**GOVERNMENT OF THE DISTRICT OF COLUMBIA**
**DEPARTMENT OF GENERAL SERVICES**

**Addendum No. 4**
**To**
**CONSTRUCTION MANAGEMENT AT-RISK SERVICES**
**THE THADDEUS STEVENS SCHOOL**
**Solicitation No: DCAM-19-CS-RFP-0001**

**Issued: June 21, 2019**

This Addendum No. 4 is issued and hereby published on the DGS website on June 21, 2019. Except as modified hereby, the Request for Proposals ("RFP") remains unmodified.

**Item #1 The Due Date for Proposals is hereby extended to June 26, 2019 at 2:00 pm.**

**Item #2** Attachment L of the RFP (Form of Contract) is hereby attached as (Exhibit 1).

**By:** _____ **Date:** 06/21/2019
Ebti K. Hana
Contracting Officer

- End of Addendum No. 4 –

# Exhibit 1
# Attachment L of the RFP
# Form of Contract

**CONSTRUCTION MANAGEMENT AT-RISK AGREEMENT**
**THE THADDEUS STEVENS SCHOOL**

**BY AND BETWEEN**

**THE DEPARTMENT OF GENERAL SERVICES**

**AND**

**[INSERT CONTRACTOR]**

**CONTRACT NUMBER: DCAM-19-CS-RFP-0001**

## PROJECT INFORMATION

**A.** PROJECT SUMMARY

| | | |
|---|---|---|
| 1. | **Project Name:** | Construction Management-At-Risk<br>The Thaddeus Stevens School |
| 2. | **Project Address:** | 1050 21st Street, NW, Washington, DC 20036 |
| 3. | **Agreement Type:** | Construction Management At-Risk with Guaranteed Maximum Price |
| 4. | **Client Agency:** | District of Columbia Public Schools ("DCPS" or "Client Agency") |
| 5. | **Construction Manager:** | [CONTRACTOR] |
| 6. | **Agreement Amounts:** | |
| i. | **Initial NTE:** | $ |
| ii. | **Project Budget:** | $ |
| 7. | **Construction Manager Compensation:** | |
| i. | **Construction Management Fee:** | $ |
| ii. | **Base Construction Management Fee (60% of the Construction Management Fee):** | $ |
| iii. | **Preconstruction Fee (15% of the Base Construction Management Fee):** | |
| iv. | **At Risk Portion of the Construction Management Fee (40% of the Construction Management Fee):** | $ |
| v. | **Maximum Cost of General Conditions:** | $ |

| | | |
|---|---|---|
| vi. | **Contingency:** | To be determined at GMP |
| vii. | **Allowances:** | To be determined at GMP |
| 8. | **Liquidated Damages:** | |
| i. | **Failure to Submit Deliverables:** | $1,500 per deliverable per day |
| ii. | **Delay in Substantial Completion:** | $5,000/per calendar day |
| 9. | **GMP Proposal Submission** | July, 25, 2019 |
| 10. | **GMP Amendment Executed By:** | October 25, 2019 |
| 11. | **Substantial Completion Date:** | June 30, 2020 |
| 12. | **Final Completion Date:** | August 31, 2020 |
| 13. | **Administrative Term Expiration Date:** | The later of January, 29, 2021 or disbursement of Final Payment to Contractor. |
| 14. | **Key personnel removal or replacement disincentive** | $25,000 per person |
| 15. | **Letter Contract:** | |
| i. | **Period of Performance** | [INSERT DATE] through the earlier of [INSERT DATE] or the date of execution of Definitized Contract by the Department |
| ii. | **NTE Amount:** | $ |
| 16. | **GMP Basis Documents Design Progression** | Design Development Documents |
| i. | GMP Basis Documents must be submitted no later than | |

**CONSTRUCTION MANAGEMENT AT-RISK AGREEMENT**
**THE THADDEUS STEVENS SCHOOL**
**DCAM-19-CS-RFP-0001**

THIS AGREEMENT ("Agreement" or "Contract") is made by and between the DISTRICT OF COLUMBIA GOVERNMENT, acting by and through its DEPARTMENT OF GENERAL SERVICES (the "Department") and [INSERT CONTRACTOR], duly organized under the laws of the [INSERT STATE], and with a place of business at [INSERT ADDRESS] (the "Construction Manager" or "Contractor", and collectively, the "Parties").

## RECITALS

**WHEREAS**, the Department issued a request for proposals dated [INSERT DATE] (the "RFP") to engage a contract manager to provide construction management at-risk services for the renovation and modernization of the Thaddeus Stevens School, located at 1050 21st Street N.W., Washington, DC 200036, (the "Project");

**WHEREAS**, the Department desires that the Project be substantially complete no later than June 30, 2020;

**WHEREAS**, the Construction Manager submitted a proposal entitled [INSERT TITLE] dated [INSERT DATE] to provide construction management at-risk services for the Project;

**WHEREAS**, the Department wishes to retain the Construction Manager to provide construction management at-risk services for the Project. The Project is to include pre-construction services and construction services;

**WHEREAS**, the Construction Manager wishes to provide the preconstruction and construction and related services necessary to complete the Project, subject to the terms and conditions set forth in this Agreement;

**WHEREAS**, the Department has retained the services of a program manager (the "Program Manager") to advise it concerning the Project;

**WHEREAS**, the Department has established a budget for the Project, including all fees, hard construction costs, loose furnishings, and fees and general conditions of the Construction Manager (such budget, the "Target GMP");

**WHEREAS**, the Department has engaged OTJ Architects, Inc. (the "Architect" or the "Architect/Engineer") pursuant to a separate contract (the "Design Contract") to provide design, planning, architectural and engineering services in order to construct the Project and the

Architect has advanced the design of the Project to the development of approximately 100% complete Design Development Documents;

**WHEREAS**, the Department will remain in contract with the Architect/Engineer and will manage the Design Contract for the duration of the Project. The Construction Manager will, however, be required to coordinate with the Architect/Engineer; and

**WHEREAS,** the Department and the Construction Manager entered into a letter contract dated [INSERT DATE] (the "Letter Contract") pursuant to which the Construction Manager was authorized to proceed with certain preconstruction services in furtherance of the Project.

**NOW, THEREFORE**, the Department and Construction Manager, for the consideration set forth herein, mutually agree as follows.

## Article 1 - DEFINITIONS

**Section 1.1. Administrative Term.**

The Agreement shall have an administrative term (the "Administrative Term") that runs from the effective date of the Notice to Proceed to the later of the Administrative Term Expiration Date set forth in the Project Information Section above or the disbursement of Final Payment to the Construction Manager in accordance with 0. In addition, within this time the Construction Manager shall execute and submit a Final Release of Liens and Claims in a form and format required by the Contracting Officer, inclusive of providing the Department with a complete set of any product manuals (O&M) and training videos. The Administrative Term is established for the sole purpose of permitting the Department's Office of the Chief Financial Officer to process payments in the event any payments become due. Notwithstanding the foregoing, nothing herein shall be construed to: extend the Substantial Completion Date; extend the Final Completion Date; or, limit the Department's ability to assess liquidated damages thereon.

**Section 1.2. Agreement.**

The term "Agreement" shall mean this entire, integrated agreement between the Department and the Construction Manager with respect to the Project, consisting of this document and the Exhibits thereto, including but not limited to the Standard Contract Provisions (Construction Contract), the Construction Documents released for the Construction Manager's use and any Change Orders or Change Directives that have been executed by the Department.

**Section 1.3. Client Agency.**

The governmental or quasi-governmental entity represented by the Department, requesting the Project.

**Section 1.4. Construction Documents.**

The final Drawings and Specifications, as prepared, sealed by the Architect's design professional in accordance with the law, and issued by the Construction Manager for the purpose of obtaining bids from potential trade subcontractors and material suppliers for use in constructing the Project.

**Section 1.5. Construction Phase Services.**

Services provided throughout the construction phase during which the Construction Manager shall carry out the bulk of the construction for the Project.

**Section 1.6. Cost of General Conditions.**

The Cost of General Conditions shall have the meaning set forth in Section 8.2 of this Contract**.**

**Section 1.7. Contract Documents.**

The term "Contract Document" refers to one or more component of the documents that comprise the Agreement between the Department and the Construction Manager, including any

modifications or changes thereof, the Drawings and Specifications, and any addenda issued thereto.

**Section 1.8. Preconstruction Phase Services.**

The services to be provided under Article 3 constituting the preconstruction phase services to be performed by the Construction Manager.

**Section 1.9. Drawings.**

The Drawings are the graphic and pictorial portions of the Contract Documents, wherever located and wherever issued, showing the design, locations and dimensions of the Work, generally including plans, elevations, sections, details, schedules and diagrams.

**Section 1.10. Final Completion.**

The point at which Substantial Completion has been achieved, all punch list items noted at Substantial Completion have been completed and all documents the Construction Manager is required to deliver to the Department as a condition to receiving final payment have been delivered.

**Section 1.11. Final Completion Date.**

The date established in the Contract by which the Construction Manager shall achieve Final Completion. The Final Completion Date may be modified only by Change Order or Change Directive in accordance with the Agreement.

**Section 1.12. Fully Complete.**

To undertake all of the Work necessary to fully construct and complete the Project and execute all tasks necessary to obtain the final certificate of occupancy for the Project from the District of Columbia; submit final lien releases from the Construction Manager and Subcontractors and material suppliers; complete all punch list items to the Department's approval and sign-off; and cause all representations, warranties and guarantees to be honored and otherwise fulfill all of the requirements set forth in the Agreement.

**Section 1.13. Guaranteed Maximum Price or GMP.**

The maximum amount, including, but not limited to, the Construction Management Fee and the Cost of the Work, that will be paid the Construction Manager to Fully Complete the Project as set forth in Article 5. The Guaranteed Maximum Price ("GMP") may be modified only by Change Order or Change Directive in accordance with the Agreement. The GMP shall be established in the GMP Amendment.

**Section 1.14. Hazardous Material.**

Any toxic substance or hazardous chemical defined or regulated pursuant to federal, state or local laws relating to pollution, treatment, storage or disposal of waste, or protection of human health or the environment. Such laws include, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act, the Resource Conservation and

Recovery Act, the Clean Water Act, the Clean Air Act and laws relating to emission, spills, leaks, discharges, releases or threatened releases of toxic material. The term Hazardous Materials shall also include petroleum and petroleum bi-products.

**Section 1.15. Notice to Proceed.**

A written notice to proceed, signed by the Department, directing the Construction Manager to proceed with the Project or any portion of the Project ("Notice to Proceed" or "NTP").

**Section 1.16. Project Schedule.**

The schedule for the Project agreed to by the Department and the Construction Manager. Such schedule shall include a baseline schedule as updated periodically by the Construction Manager, approved by the Department and as finalized by the GMP Amendment. The Project Schedule shall not be changed except by a Change Order or Change Directive issued by the Department. The Project Schedule shall be in a form and contain such detail as may be agreed upon by the Parties.

**Section 1.17. Self-Performed Work.**

Trade work performed by employees of: (1) the Construction Manager; (2) any entity that is a partner or member of the entity comprising the Construction Manager; (3) any entity that controls, is controlled by, or is under common control with the Construction Manager; or (4) any entity that controls, is controlled by, or is under common control with any entity that is part of the Construction Manager. Self-Performed Work is distinguished from trade work performed by Subcontractors unaffiliated with the Construction Manager or the entities of which the Construction Manager is comprised.

**Section 1.18. Services.**

The services to be provided pursuant to the Agreement which shall include the Preconstruction Phase Services and the Construction Phase Services.

**Section 1.19. Specifications.**

The Specifications are that portion of the Contract Documents consisting of the written requirements for materials, equipment, construction systems, standards and workmanship for the Work, and performance of related services.

**Section 1.20. Standard Contract Provisions.**

The District of Columbia Department of General Services Standard Contract Provisions, General Provisions (Construction Contract), as amended, are attached hereto as **Exhibit I** and incorporated herein.

**Section 1.21. Subcontractor.**

Any person, natural or legal, to whom the Construction Manager delegates performance of any portion of the Work required by the Agreement. The term "Subcontractor," used without a

qualifier, shall mean a subcontractor in direct privity with the Construction Manager. "Subcontractors at all tiers" shall mean not only those Subcontractors in direct privity with the Construction Manager, but also those performing Work pursuant to sub-subcontracts, subsubsubcontracts, and so on. "Subcontractors" shall include both those who are retained to perform labor only and those who are retained both to perform labor and to supply material or equipment. "Subcontractors" shall also include design professionals who are not the Construction Manager's employees and to whom the Construction Manager delegates any part of its responsibilities under the Agreement, except that references to "trade Subcontractors" shall exclude design professionals.

**Section 1.22. Substantial Completion.**

Substantial Completion shall mean that all of the following have occurred: (1) the construction and installation work have been completed with only minor punch list items remaining to be completed; (2) a temporary certificate of occupancy and all other required permits or approvals have been obtained; (3) draft copies of all operating and maintenance manuals, training videotapes and warranties required by the Agreement have been delivered to the Department and the Client Agency; (4) any supplemental training session required by the Agreement for operating or maintenance personnel have been scheduled; (5) all clean-up required by the Agreement has been completed; (6) the Project is ready for the Department and Client Agency to use it for its intended purpose; and (7) all equipment, supplies, materials and items to be installed have been installed in accordance with the manufacturer's specifications and industry standards and have undergone and passed the requisite testing and inspections. "Minor punch list items" are defined for this purpose as items that, in the aggregate, can be completed within thirty (30) days without interfering with the Department or Client Agency's normal use of the Project.

**Section 1.23. Substantial Completion Date.**

The date established herein by which the Construction Manager shall achieve Substantial Completion. The Substantial Completion Date may be modified only by Change Order or Change Directive in accordance with the Agreement. In the event the Project is to be completed in parts or phases, references in the Agreement to the "Substantial Completion Date," and all rights and obligations associated therewith, shall individually apply to the Substantial Completion Date of each such part or phase.

**Section 1.24 The term "Work**" refers to any and all work done in performance of the services necessary, at any and all phases of the Agreement, to Fully Complete the Project.

## Article 2 - GENERAL PROVISIONS

### Section 2.1. Letter Contract

The Parties acknowledge that certain of the preconstruction activities described in Article 3 of this Agreement were performed pursuant to the Letter Contract between the parties dated [INSERT DATE] . Pursuant to the terms of the Letter Contract, upon execution of this Agreement by the Department (the "Agreement Effective Date"), the Letter Contract shall automatically terminate and shall merge into and be superseded by this Agreement. For avoidance of doubt, any services provided or work performed pursuant to the merged Letter Contract, and prior to the date that this Agreement is effective, shall be governed by the terms and condition of this Agreement.

### Section 2.2. Term and Termination

The period of performance under this Agreement shall commence from the date of execution of the Letter Contract by the Department and shall terminate upon the expiration of the Administrative Term or upon termination by the Department pursuant to Articles 5 and 6 of the Standard Contract Provisions (Construction Contract).

### Section 2.3. Relationship of Parties.

The Construction Manager accepts the relationship of trust and confidence established with the Department by this Agreement, and covenants with the Department to furnish the Construction Manager's reasonable skill and judgment and to cooperate with the Program Manager in furthering the interests of the Department. The Construction Manager shall use its best efforts to perform the Work and complete the Project in an expeditious and economical manner consistent with the interests of the Department. The Department shall endeavor to promote harmony and cooperation among the Department, Construction Manager, Program Manager, and other persons or entities employed by the Department for the Project. In performing its duties under this Agreement, the Construction Manager shall at all times use the standard of care used by Construction Managers that construct projects similar to the Project in type, size and scope in large, urban areas. Whenever the term "competent" is used herein to describe the Construction Manager's actions or duties that term shall refer to the level of competence customarily possessed by those Construction Managers that construct projects similar to the Project in type, size and scope in large, urban areas.

### Section 2.4. Confidentiality of Information

The Construction Manager shall assure and keep all information and data obtained throughout the performance of the Project whether related to the Agreement, the Work in all of its aspects, the Department and the Department's employees confidential, during and following the term of the Agreement, and shall not use the information in connection with any other matters; nor shall it disclose any such information to any other person, firm or corporation, unless disclosure is required pursuant to court order, subpoena or other regulatory authority. The Construction Manager shall not be divulged of confidential information without the individual's

and the Department's written consent and only in accordance with the District's and/or Federal's laws, codes and regulations. The Construction Manager and any Subcontractors who utilize, access, or store personally identifiable information as part of the performance of this Agreement are required to safeguard this information and immediately notify the Department of any breach or suspected breach in the security of such information. The Construction Manager and all Subcontractors shall allow the Department to both participate in the investigation of incidents and exercise control over decisions regarding external reporting. The Construction Manager, Subcontractors and their respective employees working on this Project may be required to sign a confidentiality statement.

**Section 2.5. Project Description.**

This Project consists of the renovation and modernization of the Thaddeus Stevens School ("TSS") located at 1050 21st Street, N.W., Washington, DC 20036. The school will serve students from Pre-Kindergarten ("Pre-K"), ages 3& 4, from all eight wards and will be a District of Columbia Public Schools ("DCPS") facility. TSS is a historic 4-story masonry structure. TSS has approximately 40,000 sf, with 4 floors above grade with a brick envelope. The building currently has hipped roofs and mansard roofs in some locations, with eyebrow dormers. There is a combination of slate shingles and a standing seam roof system. The TSS will be renovated in two phases. The preconstruction phase ("Phase 1") will include remediation, partial demolition, and rehabilitation of the entire building envelope exterior, roof replacement, window and door enclosures, the exterior building drainage systems, the re-design of the Pocket Park, streetscape and exterior lighting. The construction phase ("Phase 2") will include an upgrade of the entire interior of the building, including the installation of a passenger elevator, flooring, ceilings, restrooms, and staffing offices. There will be a private provider for ages zero to 3, classrooms located at the basement level. The treatment of the building will require approvals by the Historic Preservation Office ("HPO") and the Commission of Fine Arts ("CFA"), prior to commencement of any renovations. The Project, including both Phases 1 and 2, is forecasted to be completed by June 30, 2020. The renovated space will soon house 138 children, 30 staff members including teachers with a maximum occupancy of 168. The TSS student enrollment expects to grow to155 students by School Year 2021.

Generally, the Construction Manager's responsibilities shall include, but will not be limited to, the following:

a) To confirm the construction of the Project in accordance with the RFP Documents.
b) To provide all construction management services necessary to implement the goals of the Project inclusive of, but not limited to, the following: civil, architectural, electrical, structural, and mechanical design services as required for the Project (by the Architect); construction management services inclusive of budgeting, value engineering ("Value Engineering"), scheduling, project administration, management and coordination of subcontractors.
c) To conduct subsurface investigation work if and as required for the Project.

d) To furnish and provide all materials, management, personnel, equipment, hazardous material abatement, supervision, labor and other services necessary to complete the Project.

The Project shall be constructed in such a way so as to allow for substantial completion to be achieved no later than the Substantial Completion Date.

**Section 2.6. Program Manager and Project Manager.**

The Department has engaged a Program Manager and Project Manager to provide certain program management functions. Such Program Manager and Project Manager shall, at all times, be acting solely for the benefit of the Department, not the Construction Manager. **The Construction Manager hereby acknowledges and agrees that only a duly authorized and designated contracting officer shall have the authority to issue Change Orders or Change Directives on the Department's behalf. As of the date that this Agreement is signed, the Department's duly authorizing contracting officers are set forth in Exhibit H.**

**The Program Manager is as follows:**

**Miguel Nogueras**
**The Department of General Services**
**Capital Construction Division**
**1250 U Street N.W., 3rd Floor**
**Washington, DC 20009**
**Miguel.nogueras@dc.gov**

**The Project Manager is as follows:**

**Sharon Smith-Fall**
**1250 U Street N.W., 3rd Floor**
**Washington, DC 20009**
**Sharon.Smith-Fall@dc.gov**

**Section 2.7. General Description of Construction Manager's Duties.**

Generally, the Construction Manager shall perform the Services in a professional workmanlike manner. The Construction Manager shall supply and furnish at the location where the Work is to be performed all labor, materials, equipment, tools, services, and supervision, and shall bear all items of expense, necessary to complete and satisfactorily perform this Agreement, except such items that the Department, in this Agreement, specifically agrees to supply or furnish to or for the use of Construction Manager. Any labor, materials, equipment, tools, services or supervision not specifically described in this Agreement, but which may be fairly implied as required thereby or necessary to properly complete the Work, shall be deemed within the Scope of the Work and shall be provided by Construction Manager at Construction Manager's sole expense.

**Section 2.8. Warranties and Representations**

**2.8.1.** All disclosures, representations, warranties, and certifications the Construction Manager makes in its proposal in response to the RFP shall remain binding and in effect throughout the term of the Agreement. The Construction Manager reaffirms that all such disclosures, representations, warranties, and certifications are true and correct.

