

DRAFT AIA® Document A133™ – 2009

Standard Form of Agreement Between Owner and Construction Manager as Constructor where the basis of payment is the Cost of the Work Plus a Fee with a Guaranteed Maximum Price

+MODIFIED AIA DOCUMENT A133-2009 AGREEMENT made as of the « » day of «March »
in the year «2018 »
(In words, indicate day, month and year.)

BETWEEN the Owner:
(Name, legal status and address)

«County of Hidalgo, Texas »« »
«HIDALGO COUNTY PURCHASING DEPT.
2812 S. Business Hwy 281
Edinburg, Texas 78539 »

and the Construction Manager:
(Name, legal status and address)

«Morganti Texas Group, Inc.
10590 Westoffice Drive, Suite 150
Houston, Texas 77042 »« »
« »

for the following Project:
(Name and address or location)

«Hidalgo County Courthouse
Edinburg, Texas»
« »

The Architect:
(Name, legal status and address)

«HDR Architecture, Inc.
8750 N. Central Expressway, Suite 100
Dallas, Texas 75231 »« »
« »

The Owner's Designated Representative:
(Name, address and other information)

«Valde Guerra, Michael Leo and Sergio Cruz when acting jointly and unanimously on behalf of the Owner with respect to this Agreement are the Owner's Designated Representative for the Project, subject to all limitations on the Designated Representative's authority as provided by this Agreement. »

ADDITIONS AND DELETIONS:

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

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

AIA Document A201™-2007, General Conditions of the Contract for Construction, is adopted in this document by reference. Do not use with other general conditions unless this document is modified.

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The Construction Manager's Designated Representative:
(Name, address and other information)

«**Joseph Klummer** »
«**Morganti Texas, Inc.** »
«**10590 Westoffice Dr., Suite 150** »
«**Houston, Texas 77042** »
« »
« »

The Designated Representative of the Program Manager ("PM"):
(Name, address and other information)

«**Brian McIntyre** »
«**Jacobs Project Management Com.** »
«**911 Central Parkway North, Suite 425** »
«**San Antonio, Texas 78232** »

The Architect's Designated Representative:
(Name, address and other information)

«**John Niesen, RA, LEED** »
«**Project Manager** »
«**HDR Architecture, Inc.** »
«**8750 N. Central Expressway, Suite 100** »
«**Dallas, Texas 75231** »
« »

The Owner and Construction Manager agree as follows.

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ARTICLE 1 GENERAL PROVISIONS

§ 1.1 The Contract Documents

The Contract Documents consist of this Agreement, Drawings, the Project Manual including, without limitation, Conditions of the Contract (General, Supplementary and other Conditions), Specifications and Addenda issued prior to the execution of this Agreement, other documents listed in this Agreement, and Modifications issued after execution of this Agreement, all of which form the Contract and are as fully a part of the Contract as if attached to this Agreement or repeated herein. Upon the Owner's acceptance of the Construction Manager's Guaranteed Maximum Price proposal (or sometimes herein, "**GMP proposal**"), the Contract Documents will also include the documents described in Section 2.2.3 and identified in the Guaranteed Maximum Price Amendment (or sometimes herein "**GMP Amendment**") and revisions prepared by the Architect and furnished by the Owner as described in Section 2.2.8. The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. If anything in the other Contract Documents, other than a Modification, is inconsistent with this Agreement, this Agreement shall govern.

The Drawings and Specifications of the Contract Documents are complementary, and the requirements of each shall be deemed required by both. If, and to the extent of, any direct inconsistency, ambiguity, or discrepancy in the Contract Documents, subject to the Modified A201-2007 Section 1.2.1, precedence shall be given to the Contract Documents in the following order of priority: (1) duly approved and written Change Orders and Modifications issued after the execution of this Agreement; (2) this Agreement, including the exhibits attached hereto and incorporated fully herein, but not including Modified A201-2007; (3) the Modified A201-2007; (4) the Drawings identified in the GMP Amendment; and (5) the Project Specifications identified in the GMP Amendment. Without limiting the foregoing, the terms of the Agreement and the Modified A201-2007 shall control over any terms in the Drawings or Specifications inconsistent therewith.

Construction Manager has the responsibility to provide the most cost-effective procurement and construction methodology consistent with the Owner's goals for the Project. Construction Manager shall have overall responsibility for and will provide complete Preconstruction Phase services and, subject to the provisions hereof regarding Owner's acceptance of the Guaranteed Maximum Price, Construction Phase services. Construction Manager shall furnish all materials, equipment, tools and labor as necessary or reasonably inferable to complete the

work, in accordance with Owner's requirements and the terms of the Contract Documents. During the Preconstruction Phase, Construction Manager shall develop the GMP Proposal which shall include, without limitation, a Guaranteed Maximum Price and associated schedule for the Construction Phase and building systems commissioning. Should the GMP Proposal be unacceptable to the Owner, Owner reserves the right (in its sole and absolute discretion) to request from other firms competitive proposals with respect to the Project and to obtain different contractor to perform the Construction Phase services or any portion thereof. Owner and Construction Manager contemplate that the work to be performed pursuant to the Contract Documents for the entire Project will be performed in separate and distinct work packages. Therefore, the terms and conditions set forth in this Agreement shall not only apply to the Work as it relates to the entire Project but to each individual work package, as well. Unless otherwise noted, the obligations and duties of each party to this Agreement shall apply to each work package to the extent applicable with the same force and effect as they do to the entire Project. Construction Manager recognizes that various external factors will influence the Owner's decision whether or not it desires to have one or more of the work packages designed and constructed by Construction Manager in accordance with the terms and provisions of this Agreement. Accordingly, Owner reserves the right to decide that it does not want one or more of the work packages initiated and/or completed as contemplated by this Agreement.

§ 1.2 Relationship of the Parties

The Construction Manager accepts the relationship of trust and confidence established by this Agreement and covenants with the Owner to cooperate with the Owner, PM and Architect and exercise the Construction Manager's best skill and judgment in furthering the interests of the Owner; to furnish efficient construction administration, management services and supervision; to furnish at all times an adequate supply of workers and materials; to perform the Work in an expeditious and economical manner consistent with the Owner's interests; and to perform the Work defined in the Contract Documents in accordance with the Owner's requirements and construction cost limitations, as approved by the Owner. The Owner agrees to furnish or approve, in a timely manner, information required by the Construction Manager, subject to the ability of The Owner's ability as a governmental agency to provide information, and to make payments to the Construction Manager in accordance with the requirements of the Contract Documents.

§ 1.3 General Conditions

For the Preconstruction Phase, the Modified AIA Document A201™-2007, General Conditions of the Contract for Construction, shall apply only as specifically provided in this Agreement. For the Construction Phase, the general conditions of the contract shall be as set forth in the Modified A201-2007, which document is incorporated herein by reference. The term "Contractor" as used in the Modified A201-2007 shall mean the Construction Manager.

§ 1.4 Registrations, Approvals and Laws

The Construction Manager and all of its consultants, trade contractors, subcontractors and suppliers shall at all time each is performing Work or services in connection with the Project possess and maintain all registrations, licenses, certifications and approvals necessary for the performance of any requirements of this Agreement. It is the Construction Manager's duty to monitor the compliance of the consultants, trade contractors, subcontractors and suppliers with, and to enforce, the requirements of this provision. The Construction Manager shall, upon request, promptly provide evidence of compliance with such registrations, licenses, certifications and approvals.

ARTICLE 2 CONSTRUCTION MANAGER'S RESPONSIBILITIES

The Construction Manager's Preconstruction Phase responsibilities are set forth in Sections 2.1 and 2.2. The Construction Manager's Construction Phase responsibilities are set forth in Section 2.3. The Owner and Construction Manager may agree, in consultation with the Architect, for the Construction Phase to commence prior to completion of the Preconstruction Phase, in which case, both phases will proceed concurrently. The Construction Manager shall identify a representative authorized to act on behalf of the Construction Manager with respect to the Project.

§ 2.1 Preconstruction Phase

§ 2.1.1 In addition to the services described in this Section 2.1, the Construction Manager shall provide the Preconstruction Phase services described in Exhibit H. The Construction Manager shall provide a preliminary written evaluation and report, not later than the 30th day following delivery of the Notice to Proceed under this Agreement, of the Owner's program, design, schedule and construction budget requirements, each in terms of the other, identifying any possible conflicts, discrepancies or concerns that may negatively impact the Project.

§ 2.1.2 Consultation

The Construction Manager shall schedule, conduct and document meetings with the PM, Architect and Owner to discuss such matters as procedures, progress, coordination and scheduling of the Work. The Construction Manager shall advise the Owner, PM and the Architect on proposed site use and improvements, selection of materials, and building systems and equipment. The Construction Manager shall also submit written recommendations consistent with the Project requirements to the Owner, PM and Architect on constructability; availability of materials and labor; time requirements for procurement, installation and construction; construction which shall satisfy the Owner's time requirements; and factors related to construction cost including, but not limited to, costs of alternative designs or materials, preliminary budgets, life-cycle data, and possible cost reductions.

§ 2.1.2.1 Throughout the Preconstruction Phase, the Construction Manager shall review and monitor the various phases of the development of the design documents to determine whether or not the Project as designed by the Architect can meet the budget and schedule goals of the Owner. It is the desire of the Owner to recognize any likely budget and schedule overruns as soon as possible, and by this Agreement it is employing the Construction Manager to review the design documents for constructability and to provide estimating services, value engineering services, Project scheduling services, and to perform other Preconstruction Phase Services described herein to help the Owner meet the project budget and schedule. At any time that Construction Manager develops misgivings about the integrity of the Project budget and/or schedule, Construction Manager is to promptly advise the Owner, PM and Architect in writing of the misgivings, and make any suggestions Construction Manager may have as to how to address the problem.

§ 2.1.2.2 During the Pre-Construction Phase, the Construction Manager shall review the Contract Documents to ascertain whether the components of the plumbing, electrical, technology, life safety and mechanical systems may be constructed without interference with each other, or with the structural or architectural components of the Project. In the event that conflicts between the systems are discovered, the Construction Manager shall promptly notify the Owner, PM and Architect in writing.

§ 2.1.2.3 Notwithstanding any provision of the Contract Documents to the contrary, the Construction Manager shall not be entitled to additional compensation for any delay or disruption to the Work arising from any conflict between the mechanical, electrical, technology, life safety and plumbing systems with each other, or with the structural or architectural components of the Work, if such conflicts could have been discovered during the Preconstruction Phase by the Construction Manager through the exercise of reasonable diligence, and the Owner, PM and Architect were not informed of such conflicts as required by Paragraph 2.1.2.2. This provision shall apply only with respect to conflicts appearing in the Drawings and Specifications provided for the Construction Manager's review prior to proposal of a Guaranteed Maximum Price.

