

TOWN OF APEX

CONSTRUCTION MANAGER AT RISK PRE-CONSTRUCTION AND CONSTRUCTION SERVICES CONTRACT

TOWN OF APEX PLEASANT PARK 92 ACRES, OLD US 1 HWY, APEX, NC 27502

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This Construction Manager at Risk Pre-Construction and Construction Services Agreement (hereinafter "Contract") is made and effective on _____ 2019, by and between the Town of Apex, a North Carolina municipal corporation (hereinafter "Town") and the Construction Manager at Risk, J.M. Thompson Company, a North Carolina company with its principal offices located at 1002 East Chatham St., Cary, NC 27513 (hereinafter "CMAR"). Town and CMAR may hereinafter be referred to collectively as "Parties." Services to be provided are as described in this Contract for the construction of the Town of Apex Pleasant Park (hereinafter "Project"). The designer for this Project is WithersRavenel, Inc. (hereinafter "Designer"), along with any of its sub-consultants.

WITNESSETH:

WHEREAS, the Town has resolved to design and construct the Town of Apex Pleasant Park; and

WHEREAS, the Town desires to procure Construction Management Services for pre-construction and construction services as set forth herein and in accordance with any subsequent amendments to the Contract (hereafter called "Services"); and

WHEREAS, the Town published a Request for Qualifications (RFQ) seeking the submission of Statements of Qualifications to act as a Construction Manager at Risk (CMAR) to furnish construction management services during the pre-construction and construction of the Project identified and described in that Request for Qualifications; and

WHEREAS, the undersigned CMAR submitted a responsive Statement of Qualifications, dated February 27, 2019; and

WHEREAS, the Town has evaluated the Statement of Qualifications and approved the selection of the undersigned CMAR to furnish professional construction management services during the design and construction of the Project; and

WHEREAS, the Town has requested from the CMAR and the CMAR has provided a Preconstruction Services Fee Spreadsheet for Services under this Contract, and

WHEREAS, CMAR has affirmed it has the experience, staff, and resources to perform such Services; and

WHEREAS, the Town has agreed to engage the CMAR, and the CMAR has agreed to contract with the Town, for performance of services as described, and according to the further terms and conditions, set forth herein.

NOW THEREFORE, in consideration of sums to be paid to the CMAR, and other good and valuable consideration, the CMAR and Town do contract and agree as follows:

1. RESPONSIBILITIES OF CMAR:

- 1.1 Reporting / Coordination.** CMAR shall provide progress reports in a format acceptable to the Town at intervals requested by the Town or otherwise established in this Contract, and any Supplemental Contract. At any time, upon request, the Town shall be entitled to information regarding the status of the Project. CMAR is responsible for coordinating its work with the Town in such a manner so as to meet Project deadlines.
- 1.2 Delays / Extensions.** If delays to the completion date for the Project or for tasks within the Project that have individual deadlines result from circumstances that could not reasonably be foreseen by CMAR and which are beyond the reasonable control of the CMAR, one or more extensions of time may be granted, upon written request documenting the reasons for the request. The Town may, in its discretion, which shall be reasonably exercised, grant such request if such request falls within the parameters set forth in Section 30 of the General Conditions of the Contract in Appendix A.
- 1.3 Responsibilities for Services Performed.** CMAR shall maintain an adequate professional staff within the state of North Carolina to render Services to the Town. CMAR may use subcontractors to provide Services only if such subcontractors and the services to be performed are identified in either the Contract or any Contract Amendment. Otherwise, all services described in the Contract, and any Contract Amendment, shall be rendered by CMAR's employees. CMAR is responsible for the professional quality, technical accuracy, and timely completion and submission of all Services performed under this Contract, and any Contract Amendment, and for the performance and payment of all its subcontractors.
- 1.4 Professional Certifications / Endorsements.** All plans, documents, reports, studies, calculations, and other data or materials prepared by the CMAR will bear the endorsement of a person employed by CMAR or its approved sub-contractors who shall be duly registered in the appropriate professional architect, engineer or other category for the work performed, if delegated design is required for a specific portion of the Work. It is understood that the Owner has hired the Designer to perform all architectural and engineering design services for the Project.
- 1.5 Retention of Records.** CMAR shall maintain all books, documents, and papers pertaining to Services performed under this Contract, and accounting records and other records of costs incurred in performance of this Contract, and any Supplemental Contracts, and shall make them available to the Town upon request during the period of this Contract, and in accordance with Chapter 132 of the North Carolina General Statutes, after final payment is made. Records of costs incurred include the CMAR's general accounting records and the Project records, together with supporting documents and records of the CMAR and its subcontractors performing work on the Project, and all other records of the CMAR and its subcontractors considered necessary by the Town for a proper audit of Project costs.
- 1.6 Meetings.** CMAR shall meet with Town representatives at mutually agreed upon times upon the Town's request. Such meetings shall be held at locations designated by the Town.