**2.8.2.** If any disclosure, representation, warranty or certification the Construction Manager has made or makes pursuant to the RFP or the Agreement, including, without limitation, representations concerning the Construction Manager's construction or design experience and qualifications, claims or litigation history or financial condition, is materially inaccurate, that shall constitute a material breach of the Agreement, entitling the Department to any and all available remedies.

**2.8.3.** The terms and conditions of this Section 2.8 shall apply during both the Preconstruction and Construction Phases.

**Section 2.9. Responsibility for Agents and Contractors.**

At all times and during both the Preconstruction and Construction Phases, the Construction Manager shall be responsible to the Department for any and all acts and omissions of the Construction Manager's agents, employees, Subcontractors, Sub-Subcontractors, material suppliers, and laborers, and the agents and employees of the Subcontractors, Sub-Subcontractors, material suppliers, and laborers performing or supplying Work in connection with the Project.

**Section 2.10 Building Information Modeling (BIM).** BIM is required to be used throughout the lifecycle of the Project, including all Project phases from project planning and concept design through construction, as-builts and into facilities management. The BIM requirements are provided as **Exhibit P**. It is expected by the Department that all team members are to be committed to the use of BIM in the Project, share their ideas of BIM expertise with the team, provide BIM data as requested by other team members, look for cost savings and schedule improvements during the entire Project duration, and endeavor to leave as a legacy a fully updated, as built, facility management ready building information model.

## Article 3 - CONSTRUCTION MANAGER'S PRECONSTRUCTION SERVICES

**Section 3.1. Preconstruction Services.**

The Preconstruction Phase will start from the issuance of the Notice to Proceed through the execution of the GMP amendment ("GMP Amendment"). The Department will issue a Notice to Proceed for preconstruction services (the "Letter Contract"). During the Preconstruction Phase, the Construction Manager shall provide such preconstruction services to properly advance the Project. Without limiting the generality of the foregoing, the Construction Manager shall: (i) work with the Department's Architect and any design consultants to provide constructability reviews of the design for the Project in consultation with Client Agency, the Department and its Program Manager; (ii) obtain bids from trade subcontractors to perform the work described in the Construction Documents and provide bid tabulations to the Department; (iii) engage in any value engineering and scoping exercises necessary to return the cost of the work to the Project Budget; (iv) engage in preconstruction activities, including identifying any long-lead items; (v) develop a GMP proposal for the Project; and (vi) enter into a GMP for the Project. Throughout the Preconstruction Phase, the Construction Manager shall schedule and attend regular meetings with the Department, the Program Manager and the Architect. A list of preconstruction deliverables is set forth in **Exhibit C**.

**Section 3.1.1 Additional Preconstruction Services.** In addition to those items enumerated above, the Construction Manager shall provide such preconstruction services as are necessary to properly advance the Project. These services shall include, but are not limited to, scheduling, estimating, shop-drawings, the ordering of long-lead materials, condition assessments, conservator studies, archeological studies, recommended testing, additional geotechnical testing, and monitoring of historic assets.

**Section 3.2. Baseline Schedule, Building System Assessment, and Construction Management Plan.**

**Section 3.2.1 Baseline Schedule.** Within seven (7) days after the Letter Contract is issued, the Construction Manager shall prepare a preliminary schedule for the Project, including the preconstruction phase activities and the construction phase activities ("Baseline Schedule"). The Baseline Schedule shall be subject to review and approval by the Department and the Construction Manager shall incorporate such adjustments to the Baseline Schedule as may be reasonably requested by the Department. This schedule shall be prepared in a Critical Path Method ("CPM") and be developed in a sufficient level of detail so as to permit the affected parties (i.e. the Department, the Architect and the Construction Manager) to properly plan the Project, and shall show: (i) key design milestones and bid packages; (ii) release dates for long lead items; (iii) release dates for key subcontractors; and (iv) Substantial and Final Completion Dates. The preliminary schedule shall include durations and logic ties for those building systems that the Construction Manager is recommending for replacement. The Baseline Schedule must

also be submitted in Primavera 6 native format or the latest version of the software and shall be updated by the Construction Manager, at a minimum, on a bi-weekly basis. The preliminary schedule is attached hereto as **Exhibit B**.

During the Preconstruction Phase, the Construction Manager shall monitor the Project's progress and promptly notify the Department of any delays, regardless of their cause, the causes of such delays, and the Construction Manager's best projection of the effect of such delays on the Project Schedule. The Department's receipt of, and lack of objection to, any schedule update showing a later Substantial Completion or Final Completion shall not be regarded as the Department's agreement that the Construction Manager may have an extension of time, or as a waiver of any of the Department's rights, but merely as the Construction Manager's representation that, as a matter of fact, the Project may not be completed by the applicable Substantial or Final Completion Date. The Project Schedule shall be maintained and continuously updated during the Preconstruction and Construction Phases.

**Section 3.2.3** **Construction Management Plan.** The Construction Manager shall submit a draft of its construction management plan ("Construction Management Plan") within fourteen (14) days after the Letter Contract is issued to include, but is not limited to, noise control, hours for construction and deliveries, truck routes, trash and debris removal plan, traffic and parking control, communications procedures, emergency procedures, quality control procedures, dust control, public street cleaning and repair, planned occupancy of public ways, erosion control, tree protection plan, vibration monitoring, temporary fire protection measures, project signage, pest control, construction staging plan, and construction logistics plan.

**Section 3.3. Constructability Reviews**

**3.3.1.** It is contemplated that the Construction Manager will have met with representatives of the Department and the Architect as well as other stakeholders to better develop the Department's requirements for the Project following contract award. During the Preconstruction Phase, the Construction Manager will be required to provide constructability reviews of the design documents for the Project.

**3.3.2.** The Construction Manager shall meet with the representatives of the Department, Architect and Client Agency throughout the Preconstruction Phase as the design progresses and these and other stakeholders provide input in and approve the design direction at appropriate times. The GMP Basis Documents, and all interim design submissions shall be subject to review and approval by the Department, and the Construction Manager shall be required to provide input on these documents to address concerns raised by the Department and/or other project stakeholders and such reviews shall not entitle the Construction Manager to an increase in the Preconstruction Fee.

**3.3.2.1.** **Preliminary Budget Estimate.** Within fourteen (14) days of the Notice to Proceed, the Construction Manager shall submit a detailed cost estimate of the

proposed design (such estimate, the "Preliminary Budget Estimate"). With regard to building systems (i.e. roofs, doors, HVAC, security, IT, etc.), the cost estimate shall be prepared on a "system" basis that identifies the key building systems or functions and allocates an estimated cost for each such system. The Construction Management Fee, the Cost of General Conditions, and Contingencies shall be broken out in separate line items. The primary purpose of such cost estimate is to aid the Department and Client Agency in understanding the costs associated with key elements of the Project so as to better prioritize and manage the use of the funding allocated to this Project.

**3.3.2.2.Baseline Budget and Program.** The Department shall provide the Construction Manager with the approved baseline budget and program. Such approval shall be provided (or signed by) the Department. In the event the Construction Manager does not receive such approval within fourteen (14) days after submitting the Preliminary Budget Estimate, it shall so advise the COTR, the Department's Deputy Director for Capital Construction and the Contracting Officer in writing of such failure and request direction. If the Construction Manager fails to provide such notice, the Construction Manager will be proceeding at its own risk and will be responsible for costs associated with Budget revisions. Only the Department shall have the authority to increase the Project Budget, and absent such direction, the Construction Manager shall proceed throughout the Project on the assumption that the budget remains as originally directed by the Department pursuant to this Section 3.3.2.2.

**3.3.2.3. Constructability/Sole Source/Long-Lead Time Memorandum.** Concurrently with the Construction Management Plan, the Construction Manager shall prepare a memorandum identifying key construction concerns related to the Project. Such memorandum shall: (i) assess the constructability issues related to the Project, including site logistics; (ii) identify any items where the design is predicated on a single manufacturer and, if so, identify at least two (2) comparable products; and (iii) identify any long-lead delivery items that could adversely affect the Baseline Schedule. To the extent any such long-lead items are identified, the memorandum shall make recommendations for addressing such items

**3.3.2.4.Early Release Packages.** The Department may release funding for hazardous materials abatement and selective demolition, and funding for long-lead items in advance of the Construction Phase. If the Construction Manager believes an earlier release is required for long-lead materials in order to meet the Project Schedule, it shall advise the Department and make a recommendation as to the requested release date. Similarly, if the Construction Manager believes that additional work must be released in advance of the establishment of a GMP for the Project, it shall advise the Department and make a recommendation as to the scope of work to be released as well as to the requested release date. Further, any decision to authorize an early release shall be made by the Department in its sole and absolute discretion.

**3.3.2.5.Permits.** The Construction Manager shall be responsible for preparing and submitting trade permit applications for construction trades that are necessary for the construction of the Project. The Construction Manager shall develop a list of the required permits and shall track the progress of all such permits through the review process. The Construction Manager shall update the Department with the status of each permit that is required for the Project. The Construction Manager shall engage such permit expediters as the Construction Manager deems necessary or appropriate in light of the Project's schedule. The Construction Manager shall hire a permit expediter to help facilitate the review, and approval of the Building Permit. The Construction Manager shall work with the Architect/Engineer and the expediter to ensure the necessary building permits (including, but not limited to demolition permits, foundation to grade permits, superstructure permits, utility permits, public space permits, and any other permits required for the execution of the Work) are received in a timely manner

The Construction Manager shall hire a permit expediter to help facilitate review, and approval of the Building Permit. The Construction Manager with work with the Architect team and the expediter to ensure the necessary building permits (including, but not limited to demolition permits, foundation to grade permits, superstructure permits, utility permits, public space permits, and any other permits required for the execution of the Work) are received in a timely manner.

## Article 4 - FORMATION OF GMP PROPOSAL

**Section 4.1. General.**

During the Preconstruction Phase, the Department shall cause the Architect/Engineer in coordination with the Construction Manager to prepare a set of drawings and specifications upon which the Construction Manager's GMP for construction of the Project will be based (the "GMP Basis Documents") as set forth in the Project Information Section of this Agreement. Based upon the GMP Basis Documents, the Construction Manager shall propose a GMP (referred to as the "GMP Proposal") no later than the date set forth in the Project Information Section of this Agreement, and which shall be submitted in accordance with this Article. The Construction Manager acknowledges and understands that the GMP Basis Documents will be incomplete at the time it submits its GMP Proposal. Although complete construction documents will not be available and many details will not be shown on GMP Basis Documents or will otherwise need to be adjusted, the GMP proposed in the Construction Manager's GMP Proposal shall be intended to represent the Construction Manager's offer for the Final Completion the Project. If the Construction Manager's GMP Proposal is acceptable to the Department, it shall be memorialized in form of an amendment to this Agreement (such amendment, the "GMP Amendment"). The Construction Manager and the Department shall execute a GMP Amendment in the form of **Exhibit K** attached hereto no later than the date set forth in the Project Information Section of this Agreement.

As part of the GMP Amendment, the Construction Manager shall certify that the GMP established thereby (i) contains sufficient amounts to perform all Work necessary for the Final Completion of the Project; and (ii) contains sufficient amounts to provide and construct any items or facilities that are not contained in the GMP Basis Documents but which are necessary for a fully functioning facility that meets the programmatic requirements established for the Project. The Construction Manager will further covenant and agree in the GMP Amendment that it will perform all of the construction work necessary for the Final Completion of the Project, including, without limitation, aspects of the Work that are not shown on the GMP Basis Documents but which are a logical development of the design intent reflected in the GMP Basis Documents, for an amount not to exceed the Guaranteed Maximum Price.

**Section 4.2. Review of GMP Basis Documents.**

The Department has selected the Construction Manager, in large part, because of its special expertise in constructing similar projects. Before submitting its Guaranteed Maximum Price, the Construction Manager shall review the GMP Basis Documents for accuracy, constructability and completeness and shall bring such deficiencies to the attention of the Department and shall cause its Architect to address any such deficiencies. To the extent that any such deficiencies in the GMP Basis Documents could have been identified by such review by a competent Construction Manager, such deficiencies shall not be the basis for a change in the GMP or delaying the Project Schedule.

**Section 4.3. Contingency.**

The Cost of the Work shall include a contingency, which shall be a sum established by the Department and the Construction Manager to cover, among other things costs necessary to address scope expansion that is a logical development of the design, issues arising from or as a result of deficiencies in the GMP Basis Documents and other costs which are properly reimbursable as Cost of the Work but not the basis for a Change Order, such as costs that were not reasonably foreseeable as of the effective date of this Agreement, including such items as emergencies, unforeseeable changes in market conditions for materials or labor, or subsurface, soils or site conditions that were neither known nor reasonably discoverable as of the effective date of the Agreement (the "Contingency"). During the Construction Phase, the Construction Manager shall keep the Program Manager informed as to the status of the Contingency and shall, at a minimum: (i) advise the Program Manager or any significant draws upon the Contingency in a timely manner; and (ii) provide the Program Manager with running status of the Contingency balance at least once every two (2) weeks.

**Section 4.4. Trade Bids.**

**4.4.1. Subcontractors and Suppliers; Bidding Procedures.** During the Preconstruction Phase, the Construction Manager shall seek to develop subcontractor interest in the Project. Within fifteen (15) days after the Letter Contract, the Construction Manager shall provide to the Department for its review and approval a written submission on the proposed bidding procedures. Such procedures shall include: (i) a list of proposed trades packages; (ii) a list of trade subcontractors that will be invited to bid on each such package; and (iii) a narrative description of the process. At least three (3) potential subcontractors shall be identified for each trade package. A copy of this deliverable must be submitted to both the COTR and the Contracting Officer. In the event the Department does not approve the proposed bidding procedures within fifteen (15) days after its receipt, such procedures shall be deemed approved unless the Department advises that such is still under review. The Construction Manager shall have at least one "over the shoulder" review session for each major trade package with the Architect. These "over the shoulder" review sessions shall be scheduled at appropriate times for such review.

**4.4.2. Bidding.** Following the Department's approval of the GMP Basis Documents, the Construction Manager shall manage the trade bidding process in accordance with the approved bidding procedures and shall use commercially reasonable best efforts to solicit at least three (3) qualified and bona fide bids for each trade package that has an expected value in excess of One Hundred Thousand Dollars ($100,000). Trade packages shall not be parceled, split or divided to avoid the $100,000 threshold. In addition to the information normally required in such bids, the Construction Manager shall also require subcontractors to provide an estimate of the percentage of labor hours performed in completing the subcontracted work which will be performed by District residents. The Construction Manager shall carefully document its procedures for making

available bid packages to potential bidders, the contents of each bid package, discussions with bidders at any pre-bid meetings, bidders' compliance with bid requirements, all bids received, the Construction Manager's evaluations of all bids, and the basis for the Construction Manager's recommendation as to which bidders should be chosen. The Department shall be afforded access to all such records at all reasonable times so that, among other things, it may independently confirm the Construction Manager's adherence to all requirements set forth in the Agreement, including, without limitation, affirmative action requirements and subcontracting requirements.

**4.4.3. Bid Tab.** As part of the negotiations leading up to the GMP, the Construction Manager shall provide to the Department tabulations of the trade bids solicited and copies of all trade bids. In general, the bid tab shall be presented in tabular format that compares the bids received and any other relevant information (i.e. exclusions, past performance history, etc.). The bid tabulation shall include scope assessments and identify required leveling of the trade submitted. To the extent that the Construction Manager's award recommendation is based on scoping adjustments, the Construction Manager shall clearly identify the scoping adjustment and the need for such adjustments. Such bid tabulation shall include LSDBE utilization information in addition to price and other information. Such bid tabulations as well as copies of the bids shall be submitted to the Department's Program Manager. The Construction Manager represents and warrants that the bid tabs so submitted shall fairly represent the results of the subcontractor bidding process and that the Construction Manager shall not misrepresent any such data to the Department or its Program Manager.

**4.4.4. Value Engineering**. Based on the trade bids received, the Construction Manager shall prepared a written report of suggested value engineering strategies necessary to reconcile the costs of constructing the Project budget. The Construction Manager shall meet with the Department's representatives to discuss any value engineering and changes in scope necessary to ensure that the Department's schedule and programmatic requirements are met and that the budget is not exceeded. The Construction Manager shall coordinate with the Architect to implement and price any approved value engineering strategies.

**Section 4.5. Basis of Guaranteed Maximum Price.**
The Construction Manager shall include with the GMP Proposal a written statement of its basis, which shall include:

**4.5.1.** GMP Basis Documents which shall include a list of the Drawings and Specifications, including all addenda thereto, and General, Supplementary and other Conditions which were used in preparation of the GMP Proposal and on which the GMP is based.

**4.5.2.** A list of Unit Prices and Allowance Items and a statement of their basis; provided, however, that only such allowances as are agreed to by the Department shall be included.

**4.5.3.** A list of the clarifications and assumptions made by the Construction Manager in the preparation of the GMP Proposal to supplement the information contained in the Drawings and Specifications, noting in particular any exclusions. The assumptions and clarifications shall take precedence over the Drawings and Specifications. The Construction Manager shall prepare a separate memorandum that highlights any differences between the then approved drawings and the modifications made in the assumptions and clarifications. Such memorandum shall specifically address any changes in the Project's aesthetics, functionality or performance.

**4.5.4.** The proposed GMP, including a statement of the detailed cost estimate organized by trade categories, allowances, Contingency, and other items and the fee that comprise the GMP.

**4.5.5.** An update to the Project's schedule to which the Construction Manager will agree to be bound. This update shall be prepared in the same level of detail and in the same manner as the Baseline Schedule.

**4.5.6.** A subcontracting plan setting forth the names and estimated dollar volume of the work that will be perform by local, small, and disadvantaged business enterprises, as certified by the Department of Small and Local Business Development, upon which the GMP is based.

**4.5.7.** Construction Manager's Key Personnel

**4.5.8.** Construction Manager's Designated Representative

**Section 4.6. Department Review of GMP Proposal.**

The Construction Manager shall meet with the Department to review the GMP Proposal and the written statement of its basis. In the event that the Department discovers any inconsistencies or inaccuracies in the information presented, the Department shall promptly notify the Construction Manager, who shall make appropriate adjustments to the GMP Proposal, its basis or both.

**Section 4.7. Department Acceptance of GMP Proposal.**

The Department and the Construction Manager shall meet to negotiate the terms of the GMP Proposal. If the GMP Proposal is acceptable to the Department, the Department shall submit the resulting GMP Amendment for review and approval by the Council for the District of Columbia (the "Council") in the event it exceeds the previously approved contract value by more than $1 million. In such event, the GMP shall not be effective until so approved and executed by the Parties.

**Section 4.8. GMP Amendment.**

In the event an acceptable GMP Proposal is not developed and a GMP Amendment is not executed, the Agreement will be terminated. In the event the Agreement is terminated pursuant to this Section, the Department shall be free to use any of the documents and information developed through the date of termination to retain a new contractor to complete the Project.

**Section 4.9. Assignment Upon Failure to Reach GMP.**

In the event that the Department and the Construction Manager are unable to agree upon a GMP, the Department shall have the right to terminate this Agreement, and if requested by the Department, the Construction Manager shall assign any trade Subcontracts to the Department upon such terms and conditions and at the time requested by the Department. In such event, the Construction Manager shall forfeit fifty percent (50%) of the Preconstruction Fee.

**Section 4.10. Certification.**

As part of the GMP Proposal submitted in accordance with this Article, the Construction Manager agrees to specifically acknowledge and declare that the Contract Documents are sufficiently complete to have enabled the Construction Manager to determine the Cost of the Work therein in order to enter into the GMP Amendment and to enable the Construction Manager to agree to construct the Work outlined therein in accordance with applicable laws, statutes, building codes and regulations to the best of Construction Manager's knowledge, and otherwise to fulfill all its obligations hereunder. The Construction Manager shall further acknowledge that it has visited the site, examined all conditions affecting the Work, is fully familiar with all of the conditions thereon and affecting the same, and, has carefully examined all drawings and specifications provided to it.

**Section 4.11. Preconstruction Phase Deliverables.**

The deliverables set forth in **Exhibit C** are required during the Preconstruction Phase. In the event that the Construction Manager fails to provide any deliverable so listed, and unless such failure is the result of any event of Force Majeure, the Construction Manager shall pay to the Department liquidated damages for each deliverable that is not timely submitted as set forth in Article 13 after receiving written notice from either the COTR or the Contracting Officer of failure to submit such deliverable.

**Section 4.12. Unsafe Materials and Hazardous Materials**

**4.12.1.** The Construction Manager shall not bring, spill or release onto the site asbestos, PCBs, or any other Hazardous Material that is not customarily used in a facility of the type and similar to the Project, and shall bring to the Department's attention any specification of such Hazardous Materials in the design documents. If the Construction Manager believes that anything in the Agreement would require that it use or bring onto the site asbestos, PCBs, or any Hazardous Material that is not customarily used in a

facility of the type and similar to the Project, it shall immediately inform the Department and seek direction before proceeding.

