and security requirements;
    2. Comply with Landlord’s regulations for hours of Work for cutting, coring, drilling, power fastening and other noise generating activities; Outlined in the Tenant Rules & Regulations Manual (as provided by email under separate cover)
    3. Notify C&W immediately of any discrepancies in the base building;
    4. Pay any charges imposed by the Landlord’s regulations as resulting from failure to comply with the Tenant Rules & Regulations Manual

**Condition of Site**

* + 1. Maintain a clean and orderly workplace on a daily basis;
    2. Remove debris on a continuous basis from the Work area;
    3. Provide all necessary and required means for both the removal and disposal of all rubbish, debris, and all other items not scheduled to remain on site. Provide all necessary and required garbage bins and garbage chutes;

**Construction Completion**

* + 1. Coordinate commissioning of all building systems and training on all relevant systems;
    2. Ensure that all inspections by local building authorities are completed to receive Occupancy authorizations;
    3. Provide all final inspection reports to C&W for review and issue to the Owner;
    4. Co-ordinate and supervise on-site to ensure the timely completion of all noted deficiencies.
    5. Participate in deficiency walkthroughs and based on written records provided by the Consulting Team, identify the actions and timelines required by the Contractor to remedy the deficiencies.
    6. Upon Contractor’s claim that Substantial Completion has been achieved, the Consulting Team will review site and verify the claim and provide a written report to C&W indicating acceptance or rejection of such claim.
    7. Ensure that all notices, approvals and permits including Landlord’s approvals required for the Work, are obtained and issued;
    8. Ongoing coordination, compilation and submission of relevant data, calculations and required information for full and final LEED submissions;

## **Post-Construction**

* + 1. Provide ongoing supervision on-site to continue with coordination and oversight of all Owner engaged suppliers/vendors (IT cabling, A/V, Security, Furniture and Food Services, etc.);
    2. Work with client and subcontractors to coordinate for necessary hand-over and training on all equipment is scheduled and completed with the Owner’s own facilities teams
    3. Collect as-built record drawings (Electronic CAD Release 14 or higher and hard copy prints) from Subcontractors to be handed over to the respective Consultant for review, approval and turnover to the Owner and Landlord;
    4. Coordinate and prepare packages of all warranties, guarantees, maintenance schedule and requirements for all equipment and materials as per contract document;
    5. Finalize and submit all contract close-out documentation as per contractual agreement;
    6. Ongoing single-point of contact coordination for repairs or replacement of any work under first-year warranties and guarantees.
    7. Make available when required for a reasonable period of time, personnel familiar with project to perform any post move-in work requested by C&W and the Owner.
    8. Attend at client’s request and end of year site inspection to address any final repairs or replacement of work prior to expiration of warranty period.

## **Other**

* + 1. The Contractor will be considered the Constructor of Record for the Project and shall be accountable for all obligations as outlined under the Ministry of Labour guidelines. As such the Contractor will be fully responsible for the on-site HSC and shall coordinate with any of the Owner’s directly contracted vendors/suppliers (i.e. IT Cabling, A/V, Security, Furniture, Food Services, etc). to ensure that all such site policies and protocols are followed.

Exhibit F

Contractors Proposal from the RFP

Separate attachment