

AGREEMENT
BETWEEN
THE BOARD OF REGENTS OF THE TEXAS A&M UNIVERSITY
SYSTEM
AND
Hoar Construction, LLC
CONSTRUCTION MANAGER-AT-RISK

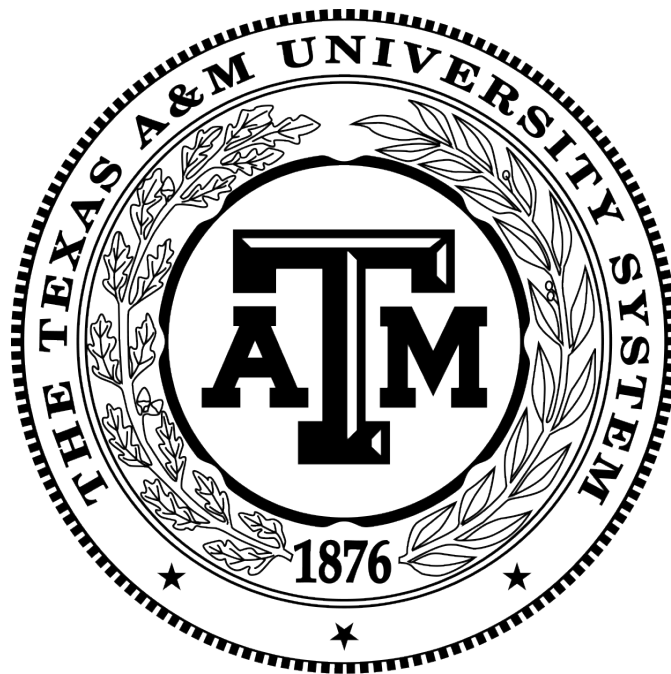


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**AGREEMENT
BETWEEN
THE BOARD OF REGENTS OF THE TEXAS A&M UNIVERSITY
SYSTEM
AND
Hoar Construction, LLC,
CONSTRUCTION MANAGER-AT-RISK**

This Agreement is effective as of November 8, 2018 (the “Effective Date”), by and between the **BOARD OF REGENTS OF THE TEXAS A&M UNIVERSITY SYSTEM** (“Owner”) and Hoar Construction, LLC, Construction Manager at Risk (“Contractor”) for the HVAC Replacement Aston Hall construction project (the “Project”). The parties acknowledge that Jones*DBR shall serve as the architect/engineer (hereafter “A/E”).

Owner intends to construct the Project at Texas A&M University, College Station, Texas, within a construction cost limit of Eleven Million, Four Hundred Forty Thousand, One Hundred Sixty Dollars and no/100 Dollars (\$11,440,160.00). This sum is referred to as the Amount Available for the Construction Contract (“AACC”), which is further defined in Paragraph 2.1.

Owner and Contractor agree as follows:

**ARTICLE 1
SCOPE OF WORK**

Contractor has overall responsibility for and shall provide complete Pre-Construction Phase and Construction Phase Services (the “Work”) and furnish all materials, equipment, tools and labor as necessary or reasonably inferable to complete the Work, or any phase of the Work, in accordance with the terms of this Agreement.

**ARTICLE 2
DEFINITIONS**

The terms, words and phrases used in this Agreement have the meanings given in the Uniform General and Supplementary Conditions for The Texas A&M University System and as follows:

2.1 “**Amount Available for the Construction Contract**” or “**AACC**” means the maximum monetary amount budgeted by Owner for all Construction Phase services, materials, labor and other work required of Contractor for completion of the Work in accordance with this Agreement. The AACC includes, without limitation, the General Conditions Costs, the Cost of the Work, the Construction Phase Fee, and Contractor’s Contingency. The AACC may be adjusted by the Owner for changes in the scope of the Project before or after acceptance of the Guaranteed Maximum Price Proposal. The AACC does not include Contractor’s Pre-Construction Phase Fee. The Final Amount Available for the Construction Contract is the AACC after the Project has been approved by The Texas A&M University System Board of Regents.

2.2 “**A/E**” or “**Architect/Engineer**” refers to the professional firm employed by Owner as

2.2 “**A/E**” or “**Architect/Engineer**” refers to the professional firm employed by Owner as architect/engineer of record for the Project, and its consultants.

2.3 “**Building Information Modeling**” or “**BIM**” is a digital representation of physical and functional characteristics of a facility. As such it serves as a shared knowledge resource for information about a facility forming a reliable basis for decisions during its life-cycle from inception onward. A basic premise of BIM is collaboration by different stakeholders at different phases of the life cycle of a facility to insert, extract, update or modify information in the BIM process to support and reflect the roles of that stakeholder. The BIM is a shared digital representation founded on open standards for interoperability.

2.4 “**Contract Documents**” means this Agreement and all exhibits and attachments listed, contained or referenced in this Agreement specifically including the Uniform General and Supplementary Conditions; Special Conditions and Owner’s Specifications; the Drawings, Specifications, details and other documents developed by A/E or Owner’s consultants, if any, and accepted by Owner which describe the Project; all Addenda issued prior to the Effective Date of this Agreement; the Guaranteed Maximum Price Proposal when accepted by Owner and executed by the parties; all Change Orders issued after the Effective Date of this Agreement; and the HUB Subcontracting Plan submitted by Contractor. These Contract Documents form the entire and integrated contract between Owner and Contractor and supersede all prior negotiations, representations or agreements, written or oral.

2.5 “**Contractor’s Contingency**” has the meaning set forth in Paragraph 11.3.

2.6 “**Construction Documents**” means, collectively, the Uniform General and Supplementary Conditions; Owner’s Special Conditions and Specifications; and the Drawings, Specifications, details, Change Orders and other documents prepared by A/E, its consultants, and by Owner’s consultants, that describe the scope and quality of the Project and the materials, supplies, equipment, systems and other elements that are required for construction of the Project that are accepted by Owner.

2.7 “**Construction Phase Fee**” means the amount set forth in Paragraph 3 of Exhibit “A” attached to this Agreement.

2.8 “**Construction Phase Services**” means the coordination, implementation and execution of the Work required by this Agreement, which are further defined in Article 8.

2.9 “**Cost of the Work**” means those costs described in Paragraph 11.2.

2.10 “**Direct Construction Cost**” shall have the meaning set forth in Article 11.

2.11 “**Estimated Construction Cost**” or “**ECC**” means the amount calculated by Contractor for the total cost of all elements of the Work based on this Agreement available at the time(s) that the ECC is prepared. The ECC shall be based on current market rates with reasonable allowance for overhead, profit and price escalation and shall include and consider, without limitation, all alternates and contingencies, designed and specified by A/E and the cost of labor and materials necessary for installation of Owner furnished equipment. The ECC shall include all the cost elements included in the AACC, as defined above, and shall represent Contractor’s best current estimate of the Guaranteed Maximum Price it will propose for the Project based on

the information then available. The ECC shall not include Contractor's Pre-Construction Phase Fee, A/E's Fees, the cost of the land and rights-of-way, or any other costs that are the direct responsibility of Owner.

2.12 **"Guaranteed Maximum Price"** or **"GMP"** means the amount proposed by Contractor and accepted by Owner as the maximum cost to Owner for construction of the Project in accordance with this Agreement. The GMP includes Contractor's Construction Phase Fee, the General Conditions Cost, the Cost of the Work, and Contractor's Contingency amount.

2.13 **"General Conditions Cost"** means costs incurred and minor work performed by Contractor without the need for competitive bids/proposals. The allowable General Conditions items are limited in Paragraph 11.1 and are further described on Exhibit "D". The maximum allowable General Conditions Cost payable to Contractor during the Construction Phase of the Project is set out in Exhibit "A" attached to this Agreement.

2.14 **"Monthly Salary Rate"** means the amount agreed to by Owner that can be used on Applications for Payment throughout the Construction Phase to account for the monthly salary costs of Contractor's salaried personnel assigned to the Project. A Monthly Salary Rate must be established for each salaried person and must be approved in writing by Owner in advance of any Application for Payment for that person. The Monthly Salary Rate is for convenience only and any payments made for Contractor's personnel are subject to audit to determine the actual cost of the wages and allowable employer contributions incurred by Contractor for services performed. The initial Monthly Salary Rate is included in Exhibit "G" attached to this Agreement.

2.15 **"Owner's Specifications"** means the construction and contract administration requirements and standards detailed in Exhibit "C" attached to this Agreement, consisting of Division 1 of the Specifications.

2.16 **"Pre-Construction Phase Fee"** means the amount set forth in Paragraph 2 of Exhibit "A" attached to this Agreement.

2.17 **"Pre-Construction Phase Services"** means the participation, documentation and execution of Contractor's Pre-Construction Phase deliverables as required by this Agreement and further defined in Article 5.

2.18 **"Program Manager"** refers to the professional management firm selected by the Owner as the Owner's representative for the Project, and its employees and consultants.

2.19 **"Project Team"** means Owner, Contractor, A/E and consultants, any separate Contractors employed by Owner, and others employed for the purpose of programming, design, and construction of the Project. The members of the Project Team will be designated in writing by Owner and may be modified from time to time in writing by Owner.

2.20 **"Reimbursable Services"** are the services specifically identified in Paragraph 10.2.2 that are provided by the Contractor in conjunction with the delivery of Pre-Construction Services under this Agreement.

2.21 **"Subcontractor"** means a person or entity who has an agreement with Contractor to perform any portion of the Work. The term Subcontractor does not include A/E or any person or

entity hired directly by Owner.

2.22 **“Work”** means the provision of all construction services, labor, materials, supplies, and equipment that are required of Contractor to complete the Project in strict accordance with the requirements of this Agreement. Work includes, but is not limited to, the Construction Phase Services, additional work required by Change Orders, and any other work reasonably inferable from this Agreement. The term “reasonably inferable” takes into consideration the understanding of the parties that some details necessary for completion of the Work may not be shown on the Drawings or included in the Specifications, but they are a requirement of the Work if they are a usual and customary component of the Work or otherwise necessary for complete installation and operation of the Work.

2.23 **“Work Progress Schedule”** or **“WPS”** shall have the meaning given in Paragraph 5.3.1.

2.24 **“Worker Wage Rate”** means the actual hourly wage of non-salaried persons performing work on the Project plus allowable employer contributions as established on the Worker Wage Rate Form required by the Construction Documents. The Worker Wage Rate must be reasonable and customary for their industry, must equal or exceed the prevailing wage established by Owner and must be approved in writing by Owner in advance of any Application for Payment. All payments for non-salaried personnel working on the Project are subject to audit to determine the actual cost of the wages and allowable employer contributions incurred by employer for services performed for the Project.

ARTICLE 3 CONTRACTOR’S GENERAL RESPONSIBILITIES

3.1 Contractor shall perform all services specifically allocated to it by the Contract Documents, BIM Execution Plan, “Facility Design Guidelines” as well as those services reasonably inferable from the Contract Documents as necessary for completion of the Work and the Project. Contractor agrees to perform these services using its best efforts, skills, judgments and abilities.

3.2 Contractor shall collaborate and cooperate with A/E and endeavor to further the interests of Owner and the Project. Contractor shall furnish Pre-Construction Phase Services and Construction Phase Services and complete the Project in an expeditious and economical manner consistent with the interests of Owner and in accordance with the Work Project Schedule.

3.3 Contractor shall designate a representative authorized to act on Contractor’s behalf with respect to the Project.

3.4 Contractor shall establish procedures for communication and coordination among the Project Team, Subcontractors, separate contractors, and others with respect to all aspects of the construction of the Project, and implement such procedures.

3.5 Contractor shall utilize Owner’s project management software application e-Builder® as the primary system for all project documentation through all phases of the Project.. Contractor shall follow Owner’s guidelines on the use of e-Builder®.

3.6 If Owner elects to “fast-track” or develop the Project in multiple stages, Contractor shall

organize and perform its services as appropriate to each stage. Each stage of the Project may have a unique schedule for completion and a specific AACC, at Owner's discretion.

3.7 Contractor shall identify to Owner the employees and other personnel that it will assign to the Project and provide the Monthly Salary Rate or Worker Wage Rate for each of them. Contractor shall also identify any consultants that will be performing services for the Project. After execution of this Agreement by Owner, Contractor shall not remove or replace the persons or entities assigned to the Project except with Owner's written consent, which consent shall not be unreasonably withheld. Contractor shall not assign to the Project or contract with any person or entity to which Owner has a reasonable objection. Contractor shall promptly update the list of persons and consultants if they change during the course of the Project.