2. RESPONSIBILITIES OF TOWN:

- 2.1 Town Authority.** Once authorized by the Town Council through approval of this Contract, the Town Manager, or designated representative, shall be authorized to take actions on behalf of the Town with respect to performance of this Contract, and any Supplemental Contracts. His instructions, requests, and decisions on behalf of the Town, where documented in writing, and not inconsistent with this Contract or Supplemental Contracts shall be binding. The Town Manager, or designated representative, may authorize and execute the following changes, if such are agreed to in writing by both parties:
- 2.1.1** change the amount of payment for particular subtasks, if such changes do not alter the rate of compensation of CMAR or its subordinates, or increase the total compensation required for completion of the Project, or reduce the amount of work being performed by CMAR;

3. SCHEDULE / TIME OF PERFORMANCE:

- 3.1** The work to be performed and the services rendered under this Contract shall commence as directed by the Town. In performing the services described in this Contract, it is mutually agreed that time is of the essence in the entrance into the obligations of this Contract by each party. The CMAR shall complete work under the Contract as mutually agreed upon.
- 3.2** The CMAR shall utilize industry standard software to prepare, provide, and maintain appropriately detailed design phase Critical Path Method ("CPM") schedules as approved by the Town.
- 3.3** Scheduling software shall allow for integration of all aspects of the design processes and provide for coordination of all Services to be performed. The scheduling software shall be capable of producing and coordinating logic developed network diagrams, and tabular reports.
- 3.4** The Project schedule shall be sufficiently detailed to allow for a realistic projection of design activity sequences and durations. Updated schedules will be required at the end of each design phase established by the Contract between the Town and Designer, and after major value analysis decisions.
- 3.5** The CMAR is to establish a detailed CPM schedule of the pre-construction/design phase with the concurrence of the Town and Designer. The CMAR is responsible to monitor this schedule during the pre-construction/design phase, ensure that this schedule is updated, and advise the Town of any deficiencies in adhering to this schedule by any party.

4. CMAR FEE AND GENERAL CONDITIONS COSTS:

- 4.1** The CMAR shall be entitled to payment of a fee (the "CMAR Fee") for its services on the Project and shall be entitled to reimbursement of General Conditions costs as set forth herein, and in accordance with Section 5 below.
- 4.2** The CMAR Fee shall be three and one half percent (3.5%) of the sum of 1) Cost of the Work, 2) the CMAR - GMP Contingency, and 3) the CMAR General Conditions set forth in the GMP accepted by the Town. The CMAR Fee as a lump sum dollar cost will be shown in a future Contract Amendment. If the Total Construction Budget is adjusted by the Town, the CMAR Fee shall not exceed three and one half percent (3.5%) of the sum of 1) the Cost of the Work, 2) the CMAR - GMP Contingency, and 3) the CMAR General Conditions, as of the date when the final GMP is established and approved by the Town, subject to modification and limitation as set forth herein. The CMAR Fee will include all CMAR home office personnel costs, including officers as well as home office and local office support staff not included in General Conditions below, together with all other CMAR home office overhead costs and profit. CMAR costs which are not to be included in the CMAR Fee are the costs of all Subcontracts, on-site field staff and home office staff providing Services on the Project, General Conditions costs (as provided below), and the CMAR-GMP Contingency described below. Notwithstanding any other provision herein, CMAR's staff and staff positions indicated in the Preconstruction Fee Proposal are reimbursable costs under this Contract. Beyond the Preconstruction Phase, CMAR's staff costs shall be included in the CMAR General Conditions as a lump sum and not as Cost of the Work.
- 4.3** When a GMP is established (post bidding) and approved for a defined phase of the Work, the CMAR Fee for that GMP shall be converted to a lump sum and be included in the GMP. When the final GMP is established and approved, the CMAR agrees that the cumulative CMAR Fee shall not exceed the maximum amount set forth above in paragraph 4.2. Thereafter, the CMAR Fee shall not be adjusted unless cumulative Town requested Change Orders to the Work of the Project adjust the total Cost of the Work in the total cumulative GMP in excess of 5% percent. The entire CMAR Fee at the time the final GMP is fixed, including all lump sum CMAR fees for each GMP for a defined phase of Work, shall not exceed the amount in 4.2 above. In the event an adjustment to the CMAR Fee is warranted under this paragraph, a lump sum adjustment to the CMAR Fee shall be equitably determined based on the nature of the changes to the Work, proven changes in the scope of services provided by the CMAR, and any other factor that would affect the effort and cost expended by the CMAR due to changes to the Work.

- 4.4** In addition to the foregoing CMAR Fee, a lump sum for the General Conditions for the entire Project on a "not-to-exceed" basis will be submitted by the CMAR with GMP 1 for the Town's approval. No costs associated with the CMAR's main office or its main office or other off-site personnel, including the costs associated with the use of items or equipment of the main office, are covered under the General Conditions lump sum. All such costs are deemed to have been included in the CMAR Fee. Subject to approval by the Town's Representative, each GMP may include special designated allowances for defined expenses. The entire General Conditions lump sum shall be fixed at the time of the final GMP, after which the General Conditions shall not be adjusted unless an amount is negotiated with Town-requested Change Orders to the Work of the Project. The sum of the entire General Conditions at the time the final GMP is fixed shall be determined and listed in future Contract Amendments, subject to approval by the Town and modification and limitation as further set forth herein.
- 4.5** General Conditions shall be broken down into a reasonable number of categories as approved by the Town's Representative. The General Conditions items to be handled by the CMAR on a not-to-exceed lump sum basis are to include, but not necessarily be limited to the following items:
- 4.5.1** Mobilization: Move on site and establish appropriate field offices.
- 4.5.2** Reimbursable Expenses: All reimbursable expenses, relating to the Project; except that, with the prior approval of the Town's Representative, travel required for product reviews, selection, inspection, approvals and expediting at the place of production of such products, shall be chargeable at cost of the Work under the GMP.
- 4.5.3** Temporary Facilities: This shall include an independent office for the Town's Designated Representative(s) and conference rooms for about twenty (20) people; and for providing field office(s) furniture. Provide CMAR's own high-speed Internet connections and field office computers, as needed, for Project tracking purposes. Provide other appropriate office type equipment for field office use, coordinated and approved by the Town's Representative. Field Office(s) temporary electric, heating, water, sanitation, and electronic equipment maintenance and field office operation costs, e.g., stationary, postage, etc., shall be provided after consultation with the Town's Representative. These costs should be incurred judiciously. Establish and maintain appropriate shipping and receiving systems.
- 4.5.4** Plans / Surveys / Permits / Testing: Reproduction of Construction Documents as needed by the CMAR over and above the allowance for Construction Documents provided by the Town. Provide surveyor's services (site layout, etc.), as required. Acquire all required permits. Perform inspections of the existing buildings and Project conditions and perform destructive testing, if required, to assist the Designer prepare a complete and accurate set of Construction Documents and for the CMAR to estimate the cost of the Work in order to minimize change orders due to unforeseen conditions within allowances in the GMP.
- 4.5.5** Site Safety / Security / Cleanup: Establish and maintain an on-site safety program throughout the construction phases. (Note: The cost of home office safety personnel is included in the CMAR Fee. The cost of materials and onsite personnel may be included in General Conditions.) Install and maintain temporary facilities, as required: safety barricades, partitions, ladders, stairs, site fencing, signage, first aid, traffic control devices, etc. Provide daily site clean-up, trash collection, and removal. Provide and maintain site security throughout Project construction phases. Provide snow, ice, storm water, sanitary sewer water or other debris removal, as may be required throughout Project construction phases to maintain the safety of the site.
- 4.5.6** General: Provide temporary weather and dust protection (that which must practically remain outside of subcontracts) as may be required during construction phases. Provide field personnel pagers, and two-way radio throughout the construction phases, as applicable. Include travel expenses for personnel related to off-site equipment/materials survey and inspections. Staffing needs shall be provided by the CMAR as part of General Conditions, and shall be limited to the specific staff positions noted. Provide Project supervisory personnel, as may be required, throughout the

construction phases, e.g., project superintendents, project managers, and project engineers. Provide field office support staff, as may be required, throughout the construction phases, e.g., secretarial, laborers, etc.

- 4.5.7** Insurance / Bond: Provide 100% Performance and Payment Bonds. Provide liability insurance and provide builder's risk insurance policy in the amount of the GMP unless directed otherwise by Town's Representative.
- 4.5.8** Close-Out / De-Mobilization: Provide final site/facility clean up. Provide final release of liens for all contracts. Provide sets of all Subcontractor as-built drawings to the Town and Designer; one set will be used by the Designer to prepare as-built drawings.
- 4.6** The CMAR will be paid for actual General Condition's costs as they are incurred or as otherwise approved by the Town, with no mark-up by the CMAR, except for the CMAR Fee.
- 4.7** The Town reserves the right to adjust the scope of Work or construction at any time prior to agreement on the final GMP. The Town and the CMAR acknowledge and agree that separate interim GMP will include costs for General Conditions that (a) will overlap or otherwise continue into subsequent phases of the Work and Project, (b) may involve preparation for work to be performed and completed in subsequent phases of the Work and Project, and (c) assures adequate protection and maintenance of Work completed in subsequent phases.
- 4.8** Deleted.
- 4.9** Costs for CMAR's staff will be included in the General Conditions lump sum. Unless a schedule of personnel rates are agreed to in writing in an amendment to this Contract, field personnel costs shall be billed at Direct Personnel Expenses / Employee costs (direct salary) plus all customary payroll benefits including but not limited to FICA, SUTA, FUTA, 401K, vacation leave, sick leave, holidays, jury duty leave and bereavement leave with no employee overhead mark up. The staff is limited to full time staff and vehicles which includes the Project Engineer(s), Superintendent(s), Foremen, Project Manager(s), and Project Executive(s) actually furnishing services to the Project, Field Secretaries / Clerks, and occasional laborers (on as needed basis), as amended from time to time by agreement of the parties.
- 4.10** Additional General Conditions costs alleged to arise from any Town-requested change orders to the Work of the Project will be reviewed on an individual change order basis. After consultation with the Designer, the Town shall determine whether the requested increases are caused by a Town-requested change order.

5. GUARANTEED MAXIMUM PRICE (GMP):

- 5.1** Time is of the essence under this Contract. The CMAR shall exert its best efforts and work with the Designer scheduling the packaging of bids and bidding the Work to accomplish substantial completion at the earliest possible date. The CMAR will develop and submit a GMP for each major phase of construction in order to accomplish the most expeditious schedule for the Work. The number of construction phases shall be developed in conjunction with the Designer and Town and shall be approved by the Town. The CMAR shall reconcile the schedule and GMP with Designer and Town against pre-established budget and schedule. Upon submission by the Designer of sealed and signed Construction Documents for an agreed phase of the Work, the CMAR will promptly begin soliciting Trade Subcontractor bids for that phase, which will include all costs of construction (hereinafter sometimes referred to as "Cost of the Work"). The CMAR will promptly and not later than 45 calendar days after receipt of Construction Documents for a phase of the Work, provide a guaranteed maximum price proposal ("GMP proposal") for the phase, including without limitation the CMAR Fee, the CMAR-GMP Contingency and the General Conditions lump sum, but not including the Town's Construction Contingency. The allocation, basis, and distribution of the cost of construction, CMAR Fee, General Conditions and CMAR-GMP Contingency for each GMP shall be set out in detail in each GMP amendment to this Contract.
- 5.2** The GMP proposal shall set out each proposed subcontract amount without adjustment for contingencies or other increases, the CMAR Fee, the General Conditions Allowance costs

including on-site field staff, the CMAR-GMP Contingency, Town's Special Allowances, if any are approved by the Town, and all Project related costs, e.g., bonds, personnel payroll benefits, etc. The GMP proposal shall reflect all cash discounts anticipated on payments made by the CMAR or any Subcontractor, which shall be for the benefit of the Town. Trade discounts, rebates, refunds, and amounts received from sales of surplus or salvaged materials and equipment shall accrue to the Town and the CMAR shall make provisions so they can be secured and shall reduce the GMP accordingly. Amounts which accrue to the Town in accordance with this section shall be accounted for and credited to the Town as a deduction from the Cost of the Work or the General Conditions as appropriate. The allocation, basis and distribution of the cost of construction, CMAR Fee, General Conditions and CMAR-GMP Contingency for each GMP shall be set out in detail in each GMP proposal.

- 5.3** Upon final submission by the Designer of the last of the complete Construction Documents for the entire Project, the CMAR will develop and submit its final GMP for the Project. At that time, the GMP will be fixed, subject to changes only as set forth herein by change order. In the event the Town does not accept the CMAR's proposed GMP, the Town may terminate this Contract in accordance with its terms. In the alternative, the Town may require the CMAR to recalculate the GMP, including any phase of any GMP, after making changes to the scope of work or obtaining further development of the drawings and specifications from the Designer.
- 5.4** The sum of all GMP proposals must not exceed the Total Construction Budget, including CMAR Fees, and overhead. If bids as they are received make it appear likely to the Town that the final GMP will exceed the desired final Total Construction Budget, the CMAR shall reject bids or otherwise take the steps that are required by the Town and this Contract to reduce the GMP, unless the Town authorizes a higher GMP.
- 5.5** Each GMP proposal for a phase of the Work shall identify the Construction Drawings that define the scope of work covered by the GMP proposal, shall describe any assumptions or clarifications concerning the scope of the Work, shall describe any contractor's special designated allowances and the basis on which each allowance was calculated, and shall contain the progress schedule related to that phase of the Work. It is the intent of the project development process to minimize the need for allowances. However, when needed they shall be identified in each trade subcontract and later tracked on each trade subcontractor's schedule of values and payment application. The CMAR shall also compile and maintain a tabulation of all allowances. Although the GMP proposal shall describe the scope of work included in the GMP, the description of the work in the GMP proposal shall not be deemed to modify or amend the Construction Documents, until incorporated by a Change Order Amendment.
- 5.6** The Town reserves the right to direct the CMAR to (and the CMAR shall) work in conjunction with the Designer to redesign the Project as necessary to maintain the Project program and meet the Total Construction Budget as follows:
 - 5.6.1** After consultation with the Town, the CMAR shall coordinate and cooperate with the Project Team to alter and redraft Construction Documents as necessary to accomplish the required reduction in cost.
 - 5.6.2** The CMAR shall develop and provide to the Town a GMP in connection with the redrafted and altered Construction Documents to accomplish the necessary reductions in cost.
 - 5.6.3** The CMAR shall analyze the Designer's originally submitted and as altered and redrafted Construction Documents, and make recommendations to the Town as to ways and methods to reduce the costs of constructing the Project to a sum which does not exceed the Total Construction Budget. The Town has the right to reject any GMP as originally submitted, or as adjusted. In that event, the Contract may be terminated according to its terms. In addition, the Town has the right to withhold, in its sole discretion, approval of the amendment of the Contract to reflect any GMP, in which event the Contract may be terminated according to its terms.
 - 5.6.4** The CMAR's detailed construction cost estimates and GMP will be reviewed by the Designer and the Town for reasonableness and compatibility with the Total Construction Budget. Meetings and negotiations between the Town, Designer and the CMAR will be held to resolve questions and differences that may occur between the Town's Project Budget and the CMAR's construction cost

estimate and corresponding GMP. The CMAR shall work with the Town and Designer to reach a mutually acceptable GMP. Notwithstanding the foregoing, the CMAR is not responsible for providing, nor does the CMAR control, the Project design and contents of the design documents prepared by the Designer. By performing any design reviews described in the Contract, the CMAR is not acting in a manner so as to assume professional responsibility or liability, in whole or in part, for all or any part of the Project design and design documents prepared by the Designer or the Town.

- 5.7** All Work shall be bid and procured for lump sum or not-to-exceed prices based on the Construction Documents. Unit prices may be solicited from the Subcontractors solely for the purpose of providing a basis to adjust Subcontracts for justifiable change orders and changes in the scope of the Work shown in the Construction Documents.
- 5.8** Upon acceptance by the Town of a GMP proposal, the Town shall prepare an amendment to this Contract to fix the GMP and establish when and on what terms the CMAR may commence the Work. Within 10 days after the execution of the amendment provided herein, the CMAR shall provide the Town with a Performance Bond and a Labor and Material Payment Bond each for 100% of the GMP in conformity with the terms of N.C. Gen. Stat. Chapter 44A and this Contract. If it appears that all bids for Work under a GMP will not be received and all contracts will not be awarded within sixty days after the date of the acceptance of the GMP, the CMAR shall provide the Town with a Performance Bond and a Labor and Material Payment Bond each for 100% of the estimated GMP in conformity with the terms of N.C. Gen. Stat. Chapter 44A and this Contract. If the Town increases the construction budget or authorizes a GMP in excess of the estimated GMP, the Town may require that the CMAR increase the Performance Bond and the Labor and Material Payment Bond each to 100% of the approved GMP. The CMAR will execute the agreed upon amendment within ten days after receipt from the Town.
- 5.9** Upon acceptance of the GMP, the CMAR shall continue to advise and assist the Town and Designer during any continuing design activities as described in the RFQ and this Contract.
- 5.10** Upon completion of the Work, any and all non-expended funds remaining in any GMP will be retained by the Town, except as specifically set forth above in Section 4.

6. CONTINGENCY ALLOWANCES:

- 6.1** Town's Contingency: A Town's Construction Contingency will be established. Expenditures against this contingency will be available to cover all costs not covered by the GMP resulting from changes in scope and initiated by the Town via a change order amendment issued by the Town.
- 6.2** In addition to the Town's Contingency for the overall Project, the Town may include in the Total Construction Budget special allowances ("Town's Special Allowance") which have been dedicated to the Project but may only be spent in the discretion of the Town. The Town's Special Allowance is a designated special allowance to provide for the management of unforeseen conditions, design errors and omissions, or new scope identified and desired by the Town and as otherwise noted herein. The Town's Special Allowance is not included in the CMAR's GMP until written authorization signed by the Town's Representative for its expenditure is executed. Allocations, restrictions upon, or expenditures from this Town's Special Allowance must be approved by the Town's Representative in writing to be considered valid in any manner. The Town may, in its discretion, use the Town's Special Allowance to pay justifiable claims for additional costs submitted by the CMAR in accordance with the Contract. The Town may also, in its discretion, authorize the CMAR to procure Subcontracts to perform work previously deleted through value engineering, or to procure Subcontracts to perform additional or changed work as directed by the Town's Representative in writing.
- 6.3** CMAR-GMP Contingency: Each GMP shall contain a CMAR-GMP Contingency fixed as an estimated lump sum for each GMP in an amount approved by the Town, