



**STATE OF MONTANA**  
**DEPARTMENT OF ADMINISTRATION**  
**ARCHITECTURE AND ENGINEERING DIVISION**  
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## PRE-CONSTRUCTION SERVICES CONDITIONS

### 1. ARTICLE 1 – DEFINITIONS

1.1. **BASIC DEFINITIONS** – The terms below are expressly defined as follows:

- 1.1.1. **Affiliate.** Affiliate shall mean any subsidiary of General Contractor/Construction Manager (GC/CM), and any other entity in which GC/CM has a financial interest or which has a financial interest in GC/CM (including without limitation parent companies, related businesses under the same holding company, or any other business controlled by, under common control with, or which controls GC/CM).
- 1.1.2. **Allowances.** Allowances shall mean the allowance amounts shown in the Guaranteed Maximum Price (GMP) Supporting Documents, together with such further allowances as may be developed by the parties as the Project progresses.
- 1.1.3. **Amendment.** Amendment shall mean a written modification of this Contract (including without limitation any agreed change to the GMP), identified as an Amendment, and executed by GC/CM and the Owner.
- 1.1.4. **Change Order.** Change Order shall mean a written modification of this Contract as identified in the General Conditions of the Contract for Construction (including without limitation any agreed change to GMP), identified as a Change Order and executed by the GC/CM and the Owner. Change Orders shall be issued only for Owner Scope Changes and unforeseen conditions.
- 1.1.5. **Construction Manager (CM).** CM shall have the meaning given herein below as GC/CM and CM/GC.
- 1.1.6. **Construction Documents.** Construction Documents shall have the meaning given in the Owner's Agreement with the Architect/Engineer for this Project.
- 1.1.7. **Construction Phase.** The Construction Phase shall mean the period commencing on the Owner's execution of a GMP Amendment or Early Work Amendment, together with the earlier of (i) issuance by Owner of a Notice to Proceed with any on-site construction or (ii) execution of a subcontract or issuance of a purchase order for materials or equipment required for the Work.
- 1.1.8. **Construction Phase Services.** Construction Phase Services shall mean all of the Work other than the Preconstruction Phase Services.
- 1.1.9. **Contract Documents.** Contract Documents shall have the meaning given in the General Conditions of the Contract for Construction.
- 1.1.10. **Design Development Documents.** Design Development Documents shall have the meaning given in the Owner's Agreement with the Architect/Engineer for this Project.
- 1.1.11. **Early Work.** Early Work shall mean Construction Phase Services authorized by Amendment that the parties agree should be performed in advance of establishment of the GMP. Permissible Early Work shall be limited to: early procurement of materials and supplies; early release of bid or proposal packages for site development and related activities; and any other advance work related to critical components of the Project for which performance prior to establishment of the GMP will materially affect the critical path schedule of the Project.
- 1.1.12. **Early Work Amendment.** Early Work Amendment shall mean an Amendment to this Contract executed by and between the parties to authorize Early Work.

- 1.1.13. Guaranteed Maximum Cost for Reimbursable expenses for General Conditions Work (GMCR). Guaranteed Maximum Cost for General Conditions Work or GC Work shall mean that guaranteed maximum sum identified herein below.
- 1.1.14. General Conditions Work. General Conditions Work (“GC Work”) shall mean (i) that portion of the Work required to support construction operations that is not included within overhead or general expense but is called out as GC Work, and (ii) any other specific categories of Work approved in writing by the Owner as forming a part of the GC Work. GC Work is defined and submitted during the GC/CM solicitation phase and is described as Guaranteed Maximum Cost for Reimbursable (GMCR) expenses for General Conditions.
- 1.1.15. General Contractor/Construction Manager (GC/CM). GC/CM shall mean the entity contracted for by the Owner to provide Pre-Construction and Construction Services as identified herein below and in the General Conditions of the Contract for Construction. Construction Manager/General Contractor (CM/GC) shall have the same meaning as GC/CM. GC/CM and CM/GC includes the “Contractor” as identified in the General Conditions of the Contract for Construction.
- 1.1.16. Guaranteed Maximum Price (GMP). GMP shall mean the Guaranteed Maximum Price of this Contract, as stated in dollars within the GMP Amendment, as determined herein below and as it may be adjusted from time to time pursuant to the provisions of this Contract.
- 1.1.17. GMP Amendment. GMP Amendment shall mean an Amendment to this Contract, issued and executed by and between the parties, to establish the GMP and identify the GMP Supporting Documents and Construction Documents for Construction Phase Services. Where “bid” and all modifications are referenced in the General Conditions of the Contract for Construction, the word is interchangeable with the GMP.
- 1.1.18. GMP Supporting Documents. GMP Supporting Documents shall mean the documents referenced in the GMP Amendment as the basis for establishing the GMP. The GMP Supporting Documents shall expressly identify the Plans and Specifications, assumptions, qualifications, exclusions, conditions, allowances, unit prices, and alternates that form the basis for the GMP.
- 1.1.19. Preconstruction Phase. The Preconstruction Phase shall mean the period commencing on the date of this Contract and ending upon commencement of the Construction Phase; provided that if the Owner and GC/CM agree, the Construction Phase may commence before the Preconstruction Phase is completed, in which case both phases shall proceed concurrently, subject to the terms and conditions of the Contract Documents.
- 1.1.20. Preconstruction Phase Services. Preconstruction Phase Services shall mean all services described herein below, including such similar services as are described in the Request For Proposals and the GC/CM's RFP Response to the extent they are accepted by Owner, but excluding any Early Work. Early Work shall be considered part of Construction Phase Services.
- 1.1.21. Schematic Design Documents. Schematic Design Documents shall have the meaning given in the Owner's Agreement with the Architect/Engineer for this Project.
- 1.1.22. Scope Change. Scope Change shall mean only (i) changed site conditions not reasonably identifiable or inferable from information available to GC/CM at the time of execution of the GMP Amendment, (ii) significant Work modifications (including additions, substitutions, and deletions) not reasonably identifiable or inferable from the Documents at every phase of design, and (iii) application of Allowances and selection of alternates, all as approved by the Owner under this Contract beyond that identified or inferable from the GMP Supporting Documents (but in the case of Allowance items, the GMP will increase only if the cost to Owner of the Allowance items exceeds the total amount of the Allowances).

## **2. ARTICLE 2 – CONTRACT DOCUMENTS**

- 2.1. Integration with General Conditions of the Contract for Construction. The requirements of these Pre-Construction Services Conditions are in addition to, and not in lieu of, the requirements of the General Conditions of the Contract for Construction.

- 2.2. Contract Documents. Owner and the GC/CM agree to the terms of the Contract that are set forth in the Contract Documents as identified in the General Conditions of the Contract for Construction.
- 2.3. Articles 3.1, 3.2, 11, 13, 14, and 15 of the “General Conditions of the Contract for Construction” also apply in their entirety to the Pre-Construction Services phase. If Article 16 is included in the “General Conditions of the Contract for Construction” it shall also apply in its entirety to the Pre-Construction Services phase

### **3. ARTICLE 3 – SERVICES AND WORK OF THIS CONTRACT**

- 3.1 Preconstruction Phase Services. The GC/CM agrees to provide all of the Preconstruction Phase Services described below on an ongoing basis in support of, and in conformance with, the time frames described in the Request for Proposals as updated by the Project Schedule throughout the course of design and as coordinated with the Owner and Architect/Engineer. The Preconstruction Phase shall end on or by **[DATE]**. If Preconstruction Phase continues beyond **[DATE]** through no fault of the GC/CM, additional compensation for extended Preconstruction Services may be negotiated with the Owner. However, commencement of the Construction Phase shall not excuse GC/CM from completion of the Preconstruction Phase Services, if such services have not been fully performed at commencement of the Construction Phase.
- 3.2 The GC/CM shall provide the following services relating to design and construction tasks:
  - 3.2.1 The GC/CM shall consult with, advise, assist, and provide recommendations to the Owner and the Architect/Engineer on all aspects of the planning and design of the Work.
  - 3.2.2 The GC/CM shall jointly schedule and attend regular meetings with the Architect/Engineer and Owner. The GC/CM shall consult with and advise the Owner and Architect/Engineer regarding site use and improvements, and the selection of materials, building systems and equipment.
  - 3.2.3 The GC/CM shall provide recommendations on construction feasibility; actions designed to minimize adverse effects of labor or material shortages; time requirements for procurement, installation and construction completion; and/or factors related to construction cost including estimates of alternative designs or materials, preliminary budgets and possible economic factors.
  - 3.2.4 The GC/CM shall provide continuous in-progress review of design documents, including the documents generally described in the industry as Schematic Design Documents, Design Development Documents, and Construction Documents and provide consultation, input, and advice on construction feasibility, clarity, completeness, consistency, constructability, coordination among trades, coordination between drawings, coordination between specifications, coordination between drawings and specifications, alternative materials, availability of trades and subcontractors, and availability of labor and materials. The GC/CM shall review Owner design review comments and provide input on resolution of design comments. Owner acknowledges that the GC/CM is providing services in its capacity as a Contractor and not as a licensed design professional.
- 3.3 The GC/CM shall provide the following services related to the Project schedule:
  - 3.3.1 The GC/CM shall prepare and periodically update a preliminary Project schedule for the Architect/Engineer’s review and Owner review and approval.
  - 3.3.2 The GC/CM shall coordinate and integrate the preliminary Project schedule with the services and activities of the Owner, Architect/Engineer, and GC/CM. As design proceeds, GC/CM shall update the preliminary Project schedule to indicate proposed activity sequences and durations, milestone dates for receipt and approval of pertinent information, preparation and advertising of all bid packages, submittal of a GMP proposal, preparation and processing of shop drawings and samples, project phasing, delivery of materials or equipment requiring long-lead time procurement, and Owner’s occupancy requirements showing portions of the Project having occupancy priority, provided that the date(s) of Substantial Completion shall not be modified without Owner’s prior written approval. If preliminary Project schedule updates indicate that previously approved schedules may not be met, the GC/CM shall make appropriate recommendations to the Owner and Architect/Engineer.
  - 3.3.3 The GC/CM shall make recommendations to Architect/Engineer and Owner regarding the phased issuance of Plans and Specifications to facilitate phased construction of the Work, if such phased construction is appropriate for the Project, taking into consideration such factors as economics, time of performance, availability of labor and materials, and provisions for temporary facilities.

- 3.4 Provide the following services relating to cost estimating:
- 3.4.1 When Programming Documents have been prepared by the Architect/Engineer and approved by the Owner, the GC/CM shall prepare for the review of the Architect/Engineer and approval of the Owner, an estimate based upon the construction type, spaces identified, and site anticipated.
  - 3.4.2 When Schematic Design Documents have been prepared by the Architect/Engineer and approved by the Owner, the GC/CM shall prepare for the review of the Architect/Engineer and approval of the Owner, a detailed estimate with supporting data.
  - 3.4.3 When Design Development Documents (35% submittal), have been prepared by the Architect/Engineer and submitted for review by the Owner and the GC/CM, and approved by the Owner, the GC/CM shall prepare for the review of the Architect/Engineer and approval of the Owner, a detailed estimate with supporting data. During the preparation of the Design Development Documents, the GC/CM shall update and refine this estimate at appropriate intervals agreed to by the Owner, Architect/Engineer and GC/CM.
  - 3.4.4 When Construction Documents have been prepared by the Architect/Engineer and submitted for review by the Owner and the GC/CM, and approved by the Owner, the GC/CM shall prepare a detailed estimate with supporting data for review by the Architect/Engineer and approval by the Owner. During the preparation of the Construction Documents, the GC/CM shall update and refine this estimate at appropriate intervals agreed to by the Owner, Architect/Engineer and GC/CM.
  - 3.4.5 If any estimate submitted to the Owner exceeds previously approved estimates or the Owner's budget, the GC/CM shall make appropriate recommendations to the Architect/Engineer and Owner.
  - 3.4.6 GC/CM shall notify the Owner and the design team immediately if any construction cost estimate appears to be exceeding the construction budget.
  - 3.4.7 The GC/CM otherwise shall work with the Architect/Engineer and Owner to develop a GMP within the Target GMP Range and within Owner's schedule.
- 3.5 Perform the following services relating to Subcontractors and suppliers:
- 3.5.1 The GC/CM shall seek to develop Subcontractor and supplier interest in the Project, and shall furnish to the Owner and Architect/Engineer for their information a list of possible Subcontractors and suppliers, including suppliers who may furnish materials or equipment fabricated to a special design, from whom competitive bids, quotes, or proposals (collectively, "Offers") will be requested for each principal portion of the Work. Submission of such list is for information and discussion purposes only and not for prequalification. The receipt of such list shall not require the Owner or Architect/Engineer to investigate the qualifications of proposed Subcontractors and suppliers, nor shall it waive the right of the Owner or Architect/Engineer later to object to or reject any proposed Subcontractor, supplier, or method of procurement.
  - 3.5.2 The GC/CM shall provide input to the Owner and the design team regarding current construction market bidding climate, status of key subcontract markets, and other local/national economic conditions. GC/CM shall determine the division of work to facilitate bidding and award of trade and subcontracts, considering such factors as bidding climate, improving or accelerating construction completion, minimizing trade jurisdictional disputes, and related issues.
  - 3.5.3 The GC/CM shall recommend to the Owner and Architect/Engineer a schedule for procurement of long-lead time items which will constitute part of the Work as required to meet the Project schedule, which shall be procured by the GC/CM upon execution of either a GMP Amendment or Early Work Amendment covering such procurement, and approval of such schedule by the Owner. The GC/CM shall expedite the delivery of long-lead time items. The GC/CM shall investigate, plan, and utilize a "just-in-time" delivery methodology, if feasible.
- 3.6 The GC/CM shall work with the Owner in identifying critical elements of the Work that may require special procurement processes, such as prequalification of Offerors, subcontractors, or alternative contracting methods.

- 3.7 The GC/CM shall work with the Owner in identifying scopes of work, bid packages, and associated durations that may affect or impact adjacent buildings and facilities, and building occupants, in addition to ongoing building operations not associated with this project. These activities and work windows will be closely monitored in the schedule and coordinated by the Owner.
- 3.8 Construction Phase Services.
- 3.8.1 Upon execution of an Early Work Amendment or GMP Amendment/Contract, the GC/CM shall provide Construction Phase Services as provided in the Contract Documents, including without limitation providing and paying for all materials, tools, equipment, labor and services, and performing all other acts and supplying all other things necessary to perform and complete the Work, as required by the Contract Documents, and to furnish to Owner a complete, fully functional Project in accordance with the Contract Documents, capable of being legally occupied and fully used for its intended purposes upon completion of the Contract (or, as to an Early Work Amendment, to furnish such Work as is described in the Early Work Amendment). Construction Phase Services shall include CM Services performed during the Construction Phase.
- 3.8.2 Notwithstanding any other references to Construction Phase Services in this Contract, this Contract shall include Preconstruction Phase Services only unless (i) the parties execute a GMP Amendment or (ii) the parties execute an Early Work Amendment.
- 3.8.3 The parties may execute one or more Early Work Amendments identifying specific Construction Phase Services that must be performed in advance of establishment of the GMP, without exceeding a not-to-exceed budget, a not-to-exceed guaranteed maximum price, or a fixed price ("Early Work Price") to be stated in such Amendment, with such Amendment. If the Early Work Price is a not-to-exceed budget, then GC/CM shall be obligated to perform the Early Work only to the extent that the Cost of Work thereof, together with the GC/CM Fee, does not exceed the Early Work Price; however if GC/CM performs Early Work with a cost in excess of the Early Work Price the GC/CM shall pay such excess cost without reimbursement unless cost overruns are caused by conditions that constitute a change within the Contract or to incorporate Work not included in the GMP Amendment. If one or more Early Work Amendments are executed, the GC/CM shall diligently continue to work toward development of a GMP Amendment acceptable to Owner, which shall incorporate the Early Work Amendments. If Owner thereafter terminates the Contract prior to execution of a GMP Amendment, the provisions of the General Conditions of the Contract for Construction shall apply.
- 3.8.4 Prior to commencement of any Construction Phase effort, and in any event not later than mutual execution of the GMP Amendment, GC/CM shall provide to Owner a full performance bond and a payment security bond as required by the General Conditions in the amount of the GMP. If an Early Work Amendment is executed, GC/CM shall provide such bond in the amount of the Early Work Price under the Early Work Amendment. GC/CM shall provide to Owner additional or replacement bonds at the time of execution of any subsequent Early Work Amendment or GMP Amendment, in each case prior to execution of the Amendment and the supplying of any labor or materials for the prosecution of the Work covered by the Amendment, and in each case in a sufficient amount so that the total bonded sum equals or exceeds the total Early Work Price or the GMP, as the case may be. In the event of a Scope Change that increases the GMP, GC/CM shall provide to Owner an additional or supplemental bond in the amount of such increase prior to performance of the additional Work.
- 3.9 Construction Management (CM) Services. Throughout the Preconstruction Phase and Construction Phase of the Project, the GC/CM shall provide CM Services, generally consisting of coordinating and managing the building process as an independent contractor, in cooperation with the Owner, Architect/Engineer and other designated Project consultants (the "Construction Principals"), all in accordance with the General Conditions of the Contract for Construction and the Supplemental Conditions for Construction. CM Services shall include, but are not limited to:
- 3.9.1 Providing all Preconstruction Phase Services described above;
- 3.9.2 Developing and delivering schedules, preparing construction estimates, performing constructability review, analyzing alternative designs, studying labor conditions, coordinating and communicating the activities of the Construction Principals throughout the Construction Phase to all Construction Principals;