3.8 The Owner's HUB Subcontracting Plan for Construction Services is available on the following website:

<http://www.tamus.edu/business/facilities-planning-construction/forms-guidelines-wage-rates/>

Contractor, as a provision of the Agreement, must comply with the requirements of the Owner's HUB policies and adhere to the HUB Subcontracting Plans submitted for Construction Phase Services. No changes to the HUB Subcontracting Plans can be made by Contractor without the prior written approval of Owner.

3.9 Contractor shall coordinate its services and work collaboratively with the A/E design team and provide cost information to the design team and the Owner at all stages of the design. It is the Contractor's responsibility to keep the design within the project AACC.

3.10 The Architect/Engineer shall utilize a Building Information Modeling (BIM) authoring software compliant with Industry Foundation Class and BIM based design processes to produce a building information model(s) (model) for this project. The Contractor shall be knowledgeable of BIM use for all phases of the design and construction process.

3.11 The Contractor shall develop a project BIM Execution Plan documenting BIM uses, analysis technologies and workflows. The BIM Execution Plan (Exhibit H) shall be submitted to the Owner within 30 days of the execution of this Agreement. A combined BIM Execution Plan from both Architect/Engineer and Contractor is also acceptable.

3.12 Participation of Contractor or its subcontractors and suppliers in contributions to the BIM process or model(s) shall not constitute the performance of design services.

ARTICLE 4

OWNER'S RESPONSIBILITIES

4.1 Owner has designated A/E as the Architect/Engineer for the Project.

4.2 Owner will provide the AACC and general schedule for the Project. The AACC provided by Owner will be established with due consideration for separate contingencies for changes in the Project during construction, and for other Project costs that are the responsibility of Owner. The general schedule will set forth Owner's plan for milestone dates and completion of the Project.

4.3 Owner will identify a person as its Owner's Designated Representative ("ODR") who is authorized to act on Owner's behalf with respect to the Project, including final determination of

fees and costs earned by Contractor and equitable back charges against Contractor. The ODR shall examine the documents submitted by Contractor and shall render decisions on behalf of Owner. The ODR shall have all the responsibilities and authorities allocated to him/her in the UGSC.

4.4 Owner, at its sole cost, will secure the services of existing facility surveys, testing and balancing, environmental surveys or other special consultants to develop such additional information as may be necessary for the design or construction of the Project.

4.5 Owner shall arrange and pay for materials, structural, mechanical, chemical and other laboratory tests as required by the Construction Documents.

4.6 Owner shall furnish all legal, accounting, auditing and insurance counseling services for itself as may be necessary for the Project.

4.7 Owner shall furnish required information and services and shall render approvals and decisions as expeditiously as is consistent with reasonable skill and care and the orderly progress of Contractor's services and of the Work.

4.8 Owner may designate one or more construction inspectors who shall be given access to the Work as requested or needed. The provision of inspection services by Owner shall not reduce or lessen Contractor's responsibility for the Project. Contractor is fully and solely responsible for constructing the Project in strict accordance with this Agreement.

4.9 Owner shall have the right to reject any defective Work on the Project. Should Contractor refuse or neglect to correct any such Work within a reasonable time after notice, Owner may have the Work corrected and recover all expenses incurred from Contractor on demand.

4.10 Owner shall cause A/E to provide Contractor a compact disc containing documents and data files derived from the model at review milestones for its use in performing reviews, preparing cost estimates and a GMP proposal, obtaining bids/proposals for the work and constructing the Project. Owner shall also make available to Contractor any supplemental Contract Documents such as addenda, equipment procurement packages, RFI or RFP responses and change order documentation. Contractor shall be responsible for preparing all copies of these documents needed for its use and that of any of its consultants or Subcontractors for performing reviews, preparing cost estimates and a GMP proposal, obtaining bids/proposals for the work and constructing the Project as set forth in this Agreement. Contractor shall also be responsible for maintaining a register of document distribution, and distributing documents to its consultants, Subcontractors, bidders, proposers and plan rooms.

ARTICLE 5

PRE-CONSTRUCTION PHASE SERVICES

The Pre-Construction Phase shall be deemed to commence upon the date specified in a written Notice to Proceed with Pre-Construction Phase Services issued by Owner and shall continue through completion of the Construction Documents and procurement of all major Subcontractor agreements. Contractor is not entitled to reimbursement for any costs incurred for

Pre-Construction Phase Services performed before issuance of the written Notice to Proceed. Pre-Construction Phase Services may overlap Construction Phase Services. Contractor shall perform the following Pre-Construction Phase Services:

5.1 General Coordination

- 5.1.1 Contractor's Pre-Construction Phase Services team shall attend Project Team meetings with Owner, Owner representatives, and A/E at regularly scheduled intervals throughout the Pre-Construction Phase. Frequent Project Team meetings are anticipated prior to Owner acceptance of the GMP and during completion of the Construction Documents.
- 5.1.2 Provide a preliminary evaluation of "Facility Design Guidelines", Program of Requirements and the AACC, each in terms of the other.
- 5.1.3 Review and understand the standards and requirements in Owner's Specifications and perform all services in accordance with those standards and requirements.
- 5.1.4 Visit the site and inspect the existing facilities, systems and conditions to ensure an accurate understanding of the existing conditions as required.
- 5.1.5 Participate as a member of the Project Team in the development of the Program of Requirements if such program has not been developed prior to the Effective Date of this Agreement.
- 5.1.6 Provide recommendations and information to the Project Team on: site usage and site improvements; building systems, equipment and construction feasibility; selection and availability of materials and labor; time requirements for installation and construction; assignment of responsibilities for safety precautions and programs; temporary Project facilities; equipment, materials and services for common use of Contractor and Owner's separate contractors, if any; cost factors, including costs of alternative materials or designs, preliminary budgets, and possible cost savings; recognizing and tracking the resolution of conflicts in the proposed Drawings and Specifications; methods of delivery of materials, systems, and equipment; and any other matters necessary to accomplish the Project in accordance with the Work Progress Schedule (as defined below) and the AACC. Notwithstanding the above, Contractor shall not be required to provide A/E services unless specifically required by the Contract Documents and Contractor's recommendations and information are furnished in its capacity as a Contractor.
- 5.1.7 Assist Owner in selecting and directing the services of existing facility surveys, testing and balancing, environmental surveys or other special consultants hired by Owner to develop additional information for the design or construction of the Project.
- 5.1.8 At Owner's request, attend public meetings and hearings concerning the development and schedule of the Project.
- 5.1.9 Contractor shall use all Construction Documents returned to A/E from the

Subcontractor proposers.

5.2 **Constructability Program**

- 5.2.1 Implement and conduct a constructability program to identify and document Project cost and schedule savings opportunities. The constructability program shall follow accepted industry practices and be reviewed by Owner at design milestones. Whenever the term “value engineering” is used in conjunction with this Agreement or the Project, it has its commonly accepted meaning within the construction industry and does not imply the practice of professional engineering without a license. If any value engineering activities constitute the professional practice of engineering, then such activities shall be performed by an engineer licensed in Texas.
- 5.2.2 Prepare a “Constructability Report” that identifies items that, in Contractor’s opinion, may negatively impact construction of the Project. The Constructability Report shall address the overall coordination of model(s), Drawings, Specifications, details and schedules and identify discrepancies that may generate Change Orders or claims once Project construction commences. Contractor shall provide Owner with an update to the Constructability Report at every milestone meeting during the Pre-Construction Phase.
- 5.2.3 Provide and implement a system for tracking questions, resolutions, decisions, directions and other information matters that arise during the development of the model(s), Drawings and Specifications for the Project. The decision tracking system shall be in a format approved by Owner and updated by Contractor at least monthly during the Pre-Construction Phase.

5.3 **Scheduling**

- 5.3.1 Develop a Work Progress Schedule for Project Team review and Owner’s approval that coordinates and integrates activities on the Project, including Contractor’s services, A/E’s design services, the work of other consultants and suppliers, and Owner’s activities with the anticipated construction schedules for other contractors. The WPS must identify all major milestones through Project Final Completion. The WPS shall be created and maintained in accordance with Owner’s Specifications Section 01 32 00 using Owner-specified format and software.
- 5.3.2 Contractor shall update the WPS throughout the Pre-Construction and Construction Phases as described in Owner’s requirements and Specifications.
- 5.3.3 The WPS shall include other detailed schedule activities as directed by Owner including, but not limited to, Owner-managed work under separate contracts such as equipment, furniture and furnishings, telephones, project security, property protection, life-safety systems, integration with central campus monitoring systems, information and instructional technology data-transmission systems, and computer technology systems.

5.4 Budget and Cost Consultation

- 5.4.1 Contractor is responsible for the construction budget and for preparing and updating all procurement and Estimated Construction Costs and distributing them to the Project Team throughout the duration of the Project.
- 5.4.2 Contractor shall prepare and update an Estimated Construction Cost report at the completion of Schematic Design, fifty percent (50%) Design Development and at the completion of the Design Development Phase. The ECC will be updated at the fifty percent (50%), seventy-five (75%) and the hundred percent (100%) completion stages of the Construction Documents phase of the Project. The GMP Proposal, when submitted, will have as its basis a current ECC report. The ECC report for Schematic Design shall be a detailed estimate organized in Construction Specifications Institute, MasterFormat 2004. The ECC reports for the Design Development and Construction Documents phases shall be detailed estimates derived from cost quantity surveys based on unit prices for labor, materials, overhead and profit, organized in Construction Specifications Institute, MasterFormat 2004 for each portion of the Work.
- 5.4.3 Contractor shall provide continuous cost consultation services throughout the duration of the Project, including identification and tracking of decisions that affect the scope or quality of the Project and providing ongoing updates of their cost and budget impact. Advise the Project Team immediately if Contractor has reason to believe that the most current ECC will exceed the AACC or not meet WPS requirements and recommend reasonable strategies for bringing the Project in line with the AACC and the WPS.
- 5.4.4 Contractor shall promptly identify all variances between estimated costs and actual costs during the Construction Phase, and shall promptly report such variances to the Project Team, in a format acceptable to Owner, along with recommendations for action, but in any event no more than two (2) business days after acquiring such information.
- 5.4.5 Should any ECC exceed or fall significantly below the approved AACC, Owner and Contractor shall negotiate changes to the Project scope, requirements or the AACC as required.

5.5 Coordination of Design and Construction Contract Documents

- 5.5.1 Review model(s), Drawings, Specifications and other Construction Documents as they are developed by A/E during the Schematic Design, Design Development, and Construction Documents design phases of the Project.
- 5.5.2 Consult with Owner and A/E on the selection of materials, equipment, component systems, and types of construction used on the Project. Advise Owner on site use, construction feasibility, availability of labor and materials, procurement time requirements, and construction coordination.
- 5.5.3 Advise Owner of any error, inconsistency or omission discovered in the model(s),

Drawings, Specifications, and other Construction Documents.

- 5.5.4 Advise Owner on reasonable adjustments in the Project scope, quality or other options for keeping the Project cost within the AACC.
- 5.5.5 Review the model(s) and Construction Documents for compliance with all applicable laws, rules and regulations, the Contract Documents, and Owner requirements.
- 5.5.6 It is not the Contractor's responsibility to ascertain that the drawings and specifications are in accordance with applicable laws, statutes, ordinances, building codes, rules and regulations, but Contractor will report any variances which should have reasonably been discovered.

5.6 Construction Planning and Subcontractor Buyout Strategy

- 5.6.1 Identify equipment or material requiring extended delivery times and advise Owner on expedited procurement of those items. Advise Owner and A/E on the preparation of performance specifications and requests for technical proposals for the procurement and installation of systems and components and for the procurement of long lead items. If requested by Owner, and subject to Owner's prior written approval, issue requests for technical proposals to qualified sources and receive proposals and assist in their evaluation.
- 5.6.2 Make recommendations to the Project Team regarding organization of the Construction Documents to facilitate the bidding and awarding of construction subcontracts in a manner that promotes the interests of the Project and Owner. These recommendations may include, but are not limited to, phased or staged construction or multiple separate contracts. The recommendations shall take into consideration such factors as time of performance, type and scope of work, availability of labor and materials, overlapping trade jurisdictions, provisions for temporary facilities, comparisons of factory and on-site production costs, shipping costs, code restrictions, Owner's goals for HUB Contractor participation, and other constraints.
- 5.6.3 Review the model(s) and Construction Documents with the Project Team to eliminate areas of conflict and overlap in the work to be performed by the various Subcontractors or Owner's separate contractors.
- 5.6.4 Develop a bid/proposal package strategy in coordination with A/E that addresses the entire scope of each phase and stage of the Project. In developing the bid/proposal package strategy, Contractor shall identify all bid/proposal packages on which Contractor intends to submit a self-performance bid/proposal. The bid/proposal package strategy shall be reviewed with Owner on a regular basis and revised throughout the buyout of the Project so as to best promote the interests of the Project and Owner.
- 5.6.5 Assist Owner, A/E, Owner's other consultants, and Owner's separate contractors in obtaining all applicable LEED documentation, risk management, code, and

regulatory agency reviews and approvals for the Project including, without limitation, the Texas Higher Education Coordinating Board, the Texas Department of Licensing and Regulation, the State Fire Marshal, the local fire department, and Owner's insurance provider.

- 5.6.6 Refine, implement and monitor required HUB Subcontracting Plans to promote equal employment opportunity in the provision of goods and services to Owner for the Project.
- 5.6.7 Review the model(s) and Construction Documents to ensure that they contain adequate provision for job site areas required for construction, all temporary facilities necessary for performance of the Work, and provisions for all of the job site facilities necessary to manage, inspect, and supervise construction of the Project.
- 5.6.8 Provide an analysis of the types and quantities of labor required for the Project and review the appropriate categories of labor required for critical phases or stages. Make recommendations that minimize the adverse effects of labor shortages.
- 5.6.9 Consult with and make recommendations to Owner on the acquisition schedule for fixtures, furniture and equipment, and coordinate with Owner as may be required to meet the WPS.

5.7 Obtaining Bids/Proposals for the Project

- 5.7.1 Contractor shall publicly advertise and solicit competitive lump sum bids/proposals from trade contractors or subcontractors for the performance of all major elements of the Project other than the minor work that may be included in General Conditions. Criteria for determining the bid/ proposal that provides the best value to Owner shall be established by the Project Team and included in the request for bids or proposals. Contractor shall notify Owner in advance in writing of the date it will receive the bids/proposals.
- 5.7.2 Schedule and conduct pre-bid conferences with interested bidders/proposers, Subcontractors, material suppliers, and equipment suppliers, and record minutes of the conferences.
- 5.7.3 Contractor and Owner shall review all trade contractor or Subcontractor bids/proposals in a manner that does not disclose the contents of any bid/proposal to persons outside of the Project Team during the selection process. Based on the selection criteria included in the request for proposals, Contractor shall recommend to Owner, in a format acceptable to Owner, the bid/proposal(s) that provides the best value for the Project. Upon Owner's written concurrence with the recommendation, Contractor may negotiate the terms of the subcontract with the apparent best value bidder/proposer.
- 5.7.4 All subcontracts must be on a lump sum basis unless other payment terms are approved in writing and in advance by the Executive Director for the Office of

Facilities Planning & Construction or designee. Upon Owner's concurrence in the final terms of the subcontract, Contractor shall enter into a written subcontract for the subcontract work and upon request provide a copy to Owner. All bids/proposals shall be publicly available after award of the subcontract or within seven (7) days after the date of final selection, whichever is later.

- 5.7.5 If Contractor reviews, evaluates, and recommends to Owner a bid/proposal from a qualified trade contractor or subcontractor, but Owner requires another bid/proposal to be accepted, Owner shall compensate Contractor by a change in price, time, or Guaranteed Maximum Price for any additional cost and risk Contractor incurs because of Owner's requirement that the other bid/proposal be accepted.
- 5.7.6 Contractor may seek to self-perform portions of the Project identified for self-performance in the bid/proposal strategy. Contractor must submit a bid/proposal for the self-performance work in the same manner as all other trade contractors or Subcontractors. Owner will, at its sole discretion, determine whether Contractor's bid/proposal provides the best value for Owner, and its determination shall be final.
- 5.7.7 For scope of work bid packages typically performed by subcontractors, Construction Manager may "self-perform" such work on a cost plus fee (Not-To-Exceed 7.5%) basis subject to an agreed upon guaranteed maximum price for the "self-performed work". The Construction Manager shall bid their proposed Guaranteed Maximum Price for the work to be "self-performed" against at least two other interested trade contractors. Any subcontract for "self-performed work" will provide for payment in an amount equal to the Cost of the Work (as defined in this Agreement) and will not exceed the agreed upon subcontract guaranteed maximum price. All terms and provisions of any subcontract for "self-performed work" will be consistent with the terms and conditions of this Agreement with the exception of the agreed upon Fee percentage. All savings under any such subcontract for "self-performed work" shall be applied to reduce the Cost of the Work under this Agreement and the Guaranteed Maximum Price of this Agreement. For purposes of defining "self-performed work" subject to this contract provision, any division of Construction Manager, or any separate Construction Manager or subcontractor that is partially owned or wholly owned by the Construction Manager or any of their employees or employee's relatives will be considered a related party entity and will be subject to this provision regarding "self-performed work". If the Contractor acquires competitive bids/proposals for the "self-performed work" the Owner at its sole determination may allow the "self-performed work" to be performed on a lump sum. Otherwise, no self-performed work will be allowed to be performed on a lump sum basis.
- 5.7.7 Contractor shall identify every Subcontractor it intends to use on the Project, including Subcontractors used for self-performed work, to Owner in writing, in a format acceptable to Owner, and deliver to Owner a HUB Subcontracting Plan at least ten (10) days before entering into any subcontract. Contractor shall not use any Subcontractor to which Owner has a reasonable objection. Contractor shall not be required to subcontract with any Subcontractor to which it has reasonable

objection. Following Owner's acceptance of a Subcontractor, that Subcontractor shall not be changed without Owner's written consent, which shall not be unreasonably withheld.

5.7.8 If a selected trade contractor or Subcontractor fails to execute a subcontract after being selected in accordance with this Paragraph or defaults in the performance of its work, Contractor may, in consultation with Owner and without further advertising, fulfill the subcontract requirements itself or select a replacement trade contractor or subcontractor to do so.

5.7.9 There are no third party beneficiaries of this Agreement.

5.8 Safety

5.8.1 In accordance with the UGSC, Contractor is responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the Project. The safety program shall comply with all applicable requirements of the Occupational Safety and Health Act of 1970 and all other applicable federal, state and local laws and regulations.

5.8.2 Contractor shall provide recommendations and information to Owner and A/E regarding the assignment of responsibilities for safety precautions and programs, temporary Project facilities, and equipment, materials, and services for common use of the Subcontractors. Contractor shall verify that appropriate safety provisions are included in the Construction Documents.

ARTICLE 6 PRE-CONSTRUCTION PHASE FEE

The Pre-Construction Phase Fee is the total compensation payable to Contractor for the performance of Pre-Construction Phase Services, except for Additional Pre-Construction Phase Services approved in advance and in writing by Owner. The Pre-Construction Phase Fee shall be a lump sum amount based on the AACC established in this Agreement.

6.1 Except as specifically allowed by Owner, Contractor shall not be entitled to any increase in the Pre-Construction Phase Fee for any costs, expenses, liabilities or other obligations arising from the performance of Pre-Construction Phase Services.

6.2 Costs associated with the following items are specifically, but not exclusively, included in the establishment of the Pre-Construction Phase Fee: profit and profit sharing; general overhead; salaries and labor; housing and relocation; estimating, scheduling and information management systems and software; contract administration; office expenses; printing and copying; consulting fees; legal or accounting fees; cost of money; taxes; insurance premiums and deductibles; bond costs; purchase or rental of equipment; utilities; travel; per diem; fines or penalties; and damage awards.

6.3 If the scope of the Pre-Construction Phase Services is changed materially, the Pre-Construction Phase Fee shall be equitably adjusted. If the AACC is changed materially before acceptance of the GMP Proposal, the Pre-Construction Phase Fee shall be adjusted in writing in

proportion to the change in the AACC. There shall be no adjustments in the Pre-Construction Phase Fee following acceptance of the GMP Proposal.

6.4 For Additional Pre-Construction Phase Services that are approved in advance and in writing by Owner, Contractor shall be entitled to additional compensation computed as follows:

6.4.1 A pre-established lump sum amount; or

6.4.2 The hourly cost of Contractor's employees or consultants who actually perform the Additional Services based on the employee's Worker Wage Rate or prorated Monthly Rate plus the actual cost of allowable expenses incurred in the performance of the Additional Pre-Construction Phase Services, plus an overhead and profit markup of ten percent (10%) of the total cost; or

6.4.3 As otherwise agreed in advance and in writing.

ARTICLE 7

GUARANTEED MAXIMUM PRICE PROPOSAL

7.1 At the conclusion of the Design Development phase the Contractor shall prepare and submit a Guaranteed Maximum Price Proposal to Owner based on the Design Development phase documents and review comments. The GMP shall be delivered to the Owner within three (3) weeks of the Design Development review meeting or a date established by the Owner. The GMP Proposal must be prepared in accordance with the guidelines established by Owner and delivered in the format specified by Owner in Exhibit "E" attached to this Agreement. Owner, at its sole option and discretion, may specify different requirements for the GMP Proposal. Contractor shall not withdraw its Guaranteed Maximum Price Proposal for ninety (90) days following submission to Owner.

7.2 In developing the GMP Proposal, Contractor shall coordinate efforts with A/E to identify qualifications, clarifications, assumptions, exclusions, value engineering and any other factors relevant to establishment of a GMP. Contractor shall review development of the GMP Proposal with Owner on an ongoing basis to address clarifications of scope and pricing, distribution of contingencies, schedule, assumptions, exclusions, and other matters relevant to the establishment of a GMP.

7.3 The GMP Proposal must include a written description of how it was derived that specifically identifies the clarifications and assumptions made by Contractor in the GMP and the monetary amounts attributable to them. The GMP Proposal shall include, without limitation, a breakdown of Contractor's estimated General Conditions Costs and estimated Cost of the Work organized by trade and Masterformat 2004; contingency amounts; the Construction Phase Fee; and the proposed Contract Time, including dates for Notice to Proceed, Substantial Completion and Final Completion. Notwithstanding the breakdown of Contractor's estimated costs, there are no line item guaranteed maximum amounts except for general conditions.

7.4 The Guaranteed Maximum Price Proposal shall allow for reasonably expected changes and refinements in the Drawings and Specifications through completion of the Construction Documents, except for material changes in scope.

7.5 The GMP Proposal shall include a Contractor's Contingency amount.

7.6 Included with its GMP Proposal, Contractor shall provide three complete, bound sets of the drawings, specifications, plans, sketches, instructions, requirements, materials, equipment specifications and other information or documents that fully describe the Project as developed at the time of the GMP Proposal and that are relevant to the establishment of the GMP. The bound supporting documents shall be referenced in and incorporated into the GMP Proposal.

7.7 The GMP Proposal and all supporting documents shall identify and describe all items, assumptions, costs, contingencies, schedules and other matters necessary and relevant for proper execution and completion of the Work and for establishment of the GMP. The GMP Proposal and the supporting documents are complementary and, in the event of an irreconcilable conflict between or among them, the interpretation that provides for the higher quality or quantity of material and/or workmanship shall prevail over all other interpretations.

7.8 In submitting the GMP Proposal, Contractor represents that it will provide every item, system or element of performance that is identified, shown or specified in the GMP Proposal or the supporting documents, along with those necessary or ancillary materials that are reasonably inferable and equipment for their complete operating installation, unless specifically accepted in writing by Owner. Upon Owner's written acceptance of the GMP Proposal, Contractor shall not be entitled to any increase in the GMP due to the continued refinement of the Construction Documents or the absence or addition of any detail or specification that may be required in order to complete the construction of the Project as described in and reasonably inferable from the GMP Proposal or the supporting documents used to establish the GMP.