§ 2.1.3 When Project requirements in Section 3.1.1 have been sufficiently identified, the Construction Manager shall prepare and periodically update a Project Schedule in coordination with the PM's project schedule, for the Architect's review and the Owner's acceptance. The Construction Manager shall obtain the PM's and Architect's approval for the portion of the Project Schedule relating to the performance of the PM's and Architect's services, respectively. The Project Schedule shall coordinate and integrate the Construction Manager's services, Construction Manager's subcontractors' services, the PM's services, the Architect's services, other Owner, Architect or PM's consultants' services (such as materials testing, test & balance and commissioning), FF&E procurement, move-in activities, and the Owner's responsibilities and identify items that could affect the Project's timely completion. The updated Project schedule shall include the following: submission of the Guaranteed Maximum Price proposal; components of the Work; times of commencement and completion required of each Subcontractor; ordering and delivery of products, including those that must be ordered well in advance of construction; proposed date of Substantial Completion; proposed date of Final Completion; and the occupancy requirements of the Owner.

§ 2.1.4 The duration of the Preconstruction Phase, in terms of the Construction Manager's scope of work, shall extend from the Notice to Proceed for this Agreement until a Final Guaranteed Maximum Price is formally accepted by the Owner's governing body and the GMP Amendment is signed.

§ 2.1.5 Preliminary Cost Estimates

§ 2.1.5.1 Based on the preliminary design and other design criteria prepared by the Architect, the Construction Manager shall prepare preliminary estimates of the Cost of the Work or the cost of program requirements using area, volume or similar conceptual estimating techniques for the Architect's review and Owner's approval. If the

Architect or Construction Manager suggests alternative materials and systems, the Construction Manager shall provide cost evaluations of those alternative materials and systems.

§ 2.1.5.2 As the Architect progresses with the preparation of the Schematic Design, Design Development and Construction Documents, the Construction Manager shall prepare and update, at 100% Schematic Design, 100% Design Development, and 50% Construction Documents, estimates of the Cost of the Work of increasing detail and refinement and allowing for the further development of the design until such time as the Owner and Construction Manager agree on a final Guaranteed Maximum Price for the Work, which shall be issued by the Construction Manager prior to the 95% Construction Documents being issued by the Architect. Such estimates shall be provided for the PM's and Architect's review and the Owner's approval. The Construction Manager shall inform the Owner, PM and Architect when estimates of the Cost of the Work exceed the latest approved Project budget and make recommendations for corrective action for cost reductions, including but not limited to, substitution of materials or revisions or alterations to the design to bring the Project within the Owner's budget, but without deleting necessary components of the Project without Owner's consent. In the event that the quality or scope identified in the estimates are unacceptable or exceed the Owner's identified budget, the Construction Manager shall work with the PM and Architect to develop options that are acceptable to Owner and are within the Owner's budget.

§ 2.1.6 Phased Construction

The Construction Manager shall provide recommendations with regard to accelerated or fast-track scheduling, procurement, or phased construction. The Construction Manager shall take into consideration cost reductions, cost information, constructability, provisions for temporary facilities and procurement and construction scheduling issues. The Construction Manager shall make recommendations to the Owner, PM, and Architect regarding the phased issuance of Drawings and Specifications. The Construction Manager may be required to issue an early Guaranteed Maximum Price, subject to the terms of Section 2.2, prior to the Construction Documents phase, to accelerate the start of site demolition, site utilities, and structural components. If an early Guaranteed Maximum Price is submitted and accepted by the Owner, the Construction Manager shall not be allowed to use the final Guaranteed Maximum Price to cover any losses for scopes of work covered in any early Guaranteed Maximum Price, to the extent the scope of work was not materially changed.

§ 2.1.7 OMITTED

§ 2.1.8 Extent of Responsibility

The Construction Manager shall exercise level of care exercised by nationally-recognized construction management firms in preparing schedules and estimates. The Construction Manager, however, does not warrant or guarantee estimates and schedules except as may be included as part of the Guaranteed Maximum Price. The Construction Manager is not required to ascertain that the Drawings and Specifications are in accordance with applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities, but the Construction Manager shall promptly report to the Architect, PM and Owner any nonconformity discovered, or in the exercise of reasonable diligence should have discovered, by or made known to the Construction Manager as a request for information in such form as the PM or Architect may require.

§ 2.1.9 Notices and Compliance with Laws

The Construction Manager shall comply with applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities applicable to its performance under this Contract, and with equal employment opportunity programs, and other programs as may be required by governmental and quasi-governmental authorities for inclusion in the Contract Documents. Such compliance includes, without limitation, compliance with all applicable provisions of Chapter 2269 of the Texas Government Code government public work procurement by Construction Manager At-Risk.

§ 2.1.10 Value Analysis

Construction Manager shall, in consultation with the PM, assist the Owner and the Architect in performing value analysis studies on construction systems and major construction components, including but not limited to the mechanical system, exterior envelope, structural system, roofing system, lighting and power service. Construction Manager shall submit a Value Analysis report no later than the 50% Construction Document set.

§ 2.2 Guaranteed Maximum Price Proposal and Contract Time

§ 2.2.1 At a time to be mutually agreed upon by the Owner and the Construction Manager and in consultation with the PM and Architect, but in no case later than 30 days following the Owner's approval of the 50% Construction Documents, the Construction Manager shall prepare a final Guaranteed Maximum Price proposal for the entire Project Work for the Owner's review and acceptance. The Guaranteed Maximum Price proposal shall be computed as the sum of the following:

- .1 the Construction Manager's Estimated Cost of the Work (as approved by the Owner) which consists of the sum of the guaranteed or fixed prices of the Work and any reasonable, good faith estimate of the cost of the balance of the Work.;
- .2 the Construction Manager's General Conditions Fee (to the extent that they are segregated from the Cost of the Work) pursuant to Section 5.1.5 below;
- .3 the Construction Manager's contingency pursuant to (and as limited by) Sections 2.2.4 and 5.2.1.2 below;
- .4 the Construction Manager's Fee in accordance with Section 5.1.1 below; and
- .5 Allowances as approved by the Owner, which may (but shall not be required to) include an Owner's Contingency.

The Owner shall be entitled to full access to the details of the process of developing the Guaranteed Maximum Price proposal. It is the intent of this Agreement that allowances, assumptions, clarifications, and any other elements that could lead to change orders after the Guaranteed Maximum Price is approved be held to a minimum.

§ 2.2.2 To the extent that the Drawings and Specifications are anticipated to require further development by the Architect, the Construction Manager shall provide in the Guaranteed Maximum Price for such further development consistent with the Contract Documents and reasonably inferable therefrom. Such further development does not include such things as changes in scope, systems, kinds and quality of materials, finishes or equipment, all of which, if required, shall be incorporated by Change Order, unless otherwise noted in the GMP Proposal and associated assumptions and clarifications.

§ 2.2.3 The Construction Manager shall include with the Guaranteed Maximum Price proposal a written statement of its basis, which shall include the following:

- .1 A list of the Drawings and Specifications, including all Addenda thereto, and the Conditions of the Contract;
- .2 A list of the clarifications and assumptions made by the Construction Manager in the preparation of the Guaranteed Maximum Price proposal, including assumptions under Section 2.2.2, to supplement the information provided by the Owner and contained in the Drawings and Specifications;
- .3 A statement of the proposed Guaranteed Maximum Price, including a statement of the estimated Cost of the Work organized by trade categories or systems, allowances, contingency, and the Construction Manager's Fee;
- .4 An updated Project Schedule, to include all major construction milestones, and the anticipated date of Substantial Completion and Final Completion upon which the proposed Guaranteed Maximum Price is based; and
- .5 A date by which the Owner must accept the Guaranteed Maximum Price not less than 30 days following the submission of the proposal.

§ 2.2.4 In preparing the Construction Manager's Guaranteed Maximum Price proposal, the Construction Manager shall include its contingency ("**Construction Contingency**") for the Construction Manager's exclusive use to cover those costs considered reimbursable as the Cost of the Work but not included in a Change Order. The Construction Contingency may be required for costs incurred in the Work from unforeseeable causes, or details which should have been anticipated by the Construction Manager at the time of the Owner's approval of the Guaranteed Maximum Price. Such unforeseeable causes or unanticipated details include, but are not limited to, refinement of details of design within the scope of standards, quality and quantities which are reasonably inferable from the Guaranteed Maximum Price documents, the correction of minor defects not relating to design, delays in receipt of materials, and additional costs relating to Subcontractor defaults not reimbursed by the Subcontractor's bonding company. Only those items of cost that meet the definition of Cost of the Work under Section 6.1 may be charged against the Construction Contingency. Any unforeseeable causes or unanticipated details that exceed the

Construction Contingency shall be borne by the Construction Manager at the Construction Manager's sole risk and expense.

It is expressly understood and agreed that, to the extent a Change Order is warranted under the terms of this Agreement, the Construction Contingency shall not be utilized. Sums may be charged to the Construction Contingency only to the extent the same have been paid or are to be paid by the Construction Manager. Notwithstanding anything in the Contract Documents to the contrary, no charge shall be made against the Construction Contingency without Owner's written consent, such consent not to be unreasonably withheld. The Guaranteed Maximum Price shall also include any contingency established by the Owner which is defined as an allowance established by the Owner for the Owner's exclusive use. Upon final accounting, all remaining monies in the Construction Contingency and any Owner's contingency shall accrue to the Owner.

§ 2.2.5 The Construction Manager shall meet with the Owner, PM and Architect to review the Guaranteed Maximum Price proposal. In the event that the Owner, PM or Architect discover any inconsistencies or inaccuracies in the information presented, they shall promptly notify the Construction Manager, who shall make appropriate adjustments to the Guaranteed Maximum Price proposal, its basis, or both. If the Guaranteed Maximum Price proposal submitted to the Owner exceeds the Owner's budget, the Construction Manager shall make appropriate recommendations to the Owner, PM and Architect for cost reductions, including but not limited to, substitution of materials or revisions or alterations to the Design, to bring the Project within the Owner's budget, but shall not delete necessary components of the Project without Owner's express written consent. In the event that the quality or scope identified in the Guaranteed Maximum Price proposal are unacceptable or exceed the Owner's identified budget, the Construction Manager shall work with the Owner, PM and Architect to develop options that are acceptable to Owner, that are within the Owner's budget, and that meet the Owner's requirements for dates of Substantial Completion and Final Completion.

§ 2.2.6 Following acceptance of a Guaranteed Maximum Price, the Owner and Construction Manager shall execute the Guaranteed Maximum Price Amendment amending this Agreement, a copy of which the Owner shall provide to the PM and Architect. The Guaranteed Maximum Price Amendment shall set forth the agreed upon Guaranteed Maximum Price with the information and assumptions upon which it is based.

§ 2.2.7 The Construction Manager shall not incur any cost to be reimbursed as part of the Cost of the Work prior to the commencement of the Construction Phase **without the prior authorization of the Owner or Owner's Designated Representative, as applicable.**

§ 2.2.8 The Owner shall authorize the Architect to provide the revisions to the Drawings and Specifications to incorporate the agreed upon assumptions and clarifications contained in the Guaranteed Maximum Price Amendment. The Owner shall promptly furnish those revised Drawings and Specifications to the Construction Manager as they are revised. The Construction Manager shall notify the Owner, PM and Architect of any inconsistencies between the Guaranteed Maximum Price Amendment and the revised Drawings and Specifications.

§ 2.2.9 The Construction Manager shall include in the Guaranteed Maximum Price any sales, consumer, use and similar taxes for the Work provided by the Construction Manager that are legally enacted and enforceable against the Owner, whether or not yet effective, at the time the Guaranteed Maximum Price Amendment is executed; provided, however, that the Construction Manager shall take such steps as necessary to not incur any taxes charges from which the Owner is exempt, and the Owner shall pay no such taxes to which it is exempt.

§ 2.3 Construction Phase

§ 2.3.1 General

§ 2.3.1.1 For purposes of Section 8.1.2 of the Modified A201–2007, the date of commencement of the Work shall mean the date of commencement of the Construction Phase.

§ 2.3.1.2 The Construction Phase shall commence upon the Owner's acceptance of the Construction Manager's Guaranteed Maximum Price proposal.

§ 2.3.2 Administration

§ 2.3.2.1 The Construction Manager shall enter into contracts with the trade contractors, subcontractors and suppliers that have been selected as provided in this Agreement.

§ 2.3.2.2 The contracts with the trade contractors, subcontractors and suppliers shall use contract forms submitted to the Owner, PM and Architect and deemed by Owner acceptable to the Owner and that pass through all requirement, obligations and duties that the Construction Manager owes Owner under this Agreement. The Owner shall be made a third-party beneficiary of such contracts.

§ 2.3.2.3 The contracts with the trade contractors, subcontractors and suppliers shall conform to the applicable payment and other procedural provisions of this Agreement, and shall not be awarded on the basis of cost plus a fee.

§ 2.3.2.4 The Construction Manager shall not enter into a contract with a “related party” according to Section 6.10.

§ 2.3.2.5 The Construction Manager, in coordination with the Program Manager, shall schedule and conduct meetings to discuss such matters as procedures, progress, coordination, scheduling, and status of the Work. The Construction Manager shall prepare and promptly distribute minutes to the Owner, PM and Architect.

§ 2.3.2.6 Upon the execution of the Guaranteed Maximum Price Amendment, the Construction Manager shall prepare and submit to the Owner, PM and Architect a construction schedule for the Work and submittal schedule in accordance with Section 3.10 of A201–2007.

§ 2.3.2.7 The Construction Manager shall record the progress of the Project. On a monthly basis, or otherwise as agreed to by the Owner, the Construction Manager shall submit written monthly progress reports to the Owner, PM and Architect, showing percentages of completion and other information required by the Owner. The Construction Manager shall also keep, and submit to the Owner and PM, a daily log containing a record for each day of weather, portions of the Work in progress detailed with work areas and trades, number of workers on site, identification of equipment on site, problems that might affect progress of the work, accidents, injuries, and other information required by the PM and Owner. The daily log shall be submitted to Owner and PM at any time during work hours and shall be presented for discussion at the meetings referenced in § 2.3.2.5 above.

§ 2.3.2.8 The Construction Manager shall with the PM develop a system of cost control for the Work, including regular monitoring of actual costs for activities in progress, including changes to the Work approved by Owner, and estimates for uncompleted tasks and proposed changes. The Construction Manager shall identify variances between actual and estimated costs and report the variances to the Owner, PM and Architect and shall provide this information in its monthly reports to the Owner, PM and Architect, in accordance with Section 2.3.2.7 above.

§ 2.3.2.9 To the extent that any portion of the Work requires a trench excavation exceeding five (5) feet in depth, in accordance with Texas Health and Safety Code Section 756.023(a), Construction Manager shall fully comply, and shall require any applicable subcontractor to comply, with:

- .1 The Occupational Safety and Health Administration standards for trench safety in effect for the Construction of the Work.
- .2 The special shoring requirements, if any, of the Owner.
- .3 Any geotechnical information obtained by Owner for use by the Construction Manager in the design of the trench safety system.

§ 2.3.2.10 Trench excavation safety protection shall be a separate pay item, and shall be based on linear feet of trench excavated. Special shoring requirements shall also be a separate pay item, and shall be based on the square feet of shoring used. Said cost shall be included within the Guaranteed Maximum Price.

§ 2.3.2.11 Trade Contractors, Subcontractors & Suppliers

§ 2.3.2.11.1 The Construction Manager shall publicly advertise for, in cooperation with the PM and Architect, and distribute all necessary bidding materials and receive bids or proposals from trade contractors, subcontractors, and suppliers, some of which may be designated by County, for the performance of all major elements of the Project Work. Any bids received before Owner’s acceptance of the GMP Proposal shall remain open until after the acceptance by Owner of the GMP Proposal. The Construction Manager may seek to self-perform portions of the Work required to be publicly advertised. If the Construction Manager submits its own proposal for any portion of

the Work, it shall do so in the same manner as required of all trade contractors, subcontractors, and suppliers and submit shall submit its proposal(s) to the PM at least twenty-four (24) hours prior to the published opening of bids. Owner, in consultation with the PM, shall decide whether or not Construction Manager's proposal for self-performing portions of the Project offers the best value to Owner. In opening proposals, neither Construction Manager nor Owner shall disclose the contents of a proposal. All proposals shall be made public pursuant to Texas law. If Construction Manager's proposal is selected by the Owner, the proposed cost for the self-performed work shall be paid to the Construction Manager, pursuant to progress payments, as if Construction Manager were a subcontractor. Such payments to Construction Manager shall be included in the Cost of the Work.

All trade contractors, subcontractors, and suppliers shall be selected on the basis of "best-value" to the Owner, utilizing the Competitive Sealed Proposals procurement process.

The Construction Manager shall adhere to and include among the other terms for bidding the following specific requirements of bidders in the information to proposers:

- .1 The successful proposer's responsibility to provide workers' compensation insurance in accordance with Texas Labor Code Chapter 406;
- .2 The successful proposer's responsibility to pay prevailing wages pursuant to Texas Government Code Chapter 2258;
- .3 A notice of the sales tax exemption for the Work and the procedure for obtaining any required exemption verification or certificate;
- .4 The notice regarding trench and shoring safety required by Texas Health and Safety Code Section 756.02;
- .5 Any other notice required by Owner.

Nothing herein shall preclude the Construction Manager from including other notices required or allowed by law. The Construction manager shall meet the requirements of Chapter 2269, Subchapter F, with respect to selection of and contracting with trade contractors, subcontractors and suppliers.

§ 2.3.2.11.2 The Construction Manager shall review all trade contractor and subcontractor bids or proposals in a manner that does not disclose the contents of the bid or proposal during the selection process to a person not employed by the Owner, PM or Architect or any other professional retained by the Owner. All bids or proposals shall be made available to the Owner on request and to the public after the later of the award of the contract or the seventh day after the date of final selection of bids or proposals. The Construction Manager shall prepare a Trade Contractor evaluation packet for each bid package with a recommended trade contractor for award. The evaluation packet shall identify all the bidders, their original proposals, any modifications or "bid-levelling", and any non-cost based evaluations used to make the final recommendation. The evaluation packet shall be submitted to the PM and Owner for review. Construction Manager will be allowed to enter into a subcontract with the recommended bidder if no objections are received from either the PM or Owner within seven (7) calendar days after the evaluation packet is submitted. The Construction Manager shall not be required to contract with anyone to whom the Construction Manager has reasonable objection. If the Construction Manager reviews, evaluates, and recommends to the Owner a bid or proposal from a trade contractor or subcontractor but the Owner requires another bid or proposal to be accepted, the Owner shall compensate the Construction Manager by an adjustment to the Guaranteed Maximum Price for any additional cost and risk that the Construction Manager incurs because of the Owner's requirement that another bid or proposal be accepted.

§2.3.3 Time, Milestones and Liquidated Damages

§2.3.3.1 The Contract Time with regard to the Construction Phase Services shall be measured from the date of commencement of the Work as provided pursuant to Section 2.3.1.1.

§2.3.3.2 The time of performance of the Construction Manager is the essence of this Agreement. The Construction Manager shall diligently prosecute the Work and achieve Substantial Completion of the Work within the Contract Time requirements set forth in Guaranteed Maximum Price Amendment, subject to adjustments as provided in the Contract Documents. After Substantial Completion, the Construction Manager shall diligently continue to prosecute the Work to final completion and shall achieve final completion of the punch list within thirty (30) days of

Substantial Completion and final completion of all other requirements of the Contract Documents within sixty (60) days of Substantial Completion, subject to adjustments as provided in the Contract Documents.

§2.3.3.3 Owner retains the right to identify specific areas of the Project for early Substantial Completion sufficient to allow for installation of Owner's equipment, furniture, millwork, phased use or partial occupancy of the facility. The parties acknowledge that a Modification of the Agreement may create milestones requiring certain phases or scopes of work to be substantially performed or completed at certain specified times. Collectively, the times required for early Substantial Completion and the milestones described above are referred to in the Contract Documents as "Critical Milestones." The Construction Manager's performance of Critical Milestones made a part of the Agreement are critical elements of the Contract Time requirements under the Agreement and are "of the essence" of the Agreement.

§2.3.3.4 The Owner reserves the right to modify or revise the Critical Milestones and any agreed construction schedule by written notice to Construction Manager. In the event that Construction Manager intends to request an increase in the Contract Sum or Contract Time as a result of such modification or revision of the Critical Milestones or the construction schedule, the Construction Manger shall comply with the notice requirements set forth in Section 15.1.2 of the Modified A201-2007.

§2.3.3.5 In the event Construction Manager shall fall behind schedule for any reason that does not justify an extension under Section 8.3 of the Modified A201-2007 of the Substantial Completion Date, Construction Manager shall, within 10 days after written request of Owner, develop and deliver a recovery plan to the Owner and PM with a recovery schedule and a program describing the additional manpower, overtime, material expediting, re-sequencing of the Work and other steps necessary for Construction Manager to meet the requirements of the Contract with regard to the Contract Time. Construction Manager shall not be entitled to compensation from the Owner or any increase in the Contract Sum for the schedule recovery efforts, except as to causes of delay for which a time extension is allowed under Section 8.3 of the Modified A201-2007. No approval or consent by the Owner or any plan for re-sequencing or acceleration of the Work submitted by Construction Manager pursuant to this Section shall constitute a waiver by Owner of any damages or losses that Owner may suffer by reason of such re-sequencing or the failure of the Construction Manager to meet the Substantial Completion Date.