**4.12.2.** The Construction Manager shall abate Hazardous Materials on the site as necessary to complete the Work contemplated by this Agreement. The Construction Manager shall comply with all laws, including, without limitation, the requirements of the EPA and all jurisdictional agencies as well as all laws relating to safety, health welfare, and protection of the environment, in removing, treating, encapsulating, passivating, and/or disposing of Hazardous Materials, including, but not limited to, removal, treatment, encapsulation, passivation, and/or disposal of the Hazardous Materials. If any notices to governmental authorities are required, the Construction Manager shall also give those notices at the appropriate times. The Construction Manager shall ensure abatement subcontractors and disposal sites are appropriately licensed and qualified.

**4.12.3.** The Construction Manager shall be entitled to submit a Change Request in accordance with Article 4 of the Standard Contract Provisions (Construction Contract) in the event the Construction Manager encounters Hazardous Materials beyond those contemplated in the Contract Documents.

**4.12.4.** The Construction Manager shall keep detailed records documenting Work done so that the Department may independently verify compliance with all laws, the number of units actually removed, treated, and/or disposed of, and the appropriate unit price(s) applicable to the Work

## Article 5 - CONSTRUCTION PHASE

**Section 5.1. General.**

The Construction Phase shall not commence until the Department issues a Notice to Proceed for Construction Phase Services. The Construction Manager shall, through Subcontractors or, with the written consent of the Department, with its own forces, perform all of the Work necessary to construct the Project so that it is complete, safe, and properly built in strict accordance with the approved Construction Documents and the other requirements of this Agreement. Without limitation, the Construction Manager shall provide all of the labor, materials, tools, equipment, temporary services, and facilities necessary to complete the Project in accordance with the drawings, specifications, schedule and budget that are issued for the Project. The Construction Manager shall be responsible for paying for and obtaining all necessary permits, with the exception of the Building Permit, and to pay all necessary fees for utility connections. The Work shall be carried out in a good and workmanlike, first-class manner, and in a timely fashion. All materials and equipment to be incorporated into the Project shall be new and previously unused, unless otherwise specified, and shall be free of manufacturing or other defects.

**5.1.1. <u>Unrenovated Portions of the Structure.</u>** In constructing the Project, the Construction Manager shall ensure that unrenovated portions of existing structures, if any, including, but not limited to, the mechanical, plumbing, electrical systems and other building systems are not adversely affected. All unrenovated portions of the structures should function, at a minimum, at the level of functionality that existed immediately prior to the construction of the Project. If any unrenovated portion of the Project functions at a lower level of functionality as a result of the Construction Manager's Work, the Construction Manager shall be back-charged the costs incurred by the Department in addressing the decreased functionality.

**Section 5.2. Design Completion.**

**5.2.1. <u>Third Party Contractors.</u>** The Department will hire third party contractors for plan review and for testing and material inspections. The Construction Manager shall coordinate and work with the Project Manager and third party plan reviewer during the building permit process.

**Section 5.3. Subcontracting and Administration**

**5.3.1.** It is contemplated that all or substantially all of the construction of the Project will be carried out by trade Subcontractors and that those trade subcontracts will be awarded through the competitive bid process contemplated in Section 4.4 The Construction Manager shall enter into a written agreement with each subcontractor. The

trade subcontractors will be under written contract with the Construction Manager. All subcontracts and agreements for the supply of equipment or materials awarded for the Project shall be fixed-price contracts unless otherwise expressly authorized by the Department, in writing. It is understood and agreed, however, that certain trade packages (such as the mechanical and electrical packages) may be awarded on a design-assist or design-build basis and that such trade packages may be awarded on such other basis subject to the Department's consent as to the bidding procedures and economic structure with regard to those packages. The Construction Manager and its affiliates may not carry out trade work with its own forces without the Department's written permission, which permission may be withheld or conditioned by the Department in its sole and absolute judgment.

**5.3.2.** In addition to the open book reporting requirements set forth in Section 5.10, the Construction Manager shall provide to the Department a copy of all quotes or proposals submitted by potential subcontractors.

**5.3.3.** The Construction Manager shall develop a purchasing strategy to address the expedited schedule and conditions of this Project and shall include appropriate provisions in the subcontracts to minimize the cost impact associated with such conditions. Such strategies may include, but are not limited to (i) obtaining from subcontractors unit price quotes for typical coordination items; (ii) setting aside allowances for coordination work; and (iii) such other techniques as may be employed by the Construction Manager.

**5.3.4.** The Construction Manager shall carefully document its procedures for making available bid packages to potential bidders, the contents of each bid package, discussions with bidders at any pre-bid meetings, bidders' compliance with bid requirements, all bids received, the Construction Manager's evaluations of all bids, and the basis for the Construction Manager's recommendation as to which bidders should be chosen. The Department shall be afforded access to all such records at all reasonable times so that, among other things, it may independently confirm the Construction Manager's adherence to all requirements set forth in the Agreement including, without limitation, affirmative action requirements and subcontracting requirements.

**5.3.5.** The Department may, in its sole discretion, reject any or all bids and proposals received for any bid package, and may require the Construction Manager to obtain new or revised bids or proposals.

**5.3.6.** The Department may, in its sole discretion, direct the Construction Manager to accept a bid from a qualified bidder other than the bidder to whom the Construction Manager recommends award of a subcontract or supply agreement. If the Department chooses this option, it shall issue a Change Order to the Construction Manager for any difference between the cost of the subcontract or supply agreement

awarded and the bid price of the Subcontractor or supplier recommended by the Construction Manager, but without any adjustment to the Construction Management Fee.

**5.3.7.** The Department must approve all Subcontractors and suppliers. The Department may elect to review the form of any subcontract or agreement with a material supplier to insure that such contract incorporates the contractual provisions required by this Agreement.

**5.3.8.** The Construction Manager shall manage the Change Order process with all subcontractors to verify validity, purpose, and cost.

**5.3.9.** The Construction Manager must contract for provision of all services and materials for the Project (other than Self-Performed Work which must be authorized in advance and in writing by the Department) via written subcontracts or, for contracts requiring provision of materials or equipment only, and not labor, via written supply agreements. All subcontracts and supply agreements shall include the following provisions:

**5.3.9.1.** that, to the extent of the work or supply within the agreement's scope, the Subcontractor or supplier is bound to the Construction Manager for the performance of all obligations which the Construction Manager owes the Department under the Agreement;

**5.3.9.2.** that the Subcontractor or supplier is not in privity with the Department and shall not seek compensation directly from the Department on any third-party beneficiary, quantum meruit, or unjust enrichment claim, or otherwise, except as may be permitted by any applicable mechanic's lien law;

**5.3.9.3.** that the Department is a third-party beneficiary of the subcontract or supply agreement, entitled to enforce any rights thereunder for its benefit;

**5.3.9.4.** that the Subcontractor or supplier consents to assignment of its agreement to the Department, at the Department's sole option, if the Construction Manager is terminated for default;

**5.3.9.5.** that the Subcontractor or supplier shall comply immediately with a written order from the Department to the Construction Manager to suspend or stop work;

**5.3.9.6.** that the Subcontractor or supplier shall maintain records of all Work it is requested or authorized to do on a time and material or cost-plus basis, or with respect to claims that it has asserted on a time and materials or cost-plus basis, during the Project and for a period of time specified in the General Conditions and requiring the Subcontractor or supplier to make those records available for review or audit by the Department during that time;

**5.3.9.7.** that the Subcontractor shall obtain and maintain, throughout the Project, workers' compensation insurance in accordance with the laws of the District of Columbia (This provision is not applicable to supply agreements);

**5.3.9.8.** that, if the Department terminates the Agreement for convenience, the Construction Manager may similarly terminate the subcontract or supply agreement for convenience, upon seven (7) days' written notice to the Subcontractor or supplier, and that the Subcontractor or supplier shall, in such a case, be entitled only to the costs set forth in Article 6 of the Standard Contract Provisions (Construction Contract);

**5.3.9.9.** that the Department shall have the right to enter into a contract with the Subcontractor or supplier for the same price as its subcontract or supply agreement price less amounts already paid, if the Construction Manager files a voluntary petition in bankruptcy or has an involuntary petition in bankruptcy filed against it;

**5.3.9.10.** that the Subcontractor or supplier shall not be entitled to payment for defective or non-conforming work, materials or equipment, and shall be obligated promptly to repair or replace non-conforming work, materials or equipment at its own cost;

**5.3.9.11.** a provision requiring that Subcontractors and suppliers promptly pay Subcontractors and suppliers at lower tiers, imposing upon the Subcontractors and suppliers a duty to pay interest on late payments, and barring reimbursement for interest paid to lower tier Subcontractors or suppliers due to a Subcontractor's or supplier's failure to pay them in timely fashion;

**5.3.9.12.** a provision requiring that all Subcontractors at all tiers comply with the provisions of Article 12 (Economic Inclusion Goals); provided, however, that the Construction Manager may, in its reasonable discretion impose a different LSDBE subcontracting goal on some or all of its Subcontractors; provided, further, however, that nothing in this provision shall be deemed to excuse the Construction Manager from using its best efforts to achieve the LSDBE subcontracting goal on an aggregate basis for the Project;

**5.3.9.13.** a provision which allows the Construction Manager to withhold payment from the Subcontractor if the Subcontractor does not meet the requirements of the Subcontract;

**5.3.9.14.** lien and claim release and waiver provisions substantially identical to those in this Agreement.

**5.3.10.** Within seven (7) calendar days of receiving any payment from the Department that includes amounts attributable to Work performed or materials or equipment supplied by a Subcontractor or supplier, the Construction Manager shall either

pay the Subcontractor or supplier for its proportionate share of the amount paid to the Construction Manager for the Subcontractor's or supplier's Work or materials or equipment, or notify the Department and the Subcontractor or supplier, in writing, of the Construction Manager's intention to withhold all or part of the payment and state the reason for the withholding. All monies paid to the Construction Manager under the Agreement shall be used first to pay amounts due to Subcontractors or suppliers supplying labor or materials for the Project and only money remaining after such payments are made may be used for other items such as the Construction Management Fee. Monies paid by joint check shall be deemed to have been paid fully to the Subcontractor or supplier named as a joint payee, unless the Department agrees otherwise in writing. Any interest paid to Subcontractors or suppliers because the Construction Manager has failed to pay them in timely fashion shall not be reimbursable as part of the Cost of the Work.

**5.3.11.** The Construction Manager shall not enter into any profit sharing, rebate, or similar arrangement with any Subcontractor or supplier at any tier with respect to the Project or the Work to be carried out for the Project.

**5.3.12.** The Construction Manager shall not substitute or replace any Subcontractor or supplier approved by the Department without the Department's prior written consent.

**5.3.13.** The Department has the right to contact Subcontractors or suppliers at all tiers, or material or equipment suppliers directly to confirm amounts due and owing to them or amounts paid to them for Work on the Project, and to ascertain from the Subcontractors or suppliers at all tiers their projections of the cost to complete their work or to supply their material or equipment, or the existence of any claims or disputes. In doing so the Department shall not issue any directions to Subcontractors or Suppliers at any tier.

**5.3.14.** If it comes to the Department's attention that a Subcontractor or supplier has not been paid in timely fashion (other than for disputed amounts), and if the Construction Manager fails to cure the problem within five (5) calendar days after the Department gives it written notice of the failure to pay, the Department may make payments to the Subcontractor or supplier and Construction Manager by joint check.

**5.3.15.** The Construction Manager shall be required to provide an evaluation of each of its subcontractors' performance by completing and submitting to the Department the Subcontractor Performance Evaluation Form set forth as **Exhibit N**, as follows:

**(a)** Within ninety (90) days of initiating the Construction Phase; and

**(b)** Within thirty (30) days after Final Completion of the Project.

**Section 5.4. Weekly Progress Meetings & Schedule Updates.**

The Construction Manager shall schedule and conduct, at a minimum, weekly progress meetings following a Construction Manager generated agenda at which the Department, the Architect, the Program Manager, the Construction Manager and appropriate Subcontractors can discuss the status of the Work. The Construction Manager shall prepare and promptly distribute meeting minutes. In addition, the Construction Manager shall submit bi-weekly Schedule updates which shall reflect actual conditions of Project progress as of the date of the update. The update shall reflect the actual progress of construction, identify any developing delays, regardless of their cause, and reflect the Construction Manager's best projection of the actual date by which Substantial Completion and Final Completion of the Project will be achieved. Via a narrative statement (not merely a critical path method schedule), the Construction Manager shall identify the causes of any potential delay and state what, in the Construction Manager's judgment, must be done to avoid or reduce that delay. The Construction Manager shall point out, in its narrative, changes that have occurred since the last update, including those related to major changes in the scope of work, activities modified since the last update, revised projections of durations, progress and completion, revisions to the schedule logic or assumptions, and other relevant changes. Any significant variance from the previous schedule or update shall also be identified in a narrative, together with the reasons for the variance and its impact on Project completion. All Schedule updates shall be in a native format reasonably acceptable to the Department (e.g., Primavera). The Department may make reasonable requests during the Project for changes to the format or for further explanation of information provided. Submission of updates showing that Substantial Completion or Final Completion of the Project will be achieved later than the applicable scheduled completion date shall not constitute requests for extension of time and shall not operate to change the scheduled completion date(s). The Department's receipt of, and lack of objection to, any schedule update showing Substantial Completion or Final Completion later than the dates agreed upon in the Project Schedule shall not be regarded as the Department's agreement that the Construction Manager may have an extension of time, or as a waiver of any of the Department's rights, but merely as the Construction Manager's representation that, as a matter of fact, Substantial Completion or Final Completion of the Project may not be completed by the agreed upon date in the Project Schedule. Changes to the scheduled completion dates may be made only in the circumstances and only by the methods set forth in this Agreement.

**Section 5.5. Written Reports.**

The Construction Manager shall provide written reports to the Department on the progress of the entire Work at least monthly from Preconstruction Notice to Proceed until Final Completion of the Project. Such written report shall including the following elements:

**5.5.1. <u>Construction Progress Update.</u>** Each monthly update shall contain a narrative description of the Project progress and a critical path method schedule in Primavera format, including any plans to correct defective or deficient work or for time lost due to delays.

**5.5.2. Cost Update.** The monthly update shall reflect, by Guaranteed Maximum Price line item, the original line item amount, approved, pending, and projected Change Order amounts, the cost incurred to date, the projected cost to complete the Work of the line item, and any variance between the actually approved budgeted balance of the line item and the projected cost to complete. A clear distinction must be made between approved Change Orders and those merely requested or anticipated. The report shall explain all variances including "buy-outs" or final actual costs including those below their respective Guaranteed Maximum Price line item. In addition, the report must disclose any instances in which the Construction Manager has transferred amounts from one line item to another, or from the Contingency to any other line item. Neither submission of, nor the Department's failure to reject an update reflecting that the projected cost to complete the Project exceeding the Guaranteed Maximum Price will operate to increase the Guaranteed Maximum Price or waive the Department's right to enforce the Guaranteed Maximum Price. If the report reflects budget overruns, it must also include a recovery plan.

**5.5.3. Economic Inclusion Report.** The monthly report shall include a detailed summary of the Construction Manager's efforts and results with respect to the economic inclusion goals set forth in this Agreement. Such report shall be in a format acceptable to the Department and shall include, at a minimum: (i) the Construction Manager's overall performance with respect to the goals; (ii) a listing of subcontracts and agreements with material suppliers during the month and the percentage of those subcontracts and agreements with material suppliers awarded to LSDBEs; (iii) a listing of subcontracts during the month and the estimated percentage of the labor hours to be worked by District of Columbia residents pursuant to those subcontracts; and (iv) a description of the major subcontracting and supply opportunities that will be solicited during the next three (3) months and the actions being taken to meet the subcontracting goals.

**5.5.4. Cash Flow Update.** If there have been any changes to the anticipated cash flow for the Project, such changes shall be disclosed and explained in the monthly report. If there are no such changes, the report shall so state.

**5.5.5. Quality Assurance Report.** The monthly report shall include a detailed summary of the steps that are being employed to ensure quality construction and workmanship. Each report shall specifically address issues that were raised by the Department and/or its Program Manager during the prior month and outline the steps that are being taken to address such issues.

**5.5.6. Progress Photos.** The monthly report shall include updated progress photos that shall detail changes in the Work during the month.

**5.5.7. Daily Log.** The Construction Manager shall also maintain a daily log containing a record of weather, Subcontractors working on the site, number of workers, major equipment on the site, Work accomplished, problems encountered and other similar

relevant data as the Department may reasonably require. The log shall be available to the Department, the Architect and the Program Manager, and on a monthly basis a copy of the log shall be submitted to the Department.

**Section 5.6. Cost Control System.**
The Construction Manager shall use a system of cost control for the Work in a format consistent with the GMP Drawings & Specifications and approved by the Department, which shall include, without limitation, regular monitoring of actual costs for activities in progress and estimates for uncompleted tasks and proposed changes. Construction Manager shall identify variances between actual and estimated costs and report the variances to the Department and the Program Manager at regular intervals.

**Section 5.7. Key Personnel.**

**5.7.1.** To carry out its duties, the Construction Manager shall provide at least the key personnel identified in **Exhibit E** to this Agreement ("Key Personnel"), who shall carry out the functions identified in **Exhibit E**. Among other things, the Key Personnel shall include (i) the Project Executive; (ii) the Field Superintendent; (iii) the Project manager who will supervise the interior design and Work; (iv) the Project Manager who will supervise the Mechanical, Electrical, and Plumbing ("MEP") work; and (v) the individual that will manage quality control and interact with the Department's quality control representative (Safety/Quality Assurance/Quality Control Manager). It is contemplated that these project managers will work from the design stage, purchasing and throughout the bulk of the field work. The Construction Manager's obligation to provide adequate staffing is not limited to providing the Key Personnel, but is determined by the needs of the Project. The Construction Manager shall not be permitted to reassign any of the Key Personnel unless the Department approves the proposed reassignment and the proposed replacement. If any of the Key Personnel become unavailable to perform services in connection with the Agreement due to death or disability, then the Construction Manager shall promptly appoint a replacement acceptable to the Department. The Department shall be entitled to complete information on each such replacement, including a current resume of his or her qualifications and experience.

**5.7.2.** Certain members of the Construction Manager's Key Personnel shall be subject to liquidated damages for their removal or reassignment by the Construction Manager. Those members of the Construction Manager's Key Personnel subject to the liquidated damages provisions in 0 shall be identified in **Exhibit E** as subject to the liquidated damages provisions. In the event there is no delineation in **Exhibit E** of those members of the Construction Manager's Key Personnel subject to the liquidated damages provisions of this Agreement, then all of the Key Personnel shall be subject to the liquidated damages provisions of this Agreement.

**5.7.3.** In addition, the Department shall have the right, to be exercised in its sole discretion, to remove, replace or to reduce the scope of services of the Construction Manager in the event that a member of the Key Personnel has been removed or replaced by the Construction Manager without the prior written consent of the Department. In the event the Department exercises the right to remove, replace or to reduce the scope of services of the Construction Manager, the Department shall have the right to enforce the terms of this Agreement and to keep-in-place those members of the Construction Manager's team not removed or replaced and the remaining members shall complete the services required under this Agreement in conjunction with the new members of the Construction Manager's team approved by the Department.

**Section 5.8. Qualified Personnel/Cooperation.**

The Construction Manager shall employ on the Project only those employees and Subcontractors who will work together in harmony and who will cooperate with one another on the Project. The Construction Manager shall enforce strict discipline, good order and harmony among its employees and its Subcontractors and shall remove from the site any person who is unfit for the work or fails to conduct herself or himself in a proper and cooperative manner. If the Department requests removal of any person as unfit or as having behaved inappropriately, the Construction Manager shall promptly comply.

**Section 5.9. Warranty.**

The Construction Manager shall provide assistance to the Department and the Client Agency during any applicable warranty period. The Construction Manager warrants to the Department that materials and equipment furnished under the Contract Documents will be of good quality and new unless otherwise required or permitted by the Contract Documents, that for the one (1) year period following the Substantial Completion Date the Work will be free from defects not inherent in the quality required or permitted, and that the Work will conform to the requirements of the Contract Documents. The Construction Manager's warranty excludes remedies for damage or defect caused by abuse, modifications not executed by the Construction Manager, improper or insufficient maintenance, improper operation, or normal wear and tear from normal usage. The Construction Manager shall use commercially reasonable efforts to schedule a joint inspection of the Project during the eleventh month after Substantial Completion is achieved. During such inspection, the Construction Manager and a representative of the Department shall walk the Project to identify any necessary warranty work.

