

# **CITY COMMISSION MEETING AGENDA**

City Hall Commission Chambers

Monday, December 19, 2016

7:00 p.m.

MEETING #5053

## **CALL TO ORDER**

## **ROLL CALL**

**INVOCATION BY** Darrell Hendrickson, First Church of God

## **PLEDGE OF ALLEGIANCE**

## **PETITIONS & PROCLAMATIONS**

**VISITORS** (Limit of five minutes per individual and fifteen minutes per topic. Final action may be deferred until the next City Commission meeting unless an emergency situation does exist).

## **CONSENT CALENDAR**

1. Approval of City Commission Meeting Minutes, December 5, 2016;
2. Appropriation Ordinance No. 24, December 19, 2016;
3. Cereal Malt Beverage License:
  - a. Casa Alvarez, 1701 W. Wyatt Earp Blvd.

## **ORDINANCES & RESOLUTIONS**

**Ordinance No. 3649:** An Ordinance Amending Article IV, Sections 4-1302 and 4-1304 of the Code of the City of Dodge City, Kansas, Providing for Fencing Contractors Licensing. Report by Director of Development Services, Kevin Israel.

**Resolution No. 2016-31:** A Resolution by the City of Dodge City, Kansas, Modifying the Schedule of Fees for Contractor and Trades Licensing. Report by Director of Development Services, Kevin Israel.

## **UNFINISHED BUSINESS**

## **NEW BUSINESS**

1. Approval of Allocation of Alcohol and Drug Funds. Report by Assistant Finance Director/Assistant to City Manager.
2. Approval of Bids for Rear Loader Solid Waste Collection Truck for Sanitation Department. Report by Director of Administration. Ryan Reid.
3. Approval of GMP/Construction Agreement for Bio-Gas Upgrading Facility. Report by Director of Engineering, Ray Slattery.

## **OTHER BUSINESS**

## **ADJOURNMENT**

# **CITY COMMISSION MEETING MINUTES**

City Hall Commission Chambers

Monday, December 5, 2016

7:00 p.m.

MEETING #5052

## **CALL TO ORDER**

**ROLL CALL** Mayor Rick Sowers, Commissioners, Kent Smoll, Jan Scoggins, Joyce Warshaw, Brian Delzeit.

**INVOCATION** Darrell Hendrickson of First Church of God

## **PLEDGE OF ALLEGIANCE**

## **PETITIONS & PROCLAMATIONS**

**VISITORS (Limit of five minutes per individual and fifteen minutes per topic. Final action may be deferred until the next City Commission meeting unless an emergency situation does exist).**

Jane Longmeyer introduced Daniel Cecil who was presented with an award for his completion of the Certified Public Managers program through the University of Kansas. Daniel wanted to thank the City for giving him the opportunity to attend. It gave him the opportunity to network and have an understanding to become a better manager and what other municipalities do in there cities. Daniel commented that it was a great opportunity to expand his horizons and continue growing. Daniel spoke about his capstone project, which were improvements to the cemetery. Mayor Rick Sowers presented Daniel with a plaque.

Ray Slattery, Director of Engineering and Paul Lewis, Director of Parks and Recreation presented the City Commission with the ACEC of Kansas (American Council of Engineering Companies of Kansas) Award for the Long Branch Lagoon which was received at the Kansas Association of City/County Mangers Conference in Newton, Kansas. ACEC presents Public Improvement Awards every year in several population categories.

Special Deputy US Marshal Charlie Meade received the Kansas *Finest* Award which was presented by Andrea Etzel, Editor of *KANSAS!* Magazine published by the Kansas Tourism Office, a Division of Wildlife, Parks and Tourism office in Topeka, Kansas. Each year 4 individuals are chosen for the award. Jim Johnson nominated Charlie for the award. Charlie has volunteered his time to the state of Kansas, Trails of Fame, Gunsmoke reunion, Ambassador for Dodge City. Charles said he was very humble and honored to receive this award. Charlie wanted to thank everyone involved that made this happen.

**CONSENT CALENDAR**

1. Approval of City Commission Meeting Minutes, November 21, 2016;
2. Approval of Appropriation Ordinance No. 23, December 5, 2016;
3. Approval of Addendum to Memorandum of Understanding for the Santa Fe Trail Gun Club now known as Santa Fe Trail Sportsman's Club, Inc.

Commissioner Joyce Warshaw moved to approve the Consent Calendar as presented. Commissioner Brian Delzeit seconded the motion. The motion carried 3-0.

**ORDINANCES & RESOLUTIONS**

**Ordinance No. 3644:** An Ordinance Directing the Installation of a Stop Sign at the Intersection of 4<sup>th</sup> Avenue Extended and the Internal Wright Park Roadway Just South of the Long Branch Lagoon Water Park and at the Intersection of Park Street and the North/South Internal Wright Park Roadway Just East of the Detention Holding Facilities Along with Establishing No Parking on the North Curb Line of the Internal Wright Park Roadway Just South of the Long Branch Lagoon Water Park form 4<sup>th</sup> Avenue Extended West 490 Feet and Providing Penalties for the Violation of the Provisions of this Ordinance was approved on a motion by Commissioner Brian Delzeit; Commissioner Joyce Warshaw seconded the motion. The motion carried 3-0.

**Ordinance No. 3645:** An Ordinance Directing the Installation of Stop Signs at the Intersection of 4<sup>th</sup> Avenue and the New South Front Street Parking Lots and at the Intersection of 5<sup>th</sup> Avenue and the new South Front Street Parking Lot and the Intersection of the Ingress/Egress Easement Over the Vacated 3<sup>rd</sup> Avenue Right-of-Way and Providing Penalties for the Violation of the Provisions of this Ordinance was approved on a motion by Commissioner Brian Delzeit; Commissioner Joyce Warshaw seconded the motion. The motion carried 3-0.

**Ordinance No. 3646:** An Ordinance Directing the Installation of Stops Signs at the Intersection of 4th Avenue and Trail Street and Providing Penalties for the Violation of the Provisions of this Ordinance was approved on a motion by Commissioner Brian Delzeit; Commissioner Joyce Warshaw seconded the motion. The motion carried 3-0.

**Commissioner Joyce Warshaw thanked the Engineering department for being aware of these things.**

**Ordinance No. 3647:** An Ordinance for the Vacating Vine Street Right-of –Way Between 9th Avenue and 10th Avenue, and Establishing an Easement Ordinance was approved on a motion by Commissioner Rick Sowers; Commissioner Brian Delzeit seconded the motion. The motion carried 3-0.

**Ordinance No. 3648:** An Ordinance Amending the Present Established School Zones (Ordinance No. 3330 and 3335) and Providing Penalties for the Violation of the Provisions of

this Ordinance was approved on a motion by Commissioner Brian Delzeit; Commissioner Joyce Warshaw seconded the motion. The motion carried 3-0.

**Resolution 2016-29:** A Resolution Describing and Defining the Boundary of the City Dodge City, Kansas was approved on a motion by Commissioner Rick Sowers; Commissioner Joyce Warshaw seconded the motion. The motion carried 3-0.

**Resolution 2016-30:** A Resolution of the Governing Body of the City of Dodge City, Kansas to Determining that: The City is Considering Removal of a Portion of the Property Constituting the Current Entertainment Area from the Existing Star Bond Project District Within the City; that the City is Considering Adding Additional Property as the New Entertainment Area of the Existing Star Bond Project District and Establishing the Date and Time of a Public Hearing on Such Matters, and Providing for the Giving of Notice of Such Public Hearing was approved on a motion by Commissioner Brian Delzeit; Commissioner Joyce Warshaw seconded the motion. The motion carried 3-0.

City Manager Cherise Tieben commented that this is a procedural piece to consider relocating the district. This is the first step into the long process.

#### **UNFINISHED BUSINESS**

#### **NEW BUSINESS**

Commissioner Joyce Warshaw moved to approve the bid from Kut Kwick in the amount of \$51,563 for a Super Slope Master Mower for the Parks Department. Commissioner Brian Delzeit seconded the motion. The motion carried 3-0.

Commissioner Brian Delzeit moved to approve the bid from Paving Maintenance Supply in the amount of \$74,987.50 for the 2016 T2 Demo Unit Asphalt Recycler for the Public Works Department. Commissioner Joyce Warshaw seconded the motion. The motion carried 3-0.

#### **OTHER BUSINESS**

City Manager, Cherise Tieben:

Reminders:

- December 8<sup>th</sup>, Ribbon Cutting at Diamond Petro Restaurant at 4:30 p.m.;
- December 9<sup>th</sup>, The Mexican Consulate of Kansas City will be in Dodge City, to answer questions and legal advice to Mexican nationals in Dodge City and surrounding areas in a forum.
- On Saturday December 10<sup>th</sup> and Sunday December 11<sup>th</sup> they will be providing documentation services. These services will be provided here at City Hall in the Commission Chambers.

- December 15<sup>th</sup> - Holiday Inn open house from 4:00 -6:30 p.m. at the Chamber;
- December 15<sup>th</sup> - Public Official Exchange at 6:30 p.m. at the Boot Hill Occident;
- The Joint City/County meeting that was postponed will be rescheduled.

Commissioner, Kent Smoll

Commissioner, Jan Scoggins

Commissioner, Brian Delzeit

- Thanks for support of local community; Significant tax increase over the summer;
- Christmas is here, shop local if you can;
- Congratulations to Joyce Warshaw on her upcoming retirement. 30 years of service with USD 443.

Commissioner, Joyce Warshaw:

- Congratulations to Daniel and Charlie;
- Holiday Seasons are here, Salvation Army bell ringers, give generously, they are looking for bell ringers;
- December 9<sup>th</sup> at Wal-Mart there is a toy drive for the Salvation Army.

Mayor, Rick Sowers

- Congratulations to Susan Wagle and Ron Rikman, Susan is going be senate present , speaker of the house position;
- Thanks to everybody that participated in the parade of lights, had a good crowd, congratulations to everyone that won on the Chile feed.
- Congratulations to Charlie and Daniel for their achievements.
- I Did the Salvation Army Kick Off fund raiser.
- Police Department. has a food drive through December 16;
- Thanks to everyone that shops local. Sales tax are up.

**ADJOURNMENT**

Commissioner Brian Delzeit moved to adjourn the meeting. Commissioner Joyce Warshaw seconded the motion. The motion carried 3 – 0.

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Mayor, Rick Sowers

ATTEST:

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Nannette Pogue, City Clerk

**INDIVIDUAL/SOLE PROPRIETOR  
APPLICATION FOR LICENSE TO SELL CEREAL MALT BEVERAGES**

(This form has been prepared by the Attorney General's Office)

City or  County of Dodge City

<b>SECTION 1 - LICENSE TYPE</b>
Check One: <input type="checkbox"/> New License <input checked="" type="checkbox"/> Renew License <input type="checkbox"/> Special Event Permit
Check One: <input checked="" type="checkbox"/> License to sell cereal malt beverages for consumption on the premises. <input type="checkbox"/> License to sell cereal malt beverages in original and unopened containers and not for consumption on the licensee's premises.

<b>SECTION 2 - APPLICANT INFORMATION</b>		
Kansas Sales Tax Registration Number (required):		
Name <u>Rocio Alvarez</u>	Phone No. <u>(620) 227-6971</u>	Date of Birth <u>5-10-60</u>
Residence Street Address <u>1204 Shira St.</u>	City <u>Dodge City Ks</u>	Zip Code <u>67801</u>
<b>Applicant Spousal Information</b>		
Spouse Name <u>Javier Alvarez</u>	Phone No. <u>(620) 227-6971</u>	Date of Birth <u>10-7-52</u>
Residence Street Address <u>1204 Shira St.</u>	City <u>Dodge City Ks</u>	Zip Code <u>67801</u>

<b>SECTION 3 - LICENSED PREMISE</b>	
Licensed Premise (Business Location or Location of Special Event)	Mailing Address (If different from business address)
DBA Name <u>Casa Alvarez Restaurant</u>	Name
Business Location Address <u>1701 W Wyatt Exp</u>	Address
City <u>Dodge City</u> State <u>Ks</u> Zip <u>67801</u>	City State Zip
Business Phone No. <u>(620) 225-7164</u>	<input checked="" type="checkbox"/> I own the proposed business location. <input type="checkbox"/> I do not own the proposed business location.
Business Location Owner Name(s)	

<b>SECTION 4 - APPLICANT QUALIFICATION</b>	
I am a U.S. Citizen	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
I have been a resident of Kansas for at least one year prior to application.	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
I have resided within the state of Kansas for <u>33</u> years.	
I am at least 21 years old.	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
I have been a resident of this county for at least 6 months.	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
Within 2 years immediately preceding the date of this application, neither I nor my spouse <sup>1</sup> has been convicted of, released from incarceration for or released from probation or parole for any of the following crimes: (1) Any felony; (2) a crime involving moral turpitude; (3) drunkenness; (4) driving a motor vehicle while under the influence of alcohol (DUI); or (5) violation of any state or federal intoxicating liquor law.	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
My spouse has previously held a CMB license.	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
My spouse has never been convicted of one of the crimes mentioned above while licensed.	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No

## *Memorandum*

*To: City Manager  
City Commissioners*

*From: Kevin Israel  
Director of Development Services*

*Date: 12-15-2016*

*Subject: Fencing Contractor Ordinance*

*Agenda Item: Ordinance NO. 3649*

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**Recommendation:** City staff recommends approval of the Fencing Contractor Licensing Ordinance (No. 3649)

**Background:** Concerns regarding licensing of Fence contractors was discussed in the work session on Nov 7<sup>th</sup>, 2016. The decision to implement a Fencing Contractors License was determined to be an answer to the concerns from the public.

**Justification:** To protect the citizens of Dodge City from unqualified installers we believe it is necessary to require all fencing installers to provide proof of insurance and obtain a Fencing Contractor License from the City of Dodge City.

**Financial Considerations:** None

**Purpose/Mission:** To assist the public and to direct and encourage quality community development which enhances the city, protects the environment, and makes the community a better place to live.

**Legal Considerations:** None

**Attachments:** Ordinance # 3649

ORDINANCE NO. 3649

AN ORDINANCE AMENDING ARTICLE IV, SECTIONS 4-1302 AND 4-1304 OF THE CODE OF THE CITY OF DODGE CITY, KANSAS, PROVIDING FOR FENCING CONTRACTORS LICENSING.

BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF DODGE CITY, KANSAS:

SECTION 1. That article IV of the Code of the City of Dodge City be amended to provide for licensing of fencing contractors.

SECTION 2. That sections 4-1302 DEFINITIONS of the City Code be amended by adding

(m) CONTRACTOR, FENCING. Those who are qualified to install, repair, and replace fencing within the jurisdiction.

SECTION 3: That section 4-1304 LICENSES be amended by adding the underscored words:

LICENSE REQUIRED. Any Master Plumber, Electrical Contractor, Master Mechanical Contractor, Water Conditioning Contractor, General Contractor, Building Contractor, Residential Contractor, Sign Hanger Contractor, Fencing Contractor, Limited Roofing Contractor and Unlimited Roofing Contractors must obtain a City License on the annual basis before performing permit required trades work.

SECTION 4. EFFECTIVE DATE. This ordinance shall take full force and effect following its adoption by the governing body and publication in the official newspaper, as provided by law.

ADOPTED BY THE GOVERNING BODY OF THE CITY OF DODGE CITY, KANSAS AND APPROVED BY THE MAYOR THIS 19<sup>th</sup> DAY OF DECEMBER, 2016.

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RICK SOWERS, MAYOR

ATTEST:

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NANNETTE POGUE, CITY CLERK

*Memorandum*

*To: City Manager  
City Commissioners*

*From: Kevin Israel  
Director of Development Services*

*Date: 12-15-2016*

*Subject: Amendment to Fee Schedule  
Contractor Licensing*

*Agenda Item: Resolution 2016-31*

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**Recommendation:** City staff recommends approval of the attached Resolution modifying the schedule of fees for contractors and trades licensing.

**Justification:** To maintain consistency in fees and processes for all trades and contractor licensing in the City of Dodge City.

**Financial Considerations:** None

**Purpose/Mission:** To assist the public and to direct and encourage quality community development which enhances the city, protects the environment, and makes the community a better place to live.