- 3.9.3 Continuously monitoring the Project schedule and recommending adjustments to ensure completion of the Project in the most expeditious manner possible;
- 3.9.4 Working with the Owner and the Architect/Engineer to analyze the design, participate in decisions regarding construction materials, methods, systems, phasing, and costs, and suggest modifications to achieve the goals of providing the Owner with the Project within the budget, GMP and schedule;
- 3.9.5 Providing Value Engineering ("VE") services ongoing through the Project. GC/CM shall develop cost proposals, in the form of additions or deductions from the GMP, including detailed documentation to support such adjustments and shall submit such proposals to Owner for its approval. GC/CM acknowledges that VE services are intended to improve the value received by Owner with respect to cost reduction or life-cycle costs of the Project;
- 3.9.6 Holding and conducting periodic meetings with the Owner and the Architect/Engineer to coordinate, update and ensure progress of the Work;
- 3.9.7 Submitting monthly written report(s) to the Owner. Each report shall include, but shall not be limited to, Project updates including (i) actual costs and progress for the reporting period as compared to the estimate of costs; (ii) explanations of significant variations; (iii) work completed; (iv) work in progress; (v) changes in the work; and (vi) other information as determined to be appropriate by the Owner. Additional oral or written updates shall be provided to the Owner as deemed appropriate by the GC/CM or as requested by the Owner;
- 3.9.8 Maintaining a daily log containing a record of weather, Subcontractors working on the site, number of workers, Work accomplished, problems encountered, safety violations and incidents of personal injury and property damage, and other similar relevant data as the Owner may reasonably require. The log shall be available to the Owner and Architect/Engineer on request;
- 3.9.9 Developing and implementing a system of cost control for the Work acceptable to Owner, including regular monitoring of actual costs for activities in progress and estimates for uncompleted tasks and proposed changes. The GC/CM shall identify variances between actual and estimated costs and report the variances to the Owner and Architect/Engineer at regular intervals;
- 3.9.10 Cooperating with any and all consultants hired by Owner;
- 3.9.11 At Owner's request, cooperating and performing warranty and inspection Work for the Project through the expiration date of the applicable warranty period;
- 3.9.12 Assisting Owner with start-up of the Project. Such start-up may occur in phases due to phased occupancy;
- 3.9.13 Incorporating commissioning and inspection agents' activities into the Project schedule and coordinating Subcontractors required to participate in the commissioning and inspection process;
- 3.9.14 Performing all other obligations and providing all other services set forth in the Contract Documents; and performing all other acts and supplying all other things necessary to fully and properly perform and complete the Work as required by the Contract.

#### **4. ARTICLE 4 – CONTRACT SUM AND GMP**

- 4.1 Contract Sum. Owner shall pay the GC/CM the "Contract Sum" which shall equal the sum of the Preconstruction Fee, Early Work Amendments, the GMP Amendment, plus any Change Orders as applicable.
- 4.2 The GMP shall be determined in accordance with the formula set forth below and as described in 4.5. The "Cost of the Work" is defined in Article 5. Costs in excess of the GMP shall be paid by the GC/CM without reimbursement by Owner. Changes to the GMP shall only be authorized by Amendment or Change Order.
  - 4.2.1  $GMP = [GC/CM \text{ Fee} \times (\text{Guaranteed Maximum Cost for Reimbursable expenses for General Conditions GMCR} + \text{Estimated Cost of the Work (ECoW inclusive of the Contractor's Contingency)})] + GMCR + \text{Estimated Cost of the Work (ECoW inclusive of the Contractor's Contingency)}$



4.2.2 GC/CM Fee of  $***\%$  is calculated on the Estimated CoW (excluding GC/CM's  $***\%$  Construction Contingency, or lump-sum Contingency as agreed between Owner and Contractor) + Guaranteed Maximum Cost for Reimbursable expenses for General Conditions GMCR.

4.2.3 The Contractor will not be due GC/CM Fee on the Construction Contingency.

4.3 Preconstruction Fee. The Preconstruction Fee is a lump-sum, fixed amount for all Pre-Construction Services and shall be payable to GC/CM on a cost reimbursement basis up to a maximum sum of  $****$  (\$\*\*\*\*), which shall cover constructability review, value engineering, cost estimating, development of GMP, and all other Preconstruction Phase Services, expenses, reimbursements, and costs. If GC/CM's costs for provision of Preconstruction Phase Services exceed the maximum Preconstruction Fee, GC/CM shall pay such additional cost without reimbursement. GC/CM shall not be entitled to any GC/CM Fee upon the Preconstruction Fee. Owner shall pay the Preconstruction Fee on a cost-reimbursement basis with each application for payment during the Preconstruction Phase. If the total actual Preconstruction Fee is less than the maximum Preconstruction Fee used for initial calculation of the GMP as provided above, the GMP shall be reduced by the difference; provided that Owner may direct instead that any applied portion of the maximum Preconstruction Fee be applied to Construction Phase Services, in which case the GMP shall not be reduced by the portion so applied. Except to the extent the parties may expressly agree to the contrary in the GMP Amendment, no Preconstruction Fee or other fee, compensation or reimbursement shall be payable to GC/CM with respect to Preconstruction Services performed after execution of the GMP Amendment.

4.4 Establishment of GC/CM Fee; Adjustments to GC/CM Fee.

4.4.1 The "GC/CM Fee" shall be a fixed percentage of the Estimated Cost of Work identified in the GMP Amendment, and shall be calculated as  $***\%$  of the Estimated Cost of the Work at the time of establishment of the GMP. In making such calculation, the Estimated Cost of the Work shall exclude the Preconstruction Fee, the GC/CM Fee itself, but shall include Allowances, selected alternates, Fixed Cost for GC Work, and reasonable GC/CM contingencies as designated in the GMP Supporting Documents. The GC/CM Fee is inclusive of overhead and profit and all other indirect or non-reimbursable costs. Owner shall pay the GC/CM Fee ratably with each application for payment during the Construction Phase. In the case of Early Work, the CM/CG Fee shall be the above percentage multiplied by the actual Cost of the Early Work.

4.4.2 Notwithstanding any provision of the General Conditions of the Contract for Construction to the contrary, and unless the parties agree in writing to the contrary, any Amendment or Change Order that increases or decreases the GMP shall adjust the GC/CM Fee then in effect by multiplying the percentage shown in 4.4.1 by the change in the Estimated Cost of the Work reflected in such approved Amendment or Change Order. For any Amendment or Change Order that increases or decreases the GMP by more than 15%, parties may negotiate a variance to the contract Fee percentage. In addition, if the Contract is terminated for any reason prior to full completion of the Work (including, without limitation, termination during or following performance of Early Work), the GC/CM Fee shall be limited to the total GC/CM Fee multiplied by the percentage of Work completed and accepted at the time of termination. The GC/CM Fee percentage shall not be subject to adjustment for any other reason, including, without limitation, schedule extensions or adjustments, Project delays, unanticipated costs, negligence, or unforeseen conditions.

4.5 Determination of GMP.

4.5.1 GC/CM shall deliver to Owner a proposed GMP and GMP Supporting Documents at a time designated by Owner during the Preconstruction Phase. If any actual subcontract Offers are available at the time the GMP is being established, GC/CM shall use those subcontract Offers as a basis in establishing the GMP.

4.5.2 As the Plans and Specifications may not be developed to the stage of biddable construction documents at the time the GMP proposal is prepared, the GC/CM shall provide in the GMP for further development of the Plans and Specifications by the Architect/Engineer that is consistent with the Contract Documents and reasonably identifiable and inferable there from. Such further development does not include such things as changes in scope, systems, quantities, kinds and quality of materials, finishes or equipment, all of which, if required, shall be incorporated by Change Order or Amendment with a corresponding GMP adjustment, if any.

- 4.5.3 The GC/CM shall include with its GMP proposal a written statement of its basis (the "GMP Supporting Documents"), which shall include at a minimum:
- 4.5.3.1 A list of the Plans and Specifications, including all addenda thereto and the conditions of the Contract, which were used in preparation of the GMP proposal.
  - 4.5.3.2 A list of allowances and a statement of their basis.
  - 4.5.3.3 A list of the clarifications and assumptions made by the GC/CM in the preparation of the GMP proposal to supplement the information contained in the Plans and Specifications.
  - 4.5.3.4 The proposed GMP, including a statement of the estimated cost organized by trade categories, allowances, contingency, and other items and the associated fees that comprise the GMP.
  - 4.5.3.5 The Date of Substantial Completion upon which the proposed GMP is based, and a schedule of the Construction Documents issuance dates upon which the date of Substantial Completion is based.
- 4.5.4 The GC/CM shall meet with the Owner and Architect/Engineer to review the GMP proposal and the written statement of its basis. If the Owner or Architect/Engineer discovers any inconsistencies or inaccuracies in the information presented, they shall promptly notify the GC/CM, who shall make appropriate adjustments to the GMP proposal, its basis or both.
- 4.5.5 Prior to the Owner's acceptance of the GC/CM's GMP proposal and issuance of a Notice to Proceed, the GC/CM shall not incur any cost to be reimbursed as part of the Cost of the Work, except as specifically provided in an Early Work Amendment.
- 4.5.6 The Owner shall authorize and cause the Architect/Engineer to revise the Plans and Specifications to the extent necessary to reflect the agreed-upon assumptions and clarifications contained in the GMP Amendment. Such revised Plans and Specifications shall be furnished to the GC/CM in accordance with schedules agreed to by the Owner, Architect/Engineer and GC/CM. The GC/CM shall promptly notify the Architect/Engineer and Owner if such revised Plans and Specifications are inconsistent with the agreed-upon assumptions and clarifications.
- 4.5.7 The GMP shall include in the Cost of the Work only those taxes which are enacted at the time the GMP or Early Work is established.
- 4.5.8 The Estimated Cost of the Work shall include the GC/CM's contingency, a sum established for the GC/CM's use, with Owner approval, to cover costs which are reimbursable as Cost of the Work but which are not the basis for a Change Order. This contingency is not available for Owner-directed design or scope changes and unforeseen or differing site conditions unless mutually agreed upon between GC/CM and the Owner. GC/CM Contingency costs will be reviewed monthly by the Owner for conformance with the contract.
- 4.5.8.1 None of the following shall constitute a reimbursable Cost of the Work, or a change order, or be paid for out of the GC/CM Contingency:
    - 4.5.8.1.1 Means and methods or changes in means and methods;
    - 4.5.8.1.2 Extensions of time for weather delays;
    - 4.5.8.1.3 Extensions of time or delays for other than Owner-directed design or scope changes, unforeseen conditions, or differing site conditions;
    - 4.5.8.1.4 Damaged work or non-conforming work;
    - 4.5.8.1.5 Out-of-sequence work;
    - 4.5.8.1.6 Work or delays attributable to subcontractors and suppliers; or,
    - 4.5.8.1.7 Delays or costs resulting from GC/CM decisions, management of the project, errors, omissions, or negligence.
    - 4.5.8.1.8 Under no circumstances will any GC/CM Contingency be used for negligence or violations of law, building codes, or regulations.
  - 4.5.8.2 All claims for use of GC/CM Contingency shall be subject to Paragraph 4.3 of the General Conditions of the Contract for Construction. The Owner may, at its sole discretion, approve use of the GC/CM Contingency on an individual event, case-by-case basis, without voiding or waiving the use of Paragraph 4.3 of the General Conditions of the Contract for Construction.



- 4.5.8.3 The Contractor shall not be due GC/CM Fee on the GC/CM Contingency (i.e. the Contractor's Construction Contingency).
- 4.5.8.4 All claims for extension(s) of contract time shall be subject to Paragraph 4.3 of the General Conditions of the Contract for Construction.
- 4.5.8.5 The GC/CM shall be liable to the Owner for construction administration expenses, including but not limited to costs of the Architect/Engineer, as a result of time extensions or delays for other than Owner-directed design or scope changes, weather delays, unforeseen conditions, or differing site conditions.
- 4.5.9 The GC/CM shall work with the Architect/Engineer and Owner to identify and confirm components and systems not specifically shown but required for a complete, fully functional Project. Owner will direct the Architect/Engineer to complete the final Construction Documents in accordance with the Project scope agreed upon by all parties at the time the GMP is established. In so doing, Owner acknowledges that GC/CM is providing its services as a Contractor and not a design professional.
- 4.5.10 Notwithstanding the level of detail represented in the GMP Supporting Documents, the GC/CM shall represent and warrant, at the time that it submits the GMP that the GMP includes the entire cost of all components and systems required for a complete, fully functional facilities in accordance with the Project scope agreed upon by all parties at the time the GMP is established.
- 4.5.11 In developing the GMP, the GC/CM shall include and identify such allowances and clarifications within the GMP as may be necessary to pay for elements that are required for a complete, fully functional facilities.
- 4.6 Cancellation of Construction Phase Services. The Owner reserves the sole right at any time, with or without cause, to terminate or cancel any or all pre-construction services and/or not pursue a GMP Amendment/Contract with the CM/GC.
- 4.7 Failure to Furnish an Acceptable GMP. If the GC/CM does not furnish a GMP acceptable to Owner within Owner's target GMP range, or if Owner determines at any time in its sole discretion that the parties may fail to reach a timely agreement on a GMP acceptable to Owner, Owner may terminate this Contract without liability, and the GC/CM shall not receive additional compensation beyond the Preconstruction Fee under this Contract and sums due under any executed Early Work Amendment. Termination under this provision shall proceed under Article 14 of the General Conditions of the Contract for Construction as a termination for Owner's convenience. GC/CM further agrees that Owner shall not be liable for any damages whether actual, consequential or otherwise, for termination of the Contract under this provision.
- 4.8 Acceptance of GMP. Upon acceptance of the GMP by Owner, the parties shall execute a GMP Amendment/Contract.
- 4.9 Owner Savings. If the sum of the remainder of the GC/CM Construction Contingency, plus the actual and final Cost of the Work, is less than the GMP, the savings shall accrue to the Owner
- 4.10 Allowance Work.
  - 4.10.1 GC/CM shall not perform any Allowance Work without prior written approval by Owner for the Allowance Work and the price thereof.
  - 4.10.2 Owner shall be entitled to apply any Allowance line items that have not been fully expended to other line item Allowances that have been fully expended, without any resulting increase in the GMP.
  - 4.10.3 If the total Cost of the Allowance Work exceeds the total Allowances within the GMP, GC/CM shall not perform any Allowance Work in excess of such amount until either (i) the parties agree that the additional Allowance work will be performed within the then-current GMP or (ii) a GMP Amendment is executed to increase the GMP by the excess cost of the Allowance work.
  - 4.10.4 The Contract Sum shall not include any Allowance items not identified in the GMP Amendment or the GMP Supporting Documents until such allowance item is reduced to a fixed price by Change Order or Amendment.