**Section 5.10. Open Book Reporting.**

The Construction Manager shall maintain an open book reporting system with the Department, allowing the Department or its consultants access to the Construction Manager's Subcontractors and material suppliers, invoices, purchase orders, Change Order estimates, records for Self-Performed Work, and other relevant documentation and sources of information concerning the Work or costs. The Department shall not use its access to the Subcontractors to give instructions or directions to them. All instructions or directions shall be given only to the Construction Manager.

**Section 5.11. Claims for Additional Time**

**5.11.1.** Time is of the essence of this Agreement. The GMP Basis Documents must be submitted no later than the date set forth within the Project Information Section and the Project must be Substantially Complete no later than the Substantial Completion Date set forth within the Project Information Section above.

**5.11.2.** The Construction Manager will perform the Work so that it shall achieve Substantial Completion by the Substantial Completion Date. Unless the failure to achieve Substantial Completion by the Substantial Completion Date is a result of an Excusable Delay, as defined in Section 4.11.3, the delay shall be deemed Non-Excusable and the Construction Manager shall not be entitled to an extension of time. Without limiting the generality of the foregoing, delays for the following reasons shall be regarded as Non-Excusable and shall not entitle the Construction Manager to an extension of time:

**5.11.2.1.** Delays due to job site labor disputes, work stoppages, or suspensions of work;

**5.11.2.2.** Delays due to adverse weather, unless the Construction Manager establishes that the adverse weather was of a nature and duration in excess of averages established by data from the U.S. Department of Commerce, National Oceanic and Atmospheric Administration for the Project locale for the ten (10) years preceding the effective date of the Agreement. For purposes of this clause, weather shall only be deemed "adverse" if the weather in question was more severe than that encountered at the Project site over the last ten (10) years for the month in question. Such determinations shall be made based on the number of rain/snow days or the cumulative precipitation total for the month in question. Notwithstanding the foregoing, named storms shall conclusively be deemed "adverse";

**5.11.2.3.** Delays due to the failure of the Construction Manager or Subcontractors or material suppliers at any tier to perform in timely or proper fashion, without regard to concepts of negligence or fault; or

**5.11.2.4.** Delays due to Site Conditions whether known or unknown as of the effective date of the Agreement, foreseeable or unforeseeable at that time, naturally occurring or man-made; provided, however, that delays due to differing Site Conditions as permitted by Article 4, Section A of the Standard Contract Provisions (Construction Contract), or Hazardous Materials Remediation shall be deemed an Excusable Delay.

**5.11.3.** The Construction Manager shall be entitled to an adjustment in the Substantial Completion Date due to an Excusable Delay. The term "Excusable Delay" shall mean:

**5.11.3.1.** Delays due to adverse weather other than those that are classified as a Non-Excusable delay in accordance with Section 4.11.2.2 of this Agreement;

**5.11.3.2.** Delays due to acts of God, war, unavoidable casualties, civil unrest, and other similar causes of delay that are beyond the control of the Construction Manager; provided, however, that in no event shall a Non-Excusable Delay or the action or inaction of the Construction Manager, or any of its employees, agents, Subcontractors or material suppliers be deemed an Excusable Delay; or

**5.11.3.3.** Delays caused by differing Site Conditions as permitted by Article 4, Section A of the Standard Contract Provisions (Construction Contract), or Hazardous Materials Remediation as contemplated in Section 5.11.2.4 of this Agreement;

**5.11.3.4.** Delays due to suspensions of work;

**5.11.3.5.** Delays caused by the Client Agency or separate contractors of the Client Agency to the extent such delays are not concurrent with delays caused by the Construction Manager or any of its employees, agents, subcontractors or material suppliers;

In addition to the forgoing, a delay shall be deemed to be an Excusable Delay only to the extent that such delay (i) warrants an extension in the Substantial or Final Completion Date; (ii) has not been caused by the Construction Manager or any of its employees, agents, Subcontractors or material suppliers; (iii) is on Project's critical path; and (iv) is in addition to any time contingency periods set forth in the critical path.

**5.11.4.** If the Construction Manager wishes to make a claim for an adjustment in time allotted per the Project Schedule, written notice as provided herein shall be given. The Construction Manager's claim shall include an estimate of the cost and of the probable effect of delay on the progress of the Work. In the case of continuing delay, only one claim is necessary.

**5.11.5.** In no event shall the Construction Manager be entitled to an increase in the GMP, the Preconstruction Fee, or the Construction Management Fee as a result of either an Excusable or Non-Excusable Delay; provided, however, that to the extent that a delay is: (i) an Excusable Delay; (ii) of unreasonable duration; (iii) caused solely by the Department; and (iv) not concurrent with any other delay, then the Construction Manager shall be entitled to receive its actual costs, including all direct and indirect costs, bonds and insurances resulting from such extended duration. It is understood that the Construction Manager shall not be entitled to any profit or home office overhead, including, but not limited to, an increase in the Construction Management Fee, on any amounts to which the Construction Manager may be entitled pursuant to the preceding sentence.

**Section 5.12. Site Safety and Clean-Up.**

**5.12.1.** The Construction Manager will be required to provide a safe and efficient site, with controlled access. As part of this obligation, the Construction Manager shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the Project, and shall comply with the requirements set forth in Article 16, Section F of the Standard Contract Provisions (Construction Contract).

**5.12.2. Safety Plan.** Prior to the start of construction activities, the Construction Manager shall prepare a safety plan for the construction phase conforming to OSHA 29 CFR 1926 (such plan, the "Safety Plan"). This Safety Plan developed by the Construction Manager shall describe the proposed separation and the specific nature of the safety measures to be taken including fences and barriers that will be used as well as the site security details. The Safety Plan will be submitted to the Department and Client Agency for their review and approval prior to the commencement of construction. Once the Safety Plan has been approved, the Construction Manager shall comply with it at all times during construction. The Construction Manager shall be required to revise the Safety Plan as may be requested by the Department or Client Agency. The cost of revising and complying with the plan shall not entitle the Construction Manager to an increase in the GMP. In the event the Construction Manager fails to provide the Safety Plan, the Construction Manager will not be permitted to commence the Construction Phase until the Safety Plan is submitted and in no event shall any resulting delay constitute an Excusable Delay. Additionally, the Construction Manager shall comply with the requirements of Article 27, Section A of the Standard Contract Provisions (Construction Contract).

**5.12.3. Safety Barriers/Fences.** As part of its responsibility for Project safety, the Construction Manager shall install such fences and barriers as may be necessary to separate the construction areas of the site from those areas that are then being used by Client Agency for educational purposes. The Construction Manager shall describe in the Safety Plan the proposed separation and the specific nature of the fences and barriers that will be used. The Construction Manager's storage/laydown area will be limited to the limits of disturbance shown on the approved construction plans.

**5.12.4. Site Security.** The Construction Manager shall be responsible for site security and shall be required to provide such watchmen as are necessary to protect the site from unwanted intrusion.

**5.12.5. Exculpation.** The right of the Department and Client Agency to comment on the Safety Plan and the nature and location of the required fences and barriers shall in no way absolve the Construction Manager from the obligation to maintain a safe site.

**5.12.6. Temporary Power.** The Construction Manager shall be responsible for the cost of temporary power used during the construction of the Project, including, but not

limited to, the cost of installing such temporary wiring as may be required to bring power to the site. The Construction Manager shall also be responsible for the cost of all temporary construction necessary on the site.

**Section 5.13. Workhours, Site Office, and Coordination with Client Agency and Community**

**5.13.1. Workhours.** The Construction Manager shall comply with the Noise Ordinance and neither it nor its subcontractors shall undertake work on the Project site other than at the times and sound level permitted by the Noise Ordinance.

**5.13.2. Site Office.** Throughout the Project, the Construction Manager shall provide and maintain a fully-equipped construction office for the Project site.

**5.13.3. Parking.** The Construction Manager shall organize its work in such a manner so as to minimize the impact of its operations on the surrounding community. To the extent that the number of workers on the site is likely to have an adverse impact on neighborhood parking, the Construction Manager shall develop a parking plan for those individuals working on the site that is reasonably acceptable to the Department.

**5.13.4. Wheel Washing Stations.** The Construction Manager shall provide wheel washing stations on site so as to prevent the accumulation of dirt and other refuse on the streets surrounding the Project site.

**5.13.5. Outreach Plan.** The Construction Manager shall keep the Department informed of the construction activities and their potential impact on the community and shall develop a community outreach plan (the "Outreach Plan"). The Construction Manager shall submit the Outreach Plan to the Department prior to its implementation which shall be subject to the Department's review and approval.

**5.13.6. Supervision.** Throughout the Work, the construction office shall be managed by personnel competent to oversee the Work at all times while construction is underway. Such personnel shall maintain full-time, on-site construction supervision and provide daily inspections, quality control, monitoring, coordination of various trades, record drawings, and daily work log.

**Section 5.14. Close-out & FF&E.**

**5.14.1.** A detailed list of FF&E requirements will be developed during the preconstruction phase and attached hereto as **Exhibit L**.

**5.14.2. Punchlist.** Promptly after Substantial Completion, the Construction Manager shall coordinate with the Architect to develop a punchlist. Once the punchlist is prepared, the Construction Manager shall inspect the work along with representatives

from the Department. The punchlist shall be revised to reflect additional work items that are discovered during such inspection. The Construction Manager shall correct all punchlist items no later than ninety (60) days after Substantial Completion is achieved.

**5.14.3. Warranties & Manuals.** Subsequent to Substantial Completion and no later than fifteen (15) days following Substantial Completion, the Construction Manager shall prepare and submit the following documentation: (i) a complete set of product manuals (O&M), training videos, warranties, etc.; (ii) attic stock; (iii) an equipment schedule; (iv) a proposed schedule of maintenance for the renovated building; (v) environmental, health and safety documents for the renovated building; and (vi) all applicable inspection certificates/permits (boiler, elevator, emergency evacuation plans, health inspection, etc.) for the renovated building. No later than thirty (30) days following Substantial Completion, the Construction Manager shall prepare and submit: (x) a complete set of its Project files; and (y) a set of record drawings; and (z) the building information modeling file(s).

**5.14.4. RESERVED**.

**5.14.5. Support for Initial Heating & Cooling Season.** The Construction Manager and its mechanical subcontractor shall provide support to Client Agency and the Department during system start-up and in initial operation for the first heating and cooling season after Substantial Completion is achieved.

**5.14.6. Training.** The Construction Manager shall provide training to Client Agency staff on all of the building systems. The Construction Manager shall be required to schedule such training sessions and shall use commercially reasonable efforts to ensure all such training occurs prior to Final Completion.

**5.14.7.** The Construction Manager shall assist Client Agency in relocating FF&E and other items as necessary within the renovated building, as well as for cleaning and other move-in services as directed by the Department. The GMP shall include an allowance and scope of work for these activities. This allowance is in addition to cleaning services that would otherwise be required by the Construction Manager, including, but not limited to, the obligation to deliver a broom clean building at the end of construction.

**Section 5.15. Salvaged and Stored Items.** The Construction Manager shall be responsible for salvaging and storing all items as identified by the Department in accordance with all applicable District laws and regulations, after notifying the Department and receiving the Department's permission to proceed.

**Section 5.16. Sediment and Erosion Control.**
The Construction Manager shall be responsible for installing sediment and erosion control measures, inclusive of, but not limited to: silt fencing, inlet protection, stabilized construction entrances, and other control measures.

**Section 5.17. Quality Control.**

**5.17.1. General Obligation.** The Construction Manager shall be responsible for all activities necessary to manage, control, and document the Work to ensure compliance with Contract Documents. The Construction Manager's responsibility includes ensuring adequate quality control services are provided by the Construction Manager's employees and its subcontractors at all levels. The work activities shall include safety, submittal management, document reviews, reporting, and all other functions related to quality construction.

**5.17.2. Quality Control Plan.** Within forty five (45) days after the Permit Set of construction documents are approved, the Construction Manager shall develop a quality control plan for the Project (the "Quality Control Plan"). A draft of the Quality Control Plan shall be submitted to the Department and shall be subject to the Department's review and approval. The Quality Control Plan shall be tailored to the specific products/type of construction activities contemplated by the GMP Basis Documents, and in general, shall include a table of contents, quality control team organization, duties/responsibilities of quality control personnel, submittal procedures, inspection procedures, deficiency correction procedures, documentation process, and a list of any other specific actions or procedures that will be required for key elements of the Work.

**5.17.3. Implementation.** During the Construction Phase, the Construction Manager shall perform regular quality control inspections and create reports based on such inspections pursuant to the Quality Control Plan. The quality control reports shall be provided to the Department electronically on a monthly basis. The Construction Manager shall incorporate a quality control section in the progress meetings to discuss outstanding deficiencies, testing/inspections, and upcoming Work. The monthly report shall include a detailed summary of the steps that are being employed to provide quality construction and workmanship. The monthly report should specifically address issues raised during the month and outline the steps that are being used to address such issues.

**Section 5.18. Acceleration.**

Subject to the terms of this Section, the Department shall have the right to direct the Construction Manager to accelerate the Work if, in the reasonable judgment of Department: (i) the Construction Manager fails to supply a sufficiency of workers or to deliver the materials or equipment with such promptness as to prevent the delay in the progress of the Work; or (ii) the progress of the Work otherwise materially falls behind the projections contained in the then currently approved Project Schedule. In the event that the Department or its Program Manager determine that either of the events specified in the preceding sentence have occurred, the Department shall provide the Construction Manager with written notice of such event and the Construction Manager shall be required to provide the Department with a schedule recovery plan ("Recovery Plan") that is

reasonably designed to address the concerns raised in such notice within three (3) days after receipt of such notice. If the Department and the Construction Manager are unable to agree on the terms of the Recovery Plan within five (5) days after the issuance of the notice (i.e. within forty eight (48) hours after the receipt of the proposed Recovery Plan), the Department shall have the right to direct such acceleration as the Department, in its reasonable judgment, deems necessary. Provided Department complies with the notice provisions of this Section, the cost of any acceleration directed under this Section shall not justify an adjustment to the GMP on the Substantial Completion Date.

Given the nature of the Project and the fact that there is a fixed date upon which the Client Agency plans to occupy the building, the Construction Manager hereby: (i) acknowledges that this provision is a material inducement upon which the Department has relied in entering into this Agreement; and (ii) represents and warrants that it has included sufficient funding in the GMP in order to comply with the requirements of this Section.

**Section 5.19. Corrective Action Plan.**

Subject to the terms of this Section, the Department shall have the right to direct the Construction Manager to revise the provisions of the Quality Control Plan if, in the reasonable judgment of the Department, the craftsmanship of the Work being installed fails to comply with generally applicable industry standards, requirements set forth in the Specifications that are reasonably related to the quality of craftsmanship quality, or any provisions set forth in this Agreement (each a "Quality Control Event"). In the event that the Department or its Program Manager determine that a Quality Control Event has occurred, the Department shall provide the Construction Manager with written notice of the occurrence of such Quality Control Event and the Construction Manager shall be required to provide the Department with a corrective action plan that is reasonably designed to address the concerns raised in such notice within three (3) days after receipt of such notice (each instance, a "Corrective Action Plan"). If the Department and the Construction Manager are unable to agree on the terms of the Corrective Action Plan within five (5) days after the issuance of the notice (i.e. within forty eight (48) hours after the receipt of the proposed corrective action plan), the Department shall have the right to direct such corrective action measures as the Department, in its reasonable judgment, deems necessary. Such directive may include adjustments to the procedural provisions set forth in the Quality Control Plan and/or may impose additional requirements on the manner in which Work is being performed. Provided the Department complies with the notice provisions of this Section, the cost of any such corrective action directed under this Section shall not justify an adjustment to the GMP on the Substantial Completion Date.

**Section 5.20. Prolog.**

The Construction Manager shall utilize the Department's Prolog system to submit any and all documentation required to be provided by the Construction Manager for the Project, including, but not limited to: (i) requests for information; (ii) submittals; (iii) meeting minutes; (iv) invoices/applications for payment (full package including all forms required by DGS); (v) certified payrolls (in addition to upload via LCP Tracker); (vi) drawings and specifications; (vii)

punchlist; (viii) building information modeling; and (ix) other documents as may be designated by the Department. The Construction Manager also shall require all subcontractors and subconsultants to utilize Prolog for the Project.

**Section 5.21. Conformance with Laws.**

It shall be the responsibility of the Construction Manager to perform under the Agreement in conformance with the Department's Procurement Regulations and all statutes, laws, codes, ordinances, regulations, rules, requirements, orders, and policies of governmental bodies, including, without limitation, the U.S. Government and the District of Columbia government; and it is the sole responsibility of the Construction Manager to determine the Procurement Regulations, statutes, laws, codes, ordinances, regulations, rules, requirements and orders that apply and their effect on the Construction Manager's obligations thereunder. Given the requirements for the Project, the Department may, at its sole discretion, (i) apply for variance to the requirement of adhering to the Green Building Act on the Project and (ii) consider deferring the scope of work associated with storm water management to a later phase of the Project.

**Section 5.22. Construction Phase Deliverables.**

The deliverables set forth on **Exhibit C** are required during the Construction Phase.

**Section 5.23. Close-Out Deliverables.**

The deliverables set forth in **Exhibit L** are required during the Project's Close-Out and prior to Final Payment, as set forth in 0.

**.1** a complete set of product manuals (O&M), training videos, warranties, etc.
**.2** as built record drawings and building information model(s).
**.3** attic stock and schedule.
**.4** equipment schedule.
**.5** proposed schedule of maintenance.
**.6** environmental, health & safety documents.
**.7** all applicable inspection certificates/permits (boiler, elevator, emergency evacuation plans, health inspection, etc.).
**.8** a complete set of its Project files.
**.9** LEED for schools – Preliminary Construction Review (Gold certification and International Green Construction Code and DOEE Storm Water Management requirements.)

**Section 5.24 Licensing, Accreditation and Registration.**

The Construction Manager and all of its subcontractors and subconsultants (regardless of tier) shall comply with all applicable District of Columbia, state, and federal licensing, accreditation, and registration requirements and standards necessary for the performance of the

Agreement. Without limiting the generality of the foregoing, all drawings shall be signed and sealed by a professional Architect or engineer licensed in the District of Columbia.

**Section 5.24 Protection of Existing Elements.**

The Construction Manager shall ensure the protection of all existing features, public utilities, and other existing structures during construction. The Construction Manager shall ensure the protection of existing, site improvements, trees and shrubs from damage during construction. Protection extends to the root systems of existing vegetation. The Construction Manager shall not store materials or equipment, or drive machinery, within drip line of existing trees and shrubs.

## Article 6 - DESIGNATED REPRESENTATIVES

**Section 6.1. Department's Designated Representative.**

The Department designates the individual(s) identified in **Exhibit G** as its representative with express authority to bind the Department with respect to all matters requiring the Department's approval or authorization. Subject to the limitations on their authority specified in **Exhibit G**, these representative(s) shall have the exclusive authority to make decisions on behalf of the Department concerning estimates and schedules, construction budgets, changes in the Work, and execution of Change Orders or Change Directives, and shall render such decisions promptly and furnish information expeditiously, so as to avoid unreasonable delay in the services or performance of the Work of the Construction Manager. In order for the Department to effectively manage the Project and assure that the Construction Manager does not receive conflicting instructions regarding the Work, the Construction Manager shall promptly notify the Department's representative upon receiving any instructions or other communication in connection with the Construction Manager's Work from any employee of the Department or other purported agent of the Department other than the Department's designated representative.

**Section 6.2. Construction Manager's Designated Representative.**

The Construction Manager designates the individual(s) identified in **Exhibit G** as its representative with express authority to bind the Construction Manager with respect to all matters requiring the Construction Manager's approval or authorization. In addition, the Department retains the right to approve candidates to serve as on-site personnel in accordance with each candidate's experience with similar projects and local marketplace conditions. Once approved, individuals cannot be changed without the Department's prior approval. During the entire term, it is agreed that the Construction Manager's designated representative will devote his or her time exclusively to the Project, unless the Department consents to a reduction in time. All services provided by the Construction Manager shall be performed in accordance with the highest professional standards recognized and adhered to by contractors that build first-class state-of-the-art buildings and projects that are similar to the Project in large urban areas.

## Article 7 - COMPENSATION AND PAYMENTS FOR PRECONSTRUCTION PHASE SERVICES

### Section 7.1. Compensation

**7.1.1.** The Department shall compensate and make payments to the Construction Manager for preconstruction services in accordance with this Article 7 - and Article 10 - . For preconstruction services, the Construction Manager's compensation shall be as set forth in the Project Information Section of this Contract (the "Preconstruction Fee"). The Preconstruction Fee shall be the Construction Manager's sole compensation for Preconstruction Phase Services. The Preconstruction Fee shall include, but not be limited to, amounts necessary to compensate the Construction Manager for:

- Profit
- Home Office Overhead
- Cost of preconstruction staff
- Fringe Benefits associated with staff costs
- Payroll taxes associated with staff costs
- Staff costs associated with obtaining permits and approvals during the Preconstruction Phase
- Out-of-house consultants
- Travel, Living and Relocation expenses
- Job vehicles
- Office equipment including but not limited to:
    - Computer hardware and software
    - Fax machines
    - Copying machines
- Office supplies
- Telephone
- Local delivery and overnight delivery costs

**7.1.2.** The Department shall compensate and make payments to the Construction Manager for design services in accordance with Article 6, Article 7 and Article 9 of this Contract.