**Legal Considerations:** None

**Attachments:** Resolution 2016-31

**RESOLUTION NO. 2016-31**

**A RESOLUTION BY THE CITY OF DODGE CITY KS, MODIFYING THE SCHEDULE OF FEES FOR CONTRACTOR AND TRADES LICENSING.**

**BE IT RESOLVED BY THE GOVERNING BODY OF THE CITY OF DODGE CITY KS:** That the fees for contractor and trades licensing are modified as follows:

<b>Contractor and Trades Licensing Fees:</b>	<b>New</b>	<b>Renewal</b>
Building, General, Residential Contractor	\$200	\$100
Commercial Unlimited Roofing Contractor	\$200	\$100
Residential Roofing Contractor	\$200	\$100
Master Water Treatment Installer	\$200	\$100
Master Plumber, Electrician, or Mechanic	\$200	\$100
Journeyman Plumber, Electrician, or Mechanic	\$200	\$100
Apprentice Plumber, Electrician, or Mechanic	\$ 35	\$ 35
Sign Hanger	\$200	\$100
Fencing Contractor	\$200	\$100

**New contractor rates will be applied for all applications received after December 31<sup>st</sup>.**

This resolution shall become effective upon the adoption by the City Commission and publication in the official City newspaper.

PASSED BY THE GOVERNING BODY OF THE CITY OF DODGE CITY, KANSAS  
THIS 19th DAY OF DECEMBER, 2016.

\_\_\_\_\_  
RICK SOWERS, MAYOR

ATTEST:

\_\_\_\_\_  
NANNETTE POGUE, CITY CLERK

*Memorandum*

*To: Cherise Tieben, City Manager*  
*From: Ernestor De La Rosa*  
*Date: December 19, 2016*  
*Subject: Allocation of 2016 Special Alcohol and Drug Funds*  
*Agenda Item: New Business*

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**Recommendation:** I recommend the approval of the disbursements of Special Alcohol and Drug Tax money for the recommended programs.

**Background:** The City of Dodge City receives a portion of the alcohol and drug tax that is collected in the community. That tax is allocated 1/3 to the General Fund, 1/3 to a Special Park and Recreation Fund and 1/3 to a Special Alcohol and Drug Fund. This allocation is spelled out in the Kansas State Statutes. The amount deposited into the Special Alcohol and Drug fund are to be used for “the purchase, establishment, maintenance or expansion of services or programs whose principal purpose is alcoholism and drug abuse prevention and education, alcohol and drug detoxification, intervention in alcohol and drug abuse or treatment of persons who are alcoholics or drug abusers or are in danger of becoming alcoholics or drug abusers”. In order to accomplish this, we take applications from agencies/programs that provide those services. A committee of 3 individuals reviewed the applications and made a recommendation on the allocation of these funds. The 3 people serving on the committee were Jane Longmeyer, Luanne Menard and Vickie Williamson. There is approximately \$94,000 to be allocated for these programs. The applications received, the amount applied for and the recommended allocation is:

<b>Organization</b>	<b>Project</b>	<b>Amount of Request</b>	<b>Recommendation</b>
Compass Behavioral Health	Co-occurring Community Support	8,957	3,000
Dodge City Public Library	DVD's and books with related topics in Spanish. Provide comprehensive list to all service agencies	559	559
Catholic Charities of Southwest Kansas	Catholic Charities Addiction program providing outpatient treatment and assessment for those who cannot pay	10,000	7,400
New Chance	Assist with social detox position & bilingual licensed counselor position	72,000	64,841
Friends of Recovery	Oxford Houses of Dodge City	20,000	18,200

**Justification:** The applications received met the general requirements of the program. The recommendations by the committee are the amounts they feel best meets the overall goals of the program.

**Financial Considerations:** Money is available in the Special Alcohol and Drug fund to pay the recommended amounts.

**Purpose/Mission:** Support the quality of life in Dodge City by best spending the monies the City receives for drug and alcohol treatment, education and prevention programs.

**Legal Considerations:** None

# Memorandum

*To: City Manager  
City Commissioners*  
*From: Ryan Reid*  
*Date: December 14, 2016*  
*Subject: Rear Loader Solid Waste Collection  
Truck*  
*Agenda Item: New Business*

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**Recommendation:** Staff recommends accepting the bid from Dodge City International for \$147,502.92 for the rear loader trash truck bid they submitted. This is the lowest bid that met our specifications.

The bid tabulation is attached for your review.

**Background:** Staff opened bids December 13th for the rear loader truck. We received seven bids. Utilities and I have reviewed the bids. We agree that the DCI bid meets our specs and that the unit will meet Sanitation's needs. As part of the deal, we will be trading in a 2002 unit that has become more difficult and costly to keep operational.

**Justification:** Sanitation has had good experiences with International trucks. Additionally the Leach Packer body is what they currently use. The safety and reliability has been good on this bod-which is an important consideration in Sanitation.

**Financial Considerations:**

Sanitation has \$200,000 budgeted for the project.

**Attachments:** Bid Tabulation, photo

Bids opened

2016 11 22

Bid Tab

Slope Mower

Bidder	\$ base	Make/Model	Trade in Offer	\$ total with Trade-in	
<b>Dodge City International</b>	<b>\$ 162,002.92</b>	<b>International 7400 /Leach 2RIII Body</b>	<b>\$ 14,500.00</b>	<b>\$ 147,502.92</b>	<b>Low bid that meets specs</b>
Dodge City International	\$ 156,602.92	International 7400 /New Way Cobra Body	\$ 12,500.00	\$ 144,102.92	Does not meet specs.
Dodge City Kenworth	\$ 165,771.00	Kenworth T400/Leach body	\$ 8,500.00	\$ 157,271.00	
Downing	\$ 161,630.00	International 7400/Pak-Mor R320C	\$ 15,000.00	\$ 146,630.00	Does not meet specs.
Downing	\$ 160,373.00	Freightliner M2-106/Pak-Mor R320C Body	\$ 15,000.00	\$ 145,373.00	Does not meet specs.
Maupin	\$ 164,455.00	Freightliner M2106 /Leach 2RIII	\$ 8,500.00	\$ 155,955.00	
Maupin	\$ 160,748.00	Western Star 4700/Leach 2RIII	\$ 8,500.00	\$ 152,248.00	



Similar to the vehicle Staff is recommending

## Memorandum

*To: City Manager  
City Commissioners*

*From: Ray Slattery, P.E.  
Director of Engineering Services*

*Date: December 14, 2016*

*Subject: Consulting Agreement for Bio-Gas Upgrading  
Facility GMP/Construction Agreement,  
SS 1601.*

*Agenda Item: New Business*

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**Recommendation:** Approve GMP/Construction Agreement with UCI pending review by KDHE. The City Attorney has already reviewed the agreement.

**Background:** As you are well aware of, the city has been looking at utilizing the raw gas generated at the South WWTP in some fashion for a number of years now. The City has started the design of an Up-Grading Facility and has approved a purchase agreement with Guild Associates, Inc. for the up-grading equipment. We are now to the point that we need to proceed with the confirming the cost of the construction of the facility. UCI was chosen at the contractor due to their familiarity with the South WWTP, where the up-grading facility is being built. UCI was the contractor for the expansion and revisions to the original South WWTP. They were also the contractor for the Reclamation Plant. They have also done on-call service work for the City at the WWTP. UCI has a good working relationship with city staff and PEC, the engineering consultants.

**Justification:** This project is can be classified as a modified design build. With UCI's experience with the existing facility and knowing that timing of the construction is crucial; UCI will be able to schedule work to keep the WWTP functioning and get the Bio-Gas Up-Grading Facility operational in a timely manner. UCI can start work while the design is finalized and prior to delivery of equipment. By approving this agreement it will allow UCI to start looking at the preliminary plans (30% plans), submitting a GMP for the construction of the project, and allow PEC and UCI to work together to provide the final stages of the project in the most cost effective manner possible. Once UCI has finalized their GMP; it will be brought back to the Commission for their approval.

**Financial Considerations:** The Preconstruction Services (GMP Proposal) within this agreement with UCI is for \$10,000.00. Funding of this project will be from the low interest loan the City has with KDHE. This loan was used to construct the Reclamation Plant and associated projects.

**Purpose/Mission:** The completion of this project will enable the City to sell the upgraded bio-gas generated at the South WWTP for another income source for the City.

**Legal Considerations:** The City is entering into an agreement with UCI and is bound by the provisions of this contract.

**Attachments:** The GMP/Construction Agreement with UCI.

AGREEMENT AND GENERAL CONDITIONS BETWEEN OWNER  
AND CONSTRUCTION MANAGER

Guaranteed Maximum Price with Fee for Preconstruction Services

**TABLE OF ARTICLES**

1. AGREEMENT
2. GENERAL PROVISIONS
3. CONSTRUCTION MANAGER'S RESPONSIBILITIES
4. OWNER'S RESPONSIBILITIES
5. SUBCONTRACTS
6. TIME
7. COMPENSATION AND GUARANTEED MAXIMUM PRICE
8. COST OF THE WORK
9. CHANGES
10. PAYMENT
11. INDEMNITY, INSURANCE, WAIVERS AND BONDS
12. SUSPENSION, NOTICE TO CURE AND TERMINATION OF THE AGREEMENT
13. DISPUTE RESOLUTION
14. MISCELLANEOUS PROVISIONS
15. CONTRACT DOCUMENTS

**ARTICLE 1.**

**AGREEMENT**

This Agreement is made this \_\_\_\_\_ day of \_\_\_\_\_ in the year 2016, by and between the

**OWNER**

City of Dodge City  
P.O. Box 880  
Dodge City, Kansas 67801-0880  
(Name and Address)

and the

**CONSTRUCTION MANAGER**

Utility Contractors, Inc. (UCI)  
659 N. Market St.  
Wichita, Kansas 67214

for services in connection with the following

**PROJECT**

Dodge City Bio-Gas Project  
South WWTP  
Dodge City, Ks

**PROJECT DESIGN**

A Bio-Gas Facility so that the upgraded bio-gas can be injected in the nearby natural gas pipe line  
Notice to the Parties shall be given at the above addresses.

## ARTICLE 2.

### GENERAL PROVISIONS

2.1 RELATIONSHIP OF PARTIES. The Owner and the Construction Manager agree to proceed with the Project on the basis of mutual trust, good faith and fair dealing.

2.1.1 The Construction Manager shall furnish construction administration and management services and use the Construction Manager's best efforts to perform the Work in an expeditious manner consistent with the Contract Documents. The Owner and Construction Manager shall endeavor to promote harmony and cooperation among all Project participants.

2.1.2 The Construction Manager represents that it is an independent contractor and that in its performance of the Work it shall act as an independent contractor.

2.1.3 Neither the Construction Manager nor any of its agents or employees shall act on behalf of or in the name of Owner except as provided in this Agreement unless authorized in writing by Owner's Representative.

2.1.4 The Owner and the Construction Manager shall perform their obligations with integrity, ensuring at a minimum that:

2.1.4.1 Conflicts of interest shall be avoided or disclosed promptly to the other Party; and

2.1.4.2 The Owner and the Construction Manager warrant that they have not and shall not pay nor receive any contingent fees or gratuities to or from the other Party, including their agents, officers and employees, sub-consultants or others from whom they may be liable, to secure preferential treatment.

2.2 EXTENT OF AGREEMENT. This Agreement is solely for the benefit of the Parties, represents the entire and integrated agreement between the Parties, and supersedes all prior negotiations, representations or agreements, either written or oral. This Agreement and each and every provision thereof is for the exclusive benefit of the Owner and Construction Manager and not for the benefit of any third party, except to the extent expressly provided in the Agreement.

2.3 ENGINEER. The Owner, through its separate contract with an outside Engineer, shall provide all architectural and engineering design services necessary for the completion of the Work. The Construction Manager shall not be required to provide professional services which constitute the practice of architecture or engineering except as otherwise provided in Paragraph 3.1.6.

2.3.1 The Owner shall obtain from the Engineer either a license for Construction Manager and Subcontractors to use the design documents prepared by the Engineer or ownership of the copyrights for such design documents, and shall indemnify and hold harmless the Construction Manager against any suits or claims of infringement of any copyrights or licenses arising out of the use of the design documents for the construction of **Bio-Gas Facility, Dodge City, Ks.** in relation to said Project.

### 2.4 DEFINITIONS

2.4.1 Agreement means this Standard Agreement and General Conditions Between Owner and Construction Manager (Where the Basis of Payment is a Guaranteed Maximum Price with Fee for Preconstruction Services), as modified by the Parties, and Exhibits and Attachments made part of this Agreement upon its execution.

2.4.2 Engineer means the licensed Architect, Engineer or Engineer and its consultants, retained by Owner to perform design services for the Project. The Owner's Engineer for the Project is Professional Engineering Consultants, P.A. - Wichita, Kansas (PEC).

2.4.3 A Change Order is a written order signed by the Owner and the Construction Manager after execution of this Agreement, indicating changes in the scope of the Work, the GMP, Date of Substantial

Completion or Date of Final Completion, including substitutions proposed by the Construction Manager and accepted by the Owner.

2.4.4 The Contract Documents consist of this Agreement, the drawings, specifications, exhibits, addenda issued prior to execution of this Agreement, approved submittals, information furnished by the Owner under Paragraph 4.3, other documents listed in this Agreement and any modifications issued after its execution period.

2.4.5 The Construction Manager is the person or entity identified in Article 1 and includes the Construction Manager's Representative.

2.4.6 The term Day shall mean calendar day unless otherwise specifically defined.

2.4.7 Final Completion occurs on the date when the Construction Manager's obligations under this Agreement are complete and accepted by the Owner and final payment becomes due and payable. This date shall be confirmed by a Certificate of Final Completion signed by the Owner and the Construction Manager.

2.4.8 A Material Supplier is a person or entity retained by the Construction Manager to provide material and equipment for the Work.

2.4.9 Others means other contractors, material suppliers, and persons at the Worksite who are not employed by the Construction Manager, or Subcontractors.

2.4.10 The term Overhead shall mean 1) payroll costs and other compensation of Construction Manager employees in the Construction Manager's principal and branch offices; 2) general and administrative expenses of the Construction Manager's principal and branch offices including deductibles paid on any insurance policy, and charges against the Construction Manager for delinquent payments; and, 3) the Construction Manager's capital expenses, including interest on capital used for the Work.

2.4.11 Owner is the person or entity identified in Article 1 and includes the Owner's representative.

2.4.12 The Owner's Program is an initial description of the Owner's objectives, including budgetary and time criteria, space requirements and relationships, flexibility and expandability requirements, special equipment and systems, site requirements, and any requirements for phased occupancy.

2.4.13 The Project, as identified in Article 1, is the building, facility or other improvements for which the Construction Manager is to perform Work under this Agreement. It may also include construction by the Owner or Others.

2.4.14 The Schedule of the Work is the document prepared by the Construction Manager that specifies the dates on which the Construction Manager plans to begin and complete various parts of the Work, including dates on which information and approvals are required from the Owner.

2.4.15 A Subcontractor is a person or entity retained by the Construction Manager as an independent contractor to provide the labor, materials, equipment or services necessary to complete a specific portion of the Work. The term Subcontractor does not include the Engineer or Others.

2.4.16 Substantial Completion of the Work occurs on the date when the Work is sufficiently complete in accordance with the Contract Documents so that the Owner may occupy or utilize the Work, including injecting bio-gas into the natural gas pipe line, or a designated portion, for the use for which it is intended, and a certificate of occupancy is issued to the Owner. The issuance of a certificate of occupancy is not a prerequisite for Substantial Completion if the certificate of occupancy cannot be obtained due to factors beyond the Construction Manager's control. This date shall be confirmed by a certificate of Substantial Completion signed by the Owner and Construction Manager.

2.4.17 A Sub-subcontractor is a person or entity who has an agreement with a Subcontractor to perform any portion of the Work.

2.4.18 Terrorism means a violent act, or an act that is dangerous to human life, property or infrastructure, that is committed by an individual or individuals and that appears to be part of an effort to coerce a civilian population or to influence the policy or affect the conduct of any government by coercion. Terrorism includes, but is not limited to, any act certified by the United States government as an act of terrorism pursuant to the Terrorism Risk Insurance Act, as amended.

