

# **GENERAL CONDITIONS OF CONSTRUCTION CONTRACT**

## **SUMMARY OF CONTENTS**

- 1. DEFINITIONS AND USE OF TERMS
- 2. THE CONTRACT
- 3. THE OWNER
- 4. ADMINISTRATION OF THE CONTRACT
- 5. CONTRACTOR
- 6. SUBCONTRACTORS AND SUPPLIERS
- 7. WORK BY OWNER AND BY OTHERS
- 8. PROTECTION OF PERSONS AND PROPERTY
- 9. SUBMITTALS
- 10. QUALITY CONTROL PLAN, COMMISSIONING REPORT & WARRANTIES
- 11. TIME
- 12. CHANGES
- 13. PAYMENTS
- 14. SUBSTANTIAL AND FINAL COMPLETION
- 15. RIGHTS AND REMEDIES
- 16. CONTRACT DISPUTES
- 17. INSURANCE AND BONDS
- 18. NONDISCRIMINATION IN EMPLOYMENT
- 19. STATUTORY REQUIREMENTS
- 20. MISCELLANEOUS PROVISIONS

## **TABLE OF CONTENTS**

**ARTICLE 1: DEFINITIONS AND USE OF TERMS -----17**

**1.1 DEFINED TERMS -----17**

        1.1.1 Addendum----- 17

        1.1.2 Affiliated Entity ----- 17

        1.1.3 Intentionally Not Used ----- 17

        1.1.4 Allowance ----- 17

        1.1.5 Application for Payment----- 17

        1.1.6 Architect, Architect/Engineer, A/E ----- 17

        1.1.7 Bid ----- 17

        1.1.8 Bid Documents ----- 17

        1.1.9 Bid, Performance and Payment Bonds ----- 17

        1.1.10 Certificate for Payment----- 17

        1.1.11 Certificate of Final Completion----- 17

        1.1.12 Certificate of Insurance ----- 17

        1.1.13 Certificate of Substantial Completion----- 17

        1.1.14 Change Order----- 17

        1.1.15 Contract ----- 17

        1.1.16 Contract Administrator----- 18

## General Conditions of Construction Contract - GCCC

---

1.1.17 Contract Amendment	18
1.1.18 Contract Documents	18
1.1.19 Contract Sum	18
1.1.20 Contract Time	18
1.1.21 Contractor	18
1.1.22 Coordination Drawings	18
1.1.23 Date of Commencement	18
1.1.24 Date of Substantial Completion	18
1.1.25 Day	18
1.1.26 Defective or Nonconforming Work	18
1.1.27 Delay	18
1.1.28 Department	19
1.1.29 Director	19
1.1.30 Drawings	19
1.1.31 Field Order	19
1.1.32 Final Completion	19
1.1.33 Geotechnical Studies	19
1.1.34 Hazardous Materials	19
1.1.35 Instructions to Bidders or Offerors	19
1.1.36 Invitation for Bids	19
1.1.37 Laws and Regulations	19
1.1.38 Liquidated Damages	19
1.1.39 Modification	19
1.1.40 Notice to Proceed	20
1.1.41 Offer	20
1.1.42 Offeror	20
1.1.43 Or-Equal Item	20
1.1.44 Owner	20
1.1.45 Product Data	20
1.1.46 Progress Schedule	20
1.1.47 Project	20
1.1.48 Project Manager	20
1.1.49 Project Manual	20
1.1.50 Proposal	20
1.1.51 Proposal Documents	20
1.1.52 Punch List	20
1.1.53 Record Documents	20
1.1.54 Referenced Standards	20
1.1.55 Request for Proposal	20
1.1.56 Samples	21
1.1.57 Schedule of Submittals	21
1.1.58 Schedule of Values	21
1.1.59 Separate Contractor	21
1.1.60 Shop Drawings	21
1.1.61 Site	21
1.1.62 Site Survey	21

General Conditions of Construction Contract - GCCC

---

1.1.63 Solicitation ----- 21  
1.1.64 Specifications ----- 21  
1.1.65 Subcontractor ----- 21  
1.1.66 Submittals ----- 21  
1.1.67 Substantial Completion ----- 21  
1.1.68 Substitution ----- 21  
1.1.69 Sub-subcontractor----- 22  
1.1.70 Superintendent----- 22  
1.1.71 Supplemental Conditions ----- 22  
1.1.72 Supplier----- 22  
1.1.73 Surety 22  
1.1.74 Taxes 22  
1.1.75 Intentionally Not Used ----- 22  
1.1.76 Unit Prices ----- 22  
1.1.77 Warranties and Guarantees ----- 22  
1.1.78 Work 22  
1.2 USE OF TERMS -----22  
    1.2.1 Singular and Plural----- 22  
    1.2.2 Tash Order ----- 22  
    1.2.3 Task Order Amendment ----- 22  
    1.2.4 Technical Terms and Trade Usage ----- 22  
    1.2.5 Titles and Headings----- 22  
ARTICLE 2: THE CONTRACT -----23  
    2.1 AGREEMENT -----23  
        2.1.1 Changes----- 23  
        2.1.2 Documents Excluded from the Contract ----- 23  
    2.2 ORGANIZATION AND INTENT -----23  
        2.2.1 Contract Documents Complementary ----- 23  
        2.2.2 Intent to Require Completed Project----- 23  
        2.2.3 Work Required if Reasonably Inferable ----- 23  
        2.2.4 Organization of Drawings and Specifications ----- 23  
        2.2.5 Inconsistent Provisions ----- 23  
    2.3 REFERENCED STANDARDS -----23  
        2.3.1 Standards Incorporated ----- 23  
        2.3.2 Availability of Referenced Standards----- 23  
        2.3.3 Precedence of Contract Documents Over Referenced  
                Standards ----- 23  
    2.4 OWNERSHIP AND USE OF DOCUMENTS -----23  
        2.4.1 Copies Furnished----- 23  
        2.4.2 Ownership of Documents----- 23  
        2.4.3 Copyright and Other Reserved Rights ----- 23

2.4.4 Use and Reproduction of Documents ----- 23  
2.4.5 Record Documents----- 24  
2.4.6 Return of Documents----- 24

**ARTICLE 3: THE OWNER -----24**

**3.1 OWNER’S REPRESENTATIVES-----24**

3.1.1 Designated Representatives ----- 24  
3.1.2 Representative of Legal Owner ----- 24

**3.2 PROJECT INFORMATION -----24**

3.2.1 Site Surveys ----- 24  
3.2.2 Site and Physical Data ----- 24  
3.2.3 Reliance by Contractor ----- 24

**3.3 OWNER RESPONSIBILITIES -----24**

3.3.1 Access to Site----- 24  
3.3.2 Permits and Fees ----- 25

**ARTICLE 4: ADMINISTRATION OF THE CONTRACT-----25**

**4.1 CONTRACT ADMINISTRATION -----25**

4.1.1 Administration by Owner ----- 25  
4.1.2 Contract Administrator Limitations of Authority ----- 25  
4.1.3 Owner’s Representatives ----- 25

**4.2 CONSTRUCTION ADMINISTRATION -----25**

4.2.1 Performance of Construction Administration ----- 25  
4.2.2 Status of Architect/Engineer----- 25  
4.2.3 Owner’s Project Manager Limitations of Authority ----- 26  
4.2.4 Communications ----- 26  
4.2.5 Change in Architect/Engineer’s Duties ----- 26  
4.2.6 Change of Architect/Engineer----- 26  
4.2.7 Timeliness of Construction Administration Services-- 26

**4.3 ADMINISTRATION OF CONSTRUCTION -----26**

4.3.1 Interpretation and Clarification of Drawings and Specifications ----- 26  
4.3.2 Standard of Interpretation ----- 26  
4.3.3 Interpretations and Decisions by Owner ----- 26  
4.3.4 Acceptability of Superintendent and Key Personnel--- 26  
4.3.5 Approval of Subcontractors and Suppliers ----- 27  
4.3.6 Approval of Submittals ----- 27  
4.3.7 Site Visits ----- 27  
4.3.8 Rejection of Work----- 27  
4.3.9 Additional Inspection, Testing or Specific Approvals - 27  
4.3.10 Authority to Stop or Suspend Work ----- 27  
4.3.11 Review of Applications for Payment ----- 27

4.3.12 Changes in the Work----- 27  
4.3.13 Substantial and Final Completion----- 27  
4.3.14 Recommendations on Payments, Changes, Claims and  
Disputes ----- 27  
4.4 LIMITATIONS OF OWNER’S AND ARCHITECT/ENGINEER’S  
RESPONSIBILITIES -----27  
4.4.1 Charge or Control ----- 27  
4.4.2 Actions not to Relieve Contractor ----- 27  
4.4.3 Responsibility for Others ----- 28  
4.4.4 Inspection, Testing or Approval and Rejection of Work  
28  
4.4.5 Stopping or Suspension of Work ----- 28  
4.4.6 Payments ----- 28  
4.4.7 Occupancy or Use ----- 28  
4.4.8 Certificate of Substantial or Final Completion ----- 28  
ARTICLE 5: CONTRACTOR -----28  
5.1 REVIEW OF CONTRACT DOCUMENTS AND FIELD  
CONDITIONS -----28  
5.1.1 Review of Site Conditions ----- 28  
5.1.2 Review of Contract Documents----- 28  
5.1.3 Field Measurements and Site Conditions ----- 28  
5.1.4 Inspection of Work ----- 28  
5.1.5 Compliance of Contract Documents with Laws and  
Regulations and Referenced Standards ----- 28  
5.1.6 Notice of Errors----- 28  
5.1.7 Risk of Performance ----- 29  
5.2 LEGAL REQUIREMENTS -----29  
5.2.1 Compliance with Laws, Regulations and Orders ----- 29  
5.2.2 Taxes 29  
5.2.3 Permits and Fees ----- 29  
5.2.4 Compliance with U.S. Green Building Council Leadership  
in Energy and Environmental Design (LEED)  
Requirements ----- 29  
5.3 CONTRACTOR’S RESPONSIBILITY FOR PERFORMANCE -----30  
5.3.1 Assignment, Scheduling and Coordination ----- 30  
5.3.2 Construction Means and Methods----- 30  
5.3.3 Discipline at the Site----- 30  
5.3.4 Responsibility for Subordinates----- 30  
5.3.5 Obligations Not Relieved----- 30  
5.4 SUPERINTENDENCE -----30  
5.4.1 Superintendent ----- 30

5.4.2 Acceptability of Key Personnel ----- 30

5.4.3 Communications with Superintendent and Project Manager  
and Owner’s Representative and/or the  
Architect/Engineer ----- 30

5.5 LABOR, MATERIALS AND EQUIPMENT -----30

5.5.1 Labor, Materials and Equipment Provided by Contractor30

5.5.2 Royalties and License Fees ----- 30

5.5.3 Compliance with Contract Documents, Approved  
Submittals, and Interpretations ----- 31

5.5.4 Compliance with Manufacturers’ Instructions ----- 31

5.5.5 Labor 31

5.5.6 Allowances ----- 31

5.5.7 Adjustments for Allowances ----- 31

5.6 CONSTRUCTION OPERATIONS -----31

5.6.1 Use of Site ----- 31

5.6.2 Benchmarks and Layout of Work ----- 32

5.6.3 Working Hours ----- 32

5.6.4 Noise Ordinance ----- 32

5.6.5 Temporary Facilities ----- 32

5.6.6 Cutting, Patching and Finishing ----- 32

5.6.7 Cleaning Up ----- 33

5.6.8 Utilities 33

5.6.9 Air Pollution Control ----- 34

ARTICLE 6: SUBCONTRACTORS AND SUPPLIERS -----34

6.1 SELECTION AND RIGHT OF REJECTION -----34

6.1.1 Identification of Subcontractors and Suppliers ----- 34

6.1.2 Qualification of Subcontractors ----- 34

6.1.3 Acceptance of Subcontractors and Suppliers ----- 35

6.1.4 Use of Acceptable Subcontractors and Suppliers ----- 35

6.1.5 Owner’s Right to Require Removal ----- 35

6.1.6 Replacement Subcontractors and Suppliers ----- 35

6.2 SUBCONTRACTUAL RELATIONS -----35

6.2.1 Subcontracts Required ----- 35

6.2.2 Copies to be Furnished by Contractor ----- 35

6.2.3 Subcontract Provisions ----- 35

6.3 PAYMENTS TO SUBCONTRACTORS AND SUPPLIERS -----36

6.3.1 Payments by Contractor to Subcontractors and Suppliers  
----- 36

6.3.2 Intentionally Not Used ----- 36

6.3.3 Substantial Completion Payment and Final Payment to  
Subcontractors and Suppliers ----- 36

6.3.4 Intentionally Not Used -----	36
6.3.5 Information Regarding Payments -----	36
6.3.6 Responsibility for Payment to Subcontractors -----	36
<b>6.4 CONTINGENT ASSIGNMENT OF SUBCONTRACTS AND PURCHASE ORDERS-----</b>	<b>36</b>
6.4.1 Assignment -----	36
6.4.2 Election by Owner -----	36
6.4.3 Rights of Surety -----	36
6.4.4 Liability for Prior Obligations-----	37
<b>ARTICLE 7: WORK BY OWNER AND BY OTHERS-----</b>	<b>37</b>
<b>7.1 OTHER WORK AT THE SITE -----</b>	<b>37</b>
7.1.1 Owner Occupancy of the Site -----	37
7.1.2 Owner’s Rights Reserved-----	37
7.1.3 Identification of Work by Others -----	37
7.1.4 Coordination of Other Work-----	37
7.1.5 Construction Schedules-----	37
7.1.6 Communications through Owner -----	37
<b>7.2 RESPONSIBILITY OF CONTRACTOR -----</b>	<b>37</b>
7.2.1 Contractor to Afford Access to Others-----	37
7.2.2 Connection with Other Work-----	37
7.2.3 Inspection and Notice of Unsuitability -----	38
7.2.4 Cutting, Patching and Finishing of Work by Others-----	38
7.2.5 Remedy of Damage to Work by Others -----	38
<b>7.3 MUTUAL RESPONSIBILITY OF THE OWNER AND SEPARATE CONTRACTORS-----</b>	<b>38</b>
7.3.1 Responsibility for Cleaning Up -----	38
7.3.2 Claims Involving Separate Contractors-----	38
<b>ARTICLE 8: PROTECTION OF PERSONS AND PROPERTY -----</b>	<b>38</b>
<b>8.1 RESPONSIBILITY FOR SAFETY -----</b>	<b>38</b>
8.1.1 Responsibility for Site Safety -----	38
8.1.2 Appointment of Safety Officer -----	38
8.1.3 Compliance with Legal Requirements-----	39
<b>8.2 SAFETY OF PERSONS AND PROPERTY -----</b>	<b>39</b>
8.2.1 Protections Required-----	39
8.2.2 Notices and Safeguards -----	39
8.2.3 Loading-----	39
8.2.4 Hazardous Activities-----	39
8.2.5 Qualified Personnel -----	39
8.2.6 Emergencies-----	39
8.2.7 Notice of Injury or Damage -----	39

8.2.8 Remedy of Property Damage ----- 39  
8.2.9 Responsibility for Site Security----- 40  
8.3 HAZARDOUS MATERIALS-----40  
8.3.1 Disclosure, Identification and Handling ----- 40  
8.3.2 Discovery of Hazardous Materials at the Site----- 40  
8.3.3 Investigation and Remediation ----- 40  
8.3.4 Resumption of Work----- 40  
8.3.5 Adjustments for PCBs and Asbestos----- 40  
8.4 INDEMNIFICATION -----40  
8.4.1 Indemnity and Duty to Defend ----- 40  
8.4.2 Effect of Limitations on Statutory Benefits----- 41  
8.4.3 Limitation as to Negligence of Indemnitee(s)----- 41  
8.4.4 Other Rights of Indemnity ----- 41  
ARTICLE 9: SUBMITTALS -----41  
9.1 SUBMITTALS REQUIRED -----41  
9.1.1 Precontract Submittals ----- 41  
9.1.2 Initial Submittals ----- 41  
9.1.3 Submittals During Construction----- 42  
9.1.4 Closing Submittals----- 42  
9.1.5 Purpose of Submittals ----- 42  
9.1.6 Performance of Work----- 42  
9.2 SUBMISSION, REVIEW AND APPROVAL OF SUBMITTALS -----42  
9.2.1 Contractor’s Submission ----- 42  
9.2.2 Verification of Information in Submittals----- 42  
9.2.3 Identification of Submittals----- 43  
9.2.4 Deviations from Contract Requirements ----- 43  
9.2.5 Return Without Action ----- 43  
9.2.6 Review and Action by Architect/Engineer ----- 43  
9.2.7 Scope of Review ----- 43  
9.2.8 Correction and Resubmission ----- 43  
9.2.9 Identification of Revisions----- 43  
9.2.10 Responsibility for Deviations, Revisions, Errors and  
Omissions in Submittals ----- 43  
9.2.11 Professional Certifications ----- 44  
9.2.12 Submittals for Finishes ----- 44  
ARTICLE 10: QUALITY CONTROL PLAN, COMMISSIONING REPORT AND  
WARRANTIES -----44  
10.1 QUALITY CONTROL PLAN AND COMMISSIONING REPORT--44  
10.1.1 Quality Control Plan----- 44  
10.1.2 Commissioning Plan----- 44



<b>10.2 GENERAL WARRANTY AND SPECIAL WARRANTIES</b>	<b>44</b>
10.2.1 General Warranty	44
10.2.2 Duration of General Warranty	44
10.2.3 Relation to Specific Correction Provisions and Other Remedies	45
10.2.4 Additional or Special Warranties	45
<b>10.3 OBSERVATION AND INSPECTION OF WORK</b>	<b>45</b>
10.3.1 Access to Work	45
10.3.2 Site Visits	45
10.3.3 Responsibility of Contractor	45
<b>10.4 UNCOVERING OF WORK</b>	<b>45</b>
10.4.1 Uncovering of Prematurely Covered Work	45
10.4.2 Uncovering of Other Covered Work	45
<b>10.5 TESTS, INSPECTIONS AND APPROVALS BY OTHERS</b>	<b>45</b>
10.5.1 Required Tests, Inspections and Approvals	45
10.5.2 Tests and Inspections by Owner	46
10.5.3 Scheduling of Tests, Inspections and Approvals	46
10.5.4 Additional Tests, Inspections and Specific Approvals	46
10.5.5 Other Tests, Inspections and Specific Approvals Required by Owner	46
10.5.6 Notice to Contractor	46
10.5.7 Observation of Tests, Inspections or Approvals	46
10.5.8 Certificates of Testing, Inspection and Approval	46
10.5.9 Costs of Re-Testing, Inspection and Approval	46
<b>10.6 REJECTION AND CORRECTION OF WORK</b>	<b>46</b>
10.6.1 Rejection of Nonconforming Work	46
10.6.2 Contractor to Correct or Replace Rejected Work	46
10.6.3 Acceptance of Defective or Nonconforming Work	47
10.6.4 Removal of Defective or Nonconforming Work	47
10.6.5 Contractor to Bear Cost to Correct or Replace Other Work	47
10.6.6 Failure to Correct or Replace	47
10.6.7 Artistic Decisions	47
<b>10.7 SPECIFIC CORRECTION OF WORK</b>	<b>47</b>
10.7.1 Specific Correction Period	47
10.7.2 Specific Correction Required	47
10.7.3 Notice and Demand for Specific Correction Obligation	47
10.7.4 Extension of Specific Correction Obligation	48
10.7.5 Inspection Prior to Warranty Expiration	48
10.7.6 Effect on Other Remedies	48
<b>ARTICLE 11: TIME</b>	<b>48</b>

**11.1 COMMENCEMENT -----48**

- 11.1.1 Date of Commencement and Notice to Proceed ----- 48
- 11.1.2 Preconstruction Conference ----- 48
- 11.1.3 Commencement of Work at the Site----- 48

**11.2 CONSTRUCTION SCHEDULES -----48**

- 11.2.1 Contractor's Initial Progress Schedule ----- 48
- 11.2.2 Requirements of the Progress Schedule ----- 48
- 11.2.3 Coordination with Other Schedules ----- 53
- 11.2.4 Review and Approval of Schedules ----- 53
- 11.2.5 Schedule of Submittals ----- 53

**11.3 PROJECT PROGRESS-----53**

- 11.3.1 Contract Time Reasonable----- 53
- 11.3.2 Time is of Essence ----- 53
- 11.3.3 Contractor to Proceed Expeditiously ----- 53
- 11.3.4 Conformance to Schedules ----- 53
- 11.3.5 Progress Record ----- 53
- 11.3.6 Substantial Completion Within Contract Time----- 53
- 11.3.7 No Damages for Presentation of Early Completion--- 53
- 11.3.8 Acceleration to Comply with Schedule----- 54
- 11.3.9 Acceleration of Schedule----- 54

**11.4 SUSPENSION OR STOPPAGE OF WORK -----54**

- 11.4.1 Owner's Right to Stop the Work ----- 54
- 11.4.2 Owner's Right to Suspend Work for Convenience ---- 54
- 11.4.3 Disputes Involving Non-payment----- 54

**11.5 DELAYS-----54**

- 11.5.1 Excusable Delays ----- 54
- 11.5.2 Compensable Delay ----- 54
- 11.5.3 Unexcused Delays ----- 55

**11.6 TIME AND RELATED COST ADJUSTMENTS -----55**

- 11.6.1 Notice of Delay ----- 55
- 11.6.2 Continuing Delay ----- 55
- 11.6.3 Request fo an Increase in Contract Time----- 55
- 11.6.4 Concurrent Delay ----- 55
- 11.6.5 Supporting Documentation----- 55
- 11.6.6 Time Extensions for Unusually Severe Weather ----- 56
- 11.6.7 Strikes and Labor Disputes----- 57
- 11.6.8 Review and Adjustment of Schedules ----- 57
- 11.6.9 Limitations on Adjustments ----- 57
- 11.6.10 Denial of Adjustments in Time or Money ----- 58

**11.7 DAMAGES FOR DELAY -----58**

11.7.1 Delay Damages -----	58
11.7.2 Liquidated Damages -----	58
11.7.3 Assessment of Liquidated Damages -----	58
<b>ARTICLE 12: CHANGES -----</b>	<b>59</b>
<b>12.1 CHANGE INSTRUMENTS -----</b>	<b>59</b>
12.1.1 Amendment only by Written Modification -----	59
12.1.2 Change Instruments -----	59
12.1.3 Change Proposals -----	59
12.1.4 Preparation and Submission of Change Orders and Contract Amendments -----	59
12.1.5 Performance of Changes -----	59
12.1.6 Changes -----	59
<b>12.2 CHANGE ORDERS -----</b>	<b>59</b>
12.2.1 Utilization -----	59
12.2.2 Adjustments in Amount Payable to Contractor -----	59
12.2.3 Adjustments in Progress Schedule -----	60
12.2.4 Absence of Proposed Adjustments -----	60
12.2.5 Action Upon Receipt -----	60
<b>12.3 FIELD ORDERS -----</b>	<b>60</b>
12.3.1 Utilization -----	60
12.3.2 Adjustments in Amount Payable to Contractor -----	60
12.3.3 Adjustments in Progress Schedule -----	61
12.3.4 Absence of Proposed Adjustments -----	61
12.3.5 Action Upon Receipt -----	61
<b>12.4 DIFFERING CONDITIONS (SITE AND STRUCTURAL) -----</b>	<b>61</b>
12.4.1 Differing Site Conditions -----	61
12.4.2 Differing Structural Conditions in Remodeling or Renovation Contracts -----	62
12.4.3 Investigation and Determination by Architect/Engineer	62
12.4.4 Disputes Over Differing Structural Conditions -----	62
<b>12.5 CONSTRUCTIVE CHANGES AND DISPUTED ADJUSTMENTS</b>	<b>62</b>
12.5.1 Notice to Owner and Architect/Engineer -----	62
12.5.2 Disputed Adjustments -----	62
<b>12.6 SUBSTITUTIONS AND OR-EQUAL ITEMS -----</b>	<b>62</b>
12.6.1 Allowance of Substitutions and Or-Equal Items -----	63
12.6.2 Or-Equal Items -----	63
12.6.3 Substitutions -----	63
12.6.4 Representations by Contractor -----	63
12.6.5 Costs Borne by Contractor -----	64
12.6.6 Timeliness -----	64

12.6.7 Improper Substitutions .....	64
<b>ARTICLE 13: PAYMENTS .....</b>	<b>64</b>
13.1 SCHEDULE OF VALUES .....	64
13.1.1 Submission.....	64
13.1.2 Form and Contents of Schedule of Values.....	64
13.1.3 Review and Approval .....	64
13.2 APPLICATIONS FOR PAYMENT .....	64
13.2.1 Initial Review and Submission .....	64
13.2.2 Form and Contents of Application .....	64
13.2.3 Inclusion of Stored Materials .....	64
13.2.4 Exclusion of Amounts Not Payable to Subcontractors and Suppliers .....	65
13.2.5 Contract Retainage .....	65
13.2.6 Passage of Clear Title .....	65
13.2.7 Contractor's Certification .....	65
13.2.8 Application of Payment for Field Orders .....	65
13.3 CERTIFICATES FOR PAYMENT .....	65
13.3.1 Issuance of Certificate for Payment .....	65
13.3.2 Representation in Certificate for Payment .....	65
13.3.3 Withholding Certification.....	66
13.3.4 Grounds for Withholding Certification .....	66
13.3.5 Release of Certificate When Grounds Removed .....	66
13.4 PROGRESS PAYMENTS .....	66
13.4.1 Withholding of Payment by Owner .....	66
13.4.2 Payment .....	66
13.4.3 Payment Not Acceptance of Defective Work .....	67
13.4.4 Payment Contingent on Performance .....	67
13.4.5 Waiver of Claims by Contractor.....	67
<b>ARTICLE 14: SUBSTANTIAL AND FINAL COMPLETION .....</b>	<b>67</b>
14.1 PARTIAL OCCUPANCY OR USE .....	67
14.1.1 Occupancy by Owner.....	67
14.1.2 Notice by Owner.....	67
14.1.3 Notice by Contractor.....	67
14.1.4 Inspection.....	67
14.1.5 Conditions for Partial Occupancy or Use .....	67
14.1.6 Partial Occupancy or Use Not Acceptance of Defective Work .....	67
14.2 SUBSTANTIAL COMPLETION .....	67
14.2.1 Notice and Request for Preliminary Inspection .....	67
14.2.2 Submittals on Substantial Completion .....	67

- 14.2.3 Substantial Completion Inspection and Correction--- 68
- 14.2.4 Reinspection----- 68
- 14.2.5 Certification of Substantial Completion----- 68
- 14.2.6 Execution and Acceptance of Certificate----- 68
- 14.2.7 Conditions of Substantial Completion----- 68
- 14.2.8 Commencement of Warranties----- 68
- 14.2.9 Delivery of Premises and Access to Work----- 68
- 14.2.10 Timing of Final Completion----- 68
- 14.2.11 Substantial Completion Cleaning----- 68
- 14.3 FINAL COMPLETION-----69**
  - 14.3.1 Notice and Request for Final Inspection----- 69
  - 14.3.2 Final Inspection and Certificate of Final Completion- 69
  - 14.3.3 Final Submittals ----- 69
  - 14.3.4 USGBC LEED Certification Required for Final Completion  
----- 70
- 14.4 FINAL ACCEPTANCE AND PAYMENT-----70**
  - 14.4.1 Final Certificate for Payment----- 70
  - 14.4.2 Delay in Final Completion----- 70
  - 14.4.3 Final Payment----- 70
  - 14.4.4 Withholding by Owner from Final Payment----- 70
  - 14.4.5 Waiver of Claims by Owner----- 71
  - 14.4.6 Waiver of Claims by Contractor----- 71
- ARTICLE 15: RIGHTS AND REMEDIES -----71**
  - 15.1 OWNER'S RIGHTS AND REMEDIES -----71**
    - 15.1.1 Special and Additional Testing and Inspection ----- 71
    - 15.1.2 Rejection of Nonconforming Work----- 71
    - 15.1.3 Withholding of Certificates and Withholding of Payments  
----- 71
    - 15.1.4 Additional Bonds and Insurance----- 71
    - 15.1.5 Removal of Superintendent, Personnel, Subcontractors or  
Suppliers ----- 71
    - 15.1.6 Stopping or Suspending the Work----- 71
    - 15.1.7 Correction of Defective Work by Owner ----- 71
    - 15.1.8 Cleaning Up ----- 71
    - 15.1.9 Owner Takeover ----- 71
  - 15.2 TERMINATION BY OWNER FOR CONVENIENCE -----71**
    - 15.2.1 Owner's Right To Terminate for Convenience----- 71
    - 15.2.2 Action by Contractor Upon Notice ----- 71
    - 15.2.3 Action by Owner Following Notice----- 72
    - 15.2.4 Contract Adjustments ----- 72
    - 15.2.5 Obligations to Continue ----- 72
  - 15.3 TERMINATION BY THE OWNER FOR CAUSE-----73**

15.3.1 Owner’s Right to Terminate for Cause ----- 73  
15.3.2 Grounds for Termination ----- 73  
15.3.3 Notice of Termination----- 73  
15.3.4 Action by Contractor and Owner ----- 73  
15.3.5 Suspension of Payments----- 73  
15.3.6 Adjustments and Payments ----- 73  
15.3.7 Right to Take Other Low Bid ----- 73  
15.3.8 Termination As If For Convenience----- 73  
15.4 CONTRACTOR’S NO RIGHT TO STOP WORK -----73  
ARTICLE 16: CONTRACT DISPUTES -----74  
16.1 CLAIM -----74  
16.2 CONTRACT ADMINISTRATOR'S DECISION ON  
CONTRACTOR'S CLAIM-----74  
16.3 DISPUTE-----74  
16.4 APPEAL OF THE DIRECTOR'S DECISION (DISPUTE.APPEAL)74  
16.5 INCORPORATION OF THE MONTGOMERY COUNTY CODE  
AND PROCUREMENT REGULATIONS -----75  
ARTICLE 17: INSURANCE AND BONDS-----75  
17.1 PERFORMANCE AND PAYMENT BONDS -----75  
17.1.1 Requirement for Bonds ----- 75  
17.1.2 Copies to be Furnished to Beneficiaries----- 75  
17.1.3 Owner’s Right to Require Additional Bonds ----- 75  
17.2 CONTRACTOR’S LIABILITY INSURANCE -----75  
17.2.1 Requirement for Insurance ----- 75  
17.2.2 Scope of Coverage ----- 75  
17.2.3 Additional Insureds ----- 76  
17.2.4 Insurance Coverage and Limits of Liability----- 76  
17.2.5 Duration of Coverage ----- 76  
17.2.6 Notice of Cancellation, Expiration or Non-renewal---- 76  
17.2.7 Certificates and Policies of Insurance----- 76  
17.2.8 Acceptance or Approval by Owner ----- 76  
17.3 PROPERTY INSURANCE -----76  
17.3.1 Owner’s Coverage Limited ----- 76  
17.3.2 Builder’s All Risk Coverage to Be Provided by Contractor  
----- 76  
17.3.3 Policy Form ----- 76  
17.3.4 Amount of Coverage ----- 76  
17.3.5 Scope of Coverage ----- 76  
17.3.6 Work Stored or in Transit ----- 76  
17.3.7 Duration of Coverage ----- 76

17.3.8 Notice of Cancellation, Expiration or Non-renewal	76
17.3.9 Certificates and Policies of Insurance	77
17.3.10 Absence of Coverage	77
<b>17.4 OTHER INSURANCE</b>	<b>77</b>
17.4.1 Owner's Liability Insurance	77
17.4.2 Boiler and Machinery Insurance	77
17.4.3 Insurance Covering Partial Use or Occupancy	77
17.4.4 Other Insurance Required by Owner	77
<b>17.5 GENERAL PROVISIONS</b>	<b>77</b>
17.5.1 Adjustment of Insured Losses by Owner	77
17.5.2 Distribution of Proceeds by Owner and Contractor	77
<b>ARTICLE 18: NONDISCRIMINATION IN EMPLOYMENT</b>	<b>77</b>
<b>ARTICLE 19: STATUTORY REQUIREMENTS</b>	<b>78</b>
<b>19.1 ETHICS REQUIREMENTS/POLITICAL CONTRIBUTIONS</b>	<b>78</b>
19.1.1 Non-Conviction of Bribery	78
<b>19.2 MINORITY CONTRACTING</b>	<b>78</b>
19.2.1 Policy 78	
19.2.2 Applicable Regulations	78
19.2.3 Minority Business Addendum	78
<b>19.3 AMERICAN STEEL</b>	<b>78</b>
19.3.1 American Steel	78
<b>19.4 PREVAILING WAGE</b>	<b>78</b>
19.4.1 State of Maryland	79
19.4.2 Montgomery County	79
19.4.3 Bond	80
<b>19.5 COST AND PRICING DATA</b>	<b>80</b>
<b>19.6 HAZARDOUS AND TOXIC SUBSTANCES</b>	<b>80</b>
<b>19.7 HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT (HIPAA) COMPLIANCE</b>	<b>80</b>
<b>19.8 IMMIGRATION REFORM AND CONTROL ACT</b>	<b>81</b>
<b>19.9 AMERICANS WITH DISABILITIES ACT</b>	<b>81</b>
<b>19.10 APPLICABLE LAWS</b>	<b>81</b>
<b>ARTICLE 20: MISCELLANEOUS PROVISIONS</b>	<b>81</b>
<b>20.1 MISCELLANEOUS PROVISIONS</b>	<b>81</b>
20.1.1 Assignment	81
20.1.2 Assignment of Payments	81

**General Conditions of Construction Contract - GCCC**

---

**20.1.3 Audit Provisions----- 81**  
**20.1.4 Extent of Contract ----- 81**  
**20.1.5 Governing Law ----- 82**  
**20.1.6 Obligations Surviving Termination ----- 82**  
**20.1.7 Severability of Provisions ----- 82**  
**20.1.8 Third Parties ----- 82**  
**20.1.9 Venue and Jurisdiction ----- 82**  
**20.1.10 Waiver of Breach ----- 82**  
**20.1.11 Written Notice ----- 82**  
**20.1.12 Intellectual Property Approval And Indemnification –  
Infringement ----- 82**  
**20.1.13 Accounting System and Audit Accurate Information82**  
**20.1.14 Duration of Obligation ----- 83**  
**20.1.15 Entire Agreement----- 83**  
**20.1.16 Independent Contractor----- 83**



**ARTICLE 1**

**DEFINITIONS AND USE OF TERMS**

**1.1 DEFINED TERMS**

**1.1.1 Addendum.** An Addendum is a written or graphic instrument issued prior to the opening of Bids or Proposals, which clarifies, corrects, or changes the Solicitation.

**1.1.2 Affiliated Entity.** An Affiliated Entity is (i) any person who is a spouse, parent, natural or adopted descendant, spouse of such descendant, sibling of such person or a trust of which any person named in this clause (i) is the primary income beneficiary; (ii) any person who directly or indirectly owns, controls or holds the power to vote fifty percent (50%) or more of the outstanding voting securities (including partnership interests) of the person in question; (iii) any person fifty percent (50%) or more of whose outstanding securities (including partnership interests) are directly or indirectly owned, controlled by, or held with power to vote by the person in question; (iv) any person directly or indirectly controlling, controlled by, or under direct common control with the person in question; (v) if the person in question is a corporation, any executive officer or director of such person or of any corporation directly or indirectly controlling such person; (vi) if the person in question is a partnership, any general partner of the partnership or any limited partner owning or controlling fifty percent (50%) or more of either the capital or profits interest in such partnership; and (vii) if the person in question is a limited liability company, any managing member of the limited liability company or any member owning or controlling fifty percent (50%) or more of either the capital or profits interest in such limited liability company. As used in this definition, "control" means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.

**1.1.3 Intentionally Not Used.**

**1.1.4 Allowance.** An Allowance is an estimated monetary amount established in the Contract Documents and included in the Contract Sum for a portion of the Work to be performed by the Contractor.

**1.1.5 Application for Payment.** An Application for Payment is a request from the Contractor for a progress or final payment on the prescribed form and includes all information required to be submitted with the form to substantiate the Contractor's right to payment. Unless otherwise provided, Applications for Payment must be submitted in the format specified by the Owner.

**1.1.6 Architect, Architect/Engineer, A/E.** The Architect, Architect/Engineer, A/E is a person, or an entity identified as such in the Contract Documents.

**1.1.7 Bid.** The Bid is an offer to furnish construction in conformity with the specifications, terms and conditions, and other requirements included in the Invitation for Bids.

.1 The *Base Bid* is the sum stated in the Bid for which the Contractor has offered to perform the Work described in the Bid Documents as the base.

.2 A *Bid Alternate* or *Alternate* is an amount stated in the Contractor's Bid to be added to or deducted from the amount of the Base Bid if the corresponding Change in the Work, as described in the Bid Documents, is accepted by the Owner in the Contract.

**1.1.8 Bid Documents.** The Bid Documents means the Invitation for Bids and all attachments.

**1.1.9 Bid, Performance and Payment Bonds.** The term Bid, Performance and Payment Bonds refers to instruments of security issued in accordance with the requirements set forth in the Bid Documents or the Contract Documents by a surety authorized to do business in the State of Maryland and approved by the Owner.

**1.1.10 Certificate for Payment.** A Certificate for Payment is the original or a copy of the Contractor's Application for Payment, which has been reviewed and recommended by the Architect/Engineer.

**1.1.11 Certificate of Final Completion.** The Certificate of Final Completion is a form the Owner issues to confirm the date of Final Completion.

**1.1.12 Certificate of Insurance.** A Certificate of Insurance is a form acceptable to the Owner, describing and certifying the insurance coverage obtained by the insured Contractor or Subcontractor from an insurer acceptable to the Owner.

**1.1.13 Certificate of Substantial Completion.** The Certificate of Substantial Completion is a form the Owner issues to confirm the Substantial Completion in accordance with Section 14.2.

**1.1.14 Change Order.** A Change Order is a written directive by the Owner to the Contractor directing a change in the Work which is within the general scope of the Contract and which may increase or decrease the Contract Time and/or the Contract Sum issued with or without the consent of the Contractor.

**1.1.15 Contract.** The Contract is the written agreement between the Owner and the Contractor, as

## General Conditions of Construction Contract - GCCC

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executed by the parties, covering the Work to be performed and fixing the Contract Time and the Contract Sum. The Contract is comprised of the Contract Documents.

**1.1.16 Contract Administrator** The Contract Administrator is the Owner's representative authorized to oversee administration of the Contract as provided in Section 4.1.

**1.1.17 Contract Amendment.** A Modification to a Contract signed by the Contractor and Director which provides for a change in the Contract provisions, including additional work outside the scope of the original Contract.

**1.1.18 Contract Documents.** The Contract Documents consist of the Contract between Owner and Contractor, Conditions of the Contract (General, Supplementary and other Conditions), Drawings, Specifications, addenda issued prior to execution of the Contract, other documents listed in the Contract, Modifications issued after execution of the Contract Performance and Payment Bonds, Notice to Proceed, mandatory insurance requirements, and Master Schedule and Critical Contract Completion Period. Unless specifically enumerated in the Contract, the Contract Documents do not include other documents such as bidding requirements (advertisement or invitation to bid, Instructions to Bidders, sample forms, the Contractor's bid or portions of addenda relating to bidding requirements). The Contract Documents also include, by reference, the applicable provisions of the Montgomery County Code (2004), as amended, and the Montgomery County Procurement Regulations, as amended, in effect at the time of Contract award.

**1.1.19 Contract Sum.** The Contract Sum is the total amount stated in the Contract which is payable by the Owner to the Contractor for proper performance of the Work under the Contract Documents. The Contract Sum is subject to adjustment only as provided herein.

**1.1.20 Contract Time.** The Contract Time is the total period of time stated in the Contract between the Date of Commencement and Substantial Completion of the Work. The Contract Time is subject to adjustment only by Change Order as provided herein.

**1.1.21 Contractor.** The Contractor is the person or entity identified as such in the Bid or Proposal and referred to in the Contract executed by the Owner. The Contractor is also the person or entity identified as the principal on the Bid, Performance and Payment Bonds.

**1.1.22 Coordination Drawings.** Drawings prepared by the Contractor showing comprehensive coordination of all Work including but not limited to structural,

architectural, vertical transportation, mechanical, plumbing, fire protection and electrical systems.

**1.1.23 Date of Commencement.** The Date of Commencement of the Work is the date established in the Notice to Proceed upon which the Contract Time begins to run; or if no date is established, then it is the date of the Notice to Proceed.

**1.1.24 Date of Substantial Completion.** The Date of Substantial Completion is the date certified by the Architect/Engineer and accepted by the Owner in accordance with Section 14.2 upon which the Work is found to be substantially complete.

**1.1.25 Day.** Unless otherwise specifically modified, the term "day" means a calendar day.

**1.1.26 Defective or Nonconforming Work.** "Defective or nonconforming" is Work that is unsatisfactory, faulty or deficient, in that it:

- .1 Does not conform to the Contract Documents;
- .2 Does not meet the requirements of any inspection, test or approval referred to in the Contract Documents or required by law;
- .3 Is used or not of recent manufacture;
- .4 Contains defects;
- .5 Represents an Or-Equal or Substitution not properly approved by the Owner; or
- .6 Has been damaged prior to Substantial Completion.

**1.1.27 Delay.** The term "delay" refers to any circumstance which has the effect of preventing the Contractor from performing Work, or a portion thereof, which at the time of the delay was on the Critical Path of the most recent CPM Schedule of Record.

- .1 An *excusable delay*, as defined in Subsection 11.5.1 may entitle the Contractor to an adjustment in the Contract Time, but does not entitle the Contractor to any additional compensation.
- .2 A *compensable delay*, as defined in Subsection 11.5.2 may entitle the Contractor to additional compensation and an adjustment in the Contract Time.
- .3 An *unexcused delay*, as defined in Subsection 11.5.3 does not entitle the Contractor to an adjustment in the Contract Time or additional compensation and may subject the Contractor to claims for damages from the Owner including Liquidated Damages.

## General Conditions of Construction Contract - GCCC

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**1.1.28 Department.** The Department means the County's using department.

**1.1.29 Director.** The Director means the Director, Office of Procurement.

**1.1.30 Drawings.** The Drawings are the graphic and pictorial portions of the Contract Documents identified in the executed Contract, generally including plans, elevations, sections, details, schedules and diagrams, and any revisions, supplements or clarifications thereto issued after execution of the Contract.

**1.1.31 Field Order.** A Field Order is a written instruction issued by the Owner to the Contractor directing a change in the Work when unforeseen and unanticipated conditions arise which require immediate action to mitigate costs or avoid delays. It may provide for additional compensation to be paid to the Contractor (outside of the Contract Sum under a separate encumbrance), but does not change the Contract Time or Contract Sum. A Field Order may also be issued directing the Contractor's performance of disputed work.

**1.1.32 Final Completion.** Final Completion is the stage in the progress of the Work, as confirmed by the Owner's acceptance of the Architect/Engineer's Certificate of Final Completion in accordance with Article 14, when all of the Work, including all Punch List work, is complete in accordance with the Contract Documents.

**1.1.33 Geotechnical Studies.** Geotechnical Studies refers to those reports of explorations and tests of subsurface conditions at or contiguous to the Site, which have been prepared for the use of the Architect/Engineer and/or Owner in designing the project. Their accuracy or completeness is limited to the very narrow parameters of locations, timing and depth of the borings, pits and other analyses. As such, they are not intended to, and do not, provide a comprehensive representation of subsurface conditions. The Geotechnical Studies have been made part of the Contract Documents for the limited purpose of design of the Work. The Geotechnical Studies shall not be relied upon by the Contractor for any means or methods of construction. Contractors and Offerors may make their own investigation of existing subsurface conditions. For Contract Modification purposes, the Geotechnical Studies establish a baseline for expected subsurface conditions. The Contractor must show a material difference between the Geotechnical Studies and actual subsurface conditions to justify a Contract Modification.

**1.1.34 Hazardous Materials.** Hazardous Materials means (a) any "hazardous waste" as defined by the Resource Conservation and Recovery Act of 1976 (42 U.S.C. §6901 et seq.), as amended from time to time, and regulations promulgated thereunder; (b) any

"hazardous substance" as defined by the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 U.S.C. Section 9601 et seq.), as amended from time to time, and regulations promulgated thereunder; (c) any "oil, petroleum products, and their by products" as defined by Md. Code Ann., Envir., §4-401(g) (1996 Repl.Vol.), as amended from time to time, and regulations promulgated thereunder; (d) any "controlled hazardous substance" or "hazardous substance" as defined by Md. Code Ann., Envir., §7-201 (1996 Repl. Vol.), as amended from time to time, and regulations promulgated thereunder; (e) any "infectious waste" as defined by the Md. Code Ann., Envir., § 9-227 (1996 Repl. Vol.), as amended from time to time and regulations promulgated thereunder; (f) any substance the presence of which on the Project site is prohibited, regulated, or restricted by applicable Laws or Regulations similar to those set forth in this definition; and/or (g) any other substance which by applicable Law or Regulation requires special handling in its Generation because of its effect or potential effect on the environment. The term "Generation" means the usage, collection, generation, storage, transportation, treatment, or disposition.

**1.1.35 Instructions to Bidders or Offerors.** The Instructions to bidders or Offerors are issued in conjunction with the Invitation for Bids or Request for Proposals and set forth some of the requirements applicable to the preparation, submission, opening and consideration of Bids or Proposals and accompanying submittals, and the award and execution of the Contract.

**1.1.36 Invitation for Bids.** Invitation for Bids or IFB is a Solicitation to prospective Offerors, the response to which is analyzed in accordance with selection criteria set forth in the Solicitation for the purpose of ranking the Bids received.

**1.1.37 Laws and Regulations.** The term "laws and regulations" includes the applicable laws, rules, regulations, ordinances, codes and orders of any and all governmental bodies, agencies, authorities and courts having jurisdiction over the Contract or the Project.

**1.1.38 Liquidated Damages.** The term "liquidated damages" refers to the amount payable by the Contractor to the Owner for each day of unexcused delay in achieving Substantial Completion of the Work. The amount of liquidated damages is initially set forth in the Bid Documents and is stated in the executed Contract.

**1.1.39 Modification.** A Modification is (i) a Contract Amendment, (ii) a Change Order, or (iii) a Field Order.

## General Conditions of Construction Contract - GCCC

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**1.1.40 Notice to Proceed.** A Notice to Proceed is one or more written notice(s) given by the Owner to the Contractor fixing the date on which the Contract Time or a designated portion thereof will commence to run and by which the Contractor must start to perform the Work or a designated portion thereof as stated in the Notice to Proceed.

**1.1.41 Offer.** The term Offer refers to either a Bid or Proposal as the case may be.

**1.1.42 Offeror.** The term Offeror refers to the person or entity making an Offer.

**1.1.43 Or-Equal Item.** The term Or-Equal Item refers to an item of material or equipment proposed by the Contractor that is allowed by the Contract Documents and, in the Owner's sole discretion, is functionally equal to an item specified or described in the Contract Documents. "Functionally equal" means that the item is sufficiently similar to that specified or described that, in the opinion of the Owner, the item meets or exceeds the physical characteristics, performance ratings, durability, serviceability, appearance and other relevant characteristics of the item specified or described in the Contract Documents, and that no change in design or related Work will be required. See Section 12.6.

**1.1.44 Owner.** The Owner is Montgomery County, Maryland. Unless noted otherwise, including specifically the exceptions outlined in Section 4.1, the authority of the Owner is granted to the Contract Administrator or such person as is expressly designated in writing by the Director as having such authority. For the purposes of ordering extra work by a Field Order, the Owner is defined as the Contract Administrator. Only the Director has the authority to execute a Change Order or Contract Amendment.

**1.1.45 Product Data.** Product Data generally consist of preprinted illustrations, standard schedules, performance charts, instructions, brochures, diagrams and other information prepared by a supplier and provided by the Contractor to illustrate materials or equipment to be incorporated in the Work.

**1.1.46 Progress Schedule.** The Progress Schedule is a schedule prepared by the Contractor, in accordance with the requirements of the Contract Documents and which is approved by the Owner, indicating the starting and completion dates for each portion of the Work, including any interim contractually required completion dates. The Contractor must prepare computer generated schedules in accordance with the Contract Documents.

**1.1.47 Project.** The Project is the total capital project administered by the Department, of which the Work performed under the Contract may be the whole or a part

in conjunction with construction or other operations by the Owner or Separate Contractors.

**1.1.48 Project Manager.** The term Project Manager refers to the person designated as such by the Contractor having authority to act on behalf of the contractor with respect to all aspects of the Project and to whom the Superintendent reports.

**1.1.49 Project Manual.** The Project Manual is the volume assembled for the Project which generally includes the Specifications, the Bid or Proposal Documents, the Contract, any Geotechnical Studies, and other Project related documents.

**1.1.50 Proposal.** The Proposal is the Contractor's complete and properly signed response to a Request for Proposal.

**1.1.51 Proposal Documents.** The Proposal Documents means the Request for Proposal (RFP) and all addenda.

**1.1.52 Punch List.** The Punch List is the list initially prepared by the Contractor for review, supplementation and approval by the Owner and the Architect/Engineer at the time of Substantial Completion of all or a portion of the Work, identifying items that are required to be completed or corrected by the Contractor as part of Final Completion (as set forth in Article 14) of the Work.

**1.1.53 Record Documents.** The term Record Documents refers to record copies, maintained at the Site by the Contractor for the Owner, of the Drawings, Specifications, Addenda, Change Orders, Field Orders and other Modifications, the most recently approved Progress Schedule and Superintendent daily records, all in good order and marked currently to record all changes and selections made during construction and their approval, and record copies of approved Shop Drawings, Product Data, Samples and similar required Submittals.

**1.1.54 Referenced Standards.** The term Referenced Standards includes standards, standard details, specifications, manuals, regulations or codes of any technical society, organization or association, or of any governmental or quasi-governmental authority referred to in the Contract Documents to describe the nature or quality of any of the Work, whether such reference be specific or by implication, and means the latest standard, standard detail, specification, manual, regulation or code in effect at the time of Bid or Proposal opening, except as may be otherwise specifically stated in the Contract Documents.

**1.1.55 Request for Proposal.** Request for Proposal or RFP is a solicitation to prospective Offerors, the response to which is analyzed in accordance with

## General Conditions of Construction Contract - GCCC

---

selection criteria set forth in the solicitation for the purpose of ranking the Proposals received.

**1.1.56 Samples.** Samples are physical examples of products, materials, equipment, assemblies or workmanship to be incorporated in the Work, and which are intended to establish standards for the completed Work.

**1.1.57 Schedule of Submittals.** The Schedule of Submittals is a listing and time schedule of Submittals prepared by the Contractor for review and approval by the Owner and the Architect/Engineer as provided in Subsection 11.2.5.

**1.1.58 Schedule of Values.** The Schedule of Values is a breakdown of the Contract Sum by Construction Specification Institute (CSI) divisions prepared by the Contractor for review and approval by the Owner and the Architect/Engineer as provided in Section 13.1.

**1.1.59 Separate Contractor.** The term Separate Contractor refers to a person or entity with which the Owner has contracted to construct other portions of the Project or perform other operations at the Site.

**1.1.60 Shop Drawings.** Shop Drawings generally consist of those drawings, diagrams, schedules and other data specially prepared for the Work by the Contractor or a Subcontractor, Sub-subcontractor, manufacturer, Supplier or distributor detailing the fabrication or assembly of some portion of the Work, copies of which are submitted by the Contractor to the A/E for approval to indicate the details of execution of that portion of the Work. The cost of preparing Shop Drawings, including Coordination Drawings, is the responsibility of the Contractor, which is included in the Contract Sum and for which the Contractor will not be paid any additional compensation. The Contractor must also, at no additional compensation, provide calculations to the A/E for approval for design/engineering portions of the Work. The submission and/or approval of Shop Drawings cannot change the Contract Documents.

**1.1.61 Site.** The term Site refers to that portion of the property on which the Work is to be performed or which has been otherwise set aside for use by the Contractor.

**1.1.62 Site Survey.** This term includes, but is not limited to site plans, topographic surveys and property surveys and refers to those drawings of physical conditions in or relating to existing surface or subsurface structures at or contiguous to the Site which have been utilized by the Architect/Engineer or Owner in preparing the Contract Documents or which have been provided by the Owner for the Contractor's information in evaluating Site conditions.

**1.1.63 Solicitation.** The term Solicitation means an Invitation for Bid or a Request for Proposal and all addenda.

**1.1.64 Specifications.** The Specifications are that portion of the Contract Documents, generally included in and identified as such in the Project Manual, setting forth the written requirements for materials, equipment, construction systems, standards and workmanship for the Work, and performance of related services.

**1.1.65 Subcontractor.** A Subcontractor is a person or entity who has a direct contract with the Contractor to perform a portion of the Work, and includes any Supplier who performs Work such as installation of materials and equipment. The term "Subcontractor" does not include a Separate Contractor or any subcontractors of a Separate Contractor.

**1.1.66 Submittals.** The term Submittals refers to all items relating to the performance of the Work which are required to be submitted by the Contractor to the Owner and/or the Architect/Engineer for review, acceptance or approval. Submittals include, but are not limited to, items such as the Schedule of Values, Progress Schedule, Schedule of Submittals, lists of Subcontractors and Suppliers, insurance certificates, Shop Drawings, Product Data, Samples, requests for substitutions or use of Or-Equal Items, Record Documents, Warranties and operating manuals, and similar items. As used herein, the term "Submittal" does not include change proposals submitted by the Contractor, the Contractor's Applications for Payment and supporting data, Disputes or Claims.

**1.1.67 Substantial Completion.** Substantial Completion is the stage in the progress of the Work, as confirmed by the Owner's acceptance of the Architect/Engineer's Certificate of Substantial Completion in accordance with Article 14, when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents (i) so the Owner can occupy or utilize the entire Work or designated portion thereof for its intended use and (ii) that the completion or correction of any Punch List items can be accomplished within a period of 30 days.

**1.1.68 Substitution.** The terms Substitution and Substitute Item refer to an item of material or equipment proposed and certified by the Contractor as substantially equivalent to an item specified or described in the Contract Documents by using the name of a proprietary item, a particular manufacturer or a particular Supplier, and the substitution of the item is not expressly prohibited, and the proposed replacement, in the Owner's sole discretion, is functionally, technically and aesthetically equal to the item specified or described.

## General Conditions of Construction Contract - GCCC

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**1.1.69 Sub-subcontractor.** A Sub-subcontractor is a person or entity who has a direct or indirect contract at any tier with a Subcontractor to perform a portion of the Work.

**1.1.70 Superintendent.** The term Superintendent refers to the person designated as the Contractor's representative at the Site with overall responsibility for direction and execution of the Work, and unless otherwise designated by the Contractor, for the protection of persons and property at the Site and compliance with all applicable Laws and Regulations.

**1.1.71 Supplemental Conditions.** The Supplemental Conditions are that part of the Contract Documents, designated as such, which amend or supplement these General Conditions.

**1.1.72 Supplier.** The term Supplier refers to any manufacturer, fabricator, supplier, distributor, materialman or vendor furnishing materials or equipment to be incorporated in the Work by the Contractor or any Subcontractor or Sub-subcontractor.

**1.1.73 Surety.** The term Surety refers to any corporation, person or entity, authorized to do business in the State of Maryland, which has issued a Bid Bond, Performance Bond, a Labor and Material Payment Bond, or similar security on the Contractor's behalf, in accordance with the requirements of the Contract Documents.

**1.1.74 Taxes.** The term Taxes includes all applicable federal, State, and local taxes and duties, including sales, consumer, use and similar taxes for the Work or portions thereof provided by the Contractor and all social security, unemployment, and similar employment taxes, withholding and contributions for employees, which are legally enacted before the opening of Bids or Proposals and effective at any time during the performance of the Work. **All Taxes applicable to the performance of the Work are payable by the Contractor and included in the Contract Sum. The Contractor will not be paid any additional compensation for payment of Taxes** except for Taxes which are legally enacted after the opening of Bids or Proposals.

**1.1.75 Intentionally Not Used.**

**1.1.76 Unit Prices.** The term Unit Prices refers to the rates stated in the Proposal or Bid Documents at which change work (additive or deductive work) is to be performed by the Contractor or deducted from the Contract Sum. Unit Prices include all direct labor and materials costs, payroll burden, relocation of stockpiled materials as necessary, indirect job costs such as insurance, bonds, coordination, engineering, permits, cleanup, tools, profit, and overhead (which includes office overhead and site-specific overhead and general

conditions) and all other costs necessary to complete the Work.

**1.1.77 Warranties and Guarantees.** The terms Warranties and Guarantees generally refer to written instruments, certificates, acknowledgments or similar documents required by the Contract Documents (other than the Contractor's general warranty) evidencing specific obligations and undertakings by the Contractor, Subcontractors, Sub-subcontractors and Suppliers, to correct, repair or replace a portion of the Work covered by such Warranty or Guarantee.

**1.1.78 Work.** The Work means the construction and services required by the Contract Documents, whether completed or partially completed, including all labor, materials, equipment and services provided or to be provided by the Contractor for incorporation into the completed construction required by the Contract Documents. The Work may constitute the whole or a part of the Project.

### 1.2 USE OF TERMS

**1.2.1 Singular and Plural.** The Owner, Architect/Engineer, Contractor, Subcontractor, Sub-subcontractor, Supplier, Separate Contractor, Surety, insurer and others are referred to throughout the Contract Documents as if singular in number. In the event that more than one person or entity occupies the position referred to and unless otherwise indicated, the term is interpreted to include all such persons or entities.

**1.2.2 Task Order.** A Task Order is an order for Work during the period of and under the terms of the Contract. The Task Order will define the specific project scope, cost, and schedule.

**1.2.3 Task Order Amendment.** A change to an existing Task Order to be signed by the Contractor and Contract Administrator which, when combined with a purchase order issued by the Office of Procurement, changes the existing Task Order provisions without affecting the Contract provisions.

**1.2.4 Technical Terms and Trade Usage.** Terms in the Contract Documents which have well-known technical or construction industry meanings and are not otherwise defined are used in accordance with such recognized meanings unless the context clearly indicates otherwise.

**1.2.5 Titles and Headings.** The titles and headings of the various sections and subsections of these General Conditions and other Contract Documents are intended only as a matter of reference and convenience and in no way define, limit, or prescribe the scope or intent of the Contract Documents.

## **ARTICLE 2**

### **THE CONTRACT**

#### **2.1 CONTRACT**

**2.1.1 Changes.** The Contract may be changed only by a Modification.

**2.1.2 Documents Excluded from the Contract.** The Contract Documents do not include documents issued or provided to the Contractor for the information of the Contractor or for reference purposes and which are not specifically incorporated in the Contract Documents.

#### **2.2 ORGANIZATION AND INTENT**

**2.2.1 Contract Documents Complementary.** The Contract Documents are complementary, and what is required by one is as binding as if required by all. Anything mentioned in the Specifications and not shown on the Drawings or shown on the Drawings and not mentioned in the Specifications, are of like effect as if shown or mentioned in both.

**2.2.2 Intent to Require Completed Project.** The intent of the Contract Documents is to require that the Contractor provide all materials and labor, including tools, equipment and supervision, necessary for the proper execution and completion of the Work

**2.2.3 Work Required if Reasonably Inferable.** Performance by the Contractor is required to the extent consistent with the Contract Documents and reasonably inferable from them as being necessary to produce the intended results. Where no explicit quality or standards for materials or workmanship are established for the Work, the Work is to be of good quality and consistent with the quality of surrounding Work which conforms to the requirements of the Contract Documents and to the standards for construction of the Project generally.

**2.2.4 Organization of Drawings and Specifications.** Organization of the Drawings around professional disciplines such as civil, architectural, structural, plumbing, mechanical and electrical, and of the Specifications into divisions, sections and articles, does not control the Contractor in dividing the Work among Subcontractors or in establishing the extent of Work to be performed by any trade or excuse the Contractor of its obligation to properly allocate and provide for the performance of all Work under the Contract.

**2.2.5 Inconsistent Provisions.** Notwithstanding any provisions to the contrary in any Contract terms or conditions supplied by the Contractor, this General Conditions of Contract document supersedes the Contractor's terms and conditions, in the event of any inconsistency.

#### **2.3 REFERENCED STANDARDS**

**2.3.1 Standards Incorporated.** All Referenced Standards are incorporated into the Contract as fully as if printed and bound with the Specifications, but only to the limited extent that such standards are applicable to the Work.

**2.3.2 Availability of Referenced Standards.** The Contractor is responsible for obtaining and having available at the Site a copy of each Referenced Standard insofar as it is applicable to the Work.

**2.3.3 Precedence of Contract Documents Over Referenced Standards.** No provision of a Referenced Standard is effective to change (i) the procedures established in the Contract Documents or by any applicable laws or regulations, or (ii) the duties and responsibilities of the Owner, Architect/Engineer or Contractor from those set forth in the Contract Documents; nor is any provision of a Referenced Standard effective to assign to the Owner or the Architect/Engineer any duty or authority to supervise or direct the furnishing or performance of the Work or any duty or authority to undertake responsibility inconsistent with the provisions of Article 4 or any other provision of the Contract Documents.

#### **2.4 OWNERSHIP AND USE OF DOCUMENTS**

**2.4.1 Copies Furnished.** Unless otherwise provided in the Contract Documents, the Owner will furnish one (1) set of Drawings and the Project Manual free of charge to the Contractor. The Owner will make such additional copies of Drawings and Project Manuals as are reasonably necessary for execution of the Work available to the Contractor at a reasonable cost.

**2.4.2 Ownership of Documents.** The Drawings, Project Manuals and other documents furnished to the Contractor are the Owner's property.

**2.4.3 Copyright and Other Reserved Rights.** The Contractor may not own or claim a copyright in the Drawings, Project Manuals and other documents furnished.

**2.4.4 Use and Reproduction of Documents.** The Drawings, Project Manuals and other documents, including copies furnished to the Contractor, are for use solely with respect to this Project. They are not to be used by the Contractor on other projects or for additions to this Project outside the scope of the Work without the specific written consent of the Owner, the Architect/Engineer and any of their consultants whose authorship or copyright is indicated thereon and Contractor must include a similar provision in all contracts with its Subcontractors and Suppliers. The Contractor is granted a limited license to use and reproduce applicable portions of the Drawings, Project Manuals and other documents furnished to them

# General Conditions of Construction Contract - GCCC

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appropriate to and for use in the execution of their Work under the Contract Documents, including submittals or distributions to meet regulatory requirements. Submittal or distribution to meet regulatory requirements or for other authorized purposes in connection with this Project is not to be construed as publication in derogation of the Owner's, the Architect/Engineer's, or any of their consultants' copyright or other reserved rights. All copies made under this license must bear the same copyright notice, if any, as is shown on the cover page or on each of the Drawings, Project Manuals and other documents that are reproduced.

**2.4.5 Record Documents.** The Contractor must maintain at the Site for the Owner one set of Record Documents. These must be available to the Owner and the Architect/Engineer for their reference during the progress of the Work. The record drawings and any other Record Documents indicating changes or selections made during construction must be delivered to the Architect/Engineer for submittal to the Owner upon completion of the Work and before final payment becomes due.

**2.4.6 Return of Documents.** All copies of Drawings, Project Manuals and other documents furnished to the Contractor, must be suitably accounted for to the Owner, on request, upon completion of the Work. At the Owner's request, all copies not reasonably required for the Contractor's, Subcontractors' or Sub-subcontractors' records must be returned to the Owner.

## ARTICLE 3

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### THE OWNER

#### 3.1 OWNER'S REPRESENTATIVES

**3.1.1 Designated Representatives.** The Department carries out the Owner's responsibilities. Unless noted otherwise, including specifically the exceptions outlined in Section 4.1, the authority of the Owner is granted to the Contract Administrator or such person as is expressly designated in writing by the Director as having such authority. For the purposes of ordering extra work by a Field Order, the Owner is defined as the Contract Administrator or such person as is designated in writing by the Director. Only the Director has the authority to execute a Change Order or Contract Amendment.

**3.1.2 Representative of Legal Owner.** In the event that the Owner is acting for the benefit of another private, nonprofit or governmental entity which is or will become the legal owner of the Project, such legal owner (i) will be identified in the Contract Documents, (ii) will be considered a beneficiary of this Contract, and (iii) will be entitled to enforce all rights and remedies of the Owner hereunder. Unless otherwise provided, however, **the Owner has assumed all responsibility for the**

**performance of the Owner's obligations under this Contract, and nothing herein is to be construed to create any obligation of such legal owner to the Contractor or to provide the Contractor any rights or remedies against such legal owner.**

#### 3.2 PROJECT INFORMATION

**3.2.1 Site Surveys.** The Owner may furnish surveys identifying the boundaries of the Site, the location of existing structures and restrictions of record such as easements and rights of way. The Owner may also furnish information with respect to topographical features and utilities of which the Owner is aware. It is the Contractor's responsibility to determine and verify all information provided by Owner including, but not limited to, grades and elevations. Notwithstanding the foregoing, the Contractor is entitled to rely on information provided by the Owner in arriving at its Contract Sum, and to the extent existing conditions are inconsistent with those shown on information provided by the Owner, the provisions of Section 12.4 shall govern.

It is the Contractor's responsibility to verify the existence and locations of utilities with the appropriate agencies and utility companies.

**3.2.2 Site and Physical Data.** Any Geotechnical Studies or other subsurface information including boring logs, soils and other reports, provided by the Owner to the Contractor.

**3.2.3 Reliance by Contractor.** The Contractor may not rely upon surface or Site and physical data with respect to the completeness of any reports and drawings for the Contractor's purposes, including, but not limited to, any aspects of the means, methods, techniques, sequences and procedures of construction to be employed by the Contractor or any of the Contractor's safety precautions and programs.

**3.2.4** For Contract Modification purposes, the Geotechnical Studies establish a baseline for expected subsurface conditions. The Contractor must show a material difference between the Geotechnical Studies and actual subsurface conditions to justify a Contract Modification.

#### 3.3 OWNER RESPONSIBILITIES

**3.3.1 Access to Site.** The Owner will furnish the Project Site as indicated in the Contract Documents, and such other lands which are designated in the Contract Documents, if any, for the use of the Contractor. The Contractor is responsible for obtaining any additional rights of way, approvals or easements for access to the Site and/or performance of the Contract resulting from the Contractor's use, means and



# General Conditions of Construction Contract - GCCC

methods. The Owner may identify in the Contract Documents encumbrances or restrictions not of general application but specifically related to use of the Site which are not of public record. If so identified in the Contract Documents, the Contractor must comply with them in performing the Work. Permanent easements for the completed facility or for changes in existing facilities will be obtained and paid for by the Owner, unless otherwise provided in the Contract Documents.

**3.3.2 Permits and Fees.** Unless otherwise indicated in the Contract Documents, the Owner will be responsible for securing and paying for (i) the building permit (provided that if the Contractor in any way modifies the building permits to phase the Work, then any additional cost resulting will be the responsibility of the Contractor), (ii) fees and surcharges for front footage, (iii) fees and surcharges for water, sewer and gas work and (iv) fees and permits for construction in the County and/or State road rights-of-way. **The Contractor will be responsible for obtaining and paying the costs of all other permits, fees, licenses, bonds and governmental approvals, except as otherwise indicated in the Contract Documents.**

## ARTICLE 4

### ADMINISTRATION OF THE CONTRACT

#### 4.1 CONTRACT ADMINISTRATION

**4.1.1 Administration by Owner.** The Contract is administered by the Contract Administrator, the identity of whom is set forth in Article 10 of the Contract. The Contract Administrator is authorized to administer the Contract commencing on the date that the Contract is signed by the Contracting Officer and terminating on the date the Contract is completed or terminated. The Contract Administrator's authority is limited as follows:

- .1 Provide direction to the Contractor to ensure satisfactory and complete performance, including issuance of Field Orders;
- .2 Monitor and inspect Contractor performance to ensure acceptable timeliness and quality;
- .3 Maintain necessary documentation and records regarding Contractor performance and other pertinent matters;
- .4 Determine acceptance or rejection of Contractor's performance;
- .5 Provide Owner determinations in response to Contractor's requests for an increase in the Contract Time and/or an increase in the Contract Sum in accordance with Articles 11 and 12;
- .6 Approve or reject invoices for payment;

- .7 Furnish necessary reports to the Director;
- .8 Furnish notice of Contractor performance failures to the Director and to the Office of the County Attorney, as appropriate; and
- .9 Recommend Contract Modifications or terminations for default or convenience to the Director.

**4.1.2 Contract Administrator Limitations of Authority.** The authority of the Contract Administrator is limited to the functions set forth above. In particular, the Contract Administrator is NOT authorized to make determinations (as opposed to recommendations) that:

- .1 Alter or modify Contracts;
- .2 Terminate or cancel Contracts;
- .3 Approve, as opposed to recommend, Change Orders or Contract Amendments; or
- .4 Waive the Owner's Contract rights.

Unless the Director changes this delegation of authority, in writing, no other person is authorized to perform the functions of the Contract Administrator for this particular Construction Contract between Owner and Contractor.

The Contract Administrator is NOT authorized to alter, modify, terminate or cancel the Contract, interpret ambiguities in Contract language, or waive the Owner's contractual rights.

**4.1.3 Owner's Representatives.** The Contract Administrator may further delegate authority and responsibility for performance of the Owner's administration of the Contract to designated individuals. For the purposes of ordering extra work by Field Order, the Owner is defined as the Contract Administrator.

#### 4.2 CONSTRUCTION ADMINISTRATION

**4.2.1 Performance of Construction Administration.** Unless otherwise provided in the Contract Documents, ongoing administration of construction as provided in the Contract Documents will be performed by the Contract Administrator with the assistance of the Owner's Project Manager(s), Construction Representative(s), or others as designated by the Contract Administrator, under the overall direction of the Contract Administrator.

**4.2.2 Status of Architect/Engineer.** The Architect/Engineer is not an agent of the Owner, but will assist the Owner in the administration of the Contract and the Work, as described in the Contract Documents, and will be the point of contact for purposes of communication (i) during construction, (ii) until final payment is due, and (iii) with the Owner's concurrence,

## General Conditions of Construction Contract - GCCC

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from time to time during the warranty period described in Section 10.2.

**4.2.3 Owner's Project Manager Limitations of Authority.** The Owner's Project Manager, Construction Representatives and others as designated by the Contract Administrator and the Architect/Engineer will have authority to act on behalf of the Owner only to the extent provided in the Contract Documents, unless otherwise modified by written instrument in accordance with other provisions of the Contract.

**4.2.4 Communications.** Except as otherwise provided in the Contract Documents, the Contractor must communicate through the Architect/Engineer. Communications by and with (i) the Architect/Engineer's consultants must be through the Architect/Engineer, (ii) Subcontractors, Suppliers and Contractor's consultants must be through the Contractor, and (iii) Separate Contractors and Owner's consultants must be through the Owner.

**4.2.5 Change in Architect/Engineer's Duties.** The Owner may make changes in the duties, responsibilities and limitations of authority of the Architect/Engineer as set forth in the Contract Documents and will provide written notice of any significant changes to the Contractor. However, no such change will provide the basis for any Claim for a change in the Contract Time or an increase in the Contract Sum.

**4.2.6 Change of Architect/Engineer.** In case the owner terminates the contract with the Architect/Engineer, the Owner will appoint a replacement Architect/Engineer whose responsibilities will remain the same as set forth in the Contract Documents, unless otherwise indicated in a notice of appointment of a new Architect/Engineer to the Contractor.

**4.2.7 Timeliness of Construction Administration Services.** The Owner and the Architect/Engineer will endeavor to provide approvals, information or services under their control with reasonable promptness to avoid unreasonable delay in the orderly progress of the Work, but the Owner will not be responsible for any delay where the Contractor has not provided reasonable prior notice in writing to the Owner of the time within which such approval, information or services will be required in order to avoid such delay.

### 4.3 ADMINISTRATION OF CONSTRUCTION

**4.3.1 Interpretation and Clarification of Drawings and Specifications.** The Architect/Engineer, with the approval of the Owner, may issue interpretations and clarifications of the Drawings and Specifications, in graphic or written form as appropriate, on written request of either the Owner or Contractor (Requests for Information (RFIs)), or when otherwise deemed

advisable by the Architect/Engineer (Architect's Supplemental Instructions (ASIs)). The Architect/Engineer's response to requests from the Owner or Contractor for interpretations or clarifications (RFIs) will be made within fifteen (15) days of receipt of the written request. Any response is presumed to be a clarification of the Contract Documents reasonably inferable from them and will not form the basis for any Claim by either party for a change in the Contract Time or the Contract Sum. **If the Contractor contends that the response constitutes a change in the Work, the Contractor must obtain written direction from the Contract Administrator before proceeding with the Work as set forth in Subsection 4.3.12 titled Changes in the Work, and it must file a Claim for an increase in the Contract Time and/or an increase in the Contract Sum in accordance with Article 11 and/or Article 12 or the Contractor will be conclusively deemed to have waived any Claim for an increase in the Contract Time or an increase in the Contract Sum based on the interpretation or instruction contained in any RFI or ASI, or otherwise.**

**4.3.2 Standard of Interpretation.** Interpretations and clarifications by the Architect/Engineer will be consistent with the intent of, and reasonably inferable from, the Contract Documents. When making such interpretations and clarifications, the Architect/Engineer will endeavor to secure faithful performance by both Owner and Contractor, will not show partiality to either and will not be liable to the Contractor for results of interpretations or clarifications issued in good faith.