§2.3.3.5.1 Owner shall additionally be entitled to direct the acceleration or re-sequencing of the Work in order to achieve completion prior to the required date for Substantial Completion, and Construction Manager shall be reimbursed for all additional costs actually incurred in respect thereto limited to the Cost of the Work, and Construction Manager shall be entitled to an increase adjustment to the GMP therefor. Before proceeding with any such Owner-directed acceleration plan under this subsection, the Construction Manager shall have received a duly prepared and authorized Change Order equitably adjusting the GMP in accordance with this Section 2.3.3.5.1.

§2.3.3.5.2 Notwithstanding any provision of the Contract Documents to the contrary, to the extent the Work is simultaneously delayed by a cause of delay for which Construction Manager is responsible and a cause of delay for which a time extension is allowed under Section 8.3 of the Modified A201-2007, Construction Manager's sole remedy will be an extension of the Contract Time without additional compensation.

§2.3.3.6 The agreed Substantial Completion Date anticipates that the Work will be delayed by the following number of days each month due to adverse weather and/or resulting site conditions:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
4	4	4	4	6	4	3	3	4	4	3	4

Work shall be considered delayed due to adverse weather and/or resulting site conditions only if Construction Manager is prevented from performing critical path activities for 50% or more of a day on which Construction Manager had scheduled to perform Work. Construction Manager will record on a daily basis whether its job progress has been materially affected by such conditions or resulting site conditions. Any such day lost due to adverse weather conditions or resulting site conditions shall be documented by independent weather records and photographs and shall, if reasonably possible, be made up by Construction Manager performing work on the ensuing Saturday or by extended hours during that week, and treating such as a work day for the purpose of complying with and meeting Construction Manager's construction schedule, it being understood that no application for extension of time will be made unless the critical path of the Project is affected. The Construction Manager will provide written

explanation and CPM schedule evidencing such impact has occurred. Construction Manager will notify Owner and PM of any such delay in writing, and on a monthly basis submit a report to the Owner and PM substantiating any days claimed to have been lost, over and above those allotted for in in this Section 2.3.3.6, due to adverse weather conditions and resulting site conditions. Each month, the parties shall agree in writing to the actual days lost for such delay and shall execute a Change Order after Substantial Completion equitably adjusting the Contract Time for the cumulative total of such days.

§ 2.3.3.7 Liquidated Damages.

§ 2.3.3.7.1 The Construction Manager acknowledges and agrees that, if the Construction Manager fails to achieve Substantial Completion of a **Critical Milestone (as defined in Section 2.3.3.3)** or the entire Work, as such dates may be amended from time to time in accordance with the Contract Documents, the Owner will sustain extensive damages and serious loss as a result of such failure. The exact amount of such damages will be difficult to ascertain. Therefore, the Owner and Construction Manager agree that, if the Construction Manager shall neglect, fail or refuse to achieve Substantial Completion of a **Critical Milestone** or the entire Work by the date required by the Contract Documents for Substantial Completion of such **Critical Milestone** or the entire Work, subject to adjustments in the Contract Time as provided in the Contract Documents, then the Construction Manager (and the Construction Manager's surety in the case of default) agrees to pay to the Owner as liquidated damages, and not as a penalty or forfeiture, Two Thousand, Five Hundred Dollars (\$2,500.00) per calendar day for each day of such delay, subject to the limitations and potential reductions set forth in this Section 2.3.3.7. Such liquidated damages are hereby agreed to be a reasonable pre-estimate of damages the Owner will incur as a result of delayed completion of the Work. The Owner may deduct liquidated damages described in this Subsection from any unpaid amounts then or thereafter due the Construction Manager under this Agreement. Any liquidated damages not so deducted from any unpaid amounts due the Construction Manager shall be payable to the Owner at the demand of the Owner, together with interest from the date of the demand at a rate equal to the lesser of the highest lawful rate of interest payable by the Construction Manager or *7% per annum*. The liquidated damages established in this Section 2.3.3.7 shall be the Construction Manager's sole liability for delay in achieving Substantial Completion of the Work by the date required by the Contract Documents. In no event shall Construction Manager be liable for aggregate liquidated damages in excess of Two Hundred, Fifty Thousand Dollars (\$250,000.00).

Notwithstanding any provision of the Contract Documents to the contrary, in the event multiple **Critical Milestones** are subject to an unexcused delay, the Construction Manager shall only be assessed liquidated damages in connection with the **Critical Milestone** for which the highest total liquidated damages are owed.

§ 2.3.4 Additional Requirements for the Work

§ 2.3.4.1 The Construction Manager shall fully and properly execute all of the Work described in the Contract Documents and reasonably inferable therefrom, except to the extent specifically indicated in the Contract Documents to be the responsibility of others.

§ 2.3.4.2 The Construction Manager shall confine its operations and restrict its staging and storage of machinery, equipment, and materials to those areas within the Project site or to such other areas authorized in writing by the Owner (the "**Staging Areas**") and shall operate in accordance with the logistics plan prepared by the Construction Manager in consultation with the PM and approved by Owner ("**Logistics Plan**"). Construction Manager shall not unduly encumber the Project site and adjacent areas with any materials or equipment and shall cooperate with Owner's separate contractors in providing reasonable access to and within the Project site and any construction occurring there and in adjacent areas. The Project site and Staging Areas shall be maintained at all time in an organized and clean manner.

§ 2.3.4.2.1 The Owner reserves the right to make reasonable modifications or revisions to the Construction Manager's Logistics Plan by written notice to Construction Manager. In the event that Construction Manager intends to request an increase in the Contract Sum or Contract Time as a result of such modification or revision of the Construction Manager's Logistics Plan, the Construction Manager shall comply with the notice requirements set forth in Section 4.3 of the Modified A201-2007.

§ 2.3.4.3 The Construction Manager shall furnish only skilled and properly trained staff for performance of the Work. The key members of the Construction Manager's staff shall be persons identified in the Construction Manager's Statement of Qualifications and agreed upon with the Owner, any such agreement not to be unreasonably

withheld. Such key members of the Construction Manager's staff shall not be changed without the written consent of the Owner, unless such person becomes unable to perform any required duties due to death, disability, transfer, or termination of employment with the Construction Manager. Without limiting the foregoing, during the performance of the Work, the Construction Manager shall keep a competent superintendent at the Project site at all times whose work responsibilities are solely dedicated to the Project, who is fully authorized to act on behalf of the Construction Manager. Notice from the Owner to such superintendent in connection with defective Work or instructions for performance of the Work shall be considered notice of such issues to the Construction Manager. Construction Manager shall remove from the Project any of Construction Manager's employees which Owner reasonably determines to be incompetent, unfit or otherwise objectionable.

§ 2.4 Professional Services

Section 3.12.10 of the Modified A201–2007 shall apply to both the Preconstruction and Construction Phases.

§ 2.5 Hazardous Materials

Section 10.3 of the Modified A201–2007 shall apply to both the Preconstruction and Construction Phases.

ARTICLE 3 OWNER'S RESPONSIBILITIES

§ 3.1 Information and Services Required of the Owner

§ 3.1.1 The Owner shall provide information with reasonable promptness, regarding requirements for and limitations on the Project, including a written program which shall set forth the Owner's objectives, constraints, and criteria, including schedule, space requirements and relationships, flexibility and expandability, special equipment, systems, sustainability and site requirements.

§ 3.1.2 Prior to the execution of the Guaranteed Maximum Price Amendment, the Construction Manager may request in writing that the Owner provide reasonable evidence that the Owner has made financial arrangements to fulfill the Owner's obligations under the Contract. Thereafter, the Construction Manager may only request such evidence if (1) the Owner fails to make payments to the Construction Manager as the Contract Documents require, (2) a change in the Work materially changes the Contract Sum, or (3) the Construction Manager identifies in writing a reasonable concern regarding the Owner's ability to make payment when due. The Owner shall furnish such evidence as a condition precedent to commencement or continuation of the Work or the portion of the Work affected by a material change. After the Owner furnishes the evidence, the Owner shall not materially vary such financial arrangements without prior notice to the Construction Manager and Architect.

§ 3.1.3 The Owner has established an overall budget for the Project based upon consultation with the Construction Manager, PM and Architect, which may include contingencies, as determined in the Owner's sole discretion, for Changes in the Work and other costs that are the responsibility of the Owner.

§ 3.1.4 Structural and Environmental Tests, Surveys and Reports. During the Preconstruction Phase, the Owner shall furnish the following information or services with reasonable promptness. The Owner shall also furnish any other information or services under the Owner's control and relevant to the Construction Manager's performance of the Work with reasonable promptness after receiving the Construction Manager's written request for such information or services. Such documents shall be provided for information only and are not warranted or represented to show the conditions at the Project site accurately. Construction Manager may use the information at its own risk and shall use customary and reasonable precautions relating to the performance of the Work. Construction Manager shall perform all Work to avoid damaging any cables, pipes, pipelines and other utilities on the Property. Construction Manager shall be responsible for any damage done to such cables, pipes, pipelines and other utilities during the Work.

§ 3.1.4.1 The Owner shall furnish tests, inspections and reports required by law and as otherwise agreed to by the parties, such as structural, mechanical, and chemical tests, tests for air and water pollution, and tests for hazardous materials.

§ 3.1.4.2 The Architect shall furnish surveys describing physical characteristics, legal limitations and utility locations for the site of the Project, and a legal description of the site. The surveys and legal information shall include, as applicable, grades and lines of streets, alleys, pavements and adjoining property and structures; designated wetlands; adjacent drainage; rights-of-way, restrictions, easements, encroachments, zoning, deed restrictions, boundaries and contours of the site; locations, dimensions and necessary data with respect to existing buildings, other improvements

and trees; and information concerning available utility services and lines, both public and private, above and below grade, including inverts and depths. All the information on the survey shall be referenced to a Project benchmark.

§ 3.1.4.3 The Architect shall furnish services of geotechnical engineers, which may include but are not limited to test borings, test pits, determinations of soil bearing values, percolation tests, evaluations of hazardous materials, seismic evaluation, ground corrosion tests and resistivity tests, including necessary operations for anticipating subsoil conditions, with written reports and appropriate recommendations.

§ 3.1.4.4 During the Construction Phase, the Owner shall furnish information or services required of the Owner by the Contract Documents with reasonable promptness. The Owner shall also furnish any other information or services under the Owner's control and relevant to the Construction Manager's performance of the Work with reasonable promptness after receiving the Construction Manager's written request for such information or services.

§ 3.2 Owner's Designated Representative

The Owner shall identify a representative authorized to act on behalf of the Owner with respect to the Project. The Owner's Designated Representative shall render decisions promptly and furnish information expeditiously, so as to avoid unreasonable delay in the services or Work of the Construction Manager. Except as otherwise provided in Section 4.2.1 of Modified A201-2007, the Architect does not have such authority. The term "Owner" means the Owner or the Owner's Designated Representative. Owner's Designated Representative shall have authority to act on behalf of the Owner, including appropriate reviews and approvals, with respect to the Project in all circumstances, including Applications for Payment and Allowance Expenditure Authorizations, except as follows: **(A) Approval of the final Schematic Design drawings; (B) Approval of any additional funding to the Project in excess of the \$150,000,000 project budget; (C) Approval of any new contract in excess of \$50,000; (D) Approval of any Change Order increasing a contract in excess of \$50,000; (E) Approval of any Change Orders increasing the contractual duration; and (F) Approval of final payments and contracts close-out.** ~~(1) approval of the Guaranteed Maximum Price Amendment; (2) approval of Change Orders increasing the Guaranteed Maximum Price in excess of \$50,000; and (3) approval of Change Orders increasing the contractual duration.~~ The Owner's Designated Representative has only such authority as granted by the Commissioners' Court of the Owner.

§ 3.2.1 Legal Requirements. The Owner shall furnish such legal, insurance and accounting services, including auditing services, as it may determine are reasonably necessary at any time for the Project to meet the Owner's needs and interests.

§ 3.3 Architect

The Owner has retained an Architect to provide services, duties, and responsibilities as described in the agreement between the Owner and Architect. The Owner shall provide the Construction Manager a copy of the executed agreement between the Owner and the Architect. Owner reserves the right to change the Architect at any time or to modify the terms of its contractual agreement with the Architect. Owner shall give Construction Manager reasonably timely notice of any termination or replacement of the Architect and of any material changes in its contractual agreement with the Architect that bears on the Work hereunder or the responsibilities or liabilities of the Construction Manager arising under this Agreement

§ 3.4 Program Manager

The Owner has retained a Program Manager to provide services, duties, and responsibilities as described in the agreement between the Owner and Program Manager. The Owner shall provide the Construction Manager a copy of the executed agreement between the Owner and the Program Manager. Owner reserves the right to change the Program at any time, to modify the terms of its contractual agreement with the Program Manager or to terminate the Program Manager, with or without a replacement. Owner shall give Construction Manager reasonably timely notice of any termination or replacement of the Program Manager and of any material changes in its contractual agreement with the Program Manager that bears on the Work hereunder or the responsibilities or liabilities of the Construction Manager arising under this Agreement

ARTICLE 4 COMPENSATION AND PAYMENTS FOR PRECONSTRUCTION PHASE SERVICES

§ 4.1 Compensation

§ 4.1.1 For the Construction Manager's Preconstruction Phase services, the Owner shall compensate the Construction Manager as follows:

§ 4.1.2 For the Construction Manager's Preconstruction Phase services described in Sections 2.1 and 2.2:
(Insert amount of, or basis for, compensation and include a list of reimbursable cost items, as applicable.)

«A lump sum of Five Hundred, Fifteen Thousand and Sixty-Five Dollars (\$515,065) , which includes consideration for all expenses necessary to timely and properly deliver all Preconstruction Phase services. »

§ 4.1.3 Omitted.

§ 4.1.4 Compensation based on Direct Personnel Expense, if any, includes the direct salaries of the Construction Manager's personnel providing Preconstruction Phase services on the Project and the Construction Manager's costs for the mandatory and customary contributions and benefits related thereto, such as employment taxes and other statutory employee benefits, insurance, sick leave, holidays, vacations, employee retirement plans and similar contributions.

§ 4.2 Payments

§ 4.2.1 Unless otherwise agreed, payments for services shall be made monthly in proportion to services performed.

§ 4.2.2 Payments are due and payable upon presentation of the Construction Manager's invoice with all supporting documentation as reasonably required by the Owner. Amounts for goods received and services provided that are not in dispute and due but are unpaid «Thirty-One days » («31 ») days after the invoice is properly received by the Owner shall bear interest at the rate entered below:

One percent (1%) plus the prime rate published by the Wall Street Journal on the first day of July of the preceding fiscal year that does not fall on a Saturday or Sunday, *per annum*.

ARTICLE 5 COMPENSATION FOR CONSTRUCTION PHASE SERVICES

§ 5.1 For the Construction Manager's performance of the Work as described in Section 2.3, the Owner shall pay the Construction Manager the Contract Sum in current funds for the proper and timely performance of this Agreement. The "Contract Sum" is the Cost of the Work as defined in Section 6.1.1 plus the Construction Manager's Fee and General Conditions Fee, plus the Contractor's Contingency, plus any other allowances, the total of which shall not exceed the Guaranteed Maximum Price. For the purposes of Article 5, the Contract Sum does not include any Preconstruction Phase compensation.

§ 5.1.1 The Construction Manager's Fee:

(State a lump sum, percentage of Cost of the Work or other provision for determining the Construction Manager's Fee.)

«»« The "Construction Manager's Fee" for the Work shall be two and two tenths percent (2.2 %) of the Contract Sum minus the sum of the General Conditions Fee as defined in Section 5.1.5 and minus any Construction Manager Fee paid or to be paid. The Construction Manager's Fee, generally, shall include all home office expenses, profit, overhead, transportation, travel, meals, and lodging, legal fees, internal accounting, relocation expenses, administrative support, office trailer equipment & supplies, office printing, training, licensing, and other expenses as detailed in Exhibit D, Division of Cost Elements. »

§ 5.1.2 The method of adjustment of the Construction Manager's Fee for changes in the Work:

« The Construction Manager's Fee shall be adjusted by Change Order that modifies the final and duly accepted Guaranteed Maximum Price, by three percent (3%). »

§ 5.1.3 Limitations, if any, on a Subcontractor's overhead and profit for increases in the cost of its portion of the Work:

See A201-2007, § 7.1.6.

§ 5.1.4 Rental rates for Construction Manager-owned equipment shall not exceed «ninety» percent («90 » %) of the standard rate paid at the place of the Project.

§ 5.1.5 The General Conditions Fee

The General Conditions Fee shall be identified separately on the GMP Amendment as a not-to-exceed reimbursable expense, subject to the limitations of ~~the~~ General Conditions Fee as submitted **by the Construction Manager and as described in Exhibit C Updated Price Proposal** ~~in the original Request for Proposals~~. The General Conditions Fee is the Construction Manager's direct cost necessary to execute the Work, which includes the professional staff's (such as Project Executive, Project Manager, Superintendent, etc.) labor cost (salary and labor burden), project safety measures (such as First Aid kits, Barricades, Temporary Fencing, Temporary Parking, golf carts, etc.), office trailer installation and rental, on-site sanitary facilities, on-site technology requirements, drinking water & ice, temporary water ~~and power~~ expenses, project signs, ~~dumpsters~~, plan reproductions, construction photographs and videography, ~~builder's risk insurance, small tools, equipment rental charges for use by Construction Manager not included in Section 6.5.1,~~ and other expenses as detailed in Exhibit D, Division of Cost Elements.

The Construction Manager shall submit detailed receipts, invoices, and other substantiating material as may be required by Owner and PM to verify the General Conditions Fee on a monthly basis. At the end of the project, unspent General Conditions Fee shall be returned to the Owner subject to the terms of 5.2.4. Expenses exceeding the not-to-exceed General Conditions Fee as identified on the GMP Amendment shall be the sole responsibility of the Construction Manager (Contractor's Contingency may not be used to cover overages in the General Conditions Fee).

Changes to the General Conditions Fee will only be considered with a valid Time Extension claim. The GMP Amendment should include the hourly rates, including provisions for escalation, for each of its staff members as assigned under the General Conditions Fee, to serve as the basis for any potential time extension evaluation.

§ 5.2 Guaranteed Maximum Price

§ 5.2.1 The Construction Manager guarantees that the Contract Sum shall not exceed the Guaranteed Maximum Price set forth in the Guaranteed Maximum Price Amendment, as it is amended from time to time. To the extent the Contract Sum exceeds the Guaranteed Maximum Price, the Construction Manager shall bear such costs in excess of the Guaranteed Maximum Price without reimbursement or additional compensation from the Owner.

§ 5.2.2 The Guaranteed Maximum Price is subject to additions and deductions by Change Order as provided in the Contract Documents and the Date of Substantial Completion shall be subject to adjustment as provided in the Contract Documents.

§ 5.2.3 Buyout Savings

As Trade Contractors, Subcontractors, and Suppliers are procured pursuant to Section 2.3.2.11, the Construction Manager shall maintain a buyout log, indicating any potential savings from the procured subcontractors against the Estimated Cost of Work in the GMP Amendment. At ninety (90) days following the Owner's acceptance of the Guaranteed Maximum Price, the Construction Manager and PM shall meet to review the buyout log and identify any actual savings from the sum of all procurements to-date against the Estimated Cost of Work. If Construction Manager and PM mutually agree that actual savings exist, those savings will be transferred out of the Cost of Work into an Owner-controlled allowance within the Contract, for Owner's exclusive use, without the need for a Change Order. Any funds transferred in this manner will no longer be available for the use of the Construction Manager to fund the Cost of Work. Following the initial meeting, the Construction Manager and PM shall continue to meet every sixty (60) days to review the buyout log and identify any potential savings that may continue to accrue.

§ 5.2.4 Guaranteed Maximum Price Savings

Should the final audited Contract Sum be less than the Guaranteed Maximum Price set forth in the GMP Amendment, as it is amended from time to time, those savings, including remaining Contractor's Contingency, unspent General Conditions, and any other allowances, if any, shall be returned to the Owner in the form of a final deductive Change Order at the end of the Project, inclusive of any Construction Manager's fee applicable to those savings.

§ 5.3 Changes in the Work

§ 5.3.1 The Owner may, without invalidating the Contract, order changes in the Work within the general scope of the Contract consisting of additions, deletions or other revisions. The Owner shall issue such changes in writing. The

Construction Manager may be entitled to an equitable adjustment in the Contract Time as a result of changes in the Work, as provided in the Modified A201-2007.

§ 5.3.2 Adjustments to the Guaranteed Maximum Price on account of changes in the Work subsequent to the execution of the Guaranteed Maximum Price Amendment may be determined by any of the methods listed in Section 7.3.3 of the Modified AIA Document A201–2007, General Conditions of the Contract for Construction.

§ 5.3.3 In calculating adjustments to subcontracts (except those awarded with the Owner’s prior consent on the basis of cost plus a fee), the terms “**cost**” and “**fee**” as used in Section 7.3.3.3 of the Modified AIA Document A201–2007 and the term “**costs**” as used in Section 7.3.7 of the Modified AIA Document A201–2007 shall have the meanings assigned to them in the Modified AIA Document A201–2007 and shall not be modified by Sections 5.1 and 5.2, Sections 6.1 through 6.7, and Section 6.8 of this Agreement. Adjustments to subcontracts awarded with the Owner’s prior consent on the basis of cost plus a fee shall be calculated in accordance with the terms of those subcontracts.

§ 5.3.4 In calculating adjustments to the Guaranteed Maximum Price, the terms “**cost**” and “**costs**” as used in the above-referenced provisions of the Modified AIA Document A201–2007 shall mean the Cost of the Work as defined in Sections 6.1 to 6.7 of this Agreement and the term “**fee**” shall mean the Construction Manager’s Fee as defined in Section 5.1 of this Agreement.

§ 5.3.5 Except as otherwise expressly provided herein or in the GMP Amendment, in calculating an adjustment to the Guaranteed Maximum Price for a change in the Work, such adjustment shall be based upon the actual increase or reduction of such costs rather than a percentage or otherwise predetermined mark-up or mark-down. The Construction Manager will not be automatically entitled to additional Construction Manager’s Fee or General Conditions Fee, but will rather be required to detail any costs, if any, that may be required to deliver the change. Generally, no additional Construction Manager’s Fee or General Conditions Fee will be allowed if the Contract Time is not extended.

ARTICLE 6 COST OF THE WORK FOR CONSTRUCTION PHASE

§ 6.1 Costs to Be Reimbursed

§ 6.1.1 The term “**Cost of the Work**” shall mean costs necessarily incurred by the Construction Manager in the proper performance of the Work. Such costs shall be at rates not higher than the standard paid at the place of the Project except with prior consent of the Owner. The Cost of the Work shall include only the items set forth in Sections 6.1 through 6.7.

§ 6.1.2 Where any cost is subject to the Owner’s prior approval, the Construction Manager shall obtain this approval prior to incurring the cost. The parties shall endeavor to identify any such costs prior to executing Guaranteed Maximum Price Amendment.

§ 6.2 Construction Manager’s Labor Costs

All of Construction Manager’s labor costs necessary to oversee **or facilitate** the Work, **whether on or off site**, shall be included in the Construction Manager’s Fee or General Conditions Fee, as appropriate. All Construction Manager’s labor costs directly associated with a trade contractor work package will be treated as a subcontract cost, to the extent the labor utilized to deliver those subcontract services does not duplicate the administrative or oversight services detailed in Section 5.1.

§ 6.3 Subcontract Costs

Payments made by the Construction Manager to Subcontractors in accordance with the requirements of the subcontracts.

§ 6.4 Costs of Materials and Equipment Incorporated in the Completed Construction

§ 6.4.1 Costs, including transportation and storage, of materials and equipment incorporated or to be incorporated in the completed construction.

§ 6.4.2 Costs of materials described in the preceding Section 6.4.1 in excess of those actually installed to allow for reasonable waste and spoilage. Unused excess materials, if any, shall become the Owner’s property at the completion of the Work or, at the Owner’s option, shall be sold by the Construction Manager. Any amounts realized from such sales shall be credited to the Owner as a deduction from the Cost of the Work.

§ 6.5 Costs of Other Materials and Equipment, Temporary Facilities and Related Items

§ 6.5.1 Costs of transportation, storage, installation, maintenance, dismantling and removal of materials, supplies, temporary facilities, machinery, equipment and hand tools not customarily owned by construction workers that are provided by the Construction Manager at the site and fully consumed in the performance of the Work. Costs of materials, supplies, temporary facilities, machinery, equipment and tools that are not fully consumed shall be based on the cost or value of the item at the time it is first used on the Project site less the value of the item when it is no longer used at the Project site. Costs for items not fully consumed by the Construction Manager shall mean fair market value. This Section 6.5.1 is limited to those items not covered by Section 5.1.

§ 6.5.2 Omitted.

§ 6.5.3 Costs of removal of debris from the site of the Work and its proper and legal disposal.

§ 6.5.4 Omitted.

§ 6.5.5 Omitted.

§ 6.5.6 Costs of materials and equipment suitably stored off the site at a mutually acceptable location, subject to the Owner's prior approval and specified insurance and bonding requirements.

§ 6.6 Miscellaneous Costs

§ 6.6.1 Premiums for that portion of insurance and bonds required by the Contract Documents that can be directly attributed to this Contract. Self-insurance for either full or partial amounts of the coverages required by the Contract Documents, with the Owner's prior approval.

§ 6.6.2 Sales, use or similar taxes imposed by a governmental authority that are related to the Work and for which the Construction Manager is liable and the Owner has no exemption.

§ 6.6.3 Fees and assessments for the building permit and for other permits, licenses and inspections for which the Construction Manager is required by the Contract Documents to pay.

§ 6.6.4 Fees of laboratories for tests required by the Contract Documents, except those related to defective or nonconforming Work for which reimbursement is excluded by Section 13.5.3 of AIA Document A201-2007 or by other provisions of the Contract Documents, and which do not fall within the scope of Section 6.7.3.

§ 6.6.5 Royalties and license fees paid for the use of a particular design, process or product required by the Contract Documents; the cost of defending suits or claims for infringement of patent rights arising from such requirement of the Contract Documents; and payments made in accordance with legal judgments against the Construction Manager resulting from such suits or claims and payments of settlements made with the Owner's consent. If such royalties, fees and costs are excluded by the last sentence of Section 3.17 of the Modified AIA Document A201-2007 or other provisions of the Contract Documents, then they shall not be included in the Cost of the Work. Construction Manager will promptly notify Owner in writing if Construction Manager discovers that a particular design, process or product required of Construction Manager under the Contract Documents requires the payment of a license fee or royalty. Upon receipt of such notice, the Owner shall advise promptly Construction Manager whether or not the Owner is willing to pay such license fee or royalty. If Owner is not willing to pay such license fee or royalty, the Owner shall cause the Architect to revise the Contract Documents as necessary to eliminate the need for such license fee or royalty to be paid, and the Contract Time and GMP shall be adjusted accordingly.

§ 6.6.6 Omitted.

§ 6.6.7 Deposits lost for causes other than the Construction Manager's negligence or failure to fulfill a specific responsibility in the Contract Documents.

§ 6.6.8 Omitted

§ 6.6.9 Omitted.

§ 6.7 Other Costs and Emergencies

§ 6.7.1 Other costs incurred in the performance of the Work if, and to the extent, approved in advance in writing by the Owner.

§ 6.7.2 Costs incurred in taking action to prevent threatened damage, injury or loss in case of an emergency affecting the safety of persons and property, as provided in Section 10.4 of the Modified AIA Document A201–2007, provided that the emergency is not caused by the negligence or failure to fulfill a specific responsibility of the Construction Manager to the Owner as set forth in the Contract Documents or the failure of the Construction Manager’s personnel to adequately supervise the Work of the Subcontractors.

§ 6.7.3 Costs of repairing or correcting damaged or nonconforming Work executed by the Construction Manager, Subcontractors of any tier or suppliers, provided that such damaged or nonconforming Work was not caused by negligence or failure to fulfill a specific responsibility of the Construction Manager and only to the extent that the cost of repair or correction is not recoverable by the Construction Manager from insurance, sureties, Subcontractors, suppliers, or others. Construction Manager shall notify the Owner before incurring costs described in this Section 6.7.3. The Contractor’s contingency may be utilized to cover these costs, with the prior written authorization of Owner.

§ 6.7.4 The costs described in Sections 6.1 through 6.7 shall be included in the Cost of the Work, notwithstanding any provision of AIA Document A201–2007 or other Conditions of the Contract which may require the Construction Manager to pay such costs, unless such costs are excluded by the provisions of Section 6.8.

§ 6.8 Costs Not To Be Reimbursed

§ 6.8.1 The Cost of the Work shall not include the items listed below:

- .1 Salaries and other compensation of the Construction Manager’s personnel stationed at the Construction Manager’s principal office or offices other than the site office, except as specifically provided in Section 6.2, or as may be provided in Article 11;
- .2 Expenses of the Construction Manager’s principal office and offices other than the site office;
- .3 Overhead and general expenses, except as may be expressly included in Sections 6.1 to 6.7;
- .4 The Construction Manager’s capital expenses, including interest on the Construction Manager’s capital employed for the Work;
- .5 Except as provided in Section 6.7.3 of this Agreement, costs due to the negligence or failure of the Construction Manager, Subcontractors of any tier and suppliers or anyone directly or indirectly employed by any of them or for whose acts any of them may be liable to fulfill a specific responsibility of the Contract;
- .6 Any cost not specifically and expressly described in Sections 6.1 to 6.7;
- .7 Costs, other than costs included in Change Orders approved by the Owner, that would cause the Guaranteed Maximum Price to be exceeded;
- .8 Costs for services incurred during the Preconstruction Phase;
- .9 Subject to and as limited by Section 9.3.3 of the Modified A201-2007, costs and expenses arising from Construction Manager’s indemnity obligations; and
- .10 Costs to repair defective Work and other costs to comply with Construction Manager’s warranty obligations under the Agreement, except as may be expressly included in Section 6.7.3 above.

§ 6.9 Discounts, Rebates and Refunds

§ 6.9.1 Cash discounts obtained on payments made by the Construction Manager shall accrue to the Owner if (1) before making the payment, the Construction Manager included them in an Application for Payment and received payment from the Owner, or (2) the Owner has deposited funds with the Construction Manager with which to make payments; otherwise, cash discounts shall accrue to the Construction Manager. Construction Manager shall take reasonable advantage of all available discounts, rebates and refunds for supplies, materials and equipment connected with the Work and that conform to the Contract Documents. Such discounts, rebates and refunds shall accrue to the benefit of the Owner. Cash discounts obtained on payments made by the Construction Manager shall accrue to the Owner. Trade discounts, rebates, refunds and amounts received from sales of surplus materials and equipment shall accrue to the Owner, and the Construction Manager shall make provisions so that they can be obtained.

§ 6.9.2 Amounts that accrue to the Owner in accordance with the provisions of Section 6.9.1 shall be credited to the Owner as a deduction from the Cost of the Work.

§ 6.10 Related Party Transactions

§ 6.10.1 For purposes of Section 6.10, the term “related party” shall mean a parent, subsidiary, affiliate or other entity having common ownership or management with the Construction Manager; any entity in which any stockholder in, or management employee of, the Construction Manager owns any interest in excess of ten percent in the aggregate; or any person or entity which has the right to control the business or affairs of the Construction Manager. The term “related party” includes any member of the immediate family of any person identified above.

§ 6.10.2 If any of the costs to be reimbursed arise from a transaction between the Construction Manager and a related party, the Construction Manager shall notify the Owner of the specific nature of the contemplated transaction, including the identity of the related party and the anticipated cost to be incurred, before any such transaction is consummated or cost incurred. If the Owner, after such notification, in its sole discretion authorizes the proposed transaction in writing, then the cost incurred shall be included as a cost to be reimbursed, and the Construction Manager shall procure the Work, equipment, goods or service from the related party, as a Subcontractor. If the Owner does not so authorize the transaction, the Construction Manager shall procure the Work, equipment, goods or service from some person or entity other than a related party according to the terms of this Agreement and applicable procurements laws.