- 4.10.5 If at the Final Completion of the Project, any portion of the Allowance funds remains unexpended, the GMP shall be reduced by a corresponding amount via a Change Order or Amendment.
- 4.11 Reallocating Projected Cost Under-runs after Bid (Offer) Buyout. As soon as possible after the awarding of the Work to the primary Subcontractors, GC/CM shall review projected costs and provide the Owner with a buy-out status report showing any projected cost under-runs, reconciling accepted Offers and other reasonably anticipated costs, to the cost estimate used by GC/CM to establish the GMP. This report shall be updated on a monthly basis. GC/CM shall include with its report any underlying documentation requested by Owner used to develop or support such report. GC/CM shall also consider the reduced risk associated with known subcontracting costs, and the impact that reduced risk has on the amount of the GC/CM's Contingency. The parties shall negotiate in good faith to execute a Change Order transferring an appropriate portion of any projected cost under-runs to an Owner-controlled contingency fund, separate from the GC/CM Construction Contingency, to be held within the GMP to pay for additional costs arising from (a) any Owner-directed or approved change to the Work, (b) schedule changes that would otherwise entitle GC/CM to an increase in the GMP, (c) Allowance items after exhaustion of all Allowances, (d) selection by Owner of more expensive alternates than those used for calculation of the GMP, (e) Owner selection of substitutions that increase the Cost of the Work, or (f) any other costs which otherwise would entitle GC/CM to an increase in the GMP. Transfer of an appropriate portion of the under-runs to an Owner-controlled contingency shall occur no earlier than 80% buy-out completion unless agreed to by both parties. Any transfer of projected aggregate cost under-runs from GC/CM's contingency to the Owner-controlled contingency fund will not affect GC/CM's obligation to complete the Project within the GMP.
- 4.12 Notice to Proceed. If Construction Phase Services are added to the Contract, then a notice to proceed will be issued by the Owner to begin the designated or full Construction Phase Services ("Notice to Proceed"). It is anticipated that the Notice to Proceed will be issued on or about [DATE] with the actual date to be provided in the GMP Amendment/Contract. A separate Notice to Proceed shall be issued for each Early Work Amendment, if any.
- 4.13 Completion of Project. The GC/CM shall achieve Substantial Completion of the entire Work not later than [DATE] (regardless of the date in the Notice To Proceed included in 4.12 above and shall achieve Final Completion on the date specified in the General Conditions of the Contract for Construction. The Owner may require as a condition of proceeding with a GMP Contract/Amendment that the Contractor achieve Final Acceptance of the entire Work not later than [DATE]. The Owner reserves the right to make Substantial Completion the Final Acceptance date without waiving or altering all the requirements of both Substantial Completion and Final Acceptance.
- 4.14 Time is of the Essence. All time limits stated in the Contract Documents are of the essence.
- 4.15 Time Extensions. Notwithstanding provisions for Contract time extensions, Owner and GC/CM agree that timely completion of the Work is essential to the success of the Project, and that approval for time extension shall be granted only as a last resort.
- 4.15.1 GC/CM agrees to make reasonable effort to recover time from delays that are the GC/CM's responsibility and shall not consider this as a compensable, Owner-directed, or forced acceleration.
- 4.15.2 If a compensable time extension is granted by the Owner, the GC/CM shall be limited to \$(to be defined in the GMP amendment) per day extended overhead (office and field).
- 4.16 Liquidated Damages. The GC/CM acknowledges that the Owner will sustain damages as a result of the GC/CM's failure to substantially complete the Project in accordance with the Contract Documents. These damages may include, but are not limited to delays in completion, use of the Project, and costs associated with Contract administration and use of temporary facilities. The GC/CM and the Owner acknowledge that the actual amount of damages would be difficult to determine accurately and agree that that the following liquidated damages figure represents a reasonable estimate of such damages and is not a penalty:
- 4.16.1 Liquidated Damages for not achieving Substantial Completion shall be \$(to be defined in Early Work Amendment, the General Conditions, or the GMP amendment) for each day of delay that Substantial Completion exceeds the required date.
- 4.16.2 The GC/CM agrees to pay to the Owner the liquidated damage sums set forth above for each day of delay or any fraction thereof and further agrees that Owner may deduct such sums from payments the Owner otherwise owes to GC/CM under the Contract. If such deduction does not result in payment to

Owner of the assessed liquidated damages in full, GC/CM shall promptly pay any and all remaining sums due to the Owner upon demand.

## **5. ARTICLE 5 – COSTS OF THE WORK (REIMBURSABLE, INCLUDED IN THE GMP)**

5.1 Cost of the Work. The term "Cost of the Work" shall mean the costs as described herein. The Cost of the Work shall include only those items necessarily and reasonably incurred by GC/CM in the proper performance of the Work and specifically identified in this Article, and only to the extent that they are directly related to the Project.

### 5.1.1 Labor Costs.

5.1.1.1 Wages paid for all labor and construction workers directly employed by the GC/CM in performance of the work.

5.1.1.2 Wages and salaries of the GC/CM's supervisory (i) whether stationed at the site or not so long as they are providing services related to the project, or (ii) engaged at factories, workshops or on the road, in expediting the production or transportation of materials or equipment required for the Work with Owner, or otherwise engaged and off the site when specifically related to the Project, in each case under this clause (iii) only with Owner's prior written approval, and only for that portion of their time directly required for the Work.

5.1.1.3 Cost of all benefits, taxes, insurance, contributions, assessments and benefits required by law or collective bargaining contracts and, for personnel not covered by such contracts, customary benefits such as Social Security, Medicare/Medicaid, sick leave, medical and health benefits, holidays, vacations and pensions, provided such costs are based on wages and salaries included in the Cost of the Work.

5.1.2 Subcontract Costs. GC/CM's actual payment to Subcontractors pursuant to GC/CM's contract with such Subcontractor for the Work on the Project. No amount paid by or payable to any such Subcontractor other than the fixed or cost reimbursement price of its subcontract shall be included in the Cost of the Work, unless otherwise approved in writing by Owner.

### 5.1.3 Costs of Materials, Supplies, and Equipment incorporated in the Work.

5.1.3.1 Costs, including transportation, of materials, supplies, and equipment incorporated or to be incorporated in the completed Work.

5.1.3.2 Costs for storage on or off site (including applicable insurance), inspection, and testing of materials, supplies and equipment unless specifically noted to be paid by the Owner.

5.1.3.3 Costs of materials in excess of those actually installed, but required to provide reasonable allowance for waste and for spoilage. Unused excess materials, if any, shall be delivered to Owner at the completion of the Work or, at Owner's option, shall be sold by the GC/CM. Net amounts realized, if any, from such sales shall be credited to Owner as a deduction from the Cost of the Work.

### 5.1.4 Costs of Miscellaneous Equipment and Other Items; Equipment Rental Charges.

5.1.4.1 Costs, including transportation, installation, maintenance, dismantling, removal, and disposal, of materials, supplies, temporary facilities, machinery, equipment, and hand tools not customarily owned by the construction workers, which are provided by the GC/CM in the performance of the Work; and cost less salvage value on such items if not fully consumed, whether sold to others or retained by the GC/CM; provided that Owner at Owner's option may require that GC/CM deliver to Owner (at no charge) at the end of the Project any of such items procured for this Project. Cost for items previously used by the GC/CM shall mean fair market value. GC/CM shall charge no additional administrative or other mark-up for purchased items. The GC/CM shall document all small tools purchased for the Project via invoices in monthly billing, and shall document the disposition of small tools which have an individual price that exceeds \$500. A copy of such disposition log shall accompany the payment application whenever these items are included in the application.

5.1.4.2 Rental charges for temporary facilities, machinery, equipment and hand tools not customarily owned by the construction workers, which are provided by the GC/CM at the site, whether rented from the GC/CM or others, and costs of transportation, installation, minor repairs and replacements, dismantling and removal thereof. Rates and quantities of equipment rented shall be according to industry standards, shall not exceed 100% of the rental rates published from time to time by the American Association of Equipment dealers in effect at the time of

rental, shall not exceed acquisition costs, and for individual items exceeding \$10,000, will be subject to Owner's prior approval. GC/CM shall deliver to Owner a list of published rates from time to time at Owner's request. For all items rented or leased, the GC/CM shall charge Owner only the rental charge incurred by GC/CM with no additional administrative or other mark-up. GC/CM shall make efforts and use its best skills and judgment to procure equipment in the most expeditious and economical manner consistent with the interest of the Owner. Efforts shall include, but not be limited to, providing Owner with a rent/buy analysis so that Owner may elect for GC/CM to procure the item in lieu of rental if the facility at issue is expected to be rented for six months or longer. Such rent/buy analysis shall include, where available, a leasing rate commensurate with the expected term of rental of the facility at issue. Inclusions to and exclusions from rental rates will be made in accordance with American Association of Equipment Dealer standards.