7.9 The GMP Proposal shall adopt and incorporate all of the terms and conditions of this Agreement and all attachments to this Agreement. Any proposed deviation from the terms and conditions of this Agreement must be clearly and conspicuously identified to Owner in writing and specifically accepted in writing by Owner. In the event of a conflict between any term of the GMP Proposal that was not clearly and conspicuously identified and approved by Owner and the terms of this Agreement and its attachments, the terms of the Agreement and its attachments shall control.

7.10 Owner may accept or reject the Guaranteed Maximum Price Proposal or attempt to negotiate its terms with Contractor. Upon acceptance by Owner of the GMP Proposal in writing, both parties shall execute the GMP Proposal which shall become part of this Agreement. If Owner rejects the GMP Proposal or the parties are unable or unwilling to agree on a GMP, Owner may terminate this Agreement.

7.11 Following Owner's acceptance of the GMP Proposal, Contractor shall continue to monitor the development of the Construction Documents so that, when complete, the Construction Documents adequately incorporate and resolve all qualifications, assumptions, clarifications, exclusions and value engineering issues identified in the GMP Proposal. During the Construction Documents stage, Contractor and A/E shall jointly deliver a monthly written status report to Owner describing the progress on the incorporation of all qualifications, assumptions, clarifications, exclusions, value engineering issues and all other matters relevant to the establishment of the GMP into the Construction Documents.

7.12 Contractor shall be entitled to an equitable adjustment of the GMP if it is required to pay

or bear the burden of any new federal, state, or local tax, or any rate increase of an existing tax, except taxes on income, adopted through statute, court decision, written ruling, or regulation taking effect after acceptance of the GMP Proposal. This equitable adjustment does not apply to tax increases borne solely by Subcontractors.

7.13 The parties may agree to convert the GMP to a lump sum contract amount at any time after Contractor has received bids or proposals from trade Contractors or Subcontractors for the performance of all major elements of the Project. In proposing a lump sum amount, Contractor shall consider the buyout savings, any unused contingency amounts and the trade package contracts that have not been finalized. In preparing a lump sum conversion proposal, Contractor must provide the following information:

- 7.13.1 The stage of completion of the Project;
 - 7.13.2 The trade packages that have been completely bought out;
 - 7.13.3 The trade packages remaining that have not been bought out;
 - 7.13.4 A complete line item breakdown of the calculations used to establish a lump sum amount based on the GMP Schedule of Values;
 - 7.13.5 An accounting of all savings amounts that are to be returned to Owner as part of the lump sum calculation; and
 - 7.13.6 Any other Project information requested by Owner.
- 7.14 Contractor shall document the actual Cost of the Project at buyout as compared to the Guaranteed Maximum Price Proposal and shall report this information to Owner monthly and with Contractor's recommendation for selection of a bid/proposal for each subcontracting package.
- 7.15 Notwithstanding anything to the contrary herein, Contractor shall have no liability for delay or liquidated damages if the parties are unable to reach an agreement on the GMP.

ARTICLE 8 CONSTRUCTION PHASE SERVICES

The Construction Phase shall be deemed to commence upon the date specified in a written Notice to Proceed issued by Owner after approval of the Guaranteed Maximum Price Proposal and shall continue until Final Completion of all Work. Pre-Construction Phase Services may overlap Construction Phase Services. Contractor shall not incur any Subcontractor costs for construction of the Project prior to issuance by Owner of written authorization to commence such Work. Contractor shall perform the following Construction Phase Services:

- 8.1 Construct the Work in strict accordance with this Agreement and as required by the UGSC, Special Conditions and Owner's Specifications within the time required by the Work Progress Schedule approved by Owner.
- 8.2 Organize and maintain a competent, full-time staff at the Project site with clearly defined lines of authority and communication as necessary to coordinate construction activities, monitor and direct progress of the Work, and further the goals of the Project Team.
- 8.3 Designate in writing a representative who is responsible for the day-to-day management of the Construction Phase Services. The designated representative shall be Owner's primary

contact during the Construction Phase and shall be available as required for the benefit of the Project and Owner. The designated representative shall be authorized to act on behalf of and bind Contractor in all matters related to Construction Phase Services including, but not limited to, execution of Change Orders and Applications for Payment.

8.4 Attend regularly scheduled Project progress meetings and fully advise the Project Team of the Project status including schedule, costs, quality and changes.

8.5 In addition to attending regularly scheduled Project progress meetings, Contractor shall schedule, direct and attend interim progress meetings (i.e., commissioning meetings, coordination meetings, pre-installation meetings) with other members of the Project Team as required to maintain Project progress. Contractor shall record and distribute the minutes of each meeting to each Project Team member. The minutes shall identify critical activities that require action and the dates by which each activity must be completed.

8.6 Coordinate delivery and installation of Owner-procured material and equipment.

8.7 In accordance with Owner's UGSC, provide and pay for all labor, materials, equipment, tools, construction equipment and machinery, transportation, and all other facilities and services necessary for the proper execution and completion of the Work in strict accordance with the requirements of the Construction Documents.

8.8 Obtain building permits and special permits for permanent improvements as required by law or the Construction Documents. Assist Owner or A/E in obtaining all approvals required from authorities having jurisdiction over the Project.

8.9 Coordinate, monitor and inspect the work of Subcontractors to ensure conformance with the Construction Documents.

8.10 Be responsible for all construction means, methods, techniques, sequences and procedures, and for coordinating all portions of the Work. Contractor shall keep Owner informed of the progress and quality of the Work.

8.11 Contractor shall promptly correct any defective Work at Contractor's sole expense, unless Owner specifically agrees to accept the Work in writing.

8.12 Warrant that the materials and equipment provided for the Project will be of good quality and new unless otherwise required or permitted by the Construction Documents; that the construction will be free from faults and defects; and that the construction will conform with the requirements of the Construction Documents. Contractor shall be responsible for correcting all items that do not comply with the Construction Documents at its sole expense without cost to Owner.

8.13 In accordance with the UGSC's provisions regarding record documents and Owner's Specifications, Contractor shall maintain and deliver the required documents that describe changes or deviations from the Construction Documents that occurred during construction and that reflect the actual "Record Drawings" of the completed Work.

ARTICLE 9

CONSTRUCTION PHASE FEE

Contractor's Construction Phase Fee is the maximum amount payable to Contractor for any cost or profit expectation incurred in the performance of the Work that is not specifically identified as being eligible for reimbursement by Owner elsewhere in this Agreement. References in the UGSC to Contractor's "overhead" and "profit" mean Contractor's Construction Phase Fee. The Construction Phase Fee includes, but is not limited to, the following items:

9.1 All profit, profit expectations and costs associated with profit sharing plans such as personnel bonuses, incentives, and rewards; company stock options; or any other like expenses of Contractor.

9.2 Salaries of Contractor's officers, project manager(s), estimators, schedulers and all other employees not stationed at the Project site and performing services directly related to the Project.

9.3 Any and all overhead, labor or general expenses of any kind unless specifically allowed under General Conditions. These costs include, but are limited to: costs for the purchase, lease, rental of or allowance for vehicles and their maintenance, radios/communication equipment, jobsite computers, software and other costs associated with the use of software programs, copiers and other business equipment, and specialized telephone systems, including cellular/digital phones, smartphones and pdas; trade or professional association dues; cost for hiring and/or relocation of any of Contractor's personnel; and travel, per diem and subsistence expense of Contractor, its officers or employees except as specifically allowed under the General Conditions. See Exhibit D for reimbursable General Conditions Cost versus non-reimbursable General Conditions Cost.

9.4 Any financial costs incurred by Contractor including the cost of capital or interest on capital, regardless of whether it is related to the Project, and costs associated with construction warranty reserves.

9.5 Any legal, accounting, professional or other similar costs incurred by Contractor, including costs incurred in connection with the prosecution or defense any dispute, mediation, arbitration, litigation or other such proceeding related to or arising from the Project.

9.6 Any Federal and/or State income and franchise taxes paid by Contractor. Any fines, penalties, sanctions or other levies assessed by any governmental body against Contractor.

9.7 Any cost arising out of a breach of this Agreement or the fault, failure or negligence of Contractor, its Subcontractors, or any person or entity for whom they may be liable. These costs include, without limitation: costs to remedy defective, rejected, or nonconforming work, materials or equipment; costs due to failure to coordinate the Work or meet WPS milestones; costs arising from Contractor's contractual indemnification obligations; liquidated or actual damages imposed by Owner for failure to complete the Work within the Contract Time; costs due to the bankruptcy or insolvency of any Subcontractor; and damage or losses to persons or property.

9.8 The cost of any and all insurance deductibles payable by Contractor and costs due to the

failure of Contractor or any Subcontractor to procure and maintain insurance as and to the extent required by this Agreement.

9.9 Any and all costs that would cause the Guaranteed Maximum Price to be exceeded.

9.10 Any and all costs not specifically identified as an element of the Direct Construction Cost.

ARTICLE 10 PAYMENTS

10.1 General Requirements

10.1.1 Each Schedule of Values submitted with an Application for Payment shall include the originally established value for each work classification line item or subcontract and shall identify any revisions to the costs or cost estimates for each work classification or subcontract. The format and tracking method of the original Schedule of Values and of all updates shall be subject to approval by Owner. At all times, the estimated cost of performing the uncompleted and unpaid portion of the Work, including Contractor's overhead and profit, shall not exceed the unpaid balance of the GMP less the retainage held by Owner on Work previously completed.

10.1.2 Expenses of transportation and overnight living expenses in connection with Owner approved out-of-state travel shall be identified separately in each Application for Payment. All travel must be approved in writing and in advance by Owner to be eligible for payment.

10.1.3 Expenses specifically excluded from reimbursement include telephone charges, FAX services, alcoholic beverages, laundry service, valet service, entertainment expenses and any non-Project related items. Tips are included in the per diem rates.

10.1.4 Retainage, as specified in the UGSC Paragraph 10.3.2 will be withheld from the entire amount approved in an Application for Payment including the Cost of the Work, General Conditions, and Contractor's Construction Phase Fee. Retainage will not be withheld from payments for Pre-Construction Phase Services.

10.1.5 Owner is an agency of the State of Texas and materials and services utilized in the construction of the Project may be exempted from state and local taxes. Contractor is responsible for taking full advantage of all tax exemptions applicable to the Project. Owner will deduct from the Applications for Payment and from the Request for Final Payment any taxes paid for materials or services that were entitled to tax exemption.

10.1.6 This Agreement is subject to the assessment of liquidated damages against Contractor as set forth in Exhibit "A" attached to this Agreement. Amounts assessed as liquidated damages, and other amounts to which Owner is entitled by way of setoff or recovery, may be deducted from any moneys due Contractor.

10.1.7 Owner shall have the right to withhold from payments due Contractor such sums as are necessary to protect Owner against any loss or damage which may result from

negligence by Contractor or any Subcontractor or failure of Contractor or any Subcontractor to perform their obligations under this Agreement.

10.1.8 Notwithstanding any other contractual provision to the contrary, Owner shall not be obligated to make any payment to Contractor under any of the following circumstances:

10.1.8.1 Contractor persistently fails to perform the Work in accordance with the Contract Documents or is otherwise in material breach or default under this Agreement;

10.1.8.2 The payment request includes services that are not performed in accordance with the Construction Documents; provided, however, Owner shall pay for those services performed in accordance with the Construction Documents;

10.1.8.3 The payment request has insufficient documentation to support the amount of payment requested for Project costs; provided, however, Owner shall pay for allowable Project costs for which there is sufficient documentation;

10.1.8.4 Contractor is in violation of the Prevailing Wage requirements or has failed to make payments promptly to Subcontractors or other third parties used in connection with any services or materials for which Owner has made payment to Contractor;

10.1.8.5 If Owner, in its good faith judgment, determines that the unpaid balance of the GMP, less retainage, is not sufficient to complete the Work in accordance with the Construction Documents;

10.1.8.6 Contractor has failed to complete the Work in accordance with the Work Progress Schedule requirements or if Owner, in its good faith judgment, determines that the remaining Work will not be completed within the agreed timeframe;

10.1.8.7 Contractor is insolvent, makes a general assignment for the benefit of its creditors or otherwise seeks protection under the laws and regulations of the bankruptcy courts; or

10.1.8.8 Contractor fails to obtain, maintain or renew insurance coverage as required by this Agreement.

10.1.8.9 Contractor fails to comply with conditions set forth in the HUB Subcontracting Plan, including but not limited to the submission of the HSP - Prime Contractor Progress Assessment Report with each monthly invoice.

10.1.9 No partial payment made by Owner shall constitute, or be construed to constitute, final acceptance or approval of the work to which the partial payment relates or of the documentation provided in support of the partial payment. No partial payment made by Owner shall constitute, or be construed to constitute, a release of Contractor from any of its obligations or liabilities with respect to the Project.

10.1.10 Owner shall have the right to verify and audit the details of Contractor's billings, certificates, accountings, cost data, and statements, either before or after payment, by (1) inspecting the books and records of Contractor during normal business hours; (2) examining any reports with respect to the Project; (3) interviewing Contractor's employees; (4) visiting the Project site; and (5) any other reasonable action. Contractor's records shall be kept on the basis of generally accepted accounting principles in accordance with cost accounting standards issued by the Federal Office of Management and Budget Cost Accounting Standards Board and organized by each Application for Payment period.

10.1.11 All payments to Contractor for Pre-Construction Phase Services and Construction Phase Services shall be by electronic direct deposit. Contractor is required to complete and submit to Owner a Vendor Direct Deposit Authorization prior to first payment request. Form can be accessed at www.window.state.tx.us/taxinfo/taxforms/74-176.pdf.

10.1.12 All payments to Contractor for Pre-Construction Phase Services and Construction Phase Services shall be accompanied by a HSP-Prime Contractor Progress Assessment Report in the form located at <http://window.state.tx.us/procurement/prog/hub/hub-forms/ProgressAssessmentReportForm.xls>

10.2 Pre-Construction Phase Payments

10.2.1 Payment for Pre-Construction Phase Services shall be made in accordance with the following schedule and upon approval by Owner:

Schematic Design Stage	15%
Design Development Stage	20%
GMP Development Stage	20%
Construction Documents Stage	40%
Subcontractor Bid/Proposal Stage	5%

10.2.2 Reimbursable Services are a part of the Pre-Construction Phase Services. These include actual not-to-exceed expenditures made by the Contractor incurred solely and directly in connection with Contractor's performance of its services hereunder for the following expenses:

- 10.2.2.1 Cost of printing.
- 10.2.2.2 Cost of geotechnical investigations.
- 10.2.2.3 Other items agreed to by the Owner in writing.

10.2.3 Expenses not allowed for reimbursement include the cost of telephone charges, cell phone and PDA charges, FAX service, alcoholic beverages, laundry, car washes, valet service, entertainment and any non-project related items.

10.2.4 Owner shall pay a mark-up not to exceed ten percent (10%) on those reimbursable identified in 10.2.2.1 through 10.2.2.2 above. A mark-up shall not be paid on lodging,

meals or travel expenses. Contractor shall submit receipts for all reimbursable services along with any reimbursement request.

10.2.5 Owner must authorize all Reimbursable Services prior to the performance of the reimbursable item. Charges for Reimbursable Services must not exceed the established category amounts unless authorization, in writing, is obtained from the Owner.

10.2.6 All payment requests for Pre-Construction Phase Services shall be submitted through e-Builder®.

10.3 Construction Phase Payments

10.3.1 Payments for Construction Phase Services shall be made as provided for in the UGSC and Owner's Specifications. All payment requests shall be submitted through e-Builder® with a Schedule of Values and include all required attachments. Payment for approved Change Orders shall be made as part of Contractor's Application for Payment. Failure to submit a Prime Contractor Progress Assessment Report form with each Application for Payment will cause rejection of the application by Owner and its return to Contractor.

10.3.1.1 Contractor's Construction Phase Fee shall be shown as a separate line item on the Schedule of Values. Payment of Contractor's Construction Phase Fee shall be made with each Application for Payment in the same proportion as the percentage completion of the Cost of the Work of the Project.

10.3.1.2 For General Conditions Costs, Contractor's Application for Payment shall be submitted on a Schedule of Values approved by the Owner and include complete copies of all receipts, invoices with check vouchers or other evidence of payment, payrolls, and any and all other evidence which Owner or its designated representatives shall deem necessary to support the amount requested. This information is subject to audit and payment for these costs is dependent on Owner's receipt of accurate and complete records of all transactions. Owner may reduce the amount requested for General Conditions Costs in any Application for Payment if Owner, in its good faith judgment, determines that the unpaid balance of the General Conditions line item in the Schedule of Values is not sufficient to fund necessary General Conditions Costs for the remainder of the Project.

10.3.1.3 Pay requests for Subcontractor work included in an Application for Payment shall not exceed the percentage of Work allocated to that Subcontractor for each respective Schedule of Values work classification which has been actually completed and shall not exceed the total value of the subcontract amount.

10.3.1.4 Contractor's Request for Final Payment shall not be made until all Work is completed and all requirements of the Contract Documents have been satisfied including, without limitation: delivery to Owner of a complete release of all liens and claims arising out of the Work; written consent of the surety to release of final payment; and an affidavit that, to the best of Contractor's information, knowledge and belief, the release includes and covers all materials and services over which Contractor has control and for which a lien could be filed and that all known debts

and claims arising from the Project have been satisfied. Alternatively, Contractor may, at its sole expense, furnish a bond satisfactory to Owner to indemnify Owner against any lien arising out of the Work. If any lien is asserted against Owner after all payments are made, Contractor shall reimburse Owner for all damages and costs Owner may incur in discharging such lien, including all court costs and reasonable attorneys' fees, and Owner shall retain all other remedies available to it at law and in equity.

10.3.1.5 Owner shall have no obligation to make Final Payment until a complete and final accounting of all the Direct Construction Cost has been submitted by Contractor and has been audited and verified by Owner or Owner's representatives.

10.3.1.6 Nothing contained herein shall require Owner to pay Contractor an aggregate amount for Construction Phase Services that exceeds the Guaranteed Maximum Price or to make any payment if, in Owner's belief, the cost to complete the Work would exceed the Guaranteed Maximum Price less previous payments to Contractor. The total amount of all Construction Phase payments to Contractor shall not exceed the actual verified Direct Construction Cost for the Project plus Contractor's Construction Phase Fee.

10.3.1.7 The acceptance by Contractor or Contractor's successors of Final Payment under this Agreement, shall constitute a full and complete release of Owner from any and all claims, demands, and causes of action whatsoever that Contractor, its Subcontractors, suppliers and consultants or any of their successors or assigns have or may have against Owner arising from the Project or any provision(s) of this Agreement except for those previously made in writing and identified by Contractor as unsettled at the time of the Request for Final Payment.

ARTICLE 11 DIRECT CONSTRUCTION COST

Direct Construction Cost means the sum of the amounts that Contractor actually and necessarily incurs constructing the Project in strict compliance with the Construction Documents. Direct Construction Cost includes only the cost categories set forth in this Article and does not include the Pre-Construction Phase Fees or the Construction Phase Fees unless specifically noted. References in the UGSC to adjustments in "cost" or "costs" mean the Direct Construction Cost.

General Conditions Costs

11.1 Contractor is entitled to receive payment for the actual cost of the allowable General Conditions items incurred after receipt of a Notice to Proceed with Construction from Owner through Substantial Completion of the Project, plus 30 calendar days. Contractor is not entitled to reimbursement for General Conditions Costs incurred before receipt of the Notice to Proceed. General Conditions Costs incurred after Substantial Completion, plus 60 calendar days, must be approved in advance by Owner.

Allowable General Conditions items are identified below and in Exhibit "D" attached to this Agreement. These items shall be included in the General Conditions Cost amount shown as a line item in the Guaranteed Maximum Price Proposal and as detailed on the Schedule of Values. Items not specifically included below or in Exhibit "D" will not be allowed as General Condition

Costs.

- 11.1.1 Personnel Costs. The actual Worker Wage Rate for Contractor's hourly employees and the Monthly Salary Rate of Contractor's salaried personnel who are identified to Owner in advance and in writing but only for the time actually stationed at the Project site with Owner's prior consent. The Project Manager's Monthly Salary Rate may be included in the General Conditions Costs only when the Project Manager is directly located on and managing the Project. All personnel costs are subject to audit to determine the actual cost of the wages, salaries and allowable employer contributions incurred by the Contractor for services performed for the Project.
- 11.1.2 Costs of long-distance telephone calls from the job-site, telegrams, postage, package delivery and courier service, hardwired internet and telephone service located on the job-site, and reasonable expenses of Contractor's jobsite office if incurred at the Project site and directly and solely in support of the Work.
- 11.1.3 Costs of materials, supplies, temporary facilities, equipment and hand tools (except those customarily owned by construction workers), supplied to the Project site by Contractor, if such items are fully consumed in the construction of the Work and are included in the list of allowable General Condition line items. Cost for used items shall be based on fair market value and may include transportation, installation, and minor maintenance costs, and removal costs. If an item is not fully consumed in the construction of the Work, its cost shall be based on actual cost of the item less its fair market salvage value.
- 11.1.4 Rental charges for temporary facilities, equipment, and hand tools (except those customarily owned by construction workers), supplied to the Project site by Contractor, provided they are included in the list of allowable General Condition line items and Owner has approved the rentals and the rental rates in advance and in writing. Rental rates may include transportation, installation, and minor maintenance costs, and removal costs. For tools, machinery or construction equipment rented directly from Contractor, the rental rate, including freight and delivery costs and all operating expenses except labor, shall be approved in advance by Owner and shall be in accordance with the "Rental Rate Blue Book for Construction Equipment" published by Penton Business Media dba Equipment Watch, latest edition, but no higher than the prevailing competitive rates for rental of similar equipment in the Project vicinity.
- 11.1.5 The aggregate rental cost of any item charged to Owner shall not exceed ninety percent (90%) of the purchase price and maintenance cost of the item. If the anticipated aggregate rental cost for an item of equipment exceeds ninety percent (90%) of the purchase and maintenance price, Contractor shall purchase the equipment and turn it over to Owner upon Final Completion of the Work or, at Owner's option, credit Owner with the fair market resale value of the item.
- 11.1.6 Permit and inspection fees that are not subject to exemption.
- 11.1.7 Premiums for insurance and bonds to the extent directly attributable to this

Project.

- 11.1.8 Governmental sales and use taxes directly attributable to the General Conditions Items that are not subject to exemption. Taxes paid on materials or services that were entitled to tax exemption will not be reimbursed by Owner as Direct Construction Costs.

11.2 Cost of the Work

Contractor is entitled to receive payment for the actual cost of the allowable Cost of the Work items incurred after receipt of Owner's written authorization to commence the Construction Phase Work through Final Completion of the Project. Contractor is not entitled to reimbursement for Cost of the Work costs incurred before receipt of Owner's written authorization. Cost of the Work includes the following:

11.2.1 Costs of materials and equipment purchased directly by Contractor and incorporated into or consumed in the performance of the Work, including transportation charges, and a reasonable and customary allowance for waste and spoilage. Payment for stored materials is subject to the UGSC.

11.2.2 Costs of site debris removal and disposal in accordance with all applicable laws and regulations if not otherwise specifically provided for under the General Conditions Costs.

11.2.3 Payments made to Subcontractors and their vendors or suppliers by Contractor for the subcontract work in accordance with the Construction Documents and the requirements of the subcontracts with the Subcontractors, vendors or suppliers.

11.2.4 Payments earned by Contractor for self-performed subcontract work, other than General Conditions work, in accordance with the Construction Documents and the terms of this Agreement and approved by Owner.

11.2.5 Testing fees borne by Contractor pursuant to the UGSC.

11.2.6 Intellectual property royalties and licenses for items specifically required by the Construction Documents which are, or will be, incorporated into the Work

11.3 Contractor's Contingency

11.3.1 The Guaranteed Maximum Price Proposal shall include a Contractor's Contingency amount to be used to fund increases in the Direct Construction Cost of the Project identified through the refinement, development and completion of the Construction Documents or procurement of the Work.

11.3.2 Any re-allocation of funds from Contractor's Contingency to cover increases in the Direct Construction Cost must be approved by Owner in advance and in writing, such approval not to be unreasonably withheld. In written requests to use Contractor's Contingency, Contractor shall provide detailed documentation of the scope of work affected and the bases for any increases in costs.

11.3.3 Contractor's Contingency is specifically not to be used for Contractor rework, or cost increases caused by lack of coordination or communication with A/E or trade Subcontractors.