2.4.19 Work means the construction and services necessary or incidental to fulfill the Construction Manager's obligations for the Project in conformance with this Agreement and the other Contract Documents. The Work may refer to the whole Project or only a part of the Project if work is also being performed by the Owner or Others.

2.4.19.1 Changed Work means work that is different from the original scope of Work; or work that changes the GMP or Date of Substantial Completion or Date of Final Completion.

2.4.19.2 Defective Work is any portion of the Work that is not in conformance with the Contract Documents, as more fully described in Paragraphs 3.5 and 3.6.

2.4.20 Worksite means the location of the Project as identified in Article 1 where the Work is to be performed.

### **ARTICLE 3. CONSTRUCTION MANAGER'S RESPONSIBILITIES**

#### **3.1 GENERAL RESPONSIBILITIES**

3.1.1 The Construction Manager shall provide all labor, materials, equipment and services necessary to complete the Work, all of which shall be provided in full accord with, and reasonably inferable from, the Contract Documents as being necessary to produce the indicated results.

3.1.2 The Construction Manager shall be responsible for the supervision and coordination of the Work, including the construction means, methods, techniques, sequences and procedures utilized, unless the Contract Documents give other specific instructions. In such case, the Construction Manager shall not be liable to the Owner for damages resulting from compliance with such instructions unless any such error, inconsistency, omission or unsafe practice in the specified construction means, methods, techniques, sequences or procedures was readily apparent and obvious and the Construction Manager failed to timely report to the Owner.

3.1.3 The Construction Manager shall perform Work only within locations allowed by the Contract Documents, applicable permits and applicable law.

3.1.4 WORKSITE VISIT. The Construction Manager acknowledges that it has visited, or has had the opportunity to visit, the Worksite to visually inspect the general and local conditions which could affect the Work.

3.1.5 CONSTRUCTION MANAGER'S REPRESENTATIVE. The Construction Manager's Representative is David Odell. The Construction Manager's Representative shall possess full authority to receive instructions from the Owner and to act on those instructions. The Construction Manager shall notify the Owner in writing of a change in the designation of the Construction Manager's Representative.

3.1.6 PROFESSIONAL SERVICES. The Construction Manager may be required to procure professional services in order to carry out its responsibilities for construction means, methods, techniques, sequences and procedures or as such services are specifically called for by the Contract Documents. The Construction Manager shall obtain these professional services, and any design certifications required, from licensed design professionals. All drawings, specifications, calculations, certifications and submittals prepared by such design professionals shall bear the signature and seal of such design professionals and the Owner, and the Engineer, shall be entitled to rely upon the adequacy, accuracy and completeness of such design services. If professional services are specifically required by the Contract Documents, the Owner shall indicate all required performance and design criteria. The Construction Manager shall not be responsible for the adequacy of such

performance and design criteria. The Construction Manager shall not be required to provide such services in violation of existing laws, rules and regulations in the jurisdiction where the Project is located.

3.2 PRECONSTRUCTION SERVICES. The Preconstruction Services under this Paragraph 3.2 are included in the Construction Manager's work.

3.2.1 PRELIMINARY EVALUATION. The Construction Manager shall provide a preliminary evaluation of the Owner's Program and report such findings to the Owner and the Engineer.

3.2.2 CONSULTATION. The Construction Manager shall schedule and attend regular meetings with the Owner and Engineer. The Construction Manager shall consult with the Owner and Engineer regarding site use and improvements and the selection of materials, building systems and equipment. The Construction Manager 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.

3.2.3 SCHEDULE OF THE WORK. When Project requirements have been sufficiently identified, the Construction Manager shall prepare a preliminary Schedule of the Work for the Engineer's review and the Owner's approval. The Construction Manager shall coordinate and integrate the Schedule of the Work with the services and activities of the Owner, Construction Manager, Engineer, and the requirements of governmental entities. As design proceeds, the Construction Manager shall update the Schedule of the Work to indicate proposed activity sequences, durations, or milestone dates for such activities as receipt and approval of pertinent information, issuance of the drawings and specifications, the preparation and processing of shop drawings and samples, delivery of materials or equipment requiring long-lead-time procurement, Owner's occupancy requirements and estimated date of Substantial Completion of the Project. If Schedule of the Work updates indicate that milestone dates contained in prior Schedules of the Work will not be met, the Construction Manager shall notify and make recommendations to the Owner. If the Project is to be completed in phases, the Construction Manager shall make recommendations to the Owner and Engineer regarding the phased issuance of the drawings and specifications.

3.2.4 ESTIMATES.

3.2.4.1 When the Owner has sufficiently identified the Owner's Program and other Project requirements and the Engineer has prepared other basic design criteria, the Construction Manager shall prepare, for the review of the Engineer and approval of the Owner, an initial estimate for the Project, utilizing area, volume or similar conceptual estimating techniques.

3.2.4.2 When schematic or preliminary design documents have been completed by the Engineer and approved by the Owner, the Construction Manager shall prepare for the review of the Engineer and approval of the Owner, a more detailed budget with supporting data. During the preparation of the design development documents with drawings and specifications, the Construction Manager shall update and refine this estimate at appropriate intervals agreed upon by the Owner, Engineer and Construction Manager.

3.2.5 CONSTRUCTION DOCUMENT REVIEW. The Construction Manager shall review the drawings and specifications in an effort to identify readily apparent and obvious constructability problems that could impact the Construction Manager's ability to perform the Work in an expeditious and economical manner. The Construction Manager shall advise the Engineer and Owner for their review and action as appropriate. In addition, the Construction Manager shall promptly report to the Owner and the Engineer any such errors or omissions in the drawings and specifications which the construction Manager believes are readily apparent and obvious.

3.2.6 TEMPORARY FACILITIES. The Construction Manager shall make recommendations regarding temporary construction facilities, equipment, materials and services for common use by the Construction Manager, its Subcontractors, Sub-subcontractors and Material Suppliers.

3.2.7 LONG-LEAD ITEMS. The Construction Manager shall recommend to the Owner and Engineer a schedule for procurement of long-lead-time items that will constitute part of the Work as required to meet the Schedule of the Work. The Construction Manager shall help expedite the delivery of long-lead-time items.

~~3.2.8~~ SOLICITATION OF SUBCONTRACTORS AND SUPPLIERS. The Construction Manager shall seek to develop Subcontractor interest in the Project and shall furnish to the Owner and Engineer a list of possible subcontractors from whom proposals may be requested for each principal portion of the Work. The Owner shall promptly reply in writing to the Construction Manager if the Owner or Engineer know of any objection to a subcontractor. The Owner may designate specific persons and/or entities from whom the Construction Manager shall solicit bids.

3.2.9 EQUAL EMPLOYMENT OPPORTUNITY AND AFFIRMATIVE ACTION. The Construction Manager shall consult with the Owner regarding equal employment opportunity and affirmative action programs.

3.2.10 CONSULTANTS. The Construction Manager shall assist the Owner in selecting, retaining and coordinating the professional services of a surveyor, testing laboratories and special consultants as needed.

3.2.11 PERMITS. The Construction Manager shall assist the Owner in obtaining building permits and special permits for permanent improvements, except for permits required to be obtained directly by the Construction Manager. The GMP does not include pricing for permits as these costs are borne by the Owner.

3.2.12 PRECONSTRUCTION SERVICES. The Construction Manager shall provide the Preconstruction Services as described in this Agreement for a fee of Ten Thousand dollars (\$ 10,000.00), which shall be paid upon execution of this Agreement. The fee for Preconstruction Services shall be included as part of Lump Sum GMP. See Exhibit "A" Scoping Document.

### 3.3 GUARANTEED MAXIMUM PRICE (GMP)

3.3.1 At such time as the Owner and Construction Manager agree the drawings and specifications are sufficiently complete, the Construction Manager shall prepare and submit to the Owner in writing a GMP. The GMP proposal shall include the sum of the estimated cost of the Work, the Construction Manager's Fee, the clarifications and assumptions upon which it is based, allowances and reasonable contingencies, and shall include compensation for Preconstruction Services. The GMP shall also include a Schedule of Values as line items including a line item for Contingency. The format for the Schedule of Values shall be substantially in the form set forth in Exhibit D. The Construction Manager does not guarantee that the individual line items as scheduled will not be exceeded, only the GMP. Variances in line items for specific Schedule of Values which exceed or are less than any specific line item including the Contingency may be used for variables in other line items so long as the GMP is not exceeded.

3.3.2 BASIS OF GUARANTEED MAXIMUM PRICE. The Construction Manager shall include with the GMP proposal a written statement of its basis, which shall include: a written statement of its basis as Exhibit "A".

3.3.2.1 A list of the drawings and specifications, including all addenda, which were used in preparation of the GMP Proposal;

3.3.2.2 A Schedule of Values and Contingency in form substantially similar to Exhibit D;

3.3.2.3 Appendix to Exhibit A shall also include the plans as specifics supplied by Owner and Engineer as Of the date of the proposed GMP, the proposed Schedule of Work as set forth below and a list of the assumptions and clarifications made by the Construction Manager in the preparation of the GMP Proposal to supplement the information contained in the drawings and specifications;

3.3.2.4 The Date of Substantial Completion or the Date of Final Completion upon which the proposed GMP is based, and the Schedule of Work upon which the Date of Substantial Completion or the Date of Final Completion is based;

3.3.2.5 A schedule of applicable alternate prices; See Exhibit "B".

3.3.2.6 A schedule of applicable unit prices;

3.3.2.7 A statement of any work to be self-performed by the Construction Manager. See Exhibit "C".

3.3.3 The Construction Manager shall meet with the Owner and Engineer to review the GMP. In the event that the Owner or Engineer discover any inconsistencies, inaccuracies or omissions in the information presented, they shall promptly notify the Construction Manager, who shall make appropriate adjustments to the GMP. The Owner shall then give prompt written approval of the adjusted GMP.

3.3.4 The Owner shall cause the Engineer to revise the drawings and specifications to the extent necessary to reflect the clarifications, assumptions, and allowances on which the GMP is based. Revised drawings and specifications shall be furnished to the Construction Manager in accordance with the current Schedule of the Work, unless otherwise agreed by the Owner, Construction Manager and Engineer. The Construction Manager shall promptly notify the Owner and Engineer if the revised drawings and specifications are inconsistent with the GMP's clarifications, assumptions, and allowances.

3.3.5 If the Contract Documents are not complete at the time the GMP proposal is submitted to the Owner, the Construction Manager shall provide in the GMP for further development of the Contract Documents. Such further development does not include changes in scope, systems, kinds and quality of materials, finishes or equipment, all of which, if required, shall be incorporated by Change Document.

3.3.6 A Contingency to cover unanticipated cost will be established within the GMP. The Contingency line item shall be used for increases in items in the Schedule of Values which exceed the original amount set forth in that line item. Any amount remaining in the Contingency at the end of the Project shall be promptly refunded to the Owner in its entirety.

3.3.7 FAILURE TO ACCEPT THE GMP PROPOSAL. Unless the Owner accepts the GMP Proposal in writing on or before the date specified in the GMP Proposal for such acceptance and so notifies the Construction Manager, the GMP Proposal shall not be effective. If the Owner fails to accept the GMP Proposal, or rejects the GMP Proposal, the Owner shall have the right to:

3.3.7.1 Suggest modifications to the GMP Proposal. If such modifications are accepted in writing by Construction Manager, the GMP Proposal shall be deemed accepted in accordance with Subparagraph 3.3.3;

3.3.7.2 Terminate the Agreement for convenience in accordance with Paragraph 12.4.

3.3.8 PRE-GMP WORK. Prior to the Owner's acceptance of the GMP Proposal, the Construction Manager shall not incur any cost to be reimbursed as part of the Lump Sum GMP, except as provided in this Agreement or as the Owner may specifically authorize in writing.

### 3.4 CONSTRUCTION SERVICES AND ADMINISTRATION

3.4.1 In order to facilitate its responsibilities for completion of the Work in accordance with and as reasonably inferable from the Contract Documents, prior to commencing the Work the Construction Manager shall examine and compare the drawings and specifications with information furnished by the Owner pursuant to Paragraph 4.3, relevant field measurements made by the Construction Manager and any visible conditions at the Worksite affecting the Work.

3.4.2 If, in the course of the performance of the obligations in Subparagraph 3.4.1, the Construction Manager discovers any errors, omissions or inconsistencies in the Contract Documents, the Construction Manager shall promptly report them to the Owner. It is recognized, however, that the Construction Manager is not acting in the capacity of a licensed design professional, and that the Construction Manager's examination is to facilitate construction and does not create an affirmative responsibility to detect errors, omissions or inconsistencies or to ascertain compliance with applicable laws, building codes or regulations. Following receipt of written notice from the Construction Manager of defects, the Owner shall promptly inform the Construction Manager what action, if any, the Construction Manager shall take with regard to the defects.

3.4.3 The Construction Manager shall have no liability for errors, omissions or inconsistencies discovered under Subparagraphs 3.4.1 and 3.4.2, unless the Construction Manager fails to report a readily apparent and obvious problem which the Construction Manager had recognized to the Owner.

3.4.4 The Construction Manager may be entitled to additional costs or time because of clarifications or instructions growing out of the Construction Manager's reports described in the three (3) preceding subparagraphs.

3.4.5 **COST REPORTING.** The Construction Manager shall keep such full and detailed accounts as are necessary for proper financial management under this Agreement. Construction Manager shall maintain a complete set of all books and records prepared or used by the Construction Manager with respect to the Project. The Construction Manager's records supporting its performance and billings under this Agreement shall be current, complete and accurate and maintained according to Generally Accepted Accounting Principles. The Owner shall be afforded access to all the Construction Manager's records, books, correspondence, instructions, drawings, receipts, vouchers, memoranda and similar data relating to this Agreement and provide access to KDHE for audit. The Construction Manager shall preserve all such records for a period of two years after the final payment or longer where required by law.

3.4.5.1 The Construction Manager agrees to use reasonable skill and judgment in the preparation of cost estimates, Schedule of the Work, Schedule of Values, but does not warrant or guarantee them other than to complete Project within GMP as amended by Change Orders.

#### 3.4.6 CONSTRUCTION PERSONNEL AND SUPERVISION

3.4.6.1 The Construction Manager shall provide competent supervision for the performance of the Work. Before commencing the Work, Construction Manager shall notify Owner in writing of the name and qualifications of its proposed superintendent(s) and project manager, so Owner may review the individual's qualifications. If, for reasonable cause, the Owner refuses to approve the individual, or withdraws its approval after once giving it, Construction Manager shall name a different superintendent for Owner's review. Any disapproved superintendent shall not perform in that capacity thereafter at the Worksite.

3.4.6.2 The Construction Manager shall be responsible to the Owner for acts or omissions of Parties or entities performing portions of the Work for or on behalf of the Construction Manager or any of its Subcontractors.

3.4.6.3 The Construction Manager shall permit only fit and skilled persons to perform the Work. The Construction Manager shall enforce safety procedures, strict discipline and good order among persons performing the Work. If the Owner determines that a particular person does not follow safety procedures, or is unfit or unskilled for the assigned work, the Construction Manager shall immediately reassign the person on receipt of the Owner's written notice to do so.

#### 3.4.7 SUBMITTALS

3.4.7.1 The Construction Manager shall submit to the Owner and, if directed, to its Engineer for review and the Owner's approval all shop drawings, samples, product data and similar submittals required by the Contract Documents. Submittals may be submitted in electronic form if required in accordance with Subparagraph 4.6.1. The Construction Manager shall be responsible to the Owner for the accuracy and conformity of its submittals to the Contract Documents. The Construction Manager shall prepare and deliver its submittals to the Owner in such time and sequence so as not to delay the performance of the Work or the work of the Owner and Others. When the Construction Manager delivers its submittals to the Owner, the Construction Manager shall identify in writing for each submittal all changes, deviations or substitutions from the requirements of the Contract Documents. The review and approval of any Construction Manager submittal shall not be deemed to authorize changes, deviations or substitutions from the requirements of the Contract Documents unless express written approval is obtained from the Owner specifically authorizing such deviation, substitution or change. To the extent a change, deviation or substitution causes an impact to the Contract Price or Contract Time, such approval shall be promptly memorialized in a Change Order. Further, the Owner shall not make any change, deviation or substitution through the submittal process without specifically identifying and authorizing such deviation to the Construction Manager. In the event that the Contract Documents do not contain submittal requirements pertaining to the Work, the Construction Manager agrees upon request to submit in a timely fashion to the Owner for review and approval any shop drawings, samples, product data, manufacturers' literature or similar submittals as may reasonably be required by the Owner.

