



STATE OF NEW MEXICO  
PUBLIC SCHOOL FACILITIES AUTHORITY  
PUBLIC SCHOOL CAPITAL OUTLAY COUNCIL

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General Conditions of the Contract for  
Construction  
2005 Edition, Version 2.0

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## **ARTICLE 1 GENERAL PROVISIONS**

### **1.1 BASIC DEFINITIONS**

#### **1.1.1 THE CONTRACT DOCUMENTS**

The Contract Documents consist of the Agreement between Owner and Contractor (hereinafter the Agreement), Conditions of the Contract (General, Supplementary and other Conditions), Drawings, Specifications and Addenda issued prior to execution of the Contract, and Modifications.

Modifications are (1) a written amendment to the Contract signed by Owner and Contractor, (2) Modification / Change Request hereinafter referred to as MCR approved by Owner, Contractor and Design Professional, (3) Change Order, or (4) a written order for a minor change in the Work, hereinafter referred to as Supplemental Instruction issued by the Design Professional. Unless specifically enumerated in the Agreement, the Contract Documents do not include other documents such as bidding requirements (advertisement or Invitation to Bid, Instructions to Bidders, sample forms, the Contractor's bid or portions of Addenda relating to bidding requirements).

#### **1.1.2 THE CONTRACT**

The Contract Documents form the Contract for Construction. The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. The Contract may be amended or modified only by a Modification. The Contract Documents shall not be construed to create a contractual relationship of any kind (1) between the Design Professional and Contractor, (2) between the Owner and a Subcontractor, Material Supplier and Equipment Supplier, (3) between the Owner and Design Professional or (4) between any persons or entities other than the Owner and Contractor. The Design Professional shall, however, be entitled to performance and enforcement of obligations under the Contract intended to facilitate performance of the Design Professional's duties.

**1.1.2.1** Each and every provision of law and clause required by law to be inserted in this Contract shall be read and enforced as though it were included herein; and if through error or otherwise any such provision is not inserted, or is not correctly inserted, then upon the written application of either party the Contract shall be amended without cost to make such insertion or correction and that the remainder of this Contract shall remain in effect and not be affected thereby.

#### **1.1.3 THE WORK**

The term "Work" means the construction and services required by or reasonably inferable from the Contract Documents, whether completed or partially completed, and includes all labor, materials, equipment and services provided or to be provided by the Contractor to fulfill the results indicated by the Contract Documents in a safe, expeditious, orderly and workmanlike manner in keeping with current standards of the industry. The Work may constitute the whole or a part of the Project. Reasonably Inferable, as used in this Agreement, shall mean information or knowledge that is derivable or evident by prudent and diligent examination of the Contract Documents and other information reasonably available by the Contractor or Subcontractor knowledgeable in their field.

#### **1.1.4 THE PROJECT**

The Project is the total construction of which the Work performed under the Contract Documents may be the whole or a part and which may include construction by the Owner or by separate contractors.

#### **1.1.5 THE DRAWINGS**

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

#### **1.1.6 THE SPECIFICATIONS**

The Specifications are the written requirements of the Contract Documents for products, materials, workmanship, and performance of related services.

#### **1.1.7 THE PROJECT MANUAL**

The Project Manual is the volume of written Construction Documents typically containing Bidding Requirements, contract forms, Conditions of the Contract and Specifications.

#### **1.1.8 PUNCH LIST**

A punch list is a comprehensive list of incomplete, defective or incorrect Work prepared by the Contractor, Design Professional or Owner to indicate Work required to be completed. Specific Punch Lists required by the Contract Documents include the Substantial Completion Punch List created by the Contractor prior to application for Substantial Completion in accordance with Paragraph 9.8, and that includes the Close-Out Punch List as required by Paragraph 9.10, and any other punch list created by the Owner or Design Professional for the purposes of this Paragraph and otherwise successful completion of the Work.

### **1.2 CORRELATION AND INTENT OF THE CONTRACT DOCUMENTS**

**1.2.1** The intent of the Contract Documents is to include all items necessary for the proper execution and completion of the Work by the Contractor. The Contract Documents are complementary, and what is required by one shall be as binding as if required by all; performance by the Contractor shall be required only to the extent consistent with the Contract Documents and reasonably inferable from them as being necessary to produce the indicated results. It is incumbent upon the Contractor to ask for clarification on any questionable aspects of the Contract Documents at least **seven (7) days** prior to the date for opening of Bids. Clarification of intent of the Contract Drawings shall be binding only by published Addenda that shall be issued no later than **four (4) days** prior to the date of the opening of Bids.

**Exception:** Addenda withdrawing the Invitation to Bid or postponing the date for receipt of Bids may be published any time prior to the date for receipt of Bids.

**1.2.2** Reasonably Inferable Work includes items:

- 1.** specified in the Contract Documents required to complete the Work, but not graphically indicated. Contractor shall provide the minimum product or work necessary to fulfill the specifications or otherwise the requirements of any industry standards, such as, but not limited to, final function of Work such as strength, profile, or use as indicated by the Contract Documents; and,
- 2.** shown or graphically indicated as required to complete the Work but not specified. Contractor shall provide the minimum product or work necessary to complete the depicted Work, such as, but not limited to, final function of Work such as strength, profile, or use as indicated by the Contract Documents.

**1.2.3** Organization of the Specifications into divisions, sections and articles, and arrangement of Drawings are for convenience of reference only and shall not control the Contractor in dividing the Work among Subcontractors or in establishing the extent of Work to be performed by any trade. Such separation will not operate to make the Owner or Design Professional an arbiter of labor disputes or work agreements.

**1.2.4** Words shall be first interpreted within the context they are used and by definition, if any, provided by the Contract Documents themselves. Unless otherwise stated in the Contract Documents, words which have well-known technical or construction industry meanings are used in accordance with such recognized meanings. If the meaning of a word is not clear from the Contract Documents or have a well-known technical or construction industry meaning, the Webster's Collegiate Dictionary, current at time of contract, meaning shall apply.

### **1.2.5 INCONSISTENCIES**

In the event of conflicts in the Contract Documents, the most restrictive or otherwise most beneficial to the Owner shall apply to all similar conditions. Other rules for conflicts in the Contract Documents shall be that:

1. Addenda shall govern over all other Contract Documents and subsequent Addenda shall govern over prior Addenda only to the extent modified;
2. between drawings and specifications, the specifications shall govern;
3. within the drawings:
  - a) schedule, when identified as such, shall govern over notes or other directions included within the drawings.
  - b) specific note shall govern over general note.
  - c) note evidently intended to be used as a general or typical note, shall be used as such throughout.
  - d) dimensions provided shall take precedence over scaled measurements.
  - e) large scale drawings shall take precedence over smaller scale drawings; and
4. General Conditions shall govern over all sections of the Contract Documents, except as modified by Supplementary General Conditions or Addenda.

### **1.3 CAPITALIZATION**

**1.3.1** Within the General Conditions, these terms are capitalized when they are used specifically in relations to the Agreement: Owner and Contractor who are parties to this Agreement, Design Professional who performs services under agreement with the Owner, Subcontractors who perform work under subcontract at any tier with the Contractor, the various Bidding and Contract Documents, Project, Work, titles of numbered Articles and Paragraphs within the Contract Documents, and names used to identify parts of the Project. When these terms are used generically and not specifically associated with the Project, they are not capitalized.

### **1.4 INTERPRETATION**

**1.4.1** In the interest of brevity, the Contract Documents frequently omit modifying words such as "all" and "any" and articles such as "the" and "an," but the fact that a modifier or an article is absent from one statement and appears in another is not intended to affect the interpretation of either statement.

## **1.5 EXECUTION OF CONTRACT DOCUMENTS**

**1.5.1** The Contract Documents shall be signed by the Owner and Contractor. If either the Owner or Contractor does not sign all the required documents of the Contract Documents, the Design Professional shall identify such unsigned documents.

**1.5.2** Execution of the Contract by the Contractor is representation that the Contractor has visited the site, become generally familiar with local conditions under which the Work is to be performed and correlated personal observations with requirements of the Contract Documents.

## **1.6 OWNERSHIP AND USE OF DRAWINGS AND SPECIFICATIONS**

**1.6.1** Drawings, specifications and copies thereof shall remain the Owner's property. They are not to be used on another project. Neither the Contractor nor any Subcontractor, material supplier or equipment supplier or any person or entity shall own or claim a copyright to any Drawings, Specifications or any other documents prepared or developed for definition of the Work. The Owner will retain all common law, statutory and other reserved rights, in addition to the copyrights. The Contractor, Subcontractors, material suppliers and equipment suppliers are authorized to use and reproduce applicable portions of the Drawings, Specifications and other documents for use in the execution of their Work under the Contract Documents. Submittal or distribution to meet official regulatory requirements or for other purposes in connection with this Project is not to be construed as publication in derogation of the Owner's copyrights or other reserved rights.

## **ARTICLE 2 OWNER**

### **2.1 GENERAL**

**2.1.1** The Owner is the person or entity identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number. The Owner shall designate in writing a representative who shall have express authority to bind the Owner with respect to all matters requiring the Owner's approval or authorization. Except as otherwise provided in Subparagraph 4.2.1, the Design Professional does not have such authority. The term "Owner" means the Owner or the Owner's authorized representative.

**2.1.2** If Project includes PSCOC funding then:

- 1.** the Owner, referred to throughout the Contract Documents, shall be interpreted to be both the School District and the Public School Facilities Authority (PSFA) as if singular in number; and,
- 2.** there shall be two (2) Owner representatives - ONE REPRESENTING School District and one representing PSFA. Agreement by both representatives shall be required in all instances where the Contract Documents require or contemplate Owner approval; and,
- 3.** provisions of Subparagraph 4.2.4.3 requiring use of the PSFA CIMS system shall apply; and,
- 4.** Work shall be fully in accordance with the Contract Documents, including all contractual and implied responsibilities; and,
- 5.** after Final Completion in accordance with Paragraph 9.11 the Contract requirements shall recognize only the School District as the Owner.

## **2.2 INFORMATION AND SERVICES REQUIRED OF THE OWNER**

**2.2.1** The Owner shall, at the written request of the Contractor, prior to commencement of the Work and thereafter, furnish to the Contractor reasonable evidence that financial arrangements have been made to fulfill the Owner's obligations under the Contract. Furnishing of such evidence shall be a condition precedent to commencement or continuation of the Work. After such evidence has been furnished, the Owner shall not materially vary such financial arrangements without prior notice to the Contractor.

**2.2.2** Except for permits and fees, including those required under Subparagraph 3.7.1, which are the responsibility of the Contractor under the Contract Documents, the Owner shall secure and pay for necessary approvals, easements, assessments and charges required for construction, use or occupancy of permanent structures or for permanent changes in existing facilities that shall include utility expansion charges but, not tapping fees.

**2.2.3** The Owner shall furnish surveys describing physical characteristics, legal limitations and utility locations for the site of the Project, and a legal description of the site. The Contractor shall be entitled to rely on the accuracy of information furnished by the Owner, but shall exercise proper precautions relating to the safe performance of the Work.

**2.2.4** Unless stated otherwise in the Contract Documents, the Owner shall furnish in accordance with Article 6 specific testing, adjusting and compliance monitoring and explicitly:

1. geotechnical testing and analysis including soil testing and compaction, but excluding load testing for caissons and piers; and,
2. concrete testing including slump analysis and compression testing with, at the Owner's request, the Contractor responsible for forming test cylinders or similar; and
3. testing and balancing of heating and air-conditioning systems with the Contractor responsible for timely, diligent and coordinated corrections to Work required until performance is compliant with the Contract Documents.

The Contractor shall be responsible for testing and costs as defined by Paragraph 13.5 and Subparagraph 12.2.1.1.

**2.2.5** Information or services required of the Owner by the Contract Documents shall be furnished by the Owner with reasonable promptness. Any other information or services relevant to the Contractor's performance of the Work, under the Owner's control, shall be furnished by the Owner after receipt from the Contractor of a written request for such information or services.

**2.2.6** Unless otherwise provided in the Contract Documents, the Contractor will be furnished, free of charge, five (5) copies of Drawings and Project Manuals; however, the Contractor may have more copies free of charge if they are available without additional cost to the Owner.

## **2.3 OWNER'S RIGHT TO STOP THE WORK**

**2.3.1** If the Contractor fails to correct Work which is not in accordance with the requirements of the Contract Documents as required by Paragraph 12.2 or persistently fails to carry out Work in accordance with the Contract Documents, the Owner may issue a written order to the Contractor to

stop the Work, or any portion thereof, until the cause for such order has been eliminated; however, the right of the Owner to stop the Work shall not give rise to a duty on the part of the Owner to exercise this right for the benefit of the Contractor or any other person or entity, except to the extent required by Subparagraph 6.1.3.

## **2.4 OWNER'S RIGHT TO CARRY OUT THE WORK**

**2.4.1** If the Contractor defaults or neglects to carry out the Work in accordance with the Contract Documents and fails within a seven (7) day period after receipt of written notice from the Owner to commence and continue correction of such default or neglect with diligence and promptness, the Owner may after such seven (7) day period, without prejudice to other remedies that the Owner may have, correct such deficiencies. In such case, an appropriate Modification in accordance with Article 7 shall be issued deducting from payments then or thereafter due the Contractor for the reasonable cost of correcting such deficiencies, including Owner's expenses and compensation for the Design Professional's additional services made necessary by such default, neglect or failure. If payments then or thereafter due the Contractor are not sufficient to cover such amounts, the Contractor shall pay the difference to the Owner.

**2.4.2** If in the event that the Contractor defaults or neglects to carry out the Work to final completion in keeping with the Substantial Completion Schedule provided in accordance with Subparagraph 9.8.2 and, fails within a seven (7) day period after receipt of written notice from the Owner to correct such default with diligence and promptness, the Owner may after such seven (7) day period, without prejudice to other remedies, correct Punch List and Close-Out deficiencies to achieve project completion without further notice to the Contractor or its surety. In such case, an appropriate Modification in accordance with Article 7 shall be issued deducting from payments then or thereafter due the Contractor the reasonable cost of correcting such deficiencies, including Owner's expenses and compensation for the Design Professional's additional services made necessary by such default, neglect or failure. If payments then or thereafter due the Contractor are not sufficient to cover such amounts, the Contractor shall pay the difference to the Owner.

**2.4.3** In carrying out the Owner's right to complete the Work in accordance with Paragraph 2.4, the Owner shall have the right to exercise the Owner's sole discretion as to the manner, methods and reasonableness of costs of completing the Work.

## **ARTICLE 3 CONTRACTOR**

### **3.1 GENERAL**

**3.1.1** The Contractor is the person or entity identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number. The term "Contractor" means the Contractor or the Contractor's authorized representative.

**3.1.2** The Contractor shall perform the Work in accordance with the Contract Documents.

**3.1.3** The Contractor shall not be relieved of obligations to perform the Work in accordance with the Contract Documents either by activities or duties of the Design Professional in the Design

Professional's administration of the Contract, or by tests, inspections or approvals required or performed by persons other than Contractor.

**3.1.4** The Contractor shall, prior to bid, be properly licensed according to the requirements of the Construction Industries Licensing Act, Chapter 60, and Article 13 NMSA 1978 and shall ensure to the Owner that such license shall remain in effect for the duration of the Work and warranty periods.

**3.1.5 Debarred or Suspended Contractors:** A business (Contractor, Subcontractor, or supplier) that has either been debarred or suspended pursuant to the requirements of Sections 13-1-177 through 13-1-180, and 13-4-11 through 13-4-17, NMSA 1978, shall not be permitted to do business with the State and shall not be considered for award of contract during the period for which it is debarred or suspended.

**3.1.6 Bribes, Gratuities and Kickbacks**

**3.1.6.1** It is illegal in the State of New Mexico for any public employee to solicit or accept anything of value in connection with award of contract for this Bid and for any person to offer or pay anything of value to any such public employee (30-24-1 and 30-24-2, NMSA 1978).

**3.1.6.2** Pursuant to Section 13-1-191, NMSA 1978, reference is hereby made to the Criminal Laws of New Mexico (including 30-24-1, 30-24-2, and 30-41-1 through 30-41-3, NMSA 1978), which prohibit bribes, kickbacks, and gratuities, and violation of which constitutes a felony. Further, the Procurement code (13-1-28 through 13-1-199, NMSA 1978) imposes civil and criminal penalties for its violation.

**3.1.7 Assignment of Antitrust Claims**

**3.1.7.1** The Contractor agrees that any and all claims that the Contractor may have or that may inure to the Contractor for overcharges resulting from antitrust violations as to goods, services, and materials purchased in connection with this Bid are hereby assigned to the State of New Mexico, but only to the extent that such overcharges are passed on to the State. The Contractor further agrees to require each of its Subcontractors and suppliers to assign any and all such claims for overcharges to the State by executing an assignment on the form provided by the Owner for such purpose. The executed forms (see Section 00400 of the Bid Documents) shall be submitted prior to the commencement of the Work or the supplying of any materials by the supplier or Subcontractor. The submission of this executed form may be waived by the Owner upon a showing of a good-faith effort by the Contractor to obtain agreement in writing from its supplier or Subcontractor. Waiver by the Owner will not unreasonably be denied.

**3.1.7.2** It is agreed that the Contractor retains all rights to any such antitrust claims to the extent of any overcharges not passed on to the State, including the right to any treble damages attributable thereto.

**3.1.8 Contracts with Nonresident Persons or Partnerships or Un-admitted Foreign Corporations; Agent for Service of Process**

Contractor agrees to the requirements of Sections 13-4-21 through 13-4-24, NMSA 1978, whereby a public works contract with a nonresident person or partnership or foreign corporation not authorized to do business in the State shall contain a specific provision designating an agent resident within the

State, and his address, upon whom process and writs in any action or proceeding against such business may be served in any action arising out of such contract.

### **3.2 REVIEW OF CONTRACT DOCUMENTS AND FIELD CONDITIONS BY CONTRACTOR**

**3.2.1** Since the Contract Documents are complementary, before starting each portion of the Work, the Contractor shall carefully study and compare the various Drawings and other Contract Documents relative to that portion of the Work, as well as the information furnished by the Owner pursuant to Subparagraph 2.2.3, shall take field measurements of any existing conditions related to that portion of the Work and shall observe any conditions at the site affecting it. These obligations are for the purpose of facilitating construction by the Contractor and for the purpose of discovering errors, omissions in the Contract Documents; any errors, inconsistencies or omissions discovered by the Contractor shall be reported promptly in writing to the Design Professional as a Request for Interpretation in accordance with Subparagraph 3.2.4.

**3.2.1.1** Before ordering any materials or proceeding with Work, the Contractor and Subcontractors shall verify measurements at the Work site and shall be responsible for the correctness of such measurements.

**3.2.2** Any design errors or omissions noted by the Contractor during this review shall be reported promptly in writing to the Owner and to the Design Professional, but it is recognized that the Contractor's review is made in the Contractor's capacity as a contractor and not as a licensed Design Professional, unless otherwise specifically provided in the Contract Documents. The Contractor is not required to ascertain that the Contract Documents are in accordance with applicable laws, statutes, ordinances, building codes, and rules and regulations, but any suspected non conformity discovered by or made known to the Contractor shall be reported promptly in writing to the Owner and to the Design Professional. If the Contractor performs Work knowing it to be contrary to laws, statutes, ordinances, building codes, and rules and regulations without such notice to the Design Professional and Owner, the Contractor shall assume appropriate responsibility for such Work and shall bear the costs attributable to correction.

**3.2.3** If the Contractor believes that additional cost or time is involved because of clarifications or instructions issued by the Design Professional in response to the Request for Interpretation pursuant to Subparagraphs 3.2.1 and 3.2.1.1, the Contractor shall make Claims as provided in Subparagraphs 4.3.6 and 4.3.7. If the Contractor fails to perform the obligations of Subparagraphs 3.2.1 and 3.2.1.1, the Contractor shall pay such costs and damages resulting from errors, inconsistencies or omissions in the Contract Documents or for differences between field measurements or conditions and the Contract Documents as would have been avoided if the Contractor had performed such obligations.

### **3.2.4 REQUEST FOR INTERPRETATION**

**3.2.4.1** Any question concerning a variation or deviation from the Contract Documents, including a minor change in the Work found necessary due to actual field conditions, shall be submitted to the Design Professional as a Request for Interpretation (RFI) for review and resolution before proceeding with the Work. When submitting an RFI, the Contractor must provide all information necessary for the Design Professional to promptly process, including detailed:

1. reference(s) to Specification number, Drawing page and detail, and the like;
2. description of issue;

3. drawings, photos or sketches of conditions, if necessary; and,
4. submittals or other information as necessary to facilitate resolution.

**3.2.4.2** Request for Interpretation may be initiated only by the Contractor and shall be answered by Design Professional within **ten (10) days**, or other reasonable time agreed upon between the parties. All Subcontractor RFI's must be initiated through the Contractor. All answers to RFI's by the Design Professional's consultants or Owner must be initiated through the Design Professional.

**3.2.4.3** If substitutions are allowed after the contract award, RFI shall not be used for any substitution request (see Subparagraph 3.4.2).

### **3.3 SUPERVISION AND CONSTRUCTION PROCEDURES**

**3.3.1** The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract, unless the Contract Documents give other specific instructions concerning these matters. If the Contract Documents give specific instructions concerning construction means, methods, techniques, sequences or procedures, the Contractor shall evaluate the jobsite safety thereof and, except as stated below, shall be fully and solely responsible for the jobsite safety of such means, methods, techniques, sequences or procedures. If the Contractor determines that such means, methods, techniques, sequences or procedures may not be safe, the Contractor shall give timely written notice to the Owner and Design Professional and shall not proceed with that portion of the Work without further written instructions from the Design Professional with concurrence from the Owner. If the Contractor is then instructed to proceed with the required means, methods, techniques, sequences or procedures without acceptance of changes proposed by the Contractor, the Owner shall be solely responsible for any resulting loss or damage not due to negligence of the Contractor, its employees, subcontractors or their agents or employees. This paragraph shall not be deemed to create a duty on the part of the Design Professional or the Owner to the Contractor, Subcontractor or their employees to monitor for jobsite safety.

**3.3.2** The Contractor shall be responsible to the Owner for acts and omissions of the Contractor's employees, Subcontractors and their agents and employees, and other persons or entities performing portions of the Work for or on behalf of the Contractor or any of its Subcontractors.

**3.3.3** The Contractor shall be responsible for inspection of portions of Work already performed to determine that such portions are in proper condition to receive subsequent Work.

### **3.4 LABOR AND MATERIALS**

**3.4.1** Unless otherwise provided in the Contract Documents, the Contractor shall provide and pay for labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, and other facilities and services necessary for proper execution and completion of the Work, whether temporary or permanent and whether or not incorporated or to be incorporated in the Work.

**3.4.2** The Contractor may request substitution of material only if:

1. allowed after the contract award;
2. all supporting information has been evaluated and approved by the Contractor;
3. includes a detailed itemized comparison of the proposed substitution with the specified product;
4. acceptance does not include substantial revision of Contract Documents, unless Contractor agrees to reimburse the Owner for those costs; and,
5. substitution request is submitted as a formal MCR.

**3.4.3** The Contractor shall enforce strict discipline and good order among the Contractor's employees and other persons carrying out the Contract. The Contractor shall not permit employment of unfit persons or persons not skilled in tasks assigned to them.

### **3.5 WARRANTY**

**3.5.1** The Contractor warrants to the Owner and Design Professional that materials and equipment furnished under the Contract will be of good quality and new, unless otherwise required or permitted by the Contract Documents, that 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. Work not conforming to these requirements, including substitutions not properly approved and authorized, may be considered defective. The Contractor's warranty excludes remedy for damage or defect caused by abuse, modifications not executed by the Contractor, improper or insufficient maintenance and improper operation, or normal wear and tear and normal usage. If required by the Design Professional, the Contractor shall furnish satisfactory evidence as to kind and quality of materials and equipment.

### **3.6 TAXES**

#### **3.6.1 Gross Receipts Tax (GRT)**

**3.6.1.1** Section 7-10-4, NMSA 1978 provides that any person (as defined in Section 7-10-3, NMSA 1978) performing services for the State, as those terms are used in the Gross Receipts Tax Registration Act (Chapter 7, Article 10, NMSA 1978), must be registered and be issued an identification number with the Taxation and Revenue Department to pay the GRT.

**3.6.1.2** The identification number is needed to properly complete the approval process of the Contract; therefore, so as to cause no delay in the processing, the Contractor must register with the Department. For information:

Taxation and Revenue Department  
P.O. Box 630  
Santa Fe, New Mexico 87504-0630  
TELEPHONE: (505) 827-0700

TRD Website: [www.state.nm.us/tax/](http://www.state.nm.us/tax/)

or, TRD District Office in Albuquerque, Farmington, Las Cruces, Santa Fe or Roswell.

**3.6.1.3** The Contractor shall pay New Mexico Gross Receipts and other applicable taxes specific for the Work provided by the Contractor which are legally enacted when bids are received or negotiations concluded.

**Exception:** Contractor shall not be responsible for any Tribal Employment taxes, such as, NBAT or TERO taxes.

**3.6.1.4** If any person who performs services for the State is not registered to pay the gross receipt tax, the State shall withhold payment of the amount due until the person has presented evidence of registration with the Revenue Division to pay the GRT.

### **3.6.2 Nonresident Contractor's Requirements for Gross Receipts Tax Surety Bond**

**3.6.2.1** Section 7-1-55A, NMSA 1978 provides that any person (as defined in Section 7-1-3, NMSA 1978) engaged in the construction business who does not have his principal place of business in New Mexico and enters into a prime construction contract to be performed in this State shall, at the time such contract is entered into, furnish the Taxation and Revenue Department with a surety bond or other acceptable security in a sum equivalent to the GRT to be paid under the contract multiplied by the applicable rate of the GRT imposed by Section 7-9-4, NMSA 1978 to secure payment of the tax imposed on the gross receipts from the Contract. He shall obtain a certificate from the Taxation and Revenue Department that the requirements of this paragraph have been met.

**3.6.2.2** If the total sum to be paid under the Contract is changed by ten percent (10%) or more after the date the surety bond or other acceptable security is furnished to the Director or his delegate, such person shall increase or decrease, as the case may be, the amount of the bond or security within fourteen (14) days after the change (7-1-55B, NMSA 1978).

**3.6.2.3** In addition to the above requirements, the Contractor will be subject to all the requirements of Section 7-1-55, NMSA 1978.

## **3.7 PERMITS, FEES AND NOTICES**

**3.7.1** Unless otherwise provided in the Contract Documents, the Contractor shall secure and pay for the Building Permit and other permits and governmental fees, licenses and inspections and Certificate of Occupancy necessary for proper execution and completion of the Work which are customarily secured after execution of the Contract and which are legally required when bids are received, negotiations concluded, and facilities occupied. Changes or modifications to the work shall include all requirements of this paragraph.

**3.7.2** The Contractor shall comply with and give notices required by laws, ordinances, rules, regulations and lawful orders of public authorities applicable to performance of the Work. Certificates of Inspection, use and occupancy will be delivered to the Owner upon completion of the Work in sufficient time for occupation of the facility in accordance with the approved schedule for the Work. Contractor shall deliver a photocopy of the Building Permit will be delivered to the Design Professional and Owner as soon as it is obtained.

## **3.8 ALLOWANCES**

**3.8.1** The Contractor shall include in the Contract Sum all allowances stated in the Contract Documents. Items covered by allowances shall be supplied for such amounts and by such persons or entities as the Owner may direct, but the Contractor shall not be required to employ persons or entities to whom the Contractor has reasonable objection.

**3.8.2** Unless otherwise provided in the Contract Documents:

1. allowances shall cover the cost to the Contractor of materials and equipment delivered at the site and all required taxes, less applicable trade discounts.

2. Contractor's costs for unloading and handling at the site, labor, installation costs, overhead, profit and other expenses contemplated for stated allowance amounts shall be included in the Contract Sum but not in the allowances;
3. whenever costs are more than or less than allowances, the Contract Sum shall be adjusted accordingly by appropriate Modification in accordance with Article 7. The amount of the Change Order shall reflect:
  - a) the difference between actual costs and the allowances under Clause 3.8.2.1; and,
  - b) changes in Contractor's costs under Clause 3.8.2.2.

**3.8.3** Materials and equipment under an allowance shall be selected by the Owner in sufficient time to avoid delay in the Work.

**3.8.4** Contractor shall include in Base Bid a cash allowance, defined by the Construction Documents, for costs associated with the drafting of As-Built into Record Drawings in accordance with Subparagraph 3.11.1 and Paragraph 9.10 Close-Out Requirements. The Contractor shall include, at a minimum, the allowance in the Base Bid and in the event costs exceed the allowance, the Contractor shall be responsible for the difference.

**Exception:** In accordance with Article 6, Owner shall be responsible for any costs required for compliance with this Subparagraph that may be associated with Owner's separate Contractors. However, the Owner's responsibility for these costs shall not relieve even partially the Contractor's responsibilities under Paragraph 9.10.

### **3.9 SUPERINTENDENT**

**3.9.1** The Contractor shall employ a competent Superintendent, who is acceptable to the Owner, and necessary assistants who shall be in attendance at the Project site during performance of the Work. The Superintendent shall represent the Contractor, and communications given to the Superintendent shall be as binding as if given to the Contractor. Important communications shall be confirmed in writing. Other communications shall be similarly confirmed on written request in each case.

**3.9.2** Within **ten (10) days after Notice of Award** and commencement of the Work, the Contractor shall submit to the Design Professional, for the Owner's consideration for approval, a resume and Statement of Qualification of proposed Superintendent(s) and assistants. During construction, the Contractor shall replace individuals who are no longer acceptable to the Owner and shall submit a resume and Statement of Qualification for proposed replacements.

### **3.10 CONTRACTOR'S SCHEDULES, LOGS, MEETINGS AND REPORTS**

**3.10.1** The Contractor, promptly after being awarded the Contract and before the first payment application, shall prepare and submit for the Owner's and Design Professional's information a Critical Path Construction Schedule for the Work that indicates the intended start and completion of the various construction activities, which shall be implemented and adhered to by the Contractor, Subcontractors, material suppliers and equipment suppliers. At a minimum, the schedule shall be a GANTT type schedule and shall not exceed time limits allowed by the Contract Documents with no fewer work breakdown events than line items of the Schedule of Values. The Schedule will incorporate and make provisions for significant known Owner activities, holidays and other special occasions. The Contractor will acknowledge that a reduction in activity may be necessary during the

time prior to and during periods of special Owner events or occasions. The schedule shall be revised to indicate Work complete before each payment application and at appropriate intervals as required by the conditions of the Work and progress of the Work. The revised schedule shall be related to the entire Project to the extent required by the Contract Documents, and shall provide for expeditious and practicable execution of the Work including, but not limited to time recovery strategies and Recovery Plan, if progress of the Work is behind schedule.

**3.10.1.1** The Contractor shall perform the Work in general accordance with the most recent schedule submitted to the Owner and Design Professional.

**3.10.2** The Contractor shall prepare before the second payment application and keep current, for the Design Professional's approval, a schedule of submittals which is coordinated with the Contractor's construction schedule and allows the Design Professional **fourteen (14) days**, or as otherwise agreed between the parties, to review submittals. A Submittal Log shall be maintained by the Contractor indicating for each scheduled submittal, the appropriate specification number, the date of submission, the date of approval and any re-submittals.

**3.10.3 Weekly Meeting:** Prior to the start of Work on the site and in no event later than the first payment application, the Contractor shall establish a weekly meeting time with the Owner and Design Professional and shall establish an agenda for the meeting. Contractor shall host the weekly job site meeting and shall maintain meeting minutes and distribute such notes to all parties in attendance and to those requested at the next meeting within **three (3) days** of the meeting. The meetings shall include but not be limited to:

1. adoption of previous week's meeting notes that include list of attendees;
2. new business;
3. old business;
4. items requiring action with those assigned to action and expected action date;
5. outstanding RFI's;
6. outstanding submittals; and,
7. other business including review of Progress Report or Payment Application if appropriate.

Meetings shall be open forum, chaired by the Contractor and shall include any Subcontractors doing work or anticipating work in the near future or for any other reason, Owner, any entities that the Owner would like to attend, including User Representative or users of completed project, Design Professional, any consultant(s) to the Design Professional who have or will have any work under way associated with the consultant's specialty. The Contractor shall alert the Owner and Design Professional as to which consultants are requested to attend the next meeting and include request in the meeting minutes. Phone or web conferencing may be used if effective in the opinion of the Owner.

**3.10.3.1 Progress Report:** Each month, at the regularly scheduled weekly meeting that is just prior to the Contractor submitting the Payment Application for that month; the Contractor shall present a Progress Report. The Contractor prepared Progress Report shall review the Project Schedule, review the Schedule Recovery Plan if necessary, and review the Three-Week-Look-Ahead Schedule.

**3.10.3.2** The Contractor prepared Three-Week-Look-Ahead Schedule shall include specific details of Work expected to be accomplished three weeks into the future, identify critical path Work to be completed, and identify potential obstacles including RFIs, submittals, material deliveries, utility hook-ups or any other event or task that might hinder the progress of the Work.

**3.10.4 Emergency Contact List:** The Contractor shall at the first weekly meeting, deliver to the Owner and the Design Professional an Emergency Contact List that will include emergency contacts for every company that has worked or will do work on the Project. List shall include company, main office number, after hours office number(s); and, both a primary and secondary contact name, cell number and home number. The Contractor shall keep the Emergency Contact List current and distribute the most current version to Owner and Design Professional.

**3.10.5 Daily Report:** The Contractor shall prepare a Daily Report each day that Contractor, Subcontractors or any other entity are on the Project. The Daily Reports shall be maintained at the site, be well organized and include:

1. report date and who prepared the report;
2. weather conditions - low temp, high temp, visibility, humidity, wind, wind direction, cloud conditions, precipitation amount, other notes;
3. companies present by name and their - number of workers, work location, total man hours that day for each company;
4. equipment - type, source, units of work done, location of work, hour meter reading;
5. material brought to site - description, units, quantity, quality, location, time;
6. visitors to site - name, company, time;
7. safety concerns - company, contact, noticed by, work activity, safety issue, requirement, outcome; and,
8. quality assurance and control - company, description of issue, specification section, issued by.

### **3.11 DOCUMENTS AND SAMPLES AT THE SITE**

**3.11.1** The Contractor shall maintain at the site for the Owner, one record copy of the Drawings, Specifications, Addenda, Modification / Change Requests, and other Modifications, in good order and marked currently to record field changes and selections made during construction, as well as, one record copy of approved Shop Drawings, Product Data, Samples and similar required submittals, and Meeting Notes and Daily Job Reports. These shall be available to the Design Professional and the Owner and shall be delivered to the Design Professional for submittal to the Owner upon completion of the Work. Information maintained in PSFA-CIMS in accordance with Subparagraph 4.2.4.1 with web access at the site shall be considered "at the site".

### **3.12 SHOP DRAWINGS, PRODUCT DATA AND SAMPLES**

**3.12.1** Shop Drawings are drawings, diagrams, schedules and other data specially prepared for the Work by the Contractor for a Subcontractor, manufacturer, supplier or distributor to illustrate some portion of the Work.

**3.12.2** Product Data are illustrations, standard schedules, performance charts, instructions, brochures, diagrams and other information furnished by the Contractor to illustrate materials or equipment for some portion of the Work.

**3.12.3** Samples are physical examples which illustrate materials, equipment or workmanship and establish standards by which the Work will be judged.

**3.12.4** Shop Drawings, Product Data, Samples and similar submittals are not Contract Documents. The purpose of their submittal is to demonstrate for those portions of the Work for which submittals are required by the Contract Documents the way by which the Contractor proposes to conform to the information given and the design concept expressed in the Contract Documents. Review by the Design Professional is subject to the limitations of Subparagraph 4.2.7. Informational submittals upon which the Design Professional is not expected to take responsive action may be so identified in the Contract Documents. Submittals which are not required by the Contract Documents may be returned without action.

**3.12.4.1** Shop Drawings, Product Data, Samples and similar shall not be submitted on a "piece meal" basis and shall be submitted in packages, in accordance with the Construction Documents, so that like or interrelated submittals, that must be compared or correlated one to another, are submitted together. Submittals not submitted as a package so that they may be compared one to another for approval or other action shall be returned to the Contractor without review but, with explanation by the Design Professional as why and what is required when re-submitted. For example, finish materials such as tile, carpet, wall covering and paint shall be submitted as a package.

**3.12.4.2** If substitutions are allowed after the contract award, a submittal shall not be used for any substitution request (see Subparagraph 3.4.2).

**3.12.5** The Contractor shall review for compliance with the Contract Documents, approve and submit to the Design Professional Shop Drawings, Product Data, Samples and similar submittals required by the Contract Documents with reasonable promptness and in such sequence as to cause no delay in the Work or in the activities of the Owner or of separate contractors. Submittals which are not marked as reviewed for compliance with the Contract Documents and approved by the Contractor may be returned by the Design Professional without action.

**3.12.6** By approving and submitting Shop Drawings, Product Data, Samples and similar submittals, the Contractor represents that the Contractor has determined and verified materials, field measurements and field construction criteria related thereto, or will do so, and has checked and coordinated the information contained within such submittals with the requirements of the Work and of the Contract Documents.

**3.12.7** The Contractor shall perform no portion of the Work for which the Contract Documents require submittal and review of Shop Drawings, Product Data, Samples or similar submittals until the respective submittal has been approved by the Design Professional and, if required, by the Jurisdiction Having Authority.

**3.12.8** The Work shall be in accordance with approved submittals, except that the Contractor shall not be relieved of responsibility for deviations from requirements of the Contract Documents by the Design Professional's approval of Shop Drawings, Product Data, Samples or similar submittals, unless the Contractor has substitution approved in accordance with Subparagraph 3.4.2 unless the Contractor informed the Design Professional in writing of such deviation at the time of submittal and the Design Professional has given written approval to the specific deviation as a minor change as a Supplemental Instruction. The Contractor shall not be relieved of responsibility for errors or omissions in Shop Drawings, Product Data, Samples or similar submittals by the Design Professional's approval thereof.

**3.12.9** The Contractor shall direct specific attention, in writing on resubmitted Shop Drawings, Product Data, Samples or similar submittals, to revisions other than those requested by the Design Professional on previous submittals. In the absence of such written notice the Design Professional's approval of a resubmission shall not apply to such revisions.

**3.12.10** The Contractor shall not be required to provide professional services which constitute the practice of architecture or engineering unless such services are specifically required by the Contract Documents for a portion of the Work or unless the Contractor needs to provide such services in order to carry out the Contractor's responsibilities for construction means, methods, techniques, sequences and procedures. The Contractor shall not be required to provide professional services in violation of applicable law. If professional design services or certifications by a Design Professional related to systems, materials or equipment are specifically required of the Contractor by the Contract Documents, the Owner and the Design Professional will specify all performance and design criteria that such services must satisfy. The Contractor shall cause such services or certifications to be provided by a properly licensed Design Professional, whose signature and seal shall appear on all drawings, calculations, specifications, certifications, Shop Drawings and other submittals prepared by such professional. The Owner and the Design Professional shall be entitled to rely upon the adequacy, accuracy and completeness of the services, certifications or approvals performed by such Design Professionals, provided the Owner and Design Professional have specified to the Contractor all performance and design criteria that such services must satisfy. Pursuant to this Subparagraph 3.12.10, the Design Professional will review, approve or take other appropriate action on submittals only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents.