### Section 7.2. Payments

**7.2.1.** Payments for Preconstruction Phase Services shall be made monthly over the anticipated duration of the Preconstruction Phase following presentation and acceptance of the Construction Manager's invoice and shall be in proportion to services

performed. In no event, however, will the aggregate of the Construction Manager's monthly invoices for Preconstruction Phase Services exceed the Preconstruction Fee.

Payments are due and payable in accordance with Article 10 - of this Agreement. Amounts unpaid after the date of which payments due shall bear interest in accordance with the Quick Payment Act.

## Article 8 - COMPENSATION FOR CONSTRUCTION PHASE SERVICES

### Section 8.1. Compensation.

**8.1.1.** The Department shall compensate and make payments to the Construction Manager for Construction Phase Services in accordance with this Article 8 - and Article 10 - . For the Construction Phase Services, the Construction Manager's compensation shall be as set forth in the Project Information Section of this Agreement (the "Construction Management Fee"). The Construction Manager acknowledges and agrees that the percentage of the total amount of the Construction Management Fee set forth in the Project Information Section of this Agreement is at risk (the "At Risk Portion"), and the Construction Manager shall only be entitled to the At Risk Portion as set forth below. Unless and until the Construction Manager's entitlement to any subset of the At Risk Portion is determined by the Department, the Construction Manager shall only be entitled to bill for the portion of the Construction Management Fee that is not at risk (the "Base Construction Management Fee"). The Base Construction Management Fee shall be billed in accordance with Article 10 - , to be paid in equal monthly installments over the anticipated duration of the Construction Phase. To the extent that the duration of the Agreement is extended, the then remaining amounts of the Base Construction Management Fee will be re-allocated such that the then existing portion of the Base Construction Management Fee shall be evenly spread over the then remaining duration of the Construction Phase.

**8.1.2.** **Award Fee Pool.** The At Risk Portion shall be used to establish and fund an award fee pool ("the Award Fee Pool"). Within sixty (60) days after approval and full execution of this Agreement, the Department shall appoint a committee that will determine entitlement to the Award Fee Pool (such committee, the "Award Fee Evaluation Committee"). The Award Fee Evaluation Committee will consist of: (i) the Department's Deputy Director for Capital Construction; (ii) a senior representative from Client Agency; and (iii) a senior member of the Program Management team that is not involved in the day-to-day management of this Project that is acceptable to both Parties.

**8.1.3.** The Construction Manager may earn the At Risk Portion of the Construction Management Fee in accordance with **Exhibit M**

**Section 8.2. Maximum Cost of General Conditions.**

The Construction Manager shall not be entitled to recover more than the amount set forth in the Project Information Section of this Agreement for the Cost of General Conditions (such amount, the "Maximum Cost of General Conditions"). If, as a result of any Change Order(s) or Change Directive(s): (i) the Project durations extends 30 days or more beyond the Substantial Completion Date; and (ii) the Construction Manager can demonstrate to the satisfaction of the Department that such additional Costs of General Conditions are reasonable and not due to any fault of the Construction Manager, its Subcontractors, materialmen, consultants or anyone making claims thereunder, the Construction Manager may request a Change Order to adjust the Maximum Cost of General Conditions. To the extent the Construction Manager incurs Costs of General Conditions in excess of the Maximum Cost of General Conditions, the Construction Manager shall not be entitled to reimbursement for such amounts unless the Department authorizes, in writing, an increase to the Maximum Cost of General Conditions. Nonetheless, in such an event, the Construction Manager exceeds the Maximum Cost of General Conditions, the Construction Manager shall continue to be required to adequately staff the Project.

**Section 8.3. Initial Not-to-Exceed Amount.**

Unless and until the GMP Amendment is executed and approved by the Council for the District of Columbia, this Agreement shall have an initial not-to-exceed amount as set forth in the Project Information Section of this Agreement (the "Initial NTE"). In no event shall the Construction Manager be entitled to recover more than the Initial NTE unless the Construction Manager is authorized to exceed the Initial NTE by the Department in advance and in writing. Prior to expending or committing any portion of the Initial NTE, the Construction Manager shall obtain the Department's written approval of such expenditure or commitment, as well as a determination as to whether the work will qualify as a "capital" expense under the Department's financial guidelines. In making such a request, the Construction Manager shall submit an itemized breakdown of the work that the Construction Manager seeks to release using funds from the Initial NTE as well as the associated costs of such work.

**Section 8.4. Project Budget.**

The Department has established a budget for the Project as set forth in the Information Section of this Agreement (such budget, the "Project Budget"). Such Project Budget includes any and all amounts which may be due to the Construction Manager pursuant to this Agreement, and in no event shall the Construction Manager be entitled to recover more than the Project Budget unless the Construction Manager is authorized to exceed the Project Budget by the Department in advance and in writing.

**Section 8.5. No Adjustments to Fee.**

It is the Department's intent to engage the Construction Manager to develop a GMP that meets the programmatic requirements set forth in **Exhibit A** by the Client Agency and the Project Budget as set forth herein (*i.e.* built to budget), to allow for Substantial Completion of the Work to be achieved no later than the Substantial Completion Date. The Construction Manager shall be entitled to an adjustment to the Construction Management Fee at the time the GMP is

established to the extent, and only to the extent, that: (i) the Department makes additions to the scope that, when measured relative to the program, cause the GMP to exceed the Project Budget by more than ten percent (10%); or (ii) the Department makes additions to the scope provided for herein which (other than for punchlist or warranty work) requires the Construction Manager's services at the Project beyond June 30, 2020. With regard to Change Orders issued after the GMP is established, the Construction Manager shall be entitled to an increase in the Construction Management Fee to the extent, and only to the extent, that: (i) the Department has added a new programmatic element to the Project; or (ii) the Department made additions to the GMP scope which (other than punchlist or warranty work) require the Construction Manager's services at the Project to extend 30 days or more beyond the Substantial Completion Date.

**Section 8.6. Markup on Trade Work.**

The maximum markup for change order work shall be in accordance with Section 17.11 of Article 17.

## Article 9 - COST OF THE WORK FOR CONSTRUCTION PHASE

### Section 9.1. Cost of the Work.

The term "Cost of the Work" shall mean the costs necessarily incurred by the Construction Manager in the proper performance of the Work and shall include only the following:

**9.1.1.** Payments made by the Construction Manager to Subcontractors and suppliers, other than design subconsultants, but only in accordance with the subcontracts and supply agreements;

**9.1.2.** All amounts due to the Construction Manager under the terms of the Department's written authorization for the Construction Manager to perform any portion of the Work as Self-Performed Work. If an authorization for the Construction Manager to engage in Self-Performed Work is not on a fixed-price basis, then, as to that Work, the following costs shall be within the Cost of the Work:

**(a) Labor.** Properly documented wages actually paid to Project foremen, construction workers, and other personnel in the direct employ of the Construction Manager, while engaged in approved Self-Performed Work, together with contributions, assessments, payroll taxes, or fringe benefits required by the laws or applicable collective bargaining agreements.

**(b) Incorporated Materials.** The cost, net of trade discounts, of all materials, products, supplies and equipment incorporated into the Self-Performed Work, including, without limitation, costs of transportation and handling.

**(c) Unincorporated Materials.** The cost of materials, products, supplies and equipment not actually installed or incorporated into the Self-Performed Work, but required to provide a reasonable allowance for waste or spoilage, subject to the Construction Manager's agreement to turn unused excess materials over to the Department at the completion of the Project or, at the Department's option, to sell the material and pay the proceeds to the Department or give the Department a credit in the amount of the proceeds against the Cost of the Work.

**9.1.3.** Royalty and license fees paid for use of a design, process or product, if its use is required by this Agreement or has been approved in advance by the Department;

**9.1.4.** Fees for obtaining all required approvals or permits associated with any abatement, demolition, utilities abandonment, and utility relocation (including utility connection fees), including any and all building and/or trade permits fees;

**9.1.5.** All performance and payment bonds and general liability insurance. The Department may, in its sole discretion, allow the Construction Manager to recover the

costs of subcontractor default insurance at a mutually agreed upon rate in lieu of trade level bonds, provided that such insurance be approved by the Department in advance and after being presented with a cost-benefit analysis of such use;

**9.1.6.** All fees and other costs necessarily incurred to carry out testing and inspection required by the Agreement or applicable laws, or otherwise to maintain proper quality assurance. The costs the Construction Manager incurs to schedule and coordinate any additional testing and inspections the Department may decide to conduct itself shall be within Cost of the Work unless the additional testing establishes that the Work tested was defective or otherwise failed to satisfy requirements set forth in the Agreement, in which case the Construction Manager shall pay the costs, without reimbursement;

**9.1.7.** All bonds to jurisdictional agencies (utilities, storm water management, land disturbance, and grading);

**9.1.8.** The Cost of General Conditions, subject however to the Maximum Cost of General Conditions; and

**9.1.9.** Costs of repairing or correcting damaged or nonconforming Work executed by the Construction Manager, Subcontractors or suppliers, provided that such damaged or nonconforming Work was not caused by negligence or failure to fulfill a specific responsibility of the Construction Manager, and only to the extent that the cost of repair or correction is not recoverable by the Construction Manager from insurance, sureties, Subcontractors or suppliers. It is understood that the cost of repairing, correcting damaged or nonconforming Work that was Self-Performed shall not be reimbursable in any event.

**Section 9.2. Cost of General Conditions.**
The Construction Manager's general conditions costs shall be reimbursable at cost and without mark-up. Only the following items, however are reimbursable (any other items or expenses are non-reimbursable and the Construction Manager shall use its fee to cover any additional cost items):

**9.2.1** Cost of Construction Staff, as defined below. Only staff stationed in the field is reimbursable; however, exceptions may be made for Project executive personnel, purchasing scheduling, cost estimating, local participation oversight and reporting and accounting services if such functions are normally provided by the Construction Manager's regional and/or home office personnel and/or if Construction Manager deems that such functions are more efficiently performed at the regional and/or home office(s). The term "Construction Staff" shall mean the Project executive, project managers and superintendents assigned to the project, administrative and professional staff performing scheduling, cost estimating and accounting services assigned on a full-time basis to the Project site;

**9.2.2** Fringe Benefits associated with construction staff;

**9.2.3** Payroll taxes and payroll insurance associated with construction staff;

**9.2.4** Staff costs associated with obtaining permits and approvals;

**9.2.5** Out-of-house consultants;

**9.2.6** Field office for the Construction Manager including but not limited to: (i) trailer purchase and/or rent; (ii) field office installation, relocation and removal; (iii) utility connections and charges during the Construction Phase; (iv) furniture; and (v) office supplies;

**9.2.7** Office equipment including but not limited to: (i) computer hardware and software; (ii) fax machines; (iii) copying machines; (iv) telephone installation, system and use charges; and (v) job radios;

**9.2.8** Local delivery and overnight delivery costs; and

**9.2.9** First aid facility; and

**9.2.10** BIM Cost (software, seats, hardware).

**Section 9.3 Costs Not to Be Reimbursed.**

All costs not specifically listed in Section 9.1 as being within the Cost of the Work are excluded from the Cost of the Work and shall not be reimbursable. In particular, but without limitation, the Cost of the Work does not include any of the following:

**9.3.1** Any personnel or labor costs other than those provided for in Section 9.1.3(a) or 9.2.1;

**9.3.2** Fees for any permits or licenses the Construction Manager requires to conduct its general business operations;

**9.3.3** Capital expenses and interest on capital employed for the Work;

**9.3.4** Direct or indirect costs of any kind, except those expressly included in Section 9.1;

**9.3.5** Sales or use taxes, unless the Construction Manager establishes that applicable law required payment of such taxes;

**9.3.6** Costs due to the errors or omissions of the Construction Manager or its Subcontractors or suppliers at all tiers, negligent or otherwise;

**9.3.7** Costs dues to breach of the Agreement by the Construction Manager or its Subcontractors or material suppliers at all tiers, including, without limitation, costs arising from defective or damaged Work or its correction, disposal of materials or equipment erroneously supplied, and repairs to property damaged by the Construction Manager or its Subcontractors or material suppliers at all tiers;

**9.3.8** Any costs incurred in performing work of any kind before Notice to Proceed, unless specifically authorized by a duly authorized Contracting Officer of the Department in advance and in writing;

**9.3.9** The cost of home or regional offices, it being understood that compensation for such costs included in the Construction Management Fee and Award Fee; and

**9.3.10** Except as provided in Section 9.1.10 of this Agreement, costs due to the errors or omissions of the Construction Manager or its Subcontractors or suppliers at all tiers, negligent or otherwise.

**Section 9.4 Discounts, Rebates And Refunds.**

**9.4.1** Cash discounts obtained on payments made by the Construction Manager shall accrue to the Department if: (i) before making such payment(s), the Construction Manager included them in an Application for Payment and received payment therefor from the Department; or (ii) the Department has deposited funds with the Construction Manager with which to make such payment(s). All other cash discounts shall accrue to the Construction Manager. Trade discounts, rebates, refunds and amounts received from sales of surplus materials and equipment shall accrue to the Department, and the Construction Manager shall make provisions so that such amounts can be secured.

**9.4.2** Amounts that accrue to the Department in accordance with the provisions of Section 0 shall be credited to the Department as a deduction from the Cost of the Work.

**Section 9.5 Facilitating Tax Exempt Purchases.**

The Department expects that the Project will qualify as tax-exempt under applicable laws. Upon request, the Department will provide the Construction Manager with the necessary information relating to the tax exemption. In the event any savings are attributable to the tax-exempt status of the Project, the Construction Manager shall not be entitled to share in such savings.

**Section 9.6 Accounting Records.**

The Construction Manager shall keep full and detailed accounts and exercise such controls as may be necessary for proper financial management under the Agreement. The Construction Manager's accounting and control systems shall be satisfactory to the Department. The Department, its representatives, and the Department's accountants shall be afforded access to the Construction Manager's records, books, correspondence, instruction, drawings, receipts,

subcontracts, purchase orders, vouchers, memoranda and other data relating to this Project, and the Construction Manager shall preserve such documentation relating to the Project for a period of three years after final payment, or for such longer period as may be required by law.

**Section 9.7 Excluded Cost Elements.**

It is the Department's intent that the Construction Manager provide a turnkey solution for the implementation of the Project, and the Project Budget set herein has been developed based on such framework. The Construction Manager shall advance the Project in a manner consistent with the Project Budget with the understanding that only the following cost elements shall be excluded from the Project Budget set forth herein:

**.1** Design by Architect/Engineer and its sub-consultants

**.2** 3rd Party Material Testing;

**.3** Commissioning;

**.4** 3rd Party Inspections;

**.5** Costs of active Client Agency equipment;

**.6** 3rd Party Plan Review;

**.7** Cost of items salvaged from other Client Agency locations as agreed between the Construction Manager and the Department, in consultation, as necessary, with Client Agency. Cost of transporting, and installing the salvaged items are not excluded.

**8.** the cost of public Art.

## Article 10 - CONSTRUCTION PHASE PAYMENTS

**Section 10.1 Progress Payments.**

The Construction Manager shall be compensated in a series of progress payments and a Final Payment, for Work completed in accordance with the Agreement, and for which proper Applications for Payment have been submitted and approved. The amount of each progress payment shall be as follows:

The Cost of Work completed to date

Plus Cost of Work for Pay Period x 60% of Construction Management Fee (i.e. Construction Management Fee not at risk)

Current approved estimated

Cost of Work through Final Completion

Plus Any subset of the At Risk Portion of the Construction Management Fee to which the Department has determined the Construction Manager to be Entitled

Minus Applicable retainage

Minus Amounts previously paid by the Department

**Section 10.2 Retention.**

The Department shall withhold from each progress payment an amount equal to ten percent (10%) of the payment related to: (i) each Subcontract and supply agreement; (ii) the Preconstruction Fee; (iii) Construction Management Fee; (iv) General Conditions Costs; and (v) the Cost of the Work related to each item of Self-Performed Work, until such time as fifty percent (50%) of the then currently budgeted cost associated with each such item has been invoiced, at which point the Department may cease retaining against such item; provided, however, that retention shall not be held on the costs of bonds, insurances, and those elements of the general requirements which consist of a single, insolated effort such as dumpster disposal and safety carpentry. The Department may elect to increase the retention on any trade Subcontractor up to ten percent (10%) in the event the Department determines that the situation so warrants. The Department, in its sole and absolute discretion, may elect to reduce the retainage relating to a particular trade Subcontractor, or the Cost of the Work related to a specific item of Self-Performed Work to zero upon: (a) satisfactory completion of such Work; (b) submission of all required warranties, certifications, and operating or maintenance instructions with respect to that Work; and (c) execution of appropriate waivers of lien and releases of claims. However, in no event shall the total retainage held by the Department be reduced to an amount that is less than two and one-half percent (2.5%) of the GMP.

**Section 10.3 Documents Required with Application for Payment.**

Each Application for Payment shall be accompanied by the Construction Manager's job cost ledgers in a form satisfactory to the Department, the Subcontractors' and Suppliers' Applications for Payment on AIA Documents G702 and G703 or other form acceptable to the Department, and such other supporting documentation as the Department may reasonably request. Each Application for Payment shall include detailed documentation of costs as a condition to approving progress payments, but the Construction Manager shall nevertheless maintain complete documentation of the costs. An executed Release of Liens and Claims in the format required by the Contracting Officer must accompany each Application for Payment.

**Section 10.4 Stored Materials.**

The Department shall not be required to pay for materials stored at the site or stored at other locations absent prior written authorization to do so, which authorization may be withheld at the Department's sole discretion. If the Department expressly agrees to pay for materials stored at the site but not yet incorporated into the Work, the Application for Payment may also include a request for payment of the cost of such materials, if the materials have been delivered to the site, and suitably stored. Such requests shall be documented by appropriate invoices and bills of sale. Payment for stored materials shall be conditioned also on the Construction Manager's representation that it has inspected the material and found it to be free from defect and otherwise in conformity with this Agreement, and on satisfactory evidence that the materials are insured under the builder's risk policy. Further, if the Construction Manager requests the Department to allow payments for storage of materials offsite, the Construction Manager shall be required, inter alia, to agree to execution of proper documentation to afford the Department a secured interest in the materials upon payment.

**Section 10.5 Construction Manager's Certification.**

Each Application for Payment shall be accompanied by the Construction Manager's signed certification that:

**Section 10.5.1.** all amounts paid to the Construction Manager on the previous Application for Payment that were attributable to Subcontractor Work or to materials or equipment being supplied by any supplier have been paid over to the appropriate Subcontractors and suppliers;

**Section 10.5.2.** that all amounts currently sought for Subcontractor Work or supply of materials or equipment are currently due and owing to the Subcontractors and material or equipment suppliers;

**Section 10.5.3.** that all Work, materials or equipment for which payment is sought is, to the best of the Construction Manager's knowledge, free from defect and meets all of the requirements set forth in the Agreement; and

**Section 10.5.4.** that the Construction Manager's subcontracts include the clauses required by subparagraphs (1) through (4) of D.C. Official Code §2-221.02(d) (2017); and

**Section 10.5.5.** The Construction Manager shall not include in an Application for Payment amounts for Work for which the Construction Manager does not intend to pay.

**Section 10.6 Lien Waivers**.

Each Application for Payment shall be accompanied by written waivers of the right to file a mechanic's lien and all other claims, in a form substantially similar to **Exhibit J** for the Construction Manager and all Subcontractors and material suppliers at all tiers who have supplied labor or material or both for which payment is requested, subject only to receipt of payment. If the Department so requests, the Construction Manager shall also submit unconditional waivers of liens for itself and all Subcontractors and material suppliers at all tiers with respect to Work or materials or equipment for which payment has been previously made, and additional forms of waiver acknowledging receipt of final payment under the Agreement, and providing final release of such liens.

**Section 10.7 Warranty of Title.**

By submitting an Application for Payment, the Construction Manager warrants to the Department that title to all Work for which payment is sought will pass to the Department, without liens, claims, or other encumbrances, upon the receipt of payment by the Construction Manager. The Department may require execution of appropriate documents to confirm passage of clear title. Passage of title shall not operate to pass the risk of loss with respect to the Work in question. Risk of loss remains with the Construction Manager until Substantial Completion, unless otherwise agreed by the Department, in writing.