**4.3.3 Interpretations and Decisions by Owner.** The Owner will provide written interpretations and decisions concerning Contract terms and conditions within a reasonable time after written request is made by the Contractor or as otherwise required during the course of the Project. Any interpretation or decision is presumed to be a clarification of the Contract terms and conditions reasonably inferable from them and may not form the basis for any Claim by the Contractor for a change in the Contract Time or the Contract Sum. **If the Contractor contends that the interpretation or decision constitutes a change in the Work, the Contractor must file a Claim for an increase in the Contract Time and/or an increase in the Contract Sum in accordance with Article 11 and/or Article 12 or the Contractor will be conclusively deemed to have waived any Claim for an increase in the Contract Time or an increase in the Contract Sum based on the interpretation or decision.**

**4.3.4 Acceptability of Superintendent and Key Personnel.** The Contractor will be advised in writing if the Superintendent or other supervisory personnel

## General Conditions of Construction Contract - GCCC

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prove unsatisfactory to the Owner as provided in Subsection 5.4.2.

### **4.3.5 Approval of Subcontractors and Suppliers.**

The Contractor will be advised in writing if the Owner has reasonable objection to, and rejects, any proposed Subcontractor or Supplier subject to review by the Owner, as provided in Subsection 6.1.2.

### **4.3.6 Approval of Submittals.**

The Architect/Engineer and the Owner, as appropriate, will review the Contractor's Submittals and take appropriate action thereon, as required for each type of Submittal. Review and approval of Shop Drawings, Product Data Samples and similar Submittals will be as provided in Section 9.2.

**4.3.7 Site Visits.** The Architect/Engineer and Owner will make Site visits as provided in Subsection 10.3.2.

**4.3.8 Rejection of Work.** The Owner, in consultation with the Architect/Engineer, may reject Work as provided in Subsection 10.6.1.

### **4.3.9 Additional Inspection, Testing or Specific Approvals.**

The Architect/Engineer has authority to recommend, and the Owner has the authority to require, additional inspection, testing or specific approval of the Work as provided in Subsection 10.5.3.

### **4.3.10 Authority to Stop or Suspend Work.**

The Owner has the authority to stop or suspend the Work as provided in Subsections 11.4.1 and 11.4.2. The Architect/Engineer does not have authority to stop or suspend the Work on behalf of the Owner unless specific written authority from the Owner to do so is provided in any notice to stop or suspend the Work.

### **4.3.11 Review of Applications for Payment.**

Based on the Architect/Engineer's observations and evaluations of the Contractor's Applications for Payment and the Work, the Architect/Engineer will certify the amounts due the Contractor and will issue Certificates for Payment in such amounts to the Owner as provided in Section 13.3. The Owner will review and approve such Applications and Certificates and make payment on Owner-approved amounts within the time specified in the Section 13.4.

### **4.3.12 Changes in the Work.**

The Architect/Engineer may assist the Owner in preparing Change Orders as provided in Section 12.2, Field Orders as provided in Section 12.3 and Contract Amendments. The Architect/Engineer may, with the Owner's concurrence, authorize minor changes in the Work not involving an increase in the Contract Time or an increase in the Contract Sum.

**Notwithstanding the foregoing or any other provision of the Contract, no additions to or changes in the Work or other extra Work may be performed**

**and no Claim for additional compensation, credit, or increase of time is valid without written authorization by the Contract Administrator and/or Director. Accordingly, no course of conduct or dealings between the parties, no implied acceptance of changes in the Work, and no Claim that the Owner has been unjustly enriched by any change to the Work, can be the basis for any Claim for an increase in the Contract Time or in the Contract Sum.**

### **4.3.13 Substantial and Final Completion.**

As provided in Article 14, the Architect/Engineer and Owner will conduct inspections to determine the date or dates of Substantial Completion and the date of Final Completion. The Architect/Engineer and Owner will issue Certificates of Substantial and Final Completion and a final Certificate for Payment upon the Architect/Engineer's recommendation and Owner's determination that the Contractor has fully completed the Contract. The Owner may accept partial Substantial Completions as to portions of the Work which have reached Substantial Completion and are available for use by the Owner.

### **4.3.14 Recommendations on Payments, Changes, Claims and Disputes.**

If the Owner requests, the Architect/Engineer will make recommendations to the Owner concerning payments, changes, Claims and Disputes, and similar matters.

## **4.4 LIMITATIONS OF OWNER'S AND ARCHITECT/ENGINEER'S RESPONSIBILITIES**

**4.4.1 Charge or Control.** Neither the Owner nor the Architect/Engineer have control over or charge of or are responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, since these are solely the Contractor's responsibility as provided in Subsection 5.3.2 and Article 8. Neither the Owner nor the Architect/Engineer will be responsible for the Contractor's failure to carry out the Work in accordance with the Contract Documents.

**4.4.2 Actions not to Relieve Contractor.** No action or failure to act on the part of the Owner or the Architect/Engineer, including but not limited to (i) the acceptance or approval of any Subcontractor, selection, Substitution or Or-Equal Item, Submittal or schedule, (ii) observation or inspection of any of the Work, (iii) the performance of any test or inspection, (iv) assistance in performance of Contractor's Work, or (v) the acceptance or failure to accept any portion of the Work, relieves the Contractor of responsibility for performing the Work in accordance with the Contract Documents.

# General Conditions of Construction Contract - GCCC

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**4.4.3 Responsibility for Others.** Neither the Owner nor the Architect/Engineer will have control over or charge of and will not be responsible for acts or omissions of the Contractor, Subcontractors, Sub-subcontractors, Suppliers or their agents or employees, or of any other persons performing portions of the Work.

**4.4.4 Inspection, Testing or Approval and Rejection of Work.** The performance of any tests, inspections or approvals required by the Contract Documents does not relieve the Contractor of any of its obligations under the Contract Documents. The Owner's and the Architect/Engineer's authority to require and the Architect/Engineer's authority to recommend additional testing, inspection or approval of Work, and the Owner's and the Architect/Engineer's authority to reject defective or nonconforming Work, does not give rise to any duty or responsibility on the part of either to exercise such authority for the benefit of the Contractor or any other person or entity.

**4.4.5 Stopping or Suspension of Work.** The authority of the Owner to stop the Work under Subsections 11.4.1 or to suspend the Work under Subsection 11.4.2 does not give rise to any duty or responsibility on the part of the Owner to exercise such authority for the benefit of the Contractor or any other person or entity.

**4.4.6 Payments.** The issuance of a Certificate for Payment by the Architect/Engineer under Subsection 13.3.1 or the making of any progress payment or final payment by the Owner under Subsections 13.4.2 or 14.4.3 does not constitute acceptance of Work not complying with the requirements of the Contract Documents. The making of final payment does not constitute a waiver of claims by the Owner as provided in Subsection 14.4.5.

**4.4.7 Occupancy or Use.** Partial or entire occupancy or use of a portion or portions of the Work by the Owner under Section 14.1 does not constitute acceptance of Work not complying with the requirements of the Contract Documents.

**4.4.8 Certificate of Substantial or Final Completion.** Neither the issuance by the Architect/Engineer of a Certificate of Substantial or Final Completion under Subsections 14.2.6 or 14.4.1, nor acceptance thereof by the Owner, constitutes acceptance of Work not complying with the requirements of the Contract Documents.

## ARTICLE 5

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### CONTRACTOR

#### 5.1 REVIEW OF CONTRACT DOCUMENTS AND FIELD CONDITIONS

**5.1.1 Review of Site Conditions.** By executing the Contract, the Contractor represents that the Contractor has reviewed and understands the Contract Documents, has visited the Site and is familiar with local conditions under which the Work is to be performed, has correlated personal observations with the requirements of the Contract Documents, and has notified the Architect/Engineer of and obtained clarification of any discrepancies which have become apparent during the bidding or proposal period.

**5.1.2 Review of Contract Documents.** The Contractor must carefully study and compare the Contract Documents among themselves and further compare the Contract Documents with any other information furnished by the Owner pursuant to Section 3.2 before commencing Work at the Site and at frequent intervals during its progress.

**5.1.3 Field Measurements and Site Conditions.** The Contractor must take field measurements and verify Site conditions and must carefully compare such field measurements and Site conditions and other information known to the Contractor with the Contract Documents, before ordering any material or doing any Work at the Site.

**5.1.4 Inspection of Work.** The Contractor must make frequent inspections during the progress of the Work to confirm that Work previously performed by the Contractor is in compliance with the Contract Documents and applicable laws and regulations and Referenced Standards and that portion of Work previously performed by the Contractor or by others are in proper condition to receive subsequent Work.

**5.1.5 Compliance of Contract Documents with Laws and Regulations and Referenced Standards.** If the Contractor believes that any portions of the Contract Documents do not comply with applicable laws, statutes, ordinances, building codes, and rules and regulations, or any orders by code enforcement officials or the Owner or its designees acting in the capacity of building code inspectors or Referenced Standards, the Contractor must promptly notify the Owner and the Architect/Engineer of the non-compliance as provided in Subsection 5.1.6 and request direction before proceeding with the affected Work.

**5.1.6 Notice of Discrepancies.** The Contractor must promptly notify the Owner and the Architect/Engineer in writing of any apparent errors, inconsistencies, omissions, ambiguities, construction impracticalities or code violations discovered as a result of the Contractor's review of the Contract Documents including any differences between actual and indicated dimensions, locations and descriptions, and must give the Owner and the Architect/Engineer timely notice in

## General Conditions of Construction Contract - GCCC

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writing of same and of any corrections, clarifications, additional Drawings or Specifications, or other information required to define the Work in greater detail or to permit the proper progress of the Work. The Contractor must provide similar notice with respect to any variance between its review of the Site and physical data and Site conditions observed.

**5.1.7 Risk of Performance.** If the Contractor performs any Work involving an apparent error, inconsistency, ambiguity, construction impracticality, omission or code violation in the Contract Documents of which the Contractor is aware, without prompt written notice to the Owner and the Architect/Engineer and request for correction, clarification or additional information, as appropriate, the Contractor does so at its own risk and expense and all Claims relating thereafter are specifically waived. Notwithstanding the foregoing, the Owner acknowledges that the Contractor is not required to ascertain that the Contract Documents are in accordance with applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities.

### 5.2 LEGAL REQUIREMENTS

**5.2.1 Compliance with Laws, Regulations and Orders.** The Contractor must obtain all licenses and comply with and give all notices required by laws, ordinances, rules, regulations, and lawful orders of public regulatory authorities bearing on performance of the Work, including the orders of the Owner or its designees acting in the capacity of building code inspectors. The Owner acknowledges that the Contractor is not required to ascertain that the Contract Documents are in accordance with applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities. The Contractor shall promptly report to the Architect any errors, inconsistencies or omissions it discovers. It is recognized that the Contractor's review of Contract Documents is made in the Contractor's capacity as a contractor and not as a licensed design professional.

**5.2.2 Taxes.** The Contractor must pay sales, consumer, use and similar taxes for the Work or portions thereof which are legally enacted when Bids or Proposals are received or negotiations concluded or which are enacted thereafter, whether or not yet effective or merely scheduled to go into effect. The Contractor is on notice that under Md. Code Ann., Tax-Gen'l, §11-220(b) (2004 Repl. Vol.), purchases made by the Contractor in furtherance of this Contract are not exempt from Maryland sales and use taxes by virtue of the Owner's status as a local government entity.

**5.2.3 Permits and Fees.** Unless otherwise provided in Section 3.3.2 or in the Contract Documents, the

Contractor must obtain and pay for all permits and governmental fees, licenses and inspections necessary for proper execution and completion of the Work, including connections, tap fees and inspections in connection with the installation of utilities and any bonds required by any utilities for the performance of any utility Work on utility lines or within a utility easement, specialized trade permits such as for plumbing, mechanical and electrical work, and any fees and charges associated therewith which have been enacted or established at the time Bids or Proposals are received or negotiations concluded or which are enacted thereafter;

**5.2.4 Compliance with U.S. Green Building Council's Leadership in Energy and Environmental Design (LEED) Requirements.** If a LEED certification level is specified in the Contract Documents, the Contractor must perform all contractor-responsible work in a manner to attain all specified LEED points, as defined by the U.S. Green Building Council (USGBC). The Contractor shall be solely responsible for planning, scheduling, performing, and documenting each LEED requirement for which the Contractor is responsible. The Contractor shall notify the Owner and the A/E of any questions concerning its LEED responsibilities within fifteen (15) days of the Notice to Proceed.

The Contractor shall be responsible for coordinating with, and providing documentation as required by, the Montgomery County Department of Permitting Services (MCDPS) to demonstrate that the Work was done in accordance with LEED requirements and to allow MCDPS to issue a temporary use and occupancy permit at Substantial Completion.

Throughout the project, the Contractor shall coordinate with, and provide documentation to, the A/E to verify its compliance with LEED requirements. Before Substantial Completion, the Contractor shall provide all required LEED documentation to the A/E to enable the A/E to submit a full LEED package to the USGBC to verify that the Work was done in accordance with LEED requirements and to allow USGBC to issue certification of the project at the specified LEED level.

If the USGBC determines that the Project does not satisfy some of the specified LEED credits, and/or if the USGBC determines that the Project fails to obtain the specified LEED certification level, and the failure to obtain these specified LEED credits and/or certification is a result of the Contractor's failure to fulfill its contractual obligations, the Contractor shall, at the request of the County: (i) Correct all deficiencies in the Work to achieve the required credits and/or level of certification; and (ii) Pay to the Owner actual damages

## General Conditions of Construction Contract - GCCC

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resulting from the Contractor's failure to perform its LEED requirements.

### 5.3 CONTRACTOR'S RESPONSIBILITY FOR PERFORMANCE

#### 5.3.1 Assignment, Scheduling and Coordination.

The Contractor is solely responsible for and has control over assigning, scheduling and coordinating all portions of the Work under the Contract performed by the Contractor's own forces and by its Subcontractors, Sub-subcontractors and Suppliers in accordance with the CPM Schedule of Record, unless the Contract Documents give other specific instructions concerning these matters.

#### 5.3.2 Construction Means and Methods.

The Contractor must provide continuous on-Site supervision and direction of the Work using the Contractor's best efforts. The Contractor has control over construction means, methods, techniques, sequences and procedures, unless the Contract Documents give other specific instructions concerning these matters, and is solely responsible therefore.

**5.3.3 Discipline at the Site.** The Contractor must enforce strict discipline and good order among the Contractor's employees and other persons for whose Work the Contractor is responsible, including Contractors, Subcontractors, Sub-subcontractors, and Suppliers.

**5.3.4 Responsibility for Subordinates.** The Contractor is responsible for the acts and omissions of all persons performing portions of the Work at the Site, including but not limited to the Contractor's employees, Subcontractors, Sub-subcontractors, Suppliers, and the agents and employees of any of them.

**5.3.5 Obligations Not Relieved.** The Contractor is not relieved of its obligations to perform the Work in accordance with the Contract Documents, or to comply with applicable laws and regulations and Referenced Standards, by the activities or duties of the Owner or the Architect/Engineer in the administration of the Contract or of construction, or by tests, inspections or approvals required or performed by persons other than the Contractor.

### 5.4 SUPERINTENDENCE

**5.4.1 Superintendent.** The Contractor must employ a competent Superintendent and necessary assistants who represent the Contractor who must be in attendance at the Site at all times during the performance of the Work or any other operations by the Contractor at the Site until issuance of the Certificate of Substantial Completion, during the performance of any punch list work, and for

such additional time thereafter as the Owner or Architect/Engineer may determine to be necessary for Final Completion.

**5.4.2 Acceptability of Key Personnel.** The Contractor's key project-specific personnel (including at a minimum the Superintendent, Project Manager and Quality Control Manager, as required by the Contract Documents) are subject to approval by the Owner and a list of them and their resumes in the form required by the Owner must be provided to the Owner in accord with Subsection 9.1.2.4. If the Owner advises the Contractor that any such personnel are unsatisfactory to the Owner, then the Contractor must promptly provide an acceptable substitute. If the Owner determines, during the Contractor's performance of the Work, that any such personnel are unsatisfactory, then the Contractor must promptly provide an acceptable substitute. The Contractor may not voluntarily change the Superintendent or key personnel without prior notice to and the consent of the Owner, not to be unreasonably withheld. The Owner may condition its consent on the Contractor's fully familiarizing the replacement personnel with all Contract Documents and the status of the Work at the Contractor's expense.

**5.4.3 Communications with Superintendent and Project Manager and Owner's Representatives and/or the Architect /Engineer.** The Superintendent and Project Manager must be fluent in written and spoken English, and communications given to the Superintendent or Project Manager are as binding as if given to the Contractor. If the Contractor contends that any communication between its Superintendent and Project Manager and any Owner's representative or the Architect/Engineer constitutes a change in the Work entitling the Contractor to an increase in the Contract Time or Contract Sum, the Contractor must before proceeding with the work obtain the written authorization of the Contract Administrator directing the performance of the work and must file notice with the Owner and Architect/Engineer in accordance with Section 12.5, and file a Claim for an increase in the Contract Time and/or a Claim for an increase in the Contract Sum in accordance with Articles 11 and 12, or any Claim relating to such Work shall be deemed waived.

### 5.5 LABOR, MATERIALS AND EQUIPMENT

**5.5.1 Labor, Materials and Equipment Provided by Contractor.** Unless otherwise provided in the Contract Documents, the Contractor must provide and pay for all labor, materials, equipment, and utilities required for the performance of the Contract.

**5.5.2 Royalties and License Fees.** The Contractor must pay all royalties and license fees and comply with any licensing requirements required in connection with

## General Conditions of Construction Contract - GCCC

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the use of a particular design, process or product of a particular manufacturer or manufacturers. The Contractor must defend suits or claims for infringement of copyrights, patent rights or trade secrets and must hold the Owner and Architect/Engineer harmless from liability and indemnify the Owner and Architect/Engineer against any loss or damage on account thereof.

**5.5.3 Compliance with Contract Documents, Approved Submittals, and Interpretations.** The Contractor must perform the Work in accordance with: (i) the Contract Documents; (ii) Submittals approved pursuant to Section 9.2 to the extent they are not in conflict with the Contract Documents; and (iii) interpretations and instructions issued by the Architect/Engineer pursuant to Subsection 4.3.1.

**5.5.4 Compliance with Manufacturers' Instructions.** Unless otherwise specifically provided in the Contract Documents, the Contractor must store, handle, install, and test all materials and equipment in accordance with the manufacturers' or Suppliers' most recent instructions and recommendations. In the event such instructions or recommendations are in conflict with any provisions of the Contract Documents, the Contractor must give prompt notice of the conflict to the Owner as provided in Subsection 5.1.6.

**5.5.5 Labor.** The Contractor must provide, and must also ensure that its Subcontractors and Sub-subcontractors provide, a sufficient number of properly skilled workers and crews to perform the Work in a safe and expeditious manner in accordance with the approved Progress Schedule, including appropriate proportions of laborers, apprentices, journeymen, masters and foremen, and must not permit employment of persons who are unfit to perform or are not skilled in tasks assigned to them.

**5.5.6 Allowances.** The Contract Sum and Contract Time include all Allowances required by the Contract Documents. The Contractor must perform all Work covered by an Allowance unless directed otherwise by the Owner. The Contractor must provide proposed or actual costs to the Owner for performing any Allowance work. If acceptable to the Owner, the Owner will then direct the Contractor to perform the Work through written notification. The Owner may require that work covered by an Allowance be purchased on the basis of the lowest responsive bid of at least three competitive bids approved by the Owner, unless the Contract Documents specify a Unit Price for the work, in which case the Allowance work must be provided at the Unit Price. Work covered by Allowances must be supplied for such amounts and by such persons or entities proposed by the Contractor and approved by the Owner or as the Owner may otherwise direct, unless the Contract Documents

specify a Unit Price for the work, in which case the work must be provided at the Unit Price.

**5.5.7 Adjustments for Allowances.** Unless otherwise provided in the Contract Documents:

- .1 Allowances designated in the Contract Documents provide for the estimated direct cost of all labor, materials and equipment, including unloading, storage, and handling at the Site, labor, installation costs, transportation to the Site and all required taxes, less applicable trade discounts **but do not include the Contractor's overhead or profit, which are included in the Contract Sum and are not compensable under the Allowances;**
- .2 Whenever actual costs (excluding those amounts indicated above as included in the Contract Sum and not compensable) are more than a monetary Allowance, the Contractor shall be entitled to an appropriate Contract Modification to reflect the difference between the costs set forth in subsection .1;
- .3 If actual costs are less or equal to the amount of a monetary Allowance, the Contractor shall include only such actual costs in the Contractor's Application for Payment; the Contract Sum must be reduced by an appropriate Contract Modification to reflect the deletion of an Allowance or lower actual costs of an Allowance; and
- .4 **All time required for the performance of work covered by an Allowance is conclusively presumed to be included in the Contract Time, unless the cost of the work exceeds the Allowance amount and the Contractor demonstrates a Delay to the critical path of the CPM Schedule of Record and requests an increase of time in accordance with Article 11.**

### 5.6 CONSTRUCTION OPERATIONS

**5.6.1 Use of Site.** The Contractor must confine operations at the Site to areas permitted by law, ordinances, permits, and the Contract Documents and must not unreasonably encumber the Site with materials and equipment. The Owner may establish reasonable additional limitations on the Contractor's use of the Site to accommodate the needs of the Owner, Separate Contractors, users of occupied facilities the public, or other forces authorized by the Owner to perform work. Provided, however, if such limitations are made known to the Contractor after the date bids are received, the Contractor may be entitled to an equitable adjustment in

## General Conditions of Construction Contract - GCCC

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the Contract Time and/or Contract Sum if the Contractor can demonstrate that such limitations adversely impact the prosecution of the Work.

**5.6.2 Benchmarks and Layout of Work.** The Contractor must establish the exterior lines and elevations of all buildings and structures to be erected on the Site, and lines and grades of Site Work such as roads, utilities and Site grading, based on reference points, the location of existing structures or improvements, or benchmarks identified in the Contract Documents or Site Surveys provided by the Owner. The Contractor must protect and preserve such established reference points, and if they are disturbed, the cost of their relocation and replacement must be borne by the Contractor. The Contractor must provide a professional certification by a State of Maryland registered professional engineer or land surveyor as to the actual location of building lines prior to the construction of the foundations. Once foundation work is complete, and prior to commencing construction of the superstructure for the Project, Contractor must submit to Owner a certified building location survey as completed by a State of Maryland registered land surveyor. The Contractor must establish the building grades, lines and levels, and column, wall and partition lines required by its Subcontractors in laying out their Work. At the completion of the Work, the Contractor must provide another professional certification by a registered professional engineer or land surveyor as to the location of the completed improvements in relation to property lines, building lines, easements, and other boundaries.

**5.6.3 Working Hours.** Except as otherwise provided in the Contract Documents, all Work must be performed between the hours of 7:00 a.m. and 4:00 p.m. Monday through Friday exclusive of County, State and federal holidays unless more restrictive hours are required by the Montgomery County Code or other applicable law governing the Contractor's performance of the Work. The Owner has the right to impose further restrictions on working hours reasonably related to the use of occupied facilities provided, however, the Contractor shall be entitled to an equitable adjustment in the Contract Time and/or Contract Sum if such restrictions are imposed after the date bids are received if the Contractor can demonstrate that such limitations adversely impact the prosecution of the Work. No delays resulting from compliance with **applicable laws or regulations may form the basis for any Claim by the Contractor for delay damages or additional compensation or for any increase in the Contract Time; any delays arising from restrictions related to the use of occupied facilities are non-compensable and any requests for an increase in the Contract Time relating to them**

**must be filed in accord with Article 11 or the same will be conclusively deemed to have been waived.** The Contractor must not permit work outside of such hours or on a Saturday, Sunday or other County, State or federal holiday without the written consent of the Owner, given after prior written notice to the Architect/Engineer; such consent, if given, may be conditioned upon payment by the Contractor of the Owner's and Architect/Engineer's additional costs and fees incurred in monitoring such off-hours Work. The Contractor must notify the Owner as soon as possible if Work must be performed outside such times in the interest of the safety and protection of persons or property at the Site or adjacent thereto, or in the event of an emergency. In no event shall the Contractor permit Work to be performed at the Site without the presence of the Contractor's Superintendent and/or persons responsible **for the protection of persons and property at the Site and compliance with all applicable Laws and Regulations, if different from the Superintendent.**

**5.6.4 Noise Ordinance.** The Contractor must comply with the Montgomery County Noise Ordinance (Chapter 31B) of the Montgomery County Code and any successor or substitute provisions covering the regulation of noise levels. It is the duty of the Contractor to familiarize itself with those provisions and perform the Work in compliance with those provisions.

**5.6.5 Temporary Facilities.** Except as otherwise provided in the Contract Documents, the Contractor must provide and pay for all labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, and other temporary facilities and services necessary for proper execution and completion of the Work, including measures for sediment control, storm water management and waste disposal. The Contractor must not use any preexisting facilities of the Owner without the specific written consent of the Owner, except as indicated in the Contract Documents. The Contractor is solely responsible for temporary facilities and services provided or utilized by the Contractor and must remove those not required to remain at the completion of the Work or any portion thereof; must promptly correct any damage caused by the erection, use or removal of temporary facilities; and must restore the Site and any adjacent areas to their original condition or that required by the Contract Documents upon completion of the Work.

**5.6.6 Cutting, Patching and Finishing.** The Contractor is responsible for all cutting, patching and finishing required to complete the Work or to make its parts fit together properly. The responsibility of the Contractor, Owner and Separate Contractors with



## General Conditions of Construction Contract - GCCC

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respect to cutting, patching and finishing work by others is as provided in Subsection 7.2.4.

**5.6.7 Cleaning Up.** The Contractor must keep the Site and adjacent areas free from accumulation of waste materials or rubbish caused by operations under the Contract, and must keep tools, construction equipment, machinery and surplus materials suitably stored when not in use. If the Contractor fails to do so in a manner reasonably satisfactory to the Owner or the Architect/Engineer within forty-eight (48) hours after notice or as otherwise required by the Contract Documents, the Owner may clean the Site and back charge the Contractor for all costs associated with the cleaning.

### 5.6.8 Utilities.

**.1 Temporary Utilities.** Unless otherwise specified in the Contract Documents, the Contractor, at its own expense, must:

- (1) Furnish all temporary heat, cooling ventilation, and humidity control including all required apparatus and fuel as may be necessary to protect the Work fully, both during its execution and until Final Completion and acceptance. Contractor must not use any method of heating, cooling, ventilation, or humidity control of the building unless approved by the Owner in advance;
- (2) Provide all temporary on-Site water service required to perform the Work, to assure safety at the Site, and as otherwise specified in the Contract Documents. All temporary service must be removed by Contractor unless otherwise specified in the Contract Documents;
- (3) Furnish all temporary electric service required to perform the Work, to assure safety at the Site, and as otherwise specified in the Contract Documents;
- (4) Furnish all temporary telephone and data service required to perform the Work, to assure safety at the Site, and as otherwise specified in the Contract Documents; and
- (5) The Contractor must provide and maintain in a neat, sanitary condition such accommodations for the use of the Contractors and Subcontractors employees as may be necessary to comply with the requirements and regulations of the Department of Health and Human Services of Montgomery County, or of other authorities

having jurisdiction, and shall commit no public nuisance.

### .2 Existing Utilities.

- (1) The existence and locations of underground or other utilities and other construction indicated on the plans are not guaranteed by Owner.
- (2) Contractor must investigate and verify the existence and location of underground or other utilities before commencing the Work. Work performed near existing structures and utilities must be done safely by hand. Contractor is responsible for any damage to, and for maintenance and protection of, existing utilities and structures.
- (3) At Contractor's expense the Contractor must coordinate with utilities companies for the adjustment, moving or relocation as necessary of existing structures, utility poles, lines, services, or other appurtenances located in, or affected by, the Work which was discoverable by a thorough site visit, and/or a careful review of the Contract Documents. No increase in the Contract Time or an increase in the Contract Sum will be granted for any Delay associated with such coordination whether caused by the Contractor, a public utility, any other third party or the Owner acting in its governmental capacity. The Contractor will be allowed an increase in the Contract Sum and/or an increase in the Contract Time associated with the adjustment, removal, or relocation of any operational but unknown and unmarked utilities which were not discoverable by a thorough site visit, and/or a careful review of the Contract Documents. Any Claim for adjustment of the Contract Time or the Contract Sum must be filed within the time and in accordance with the provisions of Articles 11 and 12 or any Claim to such will be deemed to have been conclusively waived.

### .3 Permanent Utilities.

- (1) Contractor must arrange for and coordinate the installation and inspection of permanent utilities with all appropriate utility companies. The installation cost and the time associated with such work is

## General Conditions of Construction Contract - GCCC

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included in the Contract Time and the Contract Sum unless otherwise specified in the Contract Documents. **No increase in the Contract Time or an increase in the Contract Sum will be granted for any Delay associated with obtaining such permanent utilities whether caused by the Contractor, a public utility, any other third party or the Owner acting in its governmental capacity.** The Contractor is responsible for the costs for its use of permanent utilities until Substantial Completion.

### 5.6.9 Air Pollution Control

- .1 The Contractor must comply with the Montgomery County Air Quality Ordinance (Chapter 3) of the Montgomery County Code and any successor or substitute provisions covering the regulation of air quality.
- .2 Hauling of Materials: All fine-grained loose materials hauled to or from a project must be covered to prevent spillage and blowing.
- .3 Disposal of Materials: Disposal of materials by burning at any location within the project site is prohibited. Any off-site burn area receiving materials from the project site must have a Fire Permit from the Montgomery County Department of Environmental Protection and conform to all laws and regulation associated with said Fire Permit.

## ARTICLE 6

### SUBCONTRACTORS AND SUPPLIERS

#### 6.1 SELECTION AND RIGHT OF REJECTION

**6.1.1 Identification of Subcontractors and Suppliers.** Unless otherwise provided in the Contract Documents or the Instructions to Bidders, the Contractor, within ten (10) days after issuance of the Notice to Proceed and before commencing Work at the Site, must furnish in writing to the Owner through the Architect/Engineer the names of Subcontractors and Suppliers which the Contractor intends to utilize during the first thirty (30) days, and those then known to the Contractor who are proposed for each principal portion of the Work. This list must be consistent with the Contractor's Progress Schedule required by Subsection 11.2.1 and Schedule of Submittals required by

Subsection 11.2.6. Such principal Subcontractors include, but are not limited to, (i) those performing ten percent (10%) or more of the amount of the Work as indicated by the Contractor's Schedule of Values; (ii) any Subcontractor whose Work falls on the critical path of the Contractor's Progress Schedule, and (iii) those responsible for excavation, structural steel, concrete, masonry, plumbing, mechanical, electrical, roofing and finish work. The Contractor must submit any proposed changes or additional names as the Work progresses, not less than thirty (30) days prior to the date on which the Contractor intends to contract with the proposed Subcontractor or Supplier, and sufficiently in advance of such date to permit a reasonable time for review.

- .1 The Contractor must not enter into any subcontract, contract, agreement, purchase order or other agreement for the furnishing of any portion of the materials, services, equipment or Work with any party or entity if such party or entity is an Affiliated Entity with which the Contractor has a direct or indirect ownership, control or interest unless such agreement has been approved by the Owner, such approval not to be unreasonably withheld, after full disclosure in writing by the Contractor to the Owner of such affiliation or relationship and all details relating to the proposed arrangements.
- .2 The Contractor shall submit the name of all principal Subcontractors to the Owner within sixty (60) days after Notice to Proceed and shall have all principal Subcontractors under contract within ninety (90) days of Notice to Proceed.

**6.1.2 Qualification of Subcontractors** The Owner may make such investigations as he deems necessary to determine the ability of any Subcontractor to perform its work, and the Contractor and Subcontractor shall furnish to the Owner all such information and data for this purpose as the Owner may request. The Owner may visit any Subcontractor's place of business and review any other factors relevant to a determination of the Subcontractor's ability to perform its work. The Owner reserves the right to reject any Subcontractor who has previously failed to perform properly or to complete in a timely manner, or whose proposed Subcontractors, Suppliers, or Surety have similarly failed to perform properly or timely, contracts of a similar nature, or if investigations show the Subcontractor unable to perform the requirements of the Subcontract.

- .1 Upon Owner request, Subcontractors shall furnish under oath the following proof of qualifications to perform its proposed work.

## General Conditions of Construction Contract - GCCC

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Subcontractor shall furnish a description of comparable work performed by him within the previous five years indicating the location, contract scope, contract sum, type of construction, name, address and phone number of owner and architect, date work completed, and construction period in days. Upon Owner request, Subcontractors may be required to furnish additional information as proof of qualifications. Failure to submit any requested information within 10 days of Owner request shall be sufficient cause to reject the Subcontractor.

.2 Upon Owner request, Subcontractors shall furnish a current condensed net worth statement and financial references for verification of financial responsibility.

.3 All Subcontractors must be licensed, as required by law, to perform its proposed work. Upon Owner request, Subcontractors shall furnish evidence of required licenses.

**6.1.3 Acceptance of Subcontractors and Suppliers.** The Architect/Engineer will, within a reasonable time, advise the Contractor in writing if the Owner rejects any proposed Subcontractor or Supplier, stating the reasons therefore, or stating that additional information is required in order to make a determination as to the acceptability of any proposed Subcontractor or Supplier.

**6.1.4 Use of Acceptable Subcontractors and Suppliers.** The Contractor must not contract with a proposed Subcontractor or Supplier who has been rejected by the Owner. If the Contractor wishes to change a previously selected Subcontractor or Supplier, the Contractor must submit the name of the replacement for review and acceptance as provided in Subsection 6.1.1.

**6.1.5 Owner's Right to Require Removal.** The Owner has the right to require the Contractor to remove a Subcontractor or Supplier, for any occurrence which, if done by the Contractor, would be a breach of the Contract.

**6.1.6 Replacement Subcontractors and Suppliers.** If the Owner requires removal of a Subcontractor or Supplier, the Contractor must propose another to whom the Owner has no reasonable objection. The Contractor is not entitled to any adjustment in the Contract Time or the Contract Sum occasioned by such change if the removal is for any occurrence which, if done by the Contractor, would be a breach of the Contract, or if the

Contractor has failed to act promptly and responsively in submitting names as required.

### 6.2 SUBCONTRACTUAL RELATIONS

**6.2.1 Subcontracts Required.** The Contractor must require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound to the Contractor by the terms of the Contract Documents, and to assume toward the Contractor all the obligations and responsibilities which the Contractor, by the Contract Documents, assumes toward the Owner and the Architect/Engineer. Each subcontract must allow to the Subcontractor, unless otherwise agreed to by the Owner, rights, remedies and redress against the Contractor equivalent to those that the Contractor, by the Contract Documents, has against the Owner. The Contractor must require each Subcontractor to enter into similar agreements with Sub-subcontractors.

### 6.2.2 Intentionally Not Used.

**6.2.3 Subcontract Provisions.** The Contractor must submit a copy of each subcontract to the Owner upon request. Each subcontract must specifically include provisions that:

- .1 Preserve and protect the rights of the Owner under the Contract with respect to the Work to be performed under the subcontract so that the sub-contracting thereof will not prejudice such rights;
- .2 Require the Subcontractor to comply with all applicable licensing, bonding and insurance requirements;
- .3 Require submission to the Contractor of submittals in sufficient time and in such detail as will enable the Contractor to review, approve and submit such submittals in accordance with Article 9;
- .4 Require that the Work under the subcontract be performed in accordance with the requirements of the Contract Documents and applicable laws and regulations.
- .5 Require the Subcontractor to comply with all applicable employment laws, regulations and requirements of the Contract, including requirements concerning equal employment opportunity and affirmative action and Minority Female and Disabled (MFD) requirements applicable to Subcontractors;
- .6 Require submission to the Contractor of applications for payment in sufficient time and in such detail as will enable the Contractor to apply for payment in accordance with Article

## General Conditions of Construction Contract - GCCC

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13, and provide for payment to Subcontractors as provided in Section 6.3;

- .7 Require that all requests and/or Claims for additional costs, increase of time, damages for delays or otherwise with respect to subcontracted portions of the Work for which the Owner, the Architect/Engineer, any Separate Contractor, or any of their consultants, subcontractors, agents or employees might be liable, be submitted through the Contractor in sufficient time and in such detail as will enable the Contractor to comply with the requirements of Articles 11, 12 and 16 for such requests or Claims;
- .8 Require the Subcontractor to indemnify as provided in Section 8.4;
- .9 Expressly provide for the contingent assignment referred to in Section 6.4;
- .10 Obligate the Subcontractor specifically to consent to the provisions of this Section; and
- .11 Allow the Subcontractor and applicable Sub-subcontractor to be terminable at no cost to the Owner or the Contractor if the Contract is terminated.

### **6.3 PAYMENTS TO SUBCONTRACTORS AND SUPPLIERS**

**6.3.1 Payments by Contractor to Subcontractors and Suppliers.** As required by Md. Code Ann., Real Prop., §9-302 (2003 Repl. Vol.), the Contractor shall pay each Subcontractor and Supplier, within seven (7) days after receipt of payment from the Owner that portion of the amount paid to the Contractor on account of such Subcontractor's or Supplier's portion of the Work to which the Subcontractor or Supplier is entitled. Retainage withheld from payments to a Subcontractor or Supplier must not exceed the contract retainage applicable to the Contractor on account of that Subcontractor's or Supplier's portion of the Work. The Contractor and Subcontractors are put on notice that payments made to them under the Contract are held in trust for their Subcontractors and Suppliers under Md. Code Ann., Real Prop., §9-201 (2003 Repl. Vol.) .

#### **6.3.2 Intentionally Not Used.**

**6.3.3 Substantial Completion Payment and Final Payment to Subcontractors and Suppliers.** The Contractor must make payment (excluding retainage, amounts withheld for completion of Punch List and correction of any defective Work) to Subcontractors and Suppliers within a reasonable time after Substantial Completion of the Work. Remaining retainage payments and any amounts previously withheld for completion of

Punch List and correction of any defective Work must be made to Subcontractors and Suppliers within seven (7) days after receipt of final payment by the Contractor.

#### **6.3.4 Intentionally Not Used.**

**6.3.5 Information Regarding Payments.** The Owner may at its discretion, and the Architect/Engineer may if so authorized by the Owner, furnish directly to a Subcontractor or Supplier on its request, if practicable, information regarding the Contract, including percentages of completion claimed or amounts applied for by the Contractor and action taken thereon by the Architect/Engineer and Owner on account of portions of the Work done by such Subcontractor or Supplier.

**6.3.6 Responsibility for Payment to Subcontractors.** Neither the Owner nor the Architect/Engineer shall have any obligation to pay or to see to the payment of any moneys to any Subcontractor or Supplier or provide any information to either. Notwithstanding any provision to the contrary in this Article 6 or in any other provision of the Contract Documents, any obligations imposed upon the Contractor with respect to Subcontractors and Suppliers is solely for the benefit of the Owner and Architect/Engineer and shall not be construed as giving any Subcontractor or Supplier any rights against the Owner or the Architect /Engineer or creating any privity of contract between the Owner and Architect/Engineer on one hand and any Subcontractor or Supplier on the other hand.

### **6.4 CONTINGENT ASSIGNMENT OF SUBCONTRACTS AND PURCHASE ORDERS**

**6.4.1 Assignment.** Each subcontract and Contractor's purchase order for a portion of the Work, including contracts for the purchase or rental of temporary facilities and equipment, must be assignable by the Contractor to the Owner under the conditions of this Section at no cost or change in price or time of performance on account of the assignment.

**6.4.2 Election by Owner.** The assignment of subcontracts and Contractor's purchase orders is effective only after termination of the Contract by the Owner pursuant to Sections 15.2 or 15.3, and only for those subcontracts or purchase orders which the Owner accepts by notifying the Contractor and Subcontractor or Supplier in writing.

**6.4.3 Rights of Surety.** The assignment of subcontracts and Contractor's purchase orders is subject to the prior rights of the Surety, if any, on the Project.

**6.4.4 Liability for Prior Obligations.** In the event the Owner accepts an assignment, the Owner is not liable for any obligations of the Contractor to the Subcontractor or Supplier arising prior to the effective date of the assignment, other than payment for Work performed in accordance with the Contract Documents and for which the Owner has not made payment to the Contractor. In no event does such assignment act as a release of the Contractor or its Surety from any of their obligations to the Owner, the Subcontractor, Supplier, or any other person or entity affected thereby. The Contractor must insert a provision to this effect and to the effect of Subsection 6.4.1 in all contracts with its Subcontractors and Suppliers and require all Subcontractors to insert a similar provision in all contracts with any Sub-subcontractor.

## **ARTICLE 7**

### **WORK BY OWNER AND BY OTHERS**

#### **7.1 OTHER WORK AT THE SITE**

**7.1.1 Owner Occupancy of the Site** Unless otherwise noted in the Contract, the Owner will occupy and continue operations at the Site and facility during the Work. The Contractor is responsible for coordinating with the Owner so as to not disrupt operations or usage of the Site and facility.

**7.1.2 Owner's Rights Reserved.** The Owner reserves the right to perform work at the Site with its own forces, to permit work to be performed at the Site by other forces, and to award separate contracts in connection with other portions of the Project.

**7.1.3 Identification of Work by Others.** Work to be performed by the Owner or by Separate Contractors is identified as such in the Contract Documents. If a question arises concerning the allocation of responsibilities among the Contractor and the Owner or any Separate Contractor, the Contractor must promptly request an interpretation or decision as provided in Subsection 4.3.3.

**7.1.4 Coordination of Other Work.** The Contractor must cooperate in coordinating its Work with the work, if any, of the Owner, Separate Contractors, and any other forces permitted by the Owner to perform work at the Site without an increase in the Contract Time or the Contract Sum. The Contractor must, in addition, coordinate its Work with other work at the Site as required in the Contract Documents without an increase in the Contract Time or the Contract Sum. Such coordination will be performed as designated in the Contract Documents by the Owner the Architect/Engineer, a separate consultant retained by the Owner such as a construction manager,

or may be assigned to the Contractor or a Separate Contractor, and any such assignment shall be without an increase in the Contract Time or in the Contract Sum. In the event such coordination is not performed by the Owner's own personnel, the Owner will advise the Contractor in writing of the person or entity who will be responsible for such coordination, and will describe the duties, authority and limitations of authority of such person or entity.

**7.1.5 Construction Schedules.** In the event the Owner is performing work at the Site with its own forces or by Separate Contractors or permitting other forces to perform work at the Site, the Owner will be responsible for providing the Contractor with appropriate and necessary activities, durations, and/or fragnets indicating the work and that such information shall be input into the Contractor's Project Schedule. The Contractor must participate with the Owner and any Separate Contractors and other forces permitted by the Owner to perform work at the Site in jointly reviewing the overall Project Progress Schedule when directed to do so. The Contractor must make any revisions to the Contractor's Progress Schedule that are necessary to accommodate work by the Owner and Separate Contractors and any other forces permitted by the Owner to perform work at the Site and to avoid delays and interruptions in the overall Project Progress Schedule. **The Contractor may be entitled to a change in the Contract Time or Contract Sum as a result of any Delays, impacts or inefficiencies resulting from interferences or lack of Site availability caused by Owner or Separate Contractors or other forces permitted by the Owner to perform work at the Site provided Contractor submits a Claim in accordance with Articles 11, 12 and 16.**

**7.1.6 Communications through Owner.** Communications among the Contractor and Separate Contractors must be conducted through the Owner, except as provided in Subsections 7.2.4 and 7.2.5.

#### **7.2 CONTRACTOR'S RESPONSIBILITY**

**7.2.1 Contractor to Afford Access to Others.** The Contractor must afford the Owner and Separate Contractors and other forces permitted by the Owner to perform work at the Site reasonable opportunity for introduction and storage of their materials and equipment and performance of their work and related activities.

**7.2.2 Connection with Other Work.** The Contractor must connect its Work with that of the Owner and Separate Contractors and other forces permitted by the Owner to perform work at the Site as required by the Contract Documents, the overall Project Progress

## General Conditions of Construction Contract - GCCC

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Schedule, and the directions of the Owner and its authorized representatives.

**7.2.3 Inspection and Notice of Unsuitability.** If part of the Contractor's Work or other operations depends for proper execution or results, upon, or may adversely be affected by, construction or operations by the Owner or a Separate Contractor or other forces permitted by the Owner to perform work at the Site, the Contractor must, as soon as practicable but in all events in sufficient time to prevent delay, disruption, hindrance or interference with the performance of the Contractor's work and prior to proceeding with that portion of the Work, report in writing to the Architect/Engineer and the Owner any apparent discrepancies or defects in, or other conditions pertaining to, such other construction or operations that would prevent the Contractor from achieving proper execution and results of the Work. **Failure of the Contractor to report such conditions prior to proceeding with the Work constitutes an acknowledgment (i) that the construction by the Owner or Separate Contractors or other forces permitted by the Owner to perform work at the Site is fit and proper to receive the Contractor's Work, except as to defects not then reasonably discoverable, and (ii) that their operations will not adversely affect the performance of the Work.**

**7.2.4 Cutting, Patching and Finishing of Work by Others.** The Contractor must not damage or endanger fully or partially completed construction by the Owner or Separate Contractors or other forces permitted by the Owner to perform work at the Site by cutting, patching, finishing or otherwise altering such construction, or by excavation. The Contractor must not cut or otherwise alter such work by others except with written consent of the Owner; such consent will not be unreasonably withheld. The Contractor must not unreasonably withhold from the Owner or a Separate Contractor or other forces permitted by the Owner to perform work at the Site the Contractor's consent to cutting, patching, finishing or otherwise altering the Contractor's Work.

**7.2.5 Remedy of Damage to Work by Others.** The Contractor must promptly remedy damage caused by the Contractor to completed or partially completed construction or to property of the Owner or Separate Contractors or other forces permitted by the Owner to perform work at the Site as provided in Subsection 8.2.7.

### **7.3 MUTUAL RESPONSIBILITY OF THE OWNER AND SEPARATE CONTRACTORS**

**7.3.1 Responsibility for Cleaning Up.** If a disagreement arises among the Contractor, Separate Contractors or other forces permitted by the Owner to perform work at the Site and the Owner as to their respective responsibilities for maintaining the Site, the

Work and surrounding area free from waste materials and rubbish as described in Subsection 5.6.6, the Owner may clean up or direct the Contractor or a Separate Contractor or other forces permitted by the Owner to perform work at the Site to do so, and allocate the cost thereof among them.

**7.3.2 Disagreements Involving Separate Contractors.** If a disagreement arises among the Contractor and any Separate Contractors or other forces permitted by the Owner to perform work at the Site over delays, impacts, inefficiencies, additional costs or damage to their work or property at the Site, the Contractor must, upon due notice to the Owner make a good faith effort to settle with such Separate Contractor. If a settlement is not reached, the Contractor must submit a Claim for an increase in the Contract Time and/or a Claim for an increase in the Contract Sum in accordance with Articles 11 and 12. If a Separate Contractor or other forces permitted by the Owner to perform work at the Site brings a claim under the Montgomery County Procurement Regulations against the Owner on account of any delay, impacts, inefficiencies, additional cost or damage alleged to have been caused by the Contractor, the Owner will notify the Contractor who must participate in such proceedings at the Contractor's expense. If any judgment or award against the Owner arises therefrom, the Contractor must indemnify the Owner from liability for any loss or damage and must reimburse the Owner for all fees and costs including attorney's, consultant's and expert's fees which the Owner has incurred in the defense and satisfaction of such claim, to the extent that the delay, impacts, inefficiencies, additional cost or damage is attributable to the acts, failures to act, or negligence of the Contractor or anyone for whom the Contractor is responsible.

## **ARTICLE 8**

### **PROTECTION OF PERSONS AND PROPERTY**

#### **8.1 RESPONSIBILITY FOR SAFETY**

**8.1.1 Responsibility for Site Safety.** The Contractor is responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the Contract.

**8.1.2 Appointment of Safety Officer.** The Contractor must designate a responsible, properly trained and qualified member of the Contractor's organization who must maintain a full-time presence at the Site and whose duty is the prevention of accidents and the maintenance of safety programs, precautions and procedures. This person is the Contractor's Superintendent unless otherwise permitted or required by the Contract Documents, in which case the safety

## General Conditions of Construction Contract - GCCC

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officer must be designated by the Contractor in writing to the Owner and Architect/Engineer.

**8.1.3 Compliance with Legal Requirements.** The Contractor must comply with all applicable laws, ordinances, rules, regulations and lawful orders of public authorities bearing on safety of persons or property or their protection from damage, injury or loss.

### 8.2 SAFETY OF PERSONS AND PROPERTY

**8.2.1 Protections Required.** The Contractor must take reasonable precautions for the safety of, and must provide reasonable protection to prevent damage, injury or loss to:

- .1 All persons at and adjacent to the Site and other persons who may be affected by the Work or other operations of the Contractor;
- .2 The Work and materials and equipment to be incorporated therein or otherwise utilized in the performance of the Contract, whether in storage on or off the Site, under care, custody or control of the Contractor or the Contractor's Subcontractors or Sub-subcontractors; and
- .3 Other property at the Site or adjacent thereto and not designated for removal, relocation or replacement in the course of construction.

**8.2.2 Notices and Safeguards.** The Contractor must implement and maintain, as required by the Contract Documents, applicable laws and regulations and orders of public authorities having jurisdiction (including without limitation OSHA and MOSH), manufacturers' instructions or recommendations, existing conditions and performance of the Contract, reasonable safeguards for safety and protection, including issuing appropriate notices, distributing material safety data sheets and other hazard communication information, providing protective clothing and equipment, posting danger signs and other warnings against hazards, promulgating safety regulations and notifying owners and users of adjacent sites and utilities.

**8.2.3 Loading.** The Contractor must not load nor permit any part of any structure at the Site to be loaded or subjected to stresses or pressures so as to endanger its safety or that of adjacent structures or property.

**8.2.4 Hazardous Activities.** When explosives or other hazardous materials or equipment are stored or used or unusual methods are employed or hazardous conditions are present in the performance of the Work, the Contractor must exercise utmost care and conduct such activities under supervision of properly qualified personnel.

**8.2.5 Qualified Personnel.** The Contractor must ensure that all work is performed by qualified personnel, trained in accordance with all applicable laws and regulations, to safely perform the work.

**8.2.6 Emergencies.** In an emergency affecting safety of persons or property, the Contractor must take all necessary action, without the necessity for any special instruction or authorization from the Owner or the Architect/Engineer, to prevent threatened damage, injury or loss. The Contractor must promptly but in all events within twenty-four (24) hours of the occurrence report such action in writing to the Owner and the Architect/Engineer. If the Contractor incurs additional costs on account of or is delayed by such action, the Contractor may file a Claim requesting a change in the Contract Time or Contract Sum to account for such action in accord with Articles 11 and 12. **Any such Claim must be filed within ten (10) days of the occurrence or it will be conclusively deemed to have been waived.** Any adjustment in the Contract Time or Contract Sum shall be limited to the extent that the emergency work is not attributable to the fault or neglect of the Contractor or otherwise the responsibility of the Contractor under the Contract Documents.

**8.2.7 Notice of Physical Injury or Damage.** If the Contractor suffers physical injury or damage to person or property because of an act or omission of the Owner, or of any of the Owner's employees or agents, or of others for whose acts it is contended that the Owner is liable, written notice of such injury or damage, whether or not insured, must be given to the Owner within a reasonable time not exceeding forty eight (48) hours after the onset or occurrence of such damage or injury or such shorter time as may be required by the Occupational Safety & Health Administration (OSHA). The notice must provide sufficient detail to enable the Owner to investigate the matter. **If notice is not received by the Owner within the time specified, any Claim arising from the occurrence will be deemed to be conclusively waived,** except to the extent of any applicable insurance (excluding self-insurance) coverage covering such occurrence. **The provisions of this subsection may not be used by the Contractor in lieu of the requirements of Article 12 when the Contractor is seeking an adjustment in the Contract Sum and are in addition to the requirements of Article 11 when the Contractor is seeking an adjustment in the Contract Time.**

**8.2.8 Remedy of Property Damage.** The Contractor must promptly remedy damage and loss to property referred to in Subsections 8.2.1.2 and 8.2.1.3 caused in whole or in part by the Contractor, a Subcontractor, a Sub-subcontractor, a Supplier, or anyone directly or indirectly employed by any of them, or by anyone for

## General Conditions of Construction Contract - GCCC

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whose acts they may be liable, unless otherwise instructed in writing by the Owner. This obligation is in addition to, and not in limitation of, the Contractor's obligations for indemnification under Section 8.4. The Contractor shall not be responsible for the security of materials, equipment and tools of Separate Contractors and other forces permitted by the Owner to perform work at the Site..

**8.2.9 Responsibility for Site Security.** The Contractor is responsible for taking all reasonable and necessary precautions to secure and protect the Site, the Work, materials and equipment to be incorporated therein, and any tools or equipment of the Contractor necessary or beneficial to the performance of the Work from damage due to vandalism, theft, arson, or other criminal mischief. The Contractor must repair and/or replace that portion of the Work and any materials or equipment to be incorporated therein and any tools or equipment of the Contractor necessary or beneficial to performance of the Work which are damaged or stolen due to vandalism, theft, arson, or any other criminal mischief at its expense whether or not covered by insurance. No increase of the Contract Time or increase in the Contract Sum will be granted to the Contractor as a consequence of any delay, impacts or inefficiencies resulting from any act of vandalism, theft, arson or other criminal mischief whether or not caused or contributed to by the Contractor's negligence. The Contractor is responsible for securing the Site against unlawful and unauthorized entry.

### 8.3 HAZARDOUS MATERIALS

**8.3.1 Disclosure, Identification and Handling.** The Contractor must maintain at the Site, available to the Owner and the Architect/Engineer, appropriate information pertaining to all Hazardous Materials brought to the Site. Such materials must be properly labeled or identified, and the Contractor must properly store, handle and use them at all times. Manufacturers and distributors are required by the federal Hazard Communication Standard (29 CFR §1910.1200), and the Maryland "Access to Information About Hazardous and Toxic Substances" law to label each Hazardous Material or chemical container, and to provide Material Safety Data sheets to the purchaser. The Contractor must comply with these laws and must provide the Owner and Architect/Engineer with copies of all relevant documents, including Material Safety Data sheets prior to performance of services or contemporaneous with delivery of goods. The Contractor must provide and designate appropriate and secure areas for their storage and must notify the Owner and Architect/Engineer of their presence and location at the Site. The Contractor must not store Hazardous Materials at the Site in excess of those reasonably needed for the Contractor's current

operations, and must properly remove or dispose of all Hazardous Materials, including combustible waste, as soon as possible after completion of the operations in which they are utilized.

**8.3.2 Discovery of Hazardous Materials at the Site.** In the event the Contractor encounters on the Site material reasonably believed to be a Hazardous Material (other than those for which the Contractor may have specific responsibility for remediation under the Contract), and the Contractor's reasonable precautions will be inadequate to prevent foreseeable damage or injury and the Contractor cannot proceed with the Work in the absence of the removal, containment or remediation of the Hazardous Material, the Contractor must immediately stop Work in the area affected and report, within twenty four (24) hours the condition to the Owner and the Architect/Engineer in writing.

**8.3.3 Investigation and Remediation.** Upon receipt of notice of suspected Hazardous Materials, the Owner will cause an investigation to be made to verify the presence and extent of such materials, to determine whether such materials are in fact hazardous, and the steps necessary for their removal, containment or remediation.

**8.3.4 Resumption of Work.** If the Owner's investigation confirms the presence of Hazardous Materials which present a risk of injury or damage which will not be adequately protected against by the Contractor's reasonable precautions, then the Work in the affected area must not thereafter be resumed except at the written direction of the Owner. The Work in the affected area will be resumed promptly (i) in the absence of a finding of Hazardous Material by the Owner, (ii) upon the removal, containment or remediation of the Hazardous Materials, or (iii) upon the establishment of appropriate safety precautions.

**8.3.5 Adjustments for Hazardous Materials.** The Contractor may request a change in the Contract Time or Contract Sum if the Contractor incurs additional costs on account of or is delayed by the need to remove, contain or remediate Hazardous Materials which has not been rendered harmless at the Site unless the Contractor is responsible for same under the Contract. Any such requested change in the Contract Time or Contract Sum must be made in within ten (10) days of the Owner's approved resumption of Work referenced in Subsection 8.3.4 and must fully comply with Articles 11 and 12 or any Claim will be deemed conclusively waived by the Contractor.

### 8.4 INDEMNIFICATION

**8.4.1 Indemnity and Duty to Defend.** The Contractor shall defend, indemnify and hold harmless



## General Conditions of Construction Contract - GCCC

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the Owner, its consultants and Separate Contractors, the Architect/Engineer, the Architect/Engineer's consultants, and any of their Subcontractors, Sub-subcontractor, Suppliers, agents and employees from and against liability for all claims, damages, (including incidental and consequential), losses (including purely economic losses) and expenses, including but not limited to attorneys', expert witnesses' and consultants' fees, which arise out of or result from (a) the performance of the Work, (b) operations at the Site or (c) any act or omission by the Contractor. Such performance, operations, acts or omissions of the Contractor include the performance, operations, acts or omissions of the Contractor's Subcontractors, sub-subcontractors, Suppliers and their respective agents and employees and anyone for whose acts said parties may be liable. This indemnity obligation and the duty to defend applies, regardless of whether or not such claim, damage, loss or expense is also caused or is alleged to have been caused in part by the negligence or act or omission of a party indemnified hereunder, provided it is also caused or alleged to have been caused at least in part by the Contractor, a Subcontractor, Sub-subcontractor, Supplier or their agents or anyone directly or indirectly employed by them or anyone for whose acts said parties may be liable. The duty to defend accrues at the time a claim that potentially is within the scope of coverage of the indemnity herein is made against the indemnitee(s). For purposes of this Subsection 8.4.1, the term Owner includes its boards, agencies, agents, officials and employees.

**8.4.2 Effect of Limitations on Statutory Benefits.** In claims against any indemnitee hereunder by an employee of the Contractor, a Subcontractor, Sub-subcontractor or Supplier or anyone directly or indirectly employed by them or anyone for whose acts said parties may be liable, the indemnification obligation and duty to defend under Subsection 8.4.1 are not limited by the amount or type of damages, compensation or benefits payable by or for the Contractor or a Subcontractor, Sub-subcontractor or Supplier under workers' or workmen's compensation acts, disability benefit acts or other employee benefit acts.

**8.4.3 Limitation as to Negligence of Indemnitee(s).** The Contractor's obligations under Subsection 8.4.1 to indemnify (but not the duty to defend which shall apply nonetheless) do not apply to the extent that, but only to the extent that, any claim, damage, loss or expense as to bodily injury to any person or damage to property (but not as to purely economic claims, damages, losses or expenses as to which the Contractor's obligation under Subsection 8.4.1 shall nonetheless apply) is ultimately determined to result from the sole and exclusive negligence of the indemnitee(s).

**8.4.4 Other Rights of Indemnity.** The indemnification obligations of this Section 8.4 must not be construed to negate, abridge, or reduce any common-law or statutory rights of the indemnitee(s) which would otherwise exist as to such indemnitee(s).

If Contractor will be preparing, displaying, publicly performing, reproducing, or otherwise using, in any manner or form, any information, document, or material that is subject to a copyright, trademark, patent, or other property or privacy right, then Contractor must: obtain all necessary licenses, authorizations, and approvals related to its use; include the Owner in any approval, authorization, or license related to its use; and indemnify and hold harmless the Owner related to Contractor's alleged infringing or otherwise improper or unauthorized use. Accordingly, the Contractor must protect, indemnify, and hold harmless the Owner from and against all liabilities, actions, damages, claims, demands, judgments, losses, costs, expenses, suits, or actions, and attorneys' fees and the costs of the defense of the Owner, in any suit, including appeals, based upon or arising out of any allegation of infringement, violation, unauthorized use, or conversion of any patent, copyright, trademark or trade name, license, proprietary right, or other related property or privacy interest in connection with, or as a result of, this Contract or the performance by the Contractor of any of its activities or obligations under this Contract.

## ARTICLE 9

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### SUBMITTALS

#### 9.1 SUBMITTALS REQUIRED

**9.1.1 Precontract Submittals.** The Owner reserves the right to require certain Submittals before executing the Contract. Submittals required before execution of the Contract include, but are not limited to, the following:

- .1 Performance and Payment Bonds acceptable to the Owner as provided in Subsection 17.1;
- .2 Policies and certificates of insurance acceptable to the Owner as provided in Subsections 17.2.7 and 17.3.9; and
- .3 Other submittals required by the Bid or RFP Documents.

**9.1.2 Initial Submittals.** Unless otherwise provided in the Bid or RFP Documents or the Contract Documents, Submittals required within the first thirty (30) days (or such shorter period as specified in the following sections) after issuance of a Notice to Proceed include, but are not limited to, the following:

- .1 A Progress Schedule for approval by the Architect/Engineer and the Owner as

## General Conditions of Construction Contract - GCCC

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provided in Subsection 11.2.1 which must be provided within fifteen (15) days of the Notice to Proceed;

- .2 A Schedule of Submittals including Shop Drawings, Product Data Samples and other Submittals for approval by the Architect/Engineer as provided in Subsection 11.2.6;
- .3 A list of Subcontractors and Suppliers as provided in Subsection 6.1.1 which must be provided within ten (10) days of the Notice to Proceed;
- .4 A list of Contractor's key personnel as provided in Subsection 5.4.2;
- .5 A Schedule of Values as provided in Subsection 13.1.1 which must be provided within ten (10) days of the Notice to Proceed;
- .6 A construction quality control (CQC) plan as provided in the Specifications, if applicable; and
- .7 Other Submittals required by the Contract Documents.

**9.1.3 Submittals During Construction.** Unless otherwise provided in the Contract Documents, Submittals required during the course of construction include, but are not limited to, the following:

- .1 A certified building location survey as provided in Subsection 14.3.3.7;
- .2 [This subsection intentionally not used];
- .3 Progress reports (regular and intermittent) as provided in the Specifications, properly identified and authenticated;
- .4 Certificates of inspection, approval and test reports as provided in Subsection 10.5.7;
- .5 Monthly Progress Schedules as provided in Subsection 11.2.5 and Section 9 (G) of the Contract;
- .6 Applications for Payment with supporting documentation as provided in Section 13.2; and
- .7 Shop Drawings, Product Data Samples and other Submittals required by the Contract Documents.

**9.1.4 Closing Submittals.** Unless otherwise provided in the Contract Documents, Submittals required upon Substantial and Final Completion of the Work

include those described in Subsections 14.2.2 and 14.3.3.

**9.1.5 Purpose of Submittals.** Submittals required by the Contract Documents are not Contract Documents. The purpose of their submission is to demonstrate, for those operations or portions of the Work for which Submittals are required, the way the Contractor proposes to conform to the information given and the design concept expressed in the Contract Documents, or otherwise to demonstrate the Contractor's compliance with the requirements of the Contract Documents. Review of Submittals is subject to the limitations of Subsection 9.2.7.

**9.1.6 Performance of Work.** The Contractor must not perform any portion of the Work requiring submission, review or approval of Submittals until the respective Submittal has been submitted and any required approval has been given. Such Work must be in accordance with approved Submittals and the Contract Documents. In the event of a conflict between an approved Submittal and the Contract Documents, the requirements of the Contract Documents shall control over the approved Submittal. The Contractor must correct at its cost, and without any adjustment in Contract Time, any Work the correction of which is required due to the Contractor's failure to obtain approval of a Submittal required to have been obtained prior to proceeding with the Work, including, but not limited to, correction of any conflicts in the Work resulting from such failure.

### 9.2 SUBMISSION, REVIEW AND APPROVAL OF SUBMITTALS

**9.2.1 Contractor's Submission.** The Contractor must prepare and submit to the Architect/Engineer Submittals required by the Contract Documents with reasonable promptness and in such sequence as to cause no delay in the Work or in the activities of the Owner or of Separate Contractors or other forces permitted to perform work at the Site. The Contractor must submit them in accordance with the Schedule of Submittals provided under Subsection 11.2.6. The Contractor must provide the Owner and the Architect/Engineer with copies of all Submittals made to regulatory agencies.

**9.2.2 Verification of Information in Submittals.** By submitting Shop Drawings, Product Data, Samples and similar Submittals, the Contractor represents that the Contractor has determined and verified materials, field measurements and field construction criteria related thereto and has checked and coordinated the information contained within such Submittals with the requirements of the Work and of the Contract Documents. All Submittals must bear the following

## General Conditions of Construction Contract - GCCC

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certification, signed and dated by the Contractor, and by any Subcontractor, Sub-subcontractor or Supplier who has prepared the Submittal for the Contractor:

*"I certify that the requirements of the Contract Documents have been met and all dimensions, conditions and quantities are verified as shown on the attached Submittal."*

**The foregoing certification will be deemed to have been inserted into any Submittal from which it has been omitted.**

**9.2.3 Identification of Submittals.** All Submittals, including Shop Drawings and Samples, must include submittal tracking numbers coinciding with the Specification section and Submittal log and must be dated and marked to show the names of the Project, Architect/Engineer, Contractor, originating Subcontractor, Sub-subcontractor, manufacturer or Supplier, and separate detailer if pertinent. Shop Drawings must completely identify Specification section and locations at which materials or equipment are to be installed. Reproductions of Contract Drawings are acceptable as Shop Drawings only when specifically authorized in writing by the Architect/Engineer. Submittals must be submitted under cover of a Submittal form approved by the Owner which must include at a minimum the information required in this subsection, the identity of each recipient of the Submittal, and such other information as the Owner may require.

**9.2.4 Deviations from Contract Requirements.** At the time of submission, the Contractor must specifically note in the transmittal form any deviations in the Submittal from the requirements of the Contract Documents. No such deviation will be considered as having been approved solely by reason of approval of a Submittal in which the deviation was noted; instead, if the Contractor is seeking approval of the deviation from the Contract Documents, the Contractor must comply with the provisions of Section 12.6 governing approval of Or-Equal items or Substitutions, as applicable.

**9.2.5 Return Without Action.** Incomplete Submittals will be returned to the Contractor without action and must be promptly completed and resubmitted by the Contractor. Submittals made by the Contractor which are not required by the Contract Documents may be returned without action.

**9.2.6 Review and Action by Architect/Engineer.** The Architect/Engineer or the Owner, or both as appropriate for the type of Submittal, will review and approve or take other appropriate action upon the Contractor's Submittals. Such action will be taken with such reasonable promptness as to cause no unreasonable delay in the Work, provided that

Contractor has acted promptly in submitting, correcting and resubmitting such Submittals and sufficient time has been allowed to permit adequate review. A minimum of thirty (30) Days for review must be allowed, unless otherwise agreed to in writing by the Architect/Engineer.

**9.2.7 Scope of Review.** Review of Submittals will be only for the limited purpose of checking for conformance with the design concept expressed in and the specific requirements of the Contract Documents. Review of such Submittals is not conducted for the purpose of determining their accuracy and completeness, reviewing the means and methods of fabrication or assembly, confirming details such as dimensions and quantities, or for substantiating instructions for installation or performance of equipment or systems, all of which remain the responsibility of the Contractor in accordance with the Contract Documents.

**9.2.8 Correction and Resubmission.** The Contractor must submit additional information or make any corrections required and must resubmit the required number of corrected copies of Submittals for further review and approval or other appropriate action required by the Contract Documents until such approval or other action is taken. No delay will be recognized, and no increase of Contract Time will be given, for any delay in approval of Submittals which results from returning Submittals to the Contractor for incompleteness, correction and resubmission. If more than two (2) resubmittals are required the Contractor must pay any amounts the Owner owes the Architect for review of further resubmittals.

**9.2.9 Identification of Revisions.** The Contractor must direct specific attention, in writing or on resubmitted Submittals, to any revisions made in a resubmitted Submittal other than those requested by the Owner or the Architect/Engineer on previous Submittals. No such revision will be considered as having been approved solely by reason of approval of a Submittal in which the revision was noted.

**9.2.10 Responsibility for Deviations, Revisions, Errors and Omissions in Submittals.** Approval of any Submittal will not extend to, and the Contractor will not be relieved of responsibility for, (i) deviations or revisions not specifically identified and approved in accordance with Subsections 9.2.4 or 9.2.9, or (ii) any errors or omissions in Submittals, except to the extent such errors or omissions occur in the Contract Documents and are the responsibility of the Architect/Engineer and/or Owner. Review and approval of the Contractor's Submittals by the Owner and/or the Architect/Engineer will not relieve the Contractor of its obligations under the Contract, nor will it constitute approval of safety precautions or of any construction

# General Conditions of Construction Contract - GCCC

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means, methods, techniques, sequences or procedures of fabrication or assembly. The approval of a specific item does not indicate approval of an assembly of which the item is a component.

**9.2.11 Professional Certifications.** The Contractor must provide professional certifications on submittals and shop drawings as required by the Contract Documents. The Owner and the Architect/Engineer are entitled to rely on the accuracy and completeness of professional certifications of performance criteria of materials, systems or equipment required by the Contract Documents.

**9.2.12 Submittals for Finishes.** The Architect/Engineer may postpone review of Submittals requiring color or finish selections until such time as all such Submittals have been submitted. Any delays and/or extra costs resulting from incomplete Submittals are the responsibility of the Contractor.

## ARTICLE 10

### QUALITY CONTROL PLAN, COMMISSIONING REPORT AND WARRANTIES

#### 10.1 QUALITY CONTROL PLAN AND COMMISSIONING REPORT

**10.1.1 Quality Control Plan.** Unless noted otherwise in the Contract Documents, the Contractor must prepare and submit a quality control plan in accordance with the requirements of the Contract Documents for review and approval by the Owner within thirty (30) days of Notice to Proceed. The Contractor must comply with the requirements of the approved quality control plan.

**10.1.2 Commissioning Plan.** Unless noted otherwise in the Contract Documents, the Owner will provide a commissioning plan to the Contractor; the Contractor must comply with the requirements of the Owner's commissioning plan. If noted in the Contract Documents, the Contractor must prepare and submit a commissioning plan in accordance with the requirements of the Contract Documents for review and approval by the Owner. The Contractor must comply with the requirements of the approved commissioning plan.

#### 10.2 GENERAL WARRANTY AND SPECIAL WARRANTIES

**10.2.1 General Warranty.** The Contractor warrants to the Owner that all materials and equipment furnished under the Contract will be of first quality and new unless otherwise required or permitted by the Contract Documents, that the Work will be free from defects, and that the Work will conform to the requirements of the Contract Documents.

Should a manufacturer's or service provider's warranty or guarantee exceed the requirements stated above, that guarantee or warranty will be the primary one used in the case of defect. Copies of manufacturer's or service provider's warranties must be provided upon request.

All warranties and guarantees must be in effect from the date of Substantial Completion or partial Substantial Completion by the Owner of the goods, services, or construction.

The Contractor guarantees that all work shall be accomplished in a workmanlike manner, and the Contractor must observe and comply with all Federal, State, County and local laws, ordinances and regulations in providing the goods, and performing the services or construction.

Goods and materials provided under this Contract must be of first quality, latest model and of current manufacture, and must not be of such age or so deteriorated as to impair their usefulness or safety. Items that are used, rebuilt, or demonstrator models are unacceptable, unless specifically requested by the Owner in the Specifications.

**10.2.2 Duration of General Warranty.** The Contractor warrants and guarantees for one (1) year from Substantial Completion, or for a longer period that is otherwise expressly stated in the Contract Documents, the Work. This includes a Warranty and Guarantee against any and all defects for a minimum period of one (1) year from Substantial Completion or any longer period stated in the Contract Documents. The Contractor must correct any and all defects in material and/or workmanship which may appear during the Warranty and Guarantee period, by repairing (or replacing with new items or new materials, if necessary) any such defect at no cost to the Owner, within a reasonable period of time, and to the Owner's satisfaction. The Owner shall notify the Contractor in writing within a reasonable time after the discovery of any condition covered by the General Warranty. Should the Contractor fail to commence to remedy any such failure to conform or any such defect within seven (7) days after receipt of written notice thereof for repairs that do not affect the facility operation or within (i) three (3) business days after receipt of written notice thereof for repairs that affect the facility operation or (ii) eight (8) hours after receipt of written notice thereof for repairs that affect critical systems to operate the facility, the County shall have the right to replace, repair, and/or otherwise remedy such failure, defect, or damage at the Contractor's expense.

**10.2.3 Relation to Specific Correction Provisions and Other Remedies.** The Contractor's general warranty and any additional or special warranties are not limited by the Contractor's obligations to specifically correct defective or nonconforming Work as provided in Section 10.6, nor are they limited by any other remedies provided in the Contract Documents. The Contractor shall also be liable for any damage to property or persons (including death) including consequential and direct damages relating to any breach of the Contractor's general warranty or any additional or special warranties required by the Contract Documents.

**10.2.4 Additional or Special Warranties.** The Contractor must furnish all special warranties required by the Contract Documents no later than Substantial Completion. The Owner may require additional special warranties in connection with the approval of "Or-Equals" or Substitutions, Allowance items, Work which is defective or nonconforming, or the acceptance of nonconforming Work pursuant to Subsection 10.6.3.

### **10.3 OBSERVATION AND INSPECTION OF WORK**

**10.3.1 Access to Work.** The Contractor must provide the Owner and the Architect/Engineer safe access to the Work at all times that it is in preparation or progress wherever located.

**10.3.2 Site Visits.** The Owner, its Construction Representatives, its consultants and the Architect/Engineer may visit the Site at intervals appropriate to the stage of construction to conduct progress meetings, to make observations and inspections and to become generally familiar with the progress and quality of the completed Work, and to determine in general if the Work is being performed in a manner indicating that the Work, when completed, will be in accordance with the Contract Documents.

**10.3.3 Responsibility of Contractor.** Neither the observations of Owner or the Architect/Engineer nor the performance of any inspections, tests or approvals relieves the Contractor from its obligations to perform the Work in accordance with the Contract Documents.

### **10.4 UNCOVERING OF WORK**

**10.4.1 Uncovering of Prematurely Covered Work.** If a portion of the Work is covered contrary to the request of the Owner or its designee or the Architect/Engineer, or to specific requirements of the Contract Documents, or prior to any required inspection or testing, the Owner or its designee or the Architect/Engineer may require that the covered Work be uncovered by the Contractor for observation, inspection, testing or approval as

appropriate. Any Work that is damaged or removed by such uncovering must be replaced at the Contractor's expense and without change in the Contract Time.

**10.4.2 Uncovering of Other Covered Work.** If a portion of the Work has been covered which is not required by the Contract Documents or any other requirement to remain uncovered, or which the Owner or its designee or the Architect/Engineer has not specifically requested to observe, test, inspect or approve prior to its being covered, the Owner or its designee or the Architect/Engineer, with the Owner's concurrence, may require that such Work be uncovered by the Contractor. If such Work is in accordance with the Contract Documents, a Change Order will be issued to account for the cost of uncovering and replacement **(if a Change Order is not issued, the Contractor must file a Claim for adjustment of the Contract Sum within the time and containing the information required in Article 12 or the same will be deemed to be conclusively waived)**, and if it affects activities on the critical path, the Contractor may file a Claim requesting an adjustment in the Contract Time **(if a Change Order is not issued, the Contractor must file a Claim requesting an adjustment of the Contract Time within the time and containing the information required in Article 11 or the same will be deemed to be conclusively waived)**. If such Work is not in accordance with the Contract Documents or any other requirement, the Contractor must bear the costs and time impacts of uncovering, testing, inspection, specific approval, correction and replacement, including the additional costs of the Owner's and the Architect/Engineer's services and all delays relating thereto.

### **10.5 TESTS, INSPECTIONS AND APPROVALS BY OTHERS**

**10.5.1 Required Tests, Inspections and Approvals.** The Contractor must arrange for tests, inspections and approvals of portions of the Work required by the Contract Documents, laws, ordinances, rules, regulations or orders of public authorities having jurisdiction, or the Owner or its designee acting as a public authority, to be made at an appropriate time. Unless otherwise provided in the Contract Documents, such tests, inspections and approvals, other than those provided by public authorities, must be provided by an independent testing laboratory or entity acceptable to the Owner, and the Contractor must bear all related costs of tests, inspections and approvals. The Contractor must give the Owner, through the Architect/Engineer, timely notice of when and where tests and inspections are to be made so the Owner and the Architect/Engineer may observe such procedures.

**10.5.2 Tests and Inspections by Owner.** If indicated in the Contract Documents, the Owner will hire, and pay the costs for, inspection and testing agencies for specific portions of the Work. The Contractor must coordinate with any Owner-hired inspection and testing agencies and arrange for (schedule) tests, inspections and approvals of portions of the Work required by the Contract Documents without delaying the Work.

- .1 Notice of Problems with Owner-hired Inspection Agencies.** The Contractor shall promptly notify the Owner of any problems or concerns with Owner-hired inspection and testing agencies.
- .2 Mis-scheduling of Owner-hired Inspection Agencies.** The Contractor is responsible for coordinating and accurately scheduling Owner-hired inspection and testing agencies so that the work is ready for inspection when scheduled with the agencies. The Contractor's failure to accurately schedule inspections and/or tests with the Owner-hired agencies causes the Owner unnecessary costs. If the Contractor repeatedly fails to accurately schedule the inspections/testing agencies' time, the Owner will back charge the Contractor for the cost of the unnecessary Site visits by the Owner-hired agencies.

**10.5.3 Scheduling of Tests, Inspections and Approvals.** The Contractor must schedule all tests, inspections or specific approvals required by law or the Contract Documents so as to avoid any delay in the Work.

**10.5.4 Additional Tests, Inspections and Specific Approvals.** The Owner may, in its discretion, require the Contractor to perform additional testing, or obtain inspection or specific approval of any portion of the Work, whether or not such Work is fabricated, installed or completed. However, neither a recommendation made by the Architect/Engineer nor a decision by the Owner either to require or not to require such testing, inspection or specific approval gives rise to a duty or responsibility of the Owner or the Architect/Engineer to the Contractor, Subcontractors, Sub-subcontractors, material and equipment Suppliers, their agents or employees, or other persons performing portions of the Work.

**10.5.5 Other Tests, Inspections and Specific Approvals Required by Owner.** In addition to the tests required by this Section 10.5, the Owner may at any time arrange for other tests, inspections and specific approvals to be performed by others selected by the Owner, at the Owner's expense. The Contractor must cooperate with the Owner and provide access to the Work for such tests, inspections and approvals.

**10.5.6 Notice to Contractor.** If the Owner, in its discretion, determines that portions of the Work require additional testing, inspection or approval not included under Subsection 10.5.1, the Owner or the Architect/Engineer will instruct the Contractor to make arrangements for such additional testing, inspection or approval, and the Contractor must give timely notice to the Owner and the Architect/Engineer of when and where tests and inspections are to be made so the Owner and the Architect/Engineer may observe such procedures. Unless otherwise provided, additional testing, inspection and approval must be conducted by an organization selected by the Contractor that is acceptable to the Owner. The Owner shall bear such costs except as provided in Subsections 10.5.9 and 10.6.2.

**10.5.7 Observation of Tests, Inspections or Approvals.** If the Owner or the Architect/Engineer is to observe tests, inspections or approvals, they will do so, so as not to delay any critical path activities and, where practicable, at the normal place of testing, provided reasonable notice of them has been given by the Contractor to the Owner and Architect/Engineer.

**10.5.8 Certificates of Testing, Inspection and Approval.** Required certificates of testing, inspection or approval must, unless otherwise required by the Contract Documents, be secured by the Contractor and promptly delivered to the Architect/Engineer for the Owner.

**10.5.9 Costs of Re-Testing, Inspection and Approval.** If testing, inspection or approval under Subsections 10.5.1, 10.5.3 or 10.5.4 reveals failure of any portion of the Work to comply with the Contract Documents or applicable legal requirements, the Contractor must bear all costs and time impacts made necessary by such failure, including costs of the Owner's and Architect/Engineer's additional services and expenses and the costs of repeated testing, inspection or approval, and Contractor's cost to correct.

## **10.6 REJECTION AND CORRECTION OF WORK**

**10.6.1 Rejection of Nonconforming Work.** The Owner and the Architect/Engineer may reject Work at any time that does not conform to the Contract Documents. Unless the Contractor is specifically instructed otherwise, any Work that fails a required test, inspection or approval will be considered as having been rejected, whether or not specific notice of rejection is given by the Owner or the Architect/Engineer.

**10.6.2 Contractor to Correct or Replace Rejected Work.** The Contractor must promptly correct or, at the Owner's option, replace Work which is rejected by the

Owner or the Architect/Engineer as defective or which otherwise fails to conform to the requirements of the Contract Documents, whether before or after Substantial Completion. The Owner may require additional testing or inspection of such Work as provided in Subsection 10.5.3. The Contractor must bear the costs and any time impact related to correcting or replacing such rejected Work, including costs of the Owner's and the Architect/Engineer's additional services and expenses and the costs of additional or repeated testing, inspection or approval and all delays relating thereto.

**10.6.3 Acceptance of Defective or Nonconforming Work.** If the Owner determines that it is in its best interests to accept Work which is not in accordance with the requirements of the Contract Documents instead of requiring its correction or replacement, the Owner may accept such Work with an appropriate corresponding adjustment reducing the Contract Sum and, if appropriate, the Contract Time. Any such acceptance of defective or nonconforming Work will not extend to defects or deficiencies not expressly revealed to the Owner in writing at the time of acceptance. Any such acceptance to be effective must be in writing and signed by the Director.

**10.6.4 Removal of Defective or Nonconforming Work.** The Contractor must promptly remove from the Site and dispose of any materials, supplies or equipment that does not comply with the requirements of the Contract Documents and/or which has been rejected by the Owner.

**10.6.5 Contractor to Bear Cost to Correct or Replace Other Work.** The Contractor must bear the cost and any time impact related to correcting or replacing any construction of the Owner or Separate Contractors or other forces permitted to perform work at the Site which is destroyed or damaged by the Contractor's correction, removal or replacement of Work that does not comply with the requirements of the Contract Documents.

**10.6.6 Failure to Correct or Replace.** If the Contractor fails to correct or replace Work that is rejected, defective or nonconforming within a reasonable time as required by the Owner, the Owner may correct or replace it. The Owner may remove and dispose of, or at its discretion, store for subsequent auction or private sale, the remaining materials or equipment. All costs of correction, removal, replacement, disposal, storage or sale, including costs of the Owner's and the Architect/Engineer's additional services, must be borne by the Contractor and may be back charged by the Owner against the Contract Sum.

**10.6.7 Artistic Decisions.** The Owner's decisions in matters relating to artistic effect are final.

### 10.7 SPECIFIC CORRECTION OF WORK

**10.7.1 Specific Correction Period.** Unless otherwise provided in the Contract Documents for a particular item or class of Work, and in addition to any other warranty provided in this Contract, the Contractor must correct or replace any Work found to be defective, non-complying or nonconforming, or any Work (whether by the Contractor or by others) affected thereby, discovered during the specific correction periods as follows:

- .1 Within one year after the Date of Substantial Completion of the Work or designated portion thereof;
- .2 Where the Owner takes partial occupancy or use, one year after the date for commencement of warranties established under Subsection 14.1.5;
- .3 The period of time, if any, established by terms of an applicable special warranty required by the Contract Documents; or
- .4 In the case of hidden or latent defects discovered within the period established by the applicable statute of limitations, a period of one year from the date that the Owner discovers, or should reasonably have discovered, the defect, noncompliance or nonconformance.

**10.7.2 Specific Correction Required.** If, within the applicable specific correction period provided in Subsection 10.7.1, any of the Work does not comply with the requirements of the Contract Documents, the Contractor must correct or, at the Owner's sole option, replace it promptly after receipt of written notice from the Owner to do so, unless the Owner elects to accept such Work in accordance with Subsection 10.6.3.

**10.7.3 Notice and Demand for Specific Correction Obligation.** The Owner will give notice to the Contractor within a reasonable time after discovery of Work which it believes to be subject to specific correction. The Owner will afford the Contractor an opportunity to jointly inspect the Work within a reasonable time after such notice, and will, at the Contractor's request, arrange for the Architect/Engineer's presence at such inspection. If no agreement is reached between the Owner and Contractor as to the responsibility and steps to be taken for correction, the Owner may issue a demand for correction to the Contractor, who must comply promptly with the demand. Failure to comply with such demand constitutes a material breach of the Contract. **Any Claim for an increase in the Contract Time and/or a Claim for an increase in the Contract Sum with respect to such demand for correction must be filed**

## General Conditions of Construction Contract - GCCC

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by the Contractor in accordance with Articles 11 and/or 12 or the same will be deemed to have been conclusively waived.

### 10.7.4 Extension of Specific Correction Obligation.

If the Work remains uncorrected, or if the Work has exhibited a pattern of repeated failure requiring repeated correction, the applicable specific correction period will recommence in its entirety upon the completion of the latest specific correction period.

### 10.7.5 Inspection Prior to Warranty Expiration.

Thirty (30) days prior to the expiration of the correction period provided for in Subsection 10.7.1, the Contractor must conduct a joint inspection of the Work with the Owner and the A/E to determine whether any additional items remain to be corrected.

**10.7.6 Effect on Other Remedies.** Nothing contained in this Section 10.7 is to be construed to establish a period of limitation with respect to other obligations which the Contractor might have under the Contract Documents. This Section relates only to the specific obligation of the Contractor to correct or replace the Work, and has no relationship to the time within which the Contractor's obligations under the Contract Documents may be sought to be enforced, nor to the time within which proceedings may be commenced to establish the Contractor's liability with respect to the Contractor's obligations other than specifically to correct or replace the Work. In addition, the Contractor shall also be liable for any damage to property or persons (including death) including consequential and direct damages relating to any defective Work or Work which fails to conform to the requirements of the Contract Documents.

## ARTICLE 11

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### TIME

#### 11.1 COMMENCEMENT

**11.1.1 Date of Commencement and Notice to Proceed.** The Owner will issue a Notice to Proceed and make the Site available to the Contractor within a reasonable time after execution of the Contract. The date on which the Contract Time commences, as established in the Notice to Proceed, will not be postponed by failure to proceed with the Work by the Contractor or persons or entities for whom the Contractor is responsible. For phased work noted in the Contract Documents, multiple Notices to Proceed may be issued by the Owner.

**11.1.2 Preconstruction Conference.** Promptly after the Notice to Proceed has been issued but before the Work at the Site begins, the Owner will conduct a preconstruction conference with the Contractor and any Separate Contractors to review Project requirements

including, but not limited to, preliminary Submittals, schedules, Site utilization, construction operations to occur at the Site during the succeeding sixty (60) days, communications, coordination with Separate Contractors, payment procedures, and other matters.

**11.1.3 Commencement of Work at the Site.** The Contractor must not commence operations on the Site prior to issuance of the Notice to Proceed.

#### 11.2 CONSTRUCTION SCHEDULES

##### 11.2.1 Contractor's Initial Progress Schedule.

Within fifteen (15) days after issuance of the Notice to Proceed, the Contractor must prepare and submit for the Owner's and Architect/Engineer's approval a proposed Initial Critical Path Method Project Schedule (ICPM) for performance of the Work, which schedule may be a cost and man-loaded Progress Schedule, if so specified in the Contract Documents. The Contractor will not receive any payments until such time the ICPM has been submitted and approved by the Owner. The schedule must (i) conform to all specified time limits, including Substantial, Final and any interim Completion dates, established by the Contract Documents, (ii) include all Work for each element of the Project as required by the Contract Documents, (iii) include the schedule for all Submittals, (iv) include all testing, inspections and commissioning required by the Contract Documents, and (v) provide for expeditious and practicable execution and completion of the Work within the Contract Time.

##### 11.2.2 Requirements of the Progress Schedule.

The ICPM must further comply with the scheduling specifications set forth in the Contract Documents, and to the extent not inconsistent therewith, must also fully comply with the following requirements.

The Contractor must plan, schedule, and construct the Work using a Critical Path Method Project Schedule (CPM). The CPM must be used for coordinating and monitoring all the work specified in the Contract Documents including all activities of Subcontractors, Sub-subcontractors, vendors, Suppliers, utilities, the Owner, Separate Contractors, authorities having jurisdiction, and all other parties associated with the construction of the Contract. All work including but not limited to submittals, major procurement, delivery, and construction activities must be included. All activities specified in the Contract Documents must be included in the CPM. The CPM must be based upon the entirety of the Contract Documents. **The software utilized for the CPM must generate files that are compatible with Primavera Project Planner.**

**Float.** The CPM utilizes float. Float is defined as the amount of time between when an activity "can start to



## General Conditions of Construction Contract - GCCC

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finish” and when an activity “must start or finish”. Float is a shared commodity for the use of the Owner and the Contractor and is not for the exclusive use or benefit of either party. The parties have the full use of the float until it is depleted.

**Scheduling Representative.** The Contractor must designate a scheduling representative, prior to submission of the Initial Critical Path Method Project Schedule (ICPM). The scheduling representative is the person primarily responsible for development and maintenance of the Contractor’s CPM schedule. The scheduling representative will represent the Contractor in all matters regarding the schedule and must attend all schedule related meetings.

The Contractor must submit the qualifications of the designated scheduling representative to the Owner for approval within ten (10) days of Notice-to-Proceed. This approval is required before the ICPM will be accepted. The designated scheduling representative must have at least three years of verifiable experience in preparing and maintaining CPM project schedules on contracts of similar size and complexity. Replacement of the scheduling representative by the Contractor will require written approval from the Owner.

**Initial Critical Path Method Project Schedule (ICPM).**  
The ICPM must consist of:

- (a) A time scaled diagram. The ICPM time scaled diagram will have a scale and format that is acceptable to the Owner and Architect/Engineer. The activities must be labeled with the activity identification clearly shown for each activity. All relationships between activities must be shown;
- (b) Tabular reports with activities sorted as follows:
  - (1) Activity ID. This report must include predecessors and successors for each activity with leads and lags shown;
  - (2) Activity ID. This report must include resources. This report must clearly define the resources assigned to each activity.
  - (3) Early Start, Total Float;

- (4) Total Float, Early Start;
- (5) Project Area (if applicable);
- (6) Project Phase (if applicable); and
- (7) Responsibility e.g., Contractor, specific subcontractor, specific supplier, the Owner, utilities and specific third parties.

The header of each tabular report must include the project name, Contract number, data date, run date and number, and report type.

The body of each report must include the activity identification, activity description, original and remaining duration, early/late start and finish dates, percent complete, actual start/finish dates, total float, and calendar designation for every activity.

- (c) Written Narrative (WN). The WN must comply with the requirements described hereinafter;
- (d) Printed Calendars. The printed calendars must include a listing, description, and calendar form tabulation of all calendars used in the ICPM. The calendar must contain the total number of anticipated workdays (including day and night shifts) required to complete all the work required in the Contract. The calendars must delineate the holidays and anticipated non-workdays or periods including inclement weather days. An explanation of the Contractor’s basis for determining each non-workday or period must be included in the WN; and
- (e) Data disc containing all of the information contained in the CPM. The format must be compatible with Primavera Project Planner software.

All construction activities must have durations not exceeding 10 working days, unless

## General Conditions of Construction Contract - GCCC

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otherwise approved by the Owner and Architect/Engineer. Activities for review and approval of Submittals and shop drawings by the Architect/Engineer must be given durations of not less than 30 calendar days. The Contractor may submit a short list of highly critical approval activities to the Architect/Engineer. The Architect/Engineer will make every effort to expedite the approval of these Submittals; however, this will not alter the requirements to include 30 calendar days for all approvals in the ICPM. Durations for other procurement activities will be evaluated on a case-by-case basis.

The latest calculated early finish date in the ICPM shall equal the Contract calendar date for Substantial Completion specified in the Contract Documents. If the Contractor submits an earlier Substantial Completion date than specified in the Contract Documents, the Owner, upon approval of the ICPM, may issue a Change Order to adjust the Substantial Completion date to that shown on the ICPM.

For all Contracts with a Contract Sum exceeding eight million dollars (\$8,000,000), the Contractor must resource load all construction activities in its schedule and schedule updates with the material, equipment, and manpower planned to be utilized by the Contractor and its subcontractor in accomplishing each activity. Resource loading of the CPM must be fully explained in the WN.

The Owner and/or Architect/Engineer reserve the right to require specific activities and/or milestones to be added to the CPM (consistent with the Work).

The Contractor must utilize activity codes to categorize activities by at least the following: project area; project phase; and responsibility, e.g. Contactor or specific subcontractors.

The Contractor must provide a WN as part of the ICPM. This WN must explain the sequence of work, the critical path, interim completion dates, project phasing, non-workdays, or periods, and labor and equipment resources (as appropriate). In addition, the Contractor must explain how the ICPM has provided for: permit requirements, environmental requirements, coordination with other public Contractors, milestone dates (for the Contract or other related contracts), coordination with other entities, coordination with all utility

companies, special non-workdays or periods, and weather in its ICPM. The WN must explain the specific scope of each critical activity and the basis used to determine the original duration of each activity, i.e., production rate and anticipated quantities.

All Work specified in the Contract Documents must be addressed in the WN. The Contractor shall utilize the WN to explain the following:

- (a) Relationships between activities not obviously identified;
- (b) Equipment usage and limitations;
- (c) Manpower usage and limitations;
- (d) Activity codes, abbreviations, and activity identification system;
- (e) All Calendars and how they are utilized in the CPM;
- (f) Date or time constraints;
- (g) All abbreviations in the ICPM; and
- (h) Scheduling of weather and temperature sensitive activities.

The Contractor must complete and submit the proposed ICPM within 15 calendar days after issuance of the Notice to Proceed; submission to the Architect/Engineer and Owner for review and approval shall include: one electronic copy and two paper sets (in color) to the A/E, and one electronic copy and three paper sets (in color) to the Owner.

The Architect/Engineer and Owner will complete the review of the Contractor's ICPM within 30 calendar days after the submittal. If required, the Architect/Engineer may convene a Joint Review Conference at which the Architect/Engineer, Owner and Contractor (including its scheduling representative) will make corrections and adjustments to the proposed ICPM. If a revision is necessary due

## General Conditions of Construction Contract - GCCC

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to the Owner's or Architect/Engineer's review or the Joint Review Conference, the proposed revision must be submitted by the Contractor within seven calendar days after the Contractor received the Owner's and/or Architect/Engineer's review comments or within seven calendar days after the date of the Joint Review Conference, whichever is the latest. Revisions must conform to the requirements for the ICPM. The Owner and Architect/Engineer will respond to the revised ICPM within seven calendar days after the revised ICPM is received.

**Any delay in starting work caused by the acceptance of the ICPM by the Owner or Architect/Engineer will not be considered as a basis for any adjustments in the Contract Time or Contract Sum.**

When the Owner notifies the Contractor that the ICPM has been accepted, that document will become the CPM schedule of record. The Contractor will be responsible for implementing and executing the work specified in the Contract in strict conformance with the CPM Schedule of Record. The CPM Schedule of Record will be the Contractor's work plan for completing the entire Contract as specified in the Contract Documents.

**CPM Updates.** The Contractor must update the CPM Schedule of Record and submit to the Owner and A/E for review on a monthly basis and at more frequent intervals as required by the issuance of Change Orders and Field Orders or other conditions of the Work and Project and as provided in Article 9 (G) of the Contract. The monthly updates of the CPM Schedule of Record are required to be submitted concurrent with the Contractor's monthly Application for Payment; however, the CPM update is required whether the Contractor submits a Application for Payment for a month or not.

CPM update submissions must contain the activity data as specified in (a) through (e) of the ICPM. The update must describe the progress of the project to date. The WN must include a description of the work performed during the update periods, current critical path, the amount of float on the critical path, any delays or disruptions experienced by the Contractor during the period of the update, any change in

manpower or equipment, any systematic revision, and any potential delays or disruptions.

**Systematic Revisions to the Schedule of Record.** Systematic Revisions are defined as one or more of the following:

- (a) A change in the specified original duration of an activity;
- (b) A change in the logic of the schedule;
- (c) A change in the calendars or to the calendar to which an activity is assigned;
- (d) A change to resources;
- (e) A change to any actual date, previously established;
- (f) The deletion or addition of an activity;
- (g) A change to, addition of, or deletion of a date or time constraint;
- (h) A change to, addition of, or deletion of an activity code;
- (i) A change to an activity description; and
- (j) Any change order than updating an activity.

If the Contractor indicates in the WN that a monthly CPM update contains no systematic revisions from the previous CPM Schedule of Record, the monthly CPM update must consist solely of updating the previous CPM schedule of record with actual data (actual start dates, actual finish dates, completion percentage, etc.). In the event the Contractor is submitting a monthly CPM update without any systematic revisions, no pre-coordination with the Owner and/or A/E is required.

When the Contractor proposes to make a systematic revision(s) to the CPM, the Contractor (including its scheduling representative) must verbally discuss the

## General Conditions of Construction Contract - GCCC

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proposed revision(s) with the Owner and Architect/Engineer. If the revision(s) is/are determined to be minor in nature, the Owner and Architect/Engineer will allow the Contractor to include the revision on the next CPM Update. If the Owner or Architect/Engineer determines that the revision is not minor in nature, the Contractor must submit its proposed systematic revision(s) in writing to the Owner and Architect/Engineer for review and approval prior to deviating from the CPM Schedule of Record.

The proposed revision(s) must describe the reason for the proposed revision(s), the resulting critical path, and all particulars of the revision. These must include, but not be limited to, changes in the method or manner of the work, changes in resources, addition or deletion of manpower, increased or decreased quantities, defective work, and acceleration of work.

After review, the A/E and Owner shall provide direction on what systematic revisions, if any, are acceptable. The Contractor shall submit its monthly CPM Schedule based on this direction.

**Approval and/or Acceptance of Monthly CPM Schedule Update.** The Owner, with input from the A/E shall approve, accept or reject the Contractor's monthly CPM Schedule update.

Approval: The Owner will approve a CPM Schedule update if (1) the update accurately reflects the project status as of the data date, (2) any systematic revisions are acceptable, (3) the schedule meets all other contractual requirements, and (4) the schedule's projected Substantial Completion date is at or precedes the contractual Substantial Completion date.

An approved CPM Schedule Update becomes the CPM Schedule of Record and no further action is required by the Contractor.

Acceptance: The Owner will accept but not approve a CPM Schedule update if (1) the update accurately reflects the project status as of the data date, (2) any systematic revisions are acceptable, and (3) the schedule meets all other contractual requirements, but the schedule's projected Substantial Completion date is later than the contractual Substantial Completion date.

An accepted CPM Schedule Update becomes the CPM Schedule of Record but the Contractor must take corrective action to return the project to schedule so that Substantial Completion can be achieved within the Contract Time. Before the next CPM Schedule Update, the Contractor shall submit a written description to the Owner and the A/E of its plan to overcome the delay.

Upon approval or acceptance by the Owner and Architect/Engineer, the update will become the CPM schedule of record for the period between its data date and the data date of the next approved update.

Rejection: The Owner may reject a CPM Schedule update if (1) the update does not accurately reflect the project status as of the data date, (2) utilized systematic revisions are not acceptable, (3) the schedule does not meet any contractual requirement, or (4) the schedule's projected Substantial Completion date is later than the contractual Substantial Completion date for two (2) or more consecutive months and the Contractor is not making adequate efforts to remedy the Delay.

A rejected CPM Schedule Update must be reworked to incorporate the comments of the Owner and/or the A/E and be resubmitted to the Owner and the A/E. Resubmittal by the Contractor must be made within seven calendar days after receipt of the Owner and/or Architect/Engineer's review comments. The Owner reserves the right to reject any proposed revision which adversely impacts the Owner, utilities, or other concerned parties. **No new schedule update shall be submitted until a rejected Update is resubmitted and accepted or approved by the Owner.**

Failure to timely submit a CPM Schedule update may result in the Architect/Engineer or Owner withholding payment until submission and approval/acceptance. Failure to timely resubmit a CPM Schedule update which can be approved or accepted by the Owner may result in the Architect/Engineer or Owner withholding payment until an acceptable Update or Revision is submitted.

Updates must not include any systematic revisions to the previous CPM Schedule of Record, unless prior approval by the Owner and

## General Conditions of Construction Contract - GCCC

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Architect/Engineer is received for the insertion of revisions.

The Contractor will attend bi-weekly progress meetings at the project site. At these meetings, the Contractor will provide a report on the actual status of the Work as compared to the latest CPM Schedule of Record.

**11.2.3 Coordination with Other Schedules** The Contractor must revise its Progress Schedule as necessary to conform to the overall Project Progress Schedule incorporating schedules of the Owner and any Separate Contractors as provided in Subsection 7.1.4.

**11.2.4 Review and Approval of Schedules.** The Contractor's Progress Schedule must include, at no additional cost, details requested by the Owner or the Architect/Engineer and be in the format specified in the Contract Documents and as provided in this Article 11. The Owner and the Architect/Engineer will review and approve or take other appropriate action on the Contractor's Progress Schedule, but only for the limited purpose of checking for general conformance with the requirements of the Contract Documents, this Article 11, and the schedules of the Owner, Separate Contractors and other forces permitted by the Owner to perform work at the Site. Any changes to the schedule required by the Owner or the Architect/Engineer must be made by the Contractor and the schedule resubmitted to the Owner for approval. Review and approval or acceptance of the schedule does not relieve the Contractor of its obligations to complete the Work within the Contract Time or any interim completion dates required by the Contract Documents, nor does it constitute approval of any construction means, methods, techniques, sequences or procedures. The approval or acceptance of any schedule or any schedule adjustment made as part of the approval/acceptance of any schedule does not constitute, nor does it provide the basis for, any Claim for an increase of the Contract Time or any Claim for an increase in the Contract Sum.

**11.2.5 Schedule of Submittals.** The Contractor must prepare and keep current, for the Owner's and the Architect/Engineer's approval, a Schedule of Submittals which is part of the Progress Schedule. The Schedule of Submittals must allow at least thirty (30) days for review and approval of each Submittal by the Architect/Engineer, and sufficient additional time, if required, for (i) review and approval by regulatory bodies and (ii) their correction and resubmission by the Contractor and any Subcontractors or Suppliers. The Schedule of Submittals must identify all schedules, Shop Drawings, Product Data, Samples, Warranties, operating manuals and other Submittals provided for review or

required for approval by the Owner or the Architect/Engineer, which indicates the dates or times which the Contractor proposes to submit each such Submittal (allowing sufficient time for review, correction and resubmission if required, and approval) and the dates or times on or within which such Submittals must be approved in order to avoid a delay in the progress of the Work.

### 11.3 PROJECT PROGRESS

**11.3.1 Contract Time Reasonable.** By executing the Contract, the Contractor confirms that the Contract Time is a reasonable period for performing the Work.

**11.3.2 Time is of Essence.** The Contractor acknowledges that completion of the Contract by the dates specified for Substantial and Final Completion is critical to the Owner, time being of the essence.

**11.3.3 Contractor to Proceed Expeditiously.** The Contractor must proceed expeditiously with adequate forces and maintain progress in accordance with the latest approved Progress Schedule.

**11.3.4 Conformance to Schedules.** The Contractor must conform to the most recently approved Progress Schedule. The Contractor must complete the indicated Work or achieve the required percentage of completion, as applicable, within any interim completion dates established in the most recently approved Progress Schedule.

**11.3.5 Progress Record.** The Contractor must maintain at the Site, available to the Owner and the Architect/Engineer for their reference during the progress of the Work, a color copy of the latest approved Progress Schedule, a copy of the latest CPM Schedule of Record (if different from the latest approved Progress Schedule) and any approved revisions thereto. **The Contractor must keep current records of and mark on a copy of the CPM Schedule of Record the actual commencement date, progress, and completion date of each scheduled activity indicated on the Progress Schedule.**

**11.3.6 Substantial Completion Within Contract Time.** The Contractor must achieve Substantial Completion within the Contract Time.

**11.3.7 No Damages for Prevention of Early Completion** The Contractor represents that its bid includes all costs, overhead and profit which may be incurred throughout the Contract Time and the period between Substantial and Final Completion. Accordingly, **the Contractor may not make any Claim for delay damages based in whole or in part on the premise that the Contractor would have completed**

**the Work prior to the expiration of the Contract Time but for any claimed delay.**

**11.3.8 Acceleration to Comply with Schedule.** If the Contractor's progress is not maintained in accordance with the latest approved Progress Schedule, or the Owner determines that the Contractor is not diligently proceeding with the Work or has evidence reasonably indicating that the Contractor will not be able to conform to the most recently approved Progress Schedule, the Contractor must, promptly and at no additional cost to the Owner, take all measures necessary to accelerate its progress to overcome the delay and ensure that there will be no further delay in the progress of the Work and notify the Owner thereof. Any extension of working hours requires approval of the Owner, which will not be unreasonably withheld but may be subject to reasonable conditions including payment for additional or overtime services of the Owner, the Architect/Engineer and any other applicable consultants, testing or regulatory agency costs.

**11.3.9 Acceleration of Schedule.** The Owner reserves the right to issue a written directive to accelerate the Work which may be subject to an appropriate adjustment, if any, in the Contract Sum. **If the Owner directs an acceleration of the Project Schedule and no adjustment is made in the Contract Sum, or if the Contractor disagrees with any adjustment made, the Contractor must file a request for increase to Contract Time as provided in Article 12 or any Claim for such will be deemed to be conclusively waived.**

### 11.4 SUSPENSION OR STOPPAGE OF WORK

**11.4.1 Owner's Right to Stop the Work.** If the Contractor fails to correct Work, or any portion thereof, which is not in accordance with the requirements of the Contract Documents or fails on more than one occasion to carry out Work in accordance with the Contract Documents, the Owner may, order the Contractor to stop the Work, or any portion thereof, until the cause for such order has been eliminated. The Owner or its designee, acting in the capacity of a building inspection official, has the power to stop Work as may be necessary to enforce compliance with applicable codes and regulations. Work stoppage in accordance with this Subsection does not entitle the Contractor to an increase in Contract Time or damages for delay. If the Contractor disagrees with the Owner's right to stop the Work, the Contractor must file a Claim for increase in the Contract Time and/or increase in the Contract Sum in accordance with Articles 11 and/or 12 as applicable or any Claim for such will be deemed to be conclusively waived.

**11.4.2 Owner's Right to Suspend Work for Convenience.** The Owner may, without cause and for its

convenience, order the Contractor in writing to suspend, delay or interrupt the Work in whole or in part for such period of time as the Owner may determine, subject to an appropriate adjustment in the Contract Time and/or Contract Sum. **The Contractor is not entitled to profit on any adjustment to the Contract Sum due to any such stoppage, suspension, interruption or delay.** If no adjustment is made in the Contract Sum as a consequence of the suspension order, or if the Contractor disagrees with any adjustment made, the Contractor must file a Claim for increase in the Contract Time and/or increase in the Contract Sum in accordance with Articles 11 and/or 12 as applicable or any Claim for such will be deemed to be conclusively waived.

**11.4.3 Disagreements Involving Non-payment.** In the event of any disagreement between the Contractor and the Owner involving the Contractor's Claim to entitlement of any payment, the Contractor must diligently proceed with the Work pending resolution of the disagreement subject to the provisions of Section 7(G) of the Contract.

### 11.5 DELAYS

**11.5.1 Excusable Delay.** An excusable Delay is a Delay in the progress of the Work which at the time of the Delay was a critical path activity as shown on the most recent CPM Schedule of Record and which prevents the Contractor from achieving Substantial Completion before the expiration of the Contract Time, caused by conditions which could not reasonably be anticipated by, are beyond the control of, and are without the fault or negligence of the Owner, as set forth in 11.5.2, the Contractor or anyone for whose acts the Contractor is responsible. **Excusable Delay does not include any delay caused in whole or in part by any Subcontractor, Sub-subcontractor or Supplier which is considered unexcused Delay. There shall be no compensation whatsoever for excusable delay.** Excusable Delay may, but does not necessarily, include:

- .1 Weather delay as further defined in Subsection 11.6.3;
- .2 Act or omission of government and regulatory agencies and officials (other than the Owner in its capacity as Owner);
- .3 Act or omission by third parties including utilities;
- .4 Catastrophic event such as fire, flood and unavoidable casualties; and
- .5 Strike or labor dispute.

**11.5.2 Compensable Delay** Compensable Delay is limited to delay in the progress of the Work which at the

## General Conditions of Construction Contract - GCCC

time of the delay was critical path activity as shown on the most recent CPM Schedule of Record and which prevents the Contractor from achieving Substantial Completion before the expiration of the Contract Time, caused solely and exclusively by acts or omissions of the Owner (excepting actions taken by the Owner to protect the public health or safety or to conform to law).

**11.5.3 Unexcused Delay.** Unexcused Delay is delay in Work which at the time of the delay was critical path activity as shown on the most recent CPM Schedule of Record and which prevents the Contractor from achieving Substantial Completion before the expiration of the Contract Time, and which is not excusable delay or compensable delay. No increase in the Contract Time or increase in the Contract Sum will be provided for an unexcused Delay.

### 11.6 TIME AND RELATED COST ADJUSTMENTS

**11.6.1 Notice of Delay.** The Contractor must provide written notice of any actual or prospective Delay promptly, and in no event later than five (5) days after the occurrence of the event or omission giving rise to such Delay. The notice must be provided both to the Architect/Engineer and the Contract Administrator within the specified time.

The written notice must contain the following information:

- .1 A detailed statement of the reasons and causes for the Delay;
- .2 Inclusive dates of the Delay (start date only if end date is not known);
- .3 Specific portions of the Work affected by the actual or prospective Delay; provide specific Activity Names and Numbers from the most recent CPM schedule of record
- .4 Status of Work (affected Activities) affected before commencement of the Delay;
- .5 Effect of the Delay on available "float" for referenced Activities; and
- .6 Specific action (if any) required by the A/E and/or the Owner to remedy or mitigate the Delay.

**If the Contractor fails to provide the written notice containing the specified information, within the five (5) days, as prescribed above, the Contractor will not receive any consideration, in a Claim for an increase in Contract Time and/or for a Claim for an increase in the Contract Sum, for the time period before a written notice (containing the specified information) is provided to the Owner and the A/E.**

**11.6.2 Continuing Delay** In the case of a continuing Delay (an actual or prospective Delay to a activity or activities for which the Contractor cannot progress pending further information), the Contractor must provide the initial notice (as described in the preceding subsection) and a further notice at each progress meeting throughout the duration of the Delay. The further notices must contain all of the specific information required in the preceding Subsection. **A continuing Delay ends when the Contractor has sufficient information to progress the affected work, not when the affected work is completed. The Contractor must request an increase in the Contract Time in accordance with 11.6.3 when the delayed work can progress again.**

**11.6.3 Request for an Increase in Contract Time.** If the Contract contends that the Delay is an excusable or compensable Delay, and it is entitled to an increase in Contract Time, the Contractor, in addition to providing the notice in Subsection 11.6.1, must submit a request for additional Contract Time to the Owner and the A/E within fifteen (15) days of the event ending the Delay. **The Contractor's failure to provide the written request for an increase in Contract Time containing the information specified in the following Subsection within the fifteen (15) days prescribed above will be conclusively deemed a waiver of any Claim for Delay arising from such occurrence.**

**11.6.4 Concurrent Delay.** Concurrent delay is two or more separate Delays, as defined in Section 11.5, in the progress of the Work, one or more which is caused by the Owner and one or more which is caused by the Contractor which, at the time of the Delay, delayed critical path activities as shown on the most recent CPM Schedule of Record, that occur during the same time period, and each Delay independently delayed the Contractor from achieving Substantial Completion before the expiration of the Contract Time. Any concurrent Delay will be considered an excusable Delay; therefore, the Contractor will receive a corresponding increase in Contract Time, but will not receive any compensation for a concurrent Delay.

**11.6.5 Supporting Documentation.** The Contractor's request for an increase in the Contract Time must identify those portions of the latest CPM Schedule of Record affected by the delay and must include an estimate of the cost and probable effect of the delay, if any, on the progress of the Work. Supporting documentation must include, but is not limited to:

- .1 A written detailed statement of the reasons and causes for the delay;
- .2 Inclusive dates of the delay;

## General Conditions of Construction Contract - GCCC

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- .3 Specific portions of the Work affected by the actual or prospective delay; provide specific Activity Names and Numbers from the most recent CPM schedule of record;
- .4 Status of Work affected before commencement of the delay;
- .5 Effect of the delay on available "float" time for the referenced activities and the Project;
- .6 A critical path method (CPM) analysis demonstrating that the delay has affected an activity (or activities) on the critical path of the most recent CPM schedule of record at the time of the occurrence of the delay; and
- .7 If the Contractor claims that the delay is an excusable delay or compensable delay, evidence that the delay was unforeseeable, beyond the Contractor's control, and without the fault or negligence of the Contractor or the negligence of anyone for whose acts the Contractor is responsible including any Subcontractor, sub-subcontractor or Supplier; and in the case of a compensable delay, was caused solely and exclusively by the acts or omissions of the Owner (excepting actions taken by the Owner to protect the public health or safety or to conform to law) or anyone for whose acts the Owner is responsible, and which are unreasonable under the circumstances involved and not reasonably within the contemplation of the parties.

**11.6.6 Additional Time for Unusually Severe Weather.** In order for the Contractor to be entitled to an increase of the Contract Time under this Subsection, the following conditions must be satisfied:

- .1 The weather experienced at the Project Site during the Contract period must be found to be unusually severe, that is, more severe than the adverse weather anticipated for the Project location during any given month;
- .2 The unusually severe weather must delay Work which at the time of the unusually severe weather was a critical path activity as shown on the most recent CPM Schedule of Record and which prevents the Contractor from achieving Substantial Completion before expiration of the Contract Time. The delay must be beyond the control and without the fault or negligence of the Contractor. For example, the impacted critical activity must not have occurred during unusually severe weather due to previous unexcused delays; and

- .3 The Contractor must have provided a request for an increase in the Contract Time of the weather-related delay complying with Subsection 11.6.3 above. The last day of the each month will be the date of the end of the delay for purposes of the fifteen (15) day requirement for submission. Any request for an increase in the Contract Time for a weather-related delay must be submitted by the 15<sup>th</sup> of the following month.

The following schedule of monthly anticipated adverse weather delays will constitute the base line for monthly weather time evaluations. The Contractor's Progress Schedule including all updates must reflect these anticipated adverse weather delays in all weather dependent activities.

### MONTHLY ANTICIPATED ADVERSE WEATHER DELAY

January	7 work days
February	6 work days
March	6 work days
April	7 work days
May	7 work days
June	6 work days
July	4 work days
August	5 work days
September	3 work days
October	5 work days
November	4 work days
December	4 work days

Upon Notice to Proceed and continuing throughout the Contract, the Contractor must record on its daily CQC and/or field reports, the occurrence of adverse weather and resultant impact to actual and scheduled Work. Actual adverse weather delay days must prevent Work on critical path activities for fifty (50) percent or more of the Contractor's scheduled workday. The number of actual adverse weather delays must include only the Contractor's scheduled workdays impacted by actual adverse weather (even if the adverse weather occurred in the previous month), be calculated chronologically from the first to the last day each month, and be recorded as full days. If the Contractor has complied with Subsection 11.6.3 and the number of actual adverse weather delay workdays exceeds the number of days anticipated in the table above, and have adversely affected critical path weather-dependent activities, the Contractor is entitled to an increase in the Contract Time, but not an increase in the Contract Sum (i.e. weather delays are excusable delays).



## General Conditions of Construction Contract - GCCC

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The preceding calculation and methodology is based on work days. To convert any justified time increase to calendar days, the number of justified work days shall be multiplied by (7/5 = 1.4), and rounded to the nearest whole number, to determine justified calendar days [Example: 2 work days would be converted to 2.8 (3) calendar days.]

**11.6.7 Strikes and Labor Disputes.** If strikes or labor disputes are to be considered as the basis for an excusable delay, they must be documented by data evidencing (i) the trades directly and indirectly involved in or affected by the strike or labor dispute, (ii) reasons for the strike or labor dispute, (iii) the onset and duration of the strike or labor dispute, and (iv) the measures taken by the Contractor to avoid or overcome the effects of any delay.

**11.6.8 Review and Adjustment of Schedules.** Upon receipt of a request for an increase in the Contract Time from the Contractor complying with Subsection 11.6.3 and 11.6.4 (and if applicable 11.6.5) above, the Owner will review the most recent CPM Schedule of Record to determine (i) whether the delay is in fact an excusable or compensable delay, and (ii) whether any adverse effects of the delay can be overcome by an adjustment in the Progress Schedule including the application of any unused "float" time available in the schedule. The Owner may require the Contractor to submit a more detailed Progress Schedule than previously required in order to permit the Owner to evaluate the delay. Based on such review, the Contractor must, if required by the Owner, submit for the Owner's approval a revised Progress Schedule, which minimizes the adverse effects of the delay. After review, the Owner will issue a determination of the validity of the Contractor's request. If justified, the Owner will prepare a Change Order or Contract Amendment for an increase in the Contract Time.

**11.6.9 Limitation on Adjustments. No increase in the Contract Time or increase in the Contract Sum will be allowed for any delay or part thereof occurring more than fifteen (15) days before written request for an increase in the Contract Time for the delay is provided by the Contractor.**

1. No increase in the Contract Time or increase in the Contract Sum will be made to the extent that performance is, was or would have been suspended, delayed or interrupted by another cause for which the Contractor is responsible. No increase in the Contract Sum will be made to the extent performance was or would have been suspended, delayed or interrupted by another cause for which the Owner is not solely and exclusively responsible.

2. **The Contractor will not receive any compensation for profit, additional bond cost or overhead (which includes extended office overhead and site-specific overhead and general conditions) or any other cost or compensation or any other damages of any kind or nature whatsoever whether incurred by the Contractor, its Subcontractor or Suppliers for delay, all of which are irrevocably waived by Contractor where the delay results from performance of additional Work (Change Order or Field Order Work including bilateral, unilateral, and constructive changes) beyond the Work required by the Contract Documents and the Contractor is paid for the additional Work. The Contractor acknowledges and agrees that the profit, additional bond cost and overhead (which includes extended office overhead and site-specific overhead and general conditions) if any, incurred by the Contractor in performing work beyond the Work required by the Contract Documents and any and all other costs, compensation or damages due Contractor (including any of its Subcontractors or Suppliers), is included in, and payable to the Contractor as part of the Change Order or Field Order Work. Contractor waives any and all other damages and cost of any nature or kind whatsoever including Claims for local and cumulative impacts as a result of such Change Order Work and any and all other Claims of any type or nature whatsoever including any Claim for loss of productivity or loss of efficiency.**
3. The Contractor will be compensated for compensable delays only for actual and direct damages resulting from such compensable delays. Actual direct damages are limited to site specific general conditions and do not include any indirect costs such as home office overhead. The Contractor will be compensated for such actual and direct damages for compensable delays not attributable to performance of Change Order. Work for which the Contractor is not otherwise compensated in an amount not to exceed the lesser of (i) a daily rate computed by dividing eight percent (8%) of the original Contract Sum by the original Contract Time or (ii) a daily rate computed by dividing the Contractor's profit, bond cost and site-specific overhead (but not home office overhead) for the original Contract Sum by the original Contract Time.

4. The Contractor for itself and its Subcontractors and Suppliers, irrevocably waives any and all other compensation and delay damages as a result of any compensable delays, including without limitations any Claims for any indirect cost and any Claims for loss of productivity or loss of efficiency.

**11.6.10 Denial of Adjustments in Time or Money.** In the event the Owner denies the Contractor's Claim for a change in the Contract Time or, in the case of a compensable delay, a change in the Contract Sum, the Contractor may, within thirty (30) days after such denial, submit a Claim as provided in Article 16. Submissions made prior to the denial must be resubmitted as part of the Claim after the denial. Any Claim on account of denial of a change which is not made within such thirty (30) days of the denial will be deemed conclusively to have been waived.

### 11.7 DAMAGES FOR DELAY

#### 11.7.1 Delay Damages.

- .1 By executing a Bilateral Change Order, Field Order or Contract Amendment, the Contractor represents that the Contractor is not entitled to an increase in Contract Time or an increase in the Contract Sum beyond that specified in the Bilateral Change Order, Field Order or Contract Amendment for the Work performed or to be performed under the Modification. Nor is the Contractor entitled to an increase of the Contract Time or an increase in the Contract Sum as a result of the issuance by the Owner of a Unilateral Change Order or Field Order unless a Claim for an increase in the Contract Time and/or a Claim for an increase in the Contract Sum is made by the Contractor as and when required by this Article 11 and Article 12.
- .2 No Claim for an increase in the Contract Time and/or Claim for an increase in the Contract Sum or Claims for damages may be made by the Contractor or paid to the Contractor for any delay, disruption, inefficiency, interference or hindrance from any cause whatsoever, whether foreseeable or not, including (i) acts or omissions by the Owner, its agents, employees or consultants, (ii) Contract Documents that are negligently prepared or contain inaccurate statements, or (iii) force majeure and circumstances beyond the Contractor's control. The sole remedy

for delays, disruptions or hindrances will be non-compensable increases in Contract Time for completion of the Work.

- .3 The provisions of the preceding subsection do not apply to Claims that meet all of the following conditions: (i) the Claim arises under the Contract; (ii) the Claim is limited to actual and direct damages (i.e. profit, additional bond costs (if any) and overhead (only site-specific overhead and not including home office overhead)) incurred as a result of a delay in completing the Project which the Contractor acknowledges are fully compensated for by payment of the adjustment amount specified in Subsection 11.6.9; (iii) the Contract establishes a time limit for achieving Substantial Completion and the Claim is for critical path delays that prevent achievement of Substantial Completion of the Contract within that time limit; (iv) the delay for which damages are claimed is caused solely and exclusively by the Owner; (v) the delay is not caused by actions taken by the Owner to protect the public health or safety or to conform to law; and (vi) the Contractor has fully complied with Section 11.6.
- .4 An increase in Contract Time shall be granted only for an excusable delay that is beyond the Contractor's control and occurs without the Contractor's fault or negligence. No increase in Contract Time will be granted in the absence of a written request for the increase in Contract Time complying with Section 11.6.

**11.7.2 Liquidated Damages** The Owner will suffer financial loss if Substantial Completion of the Work is not achieved within the Contract Time. Accordingly, and in lieu of actual damages or proof thereof, the Contractor agrees to pay, as Liquidated Damages and not as a penalty, the amount stipulated in the Contract for each and every day of unexcused delay in achieving Substantial Completion.

**11.7.3 Assessment of Liquidated Damages.** The Owner may assess and deduct the applicable amount of Liquidated Damages from any payment due the Contractor. If the unpaid balance of the Contract Sum is less than the amount of the Liquidated Damages, the Contractor or its Surety must pay the deficiency to the Owner upon demand.

ARTICLE 12

CHANGES

12.1 CHANGE INSTRUMENTS

12.1.1 Amendment only by Written Modification.

The Contract may be amended or modified only by a written Modification as defined in Subsection 1.1.39.

12.1.2 Change Instruments. Changes in the scope of the Contract may be affected only by a written Amendment signed by the Contractor and Owner. Changes in the Work which are within the general scope of the Contract may be affected, without invalidating the Contract, by a Change Order or Field Order. The Contract Time and Contract Sum may be changed only by a Change Order or Contract Amendment.

12.1.3 Change Proposals. The Contractor must submit a request for change to the Contract Sum (change proposal) covering a contemplated change within ten (10) days after request of the Owner or the Architect/Engineer or within ten (10) days of the event giving rise to the Contractor's request for a change in the Contract Sum or Contract Time. No increase in the Contract Time or increase in the Contract Sum or will be allowed the Contractor for the cost or time involved in making change proposals. Change proposals must define or confirm in detail the Work which is proposed to be added, deleted, or changed and must include any adjustment which the Contractor believes to be necessary in (i) the Contract Time, or (ii) the Contract Sum. Any proposed adjustment must include detailed documentation including but not limited to: cost, properly itemized and supported by sufficient substantiating data to permit evaluation including cost of labor, materials, supplies and equipment, rental cost of machinery and equipment, additional bond cost, plus a fixed fee for profit and overhead (which includes office overhead and site-specific overhead and general conditions) of ten percent (10%) if the Work is performed by the Contractor, or five percent (5%) if the Work is performed by a Subcontractor or Sub-subcontractor. The Subcontractors or Sub-subcontractors overhead and profit in turn must not exceed ten percent (10%). Change proposals are binding upon the Contractor and may be accepted or rejected by the Owner in its discretion. Acceptance of a change proposal may only be made in a written Modification. The Owner may, at its option, instruct the Contractor to proceed with the Work involved in a unilateral Change Order or unilateral Field Order in accordance with this Article 12, without accepting the change proposal in its entirety.

12.1.4 Preparation and Submission of Change Orders and Contract Amendments. If the Owner determines that a change proposal is appropriate, the

Contract Administrator or designee will prepare and submit a request for a Change Order or Contract Amendment providing for an appropriate adjustment in the Contract Time or Contract Sum, or both, for further action by the Director. No such change is effective until the Change Order has been approved by the Director.

12.1.5 Performance of Changes. Unless otherwise provided, the Contractor must perform changes in the Work promptly upon receipt of executed Modifications under applicable provisions of the Contract Documents.

12.1.6 Changes. The Director may unilaterally change the Work, materials and services to be performed. The change must be in writing and within the general scope of the Contract. The Contract will be modified to reflect any time or money adjustment the Contractor is entitled to receive. Contractor must bring to the Contract Administrator, in writing, any claim about an adjustment in time or money resulting from a change, within 30 days from the date the Director, issued the change in Work, or the claim is waived. Any failure to agree upon a time or money adjustment must be resolved under the "Disputes" clause of this Contract. The Contractor must proceed with the prosecution of the work as changed, even if there is an unresolved claim. No charge for any extra Work, time or material will be allowed, except as provided in this section.

12.2 CHANGE ORDERS

12.2.1 Utilization. A Change Order is a written directive by the Owner to the Contractor directing a change in the Work which is within the general scope of the contract and which may increase or decrease the Contract Time and/or the Contract Sum issued with or without the consent of the Contractor.

12.2.2 Adjustments in Amount Payable to Contractor. A Change Order may provide for an adjustment in the amount payable to the Contractor based only on one of the following methods:

- .1 A fixed or not-to-exceed sum agreed to by the Owner and Contractor and stated in the change instrument;
- .2 Unit Prices stated in the Contract Documents; or
- .3 Reasonable and fair cost estimate, properly itemized and supported by sufficient substantiating data to permit evaluation which will be limited to estimated costs of labor, materials, supplies and equipment, rental cost of machinery and equipment, additional bond cost, plus a fixed fee for profit and overhead (which includes office overhead and site-specific overhead and general

## General Conditions of Construction Contract - GCCC

conditions) of ten percent (10%) if the Work is performed by the Contractor, or five percent (5%) if the Work is performed by a Subcontractor or Sub-subcontractor. The Subcontractors or Sub-subcontractors overhead and profit in turn must not exceed ten percent (10%). **The total percentage of overhead and profit payable by the Owner (to both the Contractor and all sub-tier subcontractors), regardless of the sub-tier which performs the work, shall not exceed twenty percent (20%).**

- .4 Actual cost, properly itemized and supported by sufficient substantiating data to permit evaluation which will be limited to actual cost of labor, actual cost of materials, supplies and equipment, actual rental cost of machinery and equipment, additional bond cost, plus a fixed fee for profit and overhead (which includes office overhead and site-specific overhead and general conditions) of ten percent (10%) if the Work is performed by the Contractor, or five percent (5%) if the Work is performed by a Subcontractor or Sub-subcontractor. The Subcontractors or Sub-subcontractors overhead and profit in turn must not exceed ten percent (10%). **The total percentage of overhead and profit payable by the Owner (to both the Contractor and all sub-tier subcontractors), regardless of the sub-tier which performs the work, shall not exceed twenty percent (20%).**
- .5 In the absence of an agreement between the Owner and Contractor, the amount must be determined in accord with Subsection 12.2.2.2 or 12.2.2.3 above, using whichever will result in the lowest cost to the Owner.

**12.2.3 Adjustments in Progress Schedule.** A Change Order may provide for an adjustment in the Contract Time if justified by the requirements of Article 11.

**12.2.4 Absence of Proposed Adjustments.** If a Change Order is silent as to any adjustment to the Contract Time or the Contract Sum, it will be conclusively presumed that none is intended and none will be allowed unless the Contractor files an objection as and when specified in the following Subsection

**12.2.5 Action Upon Receipt.** Upon receipt of a Unilateral Change Order, the Contractor must promptly proceed with the change in the Work involved. The Contractor must advise the Owner and the Architect/Engineer in writing, promptly and in no event

later than ten (10) days after issuance of the Change Order, of the Contractor's objection (i) to the amount or method, if any, provided for in the Unilateral Change Order for adjustment in the Contract Time or in the amount payable to the Contractor, or (ii) to the absence of any adjustment to the Contract Time or the Contract Sum. Any objection to be valid must contain the specific adjustment in the Contract Time or the Contract Sum to which the Contractor claims it is entitled including a detailed explanation of the basis for its request. A Claim for an increase in the Contract Time, to be valid, must contain the supporting documentation specified in Subsection 11.6. A Claim for an increase in the Contract Sum, to be valid, must further be documented and calculated as specified in Subsection 12.2.2. **Failure of the Contractor to object as and when specified in this Subsection is deemed an acceptance of the Unilateral Change Order as issued and a waiver of any Claim by the Contractor to any adjustment to the Contract Time or the Contract Sum.**

### 12.3 FIELD ORDERS

**12.3.1 Utilization.** A Field Order is a written instruction issued by the Owner to the Contractor directing a change in the Work when unforeseen and unanticipated conditions arise which require immediate action to mitigate costs or avoid delays. It may provide for additional compensation to be paid to the Contractor (outside of the Contract), but does not change the Contract Time or Contract Sum.

- .1 The Owner may issue a unilateral Field Order to avoid Project Delay before the Contractor has prepared its cost proposal. In these instances, the Contractor should, unless noted otherwise on the Field Order, submit its cost proposal within ten (10) days and the Owner will review the cost proposal in accordance with Section 12.3.
- .2 The Owner may issue a Field Order directing the Contractor to proceed with work which the Contractor and the Owner and/or A/E disagree as to whether it is a Change to the Work. In these instances, the Contractor shall submit its Claims for an increase in the Contract Time and/or an increase in the Contract Sum in accordance with Articles 11 and 12 and the County will make a determination on the Claims. If the Contractor disagrees with the determination, the Contractor must file a Dispute in accordance with Article 16.

**12.3.2 Adjustments in Amount Payable to Contractor.** A Field Order may provide for an

## General Conditions of Construction Contract - GCCC

adjustment in the amount payable to the Contractor based only on one of the following methods:

- .1 A fixed or not-to-exceed sum stated in the change instrument;
- .2 Unit Prices stated in the Contract Documents;
- .3 Reasonable and fair cost estimate, properly itemized and supported by sufficient substantiating data to permit evaluation which will be limited to estimated costs of labor, materials, supplies and equipment, rental cost of machinery and equipment, additional bond cost, plus a fixed fee for profit and overhead (which includes office overhead and site-specific overhead and general conditions) of ten percent (10%) if the Work is performed by the Contractor, or five percent (5%) if the Work is performed by a Subcontractor or Sub-subcontractor. The Subcontractors or Sub-subcontractors overhead and profit in turn must not exceed ten percent (10%). **The total percentage of overhead and profit payable by the Owner (to both the Contractor and all sub-tier subcontractors), regardless of the sub-tier which performs the work, shall not exceed twenty percent (20%);**
- .4 Actual cost, properly itemized and supported by sufficient substantiating data to permit evaluation which will be limited to actual cost of labor, actual cost of materials, supplies and equipment, actual rental cost of machinery and equipment, additional bond cost, plus a fixed fee for profit and overhead (which includes office overhead and site-specific overhead and general conditions) of ten percent (10%) if the Work is performed by the Contractor, or five percent (5%) if the Work is performed by a Subcontractor or Sub-subcontractor. **The term 'cost' as used in this subsection is limited to the cost incurred in the actual performance of the work.** The Subcontractors or Sub-subcontractors overhead and profit in turn must not exceed ten percent (10%). **The total percentage of overhead and profit payable by the Owner (to both the Contractor and all sub-tier subcontractors), regardless of the sub-tier which performs the work, shall not exceed twenty percent (20%); or**
- .5 In the absence of an agreement between the Owner and Contractor, the amount must be determined in accord with Subsections 12.3.2.2 or 12.3.2.3 above, using whichever will result in the lowest cost to the Owner.

**12.3.3 Adjustments in Progress Schedule.** A Field Order may not be used to adjust the Contract Time. If the Contractor files an objection under Subsection 12.3.5 below which results in an entitlement by the Contractor to an increase in the Contract Time, it will be implemented by execution of a Change Order or Contract Amendment.

**12.3.4 Absence of Proposed Adjustments.** If a Field Order is silent as to any adjustment to the Contract Time or the Contract Sum, it will be conclusively presumed that none is intended and none will be allowed unless the Contractor files an objection as and when specified in the following Subsection.

**12.3.5 Action Upon Receipt.** Upon receipt of a (unilateral or bilateral) Field Order, the Contractor must promptly proceed with the change in the Work involved. The Contractor must advise the Owner and the Architect/Engineer in writing, promptly and in no event later than ten (10) days after issuance of the Field Order, of the Contractor's objection (i) to the amount or method, if any, provided for in the Field Order for adjustment in the Contract Time or to the Contract Sum, or (ii) to the absence of any adjustment in the Contract Time or to the Contract Sum. **Any objection to be valid must contain the specific adjustment to the Contract Time or the Contract Sum to which the Contractor claims it is entitled including a detailed explanation of the basis for the Claim.** A Claim for an increase in the Contract Time, to be valid, must contain the supporting documentation specified in Section 11.6. A Claim for an increase to the Contract Sum, to be valid, must further be documented and calculated as specified in Subsection 12.2.2. **Failure of the Contractor to object as and when specified in this Section is deemed an acceptance of the Field Order as issued and a waiver of any Claim by the Contractor to an adjustment to the Contract Time or the Contract Sum.**

### 12.4 DIFFERING CONDITIONS (SITE AND STRUCTURAL)

**12.4.1 Differing Site Conditions.** This Contract contains a Differing Site Condition clause and requests may be made by the Contractor and, if justified, approved by the Owner for an increase in Contract Time and an increase in the Contract Sum as consequence of differing site or subsurface conditions encountered by the Contractor. For Contract Modification purposes, the Geotechnical Studies establish a baseline for expected subsurface conditions. The Contractor must show a material difference between the Geotechnical Studies and actual subsurface conditions to justify a Contract Modification.

## General Conditions of Construction Contract - GCCC

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The Contractor must promptly, before conditions are disturbed and in no event later than five (5) days after first observing such conditions, give written notice to the Owner and Architect/Engineer of:

- .1 Subsurface or latent physical conditions at the site which differ materially from those indicated in the Contract; or
- .2 Unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the Contract.

**Failure of the Contractor either (i) to provide notice before disturbing the existing conditions or (ii) failure to give notice within five (5) days of first observing such conditions is conclusively deemed a waiver of any Claim relating to such conditions.**

**12.4.2 Differing Structural Conditions in Remodeling or Renovation Contracts** If this is a Contract for a remodeling or renovation of an existing structure and the Contractor encounters conditions in the structure (not as to the site or subsurface conditions) which differ materially from those indicated in the Contract Documents, the Contractor must give written notice thereof to the Owner and the Architect/Engineer promptly before conditions are disturbed and in no event later than five (5) days after first observing such conditions. **Failure of the Contractor either (i) to provide notice before disturbing the existing conditions or (ii) failure to give notice within five (5) days of first observing such conditions is conclusively deemed a waiver of any entitlement to an increase in the Contract Time and/or an increase in the Contract Sum relating to such conditions.**

**12.4.3 Investigation and Determination by Architect/Engineer.** After receipt of the written notice, the Architect/Engineer will promptly investigate any alleged differing condition(s) and provide a written report of its findings to the Owner. If the Architect/Engineer and Owner determine that the conditions vary materially from the Contract Documents, the Architect/Engineer will produce technical revisions to the Contract Documents as required. The Contractor shall submit Claims for an increase in the Contract Time and/or an increase in the Contract Sum in accordance with Articles 11 and 12 and the Owner will issue a corresponding Modification. To avoid Delay, the Owner may issue a unilateral Field Order or Change Order before receipt of the contractor's Claim. In that instance, a second Modification will be issued after review and acceptance of the Contractor's Claims. If the Owner determines that the actual conditions are not materially different or that no change

in the terms of the Contract is justified, the Owner will so notify the Contractor in writing.

**12.4.4 Claims Over Differing Structural Conditions.** If the Contractor objects to the Owner's finding under Subsection 12.4.3, the Contractor must file a notice as and when provided in Subsection 12.5.1 below and the same will be resolved as provided in Subsection 12.5.2 below. **Failure of the Contractor to file the notice as and when required by Subsection 12.5.1 below and Article 11 of the Contract will be conclusively deemed a waiver of any Claim relating to any such differing condition.**

### 12.5 CONSTRUCTIVE CHANGES AND DISPUTED ADJUSTMENTS

**12.5.1 Notice to Owner and Architect/Engineer.** The Contractor must advise the Owner (Contract Administrator) and the Architect/Engineer in writing promptly and in no event later than ten (10) days after (i) issuance of any interpretation, clarification, instruction, direction or order whether orally or in writing from either the Owner or the Architect/Engineer, or (ii) the occurrence of any event or discovery of any condition (including any condition as provided in Section 12.4 above), which the Contractor believes or has reason to believe entitles the Contractor to an increase in the Contract Time or an increase in the Contract Sum; and except in the case of an emergency involving possible loss of life or bodily injury or property damage exceeding \$50,000, the required written notice must be provided by the Contractor prior to proceeding with the Work. Failure of the Contractor to provide such notice constitutes an acceptance of the interpretation, clarification, instruction, direction, order, event or condition without adjustment to the amount payable to the Contractor and/or the Contract Time and a conclusive waiver of any Claim relating to the same. Any objection to be valid must contain the specific adjustment to the Contract Time and/or Contract Sum to which the Contractor claims it is entitled including a detailed explanation of the basis for the request. A Claim for an increase in the Contract Time must further contain the supporting documentation specified in Section 11.6. A Claim for an increase in the Contract Sum must further be documented and calculated as specified in Subsection 12.2.2.

**12.5.2 Disputed Adjustments.** All disputed adjustments under this Contract will be determined in accordance with Article 16 if, as conditions precedent thereto, the Contractor has timely provided all notices and objections required under the terms of the Contract.

### 12.6 SUBSTITUTIONS AND OR-EQUAL ITEMS

## General Conditions of Construction Contract - GCCC

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**12.6.1 Allowance of Substitutions and Or-Equal Items.** The Contract Sum and Contract Time are based on the requirements of the Contract Documents and use of the materials and equipment specified therein. Proposals to use Substitutions and Or-Equal Items after Contract execution is neither invited nor favored by the Owner. Or-Equal Items will be considered only where permitted by the Specifications, and Substitutions will be considered only where the specified item is not available or where significant overall cost savings are offered to the Owner. No Substitution or Or-Equal Item will be used without specific written acceptance of the Owner, which may be withheld in the sole discretion of the Owner. The determination by the Owner that an item is not an "or-equal" but a proposed Substitution, and any decision by the Owner regarding the acceptability or use of an Or-Equal or Substitution will be final and without further recourse by the Contractor. In making such determinations the Owner may, but will not be required, to rely upon the recommendations of the Architect/Engineer.

**12.6.2 Or-Equal Items.** The Contractor must submit any requests for the use of an Or-Equal Item, if specifically permitted by the Specifications, to the Owner in writing through the Architect/Engineer. If in the Owner's sole discretion an item of material or equipment proposed by the Contractor is functionally equal to that named and sufficiently similar so that no change in design or related Work will be required, it may be considered for eligibility as an Or-Equal Item, in which case further review of the proposed item will, in the Owner's sole discretion, be accomplished subject to compliance with all of the requirements for acceptance of a proposed Substitution except as expressly waived by the Owner. A decision in the Owner's sole discretion that an item of material or equipment proposed by the Contractor does not qualify as an Or-Equal Item, does not preclude a request by the Contractor that it be considered a proposed Substitution under Subsection 12.6.3. An Or-Equal Item may only be accepted by the Owner in writing.

**12.6.3 Substitutions.** After the Contract has been executed, the Owner and Architect/Engineer will consider a formal request submitted by the Contractor for the substitution of products or materials in place of those specified, when such request is accompanied by:

- .1 Evidence that the specified item is unavailable;
- .2 Complete data on the proposed Substitution substantiating compliance with the Contract Documents, including product identification and description, performance and test data, references and samples where applicable,

and an itemized comparison of the proposed item with the products specified or named in the Contract Documents;

- .3 Data indicating the effect of the Substitution on the Progress Schedule and the Contract Time, if any, on the general design and artistic effect where applicable, and its effect on work under separate contracts;
- .4 accurate cost data on the proposed item in comparison with the product specified, whether or not the Substitution of such item will require an adjustment to the Contract Sum; and
- .5 Any additional information required by the Owner or the Architect/Engineer to permit evaluation.

**12.6.4 Representations by Contractor.** Requests for Substitution based on Subsection 12.6.3 above are understood to mean that the Contractor:

- .1 Represents having personally investigated the proposed Substitution and having determined that it is equal or superior in all respects to that specified;
- .2 Will warrant the Substitution to the same extent and will provide the same or better special Warranties and Guarantees for the Substitution as was required for the item originally specified;
- .3 Certifies that the cost data is complete and includes all related costs under the Contract including, if known to the Contractor, cost under separate contracts and the Architect/Engineer's redesign costs, and that the Contractor waives all Claims for additional costs and agrees to pay all such additional costs, whether known or not, related to the Substitution including any cost which subsequently become apparent;
- .4 Certifies that the schedule and time data are complete and include all related time under the Contract (excluding time under separate contracts and for the Architect/Engineer's redesign), and that the Contractor waives all Claims for delay related to the Substitution which subsequently become apparent; and
- .5 Will coordinate the installation of the proposed Substitute, making such changes as may be required for the Work to be complete in all respects.

**12.6.5 Costs Borne by Contractor.** The Contractor must bear all costs of preparing and submitting requests for Substitutions and the use of Or-Equal Items. The Contractor bears the risk for the proper fit and performance of substituted and “or-equal” materials and the burden for additional work, time and expense resulting from substituted and “or-equal” materials. The costs of the Owner’s and Architect/Engineer’s additional services attributable to their review, evaluation, acceptance, design and implementation must also be borne by the Contractor.

**12.6.6 Timeliness.** All requests for use of an Or-equal or Substitution must be made in a timely manner in sufficient time to permit adequate review and approval or acceptance by the Owner and the Architect/Engineer, coordination with Separate Contractors, and preparation of any changes to the Contract Documents which would be required by acceptance of any proposed Substitution or Or-Equal Item so as not to delay the Work or the Project.

**12.6.7 Improper Substitutions.** Submission of an item as part of a Shop Drawing, Sample or Product Data does not constitute compliance with Section 12.6, even if the Shop Drawing, Sample or Product Data is or has been approved. **The Owner may direct removal of any unapproved Substitutions and/or Or-Equal items, and replacement with approved items, at Contractor’s cost and with no increase in the Contract Time.**

## ARTICLE 13

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### PAYMENTS

#### 13.1 SCHEDULE OF VALUES

**13.1.1 Submission.** Within ten (10) days after issuance of a Notice to Proceed, the Contractor must submit to the Architect/Engineer a Schedule of Values which allocates the Contract Sum among all portions of the Work.

**13.1.2 Form and Contents of Schedule of Values.** The Schedule of Values must be prepared in such a manner that each item of Work and each subcontracted item of work is shown as one or more line items on AIA Document G703, Continuation Sheet (latest edition), or such other form as may be prescribed by the Owner. Unless otherwise required, each line item must include its allocable share of the Contractor’s overhead and profit. The Schedule of Values must be prepared in such detail and must be supported by such data to substantiate its accuracy as required by both the Owner and the Architect/Engineer.

**13.1.3 Review and Approval.** The Architect/Engineer will review the Schedule of Values with the Owner and advise the Contractor of its approval or any revisions that

may be required for approval. This Schedule of Values as approved by the Architect/Engineer and Owner, will be used as a basis for reviewing the Contractor’s Applications for Payment, and must be revised and resubmitted as necessary to reflect adjustments to the Contract Sum by approved Contract Modifications.

#### 13.2 APPLICATIONS FOR PAYMENT

**13.2.1 Initial Review and Submission.** The Contractor must submit to the Architect/Engineer complete and itemized Applications for Payment for Work on a monthly basis in accordance with a schedule approved by the Owner. Each Application for Payment must be consistent with the approved Schedule of Values. In order to expedite the review and approval of Applications for Payment, the Contractor may submit to and review with the Architect/Engineer and Owner a draft Application for Payment at a progress meeting prior to submitting a formal Application for Payment.

**13.2.2 Form and Contents of Application.** The form of Application for Payment must be AIA Document G702, Application and Certificate for Payment, supported by AIA Document G703, Continuation Sheet (latest edition), or such other form as may be prescribed by the Owner. The application must be notarized and supported by sufficient data to demonstrate the Contractor’s right to payment and compliance with the payment provisions of the Contract to the satisfaction of the Owner and the Architect/Engineer, such as copies of requisitions from Subcontractors and material Suppliers, partial lien waivers, releases and other documents. Each Application for Payment must reflect approved Change Orders and Contract Amendments and the Contract retainage provided for in the Contract Documents.

**13.2.3 Inclusion of Stored Materials.** Applications for Payment may include materials and equipment delivered and suitably stored at the Site for subsequent incorporation in the Work. **The Owner has no obligation or responsibility to pay for materials stored off the Site.** If determined to be in the Owner’s best interest and specifically approved in writing in advance by the Owner, an Application for Payment may include materials and equipment stored off the Site at a location agreed upon in writing which is within Montgomery County. **Material stored out of Montgomery County will not be considered for payment.** Payment for materials and equipment stored on or off the Site is conditioned upon compliance by the Contractor with procedures satisfactory to the Owner to protect the Owner’s interest. Payment for materials and equipment stored off the Site will, in addition, be conditioned upon the Contractor’s provision of



## General Conditions of Construction Contract - GCCC

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applicable insurance, storage and transportation to the Site.

**13.2.4 Exclusion of Amounts Not Payable to Subcontractors and Suppliers.** Under applicable provisions of Maryland law, payments received by the Contractor are held in trust for Subcontractors and Suppliers who have furnished labor and materials covered by an Application for Payment. Accordingly, **Applications for Payment may not include requests for payment of amounts for Work performed by a Subcontractor or Supplier that the Contractor does not intend to pay for said work.**

**13.2.5 Contract Retainage.** Until Substantial Completion of the Work, the amount of each monthly Application for Payment must include the value of each line item as indicated on the approved Schedule of Values, to the extent completed, less contract retainage of ten percent (10%). Such contract retainage will apply whether or not the Owner is entitled to withhold additional amounts under the Contract. The Contractor has no right to receive any such retainage, or interest thereon, until Substantial Completion. Upon Substantial Completion and with the Surety's consent to the reduction in the retainage, the Contract retainage will be reduced to five percent (5%) of the Contract Sum if the manner of completion of the Work and its progress are and remain satisfactory to the Owner and the Architect/Engineer and will remain in effect until Final Completion.

If the Project has LEED requirements, the Contract retainage will be reduced to not more than one percent (1%) of the Contract Sum if Surety consents to the reduction in the retainage and the Contractor has performed all requirements for Final Completion except for issuance, by the USGBC, of the LEED certification at the level required in the Contract Documents.

The full ten percent (10%) retainage will be reinstated if the manner of completion of the Work and its progress do not remain satisfactory to the Owner and the Architect/Engineer, or if the Surety withholds its consent, or if there is a failure to properly perform under any of the provisions of the Contract.

**13.2.6 Passage of Clear Title.** The Contractor warrants that title to all Work covered by an Application for Payment will pass to the Owner no later than the time of payment. By submitting an Application for Payment, the Contractor further warrants that all Work for which payments have previously been received from the Owner are free and clear of liens, claims, security interests or encumbrances in favor of the Contractor, Subcontractors, material Suppliers, or other persons or

entities having provided labor, materials and equipment relating to the Work.

**13.2.7 Contractor's Certification.** Before the Contractor receives a progress payment, the Contractor must certify in writing that, in accordance with contractual arrangements, Subcontractors and Suppliers:

- .1 Have been paid from the proceeds of previous progress payments; and
- .2 Will be paid in a timely manner from the proceeds of the progress payment currently due.

**The foregoing certification will be deemed to have been inserted into any Application for Payment from which it has been omitted.**

In the event the Contractor has not paid or does not pay as certified, such failure **constitutes a ground for Termination under Subsection 15.3.2** of the Contract.

**13.2.8 Application of Payments for Field Orders.** The Contractor shall submit its Application for Payment of Field Orders monthly to the Architect/Engineer on a separate document from the Contract Application for Payment. The Contractor can submit for partial completion of Field Orders and retainage is not applied to Field Order work.

### 13.3 CERTIFICATES FOR PAYMENT

**13.3.1 Issuance of Certificate for Payment.** The Architect/Engineer will, within ten (10) days after receipt of the Contractor's Application for Payment, either issue to the Owner a Certificate for Payment for such amount as the Architect/Engineer determines is properly due, with a copy to the Contractor, or notify the Contractor and Owner in writing of the Architect/Engineer's reasons for withholding certification in whole or in part as provided in Subsection 13.3.3.

**13.3.2 Representation in Certificate for Payment.** The issuance of a Certificate for Payment will constitute a representation by the Architect/Engineer to the Owner, based on the Architect/Engineer's observations at the Site and the data comprising the Application for Payment, that to the best of the Architect/Engineer's knowledge, information and belief, (i) the Work has progressed to the point indicated and (ii) the quality of the Work, to the extent certified as having been completed, is in accordance with the Contract Documents. The foregoing representations are subject to an evaluation of the Work for conformance with the Contract Documents upon Substantial Completion, to results of subsequent tests and inspections, to minor deviations from the Contract Documents correctable prior to completion and to specific qualifications

## General Conditions of Construction Contract - GCCC

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expressed by the Architect/Engineer, in writing in the Certificate for Payment, and are not binding upon the Owner. The issuance of a Certificate for Payment will not be a representation that the Architect/Engineer has (i) made exhaustive or continuous on-site inspections to check the quality or quantity of the Work, (ii) reviewed construction means, methods, techniques, sequences or procedures, or (iii) made examination to ascertain how or for what purpose the Contractor has used money previously paid on account of the Contract Sum.

**13.3.3 Withholding Certification.** The Architect/Engineer may decide not to certify payment and may withhold a Certificate for Payment in whole or in part, to the extent reasonably necessary to protect the Owner, if in the Architect/Engineer's opinion the representations to the Owner required by Subsection 13.3.2 cannot be made. If the Architect/Engineer is unable to certify payment in the amount of the Application for Payment, the Architect/Engineer will notify the Contractor and Owner as provided in Subsection 13.3.1. If the Contractor and Architect/Engineer cannot agree on a revised amount, the Architect/Engineer will promptly issue a Certificate for Payment for the amount for which the Architect/Engineer is able to make such representations to the Owner. The Architect/Engineer may also decide not to certify payment or may nullify the whole or a part of a Certificate for Payment previously issued, to such extent as may be necessary in the Architect/Engineer's opinion to protect the Owner from loss because of the causes set forth in Subsection 13.3.4.

**13.3.4 Grounds for Withholding Certification.** The Architect/Engineer may withhold certification, or the Owner may withhold payment, to the extent reasonably necessary, to protect the Owner from loss on account of:

- .1 The quality of a portion, or all, of the Contractor's Work not being in accordance with the requirements of this Contract and with construction industry standards;
- .2 Claims made, or likely to be made, against the Owner or its property on account of the Contractor's performance;
- .3 Reasonable evidence that the Contractor has failed to use Contract funds, previously paid the Contractor by the Owner, to pay Contractor's Work and Project-related obligations including, but not limited to, Subcontractors, laborers and material and equipment Suppliers;
- .4 Reasonable evidence that the Work cannot be completed for the unpaid balance of the Contract Sum;

- .5 Loss by, or damage to the Owner or another contractor;
- .6 Reasonable evidence that the Contractor's rate of progress is such that, in the Owner's opinion, Substantial or Final Completion of the Work for the Project, or both, may be inexcusably delayed;
- .7 Failure to carry out the Work in accordance with the Contract Documents;
- .8 The quantity of the Contractor's Work being less than that stated in the Contractor's Application for Payment, or otherwise;
- .9 Other items which entitle the Owner to a setoff against the amounts due the Contractor; or
- .10 Failure of the Contractor to remove or bond off liens by its Subcontractors or Suppliers.

**13.3.5 Release of Certificate When Grounds Removed.** When the reasons for withholding certification are removed, the Architect/Engineer will certify payment for amounts previously withheld.

### 13.4 PROGRESS PAYMENTS

**13.4.1 Withholding of Payment by Owner.** The Owner may withhold payment on a Certificate for Payment in whole or in part, to the extent reasonably necessary to protect the Owner, if the Owner, based on its own Site observations, inspections or other evidence available to the Owner, does not concur with the Architect/Engineer's representations under Subsection 13.3.2 or with the Architect/Engineer's finding of removal of conditions as provided in Subsection 13.3.5. In such case the Owner will notify the Architect/Engineer and the Contractor of the reasons for withholding payment in whole or in part as permitted by this Subsection 13.4.1. If the Contractor and Owner cannot agree on a revised amount, the Owner will promptly initiate payment for an amount which the Owner determines to be appropriate. The Owner may also decide not to make payment as necessary to protect the Owner from loss because of the causes set forth in Subsection 13.3.4. In that event, Contractor must submit a revised Application for Payment for the Owner's review and approval once such causes have been remedied along with evidence reasonably satisfactory to the Owner that such causes have in fact been remedied.

**13.4.2 Payment.** Payments on Certificates for Payment which are approved by the Owner as "proper invoices" within the meaning of applicable laws and regulations will be paid within thirty (30) days after the Owner approves the Certificate for Payment.

**13.4.3 Payment Not Acceptance of Defective Work.**

Issuance of a Certificate for Payment by the Architect/Engineer or the making of any progress payment by the Owner does not constitute acceptance of Work that is not in accordance with the Contract Documents.

**13.4.4 Payment Contingent on Performance.**

Progress payments may be withheld to the extent the Contractor is not in full compliance with the Contract. The Owner's failure to make progress payments is not an event of default by the Owner under the Contract, nor does it give rise to the right of the Contractor to stop work.

**13.4.5 Waiver of Claims by Contractor** Acceptance of progress payments by the Contractor, a Subcontractor, Sub-subcontractor or Supplier (to the extent not previously waived) constitutes a waiver of Claims arising from any occurrence existing prior to payment, or arising from performance of the Work for which payment is made by that payee except those previously made in writing and identified by that payee as unsettled on the Application for Payment and which fully comply with the requirements of Articles 11, 12 and/or 16.

## **ARTICLE 14**

### **SUBSTANTIAL AND FINAL COMPLETION**

#### **14.1 PARTIAL OCCUPANCY OR USE**

**14.1.1 Occupancy by Owner.** The Owner may occupy or use any completed or partially completed portion of the Work prior to Substantial Completion of all of the Work pursuant to Subsection 14.1.2.

**14.1.2 Notice by Owner.** The Owner may, at any time, request the Contractor in writing to permit the Owner to occupy or use any such portion of the Work. Such partial occupancy or use may commence whether or not the portion is Substantially Complete. Consent of the Contractor to partial occupancy or use must not be unreasonably withheld.

**14.1.3 Notice by Contractor.** When the Contractor considers that a portion of the Work designated in the Contract Documents for partial occupancy or use can be occupied or used for its intended purpose without significant interference with the Contractor's performance of the remainder of the Work, the Contractor may notify the Owner and the Architect/Engineer in writing and request an inspection of that portion and a partial Certificate of Substantial Completion. Such notice must be issued not less than ten (10) days in advance of the date that such Work will be ready for inspection. The determination whether the

particular portion of the Work may be occupied for its intended use is at the Owner's sole discretion.

**14.1.4 Inspection.** Following notice by either the Owner or the Contractor, the Contractor must prepare and submit to the Architect/Engineer a list of items remaining to be completed or corrected as provided in Subsection 14.2.3. Immediately prior to such partial occupancy or use, the Owner, Contractor and Architect/Engineer will jointly inspect the area to be occupied or portion of the Work to be used in order to determine and record the condition and stage of progress of the Work.

**14.1.5 Conditions for Partial Occupancy or Use.** Unless otherwise provided in the Contract Documents or by agreement between the Owner and the Contractor, such partial occupancy or use will be subject to the Owner's assumption of responsibility for security, operation, safety, maintenance, heat, utilities, damage to the Work (other than damage caused by the Contractor) and insurance with respect to the portions of the Work to be occupied or used by the Owner. The period for correction of such portions of the Work and Warranties required by the Contract Documents will commence upon such partial occupancy or use.

**14.1.6 Partial Occupancy or Use Not Acceptance of Defective Work.** Unless otherwise agreed to in writing by the Owner, partial occupancy or use of a portion or portions of the Work does not constitute acceptance of Work not complying with the requirements of the Contract Documents.

#### **14.2 SUBSTANTIAL COMPLETION**

**14.2.1 Notice and Request for Preliminary Inspection.** When the Contractor considers that the Work is substantially complete and that items remaining to be completed or corrected can be accomplished within another thirty (30) days, the Contractor must give written notice to the Owner and the Architect/Engineer and request an inspection of the Work as provided in Subsection 14.2.3. The Contractor's notice and request for an inspection must be accompanied by a comprehensive Punch List describing all items to be completed or corrected before final completion and the Submittals required by Subsection 14.2.2. The Contractor must proceed promptly to complete and correct items on the list. Failure to include an item on such list does not alter the Contractor's responsibility to complete all Work in accordance with the Contract Documents.

**14.2.2 Submittals on Substantial Completion.** In addition to the Punch List, the Contractor must submit the following with its request for a determination of Substantial Completion:

## General Conditions of Construction Contract - GCCC

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- .1 A use and occupancy permit;
- .2 Final test reports as provided in Subsection 10.5.7 and certificates of inspection and approval required for use and occupancy;
- .3 Fire Marshal's approval;
- .4 Approvals from, and transfer documents for, all utilities;
- .5 Warranties and Guarantees as provided in Subsection 10.2.4,
- .6 Final, approved operating and maintenance manuals for materials and systems specified in the Contract Documents;
- .7 All documents and verification of training required in accordance with any Quality Control or Commissioning Plan; and
- .8 Schedule to complete the Punch list and value of Work not yet complete.

**14.2.3 Substantial Completion Inspection and Correction.** Upon receipt of the Punch List, the Architect/Engineer will make an inspection to determine whether the Work or designated portion thereof is substantially complete and whether remaining items can be completed or corrected within thirty (30) days. The Owner may make a similar inspection. If such inspection(s) disclose any deficiency not included on the Punch List, the Architect/Engineer shall add the deficiency to the Punch list. If such inspection(s) discloses any item, whether or not included on the Punch List, which, in the opinion of the Owner or the Architect/Engineer or Owner, (i) must be completed or corrected before the Work can be occupied or used for its intended purpose, or (ii) cannot be completed or corrected within thirty (30) days, the Architect/Engineer will so advise the Contractor, and the Contractor must promptly complete or correct such item prior to Substantial Completion.

**14.2.4 Reinspection.** If the Architect/Engineer advises the Contractor per Subsection 14.2.3 that Work is required prior to Substantial Completion, the Contractor must complete the required Work. Following the completion or correction of Work required by the Owner or the Architect/Engineer before issuance of a Certificate of Substantial Completion, the Contractor must notify the Owner and the Architect/Engineer and request another inspection by the Owner and the Architect/Engineer to determine Substantial Completion. The Contractor must submit a revised Punch List with such notice. The Architect/Engineer will promptly notify the Contractor if the Owner or the Architect/Engineer do not concur that the Work is substantially complete. In such case, the Contractor must bear the cost of any additional services

of the Owner or the Architect/Engineer until the Work is determined to be Substantially Complete.

**14.2.5 Certification of Substantial Completion.** When the Owner and the Architect/Engineer concur that the Work is Substantially Complete and that Work remaining to be completed or corrected can be accomplished within a period of thirty (30) days, the Architect/Engineer will prepare a Certificate of Substantial Completion and a revised (final) Punch List. The Certificate of Substantial Completion must be signed by the Contractor, Architect/Engineer and the Owner with the Owner's signature indicating acceptance of Substantial Completion. The Certificate of Substantial Completion shall include the final Punch List and shall fix the Date of Substantial Completion and the time periods within which the Contractor must finish all items on the Punch List accompanying the Certificate.

**14.2.6 Execution and Acceptance of Certificate.** The Certificate of Substantial Completion and accompanying Punch List must be signed by the Owner and Contractor, which will constitute their written acceptance of responsibilities assigned to them in such Certificate.

**14.2.7 Conditions of Substantial Completion.** To the extent provided in the Contract Documents or in the Certificate of Substantial Completion, the Owner, upon execution of the Certificate, will assume responsibility for security, operation, safety, maintenance, heat, utilities, damage to the Work (other than damage caused by the Contractor) and insurance.

**14.2.8 Commencement of Warranties.** Warranties required by the Contract Documents will commence on the Date of Substantial Completion of the Work unless otherwise provided in the Certificate of Substantial Completion or the Contract Documents.

**14.2.9 Delivery of Premises and Access to Work.** Upon execution of the Certificate of Substantial Completion, the Contractor will deliver custody and control of such Work to the Owner. The Owner will thereafter provide the Contractor reasonable access to such Work to permit the Contractor to fulfill the correction, completion and other responsibilities remaining under the Contract and the Certificate of Substantial Completion.

**14.2.10 Timing of Final Completion.** Unless otherwise provided in the Certificate of Substantial Completion, the Contractor must complete or correct all items included in the final Punch List within thirty (30) days after the Date of Substantial Completion.

**14.2.11 Substantial Completion Cleaning.** At the time of Substantial Completion, in addition to removing

## General Conditions of Construction Contract - GCCC

rubbish and leaving the building "broom clean," the Contractor must replace any broken or damaged materials, remove stains, spots, marks and dirt from decorated Work, clean all fixtures, vacuum all carpets and wet mop all other floors, and comply with such additional requirements, if any, which may be specified in the Contract Documents.

Additional Cleaning, in addition to general broom cleaning, the Developer shall perform at its sole cost and expense final cleaning for all trades at Substantial Completion of the Work, including but not limited to:

1. Removing temporary protections;
2. Removing marks, stains, fingerprints and other soil, debris, or dust from painted, decorated, and natural finished woodwork and other work;
3. Removing spots, mortar, plaster, soil and paint from ceramic, tile, marble and other finish materials and washing or wiping clean;
4. Cleaning fixtures, cabinet work and equipment, removing stains, paint, dirt and dust and leaving in undamaged, new condition;
5. Cleaning glass, aluminum, stainless steel and other metals in accordance with recommendations of the manufacturer;
6. Thoroughly cleaning all floors;
7. Removing all labels, washing and polishing both sides of any glass, and replacing any damaged or broken glass.
8. All mechanical filters to be replaced as new at substantial completion and, if determined necessary by the Owner, at the completion of Punch List prior to final closeout of the project;
9. Complete cleaning of the pool facilities and installation of new filters at substantial completion;
10. Window (interior and exterior) and façade cleaning at substantial completion;
11. Cleaning exposed ductwork, mechanical, electrical and plumbing, fixtures, equipment, and any areas exposed to view;
12. Cleaning inside of ductwork and air handlers;
13. Cleaning all light lenses;
14. Cleaning inside elevators and elevator sill plates; and
15. Cleaning elevator shaft and top of elevators.

### 14.3 FINAL COMPLETION

#### 14.3.1 Notice and Request for Final Inspection.

When the Contractor has completed or corrected all items on the final Punch List and considers that the Work is complete and ready for final acceptance, the Contractor must give written notice to the Owner and the Architect/Engineer and request a final inspection of the

Work as provided in Subsection 14.3.2. The Contractor's notice and request for a final inspection must be accompanied by a final Application for Payment and the Submittals required by Subsection 14.3.3.

#### 14.3.2 Final Inspection and Certificate of Final Completion.

Upon receipt of the Contractor's notice and request for final inspection, the Owner and the Architect/Engineer will promptly make such inspection and, when the Owner and the Architect/Engineer concur that the Work has been fully completed and is acceptable under the Contract Documents, the Architect/Engineer will issue a Certificate of Final Completion to the Owner. The Contractor's notice and request for final inspection constitutes a representation by the Contractor to the Owner that the Work has been completed in full and strict accordance with terms and conditions of the Contract Documents. The Architect/Engineer will promptly notify the Contractor if the Owner or the Architect/Engineer do not concur that the Work is finally complete. In such case, the Contractor complete and/or correct the outstanding Work and must bear the cost of any additional services of the Owner or the Architect/Engineer until Final Completion is achieved.

**14.3.3 Final Submittals.** Neither final payment nor any remaining retained percentage will become due until the Contractor submits the following documents to the Architect/Engineer:

- .1 An affidavit that payrolls, bills for materials and equipment, and other indebtedness connected with the Work for which the Owner or the Owner's property might be responsible or encumbered (less amounts withheld by Owner), have been paid or otherwise satisfied, submitted on AIA Document G706, Affidavit of Payment of Debts and Claims (latest edition) or such other form as may be prescribed by the Owner;
- .2 A release or waiver of liens on behalf of the Contractor and a similar release or waiver on behalf of each Subcontractor and Supplier, accompanied by AIA Document G706A, Affidavit of Release of Liens (latest edition) or such other form as may be prescribed by the Owner;
- .3 A written statement that the Contractor knows of no substantial reason that the insurance will not be renewable to cover the period required by the Contract Documents;
- .4 Consent of Surety to final payment, submitted on AIA Document G707 (latest edition) or other form prescribed by the Owner;

## General Conditions of Construction Contract - GCCC

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- .5 Other data required by the Owner establishing payment or satisfaction of obligations, such as receipts, releases and waivers of liens, claims, security interests or encumbrances arising out of the Contract, to the extent and in such form as may be prescribed by the Owner;
- .6 A certified building location survey and as-built site plan in the form and number required by the Contract Documents;
- .7 All warranties and bonds required by the Contract Documents;
- .8 Record Documents as provided in Subsection 2.4.5 and return of Contract Documents as provided therein;
- .9 Attic stock items as required by the Contract Documents; and
- .10 As applicable, documentation of approval by the Montgomery County Department of Permitting Services (DPS) of all Storm Water Management (SWM) work as to allow close-out of the SWM Permit. DPS approval will be based on satisfying all DPS Permit requirements including the submission of acceptable as-built SWM drawing and other required SWM documents.

**14.3.4 USGBC LEED Certification Required for Final Completion.** If the Project has LEED requirements, Final Completion will not be granted until the USGBC has issued the LEED certification for the Project at the level required in the Contract Documents or until the USGBC has determined that there are no contractor-responsible LEED deficiencies.

### 14.4 FINAL ACCEPTANCE AND PAYMENT

**14.4.1 Final Certificate for Payment.** The Architect/Engineer and the Owner will promptly review the final submittals, and after notice from the Owner that all final submittals are acceptable and that the Contract has been fully performed, the Architect/Engineer will issue a final Certificate for Payment. The Contractor's Application for final Payment constitutes a further representation that the conditions listed in Subsections 14.3.2 and 14.3.3 as precedent to the Contractor's being entitled to final payment have been fulfilled.

**14.4.2 Delay in Final Completion.** If, after Substantial Completion of the Work, Final Completion cannot be achieved and is materially delayed through no fault of the Contractor or as a result of issuance of Contract Modifications issued after Substantial Completion, and the Architect/Engineer so confirms, the Owner will, upon Application for Payment by the Contractor and

Certification of Payment by the Architect/Engineer, and without terminating the Contract, make payment of the balance due for that portion of the Work fully completed and accepted, provided that the remaining Contract balance for Work not fully completed or corrected after making such payment is not less than the greater of (i) the amount of the retainage stipulated in the Contract Documents and currently being retained or (ii) the Owner's estimate of the amount necessary to complete and correct any Work not fully completed or corrected after making such payment. Provided further that if bonds have been furnished, the written consent of Surety to payment of the balance due for that portion of the Work fully completed and accepted is submitted by the Contractor to the Architect/Engineer prior to the Architect/Engineer's issuance of the Certificate for Payment. Such payment will be subject to the same terms and conditions governing final payment.

- .1 **Additional Work requested by the Owner after Substantial Completion.** If the Owner directs that Work be performed beyond the Work specified in the Contract but within the general scope of the Contract (Change Order or Field Order Work) after Substantial Completion, the Contractor is entitled to an increase in the Contract Time equal to the time required to perform the additional Work, but is still liable to the Owner for any prior unexcused delays.

**14.4.3 Final Payment.** Final payment, constituting the entire unpaid balance of the Contract Sum and other amounts payable to the Contractor, less any amounts withheld by the Owner under Subsection 14.4.4, will be made by the Owner to the Contractor not more than thirty (30) days after:

- .1 The Contract has been fully performed by the Contractor except for the Contractor's responsibility to correct nonconforming Work as provided in Subsection 10.2.2 and to satisfy other requirements, if any, which necessarily survive final payment; and
- .2 A final Certificate for Payment has been issued by the Architect/Engineer and approved by the Owner as a "proper invoice" within the meaning of applicable laws and regulations.

**14.4.4 Withholding by Owner from Final Payment.** The Owner may deduct such sums from final payment as may be due on account of actual or Liquidated Damages or other unsettled obligations under the Contract Documents, such as the acceptance of defective or nonconforming Work and costs payable by the Contractor.

## General Conditions of Construction Contract - GCCC

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**14.4.5 Waiver of Claims by Owner.** The making of final payment does not constitute a waiver of claims by the Owner arising from the Contractor's performance of the Work including but not limited to:

- .1 Liens, claims, security interests or encumbrances arising out of the Contract and unsettled;
- .2 Failure of the Work to comply with the requirements of the Contract Documents;
- .3 Terms of Guarantees or Warranties required by the Contract Documents; and
- .4 Unresolved claims or disputes.

**14.4.6 Waiver of Claims by Contractor.** Acceptance of final payment by the Contractor, a Subcontractor, Sub-subcontractor or Supplier (to the extent not previously waived) constitutes a waiver of Claims arising from any occurrence existing prior to final payment, or arising from, performance of the Work for which final payment is made by that payee except those previously made in writing and identified by that payee as unsettled on the final Application for Payment and which fully comply with the provisions of Articles 11, 12 and 16.

## ARTICLE 15

### RIGHTS AND REMEDIES

#### 15.1 OWNER'S RIGHTS AND REMEDIES

**15.1.1 Special and Additional Testing and Inspection.** The Owner, on its own initiative or upon the recommendation of the Architect/Engineer, has the right to require additional inspection or testing of the Work as provided in Section 10.5.

**15.1.2 Rejection of Nonconforming Work.** The Owner has the right and the Architect/Engineer has authority to reject Work which does not conform to the Contract Documents as provided in Subsection 10.6.1 and to require its correction or replacement as provided in Subsection 10.6.2 unless accepted by the Owner under Subsection 10.6.3.

**15.1.3 Withholding of Certificates and Withholding of Payments.** The Architect/Engineer has the authority to withhold a Certificate for Payment in accordance with Subsections 13.3.3 and 13.3.4. The Owner has the right to withhold payment on a Certificate for Payment as provided in Subsections 13.3.4 and 13.4.1.

**15.1.4 Additional Bonds and Insurance.** The Owner has the right to require the Contractor to furnish additional bonds as provided in Subsections 14.3.4 and 17.1.3 and additional insurance as provided in Subsection 17.4.4.

**15.1.5 Removal of Superintendent, Personnel, Subcontractors or Suppliers.** The Owner has the right to require the Contractor to remove and replace the Contractor's Superintendent, Project Manager, Quality Control Manager and/or any of the Contractor's key project personnel, at no additional cost to the Owner, if the Contractor fails to maintain good order and discipline at the Site under Subsection 5.3.3, if any key personnel proves to be unsatisfactory under Subsection 5.4.2, or if personnel are not properly qualified as required by Subsection 5.5.5. The Owner has the right to require the removal and replacement of any Subcontractor or Supplier as provided in Subsections 6.1.5 and 6.1.6.

**15.1.6 Stopping or Suspending the Work.** The Owner has the right to order the Contractor to stop the Work as provided in Subsection 11.4.1 or to suspend the Work as provided in Subsection 11.4.2.

**15.1.7 Correction of Defective Work by Owner.** The Owner has the right to correct rejected or nonconforming or defective Work as provided in Subsection 10.6.6.

**15.1.8 Cleaning Up.** If the Contractor fails to clean up as provided in the Contract Documents, the Owner may do so as provided in Subsection 5.6.7.

**15.1.9 Owner Takeover.** If the Contractor defaults or otherwise neglects to carry out or complete the Work or a designated portion thereof in accordance with the Contract Documents, whether before or after Substantial Completion, the Owner may include with any notice of default in the performance of such Work, notice of the Owner's intent to remedy the default and perform the Work itself or with other forces, if not remedied by the Contractor within the time specified in the notice, in which case an appropriate Change Order will be issued deducting from payments then or thereafter due the Contractor the cost of correcting the deficiencies or completing such Work, including compensation for the Owner's and the Architect/Engineer's additional services made necessary by such default, neglect or failure. If payments then or thereafter due the Contractor are not sufficient to cover such amounts, the Contractor must pay the difference to the Owner upon written demand.

#### 15.2 TERMINATION BY OWNER FOR CONVENIENCE

**15.2.1 Owner's Right to Terminate for Convenience.** The Owner may, at any time, terminate the Contract or any portion thereof or of the Work for the Owner's convenience and without cause.

**15.2.2 Action by Contractor Upon Notice.** Upon receipt of written notice from the Owner of termination, the Contractor must:

## General Conditions of Construction Contract - GCCC

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- .1 Cease operations as directed by the Owner in the notice and, if required by the Owner, participate in an inspection of the Work with the Owner and the Architect/Engineer to record the extent of completion thereof, to identify the Work remaining to be completed or corrected, and to determine what temporary facilities, tools, equipment and construction machinery are to remain at the Site pending completion of the Work;
- .2 Complete or correct the items directed by the Owner, and take actions necessary, or that the Owner may direct, for the protection and preservation of any stored materials and equipment and completed Work;
- .3 Unless otherwise directed by the Owner, remove its tools, equipment and construction machinery from the Site, and
- .4 Except as directed by the Owner, terminate all existing subcontracts and purchase orders related to the Work and enter into no further subcontracts or purchase orders therefor.

**15.2.3 Action by Owner Following Notice.** Following written notice from the Owner of termination, the Owner may:

- .1 Take possession of the Site and of all materials and equipment thereon, and at the Owner's option, such temporary facilities, tools, construction equipment and machinery thereon owned or rented by the Contractor that the Owner elects to utilize in completing the Work;
- .2 Accept assignment of subcontracts and purchase orders as provided in Section 6.4, and
- .3 Complete the Work by whatever reasonable method the Owner may deem expedient.

**15.2.4 Contract Adjustments.** In case of termination for the Owner's convenience, the Contractor will be entitled to compensation only for the following items:

- .1 Payment for acceptable Work performed up to the date of termination;
- .2 The costs of preservation and protection of the Work if requested to do so by the Owner;
- .3 The cost of terminating the following contracts including:
  - (i.) Purchased materials but only if not returnable and provided to the Owner, or

the restocking or return charge, if any, if returnable at the Owner's written election;

- (ii.) Equipment rental contracts if not terminable at no cost but not to exceed an amount equal to thirty (30) days rental;

- .4 Documented transportation costs associated with removing Contractor-owned equipment;
- .5 Documented demobilization and close-out costs; and
- .6 Overhead and profit on the foregoing not to exceed ten (10%) percent.

The Contractor will not be compensated for the cost of terminating subcontracts which must be terminable at no cost to the Owner if the Contract is terminated. The Contractor will not be compensated for the cost of any idled employees unless the employee is under a written employment contract entitling the employee to continued employment after termination of the Contract and the employee cannot be assigned to other work provided that in all events the Contractor's costs must be limited to thirty (30) days of employment costs from the date of the notice of termination. **The Contractor is not entitled to any other costs or compensation (including lost or expected profit, uncompensated overhead or related expenses, or the cost of preparing and documenting its compensable expenses under this Subsection 15.2.4 as a consequence of the Owner's termination of the Contract for convenience. The Contractor conclusively and irrevocably waives its right to any other compensation or damages (compensatory or punitive) arising from termination of the Contract.** If the Owner and the Contractor are unable to agree upon the amounts specified in this subsection, the Contractor may submit a Claim as provided in Article 16. The Claim must be limited to resolution of the amounts specified in Subsections 15.2.4.1, 15.2.4.2, 15.2.4.3 and 15.2.4.4 of this Subsection 15.2.4. **No other cost, damages or expenses may be claimed or paid to the Contractor or considered as part of the Claim, the same being hereby conclusively and irrevocably waived by the Contractor.** Any such Claim must be filed with the Director within thirty (30) days of the termination of the Contract and must contain a written statement setting forth the specific reasons and supporting calculations as to the amounts the Contractor claims to be entitled to under this Subsection, all with supporting documentation of all cost claimed as a result of the termination of the Contract.

**15.2.5 Obligations to Continue.** The Contractor's obligations surviving final payment under the Contract, including without limitation those with respect to



## General Conditions of Construction Contract - GCCC

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insurance, indemnification, and correction of Work which has been completed at the time of termination, remains effective notwithstanding termination for convenience of the Owner.

### **15.3 TERMINATION BY THE OWNER FOR CAUSE**

**15.3.1 Owner's Right to Terminate for Cause.** The Owner may terminate the Contract for cause for any of the reasons set forth in the following Subsection 15.3.2.

**15.3.2 Grounds for Termination.** The Owner has the right to terminate the Contract for cause if the Contractor:

- .1 Fails to supply adequate properly skilled workers or proper materials;
- .2 Fails to make payment to Subcontractors or Suppliers for materials or labor in accordance with the respective agreements between the Contractor and the Subcontractors or Suppliers;
- .3 Fails to comply with any laws, ordinances, or rules, regulations or orders of a public authority having jurisdiction;
- .4 Fails to perform the Work in accordance with the Contract Documents or otherwise breaches any provision of the Contract Documents;
- .5 Files for bankruptcy (voluntary or involuntary);
- .6 Is guilty of an anticipatory breach or repudiation of the Contract;
- .7 Fails to make satisfactory progress in the prosecution of the Contract; or
- .8 Endangers the performance of this Contract.

**15.3.3 Notice of Termination.** The Director may terminate the Contract, in whole or in part, whenever the Director determines that sufficient grounds for termination exist as provided in Subsection 15.3.2. The Director will provide the Contractor with a written notice to cure the default. If the default is not cured, the termination for default is effective on the date specified in the Director's written notice. However, if the Director determines that default contributes to the curtailment of an essential service or poses an immediate threat to life, health, or property, the Director may terminate the Contract immediately upon issuing oral or written notice to the Contractor without any prior notice or opportunity to cure. In addition to any other remedies provided by law or the Contract, the Contractor must compensate the Owner for additional costs that foreseeably would be incurred by the Owner, whether the costs are actually incurred or not, to obtain substitute performance. A

termination for default is a termination for convenience if the termination for default is later found to be without justification.

**15.3.4 Action by Contractor and Owner.** Upon termination for cause, the Contractor must take those actions described in Subsection 15.2.2, and the Owner may take those actions described in Subsection 15.2.3, subject to the prior rights of the Contractor's Surety.

**15.3.5 Suspension of Payments.** When the Owner terminates the Contract for cause, the Contractor is not entitled to receive further payment until the Work is completed and the costs of completion have been established.

**15.3.6 Adjustments and Payments.** If the unpaid balance of the Contract Sum less amounts which the Owner is entitled to offset from the unpaid Contract balance including actual or Liquidated Damages, exceeds the costs of completing the Work, including compensation for the Owner's and the Architect/Engineer's services made necessary thereby, such excess will be paid to the Contractor or Surety, as directed by the Surety. If such costs exceed the unpaid Contract balance, the Contractor must pay the difference to the Owner upon written demand. This obligation for payment survives termination of the Contract.

**15.3.7 Right to Take Other Low Bid.** In completing the Work following termination for cause or for convenience, the Owner is not required to solicit competitive bids or to award completion work to the lowest bidder, but may obtain such completion work and related services on the basis of sole source procurement and negotiated compensation.

**15.3.8 Termination As If For Convenience.** If, after termination of the Contract, it is determined that the Owner did not have sufficient grounds to terminate for cause, the rights and obligations of the parties will be the same as if the termination had been issued for the convenience of the Owner, and the provisions of Section 15.2, including Subsection 15.2.4, will apply.

### **15.4 CONTRACTOR'S NO RIGHT TO STOP WORK**

The Contractor has no right to stop Work as a consequence of non-payment. In the event of any disagreement between the Contractor and Owner involving the Contractor's entitlement to payment, the Contractor's only remedy is to file a Claim in accordance with Article 16. The Contractor must diligently proceed with the Work pending resolution of the Claim, Dispute and/or Dispute Appeal. If, however, an Application for Payment has been approved for payment by the Owner, and the Owner fails to make payment within sixty (60)

days of the approval for payment by the Owner, the Contractor may upon ten (10) days written notice to the Owner, stop work if payment is not made by the Owner within ten (10) days following the notice.

## **ARTICLE 16**

### **CLAIMS, DISPUTES, AND DISPUTE APPEALS**

#### **16.1 CLAIM**

A Claim is a written request by the Contractor that seeks the payment of money, an adjustment of time, an adjustment or interpretation of a Contract provision, or other relief arising under or relating to the Contract. Claims include all requests for additional Contract Time and/or Contract Sum in accordance with Articles 11 and/or 12.

A Claim must be filed, in writing, with the Contract Administrator within the time and containing the information required in:

- .1 Section 11.6, as to an excusable or compensable delay;
- .2 Subsection 12.2.5, as to a unilateral Change Order;
- .3 Subsection 12.5.1, as to a Constructive Change;
- .4 Subsection 12.3.5 as to a unilateral Field Order;
- .5 Subsections 12.4.3, 12.4.4 and 12.5.1 as to differing Site and Structural conditions; and
- .6 Subsection 15.2.4 as to a disagreement arising from termination of the Contract.

As to a disagreement over interpretation of a Contract provision or the Contract Documents, the Contractor must file a Claim within ten (10) days of issuance or statement of the contrary interpretation by Owner.

As to any other Claim arising under or relating to the Contract, the Work or the Project, the Contractor must file a Claim within ten (10) days of the event giving rise to the Claim, unless otherwise specified in the Contract Documents.

A Claim will be deemed to have been conclusively waived by the Contractor if it is not filed within the specified time or it does not contain the required information.

#### **16.2 CONTRACT ADMINISTRATOR'S DECISION ON CONTRACTOR'S CLAIM**

The Contract Administrator is responsible for issuing decisions on Claims. The Contract Administrator's final decision on a Claim shall be considered an event giving

rise to a Dispute and the Contractor must file any Dispute within the time period stated in Section 16.3 from the date of the Contract Administrator's final decision.

Any dispute arising under this Contract that is not disposed of by agreement must be decided under the Montgomery County Code and the Montgomery County Procurement Regulations. Pending final resolution of a dispute, the Contractor must proceed diligently with Contract performance. Subject to subsequent revocation or alteration by the Director, the head of the County department, office or agency ("Department Head") of the Contract administrator is the designee of the Director, for the purpose of dispute resolution. The Department Head or his/her designee, must forward to the Director, a copy of any written resolution of a dispute. The Department Head may delegate this responsibility to another person (other than the Contract Administrator). A Contractor must notify the Contract administrator of a claim in writing and must attempt to resolve a claim with the Contract administrator prior to filing a dispute with the Director, or designee. The Contractor waives any dispute or claim not made in writing and received by the Director, within 30 days of the event giving rise to the dispute or claim, whether or not the Contract Administrator has responded to a written notice of claim or resolved the claim. The Director, must dismiss a dispute that is not timely filed. A dispute must be in writing, for specific relief, and any requested relief must be fully supported by affidavit of all relevant calculations, including cost and pricing information, records, and other information. At the Owner's option, the Contractor agrees to be made a party to any related dispute involving another Contractor.

#### **16.3 DISPUTE**

A Dispute means an unresolved Claim. If a Contractor's Claim is denied, in whole or in part, by the Contract Administrator, the Contractor must file any Dispute the Contractor may wish to take, with the Director, within thirty (30) days of the event giving rise to the Dispute. The Contractor waives any Dispute not timely filed. The Director must dismiss a Dispute that is not timely filed.

#### **16.4 APPEAL OF THE DIRECTOR'S DECISION (DISPUTE APPEAL).**

The Director must decide a Dispute within 45 days after receiving the Dispute unless the Contractor agrees to extend the time for a decision. If the Director denies a Dispute, in whole or in part, the Contractor may file a Dispute Appeal with the Chief Administrative Officer for Montgomery County, Maryland. The Contractor must file a Dispute Appeal within 30 days after receiving the

## General Conditions of Construction Contract - GCCC

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Director's decision, or if no decision is rendered by the Director within 45 days, within 75 days after submitting the Dispute. The Dispute Appeal will thereafter be resolved as provided by Section 11B-35 of the Montgomery County Code and Section 14.2 of the Montgomery County Procurement Regulations or their respective successor provisions. Article 16 is the Contractor's sole and exclusive remedy for resolution of any and all Disputes arising under or relating in any way to the Contract, the Work or the Project. The deadlines set forth in Article 16 and in the Montgomery County Code and Procurement Regulations are jurisdictional and if not complied with will result in denial and dismissal of the Dispute and Dispute Appeal.

### **16.5 INCORPORATION OF THE MONTGOMERY COUNTY CODE AND PROCUREMENT REGULATIONS**

All Disputes must be decided under the Montgomery County Code and the Montgomery County Procurement Regulations which is the Contractor's sole and exclusive remedy for resolving Disputes under this Contract.

## **ARTICLE 17**

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### **INSURANCE AND BONDS**

#### **17.1 PERFORMANCE AND PAYMENT BONDS**

**17.1.1 Requirement for Bonds.** For construction Contracts exceeding one hundred thousand dollars (\$100,000.00) in amount, the Contractor must furnish a performance bond and a payment bond, each in an amount equal to ninety five percent (**95%**) of the Contract Sum as security for the faithful performance of the Contract and as security for the payment of all persons performing labor and furnishing materials in connection with the Work; for construction Contracts exceeding fifty thousand dollars (\$50,000.00) but not exceeding one hundred thousand dollars (\$100,000.00) the Contractor must furnish a performance bond and a payment bond, each in an amount equal to fifty percent (50%) of the Contract Sum as security for the faithful performance of the Contract and as security for the payment of all persons performing labor and furnishing materials in connection with the Work. The performance bond and the payment bond must be in such form as the Owner may require and must be delivered to the Owner prior to execution of the Contract by the Owner. The Surety must be acceptable to the Owner and must be approved to transact business in the State of Maryland. No bond will be required for Contracts under fifty thousand dollars (\$50,000.00). **The Contractor shall also be required, at no cost to the Owner, to provide Performance and Payment Bonds required by any utilities for performance of any utility Work or Work on utility lines or within utility easements.**

#### **17.1.2 Copies to be Furnished to Beneficiaries.**

Upon the request of any person or entity appearing to be a potential beneficiary of bonds covering payment of obligations arising under the Contract, the Contractor must promptly furnish a copy of the bonds to such person or entity.

#### **17.1.3 Owner's Right to Require Additional Bonds.**

The Owner has the right to require the Contractor, or any Subcontractor or Sub-subcontractor under any contract over \$50,000.00 in amount, to furnish such additional bonds as are reasonably required by the Owner, the cost of which will be borne by the Owner, unless otherwise specified in the Contract Documents.

### **17.2 CONTRACTOR'S LIABILITY INSURANCE**

#### **17.2.1 Requirement for Insurance.**

The Contractor must purchase from and maintain with a company or companies licensed to do business in the State of Maryland such insurance as will protect the Contractor from claims set forth in Subsection 17.2.2 which may arise out of or result from the Contractor's operations under the Contract and for which the Contractor may be legally liable, whether such operations be by the Contractor or by a Subcontractor, Supplier, or Sub-subcontractor or by anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable.

**17.2.2 Scope of Coverage.** The scope of the Contractor's liability insurance coverage must include the following:

- .1 Claims under workers' compensation, disability benefit and other similar employee benefit acts which are applicable to the Work to be performed;
- .2 Claims for damages because of bodily injury, occupational sickness or disease, or death of the Contractor's employees;
- .3 Claims for damages because of bodily injury, sickness or disease, or death of any person other than the Contractor's employees;
- .4 Claims for damages from personal injury which are sustained (i) by a person as a result of an offense directly or indirectly related to employment of such person by the Contractor, or (ii) by another person;
- .5 Claims for damages, other than to the Work itself, because of injury to or destruction of tangible property, including loss of use resulting therefrom;
- .6 Claims for damages because of bodily injury, death of a person or property damage arising

## General Conditions of Construction Contract - GCCC

out of ownership, maintenance or use of a motor vehicle; and

- .7 Claims for which the Contractor is obligated to indemnify others under the requirements of Section 8.4.

**17.2.3 Additional Insureds.** The Owner and the Architect/Engineer and any additional consultants of either who are identified to the Contractor in writing must be included as additional insureds by endorsement to the policies.

**17.2.4 Insurance Coverage and Limits of Liability.** The insurance coverage and limits required by Subsections 17.2.1 and 17.2.2 must be written for not less than limits of liability specified in the Contract Documents or required by law, whichever is greater.

**17.2.5 Duration of Coverage.** Coverages, whether written on an occurrence or claims-made basis, must be maintained without interruption from Notice to Proceed until Final Completion or subsequent termination of any coverage required by the Contract Documents to be maintained after final payment.

**17.2.6 Notice of Cancellation, Expiration or Non-renewal.** The insurance policies required by this Section 17.2 must contain a provision that coverages afforded under the policies will not be canceled or allowed to expire until at least sixty (60) days prior written notice has been given to the Owner. The Certificates of Insurance and certified copies of the policies furnished by the Contractor to the Owner under the following Subsection 17.2.7 must evidence compliance with this requirement. The Contractor must promptly furnish to the Owner any information of which it is aware concerning reduction or lapse including non-renewal of coverage.

**17.2.7 Certificates and Policies of Insurance.** Certificates of Insurance acceptable to the Owner and evidencing compliance with this Section 17.2 must be filed with the Owner prior to commencement of the Work. **At the request of the Owner throughout the Contract term, the Contractor must promptly submit certified copies of such policies.** If any of the insurance coverages are required to remain in force after final payment, additional certificates evidencing continuation of such coverage must be submitted with the Contractor's final Application for Payment.

**17.2.8 Acceptance or Approval by Owner.** The form and substance of all insurance policies required to be obtained by the Contractor are subject to the approval of the Owner.

### 17.3 PROPERTY INSURANCE

**17.3.1 Owner's Coverage Limited. The Owner does not provide property insurance coverage for the**

**Work or the Project. The Owner's property insurance specifically excludes coverage of projects under construction, renovations or supplies, materials and equipment stored at the Site for incorporation into the Work.**

**17.3.2 Builder's All Risk Property Insurance Coverage to Be Provided by Contractor.** The Contractor must provide Builder's All Risk Property Insurance with a company or companies lawfully authorized to do business in the State of Maryland. This insurance must include the interests of the Owner, the Contractor and its Subcontractors, Sub-subcontractors and Suppliers.

**17.3.3 Policy Form.** Builder's All Risk Property Insurance must be written on a Risk of Loss basis (Special Coverage) including collapse and debris removal, on a Completed Value form of policy. Cost for reasonable compensation for the Architect/Engineer's services and expenses required as a result of such insured loss must be included as part of the amount of insurance.

**17.3.4 Amount of Coverage.** The Builder's All Risk Property Insurance policy furnished by the Contractor must be written in an amount equal to one hundred percent (100%) of the insurable value of the Work as well as subsequent modifications thereto for the entire Work at the Site.

**17.3.5 Scope of Coverage.** The Builder's All Risk Property Insurance policy furnished by the Contractor must include coverage for items of labor and materials in place or to be used as part of the permanent Work, including surplus materials, temporary structures, and miscellaneous materials and supplies incidental to the Work.

**17.3.6 Work Stored or in Transit.** Unless otherwise provided in the Contract Documents, the Builder's All Risk insurance must cover portions of the Work stored off the Site pursuant to the written approval of the Owner at the value established in the approval or if not established in the approval notice, at one hundred percent (100%) of the replacement value, and also portions of the Work in transit.

**17.3.7 Duration of Builder's All Risk Property Insurance Coverage.** Such Builder's All Risk Insurance must be maintained, unless otherwise provided in the Contract Documents or otherwise agreed in writing by all persons and entities who are beneficiaries of such insurance, until Substantial Completion.

**17.3.8 Notice of Cancellation, Expiration or Non-renewal.** The Builder's All Risk policy furnished by the Contractor must contain a provision that coverages

## General Conditions of Construction Contract - GCCC

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afforded under the policy will not be cancelled or allowed to expire until at least sixty (60) days' prior written notice has been given to the Owner. The policies and Certificates of Insurance furnished by the Contractor to the Owner under the following Subsection 17.3.9 must evidence compliance with this requirement. The Contractor must promptly furnish to the Owner any information of which it is aware concerning reduction or lapse including non-renewal of coverage.

### **17.3.9 Certificates and Policies of Insurance.**

Certificates of Insurance acceptable to the Owner and evidencing compliance with this Section 17.3 must be filed with the Owner along with a certified copy of the Builder's All Risk policy prior to commencement of the Work and as requested by the Owner, during the Work. If the insurance coverages are required to remain in force after final payment, additional certificates evidencing continuation of such coverage must be submitted with the Contractor's final Application for Payment.

**17.3.10 Absence of Coverage.** If the Contractor is unable to purchase such insurance required by the Contract and with all of the coverages described in this Article 17, and in the amounts specified in the Contract Documents, the Contractor must so inform the Owner in writing prior to commencement of the Work. The Owner may then obtain insurance which will protect its interests and those of the Contractor, Subcontractors, Sub-subcontractors and Suppliers in the Work, and the cost thereof will be charged to the Contractor. If the Owner is damaged by the failure or neglect of the Contractor to purchase or maintain insurance as described above, without so notifying the Owner, then the Contractor must bear all reasonable costs properly attributable thereto.

## **17.4 OTHER INSURANCE**

**17.4.1 Owner's Liability Insurance.** The Owner is responsible for purchasing and maintaining its own liability insurance and, at its option, may purchase or self-insure and maintain other insurance to protect itself against claims which may arise from operations under the Contract. The Contractor is not responsible for purchasing and maintaining such Owner's liability insurance unless specifically required by the Contract Documents.

**17.4.2 Boiler and Machinery Insurance.** The Owner, at its option, after Substantial Completion or acceptance of a portion of the Work, and until final acceptance, may require the Contractor to extend or purchase boiler and machinery insurance to cover such boilers and machinery, the cost of which will be borne by the Contractor.

**17.4.3 Insurance Covering Partial Use or Occupancy.** Partial occupancy or use in accordance

with Section 14.1 will not commence until the insurance company or companies providing property insurance have consented to such partial occupancy or use by endorsement or otherwise. The Owner and the Contractor will take reasonable steps to obtain consent of the insurance company or companies and will not, without mutual written consent, take any action with respect to partial occupancy or use that would cause cancellation, lapse or reduction of insurance.

**17.4.4 Other Insurance Required by Owner.** The Owner has the right to require the Contractor, or any Subcontractor or Sub-subcontractor, to furnish such additional insurance coverage as is reasonably required by the Owner. The additional costs of such insurance will be borne by the Owner, unless otherwise specified in the Contract Documents, who will issue an appropriate Modification to the Contract adjusting the Contract Sum. If the Contractor disagrees with the adjustment made in the Contract Sum, the Contractor must file a Claim as and when provided in Article 16. A claim for an increase in the Contract Sum, to be valid, must further be documented and calculated as specified in Subsection 12.2.2. **Failure of the Contractor to file a Claim as and when specified in this Subsection is deemed a waiver of any claim by the Contractor to an adjustment in the Contract Sum.**

## **17.5 GENERAL PROVISIONS**

**17.5.1 Adjustment of Insured Losses by Owner.** A loss insured under the Builder's All Risk insurance will be adjusted by the Owner and the Contractor and made payable to the Owner as fiduciary for the insureds, as their interests may appear.

**17.5.2 Distribution of Proceeds by Owner and Contractor.** Upon the settlement of an insured loss, the Owner will deposit in a separate account proceeds received, which the Owner will distribute in accordance with such agreement as the parties in interest may reach, or in accordance with a final determination under the disputes provisions of Article 16. The Owner, during the pendency of any such dispute, in its discretion, may apply the proceeds to the reconstruction of the Work, and to payment of the Owner's extended performance costs including but not limited to Liquidated Damages, A/E and staff costs and loss of use costs. The Contractor must pay Subcontractors their just shares of insurance proceeds received by the Contractor, and by appropriate written agreements must require Subcontractors to make payments to their Sub-subcontractors in similar manner.

## **ARTICLE 18**

### **NONDISCRIMINATION IN EMPLOYMENT**

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# General Conditions of Construction Contract - GCCC

The Contractor agrees to comply with the nondiscrimination in employment policies and provisions prohibiting unlawful employment practices in Montgomery County contracts as required by Section 11B-33 and Section 27-19 of the Montgomery County Code, as well as all other applicable state and federal laws and regulations regarding employment discrimination. The Contractor assures the Owner that, in accordance with applicable law, it does not, and agrees that it will not discriminate in any manner on the basis of race, color, religious creed, ancestry, national origin, age, sex, marital status, disability, or sexual orientation. The Contractor must bind its Subcontractors to the provisions of this Article 18; and by appropriate written agreements must require subcontractors to similarly bind their sub-subcontractors to the provisions of this Article 18.

## ARTICLE 19

### STATUTORY REQUIREMENTS

#### 19.1 ETHICS REQUIREMENTS/POLITICAL CONTRIBUTIONS

The Contractor must comply with the ethics provisions contained in chapters 11B and 19A, Montgomery County Code, which include the following: (i) a prohibition against making or offering to make certain gifts, Section 11B-51(a); (ii) a prohibition against kickbacks, Section 11B-51(b); (iii) a prohibition against a person engaged in a procurement from employing or offering to employ a public employee, Section 11B-52(a); (iv) a prohibition against a contractor that is providing a recommendation to Montgomery County from assisting another party or seeking to obtain an economic benefit beyond payment under the contract Section 11B-52(b); (v) a restriction on the use of confidential information obtained in performing a contract, Section 11B-52(c); (vi) a prohibition against contingent fees, Section 11B-53. Furthermore, the Contractor specifically agrees not to violate Sections 11B-51, 11B-52, 11B-53, 19A-12 and/or 19A-13 of the Montgomery County Code. In addition, the Contractor must comply with the political contribution reporting requirements currently codified under Title 14 of Article 33 of the Annotated Code of Maryland.

**19.1.1 Non-Conviction of Bribery.** The Contractor hereby declares and affirms that, to its best knowledge, none of its officers, directors, or partners or employees directly involved in obtaining Contracts has been convicted of bribery, attempted bribery, or conspiracy to bribe under any federal, state, or local law.

#### 19.2 MINORITY CONTRACTING

**19.2.1 Policy.** Pursuant to Section 11B-57 of the Montgomery County Code, it is the policy of the Owner to actively recruit minority businesses to provide goods and services for the performance of governmental functions. Minority-owned businesses are described in Montgomery County law as Minority/Female/Disabled-owned businesses (MFD). MFD businesses include certain non-profit entities organized to promote the interest of persons with a disability demonstrating (on a contract-by-contract basis) that at least 51% of the persons used by the non-profit entity to perform the services or manufacture the goods contracted for by the Owner, are persons with a disability. MFD firms also include firms that are 51% owned, controlled and managed by one or more member(s) of socially or economically disadvantaged minority groups, which include: African-Americans (not of Hispanic origin), Hispanic Americans, Native Americans, Asian Americans, women and the mentally or physically disabled.

**19.2.2 Applicable Regulations.** Montgomery County Procurement Regulations, Section 7, "Minority Contracting," (COMCOR 11B.00.01.07 *et seq.*) delineate the procedure to be followed. A copy of Section 7 of the Procurement Regulations is available on request.

**19.2.3 Minority Business Addendum.** The Minority Business Addendum, PMMD 91, is incorporated into and made a part of the Contract.

#### 19.3 AMERICAN STEEL

**19.3.1 American Steel.** To the extent required in Md. Code Ann., State Fin. & Proc., §17-303 (2006 Repl. Vol.), Contractor must use or supply only American steel products; provided, however, Contractor must notify Owner if Owner is entitled to an exception under Section 17-303 because:

- .1 The price of American steel products is not reasonable as provided in Md. Code Ann., State Fin. & Proc., §17-304 (2006 Repl. Vol.);
- .2 American steel products are not produced in sufficient quantity to meet the requirements of the Contract; or
- .3 The purchase of American steel products would be inconsistent with the public interest.

**Should Contractor fail to notify Owner as required by this Subsection, Owner is entitled to a reduction in the total cost of the Contract by an amount equal to the savings which would have resulted had Owner not bought American steel products.**

#### 19.4 PREVAILING WAGE

## General Conditions of Construction Contract - GCCC

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### 19.4.1 State of Maryland

If the funds for the Project are less than fifty percent (50%) State money, the Contractor is excused from performing all acts required of a Contractor under Md. Code Ann., State Fin. & Proc., §17-201 et seq. (2006 Repl. Vol.), otherwise the Contractor must perform all acts required by that law and refrain from doing all acts prohibited by that law, unless therein exempted or excluded. It is the Contractor's responsibility to determine from the Owner the percentage of State money allocated to the Work.

### 19.4.2 Montgomery County

The Contractor and all tiers of Subcontractors and Sub-subcontractors must comply with the Prevailing Wage Law contained in Chapters 11B-33C, and 20-75 of the Montgomery County Code and the requirements set forth below:

- .1 Prevailing wage means the wage rate paid by employers that is determined by a governmental authority, based upon a particular geographic area, for a given class of labor and type of project;
- .2 The purpose of a prevailing wage is to ensure that construction workers who work on public work contracts are paid the going rate for their services.
- .3 The prevailing wage rates are established by the State of Maryland and apply to all of the Contractor's employees and any and all Subcontractors and Sub-subcontractors.
- .4 The wage rates in effect, at the time the Owner issued the solicitation, are valid for the duration of the Contract.
- .5 The Contractor and all Subcontractors and Sub-subcontractors must pay employees the prescribed wage rates, as established by the State of Maryland Commissioner of Labor and Industry, in effect at the time the Owner issued the solicitation.
- .6 The Contractor and all Subcontractors and Sub-subcontractors must pay employees overtime for work more than 10 hours in any single day, work more than 40 hours in a work week, or work on Sunday or legal holiday;
- .7 The Contractor and all Subcontractors and Sub-subcontractors must classify employees in their proper work classification in conformance with the schedule established by the State of Maryland Commissioner of Labor and Industry;

- .8 The Contractor and all Subcontractors and Sub-subcontractors must electronically submit payroll records through [www.LCPTracker.net](http://www.LCPTracker.net), within 14 days after the end of each payroll period, to verify that Prevailing Wage rates have been paid to employees. The payroll records must include the following:

The name, address and telephone number of the Contractor or Subcontractor;  
The name and location of the job;  
Each employee's:  
Name;  
Current address unless previously reported;  
Specific work classification;  
Daily straight time and overtime hours;  
Total straight time and overtime hours for the payroll period;  
Rate of pay;  
Fringe benefits by type and amount;  
and  
Gross wages.

- .9 If a Contractor and any of the Subcontractors and Sub-subcontractors are late in submitting copies of any payroll records required to be submitted under the Prevailing Wage Law, the Owner may deem invoices unacceptable until the Contractor, Subcontractors and Sub-subcontractors provide the required records, and may postpone processing payments due under the Contract or under an agreement to finance the Contract;
- .10 The Contractor, Subcontractors and Sub-subcontractors must retain all payroll records for a period not less than five (5) years after the Work is completed;
- .11 The Owner may inspect the payroll records at any reasonable time and as often as necessary;
- .12 The Owner and/or its agent may perform random or regular audits and investigate any complaint of a violation of the Prevailing Wage Law;
- .13 In the event the Owner determines that a provision of the Prevailing Wage Law has been violated, the Owner may withhold payment to the Contractor sufficient to pay each employee of the Contractor or any Subcontractors and Sub-subcontractors the

## General Conditions of Construction Contract - GCCC

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- full amount of wages due under the Prevailing Wage Law and an amount sufficient to satisfy a liability of a Contractor, Subcontractors, or Sub-subcontractors for liquidated damages as provided under the Prevailing Wage Law, pending a final decision on the violation by the Owner;
- .14 Contractor may appeal a written decision of the Director, Office of Procurement, that the Contractor violated a provision of the Prevailing Wage Law to the Chief Administrative Officer ("CAO") within ten (10) days after receiving a copy of the decision. The CAO must designate a hearing officer to conduct a hearing upon receipt of a timely appeal. If the Contractor does not appeal a written decision within ten (10) days after receipt, the decision of the Director, Office of Procurement, becomes final and binding;
  - .15 Contractor and all Subcontractors and Sub-subcontractors must not discharge or otherwise retaliate against an employee for asserting any right under the Prevailing Wage Law or for filing a complaint of a violation;
  - .16 Each Contract subject to the Prevailing Wage Law may specify the payment of liquidated damages to the County by the Contractor and any Subcontractors and Sub-subcontractors for any noncompliance with the Prevailing Wage Law. Liquidated damages for this Contract are: \$10 for each calendar day that the payroll records are late; \$20 per day for each day that an employee is misclassified; and \$50 per violation of the requirement to post the prevailing wage rates at the work site;
  - .17 The failure of the Contractor and any of the Subcontractors and Sub-subcontractors to comply with the Prevailing Wage Law constitutes a material default under the Contract;
  - .18 "An aggrieved employee" is a third-party beneficiary of this Contract and the employee may by civil action recover the difference between the prevailing wage for the type of work performed and the amount actually received, with interest and a reasonable attorney's fee; and
  - .19 Where the initial Contract Sum is below the \$500,000.00 threshold, but it is subsequently increased and exceeds the \$500,000.00 threshold due to an approved Contract Modification, the amount of any such Contract

Modification that causes the Contract Sum to exceed the \$500,000.00 threshold is subject to the Prevailing Wage Law.

- .20 The Contractor, Subcontractors and Sub-subcontractors must post a clearly legible statement of each prevailing wage rate in a prominent and easily accessible place at the Work Site during the entire time Work is being performed, in English and any other language that is primarily spoken by the employees, at the Work Site.

**19.4.3 Bond.** If required to comply with Md. Code Ann., State Fin. & Proc., § 17-213(b), the Contractor must provide a suitable bond or guarantee, in a form approved by Owner, to insure the proper payment of the prevailing wage as required thereunder.

### **19.5 COST AND PRICING DATA**

Chapter 11B of the Montgomery County Code and the Montgomery County Procurement Regulations require that cost and pricing data be obtained from contractors in certain situations. The Contractor guarantees that any cost and pricing data provided to the Owner will be accurate and complete. The Contractor grants the Director access to all books, records, documents, and other supporting data in order to permit adequate evaluation of the Contractor's proposed price(s). The Contractor also agrees that, in addition to all other remedies, the price to the Owner, including profit or fee, may, at the option of the Owner, be reduced to the extent that the price was based on inaccurate, incomplete, or noncurrent data supplied by the Contractor.

### **19.6 HAZARDOUS AND TOXIC SUBSTANCES**

Manufacturers and distributors are required by federal "Hazard Communication" provisions (29 CFR §1910.1200), and the Maryland "Access to Information About Hazardous and Toxic Substances" Law, to label each hazardous material or chemical container, and to provide Material Safety Data Sheets to the purchaser. The Contractor must comply with these laws and must provide the Owner with copies of all relevant documents, including Material Safety Data Sheets, prior to performance of services or contemporaneous with delivery of goods.

### **19.7 HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT (HIPAA) COMPLIANCE**

Contractor must comply with all requirements in the federal Health Insurance Portability and Accountability Act (HIPAA), to the extent that HIPAA is applicable to this Contract. Furthermore, Contractor must enter into



## General Conditions of Construction Contract - GCCC

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the Owner's standard Business Associate Agreement when Contractor or the Owner, as part of this Contract, may use or disclose to one another, to the individual whose health information is at issue, or to a third-party, any protected health information that is obtained from, provided to, made available to, or created by, or for, the Contractor or the Owner.

### **19.8 IMMIGRATION REFORM AND CONTROL ACT**

The Contractor warrants that both the Contractor and its Subcontractors do not, and shall not, hire, recruit or refer for a fee, for employment under this Contract or any Subcontract, an alien while knowing the alien is an unauthorized alien, or any individual without complying with the requirements of the federal Immigration and Nationality laws, including any verification and record keeping requirements. The Contractor further assures the Owner that, in accordance with those laws, it does not, and will not, discriminate against an individual with respect to hiring, recruitment, or referral for a fee, of an individual for employment or the discharge of an individual from employment, because of the individual's national origin or, in the case of a citizen or prospective citizen, because of the individual's citizenship status.

### **19.9 AMERICANS WITH DISABILITIES ACT**

The Contractor agrees to comply with the nondiscrimination requirements of Titles II and III, and other provisions, of the Americans with Disabilities Act of 1990, Pub. Law 101-336, and ADA Amendments Act of 2008, Pub. Law 110-325, as amended, currently found at 42 U.S.C., § 12101, et seq.

### **19.10 APPLICABLE LAWS**

This Contract must be construed in accordance with the laws and regulations of Maryland and Montgomery County. The Montgomery County Procurement Regulations are incorporated by reference into, and made a part of, this Contract. In the case of any inconsistency between this Contract and the Procurement Regulations, the Procurement Regulations govern. The Contractor must, without additional cost to the Owner, pay any necessary fees and charges, obtain any necessary licenses and permits, and comply with applicable federal, state and local laws, codes and regulations. For purposes of litigation involving this Contract, except for Contract Disputes discussed in paragraph 8 below, exclusive venue and jurisdiction must be in the Circuit Court for Montgomery County, Maryland or in the District Court of Maryland for Montgomery County.

Furthermore, certain non-profit and governmental entities may purchase supplies and services, similar in scope of work and compensation amounts provided for

in Owner's Contract, using their own Contract and procurement laws and regulations, pursuant to the Maryland State Finance and Procurement Article, Section 13-101, *et. seq.*

Contractor and all of its subcontractors must comply with the provisions of County Code §11B-35A and must not retaliate against a covered employee who discloses an illegal or improper action described in §11B-35A. Furthermore, an aggrieved covered employee under §11B-35A is a third-party beneficiary under this Contract, who may by civil action recover compensatory damages including interest and reasonable attorney's fees, against the Contractor or one of its subcontractors for retaliation in violation of that Section. (Effective June 28, 2010).

Contractor and all of its subcontractors must provide the same benefits to an employee with a domestic partner as provided to an employee with a spouse, in accordance with County Code §11B-33D. An aggrieved employee, is a third-party beneficiary who may, by civil action, recover the cash equivalent of any benefit denied in violation of §11B-33D or other compensable damages. (Effective January 1, 2011).

## **ARTICLE 20**

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### **MISCELLANEOUS PROVISIONS**

#### **20.1 MISCELLANEOUS PROVISIONS.**

**20.1.1 Assignment.** The Contractor may not assign any part of the Contract without written consent of the Owner which consent is within the Owner's sole discretion.

**20.1.2 Assignment of Payments.** In the event the Contractor desires to make an assignment of any monies due or to become due under the Contract, the Contractor must file a copy of consent of Surety and a fully executed copy of the assignment with the Owner and the Architect/Engineer. Any such assignment must be approved by the Director.

**20.1.3 Audit Provisions.** The Owner has the right to examine the Contractor's, its Subcontractors', Sub-subcontractors' and Suppliers' records directly or indirectly pertaining or relating to the Work or the Contract. The Owner must be granted access to and an opportunity to copy such records at all reasonable times during the Contract period and for three (3) years thereafter.

**20.1.4 Extent of Contract.** The Contract represents the entire and integrated agreement between the parties

## General Conditions of Construction Contract - GCCC

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hereto and supersedes prior negotiations, representations or agreements, either written or oral.

**20.1.5 Governing Law.** The Contract is governed by the laws of the State of Maryland and of Montgomery County, Maryland.

**20.1.6 Obligations Surviving Termination.** The Contractor's obligations under the correction of Work provisions of the Contract, Warranties, representations, indemnification obligations and other continuing obligations survive acceptance of the Work under the Contract and termination of the Contract; and do not relieve the Contractor of the Contractor's obligations thereunder.

**20.1.7 Severability of Provisions.** If any one or more of the provisions contained in the Contract Documents should be deemed invalid, illegal or unenforceable in any respect, the validity, legality, and enforceability of the remaining provisions contained herein are not to be affected or impaired thereby; provided the same does not materially alter the rights or obligations of the parties.

**20.1.8 Third Parties.** The Contract Documents are not to be construed to create a contractual relationship of any kind other than between the Owner and Contractor except as specified in Subsection 3.1.2.

**20.1.9 Venue and Jurisdiction.** The Contractor hereby waives venue and jurisdiction and submits to the venue and jurisdiction of the Circuit Court for Montgomery County, Maryland, relating to administrative appeals. **Any suit or action involving this Contract may only be brought in the Circuit Court for Montgomery County Maryland and only under the Maryland Rules governing administrative appeals, which along with Article 16 is the Contractor's sole and exclusive remedy for any and all Disputes arising under or relating in any way to the Contract, the Work or the Project.**

**20.1.10 Waiver of Breach.** Any action or failure to act by the Owner, Architect/Engineer or Contractor does not constitute a waiver of any of their rights or obligations under the Contract. No such action or failure to act, whether or not repeated, constitutes a continuing waiver of any requirements of the Contract or any approval of or acquiescence in any breach.

**20.1.11 Written Notice.** Written notices are to be given to the representatives of the parties designated in the Contract. Written notice are deemed to have been duly served if delivered in person to the addressee for which it was intended, or if delivered or sent by mail to the last business address known to the party giving notice, provided that if sent by mail it must be by first class mail postage prepaid except, if to the Owner in which case it must be by registered or certified mail. Any notice given

by facsimile or e-mail must be confirmed by a copy delivered personally or by mail, and in the case of the Owner, by registered or certified mail. The date of any notice is deemed to be the earlier of the date of personal delivery or receipt by facsimile or e-mail or similar means, or if mailed, the earlier of actual receipt or three (3) days after the postmark date.

### **20.1.12 Intellectual Property Approval And Indemnification – Infringement.**

If the Contractor will be preparing, displaying, publicly performing, reproducing, or otherwise using, in any manner or form, any information, document, or material that is subject to a copyright, trademark, patent, or other property or privacy right, then the Contractor must:

.1 At its expense obtain all necessary licenses, authorizations, and approvals related to its use;

.2 Include the Owner in any approval, authorization, or license related to its use at no cost to the Owner; and

.3 Indemnify and hold harmless the Owner from and against all liabilities, actions, damages, claims, demands, judgments, losses, costs, expenses, suits, or actions, and attorneys' fees and the costs of the defense of the Owner, in any suit, including appeals, based upon or arising out of any allegation of infringement, violation, unauthorized use, or conversion of any patent, copyright, trademark or trade name, license, proprietary right, or other related property or privacy interest.

### **20.1.13 ACCOUNTING SYSTEM AND AUDIT, ACCURATE INFORMATION**

The Contractor certifies that all information the Contractor has provided or will provide to the Owner is true and correct and can be relied upon by the Owner in awarding, modifying, making payments, or taking any other action with respect to this Contract including resolving claims and disputes. Any false or misleading information is a ground for the Owner to terminate this Contract for cause and to pursue any other appropriate remedy. The Contractor certifies that the Contractor's accounting system conforms with generally accepted accounting principles, is sufficient to comply with the Contract's budgetary and financial obligations, and is sufficient to produce reliable financial information.

The Owner may examine the Contractor's and any first-tier subcontractor's records to determine and verify compliance with the Contract and to resolve or decide any claim or dispute arising under this Contract. The

## General Conditions of Construction Contract - GCCC

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Contractor and any first-tier subcontractor must grant the Owner access to these records at all reasonable times during the Contract term and for 3 years after final payment. If the Contract is supported to any extent with federal or state funds, the appropriate federal or state authorities may also examine these records. The Contractor must include the preceding language of this paragraph in all first-tier subcontracts.

### **20.1.14 DURATION OF OBLIGATION**

The Contractor agrees that all of Contractor's obligations and warranties, including all requirements imposed by the Minority Owned Business Addendum to these General Conditions, if any, which directly or indirectly are intended by their nature or by implication to survive Contractor performance, do survive the completion of performance, termination for default, termination for convenience, or termination by mutual consent of the Contract.

### **20.1.15 ENTIRE AGREEMENT**

There are no promises, terms, conditions, or obligations other than those contained in this Contract. This Contract supersedes all communications, representations, or agreements, either verbal or written, between the parties hereto, with the exception of express warranties given to induce the Owner to enter into the Contract.

### **20.1.16 INDEPENDENT CONTRACTOR**

The Contractor is an independent Contractor. The Contractor and the Contractor's employees or agents are not agents of the Owner.

**END  
GENERAL CONDITIONS OF  
CONSTRUCTION CONTRACT.**