11.3.4 As the Construction Documents are finalized and the buyout of the Work progresses, Contractor's Contingency amount shall be reduced by mutual agreement of Owner and Contractor. Any balance in Contractor's Contingency fund remaining at the end of the Project shall be returned to Owner as savings.

ARTICLE 12

CONTRACT SAVINGS, REBATES & REFUNDS

12.1 If the allowable amount of the General Conditions Costs, Cost of the Work, and Contractor's Contingency is less than the amount established for each of those categories in the originally approved Guaranteed Maximum Price Proposal, the entire difference shall be credited to Owner as savings, and the final Contract Sum shall be adjusted accordingly. When buyout of the Project is at least 85% complete, Owner may recognize any savings achieved to that point by issuing a deductive change order for the saved amount.

12.2 Owner shall be entitled to deduct amounts for the following items from any Application for Payment or from the Request for Final Payment submitted by Contractor:

12.2.1 The fair market value of all tools, surplus materials, construction equipment, and temporary structures that were charged to the Work (other than rental items) but were not consumed during construction or retained by Owner. Upon completion of the Work or when no longer required, Contractor shall either credit Owner for the fair market value (as approved by Owner) for all surplus tools, construction equipment and materials retained by Contractor or, at Owner's option, use commercially reasonable efforts to sell the surplus tools, construction equipment and materials for the highest available price and credit the proceeds to Owner's account.

12.2.2 Discounts earned by Contractor through advance or prompt payments funded by Owner. Contractor shall obtain all possible trade and time discounts on bills for material furnished, and shall pay bills within the highest discount periods. Likewise, late payment fees on any vendor invoice shall not be charged to the Owner. Contractor shall purchase materials for the Project in quantities that provide the most advantageous prices to Owner.

12.2.3 Rebates, discounts, or commissions obtained by Contractor from material suppliers or Subcontractors, together with all other refunds, returns, or credits received for materials, bond premiums, insurance and sales taxes.

12.2.4 Deposits made by Owner and forfeited due to the fault of Contractor.

12.2.5 Balances remaining on Contractor's Contingency or any other identified contract savings. Owner shall be entitled to recover any net savings realized between the GMP and the buyout price for subcontracting work once the buyout is complete. During the buyout Contractor may use savings from one procurement effort to offset overages in other procurement efforts, so long as the total Cost of the Work proposed in the GMP does not

increase.

12.3 Owner shall be entitled to recognize and recover 100% of any savings identified by cost review or audit at any time, before or after Final Payment.

ARTICLE 13 OWNERSHIP AND USE OF DOCUMENTS

13.1 Drawings, specifications and other documents prepared by A/E or its consultants, or consultants retained by Owner for the Project that describe the Work to be executed by Contractor are instruments of service and shall remain the property of their authors whether the Project for which they are made is constructed or not. Contractor shall be permitted to retain one record set of the Construction Documents. All other copies of the Construction Documents shall be returned to their respective authors or suitably accounted for. Contractor and its Subcontractors are authorized to reproduce and use portions of the Construction Documents as necessary and appropriate for the execution of the Work. Contractor and its Subcontractors shall not use the Construction Documents on any other projects.

13.2 Submission or distribution of the Construction Documents to meet official regulatory requirements or for other purposes in connection with the Project shall not diminish A/E's or other author's rights.

ARTICLE 14 TIME

14.1 ***TIME LIMITS STATED ARE OF THE ESSENCE OF THIS AGREEMENT AND THE OTHER CONTRACT DOCUMENTS.***

14.2 Unless otherwise approved, Owner and Contractor shall perform their respective obligations under this Agreement as expeditiously as is consistent with reasonable skill and care and the orderly progress of the Work.

14.3 Prior to commencement of the Construction Phase Services and concurrently with submission of the Guaranteed Maximum Price Proposal, Contractor shall submit an up-to-date WPS for the performance of Construction Phase Services as specified. The WPS shall include reasonable periods of time for Owner's and A/E's review and approval of shop drawings and submissions and for the approval of other authorities having jurisdiction over the Project.

14.4 Contractor shall achieve Substantial Completion of the Work on or before the date agreed to in the GMP Proposal, subject to time extensions granted by Change Order.

14.5 THE TIMES SET FORTH FOR COMPLETION OF THE WORK IN THE NOTICE TO PROCEED AND THE GMP PROPOSAL ARE ESSENTIAL ELEMENTS OF THIS AGREEMENT.

14.6 The Construction Phase shall be deemed to commence on the date specified in a written Notice to Proceed issued by Owner after approval of the Guaranteed Maximum Price Proposal.

14.7 Fast Track/Multiple Completion Times. Owner may elect, at its option, to stage or "fast-

track” portions of the Work. In such event Owner, may issue a separate written Notice to Proceed or written Change Order for each such stage. Each such stage, at Owner’s sole option, may have a separate substantial completion date and a separate liquidated damages amount, in accordance with Exhibit “A”. If Owner elects to “fast-track” or develop the Project in multiple stages, Contractor shall organize and perform its services as appropriate to each stage. Each stage of the Project may have a unique schedule for completion and a specific AACC, at Owner’s discretion.

ARTICLE 15

PROJECT TERMINATION AND SUSPENSION

15.1 This Agreement may be terminated during the Pre-Construction Phase by either party upon fifteen (15) days written notice should the other party fail substantially to perform in accordance with its terms through no fault of the party initiating the termination and the breach is not cured or a plan to cure the breach acceptable to the non-breaching party is not established within the fifteen (15) day period.

15.2 This Agreement may be terminated by Owner during the Pre-Construction Phase upon at least three (3) business days written notice to Contractor in the event that the Project is to be temporarily or permanently abandoned.

15.3 This Agreement may be terminated by Owner and/or CMAR at the GMP Proposal stage upon at least three (3) business days written notice to Contractor in the event that the parties are unable or unwilling to agree on a GMP Proposal.

15.4 In the event of termination that is not the fault of Contractor, Contractor shall be entitled to compensation for all services performed to the termination date provided Contractor has delivered to Owner such statements, accounts, all reports, documents and other materials as required by Owner together with all reports, documents and other materials prepared by Contractor prior to termination. Upon such payment, Owner shall have no further obligation to Contractor.

15.5 Termination of this Agreement shall not relieve Contractor or any of its employees, Subcontractors, or consultants of liability for violations of this Agreement or for any act or omission, or negligence, of Contractor related to the Project. In the event of a termination, Contractor expressly acknowledges the right of Owner to employ a substitute contractor to complete the services under this Agreement.

15.6 In the event of termination, Owner shall have the right to use any documents or other materials prepared for the Project and the ideas and designs they contain for the completion of the services described by this Agreement, for completion of the Project, or for any other purpose.

15.7 If the Project is suspended or abandoned in whole or in part for more than ninety (90) consecutive days during the Pre-Construction Phase, Contractor shall be compensated for all services performed prior to receipt of written notice from Owner of such suspension or abandonment. If the Project is resumed after being suspended for more than ninety (90) consecutive days, Contractor’s compensation for Pre-Construction Services shall be equitably adjusted if such adjustment is warranted.

ARTICLE 16

PRE-EXISTING CONDITIONS & DESIGN ERRORS AND OMISSIONS

16.1 Contractor acknowledges that it has been provided unrestricted access to the existing improvements and conditions on the Project site and that it has thoroughly investigated those conditions. Contractor's investigation will be instrumental in preparing its Guaranteed Maximum Price Proposal for the Work. Contractor shall not make or be entitled to any claim for any adjustment to the Contract Time or the Contract Sum for Pre-Construction Phase Services or for Construction Phase Services arising from Project conditions that Contractor discovered or, in the exercise of reasonable care, should have discovered in Contractor's investigation.

16.2 Contractor acknowledges that as part of its Pre-Construction Phase Services it shall participate in the development and review of the Construction Documents. Contractor's participation in the design development process will be instrumental in preparing its Guaranteed Maximum Price Proposal for the Work. Before submitting its Guaranteed Maximum Price Proposal, the Contractor shall review the drawings, specifications and other Construction Documents and notify Owner of any errors, omissions or discrepancies in the documents of which it is aware. Contractor shall not make or be entitled to any claim for any adjustment to the Contract Time or the Contract Sum for errors or omissions in the Construction Documents that Contractor discovered or, in the exercise of reasonable care, should have discovered in Contractor's Pre-Construction Phase design review process that Contractor did not bring to the attention of Owner and A/E in a timely manner. Contractor's review is made in the capacity as a contractor and not as a design professional. It is not the Contractor's responsibility to ascertain that the drawings and specifications are in accordance with applicable laws, statutes, ordinances, building codes, rules and regulations, but Contractor will report any variances which should have reasonably been discovered.

ARTICLE 17

BONDS AND INSURANCE

17.1 Upon execution of this Agreement, Contractor shall provide a security bond on the form attached as Exhibit "F" in the amount of 5% of the AACC. The surety for a security bond shall meet the same requirements as set forth for payment and performance bonds.

17.2 Upon acceptance by Owner of a Guaranteed Maximum Price Proposal, Contractor shall provide performance and payment bonds on forms prescribed by Owner and in accordance with the requirements set forth in the UGSC. The penal sum of the payment and performance bonds shall be equal to the GMP. If construction is phased or staged with different Guaranteed Maximum Prices established at different times, the penal sum of the bonds shall be increased at the start of each stage or phase based on the cumulative total value of all Guaranteed Maximum Prices in effect.

17.3 Contractor shall not commence work under this Agreement until it has obtained all required insurance and until evidence of the required insurance has been reviewed and approved by Owner. Owner's review of the insurance shall not relieve nor decrease the liability of the Contractor. Prior to commencing any work under this Agreement, Contractor shall provide evidence of the following insurance coverages:

17.3.1 Pre-Construction Phase: Employer's Liability, Workers' Compensation,

Comprehensive General Liability and Comprehensive Automobile Liability in the amounts as set forth in the UGSC.

17.3.2 Construction Phase: In addition to the coverages required during the Pre-Construction Phase, Builder's Risk and Owner's Protective Liability in the amounts as set forth in the UGSC.

17.3.3 Prior to commencing any construction work, Contractor shall provide evidence of Builder's Risk coverage as set forth in the UGSC, which coverage shall remain in full force and effect throughout the term of the Work and shall be increased as necessary for each separate bid package, phase, change order, or stage of construction prior to the commencement of construction for that package, phase, or stage.

17.3.4 Contractor shall include required insurance information in trade packages and indicate on bid/proposal forms the insurance that bidders/proposers are to include in their base proposals.

17.3.5 Contractor shall include the The Texas A&M University System Board of Regents for and on behalf of The Texas A&M University System and Texas A&M University as additional insured on the Commercial General Liability policy, and the Worker's Compensation policy shall include a waiver of subrogation in favor of the Owner.

17.4 **Owner Controlled Insurance Program (OCIP);** The Owner may elect to implement an Owner Controlled Insurance Program (OCIP). Refer to the Project Insurance specification Section 00 73 16 for additional requirements. In addition, the Construction Manager **will be required to provide** the following additional insurance coverages:

17.4.1 **Pre-Construction Phase:** Provide Workers' Compensation, Comprehensive General Liability and Comprehensive Automobile Liability in the amounts as set forth in the Uniform General and Supplementary Conditions.

17.4.2 The Owner's OCIP does not provide coverages during the Pre-Construction Phase.

17.4.3 Construction **Phase:** Provide Automobile Liability as set forth in the Uniform General and Supplementary Conditions.

17.4.4 Construction Manager shall provide the required Pre-Construction Phase insurance for the Project and additional Construction Phase insurance coverages in coordination with the Project Insurance specification.

17.4.5 Construction Manager's GMP Proposal shall exclude the cost of premiums for insurance coverage provided through the OCIP. The GMP Proposal shall only include the cost of premiums of all other insurance required by the Contract Documents.

- 17.4.6 The cost of premiums for any additional insurance coverage desired by the Construction Manager in excess of that required by this Agreement, the Uniform General and Supplementary Conditions, or the Contract Documents shall be borne solely by the Construction Manager out of its fees and not included in the GMP Proposal as a Direct Construction Cost.
- 17.4.7 Construction Manager shall include required OCIP insurance information in trade packages and indicate on proposal forms the insurance that proposers are to include and exclude in their proposals.
- 17.4.8 During construction, Owner may audit the Construction Manager's and Subcontractors' labor hours and certified payroll reports to determine actual insurance costs.
- 17.4.9 Refer to the Owner's Project Insurance specification for a complete listing of the specific coverages that Construction Manager shall exclude from proposal and contract.
- 17.5 Contractor shall not cause or allow any of its required insurance to be canceled nor permit any insurance to lapse during the term of this Agreement. If Contractor fails to obtain, maintain or renew any insurance required by this Agreement, Owner may obtain insurance coverage directly and recover the cost of that insurance from Contractor or deduct such cost of insurance from Contractor's fee.
- 17.6 Owner reserves the right to review the insurance requirements set forth in this Article during the effective period of this Agreement and to make reasonable adjustments to the insurance coverages and their limits when deemed necessary and prudent by Owner based upon changes in statutory law, court decisions, or the claims history of the industry in general and the claims history of Contractor.
- 17.7 Owner shall be entitled, upon request, and without expense, to receive complete copies of the policies with all endorsements and may make any reasonable requests for deletion, or revision or modification of particular policy terms, conditions, limitations, or exclusions, except where policy provisions are established by law or regulation binding upon the parties or the underwriter of any of such policies. Damages caused by Contractor and not covered by insurance shall be paid by Contractor upon demand, or, to the extent of unpaid fees, shall be deducted by Owner from Contractor's fee.
- 17.8 The cost of premiums for any additional insurance coverage desired by Contractor in excess of that required by this Agreement, the UGSC or the other Contract Documents shall be borne solely by Contractor out of its fees and not included in the GMP Proposal as a Direct Construction Cost.
- 17.9 If the Guaranteed Maximum Price is increased by Change Orders by more than 5% the Contractor shall provide revised bonds and insurance that reflect the new project amount.

ARTICLE 18

DISPUTE RESOLUTION

18.1 The dispute resolution process provided in Chapter 2260, *Texas Government Code*, and the related rules adopted by the Texas Attorney General pursuant to Chapter 2260, shall be used by Owner and Contractor to attempt to resolve any claim for breach of contract made by Contractor that cannot be resolved in the ordinary course of business. Contractor shall submit written notice of a claim of breach of contract under this Chapter to the Chancellor of The Texas A&M University System, who shall examine Contractor's claim and any counterclaim and negotiate with Contractor in an effort to resolve the claim.

18.2 Neither the occurrence of an event giving rise to a breach of contract claim nor the pendency of a claim constitute grounds for the suspension of performance by Contractor, in whole or in part. Owner and Contractor agree that any periods set forth in this Agreement for notice and cure of defaults are not waived, delayed, or suspended by Chapter 2260 or this Paragraph 18.2.

18.3 It is agreed that such process is not invoked if Owner initiates the dispute by first bringing a claim against Contractor, except at Owner's sole option. If Owner makes a claim against Contractor and Contractor then makes a counterclaim against Owner as a claim under Chapter 2260 and in compliance therewith, the Owner's original claim against Contractor does not become a counterclaim and is not subject to the mandatory counterclaim provisions of Chapter 2260 of the *Texas Government Code*, except at the sole option of the Owner.

ARTICLE 19 INDEMNITY

19.1 SEE PARAGRAPH 3.3.10 OF THE UGSC FOR CONTRACTOR'S GENERAL INDEMNIFICATION OBLIGATIONS.

19.2 CONTRACTOR SHALL PROTECT AND INDEMNIFY OWNER FROM AND AGAINST ALL CLAIMS, DAMAGES, JUDGMENTS AND LOSSES ARISING FROM INFRINGEMENT OR ALLEGED INFRINGEMENT OF ANY UNITED STATES PATENT, OR COPYRIGHT THAT ARISE OUT OF ANY OF THE WORK PERFORMED BY CONTRACTOR OR THE USE BY CONTRACTOR, OR BY OWNER AT THE DIRECTION OF CONTRACTOR, OF ANY ARTICLE OR MATERIAL. UPON BECOMING AWARE OF A SUIT OR THREAT OF SUIT FOR PATENT OR COPYRIGHT INFRINGEMENT, OWNER SHALL PROMPTLY NOTIFY CONTRACTOR AND CONTRACTOR SHALL BE GIVEN FULL OPPORTUNITY TO NEGOTIATE A SETTLEMENT. CONTRACTOR DOES NOT WARRANT AGAINST INFRINGEMENT BY REASON OF OWNER'S OR A/E'S DESIGN OF ARTICLES OR THEIR USE IN COMBINATION WITH OTHER MATERIALS OR IN THE OPERATION OF ANY PROCESS. IN THE EVENT OF LITIGATION, OWNER AGREES TO COOPERATE REASONABLY WITH CONTRACTOR AND THE PARTIES SHALL BE ENTITLED, IN CONNECTION WITH ANY SUCH LITIGATION, TO BE REPRESENTED BY COUNSEL AT THEIR OWN EXPENSE.

19.3 The indemnities contained in this Agreement shall survive the termination of this Agreement for any reason whatsoever.

ARTICLE 20 SPECIAL WARRANTIES

20.1 Notwithstanding anything to the contrary contained in this Agreement, Owner and Contractor agree and acknowledge Owner is entering into this Agreement in reliance on

Contractor's represented expertise and ability to provide construction management services. Contractor agrees to use its best efforts, skill, judgment, and abilities to perform its obligations and to further the interests of Owner in accordance with Owner's requirements and procedures.

20.2 Contractor represents and agrees that it will perform its services in accordance with the usual and customary standards of Contractor's profession or business and in compliance with all applicable federal, state, and municipal, laws, regulations, codes, ordinances, or orders and with those of any other body having jurisdiction over the Project. Contractor agrees to bear the full cost of correcting Contractor's negligent or improper work and services, those of its consultants and Subcontractors, and any harm caused by the negligent or improper work or services.

20.3 Contractor's duties shall not be diminished by any approval by Owner nor shall Contractor be released from any liability by any approval by Owner, it being understood that Owner is ultimately relying upon Contractor's skill and knowledge in performing the services required hereunder.

20.4 Contractor represents and agrees that all persons connected with Contractor directly in charge of its services are duly registered and/or licensed under the laws, rules and regulations of any authority having jurisdiction over the Project if such registration and/or license is required.

20.5 Contractor represents and agrees to advise Owner of anything of any nature in any drawings, specifications, plans, sketches, instructions, information, requirements, procedures, and other data supplied to Contractor (by Owner or any other party) that is, in its opinion, unsuitable, improper, or inaccurate for the purposes for which the document or data is furnished.

20.6 Contractor represents and agrees to perform its services under this Agreement in an expeditious and economical manner consistent with good business practices and the interests of Owner.

20.7 Contractor represents and agrees that there are no obligations, commitments, or impediments of any kind that will limit or prevent performance of its obligations under this Agreement.

20.8 Contractor represents and agrees that the individual executing this Agreement on behalf of Contractor has been duly authorized to act for and to bind Contractor to its terms.

20.9 Except for the obligation of Owner to pay Contractor certain fees, costs, and expenses pursuant to the terms of this Agreement, Owner shall have no liability to Contractor or to anyone claiming through or under Contractor by reason of the execution or performance of this Agreement. Notwithstanding any obligation or liability of Owner to Contractor, no present or future affiliate of Owner or any agent, officer, director, employee, or regent of Owner, or of the members comprising The Texas A&M University System, or anyone claiming under Owner has or shall have any personal liability to Contractor or to anyone claiming through or under Contractor by reason of the execution or performance of this Agreement.

ARTICLE 21

CERTIFICATION OF NO ASBESTOS CONTAINING MATERIALS OR WORK

21.1 Contractor shall provide a certification statement, included with each materials submittal,

stating that no asbestos containing materials or work is included within the scope of the proposed submittal.

21.2 Contractor shall ensure that Texas Department of State Health Services licensed individuals, consultants or companies are used for any required asbestos work including asbestos inspection, asbestos abatement plans/specifications, asbestos abatement, asbestos project management and third-party asbestos monitoring.

21.3 Contractor shall provide at Substantial Completion, a certificate, or at Owner's election, a notarized affidavit to Owner and A/E stating that no asbestos containing materials or work was provided, installed, furnished or added to the Project.

21.4 Contractor shall take whatever measures it deems necessary to insure that all employees, suppliers, fabricators, materialmen, subcontractors, or their assigns, comply with this requirement.

21.5 A person is prohibited by law from installing Asbestos Containing Building Materials (ACBM) or ACBM replacement parts in a public building unless it is demonstrated that there is no alternative material or part (25 TAC §295.34(i)). All materials used on this Project shall be certified as non- ACBM. Contractor shall ensure compliance with the following acts from all of its Subcontractors and assigns:

21.5.1 Asbestos Hazard Emergency Response Act and the Regulations promulgated under the Act (AHERA—40 CFR 763, Subpart E);

21.5.2 National Emission Standards for Hazardous Air Pollutants (NESHAP—EPA 40 CFR 61, Subpart M, National Emission Standard for Asbestos);

21.5.3 Texas Asbestos Health Protection Rules (TAHPR—Tex. Admin. Code Title 25, Part 1, Ch. 295, Subchapter C, Asbestos Health Protection)

21.6 Every Subcontractor shall provide a notarized statement that no ACBM has been used, provided, or left on this Project.

21.7 Contractor shall obtain and review material data safety sheets (MSDS) for all building materials or replacement parts listed in ***but not limited to*** 25 TAC §295.34(j) to ensure that no ACBM is used in the Project. Contractor shall provide, in hard copy and electronic form, all necessary MSDS of all products used in the construction of the Project to the Owner, along with the certification or affidavit required in Section 21.3 above.

21.8 At Final Completion Contractor shall provide a certification statement (notarized if required by Owner) that no ACBM was used during construction of the Project.

ARTICLE 22

BUSINESS ETHICS EXPECTATION

22.01 During the course of pursuing contracts with Owner and while performing contract work in accordance with this agreement, Contractor agrees to maintain business ethics standards aimed

at avoiding any impropriety or conflict of interest which could be construed to have an adverse impact on the Owner's best interests.

22.02 Contractor shall take reasonable actions to prevent any actions or conditions which could result in a conflict with Owner's best interests. These obligations shall apply to the activities of Contractor's employees, agents, subconsultants, subconsultants' employees and other persons under their control.

Contractor's employees, agents, subconsultants (and their representatives) shall not make or offer, or cause to be made or offered, any cash payments, commissions, employment, gifts valued at \$50 dollars or more, entertainment, free travel, loans, free work, substantially discounted work, or any other considerations to Owner's representatives, employees or their relatives.

Contractor's employees, agents and subconsultants (and their relatives) shall not receive or accept any cash payments, commissions, employment, gifts valued at \$50 dollars or more, entertainment, free travel, loans, free work, or substantially discounted work or any other considerations from representatives of contractors, subcontractors, or material suppliers or any other individuals, organizations, or businesses receiving funds in connection with a Project.

22.03 Contractor agrees to notify Billy C. Hamilton, Executive Vice Chancellor and Chief Financial Officer for the Office of Facilities Planning & Construction within 48 hours of any instance where the Contractor becomes aware of a failure to comply with the provisions of this article.

22.04 Upon request by Owner, Contractor agrees to provide a certified Management Representation Letter executed by a Contractor representative selected by Owner in a form agreeable to Owner stating that the representative is not aware of any situations violating the business ethics expectations outlined in this Agreement or any similar potential conflict of interest situations.

22.05 Contractor agrees to include provisions similar to this Article in all contracts with subconsultants receiving more than \$25,000 in funds in connection with a Project.

ARTICLE 23

MISCELLANEOUS PROVISIONS

23.1 Assignment. This Agreement is a personal service contract for the services of Contractor, and Contractor's interest in this Agreement, its duties and/or the fees due to Contractor may not be assigned or delegated to a third party.

23.2 Records Requirements. Records of expenses pertaining to Additional Services and services performed on the basis of a Worker Wage Rate or Monthly Salary Rate shall be kept on the basis of generally accepted accounting principles and in accordance with cost accounting standards promulgated by the Federal Office of Management and Budget Cost Accounting Standards Board and shall be available for audit by Owner or Owner's authorized representative on reasonable notice.

23.3 Child Support Certification. A child support obligor who is more than 30 days delinquent

in paying child support and a business entity in which obligor is a sole proprietor, partner, shareholder, or Owner with an Ownership interest of at least 25 percent is not eligible to receive payments from state funds under a contract to provide property, materials, or services until all arrearages have been paid or the obligor is in compliance with a written repayment agreement or court order as to any existing delinquency. The Family Code requires the following statement: "Under Section 231.006, Family Code, the vendor or applicant certifies that the individual or business entity named in this contract, bid, or application is not ineligible to receive the specified grant, loan, or payment and acknowledges that this contract may be terminated and payment may be withheld if this certification is inaccurate."

23.4 Eligibility Certification. A state agency may not accept a bid or award a contract that includes proposed financial participation by a person who received compensation from the agency to participate in preparing the specifications or request for proposals on which the bid or contract is based. The Government Code requires the following statement: "Under Section 2155.004, Government Code, the vendor certifies that the individual or business entity named in this bid or contract is not ineligible to receive the specified contract and acknowledges that this contract may be terminated and payment withheld if this certification is inaccurate."

23.5 Franchise Tax Certification. If Contractor is a taxable entity subject to the Texas Franchise Tax (Chapter 171, *Texas Tax Code*), then Contractor certifies that it is not currently delinquent in the payment of any franchise taxes or that Contractor is exempt from the payment of franchise taxes.

23.6 Payment of Debt or Delinquency to the State. Pursuant to Section 2252.903, *Texas Government Code*, Contractor agrees that any payments owing to Contractor under this Agreement may be applied directly toward any debt or delinquency that Contractor owes the State of Texas or any agency of the State of Texas regardless of when it arises, until such debt or delinquency is paid in full. "Debt or delinquency" means a debt, tax delinquency, student loan delinquency, or child support delinquency that results in a payment law prohibiting the comptroller from issuing a warrant or initiating an electronic funds transfer.

23.7 Entire Agreement; Modifications. This Agreement supersedes all prior agreements, written or oral, between Contractor and Owner and shall constitute the entire agreement and understanding between the parties with respect to the Project. This Agreement and each of its provisions shall be binding upon the parties and may not be waived, modified, amended or altered except by a writing signed by Contractor and Owner.

23.8 Captions. The captions of paragraphs in this Agreement are for convenience only and shall not be considered or referred to in resolving questions of interpretation or construction.

23.9 Governing Law and Venue. This Agreement is construed under and in accordance with the laws of the State of Texas, and is performable in the country in which the Project is located; however, mandatory venue for all legal proceedings against Owner is to be in the county in which the primary office of the chief executive officer is located.

23.10 Waivers. No delay or omission by either party in exercising any right or power arising from non-compliance or failure of performance by the other party with any of the provisions of this Agreement shall impair or constitute a waiver of any such right or power. A waiver by either party of any covenant or condition of this Agreement shall not be construed as a waiver of

any subsequent breach of that or of any other covenant or condition of this Agreement.

23.11 Binding Effect. This Agreement shall be binding upon and inure to the benefit of the parties and their respective permitted assigns and successors.

23.12 Records Availability and Retention. Records of Contractor's costs, reimbursable expenses pertaining to the Project and payments shall be available to Owner or its authorized representative during business hours and shall be retained for four (4) years after final Payment or abandonment of the Project, unless Owner otherwise instructs Contractor in writing.

23.13 Severability. Should any term or provision of this Agreement be held invalid or unenforceable in any respect, the remaining terms and provisions shall not be affected and this Agreement shall be construed as if the invalid or unenforceable term or provision had never been included.

23.14 Illegal Dumping. Contractor shall ensure that it and all of its Subcontractors and assigns prevent illegal dumping of litter in accordance with Title 5, *Texas Health and Safety Code*, Chapter 365.

23.15 Notices. All notices, consents, approvals, demands, requests or other communications relied on by the parties shall be in writing. Written notice shall be deemed to have been given when delivered in person to the designated representative of Contractor or Owner for whom it is intended; or sent by U.S. Mail to the last known business address of the designated representative; or transmitted by fax machine to the last known business fax number of the designated representative. Mail notices are deemed effective upon receipt or on the third business day after the date of mailing, whichever is sooner. Fax notices are deemed effective the next business day after faxing. Such notices of claims or disputes or other legal notices required by this Agreement shall be sent to the persons and at the locations set forth in Exhibit "A" attached to this Agreement.

23.16 Public Information. Contractor acknowledges that Owner is obligated to strictly comply with the Public Information Act, Chapter 552, *Texas Government Code*, in responding to any request for public information pertaining to this Agreement, as well as any other disclosure of information required by applicable Texas law.

Upon Owner's written request, Contractor will provide specified public information exchanged or created under this Agreement that is not otherwise excepted from disclosure under chapter 552, *Texas Government Code*, to Owner in a non-proprietary format acceptable to Owner. As used in this provision, "public information" has the meaning assigned Section 552.002, *Texas Government Code*, but only includes information to which Owner has a right of access.

Contractor acknowledges that Owner **may be** required to post a copy of the fully executed Agreement on its Internet website in compliance with Section 2261.253(a)(1), *Texas Government Code*.

23.17 Contractor Certification regarding Boycotting Israel. Contractor acknowledges that Owner is obligated to comply with Chapter 2270, *Texas Government Code*. By executing this Agreement, Contractor certifies it does not and will not, during the performance of this Agreement, boycott Israel. Contractor acknowledges this Agreement may be terminated if this

certification is inaccurate.

23.18 Contractor Certification regarding Business with Certain Countries and Organizations. Contractor acknowledges that Owner is obligated to comply with Subchapter F, Chapter 2252, *Texas Government Code*. By executing this Agreement, Contractor certifies it is not engaged in business with Iran, Sudan, or a foreign terrorist organization. Contractor acknowledges this Agreement may be terminated if this certification is inaccurate.

23.19 List of Exhibits

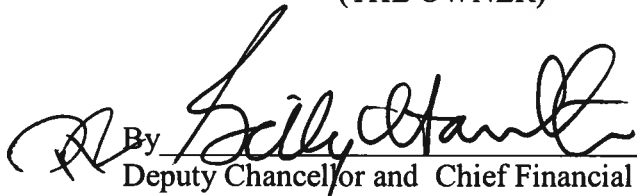
The following exhibits are fully incorporated into this Agreement by reference:

- Ex. A Fees, Costs and Other Contract Variables
- Ex. B Uniform General and Supplementary Conditions
- Ex. C Special Conditions, Wage Rates and Owner's Specifications
- Ex. D Allowable General Conditions Line Items
- Ex. E Guaranteed Maximum Price Proposal Form
- Ex. F Security Bond
- Ex. G Personnel Titles and Monthly Rates
- Ex. H BIM Execution Plan


[SIGNATURES PROVIDED ON FOLLOWING PAGE]

BY SIGNING BELOW, the Parties have executed and bound themselves to this Agreement as of the day and year first above written.

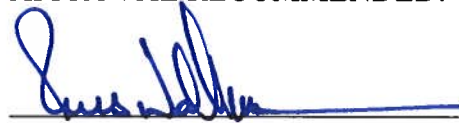
BOARD OF REGENTS OF
THE TEXAS A&M UNIVERSITY SYSTEM
(THE OWNER)

By 
Deputy Chancellor and Chief Financial Officer
Date 11-8-18

Hoar Construction, LLC
(Construction Manager)

By 
(Signature)
Brian Cook
(Print or Type Name)
Date 10/24/2018

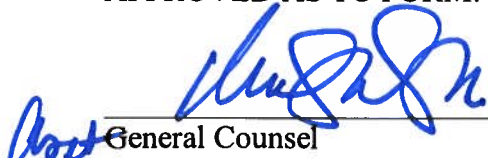
APPROVAL RECOMMENDED:


Executive Director
Office of Facilities Planning & Construction
Date 11.08.2018

Name(s) of individual(s), sole proprietors,
partner(s), shareholder(s) or owner(s) with
an ownership interest of at least 25% of the
business entity executing this Contract.

Name: Robert Burton

APPROVED AS TO FORM:


General Counsel
Date 11/7/2018

Name: _____

Name: _____

Name: _____

EXHIBIT "A"
FEES, COSTS AND OTHER CONTRACT VARIABLES

1. Guaranteed Maximum Price

The anticipated Guaranteed Maximum Price for the Project at the time this Agreement is executed is:

Eleven Million Four Hundred Forty-one Thousand, One Hundred Sixty and no/100 Dollars (\$11,441,160.00);

2. Pre-Construction Phase Fee

A. For Pre-Construction Phase Services, Owner shall pay Contractor a Pre-Construction Phase Fee in the total stipulated amount of

Twenty-five Thousand and no/100 Dollars (\$ 25,000.00);

B. Refer to Paragraph 10.2.1 for the percentages of each stage of work within the Pre-Construction Phase Fee for payment purposes;

C. For Reimbursable Services for investigation services of existing conditions, Owner shall pay Contractor

Twenty Thousand and no/100 Dollars (\$ 20,000.00).

3. Construction Phase Fee

A. For Construction Phase Services, based on the anticipated GMP established at the time of this Agreement, Owner shall pay Contractor a stipulated Construction Phase Fee amount of:

Four Hundred Forty-three Thousand, Seven Hundred and no /100 Dollars (\$443,700.00);

B. If the Owner agrees to an increase or decrease in the Guaranteed Maximum Price, the Construction Phase Fee shall be equitably adjusted.

4. Time of Completion

The anticipated date for achieving Substantial Completion of the Project at the time this Agreement was executed is July 31, 2019.

5. Liquidated Damages

For each consecutive calendar day after the date of Substantial Completion, plus any extensions of time granted by Change Order, that the Work is not substantially completed, Contractor shall pay to Owner, within ten (10) days following written demand, the amount of:

Two Thousand Five Hundred _____ Dollars per day (\$2,500/day)

not as a penalty but as liquidated damages representing the parties' estimate at the time of contract execution of the damages that Owner will sustain for late completion and once paid shall represent owner's sole and exclusive remedy for late completion. Owner may also recover the liquidated damages from any money due or that becomes due Contractor.

The parties stipulate and agree that the actual damages sustained by Owner for late completion of the Project will be uncertain and difficult to ascertain, that calculating Owner's actual damages would be impractical, unduly burdensome, and cause unnecessary delay, and that the amount of daily liquidated damages set forth above is a reasonable estimate.

Payment of the liquidated damages does not preclude recovery by Owner of other damages or losses under other provisions of the Contract, except for claims related to delays in Substantial Completion. Owner's right to receive liquidated damages shall not affect Owner's right to terminate the Agreement as provided in the General Conditions or elsewhere in the Contract Documents, nor shall termination of the Agreement release Contractor from the obligation to pay the liquidated damages.

6. Names and Addresses for Notices:

If to Owner:

Billy C. Hamilton, Deputy Chancellor and Chief Financial Officer
Office of Facilities Planning & Construction
The Texas A&M University System
301 Tarrow Street, 2nd Floor
College Station, Texas 77840-7896

With Copies to:

Pete Schmid, Acting Executive Director
Office of Facilities Planning & Construction
The Texas A&M University System
301 Tarrow Street, 2nd Floor
College Station, Texas 77840-7896

Randy Wipke, Area Manager
Office of Facilities Planning & Construction
The Texas A&M University System
301 Tarrow Street, 2nd Floor
College Station, Texas 77840-7896

If to Contractor:

Brian Cook
Hoar Construction, LLC
3700 W Sam Houston Pkwy S
Suite 220

Houston, Texas 77042

The parties may make reasonable changes in the person or place designated for receipt of notices upon advance written notice to the other party.

7. Party Representatives

A. The Owner's Designated Representative authorized to act in the Owner's behalf with respect to the Project is:

Randy Wipke, Area Manager
Office of Facilities Planning & Construction
The Texas A&M University System
301 Tarrow Street, 2nd Floor
College Station, Texas 77840-7896

B. The Contractor's designated representative authorized to act on the Contractor's behalf and bind the Contractor with respect to the Project is:

Brian Cook
Hoar Construction, LLC
3700 W Sam Houston Pkwy S
Suite 220
Houston, Texas 77042

C. The parties may make reasonable changes in their designated representatives upon advance written notice to the other party and in accordance with Paragraph 22.15.

EXHIBIT “B”
UNIFORM GENERAL AND SUPPLEMENTARY CONDITIONS

[Insert Uniform General and Supplementary Conditions]