**Section 10.8 Submission.**

On the twenty-fifth day of each month the Construction Manager shall submit to the Department (with a copy to the Program Manager) an Application for Payment, which Application for Payment shall cover the entire month during which the Application for Payment is submitted. All amounts formally submitted via Application for Payment and not disputed by the Department shall be due and payable on the last day of the month following submission or, if that is not a business day, on the following business day. If the Construction Manager and Department are unable to agree on the amounts properly due and owing, the Department shall pay in accordance with its good faith determination and the Construction Manager may protest and pursue a claim as provided in this Agreement and the Standard Contract Provisions (Construction Contract).

**Section 10.8.1 Invoice Submittal.** The Construction Manager shall create and submit payment requests in an electronic format through the DC Vendor Portal, https://vendorportal.dc.gov. The Construction Manager shall submit proper invoices on a monthly basis. To constitute a proper invoice, the Construction Manager shall enter all required

information into the Portal after selecting the applicable purchase order number which is listed on the Construction Manager's profile.

**Section 10.9 Right to Withhold Payments.**

The Department will notify the Construction Manager within fifteen (15) days after receiving any Application for Payment of any defect in the Application for Payment or the Construction Manager's performance which may result in the Department's declining to pay all or a part of the requested amount. The Department may withhold payment from the Construction Manager, in whole or part, as appropriate, if:

**10.9.1** the Work is defective and such defects have not been remedied; or

**10.9.2** the Department has determined that the Construction Manager's progress has fallen behind the Project Schedule, and the Construction Manager fails, within ten (10) calendar days of the Department's written demand, to provide the Department with a realistic and acceptable Recovery Plan in accordance with Section 5.18; or

**10.9.3** the Construction Manager's monthly schedule update reflects that the Construction Manager has fallen behind the Project Schedule, and the Construction Manager fails to include, in the same monthly report, a realistic and acceptable Recovery Plan in accordance with Section 5.18; or

**10.9.4** the Construction Manager has failed to provide reports in full compliance with Section 5.5 of this Agreement; or

**10.9.5** the Construction Manager has failed to pay Subcontractors or suppliers promptly or has made false or inaccurate certifications that payments to Subcontractors or suppliers are due or have been made; or

**10.9.6** any mechanic's lien has been filed against the Department, the site or any portion thereof or interest therein, or any improvements on the site, even though the Department has paid all undisputed amounts due to the Construction Manager, and the Construction Manager, upon notice, has failed to remove the lien, by bonding it off or otherwise, within ten (10) calendar days; or

**10.9.7** the Department has reasonable evidence that the Work will not be completed by the Substantial Completion Date, as required, that the unpaid balance of the GMP would not be adequate to cover actual or liquidated damages arising from the anticipated delay; or

**10.9.8** the Department has reasonable evidence that the Work cannot be completed for the unpaid balance of the GMP; or

**10.9.9** the Construction Manager is otherwise in substantial breach of this Agreement (including, without limitation, failures to comply with LSDBE Utilization requirements; or

**10.9.10** the Application for Payment is incomplete, unsubstantiated and/or does not contain sufficient documentation for evaluation by the Contracting Officer.

**Section 10.10 Payment Not Acceptance.**

Payment of any progress payment or final payment shall not constitute acceptance of Work that is defective or otherwise fails to conform to the Agreement, or a waiver of any rights or remedies the Department may have with respect to defective or nonconforming Work.

**Section 10.11 Department Not Obligated to Others.**

The Department shall have no obligation to pay or be responsible in any way for payments to a consultant or subcontractor performing portions of the Work.

**Section 10.12 Final Payment.**

A final payment ("Final Payment") shall be made by the Department to the Construction Manager when: (i) Final Completion has been achieved; (ii) all deliverables set forth in Section 5.14, and **Exhibit L** have been delivered to and are accepted by the Department; (iii) the Construction Manager provides the Department a complete set of product manuals (O&M), training videos, and warranties, as applicable; and (iv) a complete final Application for Payment and a final accounting for the Cost of the Work have been submitted by the Construction Manager and reviewed by the Department and, to the extent the Department determines appropriate, the Department's accountants. The Department shall make Final Payment not more than thirty (30) days after the Department verifies the amount of the final payment set forth in a complete final Application for Payment.

**10.12.1** The amount of the Final Payment shall be calculated as follows:

**10.12.1.1** Take the sum of the Cost of the Work substantiated by the Construction Manager's final accounting and the Preconstruction Fee and the Construction Management Fee as adjusted to reflect whether the goals established in **Exhibit M** have been met; but not more than the GMP.

**10.12.1.2** Subtract amounts, if any, for which the Department withholds pursuant to the Agreement.

**10.12.1.3** Subtract the aggregate of previous payments made by the Department. (If the aggregate of previous payments made by the Department exceeds the amount due the Construction Manager, the Construction Manager shall promptly reimburse the difference to the Department).

**10.12.1.4** The Final Payment shall take into account any savings accruing to the Department or the Construction Manager.

**10.12.2** The Department will review and report in writing on the Construction Manager's final accounting within 30 days after delivery of the final accounting to the Department by the Construction Manager. Based upon Department's determination of the Cost of the Work, and provided the other conditions of Section10.12.1 have been met, the Department will, within fifteen (15) days after the Department's determination, notify the Construction Manager of any amount that the Department will withhold and the reasons therefor. The time periods stated in this Paragraph 9.12 supersede those for typical progress payments.

**10.12.3** If the Department determines that the Cost of the Work is that claimed by the Construction Manager, the Construction Manager shall be entitled to proceed in accordance with Article 3 of the Standard Contract Provisions (Construction Contract). Pending a final resolution of the disputed amount, the Department shall pay the Construction Manager the amount that the Department determines to be appropriate.

## Article 11 - INSURANCE

### Section 11.1 Insurance Required by the Project

A. GENERAL REQUIREMENTS. The Contractor at its sole expense shall procure and maintain, during the entire period of performance under this contract, the types of insurance specified below. The Contractor shall have its insurance broker or insurance company submit a Certificate of Insurance to the CO giving evidence of the required coverage prior to commencing performance under this contract. In no event shall any work be performed until the required Certificates of Insurance signed by an authorized representative of the insurer(s) have been provided to, and accepted by, the CO. All insurance shall be written with financially responsible companies authorized to do business in the District of Columbia or in the jurisdiction where the work is to be performed and have an A.M. Best Company rating of A- / VII or higher. The Contractor shall require all of its subcontractors to carry the same insurance required herein.

All required policies shall contain a waiver of subrogation provision in favor of the Government of the District of Columbia.

The Government of the District of Columbia shall be included in all policies required hereunder to be maintained by the Contractor and its subcontractors (except for workers' compensation and professional liability insurance) as an additional insureds for claims against The Government of the District of Columbia relating to this contract, with the understanding that any affirmative obligation imposed upon the insured Contractor or its subcontractors (including without limitation the liability to pay premiums) shall be the sole obligation of the Contractor or its subcontractors, and not the additional insured. The additional insured status under the Contractor's and its subcontractors' Commercial General Liability insurance policies shall be effected using the ISO Additional Insured Endorsement form CG 20 10 11 85 (or CG 20 10 07 04 **and** CG 20 37 07 04) or such other endorsement or combination of endorsements providing coverage at least as broad and approved by the CO in writing. All of the Contractor's and its subcontractors' liability policies (except for workers' compensation and professional liability insurance) shall be endorsed using ISO form CG 20 01 04 13 or its equivalent so as to indicate that such policies provide primary coverage (without any right of contribution by any other insurance, reinsurance or self-insurance, including any deductible or retention, maintained by an Additional Insured) for all claims against the additional insured arising out of the performance of this Statement of Work by the Contractor or its subcontractors, or anyone for whom the Contractor or its subcontractors may be liable. These policies shall include a separation of insureds clause applicable to the additional insured.

If the Contractor and/or its subcontractors maintain broader coverage and/or higher limits than the minimums shown below, the District requires and shall be entitled to the broader coverage and/or the higher limits maintained by the Grantee and subcontractors.

1. Commercial General Liability Insurance ("CGL") - The Contractor shall provide evidence satisfactory to the CO with respect to the services performed that it carries a CGL policy, written on an occurrence (not claims-made) basis, on Insurance Services Office, Inc. ("ISO") form CG 00 01 04 13 (or another occurrence-based form with coverage at least as broad and approved by the CO in writing), covering liability for all ongoing and completed operations of the Contractor, including ongoing and completed operations under all subcontracts, and covering claims for bodily injury, including without limitation sickness, disease or death of any persons, injury to or destruction of property, including loss of use resulting therefrom, personal and advertising injury, and including coverage for liability arising out of an Insured Contract (including the tort liability of another assumed in a contract) and acts of terrorism (whether caused by a foreign or domestic source). Such coverage shall have limits of liability of not less than $1,000,000 each occurrence, a $2,000,000 general aggregate (including a per location or per project aggregate limit endorsement, if applicable) limit, a $1,000,000 personal and advertising injury limit, and a $2,000,000 products-completed operations aggregate limit.

2. Automobile Liability Insurance - The Contractor shall provide evidence satisfactory to the CO of commercial (business) automobile liability insurance written on ISO form CA 00 01 10 13 (or another form with coverage at least as broad and approved by the CO in writing) including coverage for all owned, hired, borrowed and non-owned vehicles and equipment used by the Contractor, with minimum per accident limits equal to the greater of (i) the limits set forth in the Contractor's commercial automobile liability policy or (ii) $1,000,000 per occurrence combined single limit for bodily injury and property damage.

3. Workers' Compensation Insurance - The Contractor shall provide evidence satisfactory to the CO of Workers' Compensation insurance in accordance with the statutory mandates of the District of Columbia or the jurisdiction in which the contract is performed.

   Employer's Liability Insurance - The Contractor shall provide evidence satisfactory to the CO of employer's liability insurance as follows: $500,000 per accident for injury; $500,000 per employee for disease; and $500,000 for policy disease limit.

   All insurance required by this paragraph 3 shall include a waiver of subrogation endorsement for the benefit of Government of the District of Columbia.

4. Cyber Liability Insurance - The Contractor shall provide evidence satisfactory to the Contracting Officer of Cyber Liability Insurance, with limits not less than $2,000,000 per occurrence or claim, $2,000,000 aggregate. Coverage shall be sufficiently broad to respond to the duties and obligations as is undertaken by Contractor in this agreement and shall include, but not limited to, claims involving infringement of intellectual property, including but not limited to infringement of copyright, trademark, trade dress, invasion of privacy violations, information theft, damage to or destruction of electronic information, release of private information, alteration of electronic information, extortion and network security. The policy shall provide coverage for breach response costs as well as regulatory fines and penalties as well as credit monitoring expenses with limits sufficient to respond to these obligations. This insurance requirement will be considered met if the general liability insurance includes an affirmative cyber endorsement for the required amounts and coverages.

5. Employment Practices Liability – The Contractor shall provide evidence satisfactory to the Contracting Officer with respect to the operations performed to cover the defense of claims which the District of Columbia would be named as a co-defendant in claims arising from employment related wrongful acts including but not limited to: Discrimination, Sexual Harassment, Wrongful Termination, or Workplace Torts. The policy shall include an endorsement naming the District of Columbia as a co-defendant or additional insured and shall also include the Client Company Endorsement for Temporary Help Firms and the Independent Contractors Endorsement. The policy shall provide limits of not less than $1,000,000 for each wrongful act and $2,000,000 annual aggregate for each wrongful act.

6. Environmental Liability Insurance - The Contractor shall provide evidence satisfactory to the CO of pollution legal liability insurance covering losses caused by pollution conditions that arise from the ongoing or completed operations of the Contractor. Completed operations coverage shall remain in effect for at least ten (10) years after completion of the work. Such insurance shall apply to bodily injury, property damage (including loss of use of damaged property or of property that has been physically injured), cleanup costs, liability and cleanup costs while in transit, and defense (including costs and expenses incurred in the investigation, defense and settlement of claims). There shall be neither an exclusion nor a sublimit for mold-related claims. The minimum limits required under this paragraph shall be equal to the greater of (i) the limits set forth in the Contractor's pollution legal liability policy or (ii) $2,000,000 per occurrence and $2,000,000 in the annual aggregate. If such coverage is written on a claims-made basis, the Contractor warrants that any retroactive date applicable to coverages under the policy precedes the Contractor's performance of any work under the Contract and that continuous coverage will be maintained or an extended reporting period will be exercised for at least ten (10)

years after completion. The Contractor also must furnish to the Owner certificates of insurance evidencing pollution legal liability insurance maintained by the transportation and disposal site operators(s) used by the Contractor for losses arising from facility(ies) accepting, storing or disposing hazardous materials or other waste as a result of the Contractor's operations. Such coverages must be maintained with limits of at least the amounts set forth above.

7. Professional Liability Insurance (Errors & Omissions) - The Contractor shall provide Professional Liability Insurance (Errors and Omissions) to cover liability resulting from any error or omission in the performance of professional services under this Contract. The policy shall provide limits of $5,000,000 per claim or per occurrence for each wrongful act and $10,000,000 annual aggregate. The Contractor warrants that any applicable retroactive date precedes the date the Contractor first performed any professional services for the Government of the District of Columbia and that continuous coverage will be maintained or an extended reporting period will be exercised for a period of at least ten years after the completion of the professional services.

8. Commercial Umbrella or Excess Liability - The Contractor shall provide evidence satisfactory to the CO of commercial umbrella or excess liability insurance with minimum limits equal to the greater of (i) the limits set forth in the Contractor's umbrella or excess liability policy or (ii) $10,000,000 per occurrence and $10,000,000 in the annual aggregate, following the form and in excess of all liability policies. **All** liability coverages must be scheduled under the umbrella and/or excess policy. The insurance required under this paragraph shall be written in a form that annually reinstates all required limits. Coverage shall be primary to any insurance, self-insurance or reinsurance maintained by the District and the "other insurance" provision must be amended in accordance with this requirement and principles of vertical exhaustion.

B. PRIMARY AND NONCONTRIBUTORY INSURANCE
The insurance required herein shall be primary to and will not seek contribution from any other insurance, reinsurance or self-insurance including any deductible or retention, maintained by the Government of the District of Columbia.

C. DURATION. The Contractor shall carry all required insurance until all contract work is accepted by the District of Columbia, and shall carry listed coverages for ten years for construction projects following final acceptance of the work performed under this contract and two years for non-construction related contracts.

D. LIABILITY. These are the required minimum insurance requirements established by the District of Columbia. **HOWEVER, THE REQUIRED MINIMUM INSURANCE REQUIREMENTS PROVIDED ABOVE WILL NOT IN ANY WAY LIMIT THE CONTRACTOR'S LIABILITY UNDER THIS CONTRACT.**

E. CONTRACTOR'S PROPERTY. Contractor and subcontractors are solely responsible for any loss or damage to their personal property, including but not limited to tools and equipment, scaffolding and temporary structures, rented machinery, or owned and leased equipment. A waiver of subrogation shall apply in favor of the District of Columbia.

F. MEASURE OF PAYMENT. The District shall not make any separate measure or payment for the cost of insurance and bonds. The Contractor shall include all of the costs of insurance and bonds in the contract price.

G. NOTIFICATION. The Contractor shall ensure that all policies provide that the CO shall be given thirty (30) days prior written notice in the event of coverage and / or limit changes or if the policy is canceled prior to the expiration date shown on the certificate. The Contractor shall provide the CO with ten (10) days prior written notice in the event of non-payment of premium. The Contractor will also provide the CO with an updated Certificate of Insurance should its insurance coverages renew during the contract.

H. CERTIFICATES OF INSURANCE. The Contractor shall submit certificates of insurance giving evidence of the required coverage as specified in this section prior to commencing work. Certificates of insurance must reference the corresponding contract number. Evidence of insurance shall be submitted:

**The Government of the District of Columbia**

**And mailed to the attention of:**
**Franklin Austin, CPPB, CPM/Contract and Procurement Division**
**1250 U Street NW, 3rd Floor**
**Washington, DC 20009**
**(202) 727-7128**
**Franklin.Austin5@dc.gov**

The CO may request and the Contractor shall promptly deliver updated certificates of insurance, endorsements indicating the required coverages, and/or certified copies of the insurance policies. If the insurance initially obtained by the Contractor expires prior to completion of the contract, renewal certificates of insurance and additional insured and other endorsements shall be furnished to the CO prior to the date of expiration of all such initial insurance. For all coverage required to be maintained after completion, an

additional certificate of insurance evidencing such coverage shall be submitted to the CO on an annual basis as the coverage is renewed (or replaced).

I. DISCLOSURE OF INFORMATION. The Contractor agrees that the District may disclose the name and contact information of its insurers to any third party which presents a claim against the District for any damages or claims resulting from or arising out of work performed by the Contractor, its agents, employees, servants or subcontractors in the performance of this contract.

J. CARRIER RATINGS. All Contractor's and its subcontractors' insurance required in connection with this contract shall be written by insurance companies with an A.M. Best Insurance Guide rating of at least A- VII (or the equivalent by any other rating agency) and licensed in the in the District.

## Article 12 - ECONOMIC INCLUSION REQUIREMENTS

**Section 12.1 LSDBE Utilization.**

**Section 12.1.1** If the Construction Manager subcontracts any Work, 35% of the subcontracted effort must be subcontracted to small business enterprises (SBEs). For subcontracted work, pass through entities will not count toward this goal. In order to count toward the subcontracting requirement, the SBE must perform at least thirty five percent (35%) of the work that is being counted toward the goal with its own forces. The Local, Small and Disadvantaged Business Enterprise ("LSDBE") certification shall be, in each case, as of the effective date of the applicable subcontract. Supply agreements with material suppliers shall be counted toward meeting this goal. The Construction Manager has developed a Subcontracting Plan that is attached hereto as **Exhibit D**. The Construction Manager shall comply with the terms of the SBE Subcontracting Plan in making purchases and administering its subcontracts and supply agreements.

**Section 12.1.2 Mandatory Subcontracting Plan and Requirements.**

**Section 12.1.2.1** Unless the Director of the Department of Small and Local Business Development (DSLBD) has approved a waiver in writing in accordance with D.C. Official Code § 2-218.51, for all contracts in excess of $250,000, at least 35% of the dollar volume of the contract shall be subcontracted to qualified small business enterprises (SBEs).

**Section 12.1.2.2** If there are insufficient SBEs to completely fulfill the requirement of paragraph 12.1.2.1, then the subcontracting may be satisfied by subcontracting 35% of the dollar volume to any qualified certified business enterprises (CBEs); provided, however, that all reasonable efforts shall be made to ensure that SBEs are significant participants in the overall subcontracting work.

**Section 12.1.2.3** A prime contractor that is certified by DSLBD as a small, local or disadvantaged business enterprise shall not be required to comply with the provisions of sections 12.1.2.1 and 12.1.2.2.

**Section 12.1.2.4** Except as provided in 12.1.2.5 and 12.1.2.6, a prime contractor that is a CBE and has been granted a proposal preference pursuant to D.C. Official Code § 2-218.43, or is selected through a set-aside program, shall perform at least 35% of the contracting effort with its own organization and resources and, if it subcontracts, 35% of the subcontracting effort shall be with CBEs. A CBE prime contractor that performs less than 35% of the contracting effort shall be subject to enforcement actions under D.C. Official Code § 2-218.63.

**Section 12.1.2.5** A prime contractor that is a certified joint venture and has been granted a proposal preference pursuant to D.C. Official Code § 2-218.43, or is selected through a set-aside program, shall perform at least 50% of the contracting effort with its own organization and resources and, if it subcontracts, 35% of the subcontracting effort shall be with CBEs. A certified joint venture prime contractor that performs less than 50% of the contracting effort shall be subject to enforcement actions under D.C. Official Code § 2-218.63.

**Section 12.1.2.6** Each CBE utilized to meet these subcontracting requirements shall perform at least 35% of its contracting effort with its own organization and resources.

**Section 12.1.2.7** A prime contractor that is a CBE and has been granted a proposal preference pursuant to D.C. Official Code § 2-218.43, or is selected through a set-aside program, shall perform at least 50% of the on-site work with its own organization and resources if the contract is $1 million or less.

**Section 12.1.2.8 <u>Subcontracting Plan</u>**

The Construction Manager shall perform at least 35% of the contracting effort with its own forces, and if such Construction Manager subcontracts any work, 35% of the subcontracted effort must be subcontracted to CBEs in accordance with the provisions of section 12.1.2 of this clause. For subcontracted work, pass through entities will not count toward this goal. In order to count toward the subcontracting requirement, the SBE must perform at least thirty five percent (35%) of the work that is being counted toward the goal with its own forces. The LSDBE certification shall be, in each case, as of the effective date of the subcontract. Supply agreements with material suppliers shall be counted toward meeting this goal. The Construction Manager has developed a Subcontracting Plan that is attached hereto as **<u>Exhibit D</u>**. The Construction Manager shall comply with the terms of the Subcontracting Plan in making purchases and administering its Subcontracts and Supply Agreements.