- 5.1.5 Costs of removal of debris from the site.
- 5.1.6 Cost of telegrams and long-distance telephone calls, postage and parcel delivery charges, telephone service at the site and reasonable petty cash expenses of the site office, computers and other supporting administrative equipment and furnishings which are solely for the benefit of the Work.
- 5.1.7 That portion of the travel and subsistence expenses of the GC/CM's personnel determined by Owner to be reasonable and necessary incurred while traveling in discharge of duties connected with the Work. Main office staff travel shall not be reimbursed unless approved in advance by Owner.
- 5.1.8 Other Costs.
  - 5.1.8.1 Premiums and deductibles for insurance directly attributable to this Contract.
  - 5.1.8.2 Payment and Performance bonds.
  - 5.1.8.3 Sales, use or similar excise taxes imposed by a governmental authority which are directly related to the Work and for which the GC/CM is liable.
  - 5.1.8.4 Fees and assessments for the trade permits and for other permits, licenses and inspections for which the GC/CM is required by the Contract Documents to pay. Plan review fees, assessments, and impact fees are the responsibility of the Owner.
  - 5.1.8.5 GC/CM deposits lost for causes other than the GC/CM's fault or negligence.
  - 5.1.8.6 Costs of drawings, Specifications and other documents required to complete the Work, except as provided by Owner or Architect/Engineer.
  - 5.1.8.7 Losses, expenses, or damages during construction and warranty that did not arise from the negligence of the GC/CM or its subcontractors.
  - 5.1.8.8 Other costs incurred in the performance of the Work if and to the extent approved in advance in writing by Owner.
- 5.1.9 Repairs to Damaged, Defective or Nonconforming Work. The Cost of the Work shall also include costs which are incurred by the GC/CM in taking action to prevent threatened damage, injury or loss in case of an emergency affecting the safety of persons and property.
- 5.2 The Guaranteed Maximum Cost for Reimbursable expenses for General Conditions Work (GMCR). GC/CM shall be paid as a maximum sum of \$\*\*\*\*\*, as agreed by amendment to original RFP, dated \*\*\*\* \*\*, \*\*\*\*, as payment for the GC Work, including all labor, materials, and direct and indirect costs thereof. To the extent any GC Work is otherwise described above in this Article, GC/CM's compensation for the same is included in the Cost for GC Work and shall not otherwise be charged as Cost of the Work. The Cost for GC Work, less 5% retainage thereon, shall be paid in equal installments monthly over the number of months of the scheduled Construction Phase, commencing with the first progress billing after commencement of the scheduled Construction Phase. However, no adjustment in the amount payable for General Conditions Work will be made if the actual construction period is shorter or longer than the number of months scheduled for the Construction Phase, unless the construction period is extended because of an Owner delay or due to unforeseeable conditions. These Costs for General Conditions are a maximum, not to exceed cost. Should the GC/CM spend less than planned on Fixed Costs, the GC/CM retains that balance.
- 5.3 GC/CM Overhead. GC/CM shall be paid in accordance with these Conditions for items including home office overhead, supervisory labor burden, travel, per-diems and is part of the GC/CM Fee.
- 5.4 Guaranteed Maximum Cost for Reimbursable expenses for General Conditions (GMCR) Worksheet. General Conditions Worksheet dated (to be defined in the GMP amendment) further defines costs

attributable to GC/CM fee, General Conditions, Fixed General Conditions, Overhead and Owner funded items. In the case of a conflict between the General Conditions Worksheet and this Agreement, The General Conditions Worksheet shall govern as the conflict relates to scope only.

## **6. ARTICLE 6 – COSTS OF THE WORK (NOT REIMBURSABLE, INCLUDED IN THE GMP)**

- 6.1 Costs Excluded from Cost of Work. The following shall not be included in the Cost of the Work:
- 6.1.1 Salaries and other compensation of the GC/CM's personnel stationed at the GC/CM's principal office or offices other than the site office except as allowed under Articles 5.
  - 6.1.2 Expenses of the GC/CM's principal office and offices other than the site office.
  - 6.1.3 Any overhead and general expenses, except as may be expressly included in Article 5.
  - 6.1.4 GC/CM's capital expenses, including interest on the GC/CM's capital, employed for the Work.
  - 6.1.5 Rental cost of machinery and equipment, except as provided in Article 5.
  - 6.1.6 Any cost associated with the Project not specifically and expressly described in Article 5 or not included in within the Project Cost Matrix.
  - 6.1.7 Costs due to the fault or negligence of the GC/CM, Subcontractors, suppliers, anyone directly or indirectly employed by any of them, or for whose acts any of them may be liable.
  - 6.1.8 The cost of correction of any repair work, nonconforming or defective work, or warranty work in excess of the GMP.
  - 6.1.9 Merit, safety, or other incentive payments, bonuses or awards, or any expenses in connection therewith.
  - 6.1.10 Legal, mediation, or arbitration fees, costs, and expenses except as specifically delineated in the Contract Documents.
  - 6.1.11 Fines and penalties.
  - 6.1.12 Except for Early Work, the cost of Preconstruction Phase Services.
  - 6.1.13 The Cost of the Work for GC Work in excess of the Fixed Cost for GC Work unless such fixed costs are exceeded by other terms included in this Agreement.
  - 6.1.14 Any costs in excess of the GMP.

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

- 7.1 Price Adjustments. Adjustments to the Estimated Cost of the Work required by changes in the Work shall be determined by any of the methods listed in the General Conditions of the Contract for Construction, except that, unless the adjustment is based upon fixed pricing or unit pricing:
- 7.1.1 The overhead and profit markup for the GC/CM shall be limited to the GC/CM Fee adjustment and overhead except for self performed packages that GC/CM is awarded on a competitive basis consistent with other Subcontract bid packages which may include overhead and profit associated with the self performed work;
  - 7.1.2 The increase or decrease in the Estimated Cost of the Work, other than for subcontract work, shall be calculated pursuant to Articles 5 and 6 above, instead of being based on GC/CM's direct costs as defined in the General Conditions of the Contract for Construction; and,
  - 7.1.3 In calculating adjustments to subcontracts, unless the parties agree otherwise, the change shall be limited to the Subcontractor's Direct Costs plus the supplemental mark-up provided in the General Conditions of the Contract for Construction, and shall not be modified by Articles 5 and 6 above.

- 7.2 Adjustments to GMP. Adjustments to the GMP after execution of the GMP Amendment may be made only (i) in the event of Scope Changes or (ii) as otherwise expressly provided in this Contract, and then only in accordance with the following procedure:
- 7.2.1 GC/CM shall review subsequent iterations of the Plans and Specifications as they are prepared to determine whether, in the opinion of GC/CM, they result in a Scope Change so that it can be determined if an adjustment to the GMP is warranted.
  - 7.2.2 Changes to the GMP shall be initiated by written notice by one party to the other. (GC/CM shall deliver any such GMP Change Request to Architect/Engineer and Owner's Authorized Representative within thirty (30) days after event of any Scope Change if, in GC/CM's opinion, it constitutes grounds for adjustment of the GMP. Any GMP Change Request shall include a proposal as to the appropriate GMP adjustment with respect to the Scope Change at issue.
  - 7.2.3 GC/CM shall submit its GMP Change Requests as soon as possible, and GC/CM shall not be entitled to claim a GMP increase unless GC/CM submitted a GMP Change Request to Owner's Authorized Representative and to Architect/Engineer within the earlier of (a) thirty (30) Days after GC/CM has received the information constituting the basis for the claim, or (b) as to Work already solicited, prior to commencement of the portion of the Work for which GC/CM intends to claim a Scope Change; and (c) in any event, prior to GC/CM's signing of a Change Order for the Scope Change.
  - 7.2.4 Owner may, at any time, submit a GMP Change Request requesting a reduction of the GMP, which shall include Owner's basis for such request, which may include, for example, reduction of the GC/CM's Contingency after further development of the Plans and Specifications that form the basis for the original GMP Amendment, and/or unused Allowances.
  - 7.2.5 GC/CM shall work with Architect/Engineer to reconcile all differences in its GMP Change Request with Architect/Engineer within seven (7) days from the date of submission of the GMP Change Request. "Reconciled" means that the GC/CM and Architect/Engineer have verified that their assumptions about the various categories are the same, and that identifies the reason for differences in the GMP Change Request and the Architect/Engineer's position. GC/CM shall submit the Reconciled GMP Change Request to Owner, which submission shall be a condition to any GC/CM claim for a GMP increase.
  - 7.2.6 If the Reconciled GMP Change Request is not acceptable to Owner, GC/CM agrees to work with the Owner and the Architect/Engineer to provide a GMP Change Request that is acceptable to Owner.
  - 7.2.7 GC/CM agrees to make all records, calculations, drawings and similar items relating to GMP Change Request available to Owner and to allow Architect/Engineer and Owner access and opportunity to view such documents at GC/CM's offices. Upon Owner's reasonable notice, GC/CM shall deliver two copies of such documents to Owner and Architect/Engineer at any regular meeting or at the Site.
  - 7.2.8 GMP increases, if any, shall not exceed the increased Cost of the Work arising from the Scope Change (whether based on agreed fixed pricing, or the estimated Cost of the Work increase based on cost-reimbursable pricing), reconciled in accordance with the above provisions, as arising from the incident justifying the GMP increase, plus or minus the GC/CM Fee applicable to such change in the Cost of the Work.
  - 7.2.9 Except as provided in this Article 7.2, adjustments to the GMP shall be reconciled in accordance with the General Conditions of the Contract for Construction.
  - 7.2.10 Execution by Owner. If Architect/Engineer is the Owner's Authorized Representative, then notwithstanding any provision in the Contract to the contrary, Architect/Engineer has no authority to execute Change Orders or Amendments on behalf of Owner, and only duly authorized personnel of Owner may do so.