3.4.7.2 The Owner shall be responsible for review and approval of submittals with reasonable promptness to avoid causing delay.

3.4.7.3 The Construction Manager shall perform all Work strictly in accordance with approved submittals. Approval does not relieve the Construction Manager from responsibility for Defective Work resulting from errors or omissions of any kind on the approved shop drawings.

3.4.7.4 Record copies of the following, incorporating field changes and selections made during construction shall be maintained at the Worksite and available to the Owner upon request: drawings, specifications, addenda and other modifications, and required submittals including product data, samples and shop drawings.

3.4.7.5 No substitutions shall be made in the Work unless permitted in the Contract Documents and then only after the Construction Manager obtains all approvals required under the Contract Documents for substitutions. All such substitutions shall be memorialized promptly in a Change Order no later than seven (7) Days following approval by the Owner and, if applicable, provide for an adjustment in the Contract Price or Contract Time.

3.4.8 The Construction Manager shall prepare and submit to the Owner (Designate only one)

\_\_\_1\_ final marked-up as-built drawings

in general documenting how the various elements of the Work were actually constructed or installed.

#### 3.4.9 COOPERATION WITH WORK OF OWNER AND OTHERS

3.4.9.1 The Owner may perform work at the Worksite directly or by Others. Any agreements with Others to perform construction or operations related to the Project shall include provisions pertaining to insurance, indemnification, waiver of subrogation, coordination, interference, clean up and safety which are substantively the same as the corresponding provisions of this Agreement.

3.4.9.2 In the event that the Owner elects to perform work at the Worksite directly or by Others, the Construction Manager and Owner shall coordinate the activities of all forces at the Worksite and agree upon fair and reasonable schedules and operational procedures for Worksite activities. The Owner shall require each separate contractor to cooperate with the Construction Manager and assist with the coordination of activities and the review of construction schedules and operations. The GMP or the Date of Substantial Completion or the Date of Final Completion shall be equitably adjusted, as mutually agreed by the Parties, for changes made necessary by the coordination of construction activities, and the Schedule of the Work shall be revised accordingly. The Construction Manager, Owner and Others shall adhere to the revised Schedule of the Work until it may subsequently be revised.

3.4.9.3 With regard to the work of the Owner and Others, the Construction Manager shall (a) proceed with the Work in a manner which does not hinder, delay or interfere with the work of the Owner or Others or cause the work of the Owner or Others to become defective, (b) afford the Owner or Others reasonable access for introduction and storage of their materials and equipment and performance of their activities, and (c) coordinate the Construction Manager's construction and operations with theirs as required by this Subparagraph 3.4.9.

3.4.9.4 Before proceeding with any portion of the Work affected by the construction or operations of the Owner or Others, the Construction Manager shall give the Owner and Engineer prompt, written notification of any defects the Construction Manager discovers in their work which will prevent the proper execution of the Work. The Construction Manager's obligations in this Subparagraph 3.4.9 do not create a responsibility for the work of Others, but are for the purpose of facilitating the Work. If the Construction Manager does not notify the Owner of patent defects interfering with the performance of the Work, the Construction Manager acknowledges that the work of the Owner or Others is not defective and is acceptable for the proper execution of the Work. Following receipt of written notice from the Construction

Manager of defects, the Owner shall promptly inform the Construction Manager what action, if any, the Construction Manager shall take with regard to the defects.

#### 3.4.10 CUTTING, FITTING AND PATCHING.

3.4.10.1 The Construction Manager shall perform cutting, fitting and patching necessary to coordinate the various parts of the Work and to prepare its Work for the work of the Owner or Others.

3.4.10.2 Cutting, patching or altering the work of the Owner or Others shall be done with the prior written approval of the Owner. Such approval shall not be unreasonably withheld.

#### 3.4.11 CLEANING UP.

3.4.11.1 The Construction Manager shall regularly remove debris and waste materials at the Worksite resulting from the Work. Prior to discontinuing Work in an area, the Construction Manager shall clean the area and remove all rubbish and its construction equipment, tools, machinery, waste and surplus materials. The Construction Manager shall minimize and confine dust and debris resulting from construction activities. At the completion of the Work and prior to final payment, the Construction Manager shall remove from the Worksite all construction equipment, tools, surplus materials, waste materials and debris.

3.4.11.2 If the Construction Manager fails to commence compliance with cleanup duties within two (2) business Days after written notification from the Owner of non-compliance, the Owner may implement appropriate cleanup measures without further notice and the cost shall be deducted from any amounts due or to become due the Construction Manager in the next payment period.

3.4.11.3 ACCESS TO WORK. The Construction Manager shall facilitate the access of the Owner, its Engineer and Others to Work in progress.

#### 3.4.12 MATERIALS FURNISHED BY THE OWNER OR OTHERS.

3.4.12.1 In the event the Work includes installation of materials or equipment furnished by the Owner or Others, it shall be the responsibility of the Construction Manager to examine the items so provided and thereupon handle, store and install the items, unless otherwise provided in the Contract Documents, with such skill and care as to provide a satisfactory and proper installation. Loss or damage due to acts or omissions of the Construction Manager shall be the responsibility of the Construction Manager and may be deducted from any amounts due or to become due the Construction Manager. Any defects discovered in such materials or equipment shall be reported at once to the Owner. Following receipt of written notice from the Construction Manager of defects, the Owner shall promptly inform the Construction Manager what action, if any, the Construction Manager shall take with regard to the defects.

#### 3.4.13 TESTS AND INSPECTIONS.

3.4.13.1 The Construction Manager shall schedule all required tests, approvals and inspections of the Work or portions thereof at appropriate times so as not to delay the progress of the Work or other work related to the Project. The Construction Manager shall give proper notice to all required Parties of such tests, approvals and inspections. If feasible, the Owner and Others may timely observe the tests at the normal place of testing. Except as provided in Clause 3.4.13.3, the Owner shall bear all expenses associated with tests, inspections and approvals required by the Contract Documents which, unless otherwise agreed to, shall be conducted by an independent testing laboratory or entity retained by the Owner. Unless otherwise required by the Contract Documents, required certificates of testing, approval or inspection shall be secured by the Construction Manager and promptly delivered to the Owner.

3.4.13.2 If the Owner or appropriate authorities determine that tests, inspections or approvals in addition to those required by the Contract Documents will be necessary, the Construction Manager shall arrange for the procedures and give timely notice to the Owner and Others who may observe the procedures. Costs of the additional tests, inspections or approvals are at the Owner's expense except as provided in Clause 3.4.13.3.

3.4.13.3 If the procedures described in Clauses 3.4.13.1 and 3.4.13.2 indicate that portions of the Work fail to comply with the Contract Documents due to the negligence of the Construction Manager, the Construction Manager shall be responsible for costs of testing pursuant to Clause 3.4.13.2, correction and retesting.

### 3.5 WORKMANSHIP.

3.5.1 The Work shall be executed in accordance with the Contract Documents in a workmanlike manner. All materials used in the Work shall be furnished in sufficient quantities to facilitate the proper and expeditious execution of the Work and shall be new except such materials as may be expressly provided in the Contract Documents to be otherwise.

### 3.6 WARRANTY.

3.6.1 The Construction Manager warrants that all materials and equipment furnished under the Construction Phase of this Agreement will be new unless otherwise specified, of good quality, in conformance with the Contract Documents, and free from defective workmanship and materials. At the Owner's request, the Construction Manager shall furnish satisfactory evidence of the quality and type of materials and equipment furnished. The Construction Manager further warrants that the Work shall be free from material defects not intrinsic in the design or materials required in the Contract Documents. The Construction Manager's warranty does not include remedies for defects or damages caused by normal wear and tear during normal usage, use for a purpose for which the Project was not intended, improper or insufficient maintenance, modifications performed by the Owner or Others, or abuse. The Construction Manager's warranty pursuant to this Paragraph 3.6 shall commence on the Date of Substantial Completion, except for Equipment for which warranty commencement date shall be in accordance with the manufacturer's warranty.

3.6.2 With respect to any portion of Work first performed after Substantial Completion, the Construction Manager's warranty obligation shall be extended by the period of time between Substantial Completion and the actual performance of the later Work.

3.6.3 The Construction Manager shall obtain from its Subcontractors and Material Suppliers any special or extended warranties required by the Contract Documents. All such warranties shall then be listed in an attached Addendum to this Agreement. Construction Manager's liability for such warranties shall be limited to the one-year correction period referred to in Paragraph 3.7. After that period Construction Manager shall assign them to the Owner and provide reasonable assistance to the Owner in enforcing the obligations of Subcontractors or Material Suppliers.

3.6.4 Any warranties for Equipment purchased by Construction Manager for installation as part of the Work shall be in conformance to the warranty provided by the Equipment manufacturer and seller, and any warranty by Construction Manager under this Agreement for Equipment is limited to the terms and conditions of the Equipment manufacturer/seller's warranty under this Paragraphs 3.6 and 3.7.

### 3.7 CORRECTION OF WORK WITHIN ONE YEAR.

3.7.1 If prior to Substantial Completion and within one (1) year after the date of Substantial Completion of the Work any Defective Work is found, the Owner shall promptly notify the Construction Manager in writing. Unless the Owner provides written acceptance of the condition, the Construction Manager shall promptly correct the Defective Work. If within the one (1) year correction period the Owner discovers and does not promptly notify the Construction Manager or give the Construction Manager an opportunity to test or correct Defective Work as reasonably requested by the Construction Manager, the Owner waives the Construction Manager's obligation to correct that Defective Work as well as the Owner's right to claim a breach of the warranty with respect to that Defective Work, but will not waive any claims of negligence that may exist.

3.7.2 With respect to any portion of Work first performed after Substantial Completion, the one (1) year correction period shall be extended by the period of time between Substantial Completion and the actual performance of the later Work. Correction periods shall not be extended by corrective work performed by the Construction Manager.

3.7.3 If the Construction Manager fails to correct Defective Work within a reasonable time after receipt of written notice from the Owner prior to final payment, the Owner may correct it in accordance with the Owner's right to carry out the Work in Paragraph 12.2. In such case, an appropriate Change Order shall be issued deducting the cost of correcting such deficiencies from payments then or thereafter due the Construction Manager. If payments then or there after due Construction Manager are not sufficient to cover such amounts, the Construction Manager shall pay the difference to the Owner.

3.7.4 If after the one (1) year correction period, but before the applicable limitation period, the Owner discovers any Defective Work, the Owner shall, unless the Defective Work requires emergency correction, promptly notify the Construction Manager. If the Construction Manager elects to correct the Work it shall provide written notice of such intent within fourteen (14) Days of its receipt of notice from the Owner. The Construction Manager shall complete the correction of Work within a mutually agreed time frame. If the Construction Manager does not elect to correct the Work, the Owner may have the Work corrected by itself or Others and charge the Construction Manager for the reasonable cost of the correction. Owner shall provide Construction Manager with an accounting of correction costs it incurs. Notification by Owner to Construction Manager under this section shall not extend or expand Construction Manager's obligations to correct Defective Work.

3.7.5 If the Construction Manager's correction or removal of Defective Work causes damage to or destroys other completed or partially completed work or existing building, the Construction Manager shall be responsible for the cost of correcting the destroyed or damaged property.

3.7.6 The one (1) year period for correction of Defective Work does not constitute a limitation period for any third-party claims, including but not limited to the Construction Manager's negligence and the enforcement of the Construction Manager's other obligations under the Contract Documents.

3.7.7 Prior to final payment, at the Owner's option and with the Construction Manager's agreement, the Owner may elect to accept Defective Work rather than require its removal and correction. In such cases the GMP shall be equitably adjusted for any diminution in the value of the Project caused by such Defective Work.

### 3.8 CORRECTION OF COVERED WORK.

3.8.1 On request of the Owner, Work that has been covered without a requirement that it be inspected prior to being covered may be uncovered for the Owner's inspection. The Owner shall pay for the costs of uncovering and replacement if the Work proves to be in conformance with the Contract Documents, or if the defective condition was caused by the Owner or Others. If the uncovered Work proves to be defective or if no reasonable opportunity for inspection was provided to Owner, the Construction Manager shall pay the costs of uncovering and replacement.

3.8.2 If contrary to specific requirements in the Contract Documents or contrary to a specific request from the Owner, a portion of the Work is covered, the Owner, by written request, may require the Construction Manager to uncover the Work for the Owner's observation. In this circumstance the Work shall be replaced at the Construction Manager's expense and with no adjustment to the Dates of Substantial or Final Completion.

3.8.3 The Construction Manager is required to correct in a timely fashion any Work rejected by the Owner which fails to comply with the Contract Documents prior to the commencement of the warranty period(s) or during the correction period(s) established under Paragraph 3.7. The Construction Manager shall correct at its own cost and time and bear the expense of additional services required for correction of any Defective Work for which it is responsible.

### 3.9 SAFETY OF PERSONS AND PROPERTY.

3.9.1 SAFETY PRECAUTIONS AND PROGRAMS. The Construction Manager shall have overall responsibility for safety precautions and programs in the performance of the Work. While this Paragraph 3.9 establishes the responsibility for safety between the Owner and Construction Manager, it does not relieve Subcontractors of their responsibility for the safety of persons or property in the performance of their work, nor for compliance with the provisions of applicable laws and regulations.

3.9.2 The Construction Manager shall seek to avoid injury, loss or damage to persons or property by taking reasonable steps to protect:

3.9.2.1 its employees and other persons at the Worksite;

3.9.2.2 materials and equipment stored at on-site or off-site locations for use in the Work; and

3.9.2.3 property located at the Worksite and adjacent to Work areas, whether or not the property is part of the Work.

3.9.3 CONSTRUCTION MANAGER'S SAFETY REPRESENTATIVE. The Construction Manager's Worksite Safety Representative is the Project Superintendent, Ed Bender, who shall act as the Construction Manager's authorized safety representative with a duty to prevent accidents in accordance with Subparagraph 3.9.2. The Construction Manager shall report immediately in writing all accidents and injuries occurring at the Worksite. When the Construction Manager is required to file an accident report with a public authority, the Construction Manager shall furnish a copy of the report to the Owner.

3.9.4 The Construction Manager shall provide the Owner with copies of all notices required of the Construction Manager by law or regulation. The Construction Manager's safety program shall comply with the requirements of governmental and quasi-governmental authorities having jurisdiction.

3.9.5 Damage or loss not insured under property insurance which may arise from the Work, to the extent caused by negligent acts or omissions of the Construction Manager, or anyone for whose acts the Construction Manager may be liable, shall be promptly remedied by the Construction Manager. With regard to damage or loss attributable to the acts or omissions of the Owner or Others and not to the Construction Manager, the Owner may either (a) promptly remedy the damage or loss; or (b) accept the damage or loss.

3.9.6 If the Owner deems any part of the Work or Worksite unsafe, the Owner, without assuming responsibility for the Construction Manager's safety program, may require the Construction Manager to stop performance of the Work or take corrective measures satisfactory to the Owner, or both. If the Construction Manager does not adopt corrective measures, the Owner may perform them and deduct their cost from the GMP. The Construction Manager agrees to make no claim for damages, or an increase in the GMP, or for a change in the Dates of Substantial or Final Completion based on the Construction Manager's compliance with the Owner's reasonable request.

3.10 EMERGENCIES. In an emergency, the Construction Manager shall act in a reasonable manner to prevent personal injury or property damage. If appropriate, an equitable adjustment in GMP or Date of Substantial Completion or Date of Final Completion shall be determined in a Change Order.

