

# DRAFT AIA® Document A133™ – 2019

## **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

**AGREEMENT** made as of the <> day of <> in the year <>  
(In words, indicate day, month, and year.)

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

<>  
<>  
<>  
<>

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

<>  
<>  
<>  
<>

for the following Project:  
(Name, location, and detailed description)

<>  
<>  
<>  
<>

The Architect:  
(Name, legal status, address, and other information)

<>  
<>  
<>  
<>

The Owner and Construction Manager agree as follows.

### **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™-2017, 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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### ARTICLE 1 INITIAL INFORMATION

§ 1.1 This Agreement is based on the Initial Information set forth in this Section 1.1.

*(For each item in this section, insert the information or a statement such as "not applicable" or "unknown at time of execution.")*

§ 1.1.1 The Owner's program for the Project, as described in Section 4.1.1:

*(Insert the Owner's program, identify documentation that establishes the Owner's program, or state the manner in which the program will be developed.)*

« »

§ 1.1.2 The Project's physical characteristics:

*(Identify or describe pertinent information about the Project's physical characteristics, such as size; location; dimensions; geotechnical reports; site boundaries; topographic surveys; traffic and utility studies; availability of public and private utilities and services; legal description of the site, etc.)*

« »

§ 1.1.3 The Owner's budget for the Guaranteed Maximum Price, as defined in Article 6 (referred to as the "Maximum Allowable Construction Cost" or "MACC"):

*(Provide total and, if known, a line item breakdown.)*

« »

§ 1.1.4 The Owner's anticipated design and construction milestone dates:

**.1** Design phase milestone dates, if any:

« »  
« »  
« »

**.2** Construction commencement date:

Early site work:

« »

Remainder of work:

« »

At Owner's election, the early site work may be authorized under one or more Early Work Amendments under Section 3.3.1.3, ORS 279C and applicable regulations.

**.3** Substantial Completion date or dates:

« »

**.4** Other milestone dates:

« »

**§ 1.1.5** The Owner's requirements for accelerated or fast-track scheduling, or phased construction, are set forth below:  
(Identify any requirements for fast-track scheduling or phased construction.)

« »

**§ 1.1.6** The Owner's anticipated Sustainable Objective for the Project:  
(Identify and describe the Owner's Sustainable Objective for the Project, if any.)

« »

**§ 1.1.7** Other Project information:  
(Identify special characteristics or needs of the Project not provided elsewhere.)

« »

**§ 1.1.8** The Owner identifies the following representative in accordance with Section 4.2:  
(List name, address, and other contact information.)

«HMK Company»  
«David McKay, Principal in Charge»  
«PO Box 3223»  
Salem, Oregon 97302»

**§ 1.1.9** The persons or entities, in addition to the Owner's representative, who are required to review the Construction Manager's submittals to the Owner are as follows:  
(List name, address and other contact information.)

« »  
« »  
« »  
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**§ 1.1.10** The Owner shall retain the following consultants and contractors:  
(List name, legal status, address, and other contact information.)

.1 Geotechnical Engineer:

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<< >>  
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.2 Civil Engineer:

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<< >>  
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.3 Other, if any:

*(List any other consultants retained by the Owner, such as a Project or Program Manager.)*

Surveyor:

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Hazardous Materials:

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Building Commissioning:

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Building Envelope:

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Special Inspections:

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§ 1.1.11 The Architect's representative:

*(List name, address, and other contact information.)*

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**§ 1.1.12** The Construction Manager identifies the following representative in accordance with Article 3:  
(List name, address, and other contact information.)

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**§ 1.1.13** The Owner's requirements for the Construction Manager's staffing plan for Preconstruction Services, as required under Section 3.1.9:  
(List any Owner-specific requirements to be included in the staffing plan.)

<< >>

**§ 1.1.14** The Owner's requirements for Subcontractor procurement for the performance of the Work:  
(List any Owner-specific requirements for Subcontractor procurement.)

<< >> See Section 3.1.12 of this Agreement

**§ 1.1.15** Other Initial Information on which this Agreement is based:

<< >>

**§ 1.2** The Owner and Construction Manager may rely on the Initial Information. Both parties, however, recognize that such information may materially change and, in that event, the Owner and the Construction Manager shall appropriately adjust the Project schedule, the Construction Manager's services, and the Construction Manager's compensation. The Owner shall adjust the Owner's MACC for the Guaranteed Maximum Price and the Owner's anticipated design and construction milestones, as necessary, to accommodate material changes in the Initial Information.

**§ 1.3** Neither the Owner's nor the Construction Manager's representative shall be changed without ten days' prior notice to the other party. Change to the Construction Manager's representative shall require the Owner's prior written approval.

**§ 1.4 The Construction Manager acknowledges and agrees that the Contract Documents:**

- (a) Describe the methods the Construction Manager will use to qualify and select Subcontractors. The methods shall be competitive and provide prospective Subcontractors with a reasonable opportunity to participate in the Construction Manager's qualification and selection process.
- (b) Identify the portions of the construction work for which the Construction Manager may waive the qualification and selection process described in paragraph (a) of this subsection and describe:
  - (A) How the Construction Manager may determine the portions of the construction work that will not be subject to the qualification and selection process described in paragraph (a) of this subsection; and
  - (B) The process the Construction Manager will use to qualify and select prospective Subcontractors for the portions of the construction work that are not subject to the qualification and selection process described in paragraph (a) of this subsection.
- (c) Identify the conditions under which the Construction Manager or an affiliate or subsidiary of the Construction Manager may perform or compete with other prospective Subcontractors to perform

construction work under the Contract and describe the methods the Construction Manager will use to qualify and select an affiliate or subsidiary to perform the construction work.

- (d) Describe how the Construction Manager will announce which prospective Subcontractors the Construction Manager has selected to perform construction services in connection with the Contract.
- (e) Describe the conditions under which the Construction Manager will discuss the qualification and selection process described in this subsection with a prospective Subcontractor that the Construction Manager did not select for a subcontract if the Construction Manager receives a request from the prospective Subcontractor to discuss the process.

## **ARTICLE 2 GENERAL PROVISIONS**

### **§ 2.1 The Contract Documents**

The Contract Documents consist of this Agreement, the General Conditions of the Contract for Construction (AIA Document A201-2017, as modified, hereinafter “the General Conditions”), any Supplementary and other Conditions agreed upon by the parties, Drawings, Specifications, Addenda issued prior to execution of this Agreement, other documents listed in this Agreement, and Modifications and Exhibits 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, the Contract Documents will also include the documents described in Section 3.2.3 and identified in the Guaranteed Maximum Price Amendment and revisions prepared by the Architect and furnished by the Owner as described in Section 3.2.8. 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 or Supplementary and other Conditions agreed upon by the parties after the execution of this Agreement, is inconsistent with this Agreement, this Agreement shall govern. In addition, the State of Oregon Model Rules related to Public Contracts for Construction Services (OAR 137-049) apply to this Contract, and if anything in the Contract Documents is inconsistent with the Model Rules, the Model Rules shall govern. An enumeration of the Contract Documents, other than a Modification and any Supplementary or other Conditions agreed upon by the parties after the execution of this Agreement, appears in Article 15.

### **§ 2.2 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 Architect and exercise the Construction Manager’s 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; and to perform the Work in an expeditious and economical manner consistent with the Owner’s interests. The Owner agrees to furnish or approve, in a timely manner, information required by the Construction Manager and to make payments to the Construction Manager in accordance with the requirements of the Contract Documents.

### **§ 2.3 General Conditions**

**§ 2.3.1** For the Preconstruction Phase, the General Conditions shall apply. The term “Contractor” as used in the General Conditions shall mean the Construction Manager. 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.

**§ 2.3.2** For the Construction Phase, the general conditions of the contract shall be as set forth in the General Conditions, which document is incorporated herein by reference. The term “Contractor” as used in the General Conditions shall mean the Construction Manager.

## **ARTICLE 3 CONSTRUCTION MANAGER’S RESPONSIBILITIES**

The Construction Manager’s Preconstruction Phase responsibilities are set forth in Sections 3.1 and 3.2, and in the applicable provisions of the General Conditions referenced in Section 2.3.1. The Construction Manager’s Construction Phase responsibilities are set forth in Section 3.3. 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.

## **§ 3.1 Preconstruction Phase**

### **§ 3.1.1 Extent of Responsibility**

The Construction Manager shall exercise reasonable care in performing its Preconstruction Services. The Owner and Architect shall be entitled to rely on, and shall not be responsible for, the accuracy, completeness, and timeliness of services and information furnished by the Construction Manager. 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 and Owner any nonconformity discovered by or made known to the Construction Manager as a request for information in such form as the Architect may require.

**§ 3.1.2** The Construction Manager shall provide to Owner a written preliminary evaluation of the Owner's program, schedule and construction budget requirements, each in terms of the other, with written recommendations.

### **§ 3.1.3 Consultation**

**§ 3.1.3.1** The Owner's Representative shall schedule and conduct meetings with the Architect and Construction Manager to discuss such matters as procedures, progress, coordination, and scheduling of the Work. Construction Manager shall attend and participate in such meetings, and promptly provide any comments on Owner's Representative's minutes of such meetings.

**§ 3.1.3.2** The Construction Manager shall advise the Owner and Architect on proposed site use and improvements, selection of materials, building systems, and equipment. The Construction Manager shall also provide recommendations to the Owner and Architect, consistent with the Project requirements, on constructability; availability of materials and labor; time requirements for procurement, installation and construction; prefabrication; 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. The Construction Manager shall consult with the Architect regarding professional services to be provided by the Construction Manager during the Construction Phase.

**§ 3.1.3.3** The Construction Manager shall assist the Owner and Architect in establishing building information modeling and digital data protocols for the Project, using Architect-established standards for the development, use, transmission, and exchange of digital data.

**§ 3.1.3.4** The Construction Manager shall assist Owner and Architect to identify all items required for the Project, including technical infrastructure and equipment. Construction Manager shall perform constructability reviews of drawings, specifications, and other materials prepared or submitted by Architect and/or any Consultants relating to the Project, including the schematic design documents, design development documents, and construction documents. Construction Manager shall advise and facilitate on all matters relating to or required for the Project, including the efficiency, cost and availability of labor, trade union issues, Utilities, materials, equipment, construction means and methods, sequencing, governmental review process, and/or other relevant matters relating to or required for the Project, including those which are reflected on, or required for, the drawings, specifications, and other materials for the Project prepared or submitted by Architect and/or any Consultants. To this end, Construction Manager shall review progressively the schematic design documents, design development documents, and construction drawings and specifications prepared by Architect, shall identify constructability issues, and shall advise upon selection of materials, building systems and equipment, and methods of delivery. Construction Manager shall also provide a detailed, complete and accurate logistics plan, updated monthly, identifying the sequencing of all elements of the Work during construction of the Project.

### **§ 3.1.4 Project Schedule**

**§ 3.1.4.1** Promptly after its delivery to Construction Manager, Construction Manager shall review the initial Project Schedule(s) sent by the Owner. When Project requirements in Section 4.1.1 have been sufficiently identified to the Owner's and Architect's satisfaction, the Construction Manager, in cooperation with the Owner and Architect, shall prepare and periodically update a Project schedule for the Architect's review and the Owner's acceptance. The Construction Manager shall obtain the Architect's approval for the portion of the Project schedule relating to the performance of the Architect's services. The Project schedule shall coordinate and integrate the Construction Manager's services, the Architect's services, other Owner consultants' services, and the Owner's responsibilities; and identify items that 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 in advance of construction; and the occupancy requirements of the Owner. Thereafter, Construction Manager shall revise and update the Project Schedule monthly to show the progress of construction of the Project. Construction Manager shall also make formal submissions of the Project Schedule with each Application for Payment delivered to Owner. In addition to achieving Substantial Completion and Final Completion by the dates required herein, if the Project Schedule provides for Owner's access to the Project prior to Substantial Completion for the purpose of Owner's installation of furniture, fixtures, cabling, equipment or other items, the Construction Manager shall achieve sufficient completion of the Work prior to Substantial Completion so that Owner has such access as scheduled. The Project Schedule shall not exceed the required dates for Substantial Completion and Final Completion.

**§ 3.1.4.2** The Project Schedule shall be prepared by Construction Manager in a detailed precedence-style critical path method (CPM) in Primavera P6 and in format otherwise acceptable to Owner and Architect which shall (in accordance with industry CPM standards):

- (a) provide a graphic representation of all activities and events (including obtaining all necessary permits and/or approvals) that will occur during performance of the Work;
- (b) identify each phase of construction and occupancy (including commencement and completion dates of each stage of the Work of each Trade), and include detailed work tasks in accordance with the work breakdown structure, to produce a Level 3 CPM schedule;
- (c) identify deadlines for electing alternates under Trade Agreements;
- (d) set forth Construction Manager's estimated monthly cash flow projection for Requisitions during the period reflected in such Project Schedule;
- (e) prior to the time a Subcontractor starts Work, depict in detail the time for such Subcontractor's Work and showing week by week progress for each trade in a manner consistent with the most recent cash flow projection;
- (f) identify major equipment orders and delivery deadlines.
- (g) resource-load all activities.

**§ 3.1.4.3** Prior to the commencement of the Construction Phase and during final preparation, each update of the Project Schedule shall also include the status of cost estimates, document preparation and regulatory agency approvals. During the bidding stage, the monthly update shall include the status of bidding activity. During the Construction Phase, each updated Project Schedule shall contain detailed progress schedules of the Work by trade. If Construction Manager becomes aware of any delay or problem arising in connection with the progress of the Work, Construction Manager shall promptly notify Owner thereof.

**§ 3.1.4.4** 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.

**§ 3.1.4.5** The Construction Manager shall not be entitled to any adjustment in the Contract Time or in the Contract Sum, or to any additional payment of any sort, by reason of the loss or the use of any float time, including time between the Construction Manager's anticipated completion date and the end of the Contract Time, whether or not the float time is described as such on the Construction Manager's Construction Schedule.

### **§ 3.1.5 Phased Construction**

The Construction Manager, in consultation with the Architect, shall provide recommendations with regard to accelerated or fast-track scheduling, procurement, and sequencing for phased construction. The Construction Manager shall take into consideration cost reductions, cost information, constructability, provisions for temporary facilities, and procurement and construction scheduling issues.

### **§ 3.1.6 Cost Estimates**

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



§ 3.1.6.2 As the Architect progresses with the preparation of the Schematic Design, Design Development and Construction Documents, the Construction Manager shall prepare and update, at appropriate intervals agreed to by the Owner, Construction Manager and Architect, an estimate of the Cost of the Work with increasing detail and refinement. The Construction Manager shall include in the estimate those costs to allow for the further development of the design, price escalation, and market conditions, until such time as the Owner and Construction Manager agree on a Guaranteed Maximum Price for the Work. Such estimates shall be provided for the review by Architect and Owner's cost consultants, and for the Owner's approval. If the Owner or Architect procure the services of an independent cost consultant, the Construction Manager shall align its estimate format with that cost consultant's estimate format. The Construction Manager shall cooperate to reconcile Construction Manager's cost estimates to those of Owner's cost consultant. The Construction Manager shall inform the Owner and Architect in the event that the estimate of the Cost of the Work and Fee exceeds the latest Owner's MACC, and make recommendations for corrective action. At each stage of design, Construction Manager shall provide value engineering services towards keeping the cost of Architect's design within the parameters of the MACC. Toward this end, Construction Manager shall periodically identify alternatives to the Project design and make timely recommendations for cost saving options, and respond promptly to Architect's and Owner's recommendations regarding cost saving options.

§ 3.1.6.3 If the Architect is providing cost estimating services as a Supplemental Service, and a discrepancy exists between the Construction Manager's cost estimates and the Architect's cost estimates, the Construction Manager shall work together with the Architect to reconcile the cost estimates.

§ 3.1.6.4 After its preparation, Owner shall deliver to Construction Manager Owner's initial Project Budget(s) including the latest MACC. The initial Project Budget(s) may be in the alternative, until Owner has selected either option. Promptly after the date of this Agreement, Construction Manager shall provide detailed comments on that Project Budget(s), covering all categories of construction cost, cost evaluations of alternate construction methods and systems (including the phasing and sequencing of the Work), consideration of alternative components, communications and data requirements and (if applicable) salvage or re-use of Owner's existing equipment. Each version of the Project Budget shall be in form (and shall include documentation) satisfactory to Owner.

§ 3.1.6.5 Construction Manager shall deliver to Owner Cost Estimates at intervals acceptable to Owner or as identified in the RFP. Cost Estimates submitted by Construction Manager shall be prepared independently of any prepared by Architect and its consultants and shall be in Construction Specifications Institute ("CSI") Format or in another format otherwise approved by Owner. Construction Manager's Cost Estimates shall include all elements of the scope of the Project reflected on Architect's most recent drawings and specifications. Construction Manager shall participate in meetings with Architect and the Owner's cost consultant (if any) to reconcile differences in their Cost Estimates. Construction Manager shall promptly prepare and submit to Owner a final reconciled version of each estimate for record purposes.

§ 3.1.6.6 Construction Manager shall identify discrepancies between actual and estimated costs and advise Owner whenever costs exceed budgets, estimates or the MACC.

§ 3.1.6.7 Construction Manager on request shall prepare, deliver, and update to Owner and Owner's representative a cash flow projection and an anticipated cost report for the Project, in a format approved by the Owner and keyed to the Project Budget and MACC, showing estimated monthly cash payments to each Trade, and breaking out major expenditure categories, costs of permits, and other likely causes of material cash outlay. Also, Construction Manager shall submit updates of the cash flow projection with each update of the Project Budget, showing changes in requirements and amounts previously paid.

§ 3.1.7 As the Architect progresses with the preparation of the Schematic Design, Design Development and Construction Documents, the Construction Manager shall consult with the Owner and Architect and make recommendations regarding constructability and schedules, for the Architect's review and the Owner's approval.

§ 3.1.8 The Construction Manager shall provide recommendations and information to the Owner and Architect regarding equipment, materials, services, and temporary Project facilities.

§ 3.1.9 The Construction Manager shall provide a staffing plan for Preconstruction Phase services for the Owner's review and approval.

§ 3.1.10 If the Owner identified a Sustainable Objective in Article 1, the Construction Manager shall fulfill its Preconstruction Phase responsibilities as required in the Contract Documents.

**§ 3.1.11 Subcontractors and Suppliers**

§ 3.1.11.1 The Owner has provided requirements for Subcontractor procurement in Section 3.1.12 of this Agreement, and the Construction Manager shall provide a subcontracting plan, addressing the Owner's requirements, for the Owner's review and approval. The Construction Manager shall furnish to the Owner's Representative and Architect for their information and records a list of possible Subcontractors and suppliers. The receipt of such list shall not require the Owner, the Owner's Representative or the Architect to investigate the qualifications of proposed Subcontractors or suppliers, nor shall it waive the right of the Owner to later object to or reject any proposed Subcontractor, supplier, or method of procurement.

§ 3.1.11.2 The Construction Manager shall develop Subcontractor and supplier bidding interest in the Project.

§ 3.1.11.3 The processes described in Article 9 shall apply if bid packages will be issued during the Preconstruction Phase.

**§ 3.1.12 Procurement**

The Construction Manager shall prepare, for the Architect's review and the Owner's acceptance, and well in advance of construction, a procurement schedule for items that must be ordered in advance of construction. The Construction Manager shall expedite and coordinate the ordering, procurement and delivery of materials that must be ordered well in advance of construction. If the Owner agrees to the Construction Manager's procurement any items prior to the establishment of the Guaranteed Maximum Price, the Construction Manager shall procure the items on terms and conditions acceptable to the Owner. The Owner shall not be obligated to pay for such items until bonded, insured, and confirmed as owned by Owner on terms satisfactory to Owner. If Owner decides not to engage the Construction Manager for construction, or otherwise at Owner's written request, the Construction Manager shall assign all contracts for these items to the Owner, conditioned on the Owner's payment for the items, and the Owner shall thereafter accept responsibility for them.

**§ 3.1.12.1 Procurement Requirements.** The provisions of this Section 3.1.12.1 collectively are referred to as the "Procurement Requirements." The requirements of ORS 279C.337(3) and OAR 137-049-0690 also are incorporated herein by reference. In the event of any conflict between the Basic Requirements and the Additional Requirements below, the Basic Requirements shall prevail.

**Basic Requirements:**

Within the scope of 279C.337(3), the Construction Manager's Subcontractor selection process must meet the following parameters:

- (A) Absent a written justification prepared by the Construction Manager and approved by the Owner as more particularly provided for in this section, the Construction Manager's Subcontractor selection process must be "competitive", meaning that the process must include publicly-advertised Subcontractor solicitations and be based on a low-bid competitive method, a low-quote competitive method for contracts in a specified dollar range agreeable to the Owner, or a method whereby both price and qualifications of the Subcontractors are evaluated in a competitive environment, consistent with the RFP and Contract requirements;
- (B) When the Subcontractor selection process for a particular Work package will not be "competitive" as provided for in this section, the process must meet the following requirements:
  - (i) The Construction Manager must prepare and submit a written justification to the Owner, explaining the project circumstances that support a non-competitive Subcontractor selection process for a particular Work package, including, but not limited to, Emergency circumstances, the Construction Manager's need to utilize a key Subcontractor member of the Construction Manager's project team consistent with the Construction Manager's project Proposal, the need to meet other specified Contract requirements, the continuation or expansion of an existing Subcontractor agreement that was awarded through a "competitive process" along with facts supporting the continuation or expansion of the Subcontractor agreement, or a "sole source" justification;

- (ii) For a “sole source” selection of a Subcontractor to proceed, the Owner must evaluate the written justification provided by the Construction Manager and must find that critical project efficiencies require utilization of labor, services or materials from one Subcontractor; that technical compatibility issues on the project require labor, services or materials from one Subcontractor; that particular labor, services or materials are needed as part of an experimental or pilot project or as part of an experimental or pilot aspect of the project; or that other project circumstances exist to support the conclusion that the labor, services or materials are available from only one Subcontractor;
  - (iii) The Construction Manager must provide an independent cost estimate for the Work package that will be subject to the non-competitive process, if required by the Owner;
  - (iv) The Construction Manager must fully respond to any questions or comments submitted to the Construction Manager by the Owner; and
  - (v) The Owner must approve the Construction Manager’s use of the non-competitive Subcontractor selection process prior to the Construction Manager’s pursuit of the non-competitive process.
- (C) If approved in advance by Owner, a competitive selection process may be preceded by a publicly advertised subcontractor pre-qualification process, with only those Subcontractors meeting the pre-qualification requirements being invited to participate in the later competitive process through which the Construction Manager will select the Subcontractor to perform the construction Work described in the selection process.
- (D) As used herein, “Affiliate” means a subsidiary of or a person or entity that, directly or indirectly through one or more intermediaries, controls, is controlled by or is under common control with Construction Manager or an Affiliate of Construction Manager. If the Construction Manager or an Affiliate will be included in the Subcontractor selection process to perform particular construction Work on the project, the Construction Manager must disclose that fact in the selection process documents and announcements. The Construction Manager must establish to Owner and follow an objective, independent review and opening of bids or proposals for the elements of Work involved, by a representative of the Owner or another independent third party acceptable to Owner.
- (E) Subcontractor Approvals and Protests. The procedures and reporting mechanisms related to the resolution of subcontractor and supplier protests are established in the Additional Requirements below, including the Construction Manager’s roles and responsibilities in this process and whether the Construction Manager’s subcontracting records are considered to be public records. The Owner retains the right to monitor the subcontracting process in order to protect the Owner’s interests and to confirm the Construction Manager’s compliance with the Contract and with applicable statutes, administrative rules and other legal requirements.
- (F) Construction Manager Self-Performance or Performance by Construction Manager Affiliates Without Competition. Consistent with the requirements of ORS 279C.337(3)(c), these Basic Requirements and the Additional Requirements establish the conditions under which the Construction Manager or an Affiliate of the Construction Manager may perform elements of the construction Work without competition from Subcontractors, including, for example, job-site GC Work. Other than for GC Work, in order for the Construction Manager or an Affiliate of the Construction Manager to perform elements of the construction Work without competition from Subcontractors, the Construction Manager must provide, or must have included in the Construction Manager’s RFP Proposal to perform Construction Manager Services for the project, a detailed proposal for performance of the Work by the Construction Manager or an Affiliate of the Construction Manager. If required by the Owner, the Construction Manager’s proposal to perform the construction Work must be supported by at least one independent cost estimate prior to the Work being included in the Contract.
- (G) Unsuccessful Subcontractor Briefing. ORS 279C.337(3)(e) is designed to allow a Subcontractor who was not selected by the Construction Manager to perform a particular element of the construction Work to obtain specific information from the Construction Manager, and meet with the Construction Manager to discuss the Subcontractor qualification and selection process involved and the Construction Manager’s Subcontractor selection decisions, in order to better understand why the Subcontractor was not successful in being selected to perform the particular element of the Work and to improve the Subcontractor’s substantive qualifications or the

Subcontractor's methods in competing for elements of the Work for the particular project involved, or for future projects. The briefing meetings may be held with individual Subcontractors or, if the Subcontractors agree, in groups of Subcontractors, with those groups established by bid package or other designation agreed to by the contracting agency and the Construction Manager. Nevertheless, the Construction Manager is not obligated to provide this briefing opportunity unless the Construction Manager receives a written request from a Subcontractor to discuss the Subcontractor qualification and selection process involved. Unless the Owner and the Construction Manager agree on a different schedule:

- (i) Subcontractor will be allowed 60 days from the Construction Manager's notice of award of a subcontract for a particular Work package to request, in writing, a post-selection meeting with the Construction Manager under this section; and
- (ii) The Construction Manager shall set a meeting with the Subcontractor under this section within 45 days of the Subcontractor's written request. The Construction Manager shall maintain written minutes of such meeting and shall deliver a copy of such minutes to Owner within 10 days after each such meeting.

#### **Additional Requirements:**

1. The Construction Manager shall review the Contract Documents and verify, prior to bidding, that they are ready for subcontract and supplier bidding. The Construction Manager shall perform constructability review of each Bid Package prior to bidding.

2. If the documents are not ready for bidding, prior to bidding the Construction Manager shall notify the Owner and Architect, specifying the perceived deficiency, and thereafter shall work with the Architect to complete the documents.

3. The Construction Manager shall divide the portions of the Work (other than general supervisory and "general conditions" type work of the Construction Manager) into components suitable for bidding ("Work Components"). The Construction Manager shall deliver a list of proposed Work Components to the Owner's Representative for comment prior to preparation of the Requests for Proposal.

4. The Construction Manager shall prepare a template form of Request for Proposal for Work Component procurement. The Construction Manager shall deliver a copy of such template to the Owner's Representative for review and comment before use. The Request for Proposals shall identify the scope of Component Services with reasonable specificity, the minimum qualifications of prospective bidders, and the deadline for bid submissions. The Construction Manager shall deliver a copy of each Request for Proposal to the Owner's Representative concurrent with publication.

5. The procurement by the Construction Manager of all labor and materials costing more than \$100,000 per contract, but excluding those items covered in the general conditions, will normally be publicly advertised. However, should circumstances arise where public advertisement is not practical or appropriate, and with the Owner's prior written approval, the Construction Manager may forego public advertisement, provided however, that it must attempt to obtain at least three written bids/quotes (with public opening) for the particular work to be done. At least three competitive quotes must be attempted to be solicited for all contracts between \$10,000 and \$100,000. With the Owner's concurrence, the Construction Manager/General Contractor must accept the quote that is most advantageous to the Owner. This normally would be the lowest quote from a responsible firm. Competitive quotes are encouraged but are not required for contracts less than \$10,000. Except as otherwise allowed under this Contract, The Construction Manager shall obtain at least three competitive bids for each particular Work component to be complete, including work components which the Construction Manager may be interested in self-performing, unless the Owner approves in writing the obtaining of fewer bids for the Work Component. The solicitation of Subcontractors will be made pursuant to the following procedures:

- a. All bids are required to be sealed, written, and submitted to a specific location at a specific time, each as approved in writing by the Owner's Representative.
- b. If less than three (3) bids are submitted for any work component, authorization by the Owner's Representative is required to accept the bid. When there are single fabricators of materials or special packaging requirements for Subcontractor work, or work is otherwise proposed to be sole-sourced,

- Construction Manager shall be responsible for explaining in writing to Owner the grounds for such procurement, and advance approval by the Owner's representative is required.
- c. Solicitations will be advertised at least ten (10) days in advance in the Daily Journal of Commerce and at least one other newspaper specifically targeted to reach minority, women, and emerging small business audiences.
  - d. The prevailing wage rates and all other standard terms and conditions of State of Oregon Public Works contracts shall apply to subcontracts at all tiers.
6. Except for "general conditions" type work, the compensation for which is included in the General Conditions Maximum Charge, the Construction Manager shall identify to the Owner as required in the Basic Requirements and in advance of bidding, in writing, any work that the Construction Manager proposes be performed by the Construction Manager or any Affiliate, including, without limitation, Work Components, or procurement or rental of services, equipment or materials. Such writing shall include a detailed statement of the proposed work, and a statement of qualifications. The Owner may allow a Construction Manager or a related party to perform such work if such party competes competitively with Subcontractors or other suppliers for that work and enters into a subcontract for the work in accordance with the procedures of this Section. Neither Construction Manager nor any related party shall perform work or provide services except in accordance with such procedures, unless waived in writing by Owner's Representative. In all cases where Construction Manager or a related party is proposed for provision of work or services, the unopened bids for that work (including that of the Construction Manager Party) will be submitted directly to the Owner's Representative at least 2 hours in advance of bid opening, for opening by Owner's staff or an independent third party approved by the Owner.
7. The Construction Manager shall establish the bidding schedule, conduct a pre-bid conference to familiarize bidders with bid documents and management techniques, maintain a log of firms attending the pre-bid conference and a log of the bidders, successful or not.
8. The Construction Manager shall respond to questions from potential bidders and clarifications or interpretations of the Bidding Documents. The Owner's Representative and Architect shall assist as they determine appropriate.
9. All addendums, if any, shall be provided to the Construction Manager by the Owner. The Construction Manager shall, in turn, verify that all known potential bidders have received all addendums to incorporate in their bids.
10. The Construction Manager shall open all Subcontractor bids and proposals for self-performed work in the presence of the Owner's Representative, which opening may occur at Construction Manager's office in compliance with the rest of this Section. The Owner's Representative shall be given advance notice of and the opportunity to observe all bid openings. The Owner's Representative is not obligated, however, to attend a bid opening nor to ensure the Construction Manager's compliance with the required bidding procedures. All bid openings shall be by the Owner's Representative, Owner's staff or an independent third party approved by the Owner.
11. With respect to any Subcontractor to whom Construction Manager proposes to subcontract a portion of the Work, Construction Manager shall submit the following information to Owner in sufficient time to prevent delays in the Project Schedule:
- (a) the name and address of the Subcontractor;
  - (b) a description of the portion of the Work and type of activity to be performed by such Subcontractor;
  - (c) a brief summary of the Subcontractor's past experience in performing services or producing products similar to those to be performed or produced by the Subcontractor in connection with the Work (including number of years in business and recent major projects);
  - (d) evidence that the Subcontractor has sufficient capacity (staff and/or plant) and financial resources to perform or produce the Work;
  - (e) any documents or materials required under applicable laws regarding the qualifications of the Subcontractor to be accepted for work under this Contract;
  - (f) any ownership or other financial affiliations between Construction Manager and the proposed Subcontractor; and
  - (g) such other evidence of the Subcontractor's fitness and responsibility as Owner may reasonably request.



12. The Owner's Representative shall be given the opportunity to review the Construction Manager's evaluation of bids and recommendations and authorize (or deny authorization of) the award, prior to bid award.

13. The Construction Manager shall review and respond to any recommendations of the Owner's Representative.

14. The Construction Manager shall make recommendations for awards. The Owner's Representative may require disqualification of particular bids for good cause, including without limitation the bidder's (or its affiliates) presence on the Owner's disqualified contractor list. No subcontract or supply award shall be made without the Owner's written approval. The Owner's approval shall not constitute approval of the individual Subcontractor and supplier, and the Construction Manager remains responsible for their selection.

15. The Construction Manager will announce which prospective Subcontractors the Construction Manager intends to select by written notice given to the Owner and all bidders for the Work Component at issue. The Construction Manager shall make such announcement at least five business days prior to the date of prospective award. The Construction Manager shall respond to any questions, comments, or protests of the prospective bidders for the Work Component in writing, with a copy of the writing given concurrently to all prospective bidders for the Work Component and to the Owner's Representative. The Construction Manager shall make no award without Owner's prior written authorization.

16. If the Construction Manager discusses with or communicates about the selection process for a Subcontract with a prospective Subcontractor or any entity that the Construction Manager did not select for the Work Component at issue, the Construction Manager shall maintain complete written minutes of such discussion and deliver a copy to the Owner's Representative on request.

17. After award, the Construction Manager shall prepare subcontracts and supply agreements. At Owner's option and written request, Owner shall have the right of prior written approval of the subcontract and supply agreements (or the form of the same) before execution. Whether or not Owner requests such prior written approval, Construction Manager shall deliver copies of the executed subcontracts and supply agreements to the Owner's Representative within five business days after execution.

18. The Construction Manager may not waive the competitive process described in this Section for any Work Component, including any proposed self-performed work, without (i) identifying to the Owner's Representative in advance the Work Component at issue and the Construction Manager's proposed alternative procurement method for such Work Component, through a proposed Addendum to this Agreement and (ii) procuring written approval of the waiver by Owner's Representative, including the Owner's Representative's approval of an agreed alternative procurement method. The Construction Manager shall comply with such agreed alternative procurement methodology in procurement of such Work Component.

19. Bidding is proceeding under special rules applicable to public Construction Manager/General Construction Manager contracts, and statutory formal bidding procedures for public contracts are not applicable to Subcontractor and supplier bids. Owner's approval is required for all bid awards. The Construction Manager's subcontracting records (including without limitation any bid dispute documentation) are considered to be public records generally; however, the Owner reserves sole discretion in response to any public records request regarding the same. The Owner retains the right to monitor the entire subcontracting and bid dispute process in order to protect Owner's interests. The Owner retains the right to require Construction Manager re-bidding of any Work Component, at Owner's discretion.

20. Construction Manager shall comply with the socio-economic programs described herein or in the RFP, in connection with Subcontractor and supplier bidding ("Hiring Programs"). During the course of bidding, Construction Manager shall deliver written reports to the Owner documenting Construction Manager's compliance with the Hiring Programs. The Owner is not responsible for Construction Manager's compliance with the Hiring Programs, but may at any time, by written notice to the Construction Manager, require Construction Manager's compliance with the Hiring Programs (including rebidding as applicable) and bring action to enforce such compliance.

21. Firms responding to the Construction Managers bid documents may submit a request for change of particular solicitation provisions, specifications and conditions (including comments on any requirement that a firm

believes limits competition) to the Construction Manager, with a copy to the Owner's Representative, no later than noon seven (7) days prior to the bid deadline date. Such requests for change shall include reason for the request and proposed changes to the solicitation provisions, specifications and conditions. Any such proposed changes, if accepted by Owner, will be provided in the form of an addendum, to all requesting the bid information.

22. Any firm responding to the bid who claims to have been adversely affected or aggrieved by the selection of a competing firm shall have seven calendar days after notification of the selected firm to submit a written protest to the Construction Manager, identifying with specificity the grounds for dispute, with a copy to the Owner's Representative. Failure to timely submit such protest shall bar the claim. For timely submitted bid disputes, the Construction Manager shall be solely and exclusively responsible for resolving the dispute, at the Construction Manager's sole expense. The entire bid dispute and resolution file, including minutes of all conversations, will be delivered by Construction Manager to the Owner upon request. Any additional Cost of Work resulting therefrom will be deducted from the Contingency. Statutory bid dispute procedures for public contracts are not applicable unless and then only to the extent Owner requires in writing that such procedures be used. Construction Manager is not acting as the Owner's representative in this process. Aggrieved or selected Subcontractors and suppliers are not intended third-party beneficiaries of this bid dispute provision.

23. The Construction Manager shall use good faith efforts to reach out to Local Subcontractors and Suppliers (defined as having their head office within a 25 mile radius of the center of the Owner) for participation in the Project. Construction Manager shall include a narrative of its outreach program, after approval by Owner, in the Exhibit A GMP amendment, and shall, both midway and after full bid procurement, provide to Owner a written report of such outreach efforts and their effect, in form acceptable to Owner.

24. Pursuant to Oregon Revised Statute (ORS) Chapter 200, the Owner encourages the participation of small businesses, certified by the Oregon Certification Office for Business Inclusion and Diversity ("COBID") in all contracting opportunities. This includes certified small businesses in the following categories: disadvantaged business enterprise, minority-owned business, woman-owned business, a business that a service-disabled veteran owns or an emerging small business. The Owner also encourages joint ventures or subcontracting with certified small business enterprises.

### § 3.1.13 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.

### § 3.1.14 Other Preconstruction Services

Insert a description of any other Preconstruction Phase services to be provided by the Construction Manager, or reference an exhibit attached to this document

*(Describe any other Preconstruction Phase services, such as providing cash flow projections, development of a project information management system, early selection or procurement of Subcontractors, etc.)*

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## § 3.2 Guaranteed Maximum Price Proposal

§ 3.2.1 Within 30 days after written request by the Owner, given at any time that Owner has determined that design has progressed past the Design Development stage, the Construction Manager shall prepare a Guaranteed Maximum Price proposal for the Owner's and Architect's review, and the Owner's acceptance in the form of Exhibit A attached hereto. The Guaranteed Maximum Price in the proposal shall be the sum of the Construction Manager's estimate of the Cost of the Work, the Construction Manager's contingency described in Section 3.2.4, and the Construction Manager's Fee described in Section 6.1.2.

§ 3.2.2 To the extent that the Drawings and Specifications are anticipated to require further development, the Guaranteed Maximum Price includes the costs attributable to 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. Construction Manager will identify and notify the Owner of the proposed Guaranteed Maximum Price



increase or decrease resulting from a change in the Drawings or Specifications within 20 days after receipt of the same, or any such claim for a Guaranteed Maximum Price increase shall be barred. Notwithstanding any provision of the Contract Documents seemingly to the contrary, the Guaranteed Maximum Price shall not be increased without a concomitant increase to the scope defined at the time of establishment of the Guaranteed Maximum Price or the most recent Guaranteed Maximum Price amendment. Reductions in scope shall result in a concomitant reduction in the Guaranteed Maximum Price.

**§ 3.2.3** 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 3.2.2, 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, including allowances; the Construction Manager's contingency set forth in Section 3.2.4; and the Construction Manager's Fee;
- .4 The dates of Substantial Completion and Final Completion upon which the proposed Guaranteed Maximum Price is based, if not stated in this Agreement;
- .5 A schedule of values breaking down the Guaranteed Maximum Price Proposal by task and trade, and including a copy of any bids or Subcontractor estimates, in accordance with the Procurement Requirements; and
- .6 A date by which the Owner must accept the Guaranteed Maximum Price.

**§ 3.2.4** In preparing the Construction Manager's Guaranteed Maximum Price proposal, the Construction Manager shall include its proposed contingency ("Contingency"), which shall not exceed 5% of the estimated Cost of the Work. The Contingency shall be applied by Construction Manager solely to cover unanticipated costs reimbursable as Cost of the Work that exceed the estimated Cost of the Work, but are not included in a Change Order. Construction Manager's application of the Contingency shall not change the Guaranteed Maximum Price. Change Orders shall not increase the Contingency. The Contingency may be used only with the Owner's prior written authorization, which shall not be unreasonably withheld. The status of the Contingency will be evaluated by Owner and the Construction Manager on a regular basis to reallocate unused or unneeded Contingency to Owner, or to allow the Owner to potentially add scope, to enhance aspects of the Project, or otherwise pay for Change Orders without increase to the Guaranteed Maximum Price. Such reallocation shall be based on an evaluation of remaining risk to the Project, and such reallocation shall not be unreasonably opposed or delayed by the Construction Manager. The Construction Manager shall provide a monthly status of the Construction Contingency with each Application for Payment, including its specific line item application and the basis therefor. Any portion of the Contingency not used or applied as provided above shall, at Owner's election, either be applied to pay for Owner-directed Change Orders or shall reduce the Guaranteed Maximum Price at the time of Substantial Completion.

**§ 3.2.5** The Construction Manager shall meet with the Owner and Architect to review the Guaranteed Maximum Price proposal. In the event that the Owner 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.

**§ 3.2.6** If the Owner notifies the Construction Manager that the Owner has accepted the Guaranteed Maximum Price proposal in writing before the date specified in the Guaranteed Maximum Price proposal, the Guaranteed Maximum Price proposal shall be deemed effective without further acceptance from the Construction Manager. Following acceptance of a Guaranteed Maximum Price, the Owner and Construction Manager shall execute the Guaranteed Maximum Price Amendment amending this Agreement (using the form of Exhibit A), a copy of which the Owner shall provide to the 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, which shall be consistent with the Procurement Requirements.

**§ 3.2.7** The Construction Manager shall not incur any cost to be reimbursed as part of the Cost of the Work prior to the execution of the Guaranteed Maximum Price Amendment, unless the Owner provides prior written authorization for such costs.

**§ 3.2.8** 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 and Architect of any inconsistencies between the Guaranteed Maximum Price Amendment and the revised Drawings and Specifications.

**§ 3.2.9** The Construction Manager shall include in the Guaranteed Maximum Price all sales, consumer, use and similar taxes for the Work provided by the Construction Manager that are legally enacted, whether or not yet effective, at the time the Guaranteed Maximum Price Amendment is executed, but only to the extent included in the definition of the Cost of the Work. Without limiting the foregoing, the Oregon Corporate Activity Tax (“CAT”) is expressly excluded from the definition of the Cost of the Work.

**§ 3.2.10** Unless Owner directs otherwise, the Construction Manager shall not charge more than an amount stated in the Guaranteed Maximum Price Amendment for the Cost of the Work of all “general conditions” items of Construction Manager listed in Exhibit F, which general conditions items shall be set forth as a not-to-exceed sum in the Guaranteed Maximum Price Amendment (“General Conditions Maximum Charge”).

**§ 3.2.11** Prior to execution of the Guaranteed Maximum Price Amendment, Construction Manager shall not commence demolition or construction of any aspect of the Work unless Owner directs in writing to proceed on a time-and-materials basis, or unless Owner and Construction Manager have agreed upon a not-to-exceed price for such aspect of the Work.

**§ 3.2.12** The Guaranteed Maximum Price Amendment may include allowance amounts within the Guaranteed Maximum Price for the items of work identified in the Guaranteed Maximum Price Amendment (“Allowances”). If the costs of any item to which an Allowance applies shall be greater than the amount of the Allowance, Construction Manager shall so notify Owner and if Owner authorizes the Allowance Work, the Construction Cost and Guaranteed Maximum Price shall be increased by such difference without adding any additional Construction Fee. If the cost of any item to which an Allowance applies shall be less than the amount of the Allowance, the Construction Cost and Guaranteed Maximum Price shall be decreased by the amount of such difference. Work covered under an Allowance shall be accounted for on the same basis as extra work (i.e., the same percentages for overhead and profit and general conditions that apply for extra work would be applicable to Allowance Work).

**§ 3.2.13** Any Construction Manager or Subcontractor proposals referenced as part of the Contract Documents (whether herein, in the Guaranteed Maximum Price Amendment, or any other amendment or change order) are incorporated solely for: (i) any statement of fees and schedule that is otherwise consistent with the terms of this Agreement and (ii) any statement of services and scope of Work that is consistent with the remainder of this Agreement, or that provides additional Work without adjustment to the Contract Sum or Contract Time. No other provisions of any proposal are part of this Agreement, including without limitation any purported limitation on liability. To the extent that a proposal term otherwise conflicts with the other terms of this Agreement, such proposed conflicting terms are void and are expressly and wholly subject to the terms of this Agreement. In the event of overlap or inconsistency between the provisions of such proposals and the other terms of this Agreement, the provision that provides a better quality or quantity of service to Owner shall control.

**§ 3.2.14 Alternates.**

**§ 3.2.14.1** The Construction Manager, Owner, and Architect shall agree on appropriate bid alternates for every bid package such that if the Cost of the Work in connection with the Guaranteed Maximum Price is less than (or more than) the Guaranteed Maximum Price, the Owner shall have the opportunity to authorize additive (or deductive) alternates, as appropriate. It is understood that the Owner and Construction Manager may choose to defer the award of alternates in order to ensure the successful outcome of later bid packages.

**§ 3.2.14.2** Bid alternates for Subcontractor packages, authorized by the Owner under the above provisions, shall be performed by the Construction Manager with no increase to the Guaranteed Maximum Price, with no time extension, and with no increase in Construction Manager's fee, unless both the Owner and the Construction Manager agree in writing at the time of the designation of alternates that awarding of the alternates will result in an increase in fee, and/or time extension.

§ 3.2.14.3 If the Construction Manager and Owner agree to the execution of alternates outside of the parameters described in this Agreement, such that the Guaranteed Maximum Price is not exceeded, then the Construction Manager shall not be eligible for an increase in fee. However, the Construction Manager may be eligible for a time extension, if such extension is determined to be warranted.

§ 3.2.14.4 If the Construction Manager and Owner agree to the execution of alternates outside of the parameters described in this Agreement, such that the Guaranteed Maximum Price will be exceeded, then the Construction Manager shall be entitled to an increase in fee, for the increase in the Cost of the Work above the Guaranteed Maximum Price, and as described in this document.

§ 3.2.14.5 Certain add and deduct alternates and the prices therefor (each, an “Alternate”) may be set forth in the Guaranteed Maximum Price Amendment. Owner at its option may choose to have Construction Manager perform or delete the Work set forth in any such Alternate, in which case the Construction Cost and Guaranteed Maximum Price shall be increased or decreased, as the case may be, in the amount shown. Any Alternates listed in the Guaranteed Maximum Price Amendment shall represent the firm total amount by which the Construction Cost and Guaranteed Maximum Price will be increased or decreased upon the election of such Alternate and such Alternates shall be inclusive of all direct and indirect costs (including insurance and bonds), overhead, profit and fee.

### § 3.3 Construction Phase

#### § 3.3.1 General

§ 3.3.1.1 For purposes of Section 8.1.2 of the General Conditions, the date of commencement of the Work shall mean the date of commencement of the Construction Phase.

§ 3.3.1.2 The Construction Phase shall commence upon the Owner’s acceptance of the Construction Manager’s Guaranteed Maximum Price proposal or the Owner’s issuance of a Notice to Proceed for Early Work, whichever occurs earlier.

§ 3.3.1.3 In the event the Owner determines, in its discretion, to authorize Work in advance of mutual agreement on the Guaranteed Maximum Price Amendment (“Early Work”), the Construction Manager shall not proceed with such Early Work without mutual execution of an amendment to this Agreement stating the specifications, timing and price (including the applicable Construction Manager Fee) of such Early Work (“Early Work Amendment”). Permissible Early Work shall be limited to early procurement of materials and supplies, early release of bid or proposal packages for site development and related activities, and any other advance Work related to important components of the Project for which performance prior to establishment of the GMP will materially and positively affect the development or completion of the Project. Except in the event of emergency as approved in advance by Owner, no Early Work or Owner-directed Change Order work will proceed except on a lump-sum or not-to-exceed basis. The Construction Phase shall commence upon the Owner’s execution of the Guaranteed Maximum Price Amendment or, prior to acceptance of the Guaranteed Maximum Price proposal, by written agreement of the parties. The written agreement shall set forth a description of the Work to be performed by the Construction Manager, and any insurance and bond requirements for Work performed prior to execution of the Guaranteed Maximum Price Amendment.

§ 3.3.1.4 Construction Manager shall not allow any Subcontractor to enter onto, or move materials, equipment or workers onto, the Project site until the Construction Manager has confirmed that the Subcontractor has filed with the Construction Contractors Board the separate public works bond required by Oregon Laws 2005, Chapter 360, and OAR 839-025-0015, unless otherwise exempt under those provisions

#### § 3.3.2 Administration

§ 3.3.2.1 The Owner Representative shall schedule and conduct meetings to discuss such matters as procedures, progress, coordination, scheduling, and status of the Work, not less than weekly with the Construction Manager, Architect, and Owner. The Owner Representative shall prepare and promptly distribute minutes of the meetings to the Contractor and Architect. Construction Manager shall attend and participate in such meetings, and promptly provide in writing any comments on Owner’s Representative’s minutes of such meetings. Except for written comments of the Construction Manager regarding meeting minutes delivered to the Owner’s Representative within the earlier of (i) seven days after submission of the minutes, or (ii) by the next OAC meeting, Construction Manager shall be deemed to have approved the meeting minutes as submitted.

**§ 3.3.2.2** Upon the execution of the Guaranteed Maximum Price Amendment, the Construction Manager shall prepare and submit to the Owner and Architect a construction schedule for the Work (consistent with the required Substantial Completion and Final Completion Dates with appropriate time contingencies) and a submittal schedule in accordance with Section 3.10 of the General Conditions.

**§ 3.3.2.3 Monthly Report**

The Construction Manager shall prepare and maintain ordinary and customarily accepted records of the progress of the Project. On a monthly basis, or otherwise as agreed to by the Owner, the Construction Manager shall submit written progress reports to the Owner and Architect, showing percentages of completion and other information required by the Owner.

**§ 3.3.2.4 Daily Logs**

The Construction Manager shall keep, and make available to the Owner and Architect, a daily log containing a record for each day of weather, portions of the Work in progress, 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 Owner.

**§ 3.3.2.5 Cost Control**

The Construction Manager shall develop a system of cost control for the Work, including regular monitoring of actual costs for activities in progress 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 and Architect, and shall provide this information in its monthly reports to the Owner and Architect, in accordance with Section 3.3.2.3 above.

**§ 3.3.2.6** Those portions of the Work that the Construction Manager does not customarily perform with the Construction Manager's own personnel shall be performed under subcontracts or by other appropriate agreements with the Construction Manager, in accordance with the Procurement Requirements. The Owner may designate specific persons from whom, or entities from which, the Construction Manager shall obtain bids. The Construction Manager shall obtain bids from Subcontractors and from suppliers of materials or equipment fabricated especially for the Work in accordance with the Procurement Requirements.

**§ 3.3.2.7** If the Guaranteed Maximum Price has been established and when a specific bidder (1) satisfies the Procurement Requirements and is recommended to the Owner by the Construction Manager, (2) is qualified to perform that portion of the Work, and (3) has submitted a bid that conforms to the requirements of the Contract Documents without reservations or exceptions, but the Owner unreasonably requires that another bid be accepted, then the Construction Manager may require that a Change Order be issued to adjust the Contract Time and the Guaranteed Maximum Price by the difference between the bid of the person or entity recommended to the Owner by the Construction Manager and the amount and time requirement of the subcontract or other agreement actually signed with the person or entity designated by the Owner.

**§ 3.3.2.8** Subcontracts or other agreements shall conform to the applicable payment provisions of this Agreement, and shall not be awarded on the basis of cost plus a fee without the prior consent of the Owner. If the Subcontract is awarded on a cost-plus a fee basis, the Construction Manager shall provide in the Subcontract for the Owner to receive the same audit rights with regard to the Subcontractor as the Owner receives with regard to the Construction Manager in Section 6.11 below. Subcontracts shall provide that the Subcontractor shall correct defective or nonconforming Work at no additional charge.

**§ 3.3.2.9** If the Construction Manager recommends a specific bidder that may be considered a "related party" according to Section 6.10, then the Construction Manager shall promptly notify the Owner in writing of such relationship and notify the Owner of the specific nature of the contemplated transaction, according to Section 6.10.2.

**§ 3.3.2.10** In addition to the meetings set forth above and any other obligations of Construction Manager, Construction Manager shall assist Owner in dealing and working with the neighborhood groups, government agencies and/or funding sources (public or private) for the Project, attend meetings with such entities, if applicable or requested by Owner, assist Owner in completing forms and applications, organizing information, and assembling documents and materials, and generally assist Owner as necessary in connection with its financing, permitting, and approval activities for the Project. Construction Manager shall assemble such documents and materials as may be appropriate for the anticipated discussion at such meetings, and shall make presentations regarding the Project to such entities as applicable and as

requested by Owner. Construction Manager shall receive no extra compensation for attending such meetings or making such presentations.

§ 3.3.2.11 Construction Manager shall assign all extended manufacturer's warranties to Owner and shall cooperate with the Owner's pursuit of warranties and warranty claims.

§ 3.3.3 Construction Manager shall comply with the Owner Access Standards (see Exhibit I, attached hereto) in all aspects of performance of the Work.

## **ARTICLE 4 OWNER'S RESPONSIBILITIES**

### **§ 4.1 Information and Services Required of the Owner**

§ 4.1.1 To the extent not already identified in the Request for Proposals, 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.

### **§ 4.1.2 DELETED**

§ 4.1.3 The Owner shall establish and periodically update the Owner's budget for the Project, including (1) the MACC for the Cost of the Work as defined in Article 7 with Fee, (2) the Owner's other costs, and (3) reasonable contingencies related to all of these costs. If the Owner significantly increases or decreases the Owner's MACC for the Cost of the Work, the Owner shall notify the Construction Manager and Architect. The Owner and the Architect, in consultation with the Construction Manager, may thereafter agree to a corresponding change in the Project's scope and quality.

§ 4.1.4 **Structural and Environmental Tests, Surveys and Reports.** During the Preconstruction Phase, the Owner shall furnish the following information, to the extent in Owner's possession or control, or services with reasonable promptness. The Owner shall also furnish any other site information in Owner's possession 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. The Construction Manager shall be entitled to reasonably rely on the accuracy of information and services furnished by the Owner but shall exercise proper precautions relating to the safe performance of the Work.

§ 4.1.4.1 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.

§ 4.1.4.2 If required, the Owner shall furnish surveys describing known physical characteristics, legal limitations and utility locations for the site of the Project, and a written 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 other 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.

§ 4.1.4.3 The Owner, if such services are required under the Contract Documents, shall furnish services of geotechnical engineers, which may include, but are not limited to, at Owner's discretion, 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.

§ 4.1.5 During the Construction Phase, the Owner shall furnish information or services required of the Owner by the Contract Documents with reasonable promptness.

### **§ 4.2 Owner's Designated Representative**

The Owner shall identify a representative authorized to act on behalf of the Owner with respect to the Project ("Owner's Representative"). The Owner's 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 the General Conditions, the Architect does not have such authority. The term "Owner" means the Owner or the Owner's Representative.

**§ 4.2.1 Legal Requirements.** The Owner shall furnish all legal, insurance and accounting services, including auditing services, that may be reasonably necessary at any time for the Project to meet the Owner's needs and interests. Owner is not responsible for providing legal, insurance or accounting services to or for Construction Manager.

#### **§ 4.3 Architect**

The Owner shall retain an Architect to provide services, duties and responsibilities as described in AIA Document B101™-2017, as modified by the Owner, including the changes herein and any additional services requested by the Construction Manager that are necessary for the Preconstruction and Construction Phase services under this Agreement. The Owner shall provide the Construction Manager with a copy of the scope of services in the executed agreement between the Owner and the Architect, and any further modifications to the Architect's scope of services in the agreement. Owner may elect to have any duty or right of the Architect under the Contract Documents (other than those required by law to be performed by a licensed design professional) instead to be performed by Owner's Representative.

**§ 4.4 Key Persons.** Construction Manager shall appoint the personnel named in Construction Manager's Proposal (see Exhibit E) to work on the Project in the respective positions designated therein, which shall include the Principal in Charge, Project Manager and Superintendent ("Key Persons"). Each Key Person shall be authorized to communicate to Owner on behalf of Construction Manager (which communications shall be binding on Construction Manager, and Owner communications to any Key Person shall be deemed communications to Construction Manager. Construction Manager shall not change any of the Key Persons without Owner's prior written approval. In the case any such person is no longer employed by Construction Manager, Owner's approval of such change shall not unreasonably withheld. If Owner requests a change to any of the Key Persons, Construction Manager shall work with Owner to replace such Key Person with a member of Construction Manager's staff reasonably acceptable to Owner.

### **ARTICLE 5 COMPENSATION AND PAYMENTS FOR PRECONSTRUCTION PHASE SERVICES**

#### **§ 5.1 Compensation**

**§ 5.1.1** For the Construction Manager's Preconstruction Phase services described in Sections 3.1 and 3.2, the Owner shall compensate the Construction Manager as follows. Only preconstruction services performed on or after the date of mutual signature of this Agreement are compensable.

*(Insert amount of, or basis for, compensation and include a list of reimbursable cost items, as applicable.)*

«Documented Direct Personnel Expense of the Preconstruction Phase Services not to exceed \$\_\_\_\_, to be invoiced monthly based upon actual documented hours worked.»

**§ 5.1.2** For the purposes of Section 5.1.1, the hourly billing rates for Preconstruction Phase services of the Construction Manager and the Construction Manager's Consultants and Subcontractors, if any, are set forth below.

*(If applicable, attach an exhibit of hourly billing rates or insert them below.)*

«>»

#### **Individual or Position**

« »  
« »  
« »  
« »  
«>»

#### **Rate**

«\$ »  
«\$ »  
«\$ »  
«\$ »  
«\$ »

**§ 5.1.2.1** Hourly billing rates for Preconstruction Phase services include all costs to be paid or incurred by the Construction Manager, as required by law or collective bargaining agreements, for taxes, insurance, contributions, assessments and benefits and, for personnel not covered by collective bargaining agreements, customary benefits such as sick leave, medical and health benefits, holidays, vacations and pensions, and shall remain unchanged unless the parties execute a Modification.

§ 5.1.3 Compensation based on Direct Personnel Expense 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.

## § 5.2 Payments

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

§ 5.2.2 Payments are due and payable after presentation of the Construction Manager's invoice in accordance with ORS 279C.570, and amounts unpaid when required under that statute shall bear interest at the rate stated in the statute.

## ARTICLE 6 COMPENSATION FOR CONSTRUCTION PHASE SERVICES

### § 6.1 Contract Sum

§ 6.1.1 The Owner shall pay the Construction Manager the Contract Sum in current funds for the Construction Manager's performance of the Contract after execution of the Guaranteed Maximum Price Amendment. The Contract Sum is the Cost of the Work as defined in Article 7 plus the Construction Manager's Fee, not exceeding the Guaranteed Maximum Price.

§ 6.1.2 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 shall be established as \_\_\_% of the estimated Cost of the Work as established at the time of the Guaranteed Maximum Price Amendment, except no fee shall be calculated on Fee Exclusion Items. The Construction Manager's Fee shall be stated as a lump sum in the Guaranteed Maximum Price Amendment. The Construction Manager's Fee is inclusive of all profit, overhead and all other indirect and non-reimbursable costs, and is inclusive of costs of preparation of, and response to inquiries relating to, Construction Manager's required monthly reports to Owner.

No Fee shall be applied to the following items: [Insurance, Bond Charges, LIST OTHERS»

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

«\_\_\_% of the net increase or decrease to the Cost of the Work resulting from the change, subject to Section 7.5 of the General Conditions. "Contractor's Change Fee" for the purposes of the General Conditions shall mean the Construction Manager's Fee of \_\_\_%»

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

«See Section 7.5 of the General Conditions»

§ 6.1.5 Rental rates for Construction Manager-owned equipment shall not exceed ~~one hundred~~ percent (~~100~~%) of the standard rental rate paid at the place of the Project.

§ 6.1.5.1 Unit prices, if any, shall be identified in the Guaranteed Maximum Price Amendment.

§ 6.1.6 Liquidated damages, if any:

*(Insert terms and conditions for liquidated damages, if any.)*

### § 6.1.6.1 Liquidated Damages

The Construction Manager acknowledges that the Owner will incur significant damages if the Project is not completed within the Contract Time in the form of inability to use the Project and all related facilities ("Loss of Use"); which are in addition to damages other than Loss of Use such as, but without limitation, costs of extended services of the Owner's project management staff, outside construction management firms, Architect, any separate contractors and consultants, and others performing work or services related to the Project. In consideration of the factors set out in this Section 6.1.6, the Construction Manager acknowledges and agrees that time is particularly of the essence in the Construction Manager's performance of the Work in accordance with the agreed date of commencement of the Work, the agreed dates of Substantial Completion and Final Completion of the Work, and the approved Construction Schedule. The Owner will incur serious and substantial special, incidental and consequential damages if completion of the Work does



not occur within the required Contract Time. It would be difficult if not impossible to determine the amount of Loss of Use damages. Consequently, provisions for liquidated damages as a reasonable estimate of Loss of Use are included in the Contract Documents. Such liquidated damages are a reasonable estimate of actual damages from Loss of Use delay and are not a penalty. The Owner's right to liquidated damages for delay is not affected by partial completion, occupancy, or beneficial occupancy. If the Work is to be performed in phases, with separate dates set forth elsewhere in the Contract Documents, then the liquidated damages of this Section shall apply separately to each such phase. The liquidated damages provisions herein are intended to be in addition to every other remedy enforceable at law, equity, or under this Contract, including without limitation additional Owner costs related to the Project, and the right to collect consequential damages in any case where liquidated damages are unenforceable or otherwise unavailable. The provisions shall not relieve or release the Construction Manager from liability for any and all damage or damages suffered by the Owner due to other breaches of the Contract or suffered by separate contractors or under the indemnification and warranty provisions of this Contract, or other damages that are not expressly covered by liquidated damages.

#### **§ 6.1.6.2 Loss of Use Liquidated Damages**

**§ 6.1.6.2.1** The Owner and Construction Manager acknowledge and agree that if Substantial Completion of the Work is not achieved by the Contract Time for Substantial Completion, the amount of the Owner's actual Loss of Use damages (as described in Section 6.1.6.1 above) will be difficult, impractical or impossible to determine. Accordingly, the parties agree that if Substantial Completion is not achieved by the agreed date of Substantial Completion as may be adjusted pursuant to the Contract Documents, the Construction Manager shall pay to the Owner as liquidated damages for the Loss of Use of the Project the following amounts: the sum of \_\_\_\_\_ **DOLLARS (\$\_\_\_\_\_)** for each partial day or full day of delay beyond the deadline for Substantial Completion.

**§ 6.1.6.2.2** The parties further acknowledge and agree that the Construction Manager's obligation to pay liquidated damages under this Section 6.1.6 shall be in lieu of the obligation to pay actual delay damages for the Loss of Use damages. The parties agree that the daily rate agreed to above is reasonable in comparison to the approximate scope of actual delay damages for Loss of Use that the parties anticipate as of the time of execution of this Agreement, and that the payment of such liquidated damages is not intended to be a penalty or forfeiture. The parties further acknowledge that these liquidated damages are meant to reimburse the Owner only for such Loss of Use delay damages and that the Owner reserves the right to claim other types of damages against Construction Manager resulting from delays, including but not limited to other delay damages.

**§ 6.1.6.2.3** Owner may withhold or offset such liquidated or other delay damages against any sums otherwise owed Construction Manager.

#### **§ 6.1.7 Other:**

*(Insert provisions for bonus, cost savings or other incentives, if any, that might result in a change to the Contract Sum.)*

«100% of all Savings accrue to the Owner. As used in this section, "Savings" means any positive difference between a fixed price, the Guaranteed Maximum Price or other maximum price set forth in the Contract Documents and the actual Cost of the Work and Fee, including all costs for which Owner reimburses Construction Manager and Construction Manager's fees or profits the Construction Manager earns.»

#### **§ 6.2 Guaranteed Maximum Price**

The Construction Manager guarantees that the Contract Sum shall not exceed the Guaranteed Maximum Price set forth in the Guaranteed Maximum Price Amendment, subject to additions and deductions by Change Order as provided as it is amended from time to time. To the extent the Cost of the Work and Fee exceeds the Guaranteed Maximum Price, the Construction Manager shall bear such costs in excess of the Guaranteed Maximum Price and Fee without reimbursement or additional compensation from the Owner. Costs which would cause the Guaranteed Maximum Price to be exceeded shall be paid by the Construction Manager without reimbursement by the Owner.

#### **§ 6.3 Changes in the Work**

**§ 6.3.1** 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.

§ 6.3.1.1 The Architect may order minor changes in the Work as provided in Article 7 of the General Conditions.

§ 6.3.2 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 Article 7 of the General Conditions.

§ 6.3.3 Adjustments to subcontracts awarded on the basis of a stipulated sum shall be determined in accordance with Article 7 of the General Conditions, as they refer to “cost” and “fee,” and not by Articles 6 and 7 of this Agreement. Adjustments to subcontracts awarded with the Owner’s prior written consent on the basis of cost plus a fee shall be calculated in accordance with the terms of those subcontracts.

§ 6.3.4 In calculating adjustments to the Guaranteed Maximum Price, the terms “cost” and “costs” as used in Article 7 of the General Conditions shall mean the Cost of the Work as defined in Article 7 of this Agreement and the term “fee” shall mean the Construction Manager’s Fee as defined in Section 6.1.2 of this Agreement.

§ 6.3.5 Subject to Article 15 of the General Conditions, if no specific provision is made in Section 6.1.3 for adjustment of the Construction Manager’s Fee in the case of changes in the Work, or if the extent of such changes is such, in the aggregate, that application of the adjustment provisions of Section 6.1.3 will cause substantial inequity to the Owner or Construction Manager, the Construction Manager’s Fee shall be equitably adjusted on the same basis that was used to establish the Fee for the original Work, and the Guaranteed Maximum Price shall be adjusted accordingly.

## **ARTICLE 7 COST OF THE WORK FOR CONSTRUCTION PHASE**

### **§ 7.1 Costs to Be Reimbursed**

§ 7.1.1 The term Cost of the Work shall mean only costs necessarily incurred by the Construction Manager in the proper performance of the Work in accordance with this Article 7 and Article 8. The Cost of the Work shall include only the items set forth in Sections 7.1 through 7.7. As to change work, in the event of conflict between the provisions of this Article 7 and Section 7.5 of the General Conditions, Section 7.5 of the General Conditions shall control.

§ 7.1.2 Where, pursuant to the Contract Documents, any cost is subject to the Owner’s prior approval, the Construction Manager shall obtain such approval in writing prior to incurring the cost. The parties shall endeavor to identify any such costs prior to executing the Guaranteed Maximum Price Amendment.

§ 7.1.3 Costs shall be at rates not higher than the standard rates paid at the place of the Project, except with prior approval of the Owner.

### **§ 7.2 Labor Costs**

§ 7.2.1 Unless otherwise agreed in writing, in advance, with Owner, wages or salaries of construction workers directly employed by the Construction Manager to perform the construction of the Work at the Project site or, with the Owner’s prior approval, at off-site workshops, calculated as follows and with only the following components:

- .1 Basic wages for the laborers, apprentices, journeymen, and foremen performing and/or directly supervising the Work on the Project site. The premium portion of overtime wages is not included unless pre-approved by the Owner. If the rate is higher than the applicable published prevailing wage rate, Construction Manager must provide documentation to the Owner verifying the higher rate satisfactory to the Owner.
- .2 Fringe benefits: Fringe benefits paid by the Construction Manager as established by the Oregon Bureau of Labor and Industries or contributed to labor trust funds as itemized fringe benefits, whichever is applicable. Costs paid or incurred by the Construction Manager for vacations, per diem, bonuses, stock options, or discretionary payments to employees are not reimbursable.
- .3 Workers’ insurances: Direct contributions to the State of Oregon as industrial insurance; medical aid; and supplemental pension by class and rates established by the Oregon Bureau of Labor and Industries.
- .4 Federal insurances: Direct contributions required by the Federal Insurance Compensation Act (FICA); Federal Unemployment Tax Act (FUTA); and State Unemployment Compensation Act (SUCA).

§ 7.2.2 Wages or salaries of the Construction Manager’s supervisory and administrative personnel when stationed at the Project site, or with the Owner’s prior written approval, offsite while working exclusively on the Project.

**§ 7.2.3** Wages or salaries of the Construction Manager’s supervisory and administrative personnel when performing Work and stationed at a location other than the Project site, but only for that portion of time required for the Work, and limited to the personnel and activities listed below.  
*(Identify the personnel, type of activity and, if applicable, any agreed upon percentage of time to be devoted to the Work.)*

<u>Personnel</u>	<u>Type of Activity</u>
<< >>	<< >>

**§ 7.2.4** Wages and salaries of the Construction Manager’s supervisory or administrative personnel engaged at factories, workshops or while traveling, in expediting the production or transportation of materials or equipment required for the Work, but only for that portion of their time required for the Work.

**§ 7.2.5** If agreed rates for wages and salaries under Sections 7.2.2 through 7.2.4 in lieu of actual costs, are provided in this Agreement (or in a separate Construction Manager proposal that the Owner has accepted), those rates shall apply and the rates shall remain unchanged throughout the duration of this Agreement, unless the parties execute a Modification.

**§ 7.2.6** If applicable prevailing wage rates for personnel are actually higher than as provided above, Construction Manager shall pay or cause to be paid the difference, and the difference shall not be a Cost of the Work.

### **§ 7.3 Subcontract Costs**

Payments made by the Construction Manager to Subcontractors in accordance with the requirements of the subcontracts for Work properly performed.

### **§ 7.4 Costs of Materials and Equipment Incorporated in the Completed Construction**

**§ 7.4.1** Costs, including transportation and storage at the site, of materials and equipment incorporated, or to be incorporated, in the completed construction. The Construction Manager may use Contingency to cover material escalation costs for materials within the Cost of the Work with written approval from the Owner, which shall not be unreasonably withheld.

**§ 7.4.2** Costs of materials described in the preceding Section 7.4.1 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.

### **§ 7.5 Costs of Other Materials and Equipment, Temporary Facilities and Related Items**

**§ 7.5.1** Costs of transportation, storage, installation, dismantling, maintenance, 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 Project 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.

**§ 7.5.2** Rental charges for temporary facilities, machinery, equipment, and hand tools not customarily owned by construction workers that are provided by the Construction Manager at the site, and the costs of transportation, installation, dismantling, minor repairs, and removal of such temporary facilities, machinery, equipment, and hand tools. Rates and quantities of equipment owned by the Construction Manager, or a related party as defined in Section 7.8, shall be subject to the Owner’s prior approval. The total rental cost of any such equipment may not exceed the purchase price of any comparable item. All rental rates shall be subject to the Owner’s prior written approval.

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

**§ 7.5.4** Costs of the Construction Manager’s office at the Project site, including general office equipment and supplies.

**§ 7.5.5** Costs of materials and equipment suitably stored off the Project site at a mutually acceptable location, subject to the Owner’s prior approval. In addition to other requirements of the Contract Documents applicable to payment for

stored materials, Owner may withhold payment for any stored materials until all of the following conditions are fulfilled to Owner's satisfaction: (i) evidence that Owner has acquired title to the same and such materials are covered by insurance required and the Owner is named as additional insured on insurance certificate; (ii) a Stored Materials Log for review by Owner and Architect, together with all invoices and bills of sale for such materials itemized therein; (iv) a schedule for the prompt incorporation thereof into the Project; (v) written confirmation from the Architect verifying and approving the cost and acquisition of said materials, that such materials are stored in a secure building or bonded warehouse located on the Project site, or in the jurisdiction in which the Project is situated, and that such materials are tagged and separate and not subject to commingling with other materials.

## **§ 7.6 Miscellaneous Costs**

**§ 7.6.1** Premiums for that portion of insurance and Construction Manager payment and performance bonds required by the Contract Documents that can be directly attributed to this Agreement at the following fixed rates: Bonding Rate \_\_\_\_\_% and Project Insurance Rate \_\_\_\_\_%.

**§ 7.6.2** Sales, use, or similar taxes, imposed by a governmental authority, that are related to the Work and for which the Construction Manager is liable; provided, however, that the Oregon Corporate Activity Tax ("CAT") under HB 3427, (also known as the "Student Success Act" or the "Gross Receipts Tax") is expressly excluded from the Cost of the Work and is not otherwise recoverable from the Owner.

**§ 7.6.3** 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.

**§ 7.6.4** Fees of laboratories for tests required by the Contract Documents; except those related to defective or nonconforming Work for which reimbursement is excluded under Article 13 of the General Conditions or by other provisions of the Contract Documents, and which do not fall within the scope of Section 7.7.3 of this Agreement.

**§ 7.6.5** Royalties and license fees paid for the use of a particular design, process, or product, required by the Contract Documents.

**§ 7.6.5.1** The cost of defending suits or claims for infringement of patent rights arising from requirements of the Contract Documents, 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, unless the Construction Manager had reason to believe that the required design, process, or product was an infringement of a copyright or a patent, and the Construction Manager failed to promptly furnish such information to the Architect as required by Article 3 of the General Conditions. The costs of legal defenses, judgments, and settlements shall not be included in the Cost of the Work used to calculate the Construction Manager's Fee or subject to the Guaranteed Maximum Price.

**§ 7.6.6** Costs for communications services, electronic equipment, and software, directly related to the Work and located at the Project site, with the Owner's prior approval.

**§ 7.6.7** Costs of document preproduction and delivery charges.

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

**§ 7.6.9** Legal, mediation and arbitration costs, including attorneys' fees, other than those arising from disputes between or among the Owner and Construction Manager, or its Subcontractors or suppliers, reasonably incurred by the Construction Manager after the execution of this Agreement in the performance of the Work and with the Owner's prior approval, which shall not be unreasonably withheld.

**§ 7.6.10** That portion of the reasonable expenses of the Construction Manager's supervisory or administrative personnel incurred while traveling in discharge of duties connected with the Work.

## **§ 7.7 Other Costs and Emergencies**

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

§ 7.7.2 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 Article 10 of the General Conditions, that do not arise from the negligence of Construction Manager, its Subcontractors or suppliers.

§ 7.7.3 Costs of repairing or correcting damaged Work executed by the Construction Manager, Subcontractors, or suppliers prior to Final Completion, provided that such damaged Work was not caused by the negligence of, or failure to fulfill a specific responsibility by, the Construction Manager, or its Subcontractors or suppliers and only to the extent that the cost of repair or correction is not recovered or recoverable by the Construction Manager from insurance, sureties, Subcontractors, suppliers, or others. Costs of repairing work damaged after Final Completion, and costs of repair or correction of nonconforming Work (i.e., Work that does not comply with the Drawings and Specifications) whether before or after Final Completion, are not recoverable.

§ 7.7.4 The costs described in Sections 7.1 through 7.7 of this Agreement shall be included in the Cost of the Work, unless any provision of the General Conditions or other Conditions of the Contract require the Construction Manager to pay such costs, or unless such costs are excluded by the provisions of Section 7.9 of this Agreement.

## § 7.8 Related Party Transactions

§ 7.8.1 For purposes of this Section 7.8, the term “related party” shall mean (1) a parent, subsidiary, affiliate, or other entity having common ownership of, or sharing common management with, the Construction Manager; (2) any entity in which any stockholder in, or management employee of, the Construction Manager holds an equity interest in excess of ten percent in the aggregate; (3) any entity which has the right to control the business or affairs of the Construction Manager; or (4) any person, or any member of the immediate family of any person, who has the right to control the business or affairs of the Construction Manager.

§ 7.8.2 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, 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, according to the terms of Article 9 of this Agreement. If the Owner fails to authorize the transaction in writing, 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 Article 9.

## § 7.9 Costs Not To Be Reimbursed

§ 7.9.1 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 Project site office, except as specifically provided in Section 7.2, or as may be provided in Article 14 of this Agreement;
- .2 Bonuses, profit sharing, incentive compensation, and any other discretionary payments, paid to anyone hired by the Construction Manager or paid to any Subcontractor or vendor, unless the Owner has provided prior approval;
- .3 Expenses of the Construction Manager’s principal office and offices other than the Project site office;
- .4 Overhead and general expenses, except as may be expressly included in Sections 7.1 to 7.7;
- .5 The Construction Manager’s capital expenses, including interest on the Construction Manager’s capital employed for the Work;
- .6 Except as provided in Section 7.7.3 of this Agreement, costs due to the negligence of, or failure to fulfill a specific responsibility of the Contract by, the Construction Manager, Subcontractors, and suppliers, or anyone directly or indirectly employed by any of them or for whose acts any of them may be liable;
- .7 Any cost not specifically and expressly described in Sections 7.1 to 7.7;
- .8 Costs, other than costs included in Change Orders approved by the Owner, that would cause the Guaranteed Maximum Price to be exceeded;
- .9 Costs for services incurred during the Preconstruction Phase;
- .10 Data processing or software costs related to the Work;
- .11 Any cost incurred by Construction Manager, including bond costs in response to any lien, stop notice, bonded stop notices or other such claims, unless the cost incurred by Construction Manager is solely the result of Owner's failure to make a payment to Construction Manager when due and payable with respect to the Work in question.;



- .12 Costs to correct nonconforming work or to perform warranty work or to correct unclaimed project damage either (i) in excess of \$10,000 prior to Final Completion or (ii) in any amount after Final Completion;
- .13 Travel, lodging, food, or relocation expenses;
- .14 Bonuses, profit sharing, incentive compensation, or other discretionary payments;
- .15 Costs of preparation of, and response to inquiries relating to, Construction Manager's required monthly reports to Owner;
- .16 Corporate Activity Tax; and
- .17 Any other cost or expense not expressly included in the definition of Cost of the Work.

## **ARTICLE 8 DISCOUNTS, REBATES, AND REFUNDS**

§ 8.1 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 the amount to be paid, less such discount, 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. 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. Construction Manager shall make Owner aware of any discount/rebate programs and the timing of payments required under such programs so that Owner will have, at its discretion, the opportunity to participate in such programs and accrue the discount or rebate.

§ 8.2 Amounts that accrue to the Owner in accordance with the provisions of Section 8.1 shall be credited to the Owner as a deduction from the Cost of the Work.

## **ARTICLE 9 SUBCONTRACTS AND OTHER AGREEMENTS**

§ 9.1 Those portions of the Work that the Construction Manager does not customarily perform with the Construction Manager's own personnel shall be performed under subcontracts or other appropriate agreements with the Construction Manager. The Owner may designate specific persons from whom, or entities from which, the Construction Manager shall obtain bids. The Construction Manager shall obtain bids from Subcontractors, and from suppliers of materials or equipment fabricated especially for the Work, who are qualified to perform that portion of the Work in accordance with the requirements of the Contract Documents. The Construction Manager shall deliver such bids to the Architect and Owner with an indication as to which bids the Construction Manager intends to accept. The Owner then has the right to review the Construction Manager's list of proposed Subcontractors and suppliers in consultation with the Architect and, subject to Section 9.1.1, to object to any Subcontractor or supplier. Any advice of the Architect, or approval or objection by the Owner, shall not relieve the Construction Manager of its responsibility to perform the Work in accordance with the Contract Documents. The Construction Manager shall not be required to contract with anyone to whom the Construction Manager has reasonable objection.

§ 9.1.1 When a specific Subcontractor or supplier (1) is recommended to the Owner by the Construction Manager; (2) is qualified to perform that portion of the Work; and (3) has submitted a bid that conforms to the requirements of the Contract Documents without reservations or exceptions, but the Owner requires that another bid be accepted, then the Construction Manager may require that a Change Order be issued to adjust the Guaranteed Maximum Price by the difference between the bid of the person or entity recommended to the Owner by the Construction Manager and the amount of the subcontract or other agreement actually signed with the person or entity designated by the Owner.

§ 9.2 Subcontracts or other agreements shall conform to the applicable payment provisions of this Agreement, and shall not be awarded on the basis of cost plus a fee without the Owner's prior written approval. If a subcontract is awarded on the basis of cost plus a fee, the Construction Manager shall provide in the subcontract for the Owner to receive the same audit rights with regard to the Subcontractor as the Owner receives with regard to the Construction Manager in Article 10.

## **ARTICLE 10 ACCOUNTING RECORDS**

### **§ 10.1 Accounting Records**

§ 10.1.1 The Construction Manager shall keep full and detailed records 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. 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, job cost reports, correspondence, instructions, drawings, receipts, subcontracts, Subcontractor's proposals, Subcontractor's invoices, purchase orders, vouchers, memoranda and other data relating to this Contract. The Construction Manager shall preserve these records for a period of three years after final payment, or for such longer period as may be required by law. Construction Manager shall cooperate with any audits.

§ 10.1.2 The Construction Manager's system of cost control for the Work shall be in accordance with industry standards for projects of this scope, including regular monitoring of actual costs for activities in progress 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 and Architect at regular intervals, using Construction Manager's job-cost tracking system.

§ 10.1.3 The Construction Manager's records shall include but not be limited to accounting records, written policies and procedures, Subcontractor files (including proposals of successful and unsuccessful bidders), original estimates, estimating work sheets, correspondence, change order files (including documentation covering negotiated settlements), the items described in Section 10.1.1, and any other supporting evidence necessary to substantiate charges related to the Contract shall be open to inspection and subject to audit and/or reproduction. Such records subject to examination shall also include, but not be limited to, those records necessary to evaluate and verify direct and indirect costs (including overhead allocations) as they may apply to costs associated with the Contract, and records relating to the performance of the Work.

## **ARTICLE 11 PAYMENTS FOR CONSTRUCTION PHASE SERVICES**

### **§ 11.1 Progress Payments**

§ 11.1.1 Based upon Applications for Payment submitted to the Architect by the Construction Manager, and Certificates for Payment issued by the 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.

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

§ 11.1.3 Progress Payments shall be made in accordance with the Oregon Prompt Payment Act, ORS 279C.570.

§ 11.1.4 With each Application for Payment, the Construction Manager shall submit payrolls, petty cash accounts, receipted invoices or invoices with lien/claim/bond waiver, and (if requested by the Owner) check vouchers; together with any other evidence reasonably required by the Owner or Architect to demonstrate that payments 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, plus payrolls for the period covered by the present Application for Payment, less that portion of the progress payments attributable to the Construction Manager's Fee.

§ 11.1.5 Each Application for Payment shall be based on the most recent 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: (1) the various portions of the Work; (2) any contingency for costs that are included in the Guaranteed Maximum Price but not otherwise allocated to another line item or included in a Change Order; and (3) the Construction Manager's Fee, as a separate line item.

§ 11.1.5.1 The schedule of values shall be prepared in such form and supported by such data to substantiate its accuracy as the Architect may require. The schedule of values shall be used as a basis for reviewing the Construction Manager's Applications for Payment.

§ 11.1.5.2 The allocation of the Guaranteed Maximum Price under this Section 11.1.5 shall not constitute a separate guaranteed maximum price for the Cost of the Work of each individual line item in the schedule of values.

§ 11.1.5.3 When the Construction Manager allocates costs from a contingency to another line item in the schedule of values (unless objected to by the Architect or the Owner), the Construction Manager shall submit supporting documentation to the Architect using the process (including supporting documentation) required for change orders and described in Section 7.5 of the General Conditions, and such allocations must be approved in writing prior to the submission of the applicable Application for Payment.



§ 11.1.6 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 and for which the Construction Manager has made payment or intends to make and then actually makes 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.

§ 11.1.7 In accordance with the General Conditions and subject to other provisions of the Contract Documents, the amount of each progress payment shall be computed as follows:

§ 11.1.7.1 The amount of each progress payment shall first include:

- .1 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 most recent schedule of values. 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 of the General Conditions;
- .2 That portion of the Guaranteed Maximum Price properly allocable to materials and equipment delivered and suitably stored at the Project site for subsequent incorporation in the completed construction or, if approved in writing in advance by the Owner, suitably stored off the Project site at a location agreed upon in writing;
- .3 That portion of Construction Change Directives that the Owner determines to be reasonably justified; and
- .4 The Construction Manager's Fee, computed upon the Cost of the Work described in the preceding Sections 11.1.7.1.1 and 11.1.7.1.2 at the rate stated in Section 6.1.2 or, if the Construction Manager's Fee is stated as a fixed sum in that Section, an amount that bears the same ratio to that fixed-sum fee as the Cost of the Work included in Sections 11.1.7.1.1 and 11.1.7.1.2 bears to a reasonable estimate of the probable Cost of the Work upon its completion.

§ 11.1.7.2 The amount of each progress payment shall then be reduced by:

- .1 The aggregate of any amounts previously paid by the Owner;
- .2 The amount, if any, for Work that remains uncorrected and for which the Architect has previously withheld a Certificate for Payment as provided in Article 9 of the General Conditions;
- .3 Any amount for which the Construction Manager does not intend to pay a Subcontractor or material supplier, unless the Work has been performed by others the Construction Manager intends to pay;
- .4 For Work performed or defects discovered since the last payment application, any amount for which the Architect may withhold payment, or nullify a Certificate of Payment in whole or in part, as provided in Article 9 of the General Conditions;
- .5 The shortfall, if any, indicated by the Construction Manager in the documentation required by Section 11.1.4 of this Agreement to substantiate prior Applications for Payment, or resulting from errors subsequently discovered by the Owner's auditors in such documentation; and
- .6 Retainage withheld pursuant to Section 11.1.8 of this Agreement.

#### § 11.1.8 Retainage

§ 11.1.8.1 For each progress payment made prior to Substantial Completion of the Work, the Owner may withhold the following amount, as retainage, from the payment otherwise due:

*(Insert a percentage or amount to be withheld as retainage from each Application for Payment. The amount of retainage may be limited by governing law.)*

«Five percent (5%) of the entire amount of each progress payment»

§ 11.1.8.1.1 The following items are not subject to retainage:

*(Insert any items not subject to the withholding of retainage, such as general conditions, insurance, etc.)*

«The entire amount of each progress payment is subject to retainage»

§ 11.1.8.2 Reduction or limitation of retainage, if any, shall be as follows:

*(If the retainage established in Section 11.1.8.1 is to be modified prior to Substantial Completion of the entire Work, insert provisions for such modification.)*

«To the fullest extent allowed by law, full retainage shall be held by the Owner until Final Completion»

§ 11.1.8.3 Except as set forth in this Section 11.1.8.3, upon Substantial Completion of the Work, the Construction Manager may submit an Application for Payment that includes the retainage withheld from prior Applications for Payment pursuant to this Section 11.1.8. The Application for Payment submitted at Substantial Completion shall not include retainage as follows:

*(Insert any other conditions for release of retainage, such as upon completion of the Owner's audit and reconciliation, upon Substantial Completion.)*

«To the fullest extent allowed by law, full retainage shall be held by the Owner until Final Completion»

§ 11.1.9 If final completion of the Work is materially delayed through no fault of the Construction Manager, the Owner shall pay the Construction Manager any additional amounts in accordance with Article 9 of the General Conditions.

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

§ 11.1.11 In accordance with ORS 279C.570, the Owner and the Construction Manager shall endeavor to agree upon a mutually acceptable procedure for review and approval of payments to Subcontractors, and the percentage of retainage held on Subcontracts, and the Construction Manager shall execute subcontracts in accordance with those agreements. Unless otherwise agreed in writing with the Owner or otherwise required by law, the Contractor agrees to withhold as retainage from each first-tier Subcontractor five percent (5%) of the amount of each progress payment to such first-tier Subcontractor, until completion of the entire Work (not just the Subcontract Work), and to otherwise apply such retainage in accordance with the applicable Subcontract to protect the interests of the Owner.

§ 11.1.12 In taking action on the Construction Manager's Applications for Payment the Architect shall be entitled to rely on the accuracy and completeness of the information furnished by the Construction Manager provided this does not exonerate the Architect from Owner claims if the Architect discovers or has reason to know that inaccurate or incomplete information has been provided. 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.

## § 11.2 Final Payment

§ 11.2.1 Final payment, constituting the entire unpaid balance of the Contract Sum (including any previously unreleased or unapplied retainage, if and to the extent required to be release under ORS 279C.570), shall be made by the Owner to the Construction Manager when

- .1 the Construction Manager has fully performed the Contract, except for the Construction Manager's responsibility to correct Work as provided in Article 12 of the General Conditions, 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 a final Certificate for Payment has been issued by the Architect in accordance with Section 11.2.2.2; and
- .4 All other conditions to Final Payment in the Contract Documents have been fulfilled.

§ 11.2.2 The Owner's auditors will review and report in writing on the Construction Manager's final accounting after delivery of the final accounting to the 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 as provided in Section 9.5.1 of the General Conditions. The time periods stated in this Section supersede those stated in Section 9.4.1 of the General Conditions.

§ 11.2.2.1 If the Owner conducts an audit of the Cost of the Work, the Owner shall, within 10 days after completion of the audit, submit a written report based upon the auditors' findings to the Architect.

§ 11.2.2.2 Within seven days after receipt of the written report described in Section 11.2.2.1, or receipt of notice that the Owner will not conduct an audit, and provided that the other conditions of Section 11.2.1 have been met, the Architect will 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 as provided in Article 9 of the General Conditions. The time periods stated in this Section 11.2.2 supersede those stated in Article 9 of the General Conditions. The Architect is not responsible to the Construction Manager for verifying the accuracy of the Construction Manager's final accounting.

§ 11.2.2.3 If the Owner's auditors' report concludes that the Cost of the Work, as substantiated by the Construction Manager's final accounting, is less than claimed by the Construction Manager, the Construction Manager shall be entitled to request mediation of the disputed amount pursuant to the General Conditions. A request for mediation shall be made by the Construction Manager within 30 days after the Construction Manager's receipt of a copy of the Architect's final Certificate for Payment. Failure to request mediation within this 30-day period shall result in the substantiated amount reported by the Owner's auditors becoming binding on the Construction Manager. Pending a final resolution of the disputed amount, the Owner shall pay the Construction Manager the amount certified in the Architect's final Certificate for Payment.

§ 11.2.3 The Owner's final payment to the Construction Manager shall be made no later than 30 days after the issuance of the Architect's final Certificate for Payment and fulfillment of the other conditions to Final Payment.

§ 11.2.4 If, subsequent to final payment and at the Owner's request, the Construction Manager incurs costs to correct defective or nonconforming Work, the Owner shall not reimburse the Construction Manager such costs, and such costs are not Cost of the Work. If it incurs any costs in connection therewith and the Construction Manager has participated in savings as provided in Section 5.2.1, the amount of such savings shall be recalculated and appropriate credit given to the Owner in determining the net savings amount to be paid by the Owner to the Construction Manager.

§ 11.2.5 Neither approval of an application for payment, a progress payment, release of retainage, Final Payment, or partial or entire use or occupancy of the Project by Owner shall constitute acceptance of Work not conforming to the Contract Documents or waiver of the right to assert overpayment

### § 11.3 Interest

Payments due and unpaid under the Contract shall bear interest from the date payment is due at the rate stated below, or in the absence thereof, at the legal rate prevailing from time to time at the place where the Project is located.  
(Insert rate of interest agreed upon, if any.)

Payments shall be made, and interest shall be payable, in accordance with the Oregon Prompt Payment Act, ORS 279C.570.

## ARTICLE 12 DISPUTE RESOLUTION

### § 12.1 Binding Dispute Resolution

For any Claim subject to, but not resolved by mediation pursuant to Article 15 of the General Conditions, the method of binding dispute resolution shall be as follows:  
(Check the appropriate box.)

[ ☒ ] Arbitration pursuant to Article 15 of the General Conditions

## ARTICLE 13 TERMINATION OR SUSPENSION

### § 13.1 Termination Prior to Execution of the Guaranteed Maximum Price Amendment

§ 13.1.1 If the Owner and the Construction Manager do not reach an agreement on the Guaranteed Maximum Price, the Owner may terminate this Agreement upon not less than seven days' written notice to the Construction Manager.

§ 13.1.2 In the event of termination of this Agreement pursuant to Section 13.1.1, for reasons other than Construction Manager's default, the Construction Manager shall be compensated for Preconstruction Phase services and Work

performed prior to receipt of a notice of termination, in accordance with the terms of this Agreement. In no event shall the Construction Manager's compensation under this Section exceed the compensation set forth in Section 5.1.

**§ 13.1.3** 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 Article 14 of the General Conditions.

**§ 13.1.4** In the event of termination of this Agreement pursuant to Section 13.1.3, the Construction Manager shall be equitably compensated for Preconstruction Phase services and Work performed prior to receipt of a notice of termination. In no event shall the Construction Manager's compensation under this Section exceed the compensation set forth in Section 5.1.

**§ 13.1.5** If the Owner terminates the Contract pursuant to Section 13.1.3 after the commencement of the Construction Phase but prior to the execution of the Guaranteed Maximum Price Amendment, the Owner shall pay to the Construction Manager an amount calculated as follows, which amount shall be in addition to any compensation paid to the Construction Manager under Section 13.1.4:

- .1 Take the Cost of the Work incurred by the Construction Manager to the date of termination;
- .2 Add the Construction Manager's Fee computed upon the Cost of the Work to the date of termination at the rate stated in Section 6.1 or, if the Construction Manager's Fee is stated as a fixed sum in that Section, an amount that bears the same ratio to that fixed-sum Fee as the Cost of the Work at the time of termination bears to a reasonable estimate of the probable Cost of the Work upon its completion; and
- .3 Subtract the aggregate of previous payments made by the Owner for Construction Phase services, and any Owner damages for Construction Manager's default.

**§ 13.1.6** Except in the event of Construction Manager default, the Owner shall also pay the Construction Manager fair compensation for rental of any equipment owned by the Construction Manager that the Owner elects to retain and that is not otherwise included in the Cost of the Work under Section 13.1.5.1. To the extent that the Owner elects to take legal assignment of subcontracts and purchase orders (including rental agreements), the Construction Manager shall, as a condition of receiving the payments referred to in this Article 13, execute and deliver all such papers and take all such steps, including the legal assignment of such subcontracts and other contractual rights of the Construction Manager, as the Owner may require for the purpose of fully vesting in the Owner the rights and benefits of the Construction Manager under such subcontracts or purchase orders. All Subcontracts, purchase orders and rental agreements entered into by the Construction Manager will contain provisions allowing for assignment to the Owner as described above.

**§ 13.1.6.1** Except in the event of Construction Manager default, if the Owner accepts assignment of subcontracts, purchase orders or rental agreements as described above, the Owner will reimburse or indemnify the Construction Manager for all costs arising under the subcontract, purchase order or rental agreement arising after the date of assignment, if those costs would have been reimbursable as Cost of the Work if the contract had not been terminated. If the Owner chooses not to accept assignment of any subcontract, purchase order or rental agreement that would have constituted a Cost of the Work had this agreement not been terminated, the Construction Manager will terminate the subcontract, purchase order or rental agreement and the Owner will pay the Construction Manager the costs necessarily incurred by the Construction Manager because of such termination, except in the event of Construction Manager default.

**§ 13.1.6.2** If the Construction Manager terminates the Contract after execution of the Guaranteed Maximum Price Amendment, the amount payable to the Construction Manager shall not exceed the amount the Construction Manager would otherwise have received under this Section 13, except that the Construction Manager's Fee shall be calculated proportionate to the Cost of the Work for Work actually completed.

## **§ 13.2 Termination or Suspension Following Execution of the Guaranteed Maximum Price Amendment**

### **§ 13.2.1 Termination**

The Contract may be terminated by the Owner or the Construction Manager as provided in Article 14 of the General Conditions.

### **§ 13.2.2 Termination by the Owner for Cause**

**§ 13.2.2.1** If the Owner terminates the Contract for cause as provided in Article 14 of the General Conditions, the amount, if any, to be paid to the Construction Manager under Article 14 of the General Conditions shall not cause the Guaranteed Maximum Price to be exceeded, nor shall it exceed the lesser of the amount identified in Article 14 of the General Conditions, or an amount calculated as follows:

- .1 Take the Cost of the Work incurred by the Construction Manager to the date of termination;
- .2 Add the Construction Manager's Fee, computed upon the Cost of the Work to the date of termination at the rate stated in Section 6.1 or, if the Construction Manager's Fee is stated as a fixed sum in that Section, an amount that bears the same ratio to that fixed-sum Fee as the Cost of the Work at the time of termination bears to a reasonable estimate of the probable Cost of the Work upon its completion;
- .3 Subtract the aggregate of previous payments made by the Owner; and
- .4 Subtract the costs and damages incurred, or to be incurred, by the Owner under Article 14 of the General Conditions.

**§ 13.2.2.2** If the Owner terminates for convenience, and at that time the Construction Manager is not in default of this Agreement, the Owner shall also pay the Construction Manager fair compensation for rental of any equipment owned by the Construction Manager that the Owner elects to retain and that is not otherwise included in the Cost of the Work under Section 13.2.2.1.1. In any event, to the extent that the Owner elects to take legal assignment of subcontracts and purchase orders (including rental agreements), the Construction Manager shall, and as a condition of receiving the payments referred to in this Article 13, execute and deliver all such papers and take all such steps, including the legal assignment of such subcontracts and other contractual rights of the Construction Manager, as the Owner may require for the purpose of fully vesting in the Owner the rights and benefits of the Construction Manager under such subcontracts or purchase orders.

### **§ 13.3 Suspension**

The Work may be suspended by the Owner as provided in Article 14 of the General Conditions; in such case, unless suspension is the result of acts or omissions of the Construction Manager, the Guaranteed Maximum Price and Contract Time shall be increased or decreased as provided in Article 14 of the General Conditions, except that the term "profit" shall be understood to mean the Construction Manager's Fee as described in Sections 6.1 and 6.3.5 of this Agreement.

## **ARTICLE 14 MISCELLANEOUS PROVISIONS**

**§ 14.1** Terms in this Agreement shall have the same meaning as those in the General Conditions. Where reference is made in this Agreement to a provision of the General Conditions or another Contract Document, the reference refers to that provision as amended or supplemented by other provisions of the Contract Documents.

### **§ 14.2 Successors and Assigns**

**§ 14.2.1** The Owner and Construction Manager, respectively, bind themselves, their partners, successors, assigns and legal representatives to covenants, agreements, and obligations contained in the Contract Documents. Except as provided in Section 14.2.2 of this Agreement, and in Section 13.2.2 of the General Conditions, the Construction Manager shall not assign the Contract as a whole without written consent of the Owner. If the Construction Manager attempts to make an assignment, the Construction Manager shall nevertheless remain legally responsible for all obligations under the Contract.

**§ 14.2.2** The Owner may, without consent of the Construction Manager, assign the Contract to a lender providing construction financing for the Project. The Construction Manager shall execute all consents reasonably required to facilitate the assignment.

### **§ 14.3 Insurance and Bonds**

#### **§ 14.3.1 Provision**

The Construction Manager shall provide payment and performance bonds not later than the time required under applicable Oregon law, and proof of insurance coverages required under the Agreement and described in attached Exhibit B, not later than any entry onto the Project site.



**§ 14.3.2 Additional Insured Obligations.** To the fullest extent permitted by law, the Construction Manager shall cause the primary and excess or umbrella policies for Commercial General Liability and Automobile Liability to include the Owner as an additional insured for claims caused in whole or in part by the Construction Manager's negligent acts or omissions. The additional insured coverage shall be primary and non-contributory to any of the Owner's insurance policies and shall apply to both ongoing and completed operations.

**§ 14.3.3** The Construction Manager shall provide certificates of insurance to the Owner that evidence compliance with the requirements in this Section 14.3

**§ 14.3.4** If an owner-controlled (DSIP) or contractor-controlled insurance program for the Project is permitted under ORS 737.602 or other applicable law, the Owner may require such program for the Project. If so, this Contract shall identify (1) anticipated cost savings from reduced premiums, claims reductions and other factors, (2) the allocation of cost savings, and (3) safety responsibilities, incentives or both safety responsibilities and incentives, and Article 11 of the General Conditions shall be modified in a manner acceptable to the Owner to reflect the owner-controlled or contractor-controlled program and reduced charges from Construction Manager and Subcontractors for their own insurance. In the event the Owner chooses to proceed with an owner-controlled or contractor-controlled program, Construction Manager shall, and shall cause its Subcontractors to, comply with all requirements of such insurance program as necessary for coverage. Notwithstanding any provision of the Contract Documents to the contrary, if such program is put in place, neither Construction Manager nor any Subcontractor shall charge or pass through, directly or indirectly, any of its insurance costs or deductibles to Owner as Cost of the Work, part of the Fee, or otherwise.

**§ 14.3.5 Time of the Essence.** All time limits and dates stated in the Contract Documents are of the essence.

**§ 14.3.6 Representations and Warranties of Construction Manager.** Construction Manager hereby represents and warrants to Owner, as of the effective date of this Agreement, that:

**§ 14.3.6.1** Construction Manager is qualified to do business as a licensed general contractor under the laws of the State of Oregon and has all requisite power and authority to carry on its business as now being conducted.

**§ 14.3.6.2** Construction Manager has full power and authority to enter into and perform this Contract and to consummate the transactions contemplated hereby; Construction Manager has duly and validly executed and delivered the Contract Documents to Owner and the Contract Documents constitute the legal, valid and binding obligation of Construction Manager, enforceable against Construction Manager in accordance with its terms, except as enforceability may be limited or affected by applicable bankruptcy, insolvency, reorganization, moratorium or other similar law affecting creditors' rights generally and by general principles of equity (regardless of whether enforceability is considered in a proceeding in equity or at law).

**§ 14.3.6.3** Construction Manager's Representative identified in this Agreement is the duly appointed representative of Construction Manager and has the authority to bind Construction Manager to any and all duties, obligations and liabilities under the Contract Documents and any amendments thereto.

**§ 14.3.6.4** Construction Manager certifies that all Subcontractors performing Work on the Project will be registered with the Construction Contractors Board or licensed by the State Landscape Contractors Board in accordance with ORS 701.035 to 701.055 before the Subcontractor commences Work on the Project.

**§ 14.3.6.5** Construction Manager certifies that it has an employee drug-testing program that complies with the requirements of ORS 279C.505 in place and shall maintain such program for the duration of the Contract, and that it shall include in each of its Subcontracts a requirement that the Subcontractor either maintain such a program or participate in Construction Manager's program for the duration of the Subcontract.

**§ 14.3.6.6** Construction Manager certifies that in compliance with ORS 279A.110, Construction Manager will not discriminate against Minority, Women, or Emerging Small Business Enterprises in obtaining any Subcontracts, and that it shall not discriminate on the basis of race, color, national origin or sex in the performance of the Contract and in the award of any Subcontracts.

**§ 14.3.7 Attorneys' Fees.** In the event a suit, action, arbitration, or other proceeding of any nature whatsoever, including without limitation any proceeding under the U.S. Bankruptcy Code, is instituted, or the services of an attorney are retained, to interpret or enforce any provision of this Agreement or with respect to any dispute relating to the Contract Documents, the prevailing party shall be entitled to recover from the losing party its attorneys', paralegals', accountants', and other experts' fees and all other fees, costs, and expenses actually incurred and reasonably necessary in connection therewith. In the event of suit, action, arbitration, or other proceeding, the amount thereof shall be determined by the judge or arbitrator, shall include fees and expenses incurred on any appeal or review, and shall be in addition to all other amounts provided by law. The prevailing party shall be the party receiving the net award/determined as to each separate claim.

## ARTICLE 15 SCOPE OF THE CONTRACT

**§ 15.1** This Agreement and the other Contract Documents listed below (collectively, "the Contract") 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 and the other Contract Documents may be amended only by written instrument signed by both Owner and Construction Manager.

**§ 15.2** As of the date of this Agreement, the following documents comprise the Contract:

- .1 This Agreement
- .2 AIA Document A133™-2019, Exhibit A, Form of Guaranteed Maximum Price Amendment, if executed
- .3 AIA Document A201™-2017, General Conditions of the Contract for Construction, as modified.
- .4 NA
- .5 Other Exhibits attached to and made a part of this Agreement:  
(Check all boxes that apply.)

Exhibit "B" Insurance Requirements  
 Exhibit "C" Form of Claim Waiver  
 Exhibit "D" Request for Proposal and Addenda  
 Exhibit "E" Construction Manager's Proposal  
 Exhibit "F" Construction Manager's General Conditions Charges  
 Exhibit "G" Payment and Performance Bond Forms  
 Exhibit "H" Provisions from Oregon Public Contracting Code and Public Contracting Rules  
 Exhibit "I" Owner Access Standards

☐ ☐ AIA Document E234™-2019, Sustainable Projects Exhibit, Construction Manager as Constructor Edition, dated as indicated below:  
 (Insert the date of the E234-2019 incorporated into this Agreement.)

☐ ☐

☐ ☐ Supplementary and other Conditions of the Contract:

Document	Title	Date	Pages

- .6 Other documents, if any, listed below:  
 (List here any additional documents that are intended to form part of the Contract Documents. AIA Document A201-2017 provides that the advertisement or invitation to bid, Instructions to Bidders, sample forms, the Construction Manager's bid or proposal, portions of Addenda relating to bidding or proposal requirements, and other information furnished by the Owner in anticipation of receiving bids or proposals, are not part of the Contract Documents unless enumerated in this Agreement. Any such documents should be listed here only if intended to be part of the Contract Documents.)

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

**SCHOOL DISTRICT**

**CONSTRUCTION MANAGER/GENERAL CONTRACTOR**



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**OWNER** *(Signature)*

« » « »

*(Printed name and title)*

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**CONSTRUCTION MANAGER** *(Signature)*

« » « »

*(Printed name and title)*