## **8. ARTICLE 8 – SUBCONTRACTS AND OTHER CONTRACTS**

### **8.1 General Subcontracting Requirements.**

- 8.1.1 Other than Work performed by the GC/CM, the GC/CM shall subcontract the Work to Subcontractors other than the GC/CM and its Affiliates.

8.1.2 The GC/CM shall comply with the laws of the State of Montana with regard to the procurement of subcontractors and suppliers.

## 8.2 GC/CM's Obligations under Subcontracts.

8.2.1 No use of a Subcontractor or supplier shall relieve the GC/CM of any of its obligations or liabilities under the Contract. Except as may expressly otherwise be provided in this Contract, the GC/CM shall be fully responsible and liable for the acts or omissions of all Subcontractors and suppliers including persons directly or indirectly employed by them. The GC/CM shall have sole responsibility for managing and coordinating the operations of its Subcontractors and suppliers, including the settlement of disputes with or between the GC/CM and any such Subcontractor or supplier.

8.2.2 The GC/CM shall include in each subcontract and require each Subcontractor to include in any lower tier subcontract, any provisions necessary to make all of the provisions of the Contract Documents, including the General Conditions and GC/CM's project schedule, fully effective as applied to Subcontractors. GC/CM shall indemnify Owner for any additional cost based on a subcontractor claim which results from the failure of GC/CM to incorporate the provisions of this Contract in each subcontract. The GC/CM shall provide all necessary Plans, Specifications, Hazardous Materials reports and instructions to its suppliers and Subcontractors to enable them to properly perform their work.

8.2.3 Retainage from Subcontractors. Except with the Owner's prior approval, payments to Subcontractors shall be subject to retainage of no more than 5%. The Owner and the GC/CM shall agree upon a mutually acceptable procedure for review and approval of payments and retainage for Subcontractors.

## 8.3 Subcontractor Selection.

8.3.1 Unless otherwise provided in the Request for Proposals, this Article, and the direction of the Owner, the selection of all Subcontractors and suppliers shall be made by competitive offers in a manner that will not encourage favoritism, bias, or substantially diminish competition. While not subject to the low-bid procurement requirements of Title 18 Chapter 1 MCA, the process shall conform to the following procedures, in general compliance with the open and competitive nature of public procurement, taking into account industry subcontracting practices.

8.3.2 GC/CM shall submit to the Owner its proposed procurement documents for review and comment before they are issued for solicitation. GC/CM shall consider and respond to all Owner comments regarding any proposed offer packages. As offers are received, GC/CM shall submit to the Owner an offer comparison in a mutually agreeable form together with any specific back-up requested by Owner. The competitive process used to award subcontracts by the GC/CM may be monitored by the Owner; provided that such monitoring shall not excuse GC/CM from compliance with the subcontracting requirements of this Contract. GC/CM shall cooperate in all respects with Owner's monitoring. The Owner shall be advised in advance of and be given the opportunity to be present at offer openings, and GC/CM shall provide him or her with a summary or abstract of all Offers in form acceptable to the Owner, and copies of particular offers if requested, prior to GC/CM's selection of Offerors. Prior to opening offers, the GC/CM agrees to disclose in writing to Owner any financial interest it has in any such Subcontractor, supplier or other contracting party whenever such Subcontractor, supplier or contracting party intends to compete on any Project work, directly or indirectly, including whether such party is an Affiliate of GC/CM. GC/CM shall also disclose seven (7) days in advance if they will be providing an offer as a self-performed scope of work.

8.3.3 The following minimum requirements apply to the Subcontract solicitation process:

8.3.3.1 For bid packages with an estimated value of \$75,000 or more, solicitations will be advertised by means publishing per 18-2-301 MCA, Montana Plans Exchanges, and GC/CM electronic bid notification processes, at least three (3) consecutive weeks prior to opening, and/or as agreed with Owner.

8.3.3.2 All bid openings for Subcontracting and Self-Performed Work shall be open and available to the public, the Owner, and the Architect/Engineer, regardless of the bid opening location.

8.3.3.3 Unless specific other prior arrangement has been made with Owner, all offers will be written (hardcopy, email, or facsimile), and submitted to a specific location at a specific time. GC/CM shall time-stamp all offers as received. Subcontractors must be qualified to perform the



Work for this Project by being appropriately registered and in compliance with all laws of the State of Montana.

- 8.3.3.4 If fewer than three (3) offers are submitted in response to any solicitation (inclusive of any offer submitted by GC/CM), prior written approval by Owner shall be required to accept the offer. Field Work and/or Subcontracting/Self-Performed Work by the GC/CM shall be bid against at least two (2) other subcontract bids, if reasonably available. The Owner shall have the sole right to determine reasonable availability of additional bidders.
  - 8.3.3.5 GC/CM may develop and implement a prequalification process for particular solicitations, followed by selection of successful offers among those offerors that GC/CM determines meet the prequalification standards, with Owner's prior approval of such prequalification process.
  - 8.3.3.6 GC/CM shall comply, and require Subcontractor compliance with, State of Montana Department of Labor & Industry prevailing wage rates as specified in the RFP and as adopted at the time of the solicitation.
  - 8.3.3.7 Owner may at its sole discretion, require GC/CM to re-solicit for Offers based on the same or modified documents. If GC/CM does receive a responsive offer within the initial solicitation, Owner shall be responsible for all cost and schedule overruns due to Owner directed re-solicitation except where cause of re-solicitation is the fault of the GC/CM.
  - 8.3.3.8 GC/CM shall review all Offers and shall work with Offerors to clarify Offers, reduce exclusions, verify scope and quantities, and seek to minimize work subsequently awarded via the Change Order process.
  - 8.3.3.9 The GC/CM will document any and all discussions, questions and answers, modifications and responses to or from any Offeror and ensure that the same are distributed to all Offerors, and Owner shall be entitled to inspect such documentation on request.
  - 8.3.3.10 GC/CM shall determine the lowest Offer for each solicitation that meets GC/CM's reasonable performance standards for the components of the Work at issue; provided that if GC/CM determines it is unable to execute a suitable subcontract with such Offeror, GC/CM may, with Owner's prior approval, execute a subcontract with the second-lowest Offeror. This paragraph does not preclude the award of a sub-contract to any Offeror selected as part of a pre-qualification process.
- 8.3.4 With authorization by Owner, Work may be subcontracted on other than a low price basis, including without limitation, through competitive negotiation. As a condition to its authorization, Owner may require GC/CM's agreement to establish and implement qualification and performance criteria for Offerors, including a scoring system within requests for proposals. Examples include: where there are single fabricators of materials; special packaging requirements for Subcontractor work; design-build work or, where an alternative contracting method can be demonstrated to clearly benefit Owner.
- 8.3.5 GC/CM shall notify Owner in writing in advance before award of any proposed Subcontract, which notice shall include summaries in a form acceptable to Owner of all Offers received for the Subcontract at issue. Owner reserves the right to disapprove any proposed Subcontractors, suppliers and Subcontract or supply contract awards, based on legal standards of responsibility. Owner shall not unreasonably disapprove any proposed Subcontractor or supplier and increased costs due to Owner's disapproval shall be cause for an increase in the GMP.
- 8.3.6 GC/CM's subcontracting records shall not be considered public records; provided, however, that Owner and other agencies of the State shall retain the right to audit and monitor the subcontracting process in order to protect the Owner's interests.
- 8.4 GC/CM Field Work, Subcontracted/Self-Performed Work by GC/CM.
- 8.4.1 With consent of the Owner, the GC/CM or its Affiliate may bid and compete for Field Work and/or Subcontracted/Self-Performing Work with its own forces. All field work and/or subcontracting/self-performing work by the GC/CM shall be competed as provided in this Article.
  - 8.4.2 Except as provided in this Article, any other portion of the Work proposed to be field work and/or subcontracted/self-performed by the GC/CM, including without limitation provision of any materials, equipment, or supplies, shall be subject to the provisions of this Article.
  - 8.4.3 All field work and/or subcontracted/self-performing work by GC/CM shall be bid against at least two subcontractor bids, if reasonably available.