3.11 HAZARDOUS MATERIALS.

3.11.1 A Hazardous Material is any substance or material identified now or in the future as hazardous under any federal, state or local law or regulation, or any other substance or material that may be considered hazardous or otherwise subject to statutory or regulatory requirement governing handling, disposal or clean-up. The Construction Manager shall not be obligated to commence or continue work until any Hazardous Material discovered at the Worksite has been removed, rendered or determined to be harmless by the Owner as certified by an independent testing laboratory and approved by the appropriate government agency.

3.11.2 If after the commencement of the Work, Hazardous Material is discovered at the Worksite, the Construction Manager shall be entitled to immediately stop Work in the affected area. The Construction Manager shall report the condition to the Owner, the Engineer, and, if required, the government agency with jurisdiction.

3.11.3 The Construction Manager shall not be required to perform any Work relating to or in the area of Hazardous Material without written mutual agreement.

3.11.4 The Owner shall be responsible for retaining an independent testing laboratory to determine the nature of the material encountered and whether the material requires corrective measures or remedial action. Such measures shall be the sole responsibility of the Owner, and shall be performed in a manner minimizing any adverse effects upon the Work. The Construction Manager shall resume Work in the area affected by any Hazardous Material only upon written agreement between the Parties after the Hazardous Material has been removed or rendered harmless and only after approval, if necessary, of the governmental agency with jurisdiction.

3.11.5 If the Construction Manager incurs additional costs or is delayed due to the presence or remediation of Hazardous Material, the Construction Manager shall be entitled to an equitable adjustment in the GMP or the Dates of Substantial or Final Completion. Construction Manager shall not be responsible for testing or remediating the Worksite as a result of any pre-existing condition at the Worksite due to the presence of Hazardous Materials

### 3.12 MATERIALS BROUGHT TO THE WORKSITE.

3.12.1 Material Safety Data (MSD) sheets as required by law and pertaining to materials or substances used or consumed in the performance of the Work, whether obtained by the Construction Manager, Subcontractors, the Owner or Others, shall be maintained at the Worksite by the Construction Manager and made available to the Owner, Subcontractors and Others.

3.12.2 The Construction Manager shall be responsible for the proper delivery, handling, application, storage, removal and disposal of all materials and substances brought to the Worksite by the Construction Manager in accordance with the Contract Documents and used or consumed in the performance of the Work. Unless it is found that Construction Manager has not properly handled the Hazardous Material which it was required to bring to the Worksite by the Contract documents and used in its performance of the Work, Construction Manager is not responsible for handling the clean-up of any such Hazardous Material.

3.13 CONCEALED OR UNKNOWN WORKSITE CONDITIONS. If the conditions at the Worksite are (a) subsurface or other physical conditions which are materially different from those indicated in the Contract Documents, or (b) unusual or unknown physical conditions which are materially different from conditions ordinarily encountered and generally recognized as inherent in Work provided for in the Contract Documents, the Construction Manager shall give immediate written notice of the condition to the Owner and the Engineer, and, if necessary, stop Work. Any change in the GMP, Construction Manager's Fee, Date of Substantial Completion or Date of Final Completion and, if appropriate, the Compensation for Preconstruction Services as a result of the unknown condition shall be determined as provided in Article 9. The Construction Manager shall provide the Owner with written notice of any claim as a result of unknown conditions within the time period set forth in Paragraph 9.4.

### 3.14 3.14 PERMITS AND TAXES.

3.14.1 Construction Manager shall give public authorities all notices required by law and, except for permits and fees which are the responsibility of the Owner pursuant to Paragraph 4.4, shall obtain and pay for all necessary permits, licenses and renewals pertaining to the Work. Construction Manager shall provide to Owner copies of all notices, permits, licenses and renewals required under this Agreement.

3.14.2 Construction Manager shall pay all applicable taxes legally enacted when bids are received or negotiations concluded for the Work provided by the Construction Manager.

3.14.3 The GMP is based on the project being Tax exempt for materials purchased in the fulfillment of the Contract. The Owner will provide the Construction Manager a Tax Exemption certificate for the Duration of the Project. The GMP shall be adjusted for additional costs resulting from laws, ordinances, rules and regulations enacted after the date of this Agreement, including increased taxes.

3.14.4 If, in accordance with the Owner's direction, the Construction Manager claims an exemption for taxes, the Owner shall indemnify and hold the Construction Manager harmless from any liability, penalty, interest, fine, tax assessment, attorneys fees or other expense or cost incurred by the Construction Manager as a result of any such action. Owner represents and directs Construction Manager to claim exemption for taxes for the Project.

3.15 CONFIDENTIALITY. The Construction Manager shall treat as confidential and not disclose to third persons, except Subcontractors, Sub-subcontractors and as is necessary for the performance of the Work, or use for its own benefit, any of the Owner's confidential information, know-how, discoveries, production methods and the like that may be disclosed to the Construction Manager or which the Construction Manager may acquire in connection with the Work. The Owner shall treat as confidential information all of the Construction Manager's financial reporting, safety systems and programs, and know-how, discoveries, production methods and the like that may be disclosed to the Owner in connection with the performance of this Agreement. The Owner and the Construction Manager shall each specify those items to be treated as confidential and shall mark them as "Confidential".

## ARTICLE 4.

### OWNER'S RESPONSIBILITIES

4.1 INFORMATION AND SERVICES. Any information or services to be provided by the Owner shall be provided in a timely manner so as not to delay the Work.

4.2 FINANCIAL INFORMATION. Prior to commencement of the Work and thereafter at the written request of the Construction Manager, the Owner shall provide the Construction Manager with evidence of Project financing. Evidence of such financing shall be a condition precedent to the Construction Manager's commencing or continuing the Work. The Construction Manager shall be notified prior to any material change in Project financing.

4.3 WORKSITE INFORMATION. Except to the extent that the Construction Manager knows of any inaccuracy, the Construction Manager is entitled to rely on Worksite information furnished by the Owner pursuant to this Paragraph 4.3. To the extent the Owner has obtained, or is required elsewhere in the Contract Documents to obtain, the following Worksite information, the Owner shall provide at the Owner's expense and with reasonable promptness:

4.3.1 information describing the physical characteristics of the Worksite, including surveys, Worksite evaluations, legal descriptions, data or drawings depicting existing conditions, subsurface conditions and environmental studies, reports and investigations;

4.3.2 tests, inspections and other reports dealing with environmental matters, Hazardous Material and other existing conditions, including structural, mechanical and chemical tests, required by the Contract Documents or by law; and

4.3.3 any other information or services requested in writing by the Construction Manager which are relevant to the Construction Manager's performance of the Work and under the Owner's control.

The information required by this Paragraph 4.3 shall be provided in reasonable detail. Legal descriptions shall include easements, title restrictions, boundaries, and zoning restrictions. Worksite descriptions shall include existing buildings and other construction and all other pertinent site conditions. Adjacent property descriptions shall include structures, streets, sidewalks, alleys, and other features relevant to the Work. Utility details shall include available services, lines at the Worksite and adjacent thereto and connection points. The information shall include public and private information, subsurface information, grades, contours, and elevations, drainage data, exact locations and dimensions, and benchmarks that can be used by the Construction Manager in laying out the Work.

4.4 BUILDING PERMIT, FEES AND APPROVALS. The Owner shall secure and pay for all permits, approvals, easements, assessments and fees required for the development, construction, use or occupancy of permanent structures or for permanent changes in existing facilities, including the building permit.

4.5 MECHANICS AND CONSTRUCTION LIEN INFORMATION. Within seven (7) Days after receiving the Construction Manager's written request, the Owner shall provide the Construction Manager with the information necessary to give notice of or enforce mechanics lien rights and, where applicable, stop notices. This information shall include the Owner's interest in the real property on which the Project is located and the record legal title.

4.6 CONTRACT DOCUMENTS. Unless otherwise specified, Owner shall provide a reasonable number of hard copies of the Contract Documents to the Construction Manager without cost.

4.6.1 ELECTRONIC DOCUMENTS. If the Owner requires that the Owner, Engineer and Construction Manager exchange documents and data in electronic or digital form, prior to any such exchange, the Owner, Engineer and Construction Manager shall agree on a written protocol governing all exchanges in a separate Agreement, which, at a minimum, shall specify: (1) the definition of documents and data to be accepted in electronic or digital form or to be transmitted electronically or digitally; (2) management and coordination responsibilities; (3) necessary equipment, software and services; (4) acceptable formats, transmission methods and verification procedures; (5) methods for maintaining version control; (6) privacy and security requirements; and (7) storage and retrieval requirements. Except as otherwise agreed to by the Parties in writing, the Parties

shall bear their own costs as identified in the protocol. In the absence of a written protocol, use of documents and data in electronic or digital form shall be at the sole risk of the recipient.

4.7 **OWNER'S REPRESENTATIVE.** The Owner's authorized representative is Joe Finley. The representative shall be fully acquainted with the Project, and shall have authority to bind the Owner in all matters requiring the Owner's approval, authorization or written notice. If the Owner changes its representative or the representative's authority as listed above, the Owner shall immediately notify the Construction Manager in writing.

4.8 **OWNER'S CUTTING AND PATCHING.** Cutting, patching, or altering the Work by the Owner or Others shall be done with the prior written approval of the Construction Manager, which approval shall not be unreasonably withheld.

4.9 **OWNER'S RIGHT TO CLEAN UP.** In case of a dispute between the Construction Manager and Others with regard to respective responsibilities for cleaning up at the Worksite, the Owner may implement appropriate cleanup measures after two (2) business Days notice and allocate the cost among those responsible during the following pay period.

4.10 **COST OF CORRECTING DAMAGED OR DESTROYED WORK.** With regard to damage or loss attributable to the acts or omissions of the Owner or Others and not to the Construction Manager, the Owner may either (a) promptly remedy the damage or loss or (b) accept the damage or loss. If the Construction Manager incurs additional costs or is delayed due to such loss or damage, the Construction Manager shall be entitled to an equitable adjustment in the GMP, estimated Cost of the Work, Construction Manager's Fee, Date of Substantial Completion or Date of Final Completion and, if appropriate, the Compensation for Preconstruction Services.

## **ARTICLE 5.**

### **SUBCONTRACTS**

5.1 **SUBCONTRACTORS.** The Work not performed by the Construction Manager with its own forces shall be performed by Subcontractors. All subcontracts shall be issued on a lump sum basis unless the Owner has given prior written approval of a different method of payment to the Subcontractor.

5.2 **AWARD OF SUBCONTRACTS AND OTHER CONTRACTS FOR PORTIONS OF THE WORK.**

5.2.1 As soon after the execution of this Agreement as possible the Construction Manager shall provide the Owner, and if directed, the Engineer with a written list of the proposed subcontractors and significant material suppliers. If the Owner has a reasonable objection to any proposed subcontractor or material supplier, the Owner shall notify the Construction Manager in writing. Failure to promptly object shall constitute acceptance.

5.2.2 If the Owner has reasonably and promptly objected as provided in Subparagraph 5.2.1, the Construction Manager shall not contract with the proposed subcontractor or material supplier, and the Construction Manager shall propose another acceptable to the Owner. An appropriate Change Order shall reflect any increase or decrease in the GMP or Dates of Substantial or Final Completion because of the substitution.

5.3 **BINDING OF SUBCONTRACTORS AND MATERIAL SUPPLIERS.** The Construction Manager agrees to bind every Subcontractor and Material Supplier (and require every Subcontractor to so bind its subcontractors and Material Suppliers) to all the provisions of this Agreement and the Contract Documents as they apply to the Subcontractor's and Material Supplier's portions of the Work.

5.4 **LABOR RELATIONS.** (Insert here any conditions, obligations or requirements relative to labor relations and their effect on the Project. Legal counsel is recommended):

5.5 **CONTINGENT ASSIGNMENT OF SUBCONTRACTS.**

5.5.1 If this Agreement is terminated, each subcontract agreement shall be assigned by the Construction Manager to the Owner, subject to the prior rights of any surety, provided that:

5.5.1.1 this Agreement is terminated by the Owner pursuant to Paragraphs 12.3 or 12.4; and

5.5.1.2 the Owner accepts such assignment after termination by notifying the Subcontractor and Construction Manager in writing, and assumes all rights and obligations of the Construction Manager pursuant to each subcontract agreement.

5.5.2 If the Owner accepts such an assignment, and the Work has been suspended for more than thirty (30) consecutive Days, following termination, the Subcontractor's compensation shall be equitably adjusted as a result of the suspension.

## **ARTICLE 6.**

### **TIME**

#### **6.1 PERFORMANCE OF THE WORK.**

6.1.1 **DATE OF COMMENCEMENT.** The Date of Commencement is the date of this Agreement as first written in Article 1 unless otherwise set forth below:

Notice to Proceed \_\_\_\_\_

Substantial Completion \_\_\_\_\_

Final Acceptance \_\_\_\_\_

The Work shall proceed in general accordance with the Schedule of Work as such schedule may be amended from time to time, subject to other provisions of this Agreement.

6.1.2 **SUBSTANTIAL/FINAL COMPLETION.** Unless the Parties agree or otherwise, the Date of Substantial Completion or the Date of Final Completion shall be established in Amendment No. 1 to this Agreement subject to adjustments as provided for in the Contract Documents. The Owner and the Construction Manager may agree not to establish such dates, or in the alternative, to establish one but not the other of the two dates. If such dates are not established upon the execution of this Agreement, at such time as GMP is accepted a Date of Substantial Completion or Date of Final Completion of the Work shall be established in Amendment No.1. If a GMP is not established and the Parties desire to establish a Date of Substantial Completion or Date of Final Completion, it shall be set forth in Amendment No.1.

6.1.3 Time limits stated above are of the essence of this Agreement.

6.1.4 The Construction Manager shall not knowingly commence the Work before the effective date of insurance to be provided by the Construction Manager and Owner as required by the Contract Documents.

#### **6.2 SCHEDULE OF THE WORK.**

6.2.1 Before submitting the first application for payment, the Construction Manager shall submit to the Owner and, if directed, the Engineer a Schedule of the Work that shall show the dates on which the Construction Manager plans to commence and complete various parts of the Work, including dates on which information and approvals are required from the Owner. On the Owner's written approval of the Schedule of the Work, the Construction Manager shall comply with it unless directed by the Owner to do otherwise or the Construction Manager is otherwise entitled to an adjustment in the Contract Time. The Construction Manager shall update the schedule on a monthly basis or at appropriate intervals as required by the conditions of the Work and the Project.

6.2.2 The Owner may determine the sequence in which the Work shall be performed, provided it does not unreasonably interfere with the approved project schedule. The Owner may require the Construction Manager to make reasonable changes in the sequence at any time during the performance of the Work in order to facilitate the performance of work by the Owner or Others. To the extent such changes increase Construction Manager's time and costs the GMP and Dates of Substantial or Final Completion shall be equitably adjusted.

6.3.1 If the Construction Manager is delayed at any time in the commencement or progress of the Work by any cause beyond the control of the Construction Manager, the Construction Manager shall be entitled to an equitable extension of the Date of Substantial Completion or Date of Final Completion. In addition, if the Construction Manager incurs additional costs as a result of such delay, the Construction Manager shall be entitled to an equitable adjustment in the GMP subject to Paragraph 11.2. Examples of causes beyond the control of the Construction Manager include, but are not limited to the following: acts or omissions of the Owner, the Engineer or Others; Engineer and/or Owner not providing timely or sufficiently detailed plans and specification for the orderly progress of the Work in accordance with the Schedule, changes in the Work or the sequencing of the Work ordered by the Owner, or arising from decisions of the Owner that impact the time of performance of the Work; labor disputes not involving the Construction Manager; fire; encountering Hazardous Materials; adverse weather conditions not reasonably anticipated; concealed or unknown conditions; delay authorized by the Owner pending dispute resolution and suspension by the Owner under Paragraph 12.1. The Construction Manager shall submit any requests for equitable extensions of Contract Time or equitable adjustment in Contract Price in accordance with the provisions of Article 9.