The Subcontracting Plan shall be submitted as part of the proposal and may only be amended after award with the prior written approval of the CO and Director of DSLBD. Any reduction in the dollar volume of the subcontracted portion resulting from an amendment of the plan after award shall inure to the benefit of the District.

Each subcontracting plan shall include the following:

(1) The name and address of each subcontractor;
(2) A current certification number of the small or certified business enterprise;
(3) The scope of work to be performed by each subcontractor; and
(4) The price that the prime contractor will pay each subcontractor.

**Section 12.1.2.9** **Copies of Subcontracts**

Within twenty-one (21) days of the date of award, the Construction Manager shall provide fully executed copies of all subcontracts identified in the subcontracting plan to the Contracting Officer (CO), City Administrator (CA), District of Columbia Auditor and the Director of DSLBD.

**Section 12.1.2.10** **Subcontracting Plan Compliance Reporting**

**Section 12.1.2.10.1** If the Construction Manager has a subcontracting plan required by law for this contract, the Contractor shall submit a quarterly report to the CO, CA, District of Columbia Auditor and the Director of DSLBD. The quarterly report shall include the following information for each subcontract identified in the subcontracting plan:

(A) The price that the prime contractor will pay each subcontractor under the subcontract;
(B) A description of the goods procured or the services subcontracted for;
(C) The amount paid by the prime contractor under the subcontract; and
(D) A copy of the fully executed subcontract, if it was not provided with an earlier quarterly report.

**Section 12.1.2.10.2** If the fully executed subcontract is not provided with the quarterly report, the prime contractor will not receive credit toward its subcontracting requirements for that subcontract.

**Section 12.1.2.11** **Annual Meetings**

Upon at least 30-days written notice provided by DSLBD, the Construction Manager shall meet annually with the CO, CA, District of Columbia Auditor and the Director of DSLBD to provide an update on its subcontracting plan.

**Section 12.1.2.12** **DSLBD Notices**

The Construction Manager shall provide written notice to the DSLBD and the District of Columbia Auditor upon commencement of the contract and when the contract is completed.

**Section 12.1.2.13** **Enforcement and Penalties for Breach of Subcontracting Plan**

**Section 12.1.2.13.1** A contractor shall be deemed to have breached a subcontracting plan required by law, if the contractor (i) fails to submit subcontracting plan

monitoring or compliance reports or other required subcontracting information in a reasonably timely manner; (ii) submits a monitoring or compliance report or other required subcontracting information containing a materially false statement; or (iii) fails to meet its subcontracting requirements.

**Section 12.1.2.13.2** A contractor that is found to have breached its subcontracting plan for utilization of CBEs in the performance of a contract shall be subject to the imposition of penalties, including monetary fines in accordance with D.C. Official Code § 2-218.63.

**Section 12.1.2.14** If the CO determines the Contractor's failure to be a material breach of the contract, the CO shall have cause to terminate the contract under the default provisions in clause 8 of the SCP, Default.

**Section 12.1.2.15** Neither the Construction Manager nor a Subcontractor may remove a Subcontractor or tier-Subcontractor if such Subcontractor or tier-Subcontractor is certified as an LSDBE company unless the Department approves of such removal, in writing. The Department may condition its approval upon the Construction Manager developing a plan that is, in the Department's sole and absolute judgment, adequate to maintain the level of LSDBE participation on the Project.

**Section 12.2 <u>Equal Employment Opportunity and Hiring of District Residents</u>**

**Section 12.2.1** The Construction Manager shall comply with applicable laws, regulations and special requirements of the Contract Documents regarding equal employment opportunity and affirmative action programs. In accordance with the District of Columbia Administrative Issuance System, Mayor's Order 85-85 dated June 10, 1985, the forms for completion of the Equal Employment Opportunity Information Report are incorporated herein as **<u>Exhibit O</u>**. A contract award cannot be made to any contractor that has not satisfied the equal employment requirements.

**Section 12.2.2** The Construction Manager shall ensure that at least fifty-one percent (51%) of the Construction Manager's team and every subconsultant's and subcontractor's employees hired after the effective date of the Agreement, or after such subconsultant or subcontractor enters into a contract with the Construction Manager, to work on the Project shall be residents of the District of Columbia. This percentage shall be applied in the aggregate, and not trade by trade. In addition, the Construction Manager shall use commercially reasonable best efforts to comply with the workforce percentage goals established by the recently adopted amendments to the First Source Employment Agreement Act of 1984 (D.C. Code §§ 2-219.01 *et seq.*) and any implementing regulations, including, but not limited to the following requirements:

(i) At least 20% of journey worker hours by trade shall be performed by District residents;

(ii) At least 60% of apprentice hours by trade shall be performed by District residents;

(iii) At least 51% of the skilled laborer hours by trade shall be performed by District residents; and

(iv) At least 70% of common laborer hours shall be performed by District residents.

**Section 12.2.3** intentionally omitted

**Section 12.2.4** Thirty five percent (35%) of all apprentice hours worked on the Project shall be worked by District residents.

**Section 12.3 <u>Economic Inclusion Reporting Requirements</u>**

**Section 12.3.1** Upon execution of the Agreement, the Construction Manager and all its member firms, if any, and each of its Subcontractors shall submit to the Department a list of current employees and apprentices that will be assigned to the Agreement, the date they were hired and whether or not they live in the District of Columbia.

**Section 12.3.2** The Construction Manager and its constituent entities shall comply with subchapter X of Chapter II Title 2, and subchapter II of Chapter 11 of Title 1 of the D.C. Code, and all successor acts thereto and the rules and regulations promulgated thereunder. The Construction Manager and all member firms and Subcontractors shall execute a First Source Agreement with the District of Columbia Department of Employment Services ("DOES") prior to beginning Work at the Project site.

**Section 12.3.3** The Construction Manager shall maintain detailed records relating to the general hiring of District of Columbia and community residents.

**Section 12.3.4** The Construction Manager shall be responsible for: (i) including the provisions of Section 11.3 in all subcontracts; (ii) collecting the information required in Section 11.3 from its Subcontractors; and (iii) providing the information collected from its Subcontractors in the reports required to be submitted by the Construction Manager pursuant to Section 11.3.

**Section 12.4 <u>Compliance with the Apprenticeship Act.</u>** The Construction Manager agrees to comply with the requirements of the Apprenticeship Act of 1946, D.C. Code §§ 32-1431, *et seq*., as amended. The Construction Manager shall ensure that all of its subcontractors selected to perform work on the Project on a craft-by-craft basis shall be required to comply with this Act. All terms and conditions of the Act, D.C. Apprenticeship Council Rules and

Regulations, as well as any federal requirements, shall be implemented. The Prime Contractor shall be liable for any subcontractor non-compliance.

## Article 13 - LIQUIDATED DAMAGES

**Section 13.1. Delay in Submission of Deliverables**

The Construction Manager acknowledges that the Department is engaging the Construction Manager to provide an extensive level of preconstruction support services to minimize the potential for cost overruns, schedule delays or the need for extensive Value Engineering/re-design late in the Project and that the certain preconstruction deliverables are key to identify the value of such services. Subject to the terms set forth in Section 4.11, if the Construction Manager fails to provide any of the deliverables set forth in **Exhibit C**, the Construction Manager shall pay to the Department liquidated damages in the amount set forth in the Project Information Section of this Agreement for each such deliverable that is not timely submitted.

**Section 13.2. Delay in Substantial Completion.**

If the Construction Manager fails to achieve Substantial Completion of the Project by the Substantial Completion Date, the Parties acknowledge and agree that the actual damage to the Department for the delay will be impossible to determine, and in lieu thereof, the Construction Manager shall pay to the Department, as fixed, agreed and liquidated delay damages in the amount set forth in the Project Information Section of this Agreement per day for each calendar day of delay for failure to meet the applicable Substantial Completion Date. The Construction Manager and the Department agree that the liquidated damages set forth in this Article do not constitute, and shall not be deemed, a penalty but represent a reasonable approximation of the damages to the Department associated with a delay in the Project. These damages shall not apply if the delay is the result of force majeure and the Construction Manager otherwise complies with the provisions set forth in the collective Standard Contract Provisions. In the event the Construction Manager fails to meet the Substantial Completion Date for more than thirty (30) days, the Construction Manager consents to a Termination for Default.

**Section 13.3 Early Completion.**

In the event the Construction Manager achieves Substantial Completion of the Project prior to the Substantial Completion Date, the Construction Manager shall maintain the completed Project, at its own expense, until such time that the Department agrees to occupy and use the Project for its intended use.

## Article 14 - MISCELLANEOUS PROVISIONS

**Section 14.1 Ownership and Use of Documents**.

The Drawings, Specifications and other documents prepared by the Architect/Engineer and copies thereof furnished to the Construction Manager, are for use solely with respect to this Project. They are not to be used by the Construction Manager, Subcontractors, Sub-subcontractors or suppliers on other projects, or for additions to this Project outside the scope of the Work, without the specific written consent of the Department and the Architect/Engineer. The referenced Drawing, Specifications and other documents shall become the property of the Department.

**Section 14.2 Assignment.**

The Department and Construction Manager respectively bind themselves, their partners, members, joint venturers, constituent entities, successors, assigns and legal representative to the other party hereto and to partners, members, joint venturers, constituent entities, successors, assigns and legal representatives of such other party in respect to covenants, agreements and obligations contained in the Agreement. Neither party to the Agreement shall assign the Agreement or its rights and obligations under the Agreement, without written consent of the other party. If either party attempts to make such an assignment without such consent, that party shall nevertheless remain legally responsible for all obligations under the Agreement.

**Section 14.3 Buy American Act Provision.**

The Construction Manager shall comply with the provisions of the Buy American Act (41 U.S.C. § 10a), including, but not limited to, the purchase of steel.

**14.3.1** In accordance with the Buy American Act (41 U.S.C. § l0a-l0d), and Executive Order 10582. December 17, 1954 (3 CFR, 1954-58 Comp., p. 230), as amended by Executive Order 11051, September 27,1962 (3 CFR, l059—63 Comp., p. 635), the Construction Manager agrees that only domestic construction material will be used by the Construction Manager, subcontractors, material men and suppliers in the performance of the Agreement, except for non-domestic material listed in the Agreement.

**14.3.2 Domestic Construction Material.** "Construction material" means any article, material or supply brought to the construction site for incorporation in the building or work. An unmanufactured construction material is a "domestic construction material" if it has been mined or produced in the United States. A manufactured construction material is a "domestic construction material" if it has been manufactured in the United States and if the cost of its components which have been mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. "Component" means any article, material, or supply directly incorporated in a construction material.

"Components" as used in this Section, means those articles, materials and supplies incorporated directly into the end products.

"Domestic end product", as used in this section, means, (1) an unmanufactured end product mined or produced in the United States, or (2) an end product manufactured in the United States, if the cost of its components mined, produced, or manufactured in the United States, exceeds 50 percent of the cost of all its components.

Components of foreign origin of the same class or kind as the products shall be treated as domestic. Scrap generated, collected, and prepared for processing in the Unites States is considered domestic.

"End Products", as used in this Section, means those articles, materials, and supplies to be acquired for public use under this Contract.

The Design- Builder shall deliver only domestic end products, except those:

i. For use outside the United States;

ii. That the District determines are not mined, produced, or manufactured in the Unites States in sufficient and reasonably available commercial quantities of a satisfactory quality;

iii. For which the District determines that domestic preference would be inconsistent with the public interest; or

iv. For which the District determines the cost to be unreasonable.

**14.3.3 Domestic Construction Material.** "Construction material" means any article, material or supply brought to the construction site for incorporation in the building or work. An unmanufactured construction material is a "domestic construction material" if it has been mined or produced in the United States. A manufactured construction material is a "domestic construction material" if it has been manufactured in the United States and if the cost of its components which have been mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. "Component" means any article, material, or supply directly incorporated in a construction material.

**14.3.4 Domestic Component.** A component shall be considered to have been "mined, produced, or manufactured in the United States" regardless of its source, in fact, if the article, material or supply in which it is incorporated was manufactured in the United States and the component is of a class or kind determined by the Government to be not mined, produced or manufactured in the United States in

sufficient and reasonably available commercial quantities and of a satisfactory quality.

**14.3.5 Foreign Material.** When steel materials are used in a project a minimal use of foreign steel is permitted. The cost of such materials cannot exceed on-tenth of one percent of the total project cost, or $2,500,000, whichever is greater.

**Section 14.4 The Quick Payment Clause**

**14.4.1 <u>Interest Penalties to Contractors</u>**

**14.4.1.1** The District will pay interest penalties on amounts due to the Contractor under the Quick Payment Act, D.C. Official Code §2-221.01 *et seq*., for the period beginning on the day after the required payment date and ending on the date on which payment of the amount is made. Interest shall be calculated at the rate of 1% per month. No interest penalty shall be paid if payment for the completed delivery of the item of property or service is made on or before:

a) the 3rd day after the required payment date for meat or a meat product;
b) the 5th day after the required payment date for an agricultural commodity; or
c) the 15th day after the required payment date for any other item.

**14.4.1.2** Any amount of an interest penalty which remains unpaid at the end of any 30-day period shall be added to the principal amount of the debt and thereafter interest penalties shall accrue on the added amount.

**14.4.2 <u>Payments to Subcontractors</u>**

**14.4.2.1** The Contractor must take one of the following actions within seven (7) days of receipt of any amount paid to the Contractor by the District for work performed by any subcontractor under this contract:

a) Pay the subcontractor for the proportionate share of the total payment received from the District that is attributable to the subcontractor for work performed under the contract; or

b) Notify the District and the subcontractor, in writing, of the Contractor's intention to withhold all or part of the subcontractor's payment and state the reason for the nonpayment.

**14.4.2.2** The Contractor must pay any subcontractor or supplier interest penalties on amounts due to the subcontractor or supplier beginning on the day after the payment is due and ending on the date on which the payment is made. Interest shall be calculated at the rate of 1% per month. No interest penalty shall be paid on the

following if payment for the completed delivery of the item of property or service is made on or before:

a) the 3rd day after the required payment date for meat or a meat product;
b) the 5th day after the required payment date for an agricultural commodity; or
c) the 15th day after the required payment date for any other item.

**14.4.2.3** Any amount of an interest penalty which remains unpaid by the Contractor at the end of any 30-day period shall be added to the principal amount of the debt to the subcontractor and thereafter interest penalties shall accrue on the added amount.

**14.4.2.4** A dispute between the Contractor and subcontractor relating to the amounts or entitlement of a subcontractor to a payment or a late payment interest penalty under the Quick Payment Act does not constitute a dispute to which the District of Columbia is a party. The District of Columbia may not be interpleaded in any judicial or administrative proceeding involving such a dispute.

**14.4.3 <u>Subcontractor Quick Payment Clause Flow-Down Requirements</u>**

**14.4.3.1** The Contractor shall include in each subcontract under this contract a provision requiring the subcontractor to include in its contract(s) with any lower-tier subcontractor or supplier the payment and interest clauses required under 14.4.2.1 and 14.4.2.2 hereinabove and paragraphs (1) and (2) of D.C. Official Code §2-221.02(d).

**14.4.4 <u>Requirements for Change Order payments</u>**

**14.4.4.1** The Department and the Contractor are prohibited from requiring a prime contractor or a subcontractor to undertake any work that is determined to be beyond the original scope of the prime contractor's or a subcontractor's contract or subcontract, including work under a District-issued change order, when the additional work increases the contract price beyond the not-to-exceed price or negotiated maximum price of the underlying contract, unless the Contracting Officer:

**(i)** Agrees with the prime contractor and, if applicable, the subcontractor on a price for the additional work;

**(ii)** Obtains a certification from the Chief Financial Officer that there are sufficient funds to compensate the prime contractor and, if applicable, the subcontractor for the additional work;

**(iii)** Has made a written, binding commitment with the prime contractor to pay for the additional work within 30 days after the prime contractor submits a proper invoice for the additional work to the contracting officer; and

**(iv)** Gives written notice of the funding certification from the Chief Financial Officer to the prime contractor;

**14.4.4.2** The Contractor is required to include in its subcontracts a clause that requires the prime contractor to:

**(i)** Within 5 business days of receipt of the notice required under subparagraph (A)(iv) of this paragraph, provide the subcontractor with notice of the approved amount to be paid to the subcontractor based on the portion of the additional work to be completed by the subcontractor;

**(ii)** Pay the subcontractor any undisputed amount to which the subcontractor is entitled for any additional work within 10 days of receipt of payment for the additional work from the District; and

**(iii)** If the prime contractor withholds payment from a subcontractor, notify the subcontractor in writing and state the reason why payment is being withheld and provide a copy of the notice to the contracting officer; and

**14.4.4.3** The Department, Contractor, prime contractor, or a subcontractor are prohibited from declaring another party to the contract to be in default or assessing, claiming, or pursuing damages for delays in the completion of the construction due to the inability of the parties to agree on a price for the additional work.

**Section 14.5 Contract Work Hours And Safety Standards Act Provision.** The Construction Manager agrees that the applicable work performed under this Agreement shall be subject to the Contract Work Hours and Safety Standards Act (40 U.S.C. §§ 327-333).

**Section 14.6 False Claims Act.** Construction Manager shall be governed by all laws and regulations prohibiting false or fraudulent statements and claims made to DC government, including the prescriptions set forth in District of Columbia Code §22-2514 and §§2-381.01 et seq. In the event that it is discovered that the Construction Manager has made a false, fraudulent or unsupported statement or claim to the Department, the Department may terminate this Agreement without liability.

**Section 14.7 Interpretation of Contract and Order of Precedence.** All of the documents comprising the Agreement should be read as complementary, so that what is called for by one is called for by all. Ambiguities shall be construed in favor of a broader scope of Work for the Construction Manager, as the intent of the Agreement is, with specific identified exceptions, to require the Construction Manager to assume entire responsibility for construction of the Project. If there is any inconsistency among the documents comprising the Agreement, the order of precedence among them is as follows, with the first listed document having the highest priority:

(1) This Agreement and its Modifications, Change Orders, Change Directives and any Exhibits thereto;
(2) The Department's collective Standard Contract Provisions, as amended, and any missing term in this Agreement shall be addressed in accordance with the collective Standard Contract Provisions; and
(3) The Construction Documents released or approved by the Department.

**Section 14.8 Independent Contractor.** In carrying out all its obligations under the Agreement, the Construction Manager shall be acting as an independent contractor, and not as an employee or agent of the Department, or Joint Venture or partner with the Department. The Construction Manager shall have exclusive authority to manage, direct, and control the Work, and shall be responsible for all construction means, methods, techniques, sequences, and procedures, as well as for the Project safety.

**Section 14.9 No Third-Party Beneficiary Rights.** Nothing in this Agreement shall be construed as creating third-party beneficiary rights in any person or entity, except as otherwise expressly provided in this Agreement.

**Section 14.10 Media Releases.** Neither the Construction Manager, its employees, agents or Subcontractors or material suppliers shall make any press release or similar media release related to the Project unless such press release have been discussed with the Department prior to its issuance.

**Section 14.11 Construction.** This Agreement shall be construed fairly as to all Parties and not in favor of or against any party, regardless of which party prepared the Agreement.

**Section 14.12 Notices.** All notices or communications required or permitted under the Agreement shall be in writing and shall be hand delivered or sent by telecopier or by recognized overnight carrier to the intended recipient at the address stated below, or to such other address as the recipient may have designated in writing. Any such notice or communication shall be deemed delivered as follows: if hand delivered, on the day so delivered, if sent by telecopier, on confirmation of successful transmission, and if sent by recognized overnight carrier, the next business day.

If to the Department:

George Lewis, Associate Director
and Chief Contracting Officer
Department of General Services
2000 14th Street, NW, 8th Floor
Washington, DC 20009

If to the Construction Manager:

[CONTRACTOR]
[CONTRACTOR ADDRESS]

This Section shall be read as imposing minimum requirements for distribution of required contractual notices, and not as displacing distribution requirements with respect to design documents, construction submittals, periodic reports, and other documents.

**Section 14.13 Limitations.** The Construction Manager agrees that any statute of limitations applicable to any claim or suit by the Department arising from this Agreement or its breach shall be controlled by applicable District of Columbia law.

**Section 14.14 Survival.** All agreements warranties, and representations of the Construction Manager contained in the Agreement or in any certificate or document furnished pursuant to the Agreement shall survive termination or expiration of the Agreement.

**Section 14.15 No Waiver.** If the Department waives any power, right, or remedy arising from the Agreement or any applicable law, the waiver shall not be deemed to be a waiver of the power, right, or remedy on the later recurrence of any similar events. No act, delay, or course of conduct by the Department shall be deemed to constitute the Department's waiver, which may be effected only by an express written waiver signed by the Department.