§ 6.11 Accounting Records

The Construction Manager shall keep full and detailed records, Project files and accounts related to the cost of the Work and exercise such controls as may be necessary for proper financial management under this Contract and to substantiate all costs incurred. The accounting and control systems shall be satisfactory to the Owner and maintain records according to GAAP. The Owner and the Owner’s auditors shall, during regular business hours and upon reasonable notice, be afforded access to, and shall be permitted to audit and copy, the Construction Manager’s records and accounts, including complete documentation supporting accounting entries, books, correspondence, instructions, drawings, receipts, subcontracts, Subcontractor’s proposals, purchase orders, vouchers, memoranda and other data relating to this Contract and the Work hereunder, including but not limited to all records and back-up documentation relating to reimbursable expenses and Cost of Work items. The Construction Manager shall preserve these records for a period of five years after final payment, or for such longer period as may be required by law.

ARTICLE 7 PAYMENTS FOR CONSTRUCTION PHASE SERVICES

§ 7.1 Progress Payments

§ 7.1.1 The Construction Manager shall submit monthly Applications for Payment to both the Architect and PM (with a copy to Owner), on AIA Form G702 and continuation sheets on AIA Form G703, as modified and included in Exhibit E, for approval. Upon approval by PM and Architect, PM shall forward the approved Application for Payment to the Owner. Based upon Applications for Payment submitted to the Owner, the PM and the Architect by the Construction Manager, with all supporting documentation as herein provided and Certificates for Payment issued by the PM or Architect, the Owner shall make progress payments on account of the Contract Sum to the Construction Manager as provided below and elsewhere in the Contract Documents.

- .1 During the final week of the month immediately preceding a month in which the Construction Manager will submit an Application for Payment, the Owner, the PM, Architect and the Construction Manager shall meet to review a preliminary draft of such Application for Payment (hereinafter referred to as a "Pencil Draw") prepared by the Construction Manager. Each line item will be reviewed and either accepted or noted for changes. The Owner may withhold approval for charges as provided in Modified A201-2007.
- .2 The Construction Manager shall revise the Pencil Draw in accordance with any bona fide dispute about the Work, objection or recommendation of the Owner, PM or the Architect that is consistent with the requirements of the Contract Documents. Such revised Pencil Draw shall be re-submitted by the Construction Manager to the Owner, PM and Architect.
- .3 A second meeting will be held with the Owner, PM, Architect and Construction Manager to review the revised Pencil Draw. If acceptable, PM will recommend approval to the Owner and Architect. If changes need to occur, PM will work with the Construction Manager to get all changes made as soon as possible for acceptance.

- .4 The revised and accepted Application for Payment shall be promptly certified, and the approved Certificate of Payment shall be considered the “invoice” under Chapter 2251 of the Texas Government Code.

§ 7.1.2 The period covered by each Application for Payment shall be one calendar month ending on the last day of the month.

§ 7.1.3 The Architect and PM shall have seven (7) days from date of receipt from the Construction Manager of an Application for Payment to approve or reject all or any part of the Application for Payment. Provided that all conditions precedent to payment set forth in the Contract Documents have been satisfied, including but not limited to such documentation as required by the Modified A201-2007, the Owner shall make payment of the certified amount to the Construction Manager not later than thirty (30) days after the Owner receives the approved Certificate of Payment. The time periods stated in this Section supersede those stated in Section 9.4.1 of the Modified AIA Document A201-2007.

§ 7.1.4 With each Application for Payment, the Construction Manager shall submit payrolls, petty cash accounts, receipted invoices or invoices with check vouchers attached, and any other evidence required by the Owner, PM or Architect to demonstrate that cash disbursements already made by the Construction Manager on account of the Cost of the Work equal or exceed progress payments already received by the Construction Manager, less that portion of those payments attributable to the Construction Manager’s Fee, plus payrolls for the period covered by the present Application for Payment.

§ 7.1.5 Each Application for Payment shall be based on the most recent, approved schedule of values submitted by the Construction Manager in accordance with the Contract Documents. The schedule of values shall allocate the entire Guaranteed Maximum Price among the various portions of the Work, except that the Construction Manager’s Fee, any Allowances and agreed-upon Construction Contingency shall be shown as separate items, accounting for any transfers that may have been approved. The schedule of values shall be prepared in such form and supported by such data to substantiate its accuracy as the Architect may require. This schedule, unless objected to by the Owner, PM or Architect, shall be used as a basis for reviewing the Construction Manager’s Applications for Payment and determining the amount due for each such progress payment but shall not be considered as a basis for increasing or decreasing the Guaranteed Maximum Price. After the entire Work is “bought-out” the schedule of values shall not be modified or revised without the prior written consent of the Owner and the Construction Manager in each instance.

§ 7.1.6 Applications for Payment shall show the percentage of completion of each portion of the Work as of the end of the period covered by the Application for Payment. The percentage of completion shall be the lesser of (1) the percentage of that portion of the Work which has actually been completed, or (2) the percentage obtained by dividing (a) the expense that has actually been incurred by the Construction Manager on account of that portion of the Work for which the Construction Manager has made or intends to make actual payment prior to the next Application for Payment by (b) the share of the Guaranteed Maximum Price allocated to that portion of the Work in the schedule of values.

§ 7.1.6.1 In addition to other required items, each Application for Payment shall be accompanied by the following documentation, statements and information, all in form and substance reasonably satisfactory to the Owner and in compliance with applicable state statutes:

- .1 a duly executed statement from Construction Manager detailing all moneys paid out or costs incurred by it on account of the Cost of the Work and for which payment is sought;
- .2 with regard to payments sought for Work (labor and materials) furnished by Subcontractors (including vendors or material suppliers), Construction Manager must identify all Subcontractors for whose Work payment is being sought in the Application and provide each Subcontractor’s application for payment;
- .3 with regard to Work performed by Construction Manager or its own forces, Construction Manager must provide an accurate description of the Work performed and for which payment is sought, including such supporting documentation required by this Agreement;
- .4 a statement, under oath, by Construction Manager that all bills or obligations incurred by Construction Manager, for which previous Applications for Payment have been submitted and

paid by Owner, have been paid by Construction Manager, or, if some bill or obligation remains outstanding, the statement shall fully disclose the outstanding bill or obligation by stating the name of the person or entity to whom the bill or obligation remains outstanding, the amount of the outstanding bill or obligation, and the basis or reason why such bill or obligation has not been paid;

- .5 A statement, under oath, by Construction Manager that, to the best of its information and belief, no person or entity has a claim for payment or has asserted a claim for payment arising from or in connection with the Work performed under this Agreement, other than any claim which has been fully paid and duly released or is included in the Application for Payment and fully described in subparagraph .4 immediately above, or, if Construction Manager knows or believes such a claim exists or has been asserted or made, the statement shall fully disclose the claim by stating the name of the claimant or potential claimant, a description of the Work for which payment is claimed, the amount of such claim, and the basis or reason why such claim has not been paid;

§ 7.1.7 Subject to other provisions of the Contract Documents, the amount of each progress payment shall be computed as follows:

- .1 Take that portion of the Guaranteed Maximum Price properly allocable to completed Work as determined by multiplying the percentage of completion of each portion of the Work by the share of the Guaranteed Maximum Price allocated to that portion of the Work in the schedule of values, not to exceed the actual Cost of such Work incurred by the Construction Manager for such period, less the **ten percent (10%)** Retainage to be withheld. Pending final determination of cost to the Owner of changes in the Work, amounts not in dispute shall be included as provided in Section 7.3.9 of the Modified AIA Document A201–2007;
- .2 Add that portion of the Guaranteed Maximum Price properly allocable to materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work, or if approved in advance by the Owner or PM, suitably stored off the site at a location agreed upon in writing;
- .3 Add the Construction Manager's Fee, less retainage of ~~«ten»~~ percent (~~«10»~~ %). The Construction Manager's Fee shall be computed at the rate stated in Section 5.1 or, if the Construction Manager's Fee is stated as a fixed sum in that Section, shall be an amount that bears the same ratio to that fixed-sum fee as the Cost of the Work bears to a reasonable estimate of the probable Cost of the Work upon its completion;
- .4 Subtract retainage of ~~«ten»~~ percent (~~«10»~~ %) from that portion of the Work that the Construction Manager self-performs;
- .5 Subtract the aggregate of previous payments made by the Owner;
- .6 Subtract the shortfall, if any, indicated by the Construction Manager in the documentation required by Section 7.1.4 to substantiate prior Applications for Payment, or resulting from errors subsequently discovered by the Owner's auditors in such documentation; and
- .7 Subtract amounts, if any, for which the Architect or PM has withheld or nullified a Certificate for Payment as provided in Section 9.5 of the Modified AIA Document A201–2007.

§ 7.1.8 The Owner and Construction Manager shall agree upon ~~(1)~~ a mutually acceptable procedure for review and approval of payments to Subcontractors **and (2) the percentage of retainage held on Subcontracts**, and the Construction Manager shall execute subcontracts in accordance with those agreements. **Retainage on all Subcontracts shall be ten percent (10%)**. Construction Manager shall make such payments included in Construction Manager's Application for Payment to its Subcontractors within seven (7) days after receipt of payment from Owner.

§ 7.1.9 Except with the Owner's prior approval, the Construction Manager shall not make advance payments to suppliers for materials or equipment which have not been delivered and stored at the site.

§ 7.1.10 In taking action on the Construction Manager's Applications for Payment, the Owner, PM and Architect shall be entitled to rely on the accuracy and completeness of the information furnished by the Construction Manager and shall not be deemed to represent that the Owner, PM or Architect has made a detailed examination, audit or arithmetic verification of the documentation submitted in accordance with Section 7.1.4 or other supporting data; that the Owner, PM or Architect has made exhaustive or continuous on-site inspections; or that the Owner, PM or Architect has made examinations to ascertain how or for what purposes the Construction Manager has used amounts

previously paid on account of the Contract. Such examinations, audits and verifications, if required by the Owner, will be performed by the Owner's auditors acting in the sole interest of the Owner.

§ 7.2 Final Payment

§ 7.2.1 Subject to Section 9.5.1 of the Modified A201-2007, "Final Payment," constituting the entire unpaid balance of the Contract Sum, shall be made by the Owner to the Construction Manager after, without limitation, the following:

- .1 the Construction Manager has fully, timely and properly performed the Contract except for the Construction Manager's responsibility to correct Work as provided in Section 12.2.2 of the Modified AIA Document A201-2007, and to satisfy other requirements, if any, which extend beyond final payment;
- .2 the Construction Manager has submitted a final accounting for the Cost of the Work and a final Application for Payment;
- .3 any other conditions precedent to final payment expressly set forth in the Contract Documents have been satisfied including but not limited to the following: (a) Construction Manager shall deliver to Owner the documents required by the Modified A201-2007 §3.19(d), (b) the Certificate of Occupancy required by the Modified A201-2007 §3.19(f) and (c) consent of surety;
- .4 the Construction Manager shall have delivered to Owner a reproducible sets of Record Documents, reflecting the "as-built" conditions of the Project at final completion, including, without limitation, all warranties, manuals, instructions, reports, and other such documentation as Owner may have previously requested or required by the Contract Documents; and
- .5 Commissioners' Court has duly approved such Final Payment.

§ 7.2.2 The Owner's auditors will review and report in writing on the Construction Manager's final accounting within 30 days after delivery of the final accounting to the Owner, PM and Architect by the Construction Manager. Based upon such Cost of the Work as the Owner's auditors report to be substantiated by the Construction Manager's final accounting, and provided the other conditions of Section 7.2.1 have been met, the Architect will, within seven days after receipt of the written report of the Owner's auditors, either issue to the Owner a final Certificate for Payment with a copy to the Construction Manager, or notify the Construction Manager and Owner in writing of the Architect's reasons for withholding a certificate. The time periods stated in this Section supersede those stated in Section 9.4.1 of the Modified AIA Document A201-2007. The Owner, PM and Architect are not responsible for verifying the accuracy of the Construction Manager's final accounting.

§ 7.2.3 If the Owner's auditors report the Cost of the Work as substantiated by the Construction Manager's final accounting to be less than claimed by the Construction Manager, the Construction Manager shall be entitled to request mediation of the disputed amount. Pending a final resolution of the disputed amount, the Owner shall pay the Construction Manager the undisputed amount certified in the Architect's final Certificate for Payment.

§ 7.2.4 The Owner's final payment to the Construction Manager of undisputed amounts shall be made no later than the business day that is next after the expiration of 31 after the issuance of the Architect's final Certificate for Payment for the undisputed amounts.

§ 7.2.5 If, subsequent to final payment and at the Owner's request, the Construction Manager incurs costs described in Section 6.1.1 and not excluded by Section 6.8 to correct defective or nonconforming Work, the Owner shall reimburse the Construction Manager such costs and the Construction Manager's Fee applicable thereto on the same basis as if such costs had been incurred prior to final payment, but in event in excess of the Guaranteed Maximum Price.

ARTICLE 8 INSURANCE AND BONDS

For all phases of the Project, the Construction Manager and the Owner shall purchase and maintain insurance, and the Construction Manager shall provide bonds, as set forth in Article 11 of the Modified AIA Document A201-2007 and in the exhibit referenced below.

(State bonding requirements, if any, and limits of liability for insurance required in Article 11 of AIA Document A201-2007.)

Insurance and Bond Requirements

Set out in Exhibit A

ARTICLE 9 DISPUTE RESOLUTION

§ 9.1 Any Claim between the Owner and Construction Manager shall be resolved in accordance with the provisions set forth in this Article 9 and Article 15 of A201–2007.

§ 9.2 For any Claim subject to, but not resolved by mediation pursuant to Section 15.3 of AIA Document A201–2007, the method of binding dispute resolution shall be as follows:

Jury trial with exclusive venue in a State District Court of Hidalgo County, Texas.

ARTICLE 10 TERMINATION OR SUSPENSION

§ 10.1 Termination Prior to Establishment of the Guaranteed Maximum Price

§ 10.1.1 Prior to the execution of the Guaranteed Maximum Price Amendment, the Owner may terminate this Agreement upon not less than seven days' written notice to the Construction Manager for the Owner's convenience and without cause, and the Construction Manager may terminate this Agreement, upon not less than seven days' written notice to the Owner, for the reasons set forth in Section 14.1.1 of the Modified A201–2007.

§ 10.1.2 In the event of termination of this Agreement pursuant to Section 10.1.1, the Construction Manager shall be compensated for Preconstruction Phase services performed prior to receipt of a notice of termination consistent with any compensation terms pursuant to Section 4.1 above. In no event shall the Construction Manager's compensation under this Section exceed the compensation set forth in Section 4.1.

§ 10.2 Termination Subsequent to Establishing Guaranteed Maximum Price

Following execution of the Guaranteed Maximum Price Amendment and subject to the provisions of Section 10.2.1 and 10.2.2 below, the Contract may be terminated as provided in Article 14 of the Modified AIA Document A201–2007.

§ 10.2.1 If the Owner terminates the Contract after execution of the Guaranteed Maximum Price Amendment, the amount payable to the Construction Manager pursuant to Sections 14.2 and 14.4 of the Modified A201–2007 shall not exceed the amount set forth in those sections.

§ 10.2.2 If the Construction Manager terminates the Contract after execution of the Guaranteed Maximum Price Amendment, the amount payable to the Construction Manager under Section 14.1.3 of the Modified A201–2007 shall not exceed the amount set forth in the section.

§ 10.3 Suspension

The Work may be suspended by the Owner as provided in Article 14 of the Modified AIA Document A201–2007. In such case, the Guaranteed Maximum Price and Contract Time shall be increased as provided in Section 14.3.2 of the Modified AIA Document A201–2007, except that the term "**profit**" shall be understood to mean the Construction Manager's Fee as described in Sections 5.1 and 5.3.5 of this Agreement.

ARTICLE 11 MISCELLANEOUS PROVISIONS

§ 11.1 Terms in this Agreement shall have the same meaning as those in the Modified A201–2007.

§ 11.2 Ownership and Use of Documents

Section 1.5 of the Modified A201–2007 shall apply to both the Preconstruction and Construction Phases.

§ 11.3 Governing Law

Section 13.1 of the Modified A201–2007 shall apply to both the Preconstruction and Construction Phases.

§ 11.4 Assignment

The Owner and Construction Manager, respectively, bind themselves, their agents, successors, assigns and legal representatives to this Agreement. Neither the Owner nor the Construction Manager shall assign this Agreement without the written consent of the other. If either party attempts to make such an assignment without such consent, that party shall nevertheless remain legally responsible for all obligations under the Contract.

§ 11.5 Other provisions:

§11.5.1 Changes in Work

As a condition precedent to an increase in the Guaranteed Maximum Price, an extension of the Contract Time, or a recovery of the Cost of Work for performing work outside the scope of this Agreement, the Construction Manager must, prior to the performance of any such work, obtain the written approval of the Owner, as a condition precedent to such increase, extension or recovery.

§11.5.2 Limitation of Remedies for Delay

Except as otherwise provided herein, extensions of time shall be the Construction Manager's sole remedy for any delay, unless the delay shall have been caused by acts or omissions of those performing by, through or under the Owner or by a cause otherwise within the control of those persons or entities, and then only to the extent that such acts continue after the Construction Manager has provided written notice to Owner. The Owner's reasonable exercise of any of its rights or remedies under the Contract Documents, regardless of the extent or frequency, shall not under any circumstances be construed as intentional interference with the Construction Manager's performance of the Work.

§11.5.3 Authority of Architect and PM

Notwithstanding any contrary provision hereof of any Contract Document, no consent, decision, determination, approval or certification to be made by the PM or Architect hereunder shall be binding upon Owner unless and to the extent agreed to in writing by Owner.

§11.5.4 Agreement Modifications

This Agreement may be amended only by written Modification approved by the Commissioners Court or its authorized designee, and signed by Owner's authorized representative and Construction Manager.

§11.5.5 No delay or omission by either of the parties hereto in exercising any right or power accruing upon the noncompliance or failure of performance by the other party hereto of any of the provisions of this Agreement shall impair any such right or power or be construed to be a waiver thereof. A waiver by either of the parties hereto of any of the covenants, conditions or agreements hereof to be performed by the other party hereto shall not be construed to be a waiver of any subsequent breach thereof or of any other covenant, condition or agreement herein contained.

§11.5.6 Construction Manager shall require all construction workers, whether Construction Manager's own forces, or the forces of Construction Manager's subcontractors, to wear identification tags on the front of their persons during all times that they are on Owner's property. Such identification tags shall have identification of the construction worker by number or other identifying medium in a typeface large enough to be seen from a reasonable distance.

§11.5.7 Construction Manager shall require all construction workers, whether Construction Manager's own forces or the forces of Construction Manager's subcontractors, to park their personal motor vehicles only in the parking places designated by the Owner or as otherwise agreed to in writing with the Construction Manager. Any vehicles not parked in the appropriate locations shall be towed at the vehicle owner's sole expense.

§11.5.8 Construction Manager shall follow, and shall require all employees, agents or subcontractors to follow, any tree ordinance of the municipality in which the Project is located. In addition, if not covered by the municipal tree ordinance, Contractor shall barricade and protect all trees on the Project, unless specifically designated in writing by Owner for removal, which shall be included in the Cost of the Work.

§11.5.9 Construction Manager shall institute a theft deterrent program designed to restrict construction worker theft, to maintain supervision of Construction Manager's and Construction Manager's subcontractor's forces.

§11.5.10 Construction Manager stipulates that Owner is a political subdivision of the State of Texas, and as such, may enjoy immunities from suit and liability under the Constitution and laws of the State of Texas. By entering into this Agreement, Owner does not waive any of its immunities from suit and/or

liability, except as otherwise specifically provided herein and as specifically authorized by law.

§11.5.11 In case any one or more provisions of this Agreement, or the application thereof to any person or circumstance, shall for any reason be held invalid, illegal or unenforceable in any respect, any such invalidity, illegality or unenforceability shall be deemed stricken and shall not affect any other provision of this Agreement or the application of such provisions to other persons or circumstances, and the balance of this Agreement shall be enforced to the greatest extent permitted by law.

§11.5.12 Construction Manager shall be required to utilize the project technology platforms as indicated on Exhibit G – Project Technology.

ARTICLE 12 SCOPE OF THE AGREEMENT

§ 12.1 This Agreement represents the entire and integrated agreement between the Owner and the Construction Manager and supersedes all prior negotiations, representations or agreements, either written or oral. This Agreement may be amended only by written instrument signed by both Owner and Construction Manager.

§ 12.2 The following documents comprise the Contract Documents:

- .1 AIA Document A133–2009, Standard Form of Agreement Between Owner and Construction Manager as Constructor where the basis of payment is the Cost of the Work Plus a Fee with a Guaranteed Maximum Price, as modified
- .2 AIA Document A201–2007, General Conditions of the Contract for Construction, as modified
- .3 Exhibit A – Insurance and Bond Requirements
- .4 Exhibit B – Construction Manager’s Organizational Chart
- .5 Exhibit C – Construction Manager’s Statement of Qualifications
- .6 Exhibit D – Division of Cost Elements
- .7 Exhibit E – Sample G702 and G703
- .8 Exhibit F – Sample GMP Amendment Form
- .9 Exhibit G – Project Technology
- .10 Exhibit H – Preconstruction Services
- .11 Exhibit I - Prevailing Wage Rates

.11 Other documents:
(List other documents, if any, forming part of the Agreement.)

«None »

This Agreement is entered into as of the day and year first written above.

OWNER *(Signature)*

CONSTRUCTION MANAGER *(Signature)*

«County of Hidalgo, Texas »« »
(Printed name and title)

« **Morganti Texas Group, Inc.** »« »
(Printed name and title)