6.3.2 In addition, if the Construction Manager incurs additional costs as a result of a delay that is caused by acts or omissions of the Owner, the Engineer or Others, changes in the Work or the sequencing of the Work ordered by the Owner, or arising from decisions of the Owner that impact the time of performance of the Work, encountering Hazardous Materials, or concealed or unknown conditions, delay authorized by the Owner pending dispute resolution or suspension by the Owner under Paragraph 12.1, the Construction Manager shall be entitled to an equitable adjustment in the GMP subject to Paragraph 9.4.

6.3.3 NOTICE OF DELAYS. In the event delays to the Work are encountered for any reason, the Construction Manager shall provide prompt written notice to the Owner of the cause of such delays after Construction Manager first recognizes the delay, but in no instance longer than three (3) days after the delay is encountered.

6.4 NOTICE OF DELAY CLAIMS. If the Construction Manager requests an equitable extension of Contract Time or an equitable adjustment in Contract Price as a result of a delay described in Subparagraph 6.3.1, the Construction Manager shall give the Owner written notice of the claim in accordance with Paragraph 9.4. If the Construction Manager causes delay in the completion of the Work, the Owner shall be entitled to recover its additional costs subject to Paragraph 11.2. The Owner shall process any such claim against the Construction Manager in accordance with Article 9.

6.5.1 SUBSTANTIAL COMPLETION. The Owner and the Construction Manager agree that this Agreement shall provide for the imposition of liquidated damages based on the Date of Substantial Completion established in Subparagraph 6.1.1.

The Construction Manager understands that if the Date of Substantial Completion established by this Agreement, as may be amended by subsequent Change Order, is not attained, the Owner will suffer damages which are difficult to determine and accurately specify. The Construction Manager agrees that if the Date of Substantial Completion is not attained the Construction Manager shall pay the Owner Zero Dollars (\$0) as liquidated damages and not as a penalty for each Day that Substantial Completion extends beyond the Date of Substantial Completion. The liquidated damages provided herein shall be in lieu of all liability for any and all extras costs, losses, expenses, claims, penalties and any other damages of whatsoever nature incurred by the Owner which are occasioned by any delay in achieving the Date of Substantial Completion.

6.5.2 FINAL COMPLETION. The Owner and the Construction Manager agree that this Agreement shall provide for the imposition of liquidated damages based on the Date of Final Completion.

6.5.2.1 The Construction Manager understands that if the Date of Final Completion established by this Agreement, as may be amended by subsequent Change Order is not attained, the Owner will suffer damages which are difficult to determine and accurately specify. The Construction Manager agrees that if the Date of Final Completion is not attained the Construction Manager shall pay the Owner Zero Dollars (\$0) as liquidated damages and not as a penalty for each Day that Final Completion extends beyond the Date of Final Completion. The liquidated damages provided herein shall be in lieu of all

liability for any and all extras costs, losses, expenses, claims, penalties and any other damages of whatsoever nature incurred by the Owner which are occasioned by any delay in achieving the Date of Final Completion.

6.5.3 OTHER LIQUIDATED DAMAGES. The Owner and the Construction Manager may agree upon the imposition of liquidated damages based on other project milestones or performance requirements. Such agreement shall be included as an exhibit to this Agreement.

#### 6.6 LIMITED MUTUAL WAIVER OF CONSEQUENTIAL DAMAGES.

The parties have agreed to zero (\$0.00) as the amount of liquidated damages in Paragraph 6.5 and excluding losses covered by insurance required by the Contract Documents, the Owner and the Construction Manager also agree to waive all claims against each other for any consequential damages that may arise out of or relate to this Agreement. The Owner agrees to waive damages including but not limited to the Owner's loss of use of the Project, any rental expenses incurred, loss of income, profit or financing related to the Project, as well as the loss of business, loss of financing, principal office overhead and expenses, loss of profits not related to this Project, loss of reputation, or insolvency. The Construction Manager agrees to waive damages including but not limited to loss of business, loss of financing, principal office overhead and expenses, loss of profits not related to this Project, loss of bonding capacity, loss of reputation, or insolvency. The provision of this Paragraph shall also apply to the termination of this Agreement and shall survive such termination.

SUBSTANTIAL COMPLETION -Agreement shall be subject to liquidated damages. Owner will provide rubric for determining amounts.

FINAL COMPLETION- Agreement shall be subject to liquidated damages. Owner will provide rubric for determining amounts.

### **ARTICLE 7. COMPENSATION AND GUARANTEED MAXIMUM PRICE**

7.1 The Owner shall compensate the Construction Manager for Work performed on the following basis:

7.1.1 the amount set forth in Exhibit D including Schedule of Values and contingency as described in Section 3; and

7.1.2 the Construction Manager's Fee paid in proportion to the Work performed subject to adjustment as provided in Paragraph 7.4.

7.2 The compensation to be paid shall be limited to the GMP established in this Amendment No. 1, as the GMP may be adjusted under Article 9.

7.2.1 Payment for Work performed shall be as set forth in Article 10.

7.3 CONSTRUCTION MANAGER'S FEE. The Construction Manager's Fee is included in the Schedule of Values found in Exhibit D, subject to adjustment as provided in Paragraph 7.4.

7.4 ADJUSTMENT IN THE CONSTRUCTION MANAGER'S FEE. Adjustment in the Construction Manager's Fee shall be made as follows:

7.4.1 for changes in the Work as provided in Article 9, the Construction Manager's Fee shall be adjusted as provided in Paragraph 9.3.1.3:

7.4.2 for delays in the Work not caused by the Construction Manager, except as provided in Paragraph 6.3, there shall be an equitable adjustment in the Construction Manager's Fee to compensate the Construction Manager for increased expenses; and

7.4.3 if the Construction Manager is placed in charge of managing the replacement of an insured or uninsured loss, the Construction Manager shall be paid an additional fee in the same proportion that the Construction Manager's Fee bears to the estimated Cost of the Work for the replacement.

7.5 PRECONSTRUCTION SERVICES COMPENSATION. The Construction Manager shall be compensated for Preconstruction Services, as set forth in Paragraphs 3.2 and 3.3.

## **ARTICLE 8.**

### **COST OF CHANGE ORDERS**

8.1 If the Owner and Construction Manager cannot otherwise agree on the cost of a Change order, The Owner agrees to pay the Construction Manager for the Cost of Change Orders under Clause 9.3.1.3 below.

8.2 DETERMINATION OF COST ITEMS FOR CHANGE ORDERS. Exhibit "D" Schedule of Values. Exhibit "E" Process Equipment Budget.

8.2.1 Wages paid for labor in the direct employ of the Construction Manager in the performance of the Work.

8.2.2 Salaries of the Construction Manager's employees when stationed at the field office, in whatever capacity employed, employees engaged on the road expediting the production or transportation of material and equipment, and employees from the principal or branch office performing the functions listed below..

8.2.3 Cost of all employee benefits and taxes, including but not limited to, workers' compensation, unemployment compensation, Social Security, health, welfare, retirement and other fringe benefits as required by law, labor agreements, or paid under the Construction Manager's standard personnel policy, insofar as such costs are paid to employees of the Construction Manager who are included in the Cost of the Work under Subparagraphs 8.2.2 and 8.2.3.

8.2.4 Reasonable transportation, travel, hotel and moving expenses of the Construction Manager's personnel incurred in connection with the Work.

8.2.5 Cost of all materials, supplies and equipment incorporated in the Work, including costs of inspection and testing if not provided by the Owner, transportation, storage and handling.

8.2.6 Payments made by the Construction Manager to Subcontractors for work performed under this Agreement.

8.2.7 Cost, including transportation and maintenance of all materials, supplies, equipment, temporary facilities and hand tools not owned by the workers that are used or consumed in the performance of the Work, less salvage value or residual value; and cost less salvage value on such items used, but not consumed that remain the property of the Construction Manager.

8.2.8 Rental charges of all necessary machinery and equipment, exclusive of hand tools owned by workers, used at the Worksite, whether rented from the Construction Manager or Others, including installation, repair and replacement, dismantling, removal, maintenance, transportation and delivery costs. Rental from unrelated third parties shall be reimbursed at actual cost. Rentals from the Construction Manager or its affiliates, subsidiaries or related parties shall be reimbursed at the prevailing rates in the locality of the Worksite up to eighty-five percent (85%) of the value of the piece of equipment.

8.2.9 Cost of the premiums for all insurance and surety bonds that the Construction Manager is required to procure or deems necessary, and approved by the Owner including any additional premium incurred as a result of any increase in the GMP.

8.2.10 Use, gross receipts or other taxes, tariffs or duties related to the Work for which the Construction Manager is liable.

8.2.11 Losses, expenses or damages to the extent not compensated by insurance or otherwise, and the cost of corrective work during the Construction Phase and for a period of one year following the Date of Substantial Completion, provided that such losses, expenses, damages or corrective work did not arise from the negligence of the Construction Manager.

8.2.12 All costs associated with establishing, equipping, operating, maintaining and demobilizing the field office.

8.2.13 All costs associated with demobilizing and remobilizing the field office and the Construction Manager's workforce, including Subcontractor workforces, as a result of a suspension of the Work by the Owner.

8.2.14 Reproduction costs, photographs, facsimile transmissions, long-distance telephone calls, data processing costs and services, postage, express delivery charges, data transmission, telephone service and computer-related costs at the Worksite to the extent such items are used and consumed in the performance of the Work or are not capable of use after completion of the Work.

8.2.15 All water, power and fuel costs necessary for the Work.

8.2.16 Cost of removal of all nonhazardous substances, debris and waste materials.

8.2.17 Costs incurred due to an emergency affecting the safety of persons or property.

8.2.18 Legal, mediation and arbitration fees and costs, other than those arising from disputes between the Owner and the Construction Manager, reasonably and properly resulting from the Construction Manager's performance of the Work.

8.2.19 Additional costs resulting from laws, ordinances, rules, regulations and taxes enacted after the date of this Agreement.

8.2.20 All costs directly incurred in the performance of the Work or in connection with the Project, and not included in the Construction Manager's Fee as set forth in Article 7, which are reasonably inferable from the Contract Documents as necessary to produce the intended results.

8.3 DISCOUNTS. All discounts for prompt payment shall accrue to the Owner to the extent such payments are made directly by the Owner. To the extent payments are made with funds of the Construction Manager, all cash discounts shall accrue to the Construction Manager. All trade discounts, rebates and refunds, and all returns from sale of surplus materials and equipment, shall be credited to the Cost of the Work.

## **ARTICLE 9.**

### **CHANGES**

Changes in the Work that are within the general scope of this Agreement shall be accomplished, without invalidating this Agreement, by Change Order and Interim Directed Change.

#### **9.1 CHANGE ORDER.**

9.1.1 The Construction Manager may request or the Owner may order changes in the Work or the timing or sequencing of the Work that impacts the GMP or the estimated Cost of the Work, Construction

Manager's Fee, Date of Substantial Completion or Date of Final Completion and, if appropriate, the Compensation for Preconstruction Services. All such changes in the Work shall be formalized in a Change Order. Any such requests for changes in the Work shall be processed in accordance with this Article 9.

9.1.2 The Owner and the Construction Manager shall negotiate in good faith an equitable adjustment to the GMP or the Date of Substantial Completion or Date of Final Completion and shall conclude these negotiations as expeditiously as possible. Acceptance of the Change Order and any equitable adjustment in the GMP or Date of Substantial Completion or Date of Final Completion shall not be unreasonably withheld.

## 9.2 INTERIM DIRECTED CHANGES.

9.2.1 The Owner may issue a written Interim Directed Change directing a change in the Work prior to reaching agreement with the Construction Manager on the adjustment, if any, in the GMP or the Date of Substantial Completion or Date of Final Completion.

9.2.2 The Owner and the Construction Manager shall negotiate expeditiously and in good faith for appropriate adjustments, as applicable, to the GMP or the Date of Substantial Completion or Date of Final Completion arising out of Interim Directed Changes. As the changed Work is performed, the Construction Manager shall submit its costs for such Work with its application for payment beginning with the next application for payment within thirty (30) Days of the issuance of the Interim Directed Change. If there is a dispute as to the cost to the Owner, the Owner shall pay the Construction Manager fifty percent (50%) of its estimated cost to perform the work. In such event, the Parties reserve their rights as to the disputed amount, subject to the requirements of Article 12.

9.2.3 When the Owner and the Construction Manager agree upon the adjustments in the GMP or the Date of Substantial Completion or Date of Final Completion, for a change in the Work directed by an Interim Directed Change, such agreement shall be the subject of an appropriate Change Order. The Change Order shall include all outstanding Interim Directed Changes issued since the last Change Order.

## 9.3 DETERMINATION OF COST.

9.3.1 An increase or decrease in the GMP or the Date of Substantial Completion or Date of Final Completion resulting from a change in the Work shall be determined by one or more of the following methods:

9.3.1.1 unit prices set forth in this Agreement or as subsequently agreed;

9.3.1.2 a mutually accepted, itemized lump sum;

9.3.1.3 costs calculated on a basis agreed upon by the Owner and Construction Manager plus 10% Overhead and 5% Profit for self performed work; 7% Overhead and 3% Profit for subcontracted work.

9.3.2 If the Owner and the Construction Manager disagree as to whether work required by the Owner is within the scope of the Work, the Construction Manager shall furnish the Owner with an estimate of the costs to perform the disputed work in accordance with the Owner's interpretations.

9.3.3 If the Owner issues a written order for the Construction Manager to proceed, the Construction Manager shall perform the disputed work and the Owner shall pay the Construction Manager Fifty percent (50%) of its estimated cost to perform the work. In such event, both Parties reserve their rights as to whether the work was within the scope of the Work. The Owner's payment does not prejudice its right to be reimbursed should it be determined that the disputed work was within the scope of Work. The Construction Manager's receipt of payment for the disputed work does not prejudice its right to receive full payment for the disputed work should it be determined that the disputed work is not within the scope of the Work.

9.4 CLAIMS FOR ADDITIONAL COST OR TIME. Except as provided in Subparagraph 6.3.2 and Paragraph 6.4 for any claim for an increase in the GMP or the Date of Substantial Completion or Date of Final Completion, the Construction Manager shall give the Owner written notice of the claim within fourteen (14) Days after the occurrence giving rise to the claim. Any claim submitted after said Fourteen (14) Day period shall be deemed to have been waived by the Construction Manager. Except in an emergency, notice shall be given

before proceeding with the Work. Any change in the GMP or the Date of Substantial Completion or Date of Final Completion resulting from such claim shall be authorized by Change Order.

## **ARTICLE 10.**

### **PAYMENT**

10.1 SCHEDULE OF VALUES. The Construction Manager shall prepare and submit to the Owner and, if directed, the Engineer, a schedule of values apportioned to the various divisions or phases of the Work. Each line item including the Contingency contained in the schedule of values shall be assigned a value such that the total of all items shall equal the GMP.

10.2 PROGRESS PAYMENTS.

10.2.1 APPLICATIONS. The Construction Manager shall submit to the Owner, and, if directed, its Engineer a monthly application for payment no later than the Twentieth (20<sup>th</sup>) Day of the calendar month for the preceding thirty (30) Days; or Construction Manager's applications for payment shall be itemized and supported by the Construction Manager's schedule of values and any other substantiating data as required by this Agreement. Payment applications shall include payment requests on account of properly authorized Change Orders or Interim Directed Changes. The Owner shall pay the amount otherwise due on any payment application, no later than twenty (20) Days after the Construction Manager has submitted a complete and accurate payment application. The Owner may deduct from any progress payment amounts as may be retained pursuant to Subparagraph 10.2.4.

10.2.2 STORED MATERIALS AND EQUIPMENT. Unless otherwise provided in the contract documents, applications for payment may include materials and equipment not yet incorporated into the Work but delivered to and suitably stored on-site or off-site including applicable insurance, storage and costs incurred transporting the materials to an off-site including applicable insurance, storage and costs incurred transporting the materials to an off-site storage facility. Approval of payment applications for stored materials and equipment stored off-site shall be conditioned on submission by the Construction Manager of bills of sale and proof of required insurance, or such other procedures satisfactory to the Owner to establish the proper valuation of the stored materials and equipment, the Owner's title to such materials and equipment, and to otherwise protect the Owner's interests therein, including transportation to the Worksite.