**Section 14.16 Remedies Cumulative.** Unless specifically provided to the contrary in the Agreement, all remedies set forth in the Agreement are cumulative and not exclusive of any other remedy the Department may have, including, without limitation, at law or in equity. The Department's rights and remedies will be exercised at its sole discretion, and shall not be regarded as conferring any obligation on the Department's to exercise those rights or remedies for the benefit of the Construction Manager or any other person or entity.

**Section 14.17 Headings/Captions.** The headings or captions used in this Agreement or its table of contents are for convenience only and shall not be used in interpreting the Agreement.

**Section 14.18 Entire Agreement; Modification.** The Agreement supersedes all contemporaneous or prior negotiations, representations, course of dealing, or agreements, either written or oral. No modifications to the Agreement shall be effective against the Department unless made in writing signed by both the Department and the Construction Manager, unless otherwise expressly provided to the contrary in the Agreement. Notwithstanding the foregoing, nothing herein shall be construed to limit the Department’s ability to unilaterally modify the Agreement.

**Section 14.19 Severability.** In the event any one or more of the provisions contained in this Agreement shall for any reason be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision of this Agreement, and in lieu of each such invalid, illegal or unenforceable provision, there shall be added automatically as a part of this Agreement a provision as similar in terms to such invalid, illegal or unenforceable provision as may be possible and be valid, legal and enforceable; each part of this Agreement is intended to be severable.

**Section 14.20 Anti-Deficiency Act**. The Department's obligations and responsibilities under the terms of the Agreement and the Contract Documents are and shall remain subject to the provisions of (i) the federal Anti-Deficiency Act, 31 U.S.C. §§1341, 1342, 1349, 1350, 1351, (ii) the D.C. Code 47-105, (iii) the District of Columbia Anti-Deficiency Act, D.C. Code §§ 47-355.01 - 355.08, as the foregoing statutes may be amended from time to time, and (iv) Section 446 of the District of Columbia Home Rule Act. Neither the Agreement nor any of the Contract Documents shall constitute an indebtedness of the Department, nor shall it constitute an obligation for which the Department is obligated to levy or pledge any form of taxation, or for which the Department has levied or pledged any form of taxation. **IN ACCORDANCE WITH § 446 OF THE HOME RULE ACT, D.C. CODE § 1-204.46, NO DISTRICT OF COLUMBIA OFFICIAL IS AUTHORIZED TO OBLIGATE OR EXPEND ANY AMOUNT UNDER THE AGREEMENT OR CONTRACT DOCUMENTS UNLESS SUCH AMOUNT HAS BEEN APPROVED, IS LAWFULLY AVAILABLE AND APPROPRIATED BY ACT OF CONGRESS.**

**Section 14.21 Time.** Time, if stated in a number of days, will be calendar days and thus include Saturdays, Sundays, and holidays, unless otherwise stated herein.

Section 14.22

**14.4 Removal or Replacement of Key Personnel**

Subject to the terms of Section 5.7, in each instance where the Construction Manager removes or reassigns one of the key personnel listed in **Exhibit E**, other than (a) for reasons where such personnel become unavailable due to death or disability or (b) with the prior written consent of the Department, then the Construction Manager shall owe to the Department and be charged the disincentive amount set forth in the Project Information Section of this Agreement as a disincentive and not a penalty, to reimburse the Department for its administrative costs arising from the Construction Manager's failure to provide the Key Personnel. The disincentive amount shall not bar recovery of any other damages, costs or expenses other than the Department's internal administrative costs.

**Section 14.23 Davis-Bacon Act Provision.**

The Construction Manager agrees that the construction work performed under this Agreement shall be subject to the Davis-Bacon Act (40 U.S.C. §§ 276a-276a-7). The wage rates applicable to this Project are attached as **Exhibit F**. The Construction Manager further agrees

that it and all of its subcontractors shall comply with the regulations implementing the Davis-Bacon Act and such regulations are hereby incorporated by reference.

## Article 15 - TERMINATION OR SUSPENSION

**Section 15.1** All terminations or suspensions arising out of or under this Agreement shall be in accordance with the terms of the collective Standard Contract Provisions.

**Section 15.2 Failure to Agree Upon GMP**. The Department shall have the right to terminate this Agreement in the event that the Department and the Construction Manager are unable to agree upon a GMP for the Project and the Department shall have the right, but not the obligation, to assume any of the Construction Manager's trade subcontracts upon such terms and conditions as requested by the Department. The Department's decision to terminate under this Section shall be made in the Department's sole and absolute judgment and shall not be subject to review by any reviewing body, including, but not limited to, arbitrators appointed under this Agreement or any court of competent jurisdiction.

**Section 15.3 Termination for Default**. The Department may terminate the Agreement for default if the Construction Manager fails to perform any of its duties or obligations under the Agreement. In particular, but without limitation, the Department may terminate the Agreement if:

1. The Construction Manager fails to perform the Work diligently, in accordance with the Project Schedule or to make such progress in the Work as the Department reasonably believes is necessary to complete the Project within the time required by the Agreement; or

2. The Construction Manager fails to perform the Work in a good and workmanlike manner or to correct defects in the Work promptly upon notice by the Department; or

4. The Department reasonably determines that the Construction Manager has abandoned the Work, or has failed to pay laborers, mechanics, materialmen, Subcontractors or suppliers when payment is due; or

5. The Construction Manager becomes insolvent, makes an assignment for the benefit of creditors, files a voluntary petition under any chapter of the Bankruptcy Code or has an involuntary petition filed against it under any chapter of the Bankruptcy Code, or the Construction Manager has a receiver appointed, or files for dissolution or otherwise is dissolved; or

6. The Construction Manager fails to pay its debts in a timely manner or becomes insolvent, the Department reasonably determines that the Construction Manager does not have the financial ability to carry out its obligations under the Agreement and the Construction Manager fails to give the Department prompt and reasonable assurances of its ability to perform.

7. In the event the Construction Manager fails to meet the Substantial Completion Date for more than thirty (30) days, the Construction Manager consents to a Termination for Default.

**Section 15.3.1** The Department shall provide the Construction Manager with written notice of its intent to terminate the Agreement, under this Section 15.2, seven (7) calendar days before actually putting the termination into effect.

**Section 15.3.2** If the Department terminates the Agreement for default, the Department will have the right to take over the Work, to accept assignment of some or all Subcontracts or agreements with material suppliers, to take possession of the Project, to take and use all tools, equipment and supplies then being used in connection with the Work, and to finish the Project by whatever method it deems expedient, including accepting assignment of all outstanding Subcontracts and Supply Agreements.

**Section 15.4 Termination for Convenience**. The Department may, upon seven (7) calendar days written notice to the Construction Manager, terminate the Contract in whole or specified part, for its convenience, for any reason whether the Construction Manager is in breach of contract or not. The notice of termination shall state the effective date of termination, the extent of the termination, and any specific instructions. The termination for convenience that arises out of or under this Agreement shall be in accordance with the terms of the collective Standard Contract Provisions.

**Section 15.5 Continued Responsibility After Termination**. If the Construction Manager is terminated, for default, for Convenience or otherwise, the Construction Manager shall remain responsible for defects or non-conformities in all Work performed to the date of the termination.

## Article 16 - OTHER CONDITIONS AND SERVICES

This Agreement and the rights and obligations of the Department and Construction Manager herein are subject to the approval of the Council for the District of Columbia.

## Article 17 – CHANGES IN THE WORK

**Section 17.1** **Changes Authorized.** In accordance with the collective Standard Contract Provisions, the Department may, without invalidating the Agreement, and without notice to or approval of any surety, order changes in the Work, including additions, deletions or modifications. Any such change must be conveyed by the Department to the Construction Manager via written Change Directive or Change Order.

**Section 17.2** **Executed Change Directive/Contract Modification/Change Order Required.** Only a written Change Directive, Contract Modification or change order, executed by the Department's contracting officer, may make changes to the Agreement. In particular, but without limitation, a written Change Directive or Change Order executed by the Department is the only means by which changes may be made to the Substantial or Final Completion Dates, the Preconstruction Fee, the Construction Management Fee, or the Guaranteed Maximum Price.

**Section 17.3** **Department-Initiated Changes**

**.1** If the Department wishes to make a change in the Work or to accelerate the Work, it will execute and issue to the Construction Manager a written Change Directive, either directing the Construction Manager to proceed at once with the changed Work or directing it to not to proceed, but to inform the Department, in writing, of the amount, if any, by which the Construction Manager believes that Substantial or Final Completion Dates and/or the Guaranteed Maximum Price should be adjusted to take the Change Order or Change Directive into account.

**.2** Within ten (10) days of receiving a Change Directive, the Construction Manager shall provide the Department with a written statement of all changes in the Agreement, including, without limitation, any changes to the Substantial or Final Completion Dates or the Guaranteed Maximum Price to which it believes it is entitled as a result of the Change Directive. If additional time is sought, a schedule analysis supporting the requested extension should be included. The schedule analysis should include a written narrative explanation. If a change in the Guaranteed Maximum Price is sought (or if the Department has requested a deduct change), the statement should include a breakdown, by line item, of the estimated cost changes attributable to the proposed change. The Department may request, and the Construction Manager shall provide, further cost breakdowns, clarifications, documentation or back-up if the Department reasonably believes such additional information is needed to understand and evaluate the request. The additional information required may include cost and pricing data in accordance with the Department's regulations. Any requested adjustment to the Guaranteed Maximum Price shall be limited to increased Cost of the Work due to the Change Directive. The Construction Manager is not entitled to any markup on any kind of

Change Orders except as authorized in Section 17.8, and if so authorized, any mark-up shall be in accordance with Section 17.11.

**.3** If the Department has not yet directed the Construction Manager to proceed with the change described by a Change Directive, the Department may rescind it. If the Department wishes to proceed, or has already directed the Construction Manager to proceed, the Construction Manager shall immediately proceed with the changed Work and, the Department and the Construction Manager shall use their good faith best efforts to reach an agreement upon the modifications to the Substantial or Final Completion Dates, and/or the Guaranteed Maximum Price that are justified by the Change Directive. If the Department and the Construction Manager reach agreement, the agreement shall be set forth in a Change Order and the Construction Manager shall also execute it, at which point it will become binding on both Parties.

**.4** If the parties fail to reach an agreement within sixty (60) days after the Department receives the Construction Manager's detailed statement pursuant to Section 17.3.2, and such other documentation as the Department may request, the Construction Manager may assert a claim in accordance with the Agreement. In such a case, and subject to adjustment via the claims and disputes process, the Department shall unilaterally grant the Construction Manager such adjustments, if any, to the Substantial or Final Completion Dates, the Guaranteed Maximum Price, and/or the Preconstruction or Construction Management Fee as the Department has judged to be appropriate.

**Section 17.4** **Notice of Change Event.** The Construction Manager must give the Department written notice of any Change Event within ten (10) calendar days of the date on which the Construction Manager knew, or reasonably should have known, of the Change Event. To the extent available, the notice must state the nature of the Change Event and describe, generally, all changes in the Agreement to which the Construction Manager believes it is entitled. Such notice is an express condition precedent to any claim or request for adjustment to the Substantial or Final Completion Dates, or the Guaranteed Maximum Price arising from the Change Event and, if the notice is not given within the required time, the Construction Manager will have waived the right to any adjustment to the Substantial or Final Completion Dates, or the Guaranteed Maximum Price arising from the Change Event.

**Section 17.5** **Detailed Change Request.** Within twenty (20) days after giving notice of a Change Event, the Construction Manager shall submit a written Change Request to the Department describing, in reasonable detail, all adjustments it seeks to the Substantial or Final Completion Dates or the Guaranteed Maximum Price as a result of the Change Event. The Change Request shall include the same information as described in Section 17.3 with respect to any Agreement changes the Construction Manager seeks due to the Change Event, and the

amount of any requested adjustment to the Guaranteed Maximum Price shall be limited in accordance with that Section 17.3.

**Section 17.6** **Changes to GMP.** Subject to the condition precedent that the Construction Manager have complied with the notice and documentation provisions of this Article, and subject to the limitations stated in this Agreement, the Construction Manager is entitled to an adjustment to the Guaranteed Maximum Price in the following cases:

**.1** If the Department issues a Change Directive or Change Order that directs the Construction Manager to proceed with work which is beyond the scope of Work included within this Agreement; or

**.2** The Construction Manager encounters Differing Site Conditions or Hazardous Materials not identified in the Preconstruction Phase.

**Section 17.7** **Deductive Change Orders.** The Department reserves the right to issue deductive Change Orders (reducing the Guaranteed Maximum Price or modifying the Substantial or Final Completion Dates to an earlier date) when changes are effected, by Change Directive or otherwise, which will decrease the cost of completing the Work or the time within which it can be completed.

**Section 17.8** **No Adjustments to Fee.** The Construction Manager understands and agrees that the Preconstruction Fee and Construction Management Fee shall not be increased or decreased as a result of any Change Orders or Change Directive. In furtherance of this understanding, the Construction Manager agrees that it shall not be entitled to an increase in the Preconstruction Fee, Maximum Cost of General Conditions, or the Construction Management Fee by virtue of changes authorized by the Department unless such changes fall outside the general scope of work contemplated by this Agreement. The term general scope of work shall mean a state-of-the-art recreation center facility that is consistent with the Department's program of requirements and incorporates sustainable design initiatives. Without limiting the generality of the foregoing, it is understood and agreed that the Construction Manager shall not be entitled to any additional fees or general conditions unless (i) the Department makes additions to the scope provided for in this Agreement that cause the GMP, either individually or in the aggregate, to increase by more than ten percent (10%); or (ii) the Department makes additions to the scope provided for herein which (other than for punchlist or warranty work) require the Construction Manager's services for the Project to extend beyond Final Completion Date.

**Section 17.9** **Executed Change Orders Final.** The Construction Manager agrees that any Change Order executed by the Department and Construction Manager constitutes its full and final adjustment for all costs, delays, disruptions, inefficiencies, accelerations, schedule impacts, or other consequences arising from the change in question, whether a Change Directive, or a Change Event, or from any claimed cumulative effect of changes made to the date of the Change Order, and that no further adjustments in compensation or time shall be sought or made with

respect to the Change Directive or the Change Event giving rise to the Change Order. Although the Parties anticipate that most Change Orders will not require an adjustment to the Cost of General Conditions, if the Work described in a Change Order requires an increase or decrease in the Maximum Cost of General Conditions (i.e. because such a Change requires additional field staff or other equipment that would be classified as General Conditions Costs), the Change Order shall contain an increase to the Construction Management Fee adjusting such amount. The cost of processing a Change Order shall not be considered an event that will require an increase in the Maximum Cost of General Conditions.

**Section 17.10 Failure to Agree.** If the Construction Manager claims entitlement to a change in the Agreement, and the Department does not agree that any action or event has occurred to justify any change in time or compensation, or if the Parties fail to agree upon the appropriate amount of the adjustment in time or compensation, the Department will unilaterally make such changes, if any, to the Agreement, as it determines are appropriate pursuant to the Agreement. The Construction Manager shall proceed with the Work and the Department's directives, without interruption or delay, and shall make a claim as provided in Article 19 herein. Failure to proceed due to a dispute over a change request shall constitute a material breach of the Contract and entitle the Department to all available remedies for such breach, including, without limitation, termination for default.

**Section 17.11 Mark-Up on Trade Work.** The maximum mark up for Change Order work shall be as follows:

**.1** For Work performed by a Subcontractor with its own forces, the Subcontractor shall be entitled to a mark-up of not more than fifteen percent (15%) (Covering home office overhead, the cost of insurance and bonds, field supervision, general conditions and profit) on the Direct Costs of the Work. For Work that the Department permits the Construction Manager to self-perform, the Construction Manager shall also be entitled to a mark-up of not more than fifteen percent (15%) of the Direct Cost of the Work. With regard to any such Work that is self-performed by the Construction Manager, the markup contemplated in this Section 17.11.1 shall be the Construction Manager's exclusive compensation and it shall not be entitled to the markup contemplated in Section 17.11.3;

**.2** Intervening tier Subcontractors shall be entitled to a mark-up of five percent (5%) (Covering home office overhead, the cost of insurance and bonds, field supervision, general conditions and profit) on Work Performed by lower-tier Subcontractors;

**.3** To the extent permitted by Section 17.8, the Construction Manager shall be entitled to an increase in its Construction Management Fee at a rate of [INSERT PERCENTAGE] % on work performed by Subcontractors. Such markup shall

cover the same cost elements that were included in the Construction Management Fee;

**.4** In no event shall the maximum mark-up on the Direct Cost of the Work exceed twenty five percent (25%). Direct Cost of the Work shall mean labor, material and other costs reasonably and necessarily incurred in the proper performance of the Work as approved by the Department and shall include, but not be limited to: (Direct Cost of the Work does not, however, include home office overhead, field supervision, general conditions or profit of either the Subcontractor or the Construction Manager. No personnel above the level of a working foreman shall be considered a Direct Cost of the Work).

(a) **Labor**. Payment will be made for direct labor cost plus indirect labor cost such as insurance, taxes, fringe benefits and welfare provided such costs are considered reasonable. Indirect costs shall be itemized and verified by receipted invoices. If verification is not possible, up to eighteen percent (18%) of direct labor costs may be allowed.

(b) **Rented Equipment**. Payment for required equipment rented from an outside company that is neither an affiliate of, nor a subsidiary of, the Construction Manager will be based on receipted invoices which shall not exceed rates given in the current edition of the Rental Rate Blue Book for Construction Equipment. If actual rental rates exceed manual rates, written justification shall be furnished to the Contracting Officer for consideration. No additional allowance will be made for overhead and profit. The Construction Manager shall submit written certification to the Contracting Officer that any required rented equipment is neither owned by nor rented from the Construction Manager or an affiliate of or subsidiary of the Construction Manager.

(c) **Contractor's Equipment**. Payment for required equipment owned by the Construction Management or an affiliate of the Construction Manager will be based solely on an hourly rate derived by dividing the current appropriate monthly rate by 176 hours. No payment will be made under any circumstances for repair costs, freight and transportation charges, fuel, lubricants, insurance, any other costs and expenses, or overhead and profit. Payment for such equipment made idle by delays attributable to the Government will be based on one-half the derived hourly rate under this subsection.

(d) **Materials.** Incorporated and unincorporated materials as permitted under Section 9.1.

## Article 18 – BONDS

**Section 18.1. Performance Bond and Payment Bond.** The Construction Manager shall, before commencing the Construction Phase, provide to the Department a payment bond and performance bond, each with a penal sum equal to the full value of the GMP. In addition to the delivery of the performance and payment bonds, the Construction Manager must deliver to the Contracting Officer a copy of the executed Agreement of indemnity under which the bonds were issued. Such bond shall remain in full force and effect until Final Completion is achieved and the Department shall be able to draw upon such bond regardless of the amount paid by the Department to the Construction Manager, even if such amount exceeds the penal value of such bond. Unless otherwise directed by the Department, the Construction Manager shall require all Subcontractors whose Subcontract prices exceed One Hundred Thousand Dollars ($100,000) to provide payment and performance bonds, with a penal sum equal to one hundred percent (100%) of the subcontract price. Further, the Construction Manager must deliver to the Contracting Officer copies of its subcontractor's Agreements of Indemnity. All bonds must be in a form acceptable to the Department, its lenders or bond trustee, and issued by a surety authorized to do business in the District of Columbia and bonding company listed on the United States Department of Treasury's Listing of Approved Sureties. All subcontractors' bonds must include a dual obligee rider, naming the Construction Manager and the Department as dual obligees. If the Guaranteed Maximum Price is increased pursuant to the terms of the Agreement, the Department may require that the amount of the bonds be increased in the amount of one hundred percent (100%) of the increase, and the Construction Manager shall promptly comply. The Construction Manager shall furnish a copy of its bonds to any potential beneficiary of the bonds, or permit that person or company to make a copy. If the bonds provided become unacceptable to the Department, the Construction Manager shall promptly provide substitute security acceptable to the Department. If the Construction Manager intends to exercise its rights as dual obligee under any trade Subcontractor's bond, it shall first give the Department twenty (20) days written notice, so that the Department may lodge any objection it may reasonably have to the proposed action.

## Article 19 – CLAIMS AND DISPUTE RESOLUTION

All claims or disputes arising out of this Agreement shall be governed by the terms of the the Standard Contract Provisions.

**IN WITNESS WHEREOF, the duly authorized signatories of the Parties have executed this Agreement (DCAM-19-CS-RFP-0001) as of the last date executed below.**

**DEPARTMENT OF GENERAL SERVICES, an agency within the executive branch of the Government of the District of Columbia**

**By:**_____
**Name:**_____
**Title:**_____
**Date:**_____

**[INSERT]**

**By:**_____
**Name:**
**Title:** _____
**Date:** _____