- 8.4.4 However, with advance consent in writing from Owner, the GC/CM or its Affiliates may submit an advance offer in accordance with this Article and the General Conditions, to do Work with its own forces without competition. The Owner reserves the sole right to review and determine if it is in its best interest to accept or reject such offers.
- 8.4.5 When assembling and using bid packages, for those items for which the GC/CM intends to submit a competing Offer for Self-Performed Work and after approval by the Owner, such intent must be publicly announced with the solicitation for bids required by this Article, and the Owner notified in writing that this announcement has been made. Any CM /GC competing Offer shall be forwarded to the Owner prior to the bid opening. All Offers for this work shall be publicly available by GC/CM at an announced time, date, and place as all other offers.
- 8.4.6 If the GMP is to be established after buy-out is performed, for those items for which the GC/CM intends to submit a competing Offer for Self-Performed Work and after approval by the Owner, any CM /GC competing Offer shall be forwarded to the Owner prior to the bid opening. All Offers for this work shall be publicly available by GC/CM at an announced time, date, and place as all other offers.
- 8.4.7 For all field work and/or subcontracted/self-performed work, the GC/CM shall at a minimum provide separate project management, foremen, supervision, accounting, etc. as if it were any other separate subcontracting entity, unless prior written approval is granted by the Owner. The GC/CM is expressly prohibited from using the personnel, positions, general conditions costs, and overhead from directly supervising and managing any field work and/or subcontract/self-performed work, unless specific prior written approval is granted by the Owner.
- 8.5 Protests. GC/CM, acting as an independent contractor, shall include in the competitive process to award all subcontracts, a protest process for Subcontractors and suppliers that are competing Offerors, which process shall be subject to approval by Owner. GC/CM shall be solely responsible for resolving procurement protests of Subcontractors and suppliers. GC/CM shall indemnify, defend, protect and hold harmless Owner from and against any such procurement protests and resulting claims or litigation unless protest exists in whole or in part by the Owner's actions, directions, or negligence, who shall then share its proportionate responsibility for claims or litigation. GC/CM shall act as an independent contractor, and not an agent of Owner, in connection with any procurement protest. The provisions of this Article are solely for the benefit of Owner, and do not grant any rights or remedies (including third party beneficiary rights) to any Offer or other protester, in connection with any procurement protest or claim.

## **9. ARTICLE 9 – RECORDS, ACCOUNTING, AUDITING**

- 9.1 Accounting and Audit Access. The GC/CM shall keep full and detailed accounts and exercise such controls as may be necessary for proper financial management under this Contract; the accounting and control systems shall be satisfactory to Owner. Owner and Owner's representatives, including the State of Montana accountants and auditors, shall be afforded reasonable and regular access to the GC/CM's records, books, correspondence, instructions, drawings, receipts, subcontracts, purchase orders, vouchers, memoranda and other data relating to this Contract, and the GC/CM shall preserve these for a period of three (3) years after final payment, or for such longer period as may be required by law.
- 9.2 Periodic and Final Audits. Owner may, at its discretion, perform periodic audits of the Cost of the Work and any other reimbursable costs associated with the Project. Owner intends to conduct a final audit of reimbursable costs prior to the Contract closeout. The GC/CM shall cooperate fully with Owner in the performance of such audits. Disputes over audit findings or conclusions shall be subject to the process set forth in the General Conditions.

## **10. ARTICLE 10 – REPRESENTATIONS AND WARRANTIES**

- 10.1 Representations. GC/CM represents and warrants to Owner as of the effective date of this Contract:
- 10.1.1 it is qualified to do business as a licensed general contractor under the laws of the State of Montana, and has all requisite corporate power and corporate authority to carry on its business as now being conducted;
- 10.1.2 it has full corporate power and corporate authority to enter into and perform the Contract and to consummate the transactions contemplated hereby; GC/CM has duly and validly executed and delivered the Contract to Owner and that the Contract constitutes the legal, valid and binding obligation

of GC/CM, enforceable against GC/CM in accordance with its terms, except as enforceability may be limited or affected by applicable bankruptcy, insolvency, reorganization, moratorium or other similar laws affecting creditors' rights generally and by general principles of equity (regardless of whether enforceability is considered in a proceeding in equity or at law);

- 10.1.3 GC/CM's execution and delivery of the Contract and the consummation of the transactions contemplated hereby will not conflict with or result in a material breach of any terms or provisions of, or constitute a material default under, (i) GC/CM's Articles of Incorporation or Bylaws; (ii) any note, bond, mortgage, indenture, license, lease, contract, commitment, agreement or other instrument or obligation to which GC/CM is a party or by which GC/CM may be bound; or (iii) any statute, order, writ, injunction, decree, rule or regulation applicable to GC/CM;
- 10.1.4 no material consent, approval, authorization, declaration or other order of, or registration or filing with, any court or regulatory authority or any third person is required for the valid execution, delivery and performance of the Contract by GC/CM or its consummation of the transactions contemplated hereby;
- 10.1.5 there is no action, proceeding, suit, investigation or inquiry pending that questions the validity of the Contract or that would prevent or hinder the consummation of the transactions contemplated hereby; and,
- 10.1.6 the GC/CM's Project Manager and Superintendent (if assigned by GC/CM) are duly appointed representatives and each has the authority to bind the GC/CM to any and all duties, obligations and liabilities under the Contract Documents and any Amendments or Change Orders thereto.

## **11. ARTICLE 11 – MISCELLANEOUS**

- 11.1 Headings. The headings used in the Contract are solely for convenience of reference, are not part of the Contract and are not to be considered in construing or interpreting the Contract.
- 11.2 Merger. The Contract Documents constitute the entire contract between the parties. No waiver, consent, modification or change of terms of the Contract shall bind either party unless in writing and signed by both parties. Such waiver, consent, modification or change, if made, shall be effective only in the specific instance and for the specific purpose given. There are no understandings, agreements, or representations, oral or written, not specified herein regarding the Contract. GC/CM, by signature of its representative, hereby acknowledges that it has read the Contract, understands it and agrees to be bound by its terms and conditions.
- 11.3 Progress Payments.
  - 11.3.1 Progress Payments. Based upon applications for payment submitted pursuant to the General Conditions, Owner shall make progress payments on account of the Preconstruction Fee, Cost of the Work, General Conditions, Reimbursable General Conditions, Overhead, and associated GC/CM Fee, less 5% retainage, to the GC/CM as provided below and elsewhere in the Contract Documents. Retainage will not be withheld on Preconstruction Services. A progress payment shall not be considered acceptance or approval of any Work or waiver of any defects therein.
  - 11.3.2 Percentage of Completion. Applications for payment shall show the percentage of completion of each portion of the Work as of the end of the period covered by the application for payment. The percentage of completion shall be the lesser of (i) the percentage of that portion of the Work which has actually been completed; or (2) the percentage obtained by dividing (a) the expense that has actually been incurred by the GC/CM on account of that portion of the Work for which the GC/CM has made or intends to make actual payment prior to the next application for payment by (b) the share of the GMP allocated to that portion of the Work in the Schedule of Values.
  - 11.3.3 Calculation of Payment. Subject to other provisions of the Contract Documents, the amount of each progress payment shall be computed as follows:
    - 11.3.3.1 Take that portion of the GMP properly allocable to completed Work as determined by multiplying the percentage of completion of each portion of the Work under the Schedule of Values by the share of the GMP allocated to that portion of the Work in the Schedule of Values. Pending final determination of cost to the Owner of changes in the Work, amounts not in dispute shall be included;

- 11.3.3.2 Add that portion of the GMP properly allocable to materials and equipment delivered and suitably stored and otherwise in compliance with the General Conditions;
- 11.3.3.3 Add the GC/CM's Overhead and Fee. The portion of the GC/CM's Overhead and Fee payable shall be an amount that bears the same ratio to GC/CM Overhead and Fee as sum of the amounts in the two preceding Clauses bears to the estimated probable Cost of the Work, but in no event causing total GC/CM Overhead and Fee payments to exceed the total Overhead and GC/CM Fee, except as modified by Amendments and Change Orders;
- 11.3.3.4 Subtract the aggregate of previous payments made by and retained by the Owner;
- 11.3.3.5 Subtract the shortfall, if any, indicated by the documentation required to substantiate prior applications for payment, or resulting from errors subsequently discovered by the Owner in such documentation;
- 11.3.3.6 Subtract any amounts for which the Owner has withheld or nullified payment as provided in the Contract Documents; and,
- 11.3.3.7 Subtract 5% retainage on the entire progress payment (with the exception of Pre-Construction Services).

## **12. ARTICLE 12 – CONTRACT ATTACHMENTS, APPENDICES, EXHIBITS**

Exhibit A – GC/CM Request for Proposal (RFP)

Exhibit B – GC/CM Response to RFP

Exhibit C – GC/CM Guaranteed Maximum Cost for Reimbursable Expenses for General Conditions (GMCR)

Exhibit D – General Conditions of the Contract for Construction