10.2.3 LIEN WAIVERS AND LIENS.

10.2.3.1 PARTIAL LIEN WAIVERS AND AFFIDAVITS. As a prerequisite for payment, the Construction Manager shall provide partial lien and claim waivers in the amount of the application for payment. Such waivers shall be conditional upon payment. In no event shall the Construction Manager be required to sign an unconditional waiver of lien or claim, either partial or final, prior to receiving payment or in an amount in excess of what it has been paid.

10.2.3.2 RESPONSIBILITY FOR LIENS. If Owner has made payments in the time required by this Article 10, the Construction Manager shall, within thirty (30) Days after filing, cause the removal of any liens filed against the premises or public improvement fund by any party or parties performing labor or services or supplying materials in connection with the Work. If the Construction Manager fails to take such action on a lien to provide Owner with a plan of action satisfactory to Owner for resolution of issues and removal of the lien, the Owner may cause the lien to be removed at the Construction Manager's expense, including bond costs and reasonable attorneys' fees. This Clause shall not apply if there is a dispute pursuant to Article 13 relating to the subject matter of the lien.

10.2.4 RETAINAGE. From each progress payment made prior to Substantial Completion, the Owner may retain ten percent (10%), of the amount otherwise due after deduction of any amounts as provided in Paragraph 10.3 and in no event shall such percentage exceed any applicable statutory requirements.

10.2.5 10.2.4.1 If the progress of the Work is satisfactory, after the Work is fifty percent (50%) complete, the Owner shall withhold no additional retainage and shall pay the Construction Manager the Full amount of what is due on account of progress payments;

10.2.4.1 The Owner may, in its sole discretion, reduce the amount to be retained at any time;

10.2.4.2 The Owner may release retainage on that portion of the Work a Subcontractor has completed in whole or in part, and which the Owner has accepted;

10.2.4.3 In lieu of retainage, the Construction Manager may furnish a retention bond or other security interest, acceptable to the Owner, to be held by the Owner.

10.3 ADJUSTMENT OF CONSTRUCTION MANAGER'S PAYMENT APPLICATION. The Owner may adjust or reject a payment application or nullify a previously approved payment application, in whole or in part, as may reasonably be necessary to protect the Owner from loss or damage based upon the following, to the extent that the Construction Manager is responsible under the Agreement:

10.3.1 The Construction Manager's repeated failure to perform the Work as required by the Contract Documents;

10.3.2 Loss or damage arising out of or relating to this Agreement and caused by the Construction Manager to the Owner or Others to whom the Owner may be liable;

10.3.3 The Construction Manager's failure to properly pay Subcontractors and Material Suppliers following receipt of such payment from the Owner;

10.3.4 Defective Work not corrected in a timely fashion;

10.3.5 Reasonable evidence of delay in performance of the Work such that the Work will not be completed by the Dates of Substantial or Final Completion; and

10.3.6 Reasonable evidence demonstrating that the unpaid balance of the GMP is insufficient to fund the cost to complete the Work.

10.3.7 Third-party claims involving the Construction Manager or reasonable evidence demonstrating that third-party claims are likely to be filed unless and until the Construction Manager furnishes the Owner with adequate security in the form of a surety bond, letter of credit or other collateral or commitment sufficient to discharge such claims if established.

10.3.8 No later than seven (7) Days after receipt of an application for payment, the Owner shall give written notice to the Construction Manager, at the time of disapproving or nullifying all or part of an application for payment, stating its specific reasons for such disapproval or nullification, and the remedial actions to be taken by the Construction Manager in order to receive payment. When the above reasons for disapproving or nullifying an application for payment are removed, payment will be promptly made for the amount previously withheld.

10.4 ACCEPTANCE OF WORK. Neither the Owner's payment of progress payments nor its partial or full use or occupancy of the Project constitutes acceptance of Work not complying with the Contract Documents.

10.5 PAYMENT DELAY. If for any reason not the fault of the Construction Manager the Construction Manager does not receive a progress payment from the Owner within seven (7) Days after the time such payment is due as defined in Subparagraph 10.2.1, then the Construction Manager, upon giving seven (7) Days' written notice to the Owner, and without prejudice to and in addition to any other legal remedies, may stop Work until payment of the full amount owing to the Construction Manager has been received, including interest from the date payment was due. The GMP and Dates of Substantial or Final Completion shall be equitably adjusted by a Change Order for reasonable cost and delay resulting from shutdown, delay and start-up.

10.6 SUBSTANTIAL COMPLETION

10.6.1 The Construction Manager shall notify the Owner and, if directed, its Engineer when it considers Substantial Completion of the Work or a designated portion to have been achieved. The Owner, with the

assistance of its Engineer, shall promptly conduct an inspection to determine whether the Work or designated portion can be occupied or utilized for its intended use by the Owner without excessive interference in completing any remaining unfinished Work by the Construction Manager. If the Owner determines that the Work or designated portion has not reached Substantial Completion, the Owner, with the assistance of its Engineer shall promptly compile a list of items to be completed or corrected so the Owner may occupy or utilize the Work or designated portion for its intended use. The Construction Manager shall promptly complete all items on the list.

10.6.2 When Substantial Completion of the Work or a designated portion is achieved, the Construction Manager shall prepare a Certificate of Substantial Completion that shall establish the date of Substantial Completion, and the respective responsibilities of the Owner and Construction Manager for interim items such as security, maintenance, utilities, insurance and damage to the Work, and fixing the time for completion of all items on the list accompanying the Certificate. The Certificate of Substantial Completion shall be submitted by the Construction Manager to the Owner, and if directed, to its Engineer for the Owner's written acceptance of responsibilities assigned in the Certificate.

10.6.3 Unless otherwise provided in the Certificate of Substantial Completion, warranties required by the Contract Documents shall commence on the date of Substantial Completion of the Work or a designated portion.

10.6.4 Unless otherwise provided herein, upon acceptance by the Owner of the Certificate of Substantial Completion, the Owner shall pay to the Construction Manager the remaining retainage held by the Owner for the Work described in the Certificate of Substantial Completion less a sum equal to two hundred percent (200%) of the estimated cost of completing or correcting remaining items on that part of the Work, as agreed to by the Owner and Construction Manager as necessary to achieve Final Completion. Uncompleted items shall be completed by the Construction Manager in a mutually agreed time frame. The Owner shall pay the Construction Manager monthly the amount retained for unfinished items as each item is completed.

#### 10.7 PARTIAL OCCUPANCY OR USE.

10.7.1 The Owner may occupy or use completed or partially completed portions of the Work when (a) the portion of the Work is designated in a Certificate of Substantial Completion, (b) appropriate insurer(s) consent to the occupancy or use, and (c) public authorities authorize the occupancy or use. The Construction Manager shall not unreasonably withhold consent to partial occupancy or use. Owner shall not unreasonably refuse to accept partial occupancy.

#### 10.8 FINAL COMPLETION AND FINAL PAYMENT.

10.8.1 Upon notification from the Construction Manager that the Work is complete and ready for final inspection and acceptance, the Owner, with the assistance of its Engineer shall promptly conduct an inspection to determine if the Work has been completed and is acceptable under the Contract Documents.

10.8.2 When the Work is complete, the Construction Manager shall prepare for the Owner's acceptance a final application for payment stating that to the best of the Construction Manager's knowledge, and based on the Owner's inspections, the Work has reached final completion in accordance with the Contract Documents.

10.8.3 Final payment of the balance of the GMP shall be made to the Construction Manager within twenty (20) Days after the Construction Manager has submitted an application for final payment, including submissions required under Subparagraph 10.8.4, and a Certificate of Final Completion has been executed by the Owner and Construction Manager.

10.8.4 Final payment shall be due on the Construction Manager's submission of the following to the Owner:

10.8.4.1 an affidavit declaring any indebtedness connected with the Work, e.g. payrolls or invoices for materials or equipment, to have been paid, satisfied or to be paid with the proceeds of final payment, so as not to encumber the Owner's property;

10.8.4.2 as-built drawings, manuals, copies of warranties and all other close-out documents required by the Contract Documents;

10.8.4.3 release of any liens, conditioned on final payment being received;

10.8.4.4 consent of any surety if required by Owner; and

10.8.4.5 any outstanding known and unreported accidents or injuries experienced by the Construction Manager or its Subcontractors at the Worksite.

10.8.5 If, after Substantial Completion of the Work, the Final Completion of a portion of the Work is materially delayed through no fault of the Construction Manager, the Owner shall pay the balance due for portion(s) of the Work fully completed and accepted. If the remaining contract balance for Work not fully completed and accepted is less than the retained amount prior to payment, the Construction Manager shall submit to the Owner, and if directed the Engineer the written consent of any surety to payment of the balance due for portions of the Work that are fully completed and accepted. Such payment shall not constitute a waiver of claims, but otherwise shall be governed by Paragraph 10.8.

10.8.6 Claims not reserved in writing with the making of final payment shall be waived except for claims relating to liens or similar encumbrances, warranties and Defective Work.

10.8.7 ACCEPTANCE OF FINAL PAYMENT. Unless the Construction Manager provides written identification of unsettled claims with an application for final payment, its acceptance of final payment constitutes a waiver of such claims.

10.9 LATE PAYMENT. Payments due but unpaid shall bear interest from the date payment is due at the prime rate prevailing at the place of the Project.

## **ARTICLE 11. INDEMNITY, INSURANCE, WAIVERS AND BONDS**

### **11.1 INDEMNITY.**

11.1.1 To the fullest extent permitted by law, the Construction Manager shall indemnify and hold harmless the Owner, Owner's officers, directors, members, consultants, agents, and employees, the Engineer and Others (the Indemnities) from all claims for bodily injury and property damage, other than to the Work itself and other property insured under Paragraph 11.3, including reasonable attorneys' fees, costs and expenses, that may arise from the performance of the Work, but only to the extent caused by the negligent acts or omissions of the Construction Manager, Subcontractors or anyone employed directly or indirectly by any of them or by anyone for whose acts any of them may be liable. The Construction Manager shall be entitled to reimbursement of any defense costs paid above Construction Manager's percentage of liability for the underlying claim to the extent provided for under Subparagraph 11.1.2.

11.1.2 To the fullest extent permitted by law, the Owner shall indemnify and hold harmless the Construction Manager, its officers, directors, members, consultants, agents, and employees, Subcontractors or anyone employed directly or indirectly by any of them or anyone for whose acts any of them may be liable from all claims for bodily injury and property damage, other than property insured under Subparagraph 11.4.1, that may arise from the performance of work by Owner, Engineer or Others, to the extent of the negligence attributed to such acts or omissions by Owner, Engineer or Others. The Construction Manager shall be entitled to reimbursement of any defense costs paid above Construction Manager's percentage of liability for the underlying claim to the extent provided for under Subparagraph 11.1.1.

11.1.3 LIMITATION ON LIABILITY. Construction Manager's liability under this Agreement including any claim for indemnity shall be limited to the total amount paid to Construction Manager under this Agreement, or the amount of insurance to be provided by Construction Manager under this section, whichever amount is greater.

### **11.2 INSURANCE.**

Prior to the start of the Work, the Construction Manager shall procure and maintain in force Workers Compensation Insurance, Employers' Liability Insurance, Business Automobile Liability Insurance, and Commercial General Liability Insurance (CGL). The CGL policy shall include coverage for liability arising from

premises, operations, independent contractors, products-completed operations, personal injury and advertising injury, contractual liability, and broad form property damage. The Construction Manager's Employers' Liability, Business Automobile Liability and Commercial General Liability policies, as required in this Subparagraph 11.2.1, shall be written with at least the following limits of liability:

- 11.2.1.1 Employer's Liability
  - a. \$1,000,000 Bodily Injury by Accident Each Accident
  - b. \$1,000,000 Bodily Injury by Disease Policy Limit
  - c. \$1,000,000 Bodily Injury by Disease Each Employee
- 11.2.1.2 Business Automobile Liability Insurance
  - a. \$1,000,000 Each Accident
- 11.2.1.3 Commercial General Liability Insurance
  - a. \$1,000,000 Each Occurrence
  - b. \$2,000,000 General Aggregate
  - b. \$2,000,000 Products/Completed Operations Aggregate
  - c. \$1,000,000 Personal and Advertising Injury Limit

11.2.1 Employers' Liability, Business Automobile Liability and Commercial General Liability coverages required under Subparagraph 11.3.1 may be arranged under a single policy for the full limits required or by a combination of underlying policies with the balance provided by Excess or Umbrella Liability policies.

11.2.2 The Construction Manager shall maintain in effect all insurance coverage required under Subparagraph 11.2.1 with insurance companies lawfully authorized to do business in the jurisdiction in which the Project is located. If the Construction Manager fails to obtain or maintain any insurance coverage required under this Agreement, the Owner may purchase such coverage and charge the expense to the Construction Manager, or terminate this Agreement.

The policies of insurance required under Subparagraph 11.2.1 shall contain a provision that the coverages afforded under the policies will not be cancelled or allowed to expire until at least thirty (30) Days prior written notice has been given to the Owner. The Construction Manager shall maintain completed operations liability insurance for one (1) year after acceptance of the Work, Substantial Completion of the Project, or to the time required by the Contract Documents, whichever is longer. Prior to commencement of the Work, Construction Manager shall furnish the Owner with certificates evidencing the required coverages.

### 11.3 PROPERTY INSURANCE.

11.3.1 Before the start of the Work, the Construction Manager shall obtain and maintain a Builder's Risk Policy upon the entire Project for the full cost of replacement at the time of loss to be included in the GMP. This insurance shall also name the Owner, Construction Manager, Subcontractors and Sub-subcontractors and the Engineer as named insureds. This insurance shall be written as a Builder's Risk Policy or equivalent form to cover all risks or physical loss except those specifically excluded by the policy, and shall insure at least against the perils of fire, lightning, explosion, windstorm, and hail, smoke, aircraft (except aircraft, including helicopter, operated by or on behalf of Construction Manager) and vehicles, riot and civil commotion, terrorism, theft, vandalism, malicious mischief, debris removal, flood, earthquake, earth movement, water damage, wind, testing if applicable, collapse however caused, and damage resulting from defective design, workmanship or material. The Owner shall be solely responsible for any deductible amounts or coinsurance penalties. This policy shall provide

for a waiver of subrogation in favor of the Owner, Subcontractors, Sub-subcontractors and Material Suppliers. This insurance shall remain in effect until final payment has been made or until no person or entity other than the Owner has an insurable interest in the property to be covered by this insurance, whichever is sooner. Partial occupancy or use of the Work shall not commence until the Owner has secured the consent of the insurance company or companies providing the coverage required in this Subparagraph 11.3.1. Prior to commencement of the Work, the Owner shall provide a copy of the property policy or policies obtained in compliance with this Subparagraph 11.3.1.

11.3.2 Owner and Construction Manager waive all rights against each other and their respective employees, agents, contractors, subcontractors and sub-subcontractors for damages caused by risks covered by the property insurance provided under Subparagraph 11.3.1, except such rights as they may have to the proceeds of the insurance and such rights as the Construction Manager may have for the failure of the Owner to obtain and maintain property insurance in compliance with Subparagraph 11.3.1 To the extent of the limits of Construction Manager's Commercial General Liability Insurance specified in Subparagraph 11.3.1 or the amount paid to Construction Manager under this Agreement, whichever is more, the Construction Manager shall indemnify and hold harmless the Owner against any and all liability, claims, demands, damages, losses and expenses, including attorneys' fees, in connection with or arising out of any damage or alleged damage to any of Owner's existing adjacent property that may arise from the performance of the Work, to the extent caused by the negligent acts or omissions of the Construction Manager, Subcontractor or anyone employed directly or indirectly by any of them or by anyone for whose acts any of them may be liable.

#### 11.4 OWNER'S INSURANCE.

11.4.1 OWNER'S LIABILITY INSURANCE. The Owner shall obtain and maintain its own liability insurance for protection against claims arising out of the performance of this Agreement, including without limitation, loss of use and claims, losses and expenses arising out of the Owner's errors or omissions in amount equal or greater to that required from Construction Manager under Paragraph 11.2.