**3.12.11** The Contractor shall not be responsible for the adequacy of the performance or design criteria required by the Contract Documents.

### **3.13 USE OF SITE**

**3.13.1** The Owner assumes no responsibility or liability for the physical conditions or safety of the Work site or for any improvements located on the Work site. The Contractor shall be solely responsible for providing a safe place for the performance of the Work. The Owner shall not be required to make any adjustment to either the Contract Sum or Contract Time concerning any failure by the Contractor or Subcontractor to comply with the requirements of this Paragraph 3.13.

**3.13.2** The Contractor will bear the cost and make the necessary arrangements and provisions for all construction water required during the entire construction period through the Owner or otherwise.

**3.13.3** The Contractor will bear the cost and make the necessary arrangements and provisions for all construction electricity including distribution required during the entire construction period through the Owner or otherwise.

**3.13.4** The Contractor will bear the cost and be responsible for temporary lighting, heating and cooling for the entire project.

**Exception:** If available and at no premium cost to the Owner, the Owner will at no cost to the Contractor, allow the Contractor to utilize the Owner's existing lighting, heating and cooling providing Contractor will return systems to like or better condition that shall include, but not be limited to, new lamping, new filters, and the like.

**3.13.5** Any temporary utility or other work done by the Contractor to accommodate Work requirements shall be removed at the conclusion of the Work and all finishes shall be repaired to match the existing, or in the areas of new construction, equal to or exceeding the requirements of the Contract Documents.

**3.13.6** The Contractor shall request in writing any utility shut downs well in advance of necessity of any shut down and shall not proceed with any shut down without prior Owner approval. The Owner shall not be required to make any adjustment to either the Contract Sum or Contract Time concerning any failure by the Contractor or Subcontractor to comply with the requirements of this Subparagraph 3.13.3.

**3.13.7** The Contractor shall provide and maintain a suitable temporary main field office at the Project site. The Office may be in, or a part of, the existing facility, provided that prior approval is obtained from the Owner. The Contractor will move or remove their office from the existing facility at the request of the Owner.

**3.13.8** The Contractor may, if space is available, allow Subcontractors, material suppliers and equipment suppliers to provide and maintain field offices or storage trailers on the Project site for their own use. Locations and size of any office or storage trailers shall be as approved by the Contractor and Owner prior to their placement on site. The Owner or Contractor may at any time require any temporary building or trailer to be moved or removed

**3.13.9** The Contractor shall confine operations at the site to areas permitted by law, ordinances, permits and the Contract Documents and shall not unreasonably encumber the site with materials or equipment.

**3.13.10** All project related vehicles either company or personal vehicles may park on-site only in areas designated by the Owner and Design Professional. Parking will only be provided to the extent space on site will allow. All Contractors' parking must be well removed from normal facility traffic, and especially away from any pedestrian crossings, walkways, or drop off or loading areas.

**3.13.11** All Contractor access to the Project site shall be by a designated construction entrance as directed by the contract documents, the Design Professional and the Owner, and shall be enforced by the Contractor.

**3.13.12** Access to existing facility work areas, either occupied or not occupied, shall be controlled by the Owner. Every effort will be made by the Contractor to cooperate with the Owner's security requirements and policies. Access to a work area must be in accordance with the times and conditions scheduled and agreed to by all parties. Any access, other than at normally scheduled work times, must

be coordinated with the Owner or Owner's appointee at least 48 hours in advance. The Owner has the right to restrict or limit access as necessary to meet their needs, especially in regard to security and safety. Each Contractor, Subcontractor, or supplier's full cooperation is required.

**3.13.13** The Project working hours shall be those established by the Contract Documents and as agreed by the Owner. Any changes in project working hours such as adding shift work, extending work day hours or other similar changes must be submitted least forty-eight (48) hours in advance to the Owner for consideration.

**3.13.14** Contractor shall make every effort to minimize disruptions such as noise or dust and shall provide safe access and egress to the Owner's operations, facility, portion of facility, or surrounding areas, including, but not limited to neighborhood or community, and shall, to inform and gain approval from the Owner of planned work, prepare and present to the Owner and Design Professional for Owner approval prior to beginning construction or using the site a:

1. schedule for the work, to include phasing plans, proposed hours of operations, and activities to take place on weekends, school holidays and/or other special access requirements;
2. site logistics plan, showing proposed secure and fenced areas, locations and types of temporary barricades, material storage and staging areas, school property entrances used for material deliveries, and special material or equipment storage requirements. This plan will include a description and proposed location for the Contractor's temporary office, storage trailers, Subcontractor's trailers, sanitary facilities, employee parking areas, etc.;
3. detailed construction and phasing plan, to include locations of proposed temporary dust or noise partitions, alternate emergency egress routes, temporary facilities, means and path of moving materials and equipment into the facility, and provisions for maintaining and supplying required utility services; and,
4. routing plan to maintain safe ingress and egress to all areas at all times for students, staff and public either nearby or within the Project site that shall include re-routing pedestrian ways, re-routing traffic, erect routing signs, building of bridges, barricades, pedestrian tunnels, or whatever effort that will best accommodate Owner operations and provide required protection while work is in progress ensuring that no entrances or exits are blocked, closed off, or restricted in any way unless prior approval is granted by the Owner and the Fire Marshall or other jurisdiction having authority.

**3.13.15** Contractor shall ensure that any and all of the Contractor's flammable liquids are stored outside of the building, and transported in approved containers. Paint, paint thinners, gasoline, oil, roofing materials or other flammable materials shall be stored fifty (50) feet, or more, outside of all buildings, marked as to contents and properly protected. The Contractor shall not pour flammable or toxic solvents, thinners, etc., into drains and sewers.

**3.13.16** Whenever electric light for illumination purposes is found necessary for the safe progress of the work, the Contractor shall provide such lights as may be required to properly execute the work. This temporary lighting shall be constructed and arranged as not to interfere with the progress of other trades or Contractors working in the facility. This system of temporary lighting shall be erected and maintained strictly in accordance with the controlling codes and OSHA standards. The Contractor shall furnish all bulbs and temporary lighting devices required to carry on the work for all Trades under their Contract.

**3.13.17** In accordance with Paragraphs 3.15, 6.3, 10.2 and others of the General Conditions, the Contractor shall be responsible for the daily removal and disposal of all rubbish, debris and trash from the site and building which results from Work. The Contractor shall provide a dumpster, or other trash removal facility, for use by their Subcontractors and all rubbish, debris and trash shall be deposited in Contractor provided containers located at an approved location on the site. There shall be no burning of trash or other open fires on the site. If in the opinion of the Owner neatness is not maintained, the Owner may following appropriate notice to the Contractor, have the area cleaned and withhold cost from any amounts owing to Contractor.

**3.13.18** The Contractor shall, at the completion of Work in a given area, expeditiously remove all surplus material, equipment, and debris of every nature resulting from their operations, and put the areas in a neat, clean, and orderly condition. At Final Completion of the Project or an area of the Project, the Contractor shall final clean from top to bottom inside and out everything to the Owner's satisfaction that including plumbing fixtures, equipment, windows, floors, walls, light fixtures and the like in accordance with Paragraph 3.15 of the General Conditions.

**3.13.19** The Contractor shall in accordance with Article 10, afford protection to all adjacent areas, buildings, roads, walks, and all other property adjacent to their work. Any portion of a building or other property damaged during construction operations shall be promptly, properly and thoroughly repaired and replaced without cost to the Owner.

**3.13.20** Contractor shall maintain a safety plan that includes how the Contractor proposes to meet all OSHA and related requirements, details on safety equipment to be utilized, how the potential for fire and other potential hazards will be addressed, welding and cutting procedures and, how the Contractor will maintain safety related systems such as fire alarms, intercoms, and sprinklers while the Work is proceeding in accordance with Paragraph 3.3 and other parts of the General Conditions.

**3.13.21 Jobsite Requirements Pertaining to Personnel:**

1. All personnel on site, directly or indirectly in the employ of Contractor, are restricted from any interaction with any Owner Staff, Students, or other members of the public while on, or adjacent to Owner property except through jobsite meetings in accordance with Subparagraph 3.10.3 or as otherwise determined by the Owner;
2. shall remain in their designated work areas. Communications with any non-project related persons on or near the site shall be through project Superintendent;
3. no firearms or any other types of weapons, of any sort will be allowed on site. If any person is found to be in possession of any Firearm, of any kind, they will be directed to leave immediately and will not be allowed to return. This includes any firearms found in Company or Private vehicles, tool boxes or brought on site in any other manner;
4. it is the policy of the Owner to prohibit smoking on any occupied school campus and on a new, un-occupied, site to limit smoking to designated areas;
5. it is the policy of the Owner to prohibit use, possession, sale, and distribution of alcohol, drugs, or other controlled substances on its premises and to prohibit the presence of an individual with such substances in their body from the workplace, the Contractor shall enforce this policy; and,
6. Contractor agrees that any employee who is found in violation of requirements of this Paragraph, or of the Contract Documents, or who refuses to permit inspection shall be barred from the Project site at the discretion of the Owner in accordance with Subparagraph 13.8.4.1.

**3.14 CUTTING AND PATCHING**

**3.14.1** The Contractor shall be responsible for cutting, fitting or patching required to complete the Work or to make its parts fit together properly.

**3.14.1.1** Cutting and patching shall be done by individuals skilled in working the materials involved so to prevent a reduction of visual qualities or resulting in substantial evidence of the cut-and-patch work.

**3.14.2** The Contractor shall not damage or endanger a portion of the Work, fully or partially completed, or existing construction of the Owner or separate contractors by cutting, patching or otherwise altering such construction, or by excavation. The Contractor shall not cut or otherwise alter such construction by the Owner or a separate contractor except with written consent of the Owner and of such separate contractor; such consent shall not be unreasonably withheld. The Contractor will not unreasonably withhold from the Owner or a separate contractor the Contractor's consent to cutting or otherwise altering the Work.

### **3.15 CLEANING UP**

**3.15.1** The Contractor on a daily basis shall keep the premises and surrounding area free from accumulation of waste materials or rubbish caused by operations under the Contract. At completion of the Work, the Contractor shall remove from and about the Project waste materials, rubbish, the Contractor's tools, construction equipment, machinery and surplus materials and shall then thoroughly clean the premises and the site to the Owner's satisfaction.

**3.15.2** If the Contractor fails to clean up as provided in the Contract Documents, the Owner may do so and the cost thereof shall be charged to the Contractor in accordance with Paragraph 6.3.

### **3.16 ACCESS TO WORK**

**3.16.1** The Contractor shall provide the Owner and Design Professional access to the Work in preparation and progress wherever located.

### **3.17 ROYALTIES, PATENTS AND COPYRIGHTS**

**3.17.1** The Contractor shall pay all royalties and license fees. The Contractor shall defend suits or claims for infringement of copyrights and patent rights and shall hold the Owner and Design Professional harmless from loss on account thereof, but shall not be responsible for such defense or loss when a particular design, process or product of a particular manufacturer or manufacturers is required by the Contract Documents or where the copyright violations are contained in Drawings, Specifications or other documents prepared by the Owner or Design Professional. However, if the Contractor has reason to believe that the required design, process or product is an infringement of a copyright or a patent, the Contractor shall be responsible for such loss unless such information is promptly furnished in writing to the Design Professional.

### **3.18 INDEMNIFICATION**

**3.18.1** To the fullest extent permitted by law and to the extent claims, damages, losses or expenses are not covered by Project Management Protective Liability insurance purchased by the Contractor in accordance with Paragraph 11.3, the Contractor shall indemnify and hold harmless the Owner, Design Professional, Design Professional's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out

of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Paragraph 3.18.

This Agreement to indemnify shall not extend to liability, claims, damages, losses or expenses, including attorney fees, arising out of the:

1. preparation or approval of maps drawings, opinions, reports, surveys, change orders, designs, or specifications by the parties indemnified hereunder, or the agents or employees of the parties indemnified hereunder; or,
2. giving or failure to give directions or instructions by the parties indemnified or their agents or employees, where such giving or failure to give directions or instructions is the primary cause of bodily injury to persons or damage to property.

**3.18.2** In claims against any person or entity indemnified under this Paragraph 3.18 by an employee of the Contractor, a Subcontractor, or anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under Subparagraph 3.18.1 shall not be limited by a limitation on amount or type of damages compensation or benefits payable by or for the Contractor, Subcontractor under any Liability Insurance, Workers' Compensation Acts, Disability Benefit Acts or other employee benefit acts.

### **3.19 REPRESENTATIONS AND ASSURANCES**

**3.19.1** The Contractor, in addition to the requirements of the Contract Documents, represents to the Owner, as an inducement to the Owner to execute the Owner-Contractor Agreement, which representations will survive the execution and delivery of the Agreement and the completion of the Work that Contractor:

1. is financially solvent, able to pay debts, and has sufficient working capital to complete the Work;
2. is able to furnish the plant, tools, materials, supplies, equipment, skilled labor and sufficient experience and competence required to complete the Work equal to or exceeding industry standards;
3. in accordance with Subparagraph 3.1.3, is authorized and properly licensed to do business in the State of New Mexico and in the locale where the Work is located;
4. in execution of the Agreement and performance thereof is within the Contractor's duly authorized powers; and,
5. Subcontractors, material suppliers and equipment suppliers have visited the site of Work and have become familiar with the conditions under which the Work is to be performed, obtained all available information and have correlated observations and acquired information with the requirements of the Contract Documents including conditions:
  - a) bearing upon access to the site, accommodations required, transportation, disposal, handling and storage;
  - b) affecting availability of labor, materials, equipment, water, electricity, utilities and roads;
  - c) such as weather, river stages, flooding;

- d) related to the apparent form and nature of the Work site, including the surface and sub-surface conditions; and,
- e) that in general would be deemed by a prudent contractor to be material to the Work as to assess risk, contingencies and other circumstances.

## **ARTICLE 4 ADMINISTRATION OF THE CONTRACT**

### **4.1 DESIGN PROFESSIONAL**

**4.1.1** The term "Design Professional" means the Architect, Engineer or other professional person lawfully licensed to practice the profession within the State of New Mexico and can fulfill the requirements of the Contract Documents within that person's licensed authority. If lawfully allowed, the Design Professional shall also mean the Design Professional's authorized representative unless the Owner has a reasonable objection.

**4.1.2** Duties, responsibilities and limitations of authority of the Design Professional as set forth in the Contract Documents shall not be restricted, modified or extended without written consent of the Owner, Contractor and Design Professional. Consent shall not be unreasonably withheld.

**4.1.3** If the employment of the Design Professional is terminated, the Owner shall employ a new Design Professional against whom the Contractor has no reasonable objection and whose status under the Contract Documents shall be that of the former Design Professional.

**4.1.4** If there is no Design Professional, the Owner shall assume the responsibilities for Administration of the Contract Documents.

### **4.2 DESIGN PROFESSIONAL'S ADMINISTRATION OF THE CONTRACT**

**4.2.1** The Design Professional will provide administration of the Contract as described in the Contract Documents, and will be an Owner's representative (1) during construction, (2) until final payment is due and (3) with the Owner's concurrence, from time to time during the one-year period for correction of Work described in Paragraph 12.2. The Design Professional will have authority to act on behalf of the Owner only to the extent provided in the Contract Documents, unless otherwise modified in writing in accordance with other provisions of the Contract.

**4.2.2** The Design Professional, as a representative of the Owner, will visit the site at intervals appropriate to the stage of the Contractor's operations (1) to become familiar with and to keep the Owner informed about the progress and quality of the Work completed, (2) to use all reasonable efforts to guard the Owner against defects and deficiencies in the Work, and (3) to determine in general if the Work is being performed in a manner indicating that the Work, when fully completed, will be in accordance with the Contract Documents. The Design Professional will not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work that is the responsibility of the Contractor to provide. The Design Professional will neither have control over or charge of, nor be responsible for, the construction means, methods, techniques, sequences or procedures, or for the safety precautions and programs in connection with the Work, since these are solely the Contractor's rights and responsibilities under the Contract Documents, except as provided

in Subparagraph 3.3.1. However, if the Design Professional becomes aware of the failure of the Contractor, Subcontractors or any other person or entity performing any of the Work to use proper construction means, methods, techniques, sequences, procedures, safety precautions and programs or failure of any of the foregoing parties to carry out the Work in accordance with the Contract Document, the Design Professional shall promptly notify the Contractor and the Owner of the deficiency.

**4.2.3.** The Design Professional will not be responsible for the Contractor's failure to perform the Work in accordance with the requirements of the Contract Documents. The Design Professional will not have control over or charge of and will not be responsible for acts or omissions of the Contractor, Subcontractors, or their agents or employees, or any other persons or entities performing portions of the Work.

#### **4.2.4 COMMUNICATIONS FACILITATING CONTRACT ADMINISTRATION**

**4.2.4.1** Except as otherwise provided in the Contract Documents or when direct communications have been specially authorized or requested by the Owner, the Owner and Contractor shall endeavor to communicate with each other through the Design Professional about matters arising out of or relating to the Contract. Communications by and with the Design Professional's consultants shall be through the Design Professional. Communications by and with Subcontractors and material suppliers shall be through the Contractor. Communications by and with separate contractors shall be through the Owner.

**4.2.4.2** English is the language that will be used on site to issue all directions, used in all project related meetings, and used in all project related correspondence. Contractor, Subcontractors, material suppliers and equipment suppliers' foremen and supervisory staff, must be able to read and converse in English, and be able to receive and understand all directions issued by the Owner and Design Professional.

**4.2.4.3** In accordance with Subparagraph 2.1.2, with the Contract Documents, or otherwise required by Owner, the Contractor, Design Professional and Owner shall utilize PSFA-CIMS for project communications and shall:

1. create all contractual communications through the PSFA-CIMS including, but not limited to, Daily Reports, RFI's, MCR's, Meeting Minutes, Submittal Log and Punch Lists;
2. provide an adequate number of users to properly manage the Project in accordance with the Contract Documents and the Project Schedule;
3. have access to the Internet and an Internet e-mail address, of their own choice, and provide to the PSFA the names, positions, and e-mail addresses of all individuals who will have access to the PSFA-CIMS;
4. contract directly with a PSFA authorized training vendor if the limited PSFA training is not deemed sufficient to correctly and consistently use the PSFA-CIMS;
5. have adequate computer to run PSFA-CIMS but, not less than a Pentium or equal machine with a 56k baud or faster connection to the Internet;
6. have a Windows 98 or later operating system;
7. have an internet browser that supports HTML 1.1 such as Internet Explorer 6 or later; and,

8. agree that use of this PSFA-CIMS software will not replace or change any contractual responsibilities of the Contract Documents; and,
9. optionally have, but not required to have, as a benefit to sending images to Design Professional and Owner as an attachment to an RFI or other CIMS document instead of faxing or mailing, an attached scanner minimum 800 x 600 pixels and a digital camera minimum resolution of one (1) mega pixels.

For PSFA-CIMS information on installation and use of the PSFA-CIMS or for scheduling training contact the PSFA-CIMS administrator at (505)843-6272 or e-mail question to [systems-support@PSFA.k12.nm.us](mailto:systems-support@PSFA.k12.nm.us) and include PSFA-CIMS support in subject line.

**4.2.5** Based on the Design Professional's evaluations of the progress and quality of the Work, Contractor's Application for Payment and all other information available to the Design Professional, the Design Professional shall within **five (5) days** of receipt of a properly completed Application for Payment certify to the Owner the undisputed amount recommended for payment to the Contractor and shall provide specific reasoning for denial of disputed amounts.

**4.2.6** The Design Professional will have authority to reject Work that does not conform to the Contract Documents, and shall do so unless, after consultation with the Owner, Owner instructs otherwise. Whenever the Design Professional considers it necessary or advisable, the Design Professional will have authority, subject to the Owner's approval, to require inspection or testing of the Work in accordance with Subparagraphs 13.5.2 and 13.5.3, whether or not such Work is fabricated, installed or completed. However, neither this authority of the Design Professional nor a decision made in good faith either to exercise or not to exercise such authority shall give rise to a duty or responsibility of the Design Professional to the Contractor, Subcontractors, material and equipment suppliers, their agents or employee, or other persons or entities performing portions of the Work.

**4.2.7** Unless rejected in accordance with Subparagraph 3.12.4.1 or is otherwise not in compliance with Section 3 of this Agreement, the Design Professional, shall within a reasonable time not to exceed **fourteen (14) days**, or other reasonable time agreed upon by the parties, review and approve or take other appropriate action upon the Contractor's submittals such as Shop Drawings, Product Data and Samples, for the purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. Review of such submittals is conducted solely in the interest of the Owner, and shall not relieve the Contractor of responsibility for determining the accuracy and completeness of other details such as dimensions and quantities, or for substantiating instructions for installation or performance of equipment or systems, all of which remain the responsibility of the Contractor as required by the Contract Documents. The Design Professional's review of the Contractor's submittals shall not relieve the Contractor of any obligations of these General Conditions. The Design Professional's review shall not constitute approval of safety precautions or, unless otherwise specifically stated by the Design Professional, of any construction means, methods, techniques, sequences or procedures. The Design Professional's approval of a specific item shall not indicate approval of an assembly of which the item is a component.

**4.2.7.1** The Contractor shall be responsible for cost of inordinate re-reviews, exceeding two, by Design Professional due to non-compliance with Subparagraph 3.12.6.

**4.2.7.2** Rejection of any submittal due to non-compliance with Subparagraph 3.12.6 shall not be the basis for claim for a project delay.

**4.2.8** The Design Professional may prepare for Owner consideration, Modification / Change Requests and Change Orders. The Design Professional shall review Contractor proposals for adjustment to the Contract Sum or Contract Time relative to a Modification / Change Request and shall either approve, reject or suggest compromise to such proposals.

**4.2.8.1** The Design Professional may authorize Supplemental Instructions for minor changes in the Work as provided in Paragraph 7.4, provided there is no material change to the time, cost, specification or scope of the Work.

**4.2.9** The Design Professional will conduct inspections to make recommendations to the Owner of the date or dates of Substantial Completion and the date of Final Completion, will receive, approve and forward to the Owner, for the Owner's records, written warranties, Certificates of Insurance and related documents required by the Contract and assembled by the Contractor and will issue a final Certificate for Payment upon compliance with the requirements of the Contract Documents.

**4.2.10** If the Owner and Design Professional agree, the Design Professional will provide one or more project representatives to assist in carrying out the Design Professional's responsibilities at the site.

**4.2.11** Subject to the claims procedures set forth in Paragraph 4.3, the Design Professional will, in the first instance, interpret and decide matters concerning performance under, and requirements of, the Contract Documents on written request of either the Owner or Contractor. The Design Professional's response to such requests will be made in writing within any time limits agreed upon or otherwise with reasonable promptness. If no agreement is made concerning the time within which interpretations required of the Design Professional shall be furnished in compliance with this Paragraph 4.2, then delay shall not be recognized on account of failure by the Design Professional to furnish such interpretations until **ten (10) days** after written request is made for them.

**4.2.12** Interpretations and decisions of the Design Professional will be consistent with the intent of and reasonably inferable from the Contract Documents and will be in writing or in the form of drawings. When making such interpretations and initial decisions, the Design Professional will make all reasonable efforts to secure faithful performance by both the Owner and the Contractor and will not show partiality to either, and will not be liable for results or interpretations or decisions so rendered in good faith.

**4.2.13** The Design Professional's decisions on matters relating to aesthetic effect will, with the Owner's consent, be final if consistent with the intent expressed in the Contract Documents.

### **4.3 CLAIMS AND DISPUTES**

**4.3.1** Definition. A Claim is a demand or assertion by one of the parties seeking as a matter of right, adjustment or interpretation of Contract terms, payment of money, extension of time or other relief with respect to the terms of the Contract. The term "Claim" also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract.

Claims must be initiated by written notice. The responsibility to substantiate Claims shall rest with the party making the Claim.

**4.3.2 Time Limits on Claims.** Claims by either party must be initiated within **twenty-one (21) days** after occurrence of the event giving rise to such Claim or within **five (5) days** after the claimant first recognizes the condition giving rise to the Claim, whichever is later. Claims must be initiated by written notice to the Design Professional and the other party.

**4.3.3 Continuing Contract Performance.** Pending final resolution of a Claim except as otherwise agreed in writing or as provided in Subparagraph 9.7.1 and Article 14, the Contractor shall proceed diligently with performance of the Contract and the Owner shall continue to make payments in accordance with the Contract Documents.

**4.3.4 Claims for Concealed or Unknown Conditions.** If conditions are encountered at the site which are (1) subsurface or otherwise concealed physical conditions which differ materially from those indicated in the Contract Documents or (2) unknown physical conditions of an unusual nature, which differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents, then notice by the observing party shall be given to the other party promptly before conditions are disturbed and in no event later than **twenty-one (21) days** after first observance of the conditions. The Design Professional will promptly investigate such conditions and if they differ materially and cause an increase or decrease in the Contractor's cost of, or time required for, performance of any part of the Work, will recommend an equitable adjustment in the Contract Sum or Contract Time, or both. If the Design Professional determines that the conditions at the site are not materially different from those indicated in the Contract Documents and that no change in the terms of the Contract is justified, the Design Professional shall so notify the Owner and Contractor in writing, stating the reasons. Claims by either party in opposition to such determination must be made within **twenty-one (21) days** after the Design Professional has given notice of the decision. If the conditions encountered are materially different, the Contract Sum and Contract Time shall be equitably adjusted, but if the Owner and Contractor cannot agree on an adjustment in the Contract Sum or Contract Time, the adjustment shall be referred to the Design Professional for initial determination, subject to further proceedings pursuant to Paragraph 4.4.

**4.3.5 Claims for Additional Cost.** If the Contractor wishes to make Claim for an increase in the Contract Sum, written notice as provided herein shall be given before proceeding to execute the Work. Prior notice is not required for Claims relating to an emergency endangering life or property arising under Paragraph 10.6.

**4.3.6** If the Contractor believes additional cost is involved for reasons including but not limited to (1) a written interpretation from the Design Professional, (2) an order by the Owner to stop the Work where the Contractor was not at fault, (3) a written order for a minor change in the Work issued by the Design Professional, (4) unjustified failure of payment by the Owner, (5) termination of the Contract by the Owner, (6) Owner's suspension or (7) other reasonable grounds, Claim shall be filed in accordance with this Paragraph 4.3.

#### **4.3.7 CLAIMS FOR ADDITIONAL TIME**

**4.3.7.1** If the Contractor wishes to make Claim for an increase in the Contract Time, it shall be submitted as a Modification / Change Request in accordance with Article 7. In the case of a continuing delay only one Claim is necessary.

**4.3.7.2** If adverse weather conditions are the basis for a Claim for additional time, such Claim shall be documented by data substantiating that weather conditions were abnormal for the period of time, could not have been reasonably anticipated and had an adverse effect on the scheduled construction. Substantiation must include supporting evidence from the U.S. Weather Bureau or similar for the previous ten (10) year averages for the locale of the Project, as well as, evidence supported by original project schedule and daily job logs that specific Work events falling on the critical path were delayed.

**4.3.8** Injury or Damage to Person or Property. If either party to the Contract suffers injury or damage to person or property because of an act or omission of the other party, or of others for whose acts such party is legally responsible, written notice of such injury or damage, whether or not insured, shall be given to the other party within a reasonable time not exceeding **five (5) days** after discovery. The notice shall provide sufficient detail to enable the other party to investigate the matter.

**4.3.8.1** The Contractor shall promptly notify the Owner and Design Professional in writing of any claims received by the Contractor for personal injury or property damage related to the Work.

**4.3.9** If unit prices are stated in the Contract Documents or subsequently agreed upon, and if quantities originally contemplated are changed in a proposed Modification / Change Request by more than fifteen percent (15%), the applicable unit prices shall be equitably adjusted in accordance with Article 7.

**4.3.10** Claims for Consequential Damages. The Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract. This mutual waiver includes damages incurred by the:

1. Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and
2. Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, loss of profit except anticipated profit arising directly from the Work performed.

This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination in accordance with Article 14. Nothing contained in this Subparagraph 4.3.10 shall be deemed to preclude an award of liquidated damages, when applicable, in accordance with the requirements of the Contract Documents.

#### **4.4 RESOLUTION OF CLAIMS AND DISPUTES**

**4.4.1** Decision of Design Professional. Claims, including those alleging an error or omission by the Design Professional, but excluding those arising under Paragraphs 10.3 through 10.5, shall be referred initially to the Design Professional for decision. An initial decision by the Design Professional shall be required as a condition precedent to mediation, arbitration or litigation of all Claims between the Contractor and Owner arising prior to the date final payment is due, unless **thirty**

**(30) days** have passed after the Claim has been referred to the Design Professional with no decision having been rendered by the Design Professional. The Design Professional will not decide disputes between the Contractor and persons or entities other than the Owner.

**4.4.2** The Design Professional will review Claims and within **ten (10) days** of the receipt of the Claim take one or more of the following actions: (1) request additional supporting data from the claimant or a response with supporting data from the other party, (2) reject the Claim in whole or in part, (3) approve the Claim, (4) suggest a compromise, or (5) advise the parties that the Design Professional is unable to resolve the Claim if the Design Professional concludes that, in the Design Professional's sole discretion, it would be inappropriate for the Design Professional to resolve the Claim.

**4.4.3** In evaluating Claims, the Design Professional may, but shall not be obligated to, consult with or seek information from either party or from persons with special knowledge or expertise who may assist the Design Professional in rendering a decision. The Design Professional may request the Owner to authorize retention of such persons at the Owner's expense.

**4.4.4** If the Design Professional requests a third party to provide a response to a Claim or to furnish additional supporting data, such party shall respond, within **ten (10) days** after receipt of such request, and shall either provide a response on the requested supporting data, advise the Design Professional when the response or supporting data will be furnished or advise the Design Professional that no supporting data will be furnished. Upon receipt of the response or supporting data, if any, the Design Professional will either reject or approve the Claim in whole or in part.

**4.4.5** The Design Professional will approve or reject Claims by written decision, which shall state the reasons therefore and which shall notify the parties of any change in the Contract Sum or Contract Time or both. The approval or rejection of a Claim by the Design Professional shall be final and binding on the parties but subject to mediation and arbitration.

**4.4.6** A written decision of the Design Professional shall state that (1) the decision is final, but subject to mediation and arbitration and (2) a demand for arbitration of a Claim covered by such decision must be made within **thirty (30) days** after the date on which the party making the demand receives the final written decision, then failure to demand arbitration within said **thirty (30) days** period shall result in the Design Professional's decision becoming final and binding upon the Owner and Contractor. If the Design Professional renders a decision after arbitration proceedings have been initiated, such decision may be entered as evidence, but shall not supersede arbitration proceedings unless the decision is acceptable to all parties concerned.

**4.4.7** Upon receipt of a Claim against the Contractor or at any time thereafter, the Design Professional or the Owner may, but is not obligated to, notify the surety, if any, of the nature and amount of the Claim. If the Claim relates to a possibility of a Contractor's default, the Design Professional or the Owner may, but is not obligated to, notify the surety and request the surety's assistance in resolving the controversy.

## **4.5 MEDIATION**

**4.5.1** Any Claim arising out of or related to the Contract, except those waived as provided for in Subparagraph's 4.3.10, 6.2.3, 9.11.4, and 9.11.5 shall, after initial decision by the Design Professional or **thirty (30) days** after initial decision by the Design Professional or **thirty (30) days** after submission of the Claim to the Design Professional, be subject to mediation as a condition precedent to arbitration or the institution of legal or equitable proceedings by either party.

**4.5.2** The parties shall endeavor to resolve their Claims by mediation which, unless the parties mutually agree otherwise, shall be in accordance with the procedures of the New Mexico Public Works Mediation Act (NMSA §13-4C-1 et seq.) except that before any party may select a mediator it must confer in good faith with the other party concerning the selection of a mutually acceptable mediator. The request may be made concurrently with the filing of a demand for arbitration but, in such event, mediation shall proceed in advance of arbitration or legal or equitable proceedings, which shall be stayed pending mediation for a period of **sixty (60) days** from the date of notice of mediation session, unless stayed for a longer period by agreement of the parties or court order.

**4.5.3** The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in the place where the Project is located, unless another location is mutually agreed upon. Settlement Agreements reached in mediation and signed by all parties involved in the dispute shall be enforceable in any court having jurisdiction thereof.

## **4.6 ARBITRATION**

**4.6.1** Any Claim arising out of or related to the Contract, except those waived as provided for in Subparagraphs 4.3.10, 6.2.3, 9.11.4 and 9.11.5, shall after decision by the Design Professional or **thirty (30) days** after submission of the Claim to the Design Professional, be subject to arbitration. Prior to arbitration, the parties shall endeavor to resolve disputes by mediation in accordance with the provisions under Paragraph 4.5.

**4.6.2** Claims not resolved by mediation shall be decided by arbitration which, unless the parties mutually agree otherwise, shall be in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect. The Demand for Arbitration shall be filed in writing with the other party to the Contract and with the American Arbitration Association, and a copy shall be filed with the Design Professional.

**4.6.3** A Demand for Arbitration shall be made within the time limits specified in Subparagraphs 4.4.6 and 4.6.1 as applicable, and in other cases within a reasonable time after the Claim has arisen, and in no event shall it be made after the date when institution of legal or equitable proceedings based on such Claim would be barred by the applicable statute of limitations as determined pursuant to Paragraph 13.7.

**4.6.4** Claims and Timely Assertion of Claims. The party filing a Notice of Demand for Arbitration must assert in the demand all Claims then known to that party on which arbitration is permitted to be demanded.

**4.6.5** Arbitration proceedings under this Agreement may be consolidated or joined with arbitration proceedings pending between other parties if the arbitration proceedings arise out of the same transaction or relate to the same subject matter. Consolidation will be by order of the arbitrator, in any

of the pending cases, or if the arbitrator fails to make such an order, the parties may apply to any court of competent jurisdiction for such an order. Inclusive to this Subparagraph are the Owner, the Design Professional, the Contractor, all subcontractors, material suppliers, equipment suppliers, engineers, designers, lenders, sureties, and all other parties concerned with the construction of the Project are bound, each to each other, by this Subparagraph, provided such party has signed this Agreement or has signed an agreement which incorporates this Agreement by reference or signs any other agreement to be bound by this arbitration clause.

**4.6.6** Judgment on Final Award. The award rendered by the arbitrator or arbitrators shall be final and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

## **ARTICLE 5 SUBCONTRACTS**

### **5.1 DEFINITIONS**

**5.1.1** A Subcontractor is a person or entity who has a direct or indirect contract with the Contractor to perform a portion of the Work regardless of contractual tiers below the prime contract between the Owner and Contractor. The term "Subcontractor" is referred to throughout the Contract Documents as if singular in number and means a Subcontractor or an authorized representative of the Subcontractor. The term "Subcontractor" does not include a separate contractor or subcontractors of a separate contractor.

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

**5.2.1** Unless otherwise stated in the Contract Documents or the bidding requirements, the Contractor, as soon as practicable after Notice of Intent to Award, shall furnish in writing to the Owner through the Design Professional the names of entities and key personnel (including those who are to furnish materials or equipment fabricated to a special design) proposed for each principal portion of the Work. The Design Professional will promptly reply to the Contractor in writing stating whether or not the Owner or the Design Professional, after due investigation, has reasonable objection to any such proposed entity or person. Failure of the Owner or Design Professional to reply promptly shall constitute notice of no reasonable objection. The requirements of this Subparagraph 5.2.1 shall supplement Subcontractor listing at bid as required by §13-4-34 NMSA 1978.

**5.2.2** The Contractor shall not contract with a proposed person or entity to whom the Owner or Design Professional has made reasonable and timely objection. The Contractor shall not be required to contract with anyone to whom the Contractor has made reasonable objection.

**5.2.3** If the Owner or Design Professional has reasonable objection to a person or entity proposed by the Contractor, the Contractor shall propose another to whom the Owner or Design Professional has no reasonable objection. If the proposed but rejected Subcontractor was reasonably capable of performing the Work, the Contract sum and Contract Time shall be increased or decreased by the difference, if any, occasioned by the change, and an appropriate Modification in accordance with Article 7 shall be issued before commencement of the substitute Subcontractor's Work. However, no

increase in the Contract Sum or Contract Time shall be allowed for such change unless the Contractor has acted promptly and responsively in submitting names as required.

**5.2.4** The Contractor shall not change a Subcontractor, person or entity previously selected if the Owner or Design Professional makes reasonable objection to such substitute. Any substitutions of a Subcontractor will comply with the New Mexico Subcontractor Fair Practices Act to the extent that the Subcontractors Fair Practices Act is applicable.

### **5.3 SUBCONTRACTUAL AND SUPPLIER RELATIONS**

**5.3.1** By appropriate agreement, written where legally required for validity, the Contractor shall require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound to the Contractor by terms of the Contract Documents, and to assume toward the Contractor all the obligations and responsibilities, including performance of Work, responsibility for safety of the Subcontractor's Work, which the Contractor, by these Documents, assumes toward the Owner and Design Professional. Each subcontract and supplier agreement shall preserve and protect the rights of the Owner and Design Professional under the Contract Documents with respect to the Work to be performed by the Subcontractor so that subcontracting thereof will not prejudice such rights, and shall allow to the Subcontractor, unless specifically provided otherwise in the subcontract agreement, the benefit of all rights, remedies and redress against the Contractor that the Contractor, by the Contract Documents, has against the Owner. Where appropriate, the Contractor shall require each Subcontractor to enter into similar agreements with suppliers. The Contractor shall make available to each proposed Subcontractor and supplier, prior to execution of the Agreement, copies of the Contract Documents to which the Subcontractor and suppliers where appropriate will be bound, and, upon written request of the Subcontractor, identify to the Subcontractor terms and conditions of the proposed subcontract agreement which may be at variance with the Contract Documents.

**5.3.2** Nothing contained in Subparagraph 5.3.1 or elsewhere in the Contract Documents shall create any contractual relationship with or cause of action in favor of a third party against the Owner.

**5.3.3** Each entity intending to do work on the Project shall, prior to bid, be properly licensed according to the requirements of the Construction Industries Licensing Act, Chapter 60, Article 13 NMSA 1978 and shall ensure to the Contractor and to the Owner that such license shall remain in effect for the duration of the Work and warranty periods.

### **5.4 CONTINGENT ASSIGNMENT OF SUBCONTRACTS AND SUPPLIER AGREEMENTS**

**5.4.1** Each subcontract or supplier agreement for a portion of the Work may be assigned by the Contractor to the Owner provided that assignment is:

1. effective only after termination of the Contract by the Owner for cause pursuant to Paragraph 14.2 and only for those subcontract or supplier agreements which the Owner accepts by notifying the Subcontractor, supplier and the Contractor in writing; and
2. subject to the prior rights of the surety, if any, obligated under bond relating to the Contract.

**5.4.2** Upon such assignment, if the Work has been suspended for more than **thirty (30) days**, the Subcontractor's or supplier's compensation shall be equitably adjusted for increases in cost resulting from the suspension.

## **ARTICLE 6 CONSTRUCTION BY OWNER OR BY SEPARATE CONTRACTORS**

### **6.1 OWNER'S RIGHT TO PERFORM CONSTRUCTION AND TO AWARD SEPARATE CONTRACTS**

**6.1.1** The Owner reserves the right to perform construction or operations related to the Project with the Owner's own forces, and to award separate contracts in connection with other portions of the Project or other construction or operations on the site under Conditions of the Contract identical or substantially similar to these, including those portions related to insurance and waiver of subrogation. If the Contractor claims that delay or additional cost is involved because of such action by the Owner, the Contractor shall make such Claim as provided in Paragraph 4.3.

**6.1.2** When separate contracts are awarded for different portions of the Project or other Construction or operations on the site, the term "Contractor" in the Contract Documents in each case shall mean the Contractor who executes each separate Owner-Contractor Agreement.

**6.1.3** The Owner shall provide for coordination of the activities of the Owner's own forces and of each separate contractor with the Work of the Contractor, who shall cooperate with them. The Contractor and Subcontractors shall participate with other separate contractors, the Owner's own forces and the Owner in reviewing and coordinating their construction schedules when directed to do so. The Contractor shall make any revisions to the construction schedule deemed necessary after a joint review and mutual agreement. The construction schedules shall then constitute the schedules to be used by the Contractor, separate contractors and the Owner until subsequently revised. The Contractor and Subcontractors shall not delay or cause additional expense to another contractor by neglecting to perform correctly or to an agreed schedule. In the absence of a schedule mutually agreed upon by all parties, the Owner may create a binding schedule for all parties or take other appropriate action to avoid unnecessary delay and damages.

**6.1.4** Unless otherwise provided in the Contract Documents, when the Owner performs construction or operations related to the Project with the Owner's own forces, the Owner shall be deemed to be subject to the same obligations and to have the same rights which apply to the Contractor under the Conditions of the Contract, including, without excluding others, those stated in Article 3, this Article 6 and Articles 10, 11, and 12.

**6.1.5** Unless otherwise provided in the Contract Documents, the Owner's HVAC Test and Balance (T&B) Contractor shall test and balance the HVAC system to design requirements in coordination with the Contractor's or Subcontractors own forces. The T&B work shall integrate with the Contractor's or Subcontractor's installation of the Work, equipment start-up and operational testing as required by the Contract Documents. Coordination and cooperation for this work and other similar Owner contractor work shall be in accordance with Paragraph 6.2.

### **6.2 MUTUAL RESPONSIBILITY**

**6.2.1** The Contractor shall afford the Owner and separate contractors' reasonable opportunity for introduction and storage of their materials and equipment and performance of their activities, and

shall connect and coordinate the Contractor's construction and operations with theirs as required by the Contract Documents.

**6.2.2** If part of the Contractor's Work depends on proper execution or results upon construction or operations by the Owner or a separate contractor, the Contractor shall, prior to proceeding with that portion of the Work, promptly report to the Design Professional and Owner apparent discrepancies or defects in such other construction that would render it unsuitable for proper execution and results. Failure of the Contractor to report shall constitute an acknowledgment that the Owner's or separate contractor's completed or partially completed construction is fit and proper to receive the Contractor's Work, except as to defects not then reasonably discoverable.

**6.2.3** The Owner shall be reimbursed by the Contractor for costs incurred by the Owner which are payable to a separate contractor because of delays, improperly timed activities or defective construction of the Contractor. The Owner shall be responsible to the Contractor for costs incurred by the Contractor because of delays, improperly timed activities and damage to the Work or defective construction of the Owner or a separate Owner contractor. Should the Contractor sustain any personal injury or damage to property through any act or omission of any other Contractor having a contract with the Owner, the Contractor sustaining damage will have no claim or cause of action against the Owner for such damage and hereby waives any such claim.

**6.2.4** The Contractor shall promptly remedy damage caused by the Contractor to completed or partially completed or existing construction or to property of the Owner or separate contractors as provided in Subparagraph 10.2.5.

**6.2.5** The Owner and each separate contractor shall have the same responsibilities for cutting and patching as are described for the Contractor in Subparagraph 3.14.

### **6.3 OWNER'S RIGHT TO CLEAN UP**

**6.3.1** If a dispute arises among the Contractor, separate contractors and the Owner as to the responsibility under their respective contracts for maintaining the premises and surrounding area free from waste materials and rubbish, the Owner may clean up and the Design Professional will allocate the cost among those responsible.

## **ARTICLE 7 CHANGES IN THE WORK**

### **7.1 GENERAL**

**7.1.1** Changes in the Work may be accomplished after execution of the Contract, and without invalidating the Contract, by Modification / Change Request, or by Supplemental Instruction for a minor change in the Work, subject to the limitations stated in this Article 7 and elsewhere in the Contract Documents.

**7.1.2** Any material change in the Work require a Modification / Change Request (MCR) that has been finalized by agreement by the Owner and based on proposal from the Contractor and recommendation of the Design Professional. A Change Order, required to modify the Purchase

Order, shall accumulate approved MCRs, and must be approved by the Owner, Contractor and Design Professional. Supplemental Instruction for a minor change in the Work, will not create cost or time effect on the Project in accordance with Subparagraph 7.4.1, and may be issued only by the Design Professional.

**7.1.3** Changes in the Work shall be performed under applicable provisions of the Contract Documents, and the Contractor shall proceed promptly, unless otherwise provided in the Modification / Change Request or Supplemental Instruction.

## **7.2 MODIFICATON / CHANGE REQUEST**

**7.2.1** A Modification / Change Request or MCR is a written document that may be initiated by the Contractor, Design Professional or Owner that identifies why there is a potential change in the Work that may require an adjustment, to the Contract Sum or Contract Time, or both, and suggests how that the change should take place. Following the initiation of a MCR by one of the parties, the Owner:

1. must agree to MCR's content and feasibility and if in agreement may authorize the MCR to; proceed with estimates of costs only; or proceed with the Work with estimates of costs to follow in accordance with Subparagraph 7.2.4;
2. will consider proposal(s) from the Contractor in accordance with Article 7 for adjustment to Contract Sum or Contract Time, if any; and,
3. shall authorize the Work to proceed if not previously authorized in accordance with Subparagraph 7.2.4 and authorize adjustment to Contract Sum in accordance with Paragraph 7.2 or, shall reject the MCR and replace with another or, stop all action on the MCR.

**7.2.1.1** A MCR is required for any modification or change in the Work that:

1. may affect the Contract Sum or Time;
2. alters the Work by substitution or any other way not considered minor as defined by Paragraph 7.4; or,
3. otherwise materially affect the Work or intended function of the Project including a change to aesthetics.

**7.2.1.2** A MCR when finalized by Owner approval, may modify the Contract without invalidating the Contract and may order changes in the Work within the general scope of the Contract with Contract Sum and Contract Time. Owner approval of a MCR:

1. shall adjust the Contract Sum accordingly; and,
2. will begin Owner consideration of related adjustment to Contract Time, if any;
3. and shall be included into a Change Order upon approval of the parties in accordance with Paragraph 7.3.

**7.2.2** A MCR shall be used to:

1. approve a modification or change to the Work;
2. accumulate data such as cost and time impacts before authorizing a modification or change to the Work;
3. direct Work to be done with cost, time, etc. to follow in the absence of total agreement on the terms of a modification or change to the Work or to prevent delay of the Work; and,

4. stop all action on a proposed modification or change to the Work.

**7.2.3** If Work defined by a MCR requires an adjustment to Contract Sum or Contract Time, the Contractor shall, within **ten (10) days** of the date of Owner issuance of MCR or delivery of MCR to Contractor if that date is later, prepare and deliver to the Design Professional a proposal for such adjustment based on:

1. unit prices or lump sum allowances stated in the Contract Documents;
2. unit price or lump sum determined in accordance with Subparagraph 7.2.5;
3. provision in the MCR as determined by the Owner and in accordance with Subparagraph 7.2.5; or,
4. a manner agreed upon by the parties and consistent with Subparagraph 7.2.5 and these General Conditions.

**7.2.4** Upon receipt of a Modification / Change Request authorized by the Owner to "Proceed with the Work with costs to follow", the Contractor shall consider the MCR a directive and promptly proceed with the change in the Work involved and, provide a proposal for adjustment to Contract in accordance with Subparagraph 7.2.3.

**7.2.5 Allowable Costs and Fees:** If a proposal to adjust the Contract Sum exceeds \$200 and if not otherwise provided in the MCR or Contract Documents, the Contractor, shall provide an itemized accounting\* together with appropriate supporting data that include :

1. quantities and unit costs of materials, including cost of transportation, whether incorporated or consumed;
2. quantities and unit costs of labor, including labor burdens such as social security and unemployment insurance, fringe benefits such as health insurance required by agreement or custom (Labor Burdens shall not include retirement plans qualified by minimum employment time, organizational fees or dues, legal or related expenses, information technology training and the like);
3. quantities and unit utilization or rental costs of machinery and equipment, exclusive of hand tools, whether rented from the Contractor or others;
4. quantities and unit costs of on-site supervision and field office personnel directly attributable to the change;
5. quantities and unit costs of and insurance, use tax or similar related to the Work;
6. Overhead and Profit\*\*;
7. quantities and unit premiums for all bond costs and permit fees on items 1 through above; and,
8. State Gross Receipts Tax (GRT); and,

\* If pricing compounds, the compounding order shall be the same as listed items 1 - 8 of this Sub-paragraph.

\*\* Overhead and Profit (O&P), that may include, but is not limited to, project management, main office expenses, computers, minor tools and incidentals, may be added on top of items 1 through 5 above, provided that combined they do not exceed the following:

Subtotal before applying	Under \$2000	\$2000	\$10,001	Over
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overhead and profit		to \$10,000	to \$50,000	\$50,001
Contractor - For work performed by own forces	18%	16%	14%	12%
Contractor - For subcontracted work.	11%	9%	6%	5%
For work performed by 1 <sup>st</sup> tier Subcontractor	18%	15%	12%	9%
For work performed by 2 <sup>nd</sup> tier Subcontractor	10%	8%	5%	4%
Subcontractor - Maximum aggregate O&P allowed over cost regardless of number of tiers.	29%	24%	18%	14%
<b>Exception:</b> In extraordinary circumstances, the Owner may allow adjustment to the above maximums provided net profit does not exceed 2% of the cost of MCR before bonds or tax.				

**7.2.5.1 Time-and-Material:** If for the purpose of authorizing Work to proceed upon issuance on an MCR prior to the Owner receiving proposal of costs, so that labor or material costs are to be accumulated for later inclusion into a proposal to adjust the contract sum, the MCR must clearly state conditions and limitations of time-and-material work to proceed under the change in Work with costs to follow provision of the MCR. At a minimum, the MCR shall state the maximum allowable cost. In addition, the Daily Job Report must reflect all appropriate detail on related Work, such as work performed that day, number of workers, materials received and similar. A separate daily worker log must also be maintained that will be included in the proposed cost of the MCR. The daily worker log for each MCR, must list each worker, the type of work performed and the hours worked, and must be signed-off daily by an individual, agreed upon in the MCR, that may be the Project Superintendent. In accordance with this Paragraph 7.2, proposal of costs shall be delivered by the Contractor within Ten (10) days of issuance of MCR.

**7.2.5.2 Audit:** The Owner shall be entitled to audit the books and records of a Contractor or any Subcontractor for any time-and-material or negotiated cost, such as those associated with a change in the Work, to the extent that such books and records relate to the proposal or performance of such Work. Such books and records shall be maintained by the Contractor for a period of three years from the date of final payment under the prime Contract and by the Subcontractor for a period of three years from the date of final payment under the subcontract, unless a shorter period is otherwise authorized in writing.

**7.2.6** The amount of credit to be allowed by the Contractor to the Owner for a deletion or change which results in a net decrease in the Contract Sum shall be actual net cost as confirmed by the Design Professional. When both additions and credits covering related Work or substitutions are involved in a change, the allowance for overhead and profit shall be figured on the basis of net increase, if any, with respect to that change.

**7.2.7** A proposed adjustment to Contract Sum and Contract Time submitted by Contractor for a MCR indicates agreement of the Contractor therewith for the proposed Modification. The Design

Professional shall make recommendation to the Owner on the appropriateness of the proposed adjustment. The Owner may, after evaluation of the proposal and review of the Design Professional's recommendation, accept the Contractor's proposed adjustment to Contract Sum and finalize the MCR. If Owner approves MCR, it shall be recorded for inclusion into a Change Order.

**7.2.8** If the Contractor does not respond promptly with a proposal for adjustment to Contract Sum and Contract Time relative to an MCR or disagrees with the method for adjustment, or; if there are amounts or terms in dispute for such changes in the Work; the Design Professional on the basis of reasonable expenditures or savings of those performing the Work attributable to the change in the Work shall make a determination for purpose of settlement of dispute. That determination of adjustment to the Contract Sum and Contract Time shall be presented to the Owner and the Contractor for consideration. If the Owner or the Contractor do not agree with the Design Professional's determination, the provisions of Subparagraph 7.2.9 shall apply. When the Owner and Contractor agree with the determination made by the Design Professional concerning the adjustments in the Contract Sum, such agreement shall be effective immediately upon Contractor's acceptance in writing and Owner's approval of MCR.

**7.2.9** The Owner shall, within **fifteen (15) days** of the determination made by the Design Professional regarding adjustment to Contract Sum or Contract Time in accordance with Subparagraph 7.2.8, either:

1. accept the Design Professional's determination and, approve the MCR with the adjustment recommended by the Design Professional and record the MCR as approved by the Owner to be included into a Change Order; or
2. approve the MCR with an adjustment the Owner determines to be appropriate based on available information and record the MCR as approved by the Owner to be included into a Change Order.

Adjustment to Contract Sum in accordance with this Subparagraph 7.2.9 shall be subject to the right of Contractor to disagree and assert a claim in accordance with Paragraph 4.3.

**7.2.10** Partial agreement of an adjustment to Contract Sum or Contract Time relative to a MCR may be allowed by the Owner only if adjustment to Work, requested by the MCR, can be subdivided into independent parts. In the event of such subdivision; MCR shall be broken into separate parts with alpha suffixes such as MCR 2A, MCR 2B and so on.

**7.2.11** Periodically, approved MCR's shall be accumulated by the Owner or Design Professional into a Change Order in accordance with Paragraph 7.3.

### **7.3 CHANGE ORDERS**

**7.3.1** A Change Order is a written instrument prepared by the Design Professional and signed by the Owner, Contractor and Design Professional, stating their agreement upon:

1. change in the work as made by finalized Modification / Change Request(s) that has been previously approved by the Owner or authorized in accordance with Sub-paragraphs 7.2.8 or 7.2.9.;
2. amount of the adjustment, if any in the Contract Sum resultant of approved MCR(s);
3. extent of the adjustment, if any, in the Contract Time related to approved MCR(s); or,

4. if disagreement on adjustment in the Contract Time, parties agree to postponement of inclusion of any adjustment to Contract Time into a Change Order; however, all Contractor proposed or Owner offered adjustment(s) to time shall be incorporated into a Change Order prior to Substantial Completion in accordance with Subparagraph 9.8.6.

**POSTPONEMENT OF ADJUSTMENT TO CONTRACT TIME LANGUAGE:**

"At the time of this Change Order, there is no agreement on adjustment to the Contract Time related to MCR(s) XX, XX, XX and XX. The Contractor, without prejudice and without waiving any rights to such claim for adjustment to Contract Time in relation to these MCR(s), agrees to postpone claim in accordance with Paragraph 7.3 of the General Conditions."

**7.3.2** Methods used in determining adjustments to the Contract Sum include those listed in Paragraph 7.2. Proposals submitted that do not follow the requirements under Paragraph 7.2 will be returned to be resubmitted prior to processing.

**7.4 MINOR CHANGES IN THE WORK**

**7.4.1** The Design Professional will have authority to order Supplemental Instructions for minor changes in the work not involving adjustment in the Contract Sum or extension of the Contract Time and not inconsistent with the intent of the Contract Documents. Such changes shall be effected by written order and shall be binding on the Owner and Contractor. The Contractor shall carry out such written orders promptly.

**ARTICLE 8 TIME**

**8.1 DEFINITIONS**

**8.1.1** Unless otherwise provided, Contract Time is the period of time, including authorized adjustments, allotted in the Contract Documents for Substantial Completion of the Work.

**8.1.2** The date of commencement of the Work is the date established in the Agreement.

**8.1.3** The date of Substantial Completion is the date certified by the Design Professional in accordance with Paragraph 9.8.

**8.1.4** The term "day" as used in the Contract Documents shall mean calendar day unless otherwise specifically defined.

**8.2 PROGRESS AND COMPLETION**

**8.2.1** Time limits stated in the Contract Documents are of the essence of the Contract. By executing the Agreement the Contractor confirms that the Contract Time is a reasonable period for performing the Work.

**8.2.2** The Contractor shall not knowingly, except by agreement or instruction of the Owner in writing, prematurely commence operations on the site or elsewhere prior to the effective date of insurance required by Article 11 to be furnished by the Contractor and Owner. The date of commencement of the Work shall not be changed by the effective date of such insurance. Unless the

date of commencement is established by the Contract Documents, a Notice to Proceed shall be given by the Owner that shall establish the commencement of the Contract Time as provided by the Contract Documents.

**8.2.3** The Contractor shall proceed expeditiously with adequate forces and shall achieve Substantial Completion within the Contract Time.

**8.2.4** The Owner shall not be liable to the Contractor for additional time or money if the Contractor submits a progress report or construction schedule expressing an intention to achieve completion of the Work prior to the Contract Time and then is not able to achieve intended accelerated schedule regardless of the reason.

### **8.3 DELAYS AND EXTENSIONS OF TIME**

**8.3.1** If the Contractor is delayed at any time in the commencement or progress of the Work by an act or neglect of the Owner or Design Professional, or of a separate contractor employed by the Owner, or by changes ordered in the Work, or by labor disputes, fire, unusual delay in deliveries, unavoidable casualties or other causes beyond the Contractor's control, or by delay authorized by the Owner pending mediation and arbitration, or by other causes which the Design Professional and the Owner determine may justify delay, then the Contract Time shall be extended by Modification in accordance with Article 7 for such reasonable time as the Design Professional in concurrence with the Owner may determine.

**8.3.2** Extensions of time not associated with modifications or changes to the Work shall not be allowed to increase the Contract amount for overhead or for any other reason and shall strictly apply toward liquidated damages.

**8.3.3** Claims relating to time shall be made in accordance with applicable provisions under Paragraph 4.3.

### **8.4 CONTRACT TIME AND LIQUIDATED DAMAGES**

**8.4.1** The Contractor agrees that the Work will be prosecuted regularly, diligently and without interruption at such rate of progress as will ensure completion within the Contract Time. It is expressly understood and agreed, by and between the Contractor and the Owner, that the Contract Time is a reasonable time for completion of the Work, taking into consideration the average climate range and usual industrial conditions prevailing in the locality of the Project. If the Contractor neglects, fails or refuses to complete the Work within the Contract Time, or any proper extension granted by the Owner, then the Contractor agrees to pay the Owner the amount specified in the Contract Documents, not as a penalty, but as liquidated damages.

**8.4.2** The parties agree that the amount of the likely damage to the Owner for such delay is difficult to ascertain at the time of execution of this Agreement, but that a reasonable estimate of such damages for delay is set forth in the contract Documents. Liquidated damages may be deducted from any monthly progress payments due to the Contractor or from other monies being withheld from the Contractor when a reasonable estimate of expected Substantial Completion can be determined by the Owner.

**8.4.3** Final accounting of Liquidated Damages shall be determined at Substantial Completion and the Contractor and Surety are liable for any liquidated damages over and above unpaid balance held by the Owner.

## **ARTICLE 9 PAYMENTS AND COMPLETION**

### **9.1 CONTRACT SUM**

**9.1.1** The Contract Sum is stated in the Agreement and, including authorized adjustments, is the total amount payable by the Owner to the Contractor for performance of the Work under the Contract Documents.

### **9.2 SCHEDULE OF VALUES**

**9.2.1** Before the first Application for Payment, the Contractor shall submit to the Design Professional a schedule of values allocated to various portions of the Work, prepared in such form and supported by such data to substantiate its accuracy as the Design Professional may require. Support data shall include accounting of all Project costs distributed to Level 2 UniFormat™ convention. The schedule of values, upon acceptance by the Design Professional with the Owner's prior approval, shall be used as a basis for reviewing the Contractor's Application for Payment.

**9.2.1.1** Gross Receipts Tax shall be included in each line item of the Schedule of Values. Allowance items, such as Documentation and Close-Out amount, do not include GRT as listed in Subparagraph 9.2.2 and GRT shall be added before including as Schedule of Values line item. In the event of a GRT rate change, the Contractor shall submit an MCR requesting an adjusted amount on balance to complete the Contract.

**9.2.1.2** If Public Schools Capital Outlay Public School Facilities Authority (PSFA) funding is provided to the Project, individual line items of the Schedule of Values shall be allocated to the various portions of the PSFA Work, prepared in such form and supported by such data to substantiate its accuracy as the Design Professional and the PSFA may require.

**9.2.2** To protect the Owner from the significant liability and arduous accounting efforts required by lingering documentation and close-out work, the Schedule of Values shall provide a separate line item titled "Documentation and Close-Out" to provide a value consistent with and appropriate to required documentation provisions throughout the Contract including those required by Subparagraph 4.2.4.3 and Paragraph 9.10. The value of the Documentation and Close-Out line item shall not be less than the following:

For a total Contract amount excluding tax of:	Documentation and Close-Out amount
less than \$20,000	\$0
20,001 - 75,000	6,000
75,001 - 100,000	8,000
100,001 - 200,000	10,000

200,001 - 350,000	15,000
350,001 - 500,000	25,000
501,001 - 1,000,000	50,000
1,000,001 - 1,500,000 -	70,000
1,500,001 - 2,000,000	90,000
2,000,001 - 3,000,000	120,000
for each additional million	add 30,000

**9.2.2.1** If requested in writing by the Contractor, and in the sole opinion of the Owner, the Contractor is in full compliance with the documentation requirements of the Contract including the provisions of Subparagraph 4.2.4.3, the Documentation and Close-Out Schedule of Value line item may be reduced each month prior to Substantial Completion up to five percent (5%) of the originally scheduled amount or one thousand dollars (\$1,000), whichever is greater, providing that the Documentation and Close-Out line item is not reduced to less than fifty percent (50%) of the original amount required until which time that Close-Out is complete as required by Paragraph 9.10.

### **9.3 APPLICATIONS FOR PAYMENT**

**9.3.1** No later than the 25<sup>th</sup> of each month, the Contractor shall submit to the Design Professional an itemized Application for Payment for operations completed in accordance with the Schedule of Values for that month. Such application shall be supported by such data substantiating the Contractor's right to payment as the Owner or Design Professional may require such copies of requisitions from Subcontractors and material suppliers. No Applications for Payment will be processed until the initial Schedule of Values is received and approved by Design Professional with concurrence from the Owner and for subsequent payment applications; the Project Schedule has been updated in accordance with Subparagraph 3.10.1.

**9.3.1.1** No Application for Payment may include more than:

1. ninety-five percent (95%) of the scheduled value of any work requiring testing prior to testing and verification of testing by the Design Professional to meeting requirements of the Contract Documents;
2. ninety percent (90%) of the scheduled value for systems that require, as a part of acceptance of the Work, testing or balancing including, but not limited to, mechanical heating, air-conditioning and electrical distribution until testing, balancing or other verification required by the Contract Documents has been completed and verified as acceptable by the Design Professional.

**9.3.1.2** Such applications may not include requests for payment for portions of the Work for which the Contractor does not intend to pay to a Subcontractor or material supplier, unless such Work has been performed by others whom the Contractor intends to pay.

**9.3.2** Unless otherwise provided in the Contract Documents, payments shall be made on account of materials and equipment delivered and suitably stored at the site for subsequent incorporation into the Work. Any payments for such materials or equipment shall be conditioned upon the Contractor's demonstration that they are adequately protected from weather, damage, vandalism and theft and that

such materials or equipment have been inventoried and stored in accordance with procedures established by or approved by the Owner. If approved in advance by the Owner, payment may similarly be made for materials and equipment suitably stored off the site at a location agreed upon in writing and with sufficient Contractor provided insurance against loss, and with Owner named as co-insured, to cover the value of stored materials and their transport to the Project.

**9.3.3** The Contractor warrants that title to all Work covered by an Application for Payment will pass to the Owner no later than the time of payment. The Contractor further warrants that upon submittal of an Application for Payment all Work for which Certificates for Payment have been previously issued and payments received from the Owner shall be free and clear of claims, security interests or encumbrances in favor of the Contractor, Subcontractors, material suppliers, or other persons or entities making a claim by reason of having provided labor, material suppliers and equipment relating to the Work. The Contractor additionally warrants that all As-Built drawings accurately depict completed Work covered by an Application for Payment, inclusive of all trades and inclusive of, but not be limited to, actual locations and installed types, brand, model number and similar of all Work including ducts, pipes, conduit, equipment, walls and site utilities.

#### **9.4 CERTIFICATES FOR PAYMENT**

**9.4.1** Application for Payment must be submitted to the Design Professional no later than the 25<sup>th</sup> of the month for which the application is being made. The Design Professional will review with the Owner the accuracy and appropriateness of the application and, within **five (5) days** after receipt of the Contractor's Application for Payment, either issue to the Owner a Certificate for Payment, with a copy to the Contractor, for such amount as the Design Professional determines is properly due, or notify the Contractor and Owner in writing of the Design Professional's reasons for withholding certification in whole or in part as provided in Subparagraph 9.5.1. In no event will the Owner accept or process a Certification for Payment received after the 10<sup>th</sup> of the month following the month for which the application is being made. Certifications for Payment received after the 10<sup>th</sup> of the month "owner-cut-off-date" will be processed along with the following month's applications and will not be considered in default of the provisions of Subparagraph 9.4.3,

**9.4.2** The issuance of a Certificate for Payment will constitute a representation by the Design Professional to the Owner, based on the Design Professional's evaluation of the Work and the data comprising the Application for Payment, that the Work has progressed to the point indicated and that, to the best of the Design Professional's knowledge, information and belief, the quality of the Work is in accordance with the Contract Documents and that As-Built drawings are current to actual Work completed. The foregoing representations are subject to an evaluation of the Work for conformance with the Contract Documents upon Substantial Completion, to results of subsequent tests and inspections, to correction of minor deviations from the Contract Documents prior to completion and to specific qualifications expressed by the Design Professional. The issuance of a Certificate for Payment will further constitute a representation that the Contractor is entitled to payment in the amount certified.

**9.4.3** The Owner will issue payment to the Contractor in the amount certified in the approved Certificate for Payment within **twenty-one (21) days** from the end of the progress payment period which shall be the end of the month for which the Certificate of Payment is made. The **five (5) days** allowed the Design Professional for review in Subparagraphs 4.2.5 and 9.4.1 are partially included in the **twenty-one (21) day** period.

## **9.5 DECISIONS TO WITHHOLD CERTIFICATION**

**9.5.1** The Design Professional may withhold a Certificate for Payment and may assess Liquidated Damages in accordance with Paragraph 8.4, in whole or in part, to the extent reasonably necessary to protect the Owner, if in the Design Professional's opinion the representations to the Owner required by Subparagraph 9.4.2 cannot be made. If the Design Professional is unable to certify payment in the amount of the Application, the Design Professional will notify the Contractor and Owner as provided in Subparagraph 9.4.1. If the Contractor and Design Professional cannot agree on a revised amount, the Design Professional will promptly issue a Certificate for Payment for the amount for which the Design Professional is able to make such representations to the Owner. The Design Professional may also withhold a Certificate for Payment or, because of subsequently discovered evidence, may nullify the whole or a part of a Certificate for Payment previously issued, to such extent as may be necessary in the Design Professional's opinion to protect the Owner from loss for which the Contractor is responsible, including loss resulting from acts and omissions described in Subparagraph 3.3.2, because of:

1. defective Work not remedied;
2. third party claims filed or reasonable evidence indicating probable filing of such claims unless security acceptable to the Owner is provided by the Contractor;
3. failure of the Contractor to make payments properly to Subcontractors or for labor, materials or equipment;
4. reasonable evidence that the Work cannot be completed for the unpaid balance of the Contract Sum;
5. damage to the Owner or another contractor;
6. reasonable evidence that the unpaid balance would not be adequate to cover actual or liquidated damages for the anticipated delay; or
7. persistent failure to carry out the Work in accordance with the Contract Documents.

**9.5.2** When the above reasons for withholding certification are removed, certification will be made for amounts previously withheld.

## **9.6 PROGRESS PAYMENTS**

**9.6.1** After the Design Professional has issued a Certificate for Payment, the Owner shall make payment in the manner and within the time provided in the Contract Documents.

**9.6.2** The Contractor shall promptly pay each Subcontractor and supplier, upon receipt of payment from the Owner, out of the amount paid to the Contractor on account of such Subcontractor's portion of the Work, the amount to which said Subcontractor is entitled, reflecting percentages actually retained, if any, from payments to the Contractor on account of such Subcontractor's portion of the Work. The Contractor shall, by appropriate agreement with each Subcontractor, require each Subcontractor to make payments in a similar manner. It is the Contractor's responsibility to comply with § 57-28-5(C) of the New Mexico Retainage Act, requiring Contractors to make prompt payment to Subcontractors for work performed within **seven (7) days** after receipt of payment from the Owner or pay interest for failing to make prompt payment.

**9.6.3** The Design Professional will on request, furnish to a Subcontractor information regarding percentages of completion or amounts applied for by the Contractor and action taken thereon by the Design Professional and Owner on account of portions of the Work done by such Subcontractor.

**9.6.4** Neither the Owner nor Design Professional shall have an obligation to pay or to see to the payment of money to a Subcontractor except as may otherwise be required by law.

**9.6.5** Payment to material suppliers shall be treated in a manner similar to that provided in Subparagraphs 9.6.2, 9.6.3 and 9.6.4.

**9.6.6** A Certificate for Payment, a progress payment, or partial or entire use or occupancy of the Project by the Owner shall not constitute acceptance of Work not in accordance with the Contract Documents.

**9.6.7** Payments received by the Contractor for Work properly performed by Subcontractors and suppliers shall be held by the Contractor for those Subcontractors or suppliers who performed Work or furnished materials, or both, under contract with the Contractor for which payment was made by the Owner. Nothing contained herein shall require money to be placed in a separate account and not commingled with money of the Contractor, or create any fiduciary liability or tort liability on the part of the Contractor for breach of trust or entitle any person or entity to an award of punitive damages against the Contractor for breach of the requirements of this provision.

## **9.7 FAILURE OF PAYMENT**

**9.7.1** If the Owner does not pay the Contractor the amount approved by the Design Professional or the Design Professional does not approve the application for payment then, within **forty-five (45) days** from the end of the progress payment period, Contractor may, upon **seven (7) additional days** written notice to the Owner and Design Professional, stop the Work until payment of the amount owing has been received. Unless Contractor's action was improper or if the amount claimed is shown not to have been due, the Contract Time shall be extended appropriately and the Contract Sum shall be increased by the amount of the Contractor's reasonable costs of shut-down, delay and start-up, plus interest as provided for in the Contract Documents. In the event of a wrongful Stop-Work, the Contractor shall remain responsible to the Owner for delivering the Project in accordance with the Contract Documents.

## **9.8 SUBSTANTIAL COMPLETION**

**9.8.1** Substantial Completion is the stage in the progress of the Work when the Work or designated portion thereof is complete and in compliance with the Contract Documents except for minor items so that the Owner can completely occupy or fully utilize the Work for its intended use. Owner's Occupancy under conditional approval by public authorities having jurisdiction over the Work, or occupancy of a facility or otherwise utilizing the Work under duress, shall not be considered Substantial Completion.

**9.8.2** When the Contractor considers that the Work, or a portion thereof which the Owner agrees to accept separately, is substantially complete, the Contractor shall promptly prepare and submit to the Design Professional a comprehensive Contractor's Punch List inclusive and all incomplete and non-compliant Work to be completed or corrected prior to final payment, as well as, the requirements of

Subparagraph 9.10.2. The Contractor shall submit along with the punch list a separate and detailed schedule indicating the date of Final Completion and all work to be completed before Final Completion including Close-Out requirements as provided in Paragraph 9.10. Failure to include any item on punch list does not alter the responsibility of the Contractor to complete all Work in accordance with the Contract Documents.

**9.8.3** Upon receipt of the Contractor's Punch List, the Design Professional will within **ten (10) days** make an inspection to determine whether the Work or designated portion thereof is substantially complete. If the Design Professional's inspection discloses any item, whether or not included on the Contractor's list, which is not sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work or designated portion thereof, as it is fully intended and designed to be used, the Contractor shall, before issuance of the Certificate of Substantial Completion, complete or correct such item upon inspection by the Design Professional to determine Substantial Completion. In the event the Work does appear Substantially Complete, the Design Professional will review the Contractor's Punch List for completeness required for issuance of Substantial Completion. The Contractor shall be responsible for cost of excessive Design Professional time and effort in completing list of incomplete and non-compliant Work not included in Contractor's Punch List or otherwise due to Contractor's neglect of responsibilities of Subparagraph 9.8.2.

**9.8.4** When the Work or designated portion thereof is substantially complete, the Design Professional will prepare a Certificate of Substantial Completion, with the Owner's prior approval, which shall establish the date of Substantial Completion, shall establish responsibilities of the Owner and Contractor for security maintenance, heat, utilities, damage to the Work and insurance, and shall fix the time within which the Contractor shall finish all items on the list accompanying the Certificate in accordance with Subparagraph 9.8.2..

**9.8.5** Warranties shall be in accordance with this Subparagraph 9.8.5 and Paragraph 12.2 and shall include all components and equipment required by the Contract Documents. All Work shall be warranted for the greater of:

1. a minimum of one (1) year from the date of Substantial Completion;
2. one (1) year from the date of first installation in accordance with Subparagraph 12.2.2.2;
3. one (1) year from the date of replacement due to failure such that; each component of the Work must not fail for a one (1) year period regardless of the date of Substantial Completion;
4. that required by the Contract Documents; or,
5. that provided in the Certificate of Substantial Completion that will become an addendum to the Contract.

Owner and Contractor may, by mutual agreement, amend the Contract at Substantial Completion to include Performance Bonding, extended warranty, on-site maintenance, subsequent testing, scheduled replacement or other mutually agreeable terms.

**9.8.6** Any postponement(s) of inclusion(s) of adjustment(s) to Contract Time in accordance with Subparagraph 7.3.1.4 shall be included into a MCR for agreement and then into a Change Order prior to Certificate of Substantial Completion. If the Contractor and the Owner do not agree on Contractor proposal, the Design Professional on the basis of evidence that critical path of work flow was reduced or expanded attributable to the change(s) in the Work with evidence being differences in Contractor's

initial and current schedules and other evidence, shall make an determination for purpose of settlement of dispute. That determination of adjustment to the Contract Time shall be presented to the Owner and the Contractor for consideration. When the Owner and Contractor agree with the determination made by the Design Professional concerning the adjustments in the Contract Time such agreement shall be effective immediately, upon Contractor's written approval, and shall be recorded by preparation and execution of an appropriate MCR that shall be approved by the Owner. If after **five (5) days** the Owner or Contractor cannot agree with the determination made by the Design Professional regarding adjustment to Contract Time, then the Design Professional may order the preparation and execution of an appropriate MCR and:

1. if the Contractor is in disagreement, the MCR shall be recorded as approved by the Owner to be included in a Change Order;
2. if the Owner is in disagreement, the MCR shall be recorded as "approved by dispute resolution authority of the Design Professional" in accordance with this Subparagraph 9.8.6 to be included into a Change Order; and,
3. either approval shall be subject to the right of either party to disagree and assert a claim in accordance with Article 4.

**9.8.7** Liquidated Damages shall be determined in accordance with Paragraph 8.4.

**9.8.8** The Certificate of Substantial Completion shall be submitted to the Contractor and Contractor shall submit for consent of surety, if required, for written acceptance and following acceptance, the Owner shall make payment to Substantial Completion. Such payment shall be adjusted for Work that is incomplete or not in accordance with the requirements of the Contract Documents.

## **9.9 PARTIAL OCCUPANCY OR USE**

**9.9.1** The Owner may occupy or use any completed or partially completed portion of the Work at any stage provided such occupancy or use is consented to by the insurer as required under Clause 11.4.1.3 and authorized by public authorities having jurisdiction over the Work. Such partial occupancy or use may commence whether or not the portion is substantially complete, provided the Owner and Contractor have communicated in writing the responsibilities for payments, security, maintenance, heat, utilities, damage to the Work and insurance, and have agreed in writing concerning the period for correction of the Work and commencement of warranties, if different from the Contract Documents. When the Contractor considers a portion substantially complete, the Contractor shall prepare and submit a list to the Design Professional as provided under Subparagraph 9.8.2. The stage or the progress of the Work shall be determined by written agreement between the Owner and Contractor or, if no agreement is reached, then by decision of the Design Professional.

**9.9.2** Immediately prior to such partial occupancy or use, the Owner, Contractor and Design Professional shall jointly inspect the area to be occupied or portion of the Work to be used in order to determine and record the condition of the Work.

**9.9.3** Unless otherwise agreed upon, partial occupancy or use of a portion or portions of the Work shall not constitute acceptance of work not complying with the requirements of the Contract Documents.

## **9.10 CLOSE-OUT REQUIREMENTS**

**9.10.1** Before final completion in accordance with Paragraph 9.11 can be achieved all Work must be complete and accepted including the requirements under Paragraph 9.10 including:

1. Work associated with Punch List(s);
2. testing, balance or performance operations complete and in agreement that associated work is in compliance with the Contract Documents and verified as such by the Design Professional;
3. one hard copy and one electronic copy in .pdf format of final approved test, balance or performance report(s) complete with directory of contents submitted to Owner;
4. Operation and Maintenance Manuals complete and verified as such by the Design Professional;
5. Owner sign-off of receipt of O&M Training on proper use, care and operation of all systems or components as required by the Contract Documents;
6. one hard copy set and one electronic copy in .pdf format of final approved Operation and Maintenance Manuals with directory of contents submitted to Owner and uploaded by Contractor into CIMS;
7. As-Built drawings converted to accurate Record Drawings and verified as such by the Design Professional using information provided by the Contractor and by other knowledge the Design Professional may possess;
8. one vellum set and one electronic copy in .dwg format and one copy in .pdf format of final approved Record Drawings with directory of contents submitted to Owner and uploaded by Contractor into CIMS;
9. written certification signed by Owner of delivery and stocking of extra material, equipment or components required by the Contract Documents at a location established by the Owner;
10. delivery of all warranties required by the Contract Documents;
11. all keys, passes, codes, software or other methods or components of control or security have been correctly and adequately accounted for and closed-out; and,
12. up-loading of all Close-Out documents into CIMS including scans of Building Code Approvals and other code certifications, Substantial Completion documents, Punch Lists, Warranties, O&M Manuals, Training Sign-off, Extra Stock Sign-off, Record Drawings, Final Completion documents, Correction of Work Period documents and 11<sup>th</sup> month inspection.

**Exception:** Up-loading of Final Completion, Correction of Work Period and 11<sup>th</sup> month inspection documents shall be loaded into CIMS within **seven (7) days** of availability.

**9.10.2** The Contractor shall prepare a separate Close-Out Punch List listing all requirements of Subparagraph 9.10.1 and the status of each, whether completed or not and the expected completed date of each component of the list. The Close-Out Punch List shall be a separate part and a subset of the Contractor's Punch List required for Substantial Completion in accordance with Subparagraph 9.8.2. At completion of the List, the Contractor shall state in writing to the Design Professional that the Close-Out Punch List has been completed and request a Close-Out Meeting with the Design Professional and the Owner. The Design Professional shall schedule such meeting within **ten (10) days** of the request, or otherwise reply in writing to the Contractor why the request is pre-mature. At the Close-Out Meeting, all requirements to achieve close-out will be verified, and if Work is found to be complete, the Design Professional, with concurrence from the Owner, shall provide written approval of Contractor's completion of close-out requirements within **five (5) days** of the conclusion of the meeting.

**9.10.3** The balance at Substantial Completion of the Schedule of Values line item for Documents and Close-Out in accordance with Subparagraph 9.2.2 shall only be approved for payment when all requirements under Paragraph 9.10 are complete. No partial payment of the Close-Out balance will be considered. Contractor agrees that Close-Out Requirements, in accordance with Paragraph 9.10, are part of the value of Work defined by the Contract Documents and shall not be construed to mean retainage. Any variation or deviation from this Paragraph 9.10 shall be made through an appropriate Modification in accordance with Article 7.

## **9.11 FINAL COMPLETION AND FINAL PAYMENT**

**9.11.1** Upon receipt of a written notice from the Contractor that the Work is ready for final inspection and acceptance and upon receipt of a final Application for Payment, the Design Professional will promptly make such inspection and, when the Design Professional finds the Work acceptable under the Contract Documents and the Contract fully performed, the Design Professional will promptly, with the Owner's prior approval, issue a Certificate of Final Completion and following approval by all parties, a final Certificate for Payment each stating that to the best of the Design Professional's knowledge, information and belief and on the basis of the Design Professional's or Design Professional's Project Representative's on-site visits and inspections, the Work has been completed in accordance with terms and conditions of the Contract Documents and that the entire balance found to be due the Contractor and noted in the final Certificate is due and payable. The Design Professional's issuance of Certificate of Final Completion and final Certificate for Payment will constitute a further representation that conditions listed in Subparagraphs 9.10 and 9.11.2 have been fulfilled as precedent to the Contractor's being entitled to final payment.

**9.11.2** Final payment shall not become due until the Contractor submits to the Design Professional:

1. an affidavit that payrolls, bills for subcontracts, materials and equipment, and other indebtedness connected with the Work for which the Owner or the Owner's property might be responsible or encumbered (less amounts withheld by Owner) have been paid or otherwise satisfied;
2. a certificate evidencing that insurance required by the Contract Documents to remain in force after final payment is currently in effect and will not be canceled or allowed to expire until at least **forty-five (45) days** following written notice to the Owner;
3. a written statement that the Contractor knows of no substantial reason that the insurance will not be renewable to cover the period required by the Contract Documents;
4. consent of surety, if any, to final payment;
5. releases and waivers of claims of all Subcontractors, and suppliers; and,
6. if required by the Owner, other data establishing payment or satisfaction of obligations, such as receipts, releases and waivers, claims, security interests or encumbrances arising out of the Contract, to the extent and in such form as may be designated by the Owner. If a Subcontractor or other entity refuses to furnish a release or waiver required by the Owner, the Contractor may furnish a bond satisfactory to the Owner to indemnify and protect the Owner.

If any claim remains unsatisfied after payments are made, the Contractor shall refund to the Owner all money that the Owner may be compelled to pay in discharging such claim, including all costs and reasonable attorney's fees.

**9.11.3** If, after Substantial Completion of the Work, Final Completion thereof is materially delayed through no fault of the Contractor or by issuance of changes in the Work affecting Final Completion,

and the Design Professional so confirms, the Owner shall, upon application by the Contractor and certification by the Design Professional, and without terminating the Contract, make payment of the balance due for that portion of the Work fully completed and accepted. If bonds have been furnished, the written consent of surety to payment of the balance due for that portion of the Work fully completed and accepted shall be submitted by the Contractor to the Design Professional prior to certification of such payment. Such payment shall be made under terms and conditions governing final payment, except that it shall not constitute a waiver of Claims.

**9.11.4** The making of final payment shall constitute a waiver of Claims by the Owner except those arising from:

1. Claims, security interests or encumbrances arising out of the Contract and unsettled;
2. failure of the Work to comply with the requirements of the Contract Documents; or
3. terms of special warranties required by the Contract Documents.

**9.11.5** Acceptance of final payment by the Contractor, a Subcontractor or supplier shall constitute a waiver of Claims by that payee, except those previously made in writing and identified by the payee as unsettled at the time of final Application for Payment.

## **ARTICLE 10 PROTECTION OF PERSONS AND PROPERTY**

### **10.1 SAFETY PRECAUTIONS AND PROGRAMS**

**10.1.1** The Contractor shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the Contract. The Owner may, but is under no obligation, point out unsafe conditions or operations.

**10.1.2** The Contractor shall at all times conduct operations and take precautions under this Contract in a manner to avoid risk or bodily harm to persons on or around the Work site and to avoid risk of damage to any property. The Contractor shall continuously inspect the construction operations and shall cause Subcontractors and all other entities on or around the Project to be aware of dangers or risks and to comply with applicable health or safety laws, codes, standards and regulations applicable to the locale where the Project is located.

### **10.2 SAFETY OF PERSONS AND PROPERTY**

**10.2.1** The Contractor shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to:

1. employees on the Work and other persons who may be affected thereby and shall include clean work site, well maintained equipment, barricades, safety awareness programs or whatever effort that will best accomplish required protection;
2. students, staff and public either nearby or within the Project site that shall include re-routing pedestrian ways, re-routing traffic, providing signage, building of bridges, barricades, pedestrian tunnels, or whatever effort that will best accomplish required protection;
3. Work and materials and equipment to be incorporated therein, whether in storage on or off the site, under care, custody or control of the Contractor or the Contractor's Subcontractors; and

4. other property at the site or adjacent thereto, such as trees, shrubs, lawns, walks, pavements, roadways, structures and utilities not designated for removal, relocation or replacement in the course of construction.

**10.2.2** The Contractor shall give notices and comply with applicable laws, ordinances, rules, regulations and lawful orders of public authorities bearing on safety of persons or property or their protection from damage, injury or loss.

**10.2.3** The Contractor shall erect and maintain, as required by existing conditions and performance of the Contract, reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards, promulgating safety regulations and notifying owners and users of adjacent sites and utilities.

**10.2.4** When use or storage of explosives or other hazardous materials or equipment or unusual methods are necessary for execution of the Work, the Contractor shall exercise utmost care and carry on such activities under supervision of properly qualified personnel.

**10.2.5** The Contractor shall promptly remedy damage and loss (other than damage or loss insured under property insurance required by the Contractor Documents) to property referred to in Subparagraphs 10.2.1.3 and 10.2.1.4 caused in whole or in part by the Contractor, a Subcontractor, or anyone directly or indirectly employed by any of them, or by anyone for whose acts they may be liable and for which the Contractor is responsible, except damage or loss attributable to acts or omissions of the Owner or Design Professional or anyone directly or indirectly employed by either of them, or by anyone for whose acts either of them may be liable, and not attributable to the fault or negligence of the Contractor. The foregoing obligations of the Contractor are in addition to the Contractor's obligations stated throughout the Contract Documents.

**10.2.6** The Contractor shall designate a responsible member of the Contractor's organization at the site whose duty shall be the prevention of accidents. This person shall be the Contractor's superintendent, unless otherwise designated by the Contractor in writing to the Owner and Design Professional.

**10.2.7** The Contractor shall report in writing to the Owner and the Design Professional within **five (5) days** of an accident arising out of or in connection with the Work which caused lost time injury, personal injury, death or property damage, giving full details and statements of any witnesses. In cases of serious bodily injury, death or serious property damage, Contractor shall immediately contact the proper authorities, as well as, Owner and Design Professional by the most expeditious means.

### **10.3 HAZARDOUS MATERIALS**

**10.3.1** If reasonable precautions will be inadequate to prevent foreseeable bodily injury or death to persons resulting from a material or substance, including but not limited to asbestos or polychlorinated biphenyl (PCB), encountered on the site by Contractor, the Contractor shall, upon recognizing the condition, immediately stop Work in the affected area and immediately report the condition to the Owner and Design Professional in writing.

**10.3.2** The Owner shall obtain the services of a properly licensed testing laboratory to verify the presence or absence of the material or substance reported by the Contractor and, in the event such material or substance is found to be present, to obtain the services of a remediation contractor to remove the hazard and to verify that it has been rendered harmless. When the material or substance has been rendered harmless, Work in the affected area shall resume upon written agreement of the Owner and Contractor. The Contract Time adjusted as provided in Article 7. "Rendered Harmless" shall mean that the levels of such materials are less than any applicable exposure levels, including but not limited to EPA regulations.

**10.4** The Owner shall not be responsible under Paragraph 10.3 for materials and substances brought to the site by the Contractor.

**10.5** If, without negligence on the part of the Contractor, the Contractor is held liable for the cost of remediation of a hazardous material or substance solely by reason of performing Work as required by the Contract Documents, the Contract shall be equitably adjusted in accordance with Article 7.

## **10.6 EMERGENCIES**

**10.6.1** In an emergency affecting safety of persons or property, the Contractor shall use its best efforts to prevent threatened damage, injury or loss. Additional compensation or extension of time claimed by the Contractor on account of an emergency, shall be determined as provided in Paragraph 4.3 and Article 7.

## **ARTICLE 11 INSURANCE AND BONDS**

### **11.1 LIABILITY INSURANCE**

**11.1.1** The Contractor and Subcontractors shall purchase from and maintain in a company or companies lawfully authorized to transact insurance in New Mexico, insurance that shall protect the Contractor and Subcontractors from claims set forth below, which may arise out of or result from operations under the Contract and for which the Contractor and Subcontractors may be legally liable, whether such operations be by the Contractor and Subcontractors or by anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable:

1. claims under Workers' Compensation, Disability Benefit and other similar Employee Benefit Acts, which are applicable to the Work to be performed;
2. claims for damages because of bodily injury, occupational sickness or disease, or death of the Contractor's employees;
3. claims for damages because of bodily injury, sickness or disease, or death of any person other than the Contractor's employees;
4. claims for damage for personal injury;
5. claims for damages, other than to the Work itself, because of injury to or destruction of tangible property, including loss of use resulting there from;
6. claims for damages because of bodily injury, death of a person property damage arising out of ownership, maintenance or use of a motor vehicle;
7. claims for bodily injury or property damage arising out of completed operations; and

8. claims involving contractual liability insurance applicable to the Contractor's obligations under Paragraph 3.18.

Provision of insurance does not limit the liability of the Contractor under 3.18.1 herein.

**11.1.2** The Contractor shall ensure that liability insurance is maintained in accordance with Article 11 and may, at Contractor's option, either insure the activities of Subcontractors or require them to maintain insurance to cover all claims in Article 11. If the Owner is damaged by the failure or neglect of the Contractor to maintain insurance as described above, then the Contractor shall be liable for all costs and damages properly attributable thereto.

**11.1.3** The insurance required by Subparagraph 11.1.1 shall be written for not less than limits of liability specified herein or required by law, whichever coverage is greater. Coverage, shall be written on an occurrence basis and shall be maintained without interruption from the date of commencement of the Work until date of Final Payment and termination of any coverage required to be maintained after final payment.

**11.1.4** Certificates of Insurance acceptable to the Owner shall be filed with the Owner prior to commencement of the Work. These certificates and the insurance policies required by this Paragraph 11.1 shall contain a provision that coverages afforded under the policies will not be canceled or allowed to expire until at least **forty-five (45) days** prior written notice has been given to the Owner. If any of the foregoing insurance coverages are requested to remain in force after final payment and are reasonably available, an additional certificate evidencing continuation of such coverage shall be submitted with the final Application for Payment as required by Subparagraph 9.10.2. Information concerning reduction of coverage on account of revised limits or claims paid under the General Aggregate, or both shall be furnished by the Contractor with reasonable promptness.

**11.1.4.1** The Certificates of Insurance shall clearly state the coverages, limits of liability, covered operations, effective dates and dates of expiration of policies of Insurance. The Contractor will promptly notify and furnish to the Owner copies of any endorsements that are subsequently issued amending coverage or limits. The Certificates of Insurance shall be in the appropriate ACORD form, or similar format acceptable to the Owner and shall include the following statements:

1. "The State of New Mexico, the *(the name(s) of the Owner whose name(s) appear on the Agreement)*, its agents, servants and employees are recognized as Additionally Insured."
2. "The insurance coverage certified herein will not be canceled or materially changed, except after **forty-five (45) days** written notice has been provided to the Owner"
3. "The insured will not violate, or permit to be violated, any conditions of this policy, and will at all times satisfy the requirements of the insurance company transacting the policy."
4. "The coverage provided by this certificate is primary."
5. "Nothing in this certificate of coverage will be construed to affect the State of New Mexico or owner, agents, servants and employees defenses, immunities or limitations of liability under the New Mexico Tort Claims Act."

**11.1.5 Minimum Required Coverages:**

**11.1.5.1** Worker's Compensation Insurance shall be provided as required by applicable State law for all employees engaged at the site of the Project under this Contract, including Subcontractor

employees. In case any class of employee engaged in work on the Project under this Contract is not protected under the Worker's Compensation Statute, the Contractor shall provide, and cause each Subcontractor to provide Employer's Liability Insurance in an amount not less than five hundred thousand (\$500,000). Failure to comply with the conditions of this Subparagraph 11.1.5.1 will subject this Contract to termination.

**11.1.5.2** Public Liability Insurance shall not be less than the liability amounts set forth in the New Mexico Tort Claims Act, §41-4-1 et seq. NMSA 1978, as it now exists or may be amended.

**11.1.5.3** Comprehensive Vehicle Liability Insurance, for both owned and non-owned vehicles, shall be one million dollars (\$1,000,000) per occurrence combined single limit for both personal injury and property damage.

## **11.2 OWNER'S LIABILITY INSURANCE**

**11.2.1** The Owner shall be responsible for purchasing and maintaining the Owner's usual liability insurance.

## **11.3 PROJECT MANAGEMENT PROTECTIVE LIABILITY INSURANCE**

**11.3.1** Optionally, the Owner may provide Project Management Protective Liability Insurance, otherwise known as Project Insurance, as primary coverage for the Owner's, Contractor's and Design Professional's vicarious liability for construction operations under the Contract. The minimum limits of liability purchased with such coverage shall be equal to the limits required for Contractor's Liability Insurance under Clauses 11.1.1.2 through 11.1.1.5.

**11.3.2** To the extent damages are covered by Project Management Protective Liability insurance, the Owner, Contractor and Design Professional waive all rights against each other for damages, except such rights as they may have to the proceeds of such insurance. The policy shall provide for such waivers of subrogation by endorsement or otherwise.

## **11.4 PROPERTY INSURANCE**

**11.4.1** Unless Builder's Risk coverage is furnished by the Owner as indicated in Paragraph 7.2 of the Agreement between the Owner and the Contractor, the Contractor shall provide insurance which will protect the interests of the Contractor and Subcontractors in the Work. Such property insurance shall be maintained, unless otherwise provided in the Contract Documents or otherwise agreed in writing by all persons and entities who are beneficiaries of such insurance, until Final Payment has been made as provided in Paragraph 9.11 or until no person or entity other than the Owner has an insurable interest in the property required by this Paragraph 11.4 to be covered, whichever is later. This insurance shall include interests of the Owner, the Contractor, and Subcontractors in the Project.

**11.4.1.2** This property insurance may not cover portions of the Work stored off the site or any portions of the Work in transit. Insurance covering Work or materials stored off site shall be in accordance with sub-paragraph 9.3.2.

**11.4.1.3** Partial occupancy or use in accordance with Paragraph 9.9 shall not commence until the insurance company or companies providing property insurance have consented to such partial

occupancy or use by endorsement or otherwise. The Owner and the Contractor shall take reasonable steps to obtain consent of the insurance company or companies and shall, without mutual written consent, take no action with respect to partial occupancy or use that would cause cancellation, lapse or reduction of insurance.

**11.4.2 Boiler and Machinery Insurance.** The Owner shall purchase and maintain Equipment Breakdown Coverage if required by the Contract Documents or by law, which shall specifically cover such insured objects during installation and until final acceptance by the Owner, this insurance shall include interests of the Owner, Contractor and Subcontractors in the Work.

**11.4.3 Loss of Use Insurance.** The Owner, at the Owner's option, may purchase and maintain such insurance as will insure the Owner against loss of use of the Owner's property due to fire or other hazards, however caused. The Owner waives all rights of action against the Contractor for loss of use of the Owner's property, including consequential losses due to fire or other hazards however caused.

**11.4.4** If the Contractor requests in writing that insurance for risks other than those described herein or other special causes of loss be included in the property insurance policy, the Owner shall, if possible, include such insurance, and the cost thereof shall be charged to the Contractor by appropriate Modification / Change Request Change Order.

**11.4.5** If during the Project construction period the Owner insures properties, real or personal or both, at or adjacent to the site, by property insurance under policies separate from those insuring through a policy or policies other than those insuring the Project during the construction period, the Owner shall waive rights in accordance with the terms of Subparagraph 11.4.7 for damages caused by fire or other causes of loss covered by this separate property insurance. All separate policies shall provide this waiver of subrogation by endorsement or otherwise.

**11.4.6** Before an exposure to loss may occur, the Contractor may review any Owner provided insurance required by this Paragraph 11.4. Each policy shall contain a provision that the policy will not be canceled or allowed to expire, and that its limits will not be reduced, until at least **thirty (30) days** prior written notice has been given to the Contractor.

**11.4.7 Waivers of Subrogation.** The Owner and Contractor waive all rights against each other and any of their subcontractors, agents and employees, for damages caused by fire or other causes of loss to the extent covered by property insurance obtained pursuant to this Paragraph 11.4 or other property insurance applicable to the Work, except such rights as they have to proceeds of such insurance held by the Owner. The Owner or Contractor, as appropriate, shall require of the Design Professional, Design Professional's consultants, separate contractors described in Article 6, if any, and the subcontractors, agents and employees of any of them, by appropriate agreements, written where legally required for validity, similar waivers each in favor of other parties enumerated herein. The policies shall provide such waivers of subrogation by endorsement or otherwise. A waiver of subrogation shall be effective as to a person or entity that would otherwise have a duty of indemnification, contractual or otherwise, did not pay the insurance premium directly or indirectly, and whether or not the person or entity had an insurable interest in the property damaged. The provisions of this paragraph shall not include claims with respect to damages to non-work buildings or properties

**11.4.7.1** The provisions of Paragraph 11.4.7 shall not be effective as to a person or entity whose acts or failures to act cause the harm and rise to a level beyond mere negligence.

**11.4.8** A loss insured under Owner's property insurance shall be adjusted by the Owner and made payable to the Owner for the insured's, as their interests may appear, subject to requirements of any applicable mortgagee clause and of Subparagraph 11.4.10. The Contractor shall pay Subcontractors their just shares of insurance proceeds received by the Contractor, and by appropriate agreements, written where legally required for validity.

**11.4.9** The Owner shall distribute in accordance with such agreement as the parties in interest may agree, or in accordance with an arbitration award in which case the procedure shall be as provided in Paragraph 4.6. If after such loss, no other special agreement is made, and unless the Owner terminates the Contract for convenience, replacement of damaged property shall be performed by the Contractor after notification of a Change in the Work in accordance with Article 7.

**11.4.10** The Owner shall have power to adjust and settle a loss with insurers.

## **11.5 PERFORMANCE BOND AND PAYMENT BOND**

**11.5.1** If the contract price exceeds \$25,000, the Contractor shall furnish Labor, Material and Performance surety bonds covering faithful performance of the Contract in amounts not less than 100 percent of the Contract amount, exclusive of GRT, unless Owner or the Contract Documents require a lesser percentage, for payment of obligations arising there under. These Labor, Material and Performance bonds shall be delivered to the Owner within **seven (7) days** of the Notice of Award or evidence satisfactory to the Owner that such bonds are forthcoming. Said bonds must comply with the requirements of §13-4-18, NMSA 1978. If the amount of the Sum of the Work is increased, the amounts of the bonds shall be increased accordingly.

**11.5.1.1** Effective June 17, 2005, a Subcontractor shall provide a performance and payment bond on a public works building project if the subcontractor's contract (to the Contractor) for work to be performed on a project is fifty thousand dollars (\$50,000) or more. Failure of a Subcontractor to provide required bond shall not subject the Owner to any increase in cost due to any substitution of an approved Subcontractor.

**11.5.2** Upon the request of any person or entity appearing to be a potential beneficiary of bonds covering payment of obligations arising under the Contract, the Contractor shall promptly furnish a copy of the bonds or shall permit a copy to be made.

## **ARTICLE 12 UNCOVERING AND CORRECTION OF WORK**

### **12.1 UNCOVERING OF WORK**

**12.1.1** If a portion of the Work is covered contrary to the Design Professional's or Owner's request or to requirements specifically expressed in the Contract Documents, it must be uncovered for the Design Professional's and Owner's examination and be replaced at the Contractor's expense without change in the Contract Time.

**12.1.2** If a portion of the Work has been covered, which the Design Professional has not specifically requested to examine prior to its being covered, the Design Professional may request to see such Work and it shall be uncovered by the Contractor. If such Work is in accordance with the Contract Documents, costs of uncovering and replacement shall, by appropriate Modification in accordance with Article 7, be at the Owner's expense. If such Work is not in accordance with the Contract Documents, correction shall be at the Contractor's expense unless the condition was caused by the Owner or a separate contractor in which event the Owner shall be responsible for payment of such costs.

## **12.2 CORRECTION OF WORK**

### **12.2.1 BEFORE OR AFTER SUBSTANTIAL COMPLETION**

**12.2.1.1** The Contractor shall promptly correct Work rejected by the Owner or Design Professional or failing to conform to the requirements of the Contract Documents, whether discovered before or after Substantial Completion and whether or not fabricated, installed or completed. Costs of correcting such defective Work, including additional testing and inspections and compensation for the Design Professional's services and expenses made necessary thereby, shall be at the Contractor's expense.

### **12.2.2 AFTER SUBSTANTIAL COMPLETION**

**12.2.2.1** In addition to the Contractor's obligations under Paragraph 3.5, if within one year after the date of Substantial Completion of the Work or designated portion thereof or after the date for commencement of warranties established under Subparagraph 9.8.5, or by terms of an applicable special warranty required by the Contract Documents, any of the Work is found to be not in accordance with the requirements of the Contract Documents, the Contractor shall correct it promptly after receipt of written notice from the Owner to do so, unless the Owner has previously given the Contractor a written acceptance of such condition. The Owner shall give such notice promptly after discovery of the condition. During the one year period for correction of the Work, if the Owner fails to notify the Contractor and gives the Contractor an opportunity to make the correction, the Owner waives the rights to require the correction by Contractor and to make a claim for breach of warranty. If the Contractor fails to correct nonconforming Work within reasonable time during that period after receipt of notice from the Owner or Design Professional, the Owner may correct it in accordance with Paragraph 2.4.

**12.2.2.2** The one-year period for correction of Work shall be extended with respect to portions of Work first performed after Substantial Completion by the period of time between Substantial Completion and the actual performance of the Work and in accordance with all other requirements of Subparagraph 9.8.5.

**12.2.2.3** The one-year period for correction of Work shall be extended by corrective Work performed by the Contractor pursuant to this Paragraph 12.2 and Sub-paragraph 9.8.5.

**12.2.3** The Contractor shall remove from the site portions of the Work which are not in accordance with the requirements of the Contract Documents and are neither corrected by the Contractor nor accepted by the Owner.

**12.2.4** The Contractor shall bear the cost of correcting destroyed or damaged construction, whether completed or partially completed, of the Owner or separate contractors caused by the Contractor's correction or removal of Work which is not in accordance with the requirements of the Contract Documents.

**12.2.5** Nothing contained in this Paragraph 12.2 shall be construed to establish a period of limitation with respect to other obligations which the Contractor might have under the Contract Documents or law. Establishment of the one-year period for correction of Work as described in Subparagraph 12.2.2 relates only to the specific obligation of the Contractor to correct the Work, and has no relationship to the time within which the obligation to comply with the Contract Documents may be sought to be enforced, nor to the time within which proceedings may be commenced to establish the Contractor's liability with respect to the Contractor's obligations other than specifically to correct the Work.

**12.2.6** Eleven (11) months after Substantial Completion, the Design Professional shall coordinate, with the Owner and the Contractor, an 11-Month Correction Period Inspection of all portions of the Work. Any Work found defective or needing adjustment or other correction in order to function and operate in accordance with the indication of the Contract Documents shall be promptly completed by the Contractor within **twenty (20) days**, or as otherwise agreed between the parties. The Owner may make such corrections or adjustments in accordance with Paragraph 2.4.

### **12.3 ACCEPTANCE OF NONCONFORMING WORK**

**12.3.1** If the Owner prefers to accept Work which is not in accordance with the requirements of the Contract Documents, the Owner may do so instead of requiring its removal and correction, in which case the Contract Sum will be reduced as appropriate and equitable. Such adjustment shall be effected whether or not final payment has been made.

## **ARTICLE 13 MISCELLANEOUS PROVISIONS**

### **13.1 LAW**

**13.1.1** The Contract shall be governed by the laws of the State of New Mexico and parties agree that the State of New Mexico District Court of the County, where the Project is located, shall have exclusive jurisdiction to resolve all Claims, issues and disputes not otherwise resolved in accordance with the Contract Documents.

**13.1.2** The Owner's total liability to Contractor or any other entity claiming by, through, or under Contractor for any Claim, cost, loss, expense or damage caused in part by the fault of the Owner and in part by the fault of the contractor or any other entity or individual shall not exceed the percentage share that Owner's fault bears to the total fault of Owner, Contractor and all other entities and individuals as determined on the basis of comparative fault principles.

**13.1.3** All Work shall be completed in accordance with and shall be inspected within requirements of the Construction Industries Licensing Act, Chapter 60, Article 13 NMSA 1978.

## **13.2 SUCCESSORS AND ASSIGNS**

**13.2.1** The Owner and Contractor respectively bind themselves, their partners, successors, assigns and legal representatives to the other party hereto and to partners, successors, assigns and legal representatives of such other party in respect to covenants, that party shall nevertheless remain legally responsible for all obligations under the Contract.

**13.2.2** The Owner may, without consent of the Contractor, assign the Contract to an institutional lender providing construction financing for the Project. In such event, the lender shall assume the Owner's rights and obligations under the Contract Documents. The Contractor shall execute all consents reasonably required to facilitate such assignment.

**13.2.3** The Contractor shall not assign the Contract or proceeds hereof without written consent of the Owner. If contractor attempts to make such an assignment without such consent, it shall be void and confer no rights to third parties; the Contractor shall nevertheless remain legally responsible for all obligations under the Contract. Any consent of the Owner to such assignment shall be written and include "it is agreed that the funds to be paid to the assignee under this assignment are subject to performance by the Contractor and to claims for services rendered or materials supplied for the performance and of the Work and other obligations of the Contract Documents in favor of any entity rendering such services or providing such materials".

## **13.3 WRITTEN NOTICE**

**13.3.1** Written notice shall be deemed to have been duly served if delivered in person to the individual or a member of the firm or entity or to an officer of the corporation for which it was intended, or if delivered at or sent by Registered or Certified Mail, Federal Express, or similar service with proof of delivery to the last business address known to the party giving notice.

## **13.4 RIGHTS AND REMEDIES**

**13.4.1** Duties and obligations imposed by the Contract Documents and rights and remedies available there under, shall be in addition to and not a limitation of duties, obligations, rights and remedies otherwise imposed or available by law.

**13.4.2** No action or failure to act by the Owner, Design Professional or Contractor shall constitute a waiver of a right or duty afforded them under the Contract, nor shall such action or failure to act constitute approval or acquiescence in a breach there under, except as may be specifically agreed in writing.

**13.4.3** Contractor shall carry out the Work without delay in accordance with the Contract Documents during any and all disputes or disagreements, unless otherwise agreed to by the Owner in writing.

## **13.5 TEST AND INSPECTIONS**

**13.5.1** Tests, inspections and approvals of portions of the Work required by the Contract Documents or by laws, ordinances, rules, regulations or orders of public authorities having jurisdiction shall be made at an appropriate time. Unless otherwise provided by Subparagraph 2.2.4 or elsewhere in the Contract Documents, the Contractor shall make arrangements for such tests, inspections and approvals with an independent testing laboratory or entity acceptable to the Owner, provided by the

Owner, or with the appropriate public authority, and shall bear all related costs of tests, inspections and approvals unless otherwise provided in the Contract Documents. The Contractor shall give the Owner and Design Professional timely notice of when and where tests and inspections and approvals are to be made so that the Design Professional may be present for such procedures. The Owner shall bear costs of tests, inspections or approvals which do not become requirements until after bids are received or negotiations concluded.

**13.5.2** If the Design Professional, Owner or public authorities having jurisdiction determine that portions of the Work require additional testing, inspection or approval not included under Subparagraph 13.5.1, the Design Professional will, upon written authorization from the Owner, instruct the Contractor to make arrangements for such additional testing, inspection or approval by an entity acceptable to the Owner, and the Contractor shall give timely notice to the Design Professional of when and where tests and inspections are to be made so that the Design Professional may be present for such procedures. Such costs, except as provided in Subparagraph 13.5.3, shall be at the Owner's expense.

**13.5.3** If such procedures for testing, inspection, or approval under Subparagraphs 13.5.1 and 13.5.2 reveal failure of the portions of the Work to comply with requirements established by the Contract Documents, all costs made necessary by such failure including those of repeated procedures and compensation for the Design Professional's services and expenses shall be at the Contractor's expense.

**13.5.4** Required certificates of testing, inspection or approval shall, unless otherwise required by the Contract Documents, be secured by the Contractor and promptly delivered to the Design Professional and to the Owner.

**13.5.5** If the Design Professional is to observe tests, inspections or approvals required by the Contract Documents, the Design Professional will do so promptly and, where practicable, at the normal place of testing.

**13.5.6** Tests or inspections conducted pursuant to the Contract Documents shall be made promptly to avoid unreasonable delay in the Work.

## **13.6 INTEREST**

**13.6.1** Payments due and unpaid undisputed amounts, under the Contract Documents, shall bear interest from the date payment is due in accordance with State statute regulating prompt payment.

## **13.7 COMMENCEMENT OF STATUTORY LIMITATION PERIOD**

**13.7.1** As between the Owner and Contractor:

1. before Substantial Completion. As to acts or failures to act occurring prior to the relevant date of Substantial Completion, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than such date of Substantial Completion;
2. between Substantial Completion and Final Certificate for Payment. As to acts or failures to act occurring subsequent to the relevant date of Substantial Completion and prior to issuance of the final Certificate for Payment; and

3. after Final Certificate for Payment. As to acts or failures to act occurring after the relevant date of issuance of the final Certificate for Payment, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than the date of any act of failure to act by the Contractor pursuant to any Warranty provided under Subparagraph 9.8.5, Paragraph 12.2, or the date of actual commission of any other act or failure to perform any duty or obligation by the Contractor or Owner, whichever occurs last.

## **13.8 EMPLOYMENT**

### **13.8.1 Equal Employment Opportunity**

**13.8.1.1** The Contractor agrees not to discriminate against any employee or applicant for employment because of race, color, religion, sex, national origin or other in accordance with U.S. Executive Order 11246, as amended, and NM Executive Order 85-15. The Contractor and Subcontractors agree to post in conspicuous places, available to employees and applicants for employment, notices setting forth the policies of nondiscrimination. and shall in all solicitation or advertisement for employees placed by them or on their behalf, state that all qualified applicants will receive consideration for employment without regard to race, religion, color, sex or national origin.

**13.8.1.2** If the Contract constitutes a federally assisted construction contract within the meaning of 41 CFR 60-1.3 (1987), then the equal opportunity clause of 41 CFR 60-1.4(b) is incorporated herein by reference.

### **13.8.2 Wage Rates**

**13.8.2.1** For Contracts in excess of \$60,000, minimum wages will be paid as determined by the Office of the Labor Commissioner in accordance with §50-4-20 to 50-4-30 NMSA 1978, entitled "Minimum Wage Act" The Contractor and Subcontractors shall deliver or mail copies of the certified weekly payrolls, prepared in accordance with regulations, to the Labor Commission and to the Design Professional.

**13.8.2.2** The scale of wages to be paid will be posted by the Contractor in a prominent and easily accessible place on the job site.

### **13.8.3 Apprentices**

**13.8.3.1** Except as otherwise required by law, the number of apprentices in each trade or occupation employed by the Contractor and Subcontractors, material suppliers and equipment suppliers shall not exceed the number permitted by the applicable standards of the United States Department of Labor, or, New Mexico Construction Industries Division.

### **13.8.4 On-the-Job Relations with Contractor**

**13.8.4.1** The Contractor shall at all times have competent superintendent(s) or foremen on the job in immediate charge of the Work who shall receive communications from Design Professional or Owner in the prosecution of the Work, in accordance with the Contract Documents. Any person executing the Work, who in the opinion of the Design Professional or the Owner, appears to be incompetent or act in a disorderly or intemperate manner or violating provisions of the Contract Documents, shall upon written request, be immediately removed from the Project and not again be employed on any

part of the Work. Failure to comply with this Subparagraph 13.8.4.1, shall upon the Owner's decision, be cause to immediately stop the Work in accordance with Paragraph 14.2.

### **13.8.5 Employee Background Checks**

**13.8.5.1** The Contractor shall be responsible for complying with the provisions of §22-10.3.3.B NMSA 1978, regarding employees' having unsupervised access to students. In the event that §22-10.3.3.B NMSA 1978 applies, and upon prior approval by the Owner, reasonable costs for background checks shall be reimbursed without mark-up or fee.

### **13.9 Records**

**13.9.1** In the even of a dispute between Owner and Contractor, the Owner shall have right to discovery and access to and the right to examine any accounting or other records of the Contractor involving transactions and Work related to this Contract for three (3) years after Final Payment or after final resolution of any disputes, whichever is later. The conditions of this paragraph apply equally to Subcontractors and suppliers.

## **Article 14 TERMINATION OR SUSPENSION OF THE CONTRACT**

### **14.1 Termination by the Contractor**

**14.1.1** The Contractor may terminate the Contract if the Work is stopped for a period of **thirty (30) consecutive days** through no act or fault of the Contractor or a Subcontractor or their agents or any other persons or entities performing portions of the Work under the contract with the Contractor, for any of the following reasons:

1. issuance of an order of a court or other public authority having jurisdiction which requires all Work to be stopped;
2. an act of government, such as a declaration or national emergency which requires all Work to be stopped;
3. because the Design Professional has not issued a Certificate for Payment and has not notified the Contractor of the reason for withholding certification as provided in Subparagraph 9.4.1, or because the Owner has not made payment on a Certificate for Payment within the time stated in the Contract Documents; or
4. the owner has failed to furnish to the Contractor promptly, upon the Contractor's written request, reasonable evidence as required by Subparagraph 2.2.1.

**14.1.2** The Contractor may terminate the Contract if, through no act or no fault of the Contractor or a Subcontractor or their agents or employees or any other persons or entities performing portions of the Work under contract with the Contractor, repeated suspensions, delays or interruptions of the entire Work by the Owner as described in Paragraph 14.3 constitute in the aggregate more than one hundred percent (100%) of the total number of days scheduled for completion, or **one hundred twenty (120) days** in any 365-day period, whichever is less.

**14.1.3** If one of the reasons described in Subparagraph 14.1.1 or 14.1.2 exists, the Contractor may, upon **seven (7) days** written notice to the Owner and Design Professional, terminate the Contract and recover from the Owner payment for Work executed, including overhead and profit in accordance

with Article 7 for Work performed, and for proven loss with respect to materials, equipment, tools, and construction equipment and machinery excluding, overhead and profit.

**14.1.4** If the Work is stopped for a period of **sixty (60) consecutive days** through no act or fault of the Contractor or a Subcontractor or their agents or employees or any other persons performing portion of the Work under contract with the Contractor because the Owner has persistently failed to fulfill the Owner's obligations under the Contract Documents with respect to matters important to the progress of the Work, the Contractor may, upon **seven (7) additional days** written notice to the Owner and the Design Professional, terminate the Contract and recover from the Owner as provided in Subparagraph 14.1.3.

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

**14.2.1** The Owner may terminate the Contract if the Contractor:

1. refuses or fails to supply enough properly skilled workers or proper materials;
2. fails to make payment to Subcontractors for material or labor in accordance with the respective agreements between the Contractor and the Subcontractors;
3. disregards laws, ordinances, or rules, regulations or orders of a public authority having jurisdiction;
4. disregards the authority of the Owner or Design Professional;
5. fails after commencement of the Work to proceed day-to-day continuously with the construction and completion of the Work for more than **ten (10) days**, except as permitted under the Contract Documents;
6. fails to maintain owner approved schedule or owner approved recovery schedule; and,
7. otherwise is guilty of substantial breach of a provision of the Contract Documents.

**14.2.2** When any of the above reasons exist, the Owner may without prejudice to any other rights or remedies of the Owner and after giving the Contractor and the Contractor's surety notice, as required by the surety bonds, if any, **seven (7) days** written notice, terminate employment of the Contractor and may, subject to any prior rights of the surety:

1. take possession of the site and of all materials, equipment, tools, and construction equipment and machinery thereon owned by the Contractor;
2. accept assignment of subcontracts pursuant to Paragraph 5.4; and
3. finish the Work by whatever reasonable method the Owner may deem expedient. Upon request of the Contractor, the Owner shall furnish to the Contractor a detailed accounting of the costs incurred by the Owner in finishing the Work.

**14.2.3** When the Owner terminates the Contract for one of the reasons stated in Subparagraph 14.2.1, the Contractor shall not be entitled to receive further payment until the Work is finished.

**14.2.4** If the unpaid balance of the Contract Sum exceeds costs of finishing the Work, including compensation for the Design Professional's services and expenses made necessary thereby, and other damages incurred by the Owner and not expressly waived. If such costs and damages exceed the unpaid balance, the Contractor shall pay the difference to the Owner. The amount to be paid to the

Contractor or Owners as the case may be, shall be certified by the Design Professional, upon application, and this obligation for payment shall survive termination of the Contract.

**14.2.5** In carrying out the Owner's right to complete the Work in accordance with Paragraph 14.2, the Owner shall have the right to exercise the Owner's sole discretion as to the manner, methods and reasonableness of costs of completing the Work.

### **14.3 SUSPENSION BY THE OWNER BY CONVENIENCE**

**14.3.1** The Owner may, without cause, order the Contractor in writing to suspend, delay or interrupt the Work in whole or in part for such period of time as the Owner may determine.

**14.3.2** The Contract Sum and Contract Time shall be adjusted for increases in the cost and time caused by suspension, delay or interruption as described in Subparagraph 14.3.1. Adjustment of the Contract Sum shall include profit. No adjustment shall be made to the extent:

1. that performance is, was or would have been so suspended, delayed or interrupted by another cause for which the Contractor is responsible; or
2. that an equitable adjustment is made or denied under another provision of the Contract.

### **14.4 TERMINATION BY THE OWNER FOR CONVENIENCE**

**14.4.1** The Owner may, at any time, terminate the Contract for the Owner's convenience and without cause.

**14.4.2** Upon receipt of written notice from the Owner of such termination for the Owner's convenience, the Contractor shall:

1. cease operation as directed by the Owner in the notice;
2. take action necessary, or that the Owner may direct, for the protection and the preservation of the Work; and
3. except for Work directed to be performed prior to the effective date of termination stated in the notice, terminate all existing Subcontracts and Purchase Orders.

**14.4.3** In case of such termination for the Owner's convenience, the Contractor shall be entitled to receive payment for Work executed, and costs incurred by reason of such termination, along with reasonable overhead and profit on the Work completed.