11.5 ROYALTIES, PATENTS AND COPYRIGHTS. The Construction Manager shall pay all royalties and license fees which may be due on the inclusion of any patented or copyrighted materials, methods or systems selected by the Construction Manager and incorporated in the Work. The Construction Manager shall indemnify and hold the Owner harmless from all suits or claims for infringement of any patent rights or copyrights arising out of such selection. The Owner agrees to indemnify and hold the Construction Manager harmless from any suits or claims of infringement of any patent rights or copyrights arising out of any patented or copyrighted materials, methods or systems specified by the Owner or Engineer.

#### 11.6 BONDS.

##### 11.6.1 Performance, Payment Bonds and Statutory Bonds

(Designate only one)

  x   are/        are not

required of the Construction Manager. Such bonds shall be issued by a surety admitted in the State in which the Project is located and must be acceptable to the Owner. The penal sum of the bonds shall be one hundred (100%) of the GMP. Any increase in the GMP that exceeds ten percent (10%) in the aggregate shall require a rider to the Bonds increasing penal sums accordingly. Up to such ten percent (10%) amount, the penal sum of the bond shall remain equal to one hundred (100%) of the original GMP. The Construction Manager shall endeavor to keep its surety advised of changes potentially impacting the GMP and Contract Time, though the Construction Manager shall require that its surety waives any requirement to be notified of any alteration or extension of time within the scope of the initial Agreement. The Construction Manager's payment bond for the Project, if any, shall be made available by the Owner for review and copying by the Subcontractor. The Owner's acceptance shall not be unreasonably withheld.

## **ARTICLE 12. SUSPENSION, NOTICE TO CURE AND TERMINATION OF THE AGREEMENT**

#### 12.1 SUSPENSION BY OWNER FOR CONVENIENCE.

12.1.1 OWNER SUSPENSION. Should the Owner order the Construction Manager in writing to suspend, delay, or interrupt the performance of the Work for such period of time as may be determined to be appropriate for the convenience of the Owner and not due to any act or omission of the Construction Manager or any person or entity for whose acts or omissions the Construction Manager may be liable, then the Construction Manager shall immediately suspend, delay or interrupt that portion of the Work as ordered by the Owner. The GMP, Construction Manager's Fee and the Dates of Substantial or Final Completion shall be equitably adjusted by Change Document for the cost and delay resulting from any such suspension.

12.1.2 Any action taken by the Owner that is permitted by any other provision of the Contract Documents and that results in a suspension of part or all of the Work does not constitute a suspension of Work under this Paragraph 12.1.

12.2 NOTICE TO CURE A DEFAULT. If the Construction Manager persistently refuses or fails to supply enough properly skilled workers, proper materials, or equipment, to maintain the approved Schedule of the Work in accordance with Article 6, or fails to make prompt payment to its workers, Subcontractors or Material Suppliers, disregards laws, ordinances, rules, regulations or orders of any public authority having jurisdiction, or is otherwise guilty of a material breach of a provision of this Agreement, the Construction Manager may be deemed in default. If the Construction Manager fails within ten (10) Days after receipt of written notification to commence and continue satisfactory correction of such default with diligence and promptness or reach an agreement with Owner of reasonable cure of any default including a time table for cure, then the Owner shall give the Construction Manager a second notice to correct the default within a three (3) Day period. If the Construction Manager fails to promptly commence and continue satisfactory correction of the default following receipt of such second notice, the Owner without prejudice to any other rights or remedies may:

12.2.1 supply workers, equipment and other facilities as the Owner deems necessary for the satisfactory correction of the default and charge the cost to the Construction Manager, who shall be liable for the payment of same including reasonable overhead, profit and attorneys' fees;

12.2.2 contract with Others to perform such part of the Work as the Owner determines shall provide the most expeditious correction of the default, and charge the cost to the Construction Manager; who shall be liable for the payment of same including reasonable overhead, profit and attorneys' fees;

12.2.3 withhold payment due the Construction Manager in accordance with Paragraph 10.3; and

12.2.4 in the event of an emergency affecting the safety of persons or property, immediately commence and continue satisfactory correction of such default as provided in Subparagraphs 12.2.1 and 12.2.2 without first giving written notice to the Construction Manager, but shall give prompt written notice of such action to the Construction Manager following commencement of the action.

12.3 OWNER'S RIGHT TO TERMINATE FOR DEFAULT.

12.3.1 TERMINATION BY OWNER FOR DEFAULT. If, within three (3) Days of receipt of the second notice to cure pursuant to Paragraph 12.2, the Construction Manager fails to commence and satisfactorily continue correction of the default set forth in the notice to cure, the Owner may terminate this Agreement by written notice absent appropriate corrective action. Termination for default is in addition to any other remedies available to Owner under Paragraph 12.2. If the Owner's cost arising out of the Construction Manager's failure to cure, including the cost of completing the Work and reasonable attorney fees, exceeds the unpaid GMP, the Construction Manager shall be liable to the Owner for such excess costs. In the event the Owner exercises its rights under this Paragraph, upon the request of the Construction Manager the Owner shall furnish to the Construction Manager a detailed accounting of the cost incurred by the Owner.

12.3.2 If the Owner or Others perform Work under this Paragraph 12.3, the Owner shall have the right to take and use any materials and supplies belonging to the Construction Manager and located at the Worksite for the purpose of completing any remaining Work. Immediately upon completion of the Work, any remaining materials, supplies or equipment not consumed or incorporated in the Work, and not paid for by Owner, shall be returned to the Construction Manager in substantially the same condition as when they were taken, reasonable wear and tear excepted.

12.3.3 If the Construction Manager files a petition under the Bankruptcy Code, this Agreement shall terminate if the Construction Manager or the Construction Manager's trustee rejects the Agreement, if there has been a default, or if the Construction Manager is unable to give adequate assurance that the Construction Manager will perform as required by this Agreement or otherwise is unable to comply with the requirements for assuming this Agreement under the applicable provisions of the Bankruptcy Code.

12.3.4 The Owner shall make reasonable efforts to mitigate damages arising from Construction Manager's default, and shall promptly invoice the Construction Manager for all amounts due pursuant to Paragraphs 12.2 and 12.3.

#### 12.4 TERMINATION BY OWNER FOR CONVENIENCE.

12.4.1 Upon written notice to the Construction Manager, the Owner may, without cause, terminate this Agreement. The Construction Manager shall immediately stop the Work, follow the Owner's instructions regarding shutdown and termination procedures, and strive to minimize any further costs.

12.4.2 If the Owner terminates this Agreement pursuant to this Paragraph 12.4, the Construction Manager shall be paid

12.4.2.1 for the Work performed to date including overhead and profit;

12.4.2.2 for all demobilization costs and costs incurred as a result of the termination but not including overhead or profit on work not performed;

12.4.2.3 all retainage on all Work performed and five percent (5%) fee on all Work remaining to be performed.

12.4.3 If the Owner terminates this Agreement pursuant to Paragraphs 12.3 or 12.4, the Construction Manager shall:

12.4.3.1 execute and deliver to the Owner all papers and take all action required to assign, transfer and vest in the Owner the rights of the Construction Manager to all materials, supplies and equipment for which payment has or will be made in accordance with the Contract Documents and all subcontracts, orders and commitments which have been made in accordance with the Contract Documents;

12.4.3.2 exert reasonable efforts to reduce to a minimum the Owner's liability for subcontracts, orders and commitments that have not been fulfilled at the time of the termination;

12.4.3.3 cancel any subcontracts, orders and commitments as the Owner directs; and

12.4.3.4 sell at prices approved by the Owner any materials, supplies and equipment as the Owner directs, with all proceeds paid or credited to the Owner.

#### 12.5 CONSTRUCTION MANAGER'S RIGHT TO TERMINATE.

12.5.1 Upon ten (10) Business Days' written notice to the Owner, the Construction Manager may terminate this Agreement if the Work has been stopped for a thirty (30) Day period through no fault of the Construction Manager for any of the following reasons:

12.5.1.1 under court order or order of other governmental authorities having jurisdiction;

12.5.1.2 as a result of the declaration of a national emergency or other governmental act during which, through no act or fault of the Construction Manager, materials are not available; or

12.5.1.3 suspension by Owner for convenience pursuant to Paragraph 12.1.

12.5.2 In addition, upon ten (10) Business Days written notice to the Owner, the Construction Manager may terminate the Agreement if the Owner:

12.5.2.1 fails to furnish reasonable evidence pursuant to Paragraph 4.2 that sufficient funds are available and committed for Project financing or

12.5.2.2 assigns this Agreement over the Construction Manager's reasonable objection,  
or

12.5.2.3 fails to pay the Construction Manager in accordance with this Agreement and the Construction Manager has complied with Paragraph 10.6.

12.5.3 Upon termination by the Construction Manager in accordance with Paragraph 12.5, the Construction Manager shall be entitled to recover from the Owner payment for all Work executed and for any proven loss, cost or expense in connection with the Work, including all demobilization costs plus five percent (5%) on Work not performed.

12.6 OBLIGATIONS ARISING BEFORE TERMINATION. Even after termination pursuant to Article 12, the provisions of this Agreement still apply to any Work performed, payments made, events occurring, costs charged or incurred or obligations arising before the termination date.

## **ARTICLE 13.**

### **DISPUTE MITIGATION AND RESOLUTION**

13.1 WORK CONTINUANCE AND PAYMENT. Unless otherwise agreed in writing, the Construction Manager shall continue the Work and maintain the Schedule of the Work during any dispute resolution proceedings. If the Construction Manager continues to perform, the Owner shall continue to make payments in accordance with this Agreement.

13.2 DIRECT DISCUSSIONS. If the Parties cannot reach resolution on a matter relating to or arising out of the Agreement, the Parties shall endeavor to reach resolution through good faith direct discussions between the Parties' representatives, who shall possess the necessary authority to resolve such matter and who shall record the date of first discussions. If the Parties' representatives are not able to resolve such matter within five (5) business Days from the date of first discussion, the Parties' representatives shall immediately inform senior executives of the Parties in writing that resolution was not affected. Upon receipt of such notice, the senior executives of the Parties shall meet within five (5) business Days to endeavor to reach resolution. If the dispute remains unresolved after fifteen (15) Days from the date of first discussion, the Parties shall submit such matter to the dispute mitigation and dispute resolution procedures selected herein.

13.3 MEDIATION. If direct discussions pursuant to Paragraph 13.2 do not result in resolution of the matter, the Parties shall endeavor to resolve the matter by mediation. The mediation rules and administration of the mediation shall be as mutually agreed by the Parties. The mediation shall be convened within thirty (30) business Days of the matter first being discussed and shall conclude within forty-five (45) business Days of the matter being first discussed. Either Party may terminate the mediation at any time after the first session, but the decision to terminate shall be delivered in person by the terminating Party to the non-terminating Party and to the mediator. The costs of the mediation shall be shared equally by the Parties.

13.4 BINDING DISPUTE RESOLUTION. If the matter remains unresolved after submission of the matter to a mitigation procedure or to mediation, the Parties shall submit the matter to the binding dispute resolution procedure selected herein:

  x   Litigation in either the state or federal court having jurisdiction of the matter in the location of the Project.

13.4.1 VENUE. The venue of any binding dispute resolution procedure shall be the location of the Project unless the Parties agree on a mutually convenient location.

13.5 MULTIPARTY PROCEEDING. The Parties agree that all Parties necessary to resolve a claim shall be Parties to the same dispute resolution proceeding. Appropriate provisions shall be included in all other contracts relating to the Work to provide for the joinder or consolidation of such dispute resolution procedures.

13.6 LIEN RIGHTS. Nothing in this Article 13 shall limit any rights or remedies not expressly waived by the Construction Manager that the Construction Manager may have under lien laws.

## **ARTICLE 14.**

### **MISCELLANEOUS PROVISIONS**

14.1 ASSIGNMENT. Neither the Owner nor the Construction Manager shall assign their interest in this Agreement without the written consent of the other except as to the assignment of proceeds. The terms and conditions of this Agreement shall be binding upon both Parties, their partners, successors, assigns and legal representatives. Neither Party to this Agreement shall assign the Agreement as a whole without written consent of the other except that the Owner may assign the Agreement to a wholly owned subsidiary of Owner when Owner has fully indemnified Construction Manager or to an institutional lender providing construction financing for the Project as long as the assignment is no less favorable to the Construction Manager than this Agreement. In the event of such assignment, the Construction Manager shall execute any consent reasonably required. In such event, the wholly owned subsidiary or lender shall assume the Owner's rights and obligations under the Contract Documents. If either Party attempts to make such an assignment, that Party shall nevertheless remain legally responsible for all obligations under this Agreement, unless otherwise agreed by the other Party.

14.2 GOVERNING LAW. This Agreement shall be governed by the law of the State of Kansas.

14.3 SEVERABILITY. The partial or complete invalidity of any one or more provisions of this Agreement shall not affect the validity or continuing force and effect of any other provision.

14.4 NO WAIVER OF PERFORMANCE. The failure of either Party to insist, in any one or more instances, on the performance of any of the terms, covenants or conditions of this Agreement, or to exercise any of its rights, shall not be construed as a waiver or relinquishment of such term, covenant, condition or right with respect to further performance or any other term, covenant, condition or right.

14.5 TITLES AND GROUPINGS. The titles given to the articles of this Agreement are for ease of reference only and shall not be relied upon or cited for any other purpose. The grouping of the articles in this Agreement and of the Owner's specifications under the various headings is solely for the purpose of convenient organization and in no event shall the grouping of provisions, the use of paragraphs or the use of headings be construed to limit or alter the meaning of any provisions.

14.6 JOINT DRAFTING. The Parties expressly agree that both had opportunity to negotiate its terms and to obtain the assistance of counsel in reviewing its terms prior to execution. Therefore, this Agreement shall be construed neither against nor in favor of either Party, but shall be construed in a neutral manner.

14.7 RIGHTS AND REMEDIES. The Parties' rights, liabilities, responsibilities and remedies with respect to this Agreement, whether in contract, tort, negligence or otherwise, shall be exclusively those expressly set forth in this Agreement.

## **ARTICLE 15.**

### **CONTRACT DOCUMENTS**

15.1 The Contract Documents in existence at the time of execution of this Agreement are as follows:

15.2.1 The drawings and specifications are complementary. If Work is shown only on one but not on the other, the Construction Manager shall perform the Work as though fully described on both consistent with the Contract Documents and reasonably inferable from them as being necessary to produce the indicated results.

15.2.2 In case of conflicts between the drawings and specifications, the specifications shall govern. In any case of omissions or errors in figures, drawings or specifications, the Construction Manager shall immediately submit the matter to the Owner and, if directed, to its Engineer for clarification. The Owner's clarifications are final and binding on all Parties, subject to an equitable adjustment in Dates of Substantial or Final Completion or Price pursuant to Article 9 or dispute resolution in accordance with Article 13.

15.2.3 Where figures are given, they shall be preferred to scaled dimensions.

15.2.4 Any terms that have well-known technical or trade meanings, unless otherwise specifically defined in this Agreement, shall be interpreted in accordance with their well-known meanings.

15.2.5 In case of any inconsistency, conflict or ambiguity among the Contract Documents, the documents shall govern in the following order: (a) Change Orders and written amendments to this Agreement; (b) the Agreement; (c) subject to Subparagraph 15.2.2 the drawings, specifications and addenda issued prior to the execution of this Agreement; (d) approved submittals; (e) information furnished by the Owner pursuant to Paragraph 4.3; (f) other documents listed in this Agreement. Among all the Contract Documents, the term or provision that is most specific or includes the latest date shall control. Information identified in one Contract Document and not identified in another shall not be considered to be a conflict or inconsistency. If any provision of this Agreement conflicts with or is inconsistent with any other provision of other Contract Documents, the provision of this Agreement governs, unless the other provision specifically refers to the provision it supersedes and replaces in this Agreement.

This Agreement is entered into as of the date entered in Article 1.

ATTEST: .....

OWNER: City of Dodge City

BY: .....

PRINT NAME \_\_\_\_\_

PRINT TITLE \_\_\_\_\_

ATTEST: .....

CONSTRUCTION MANAGER: Utility Contractors, Inc. d/b/a UCI

BY: .....

PRINT NAME \_\_\_\_\_

PRINT TITLE \_\_\_\_\_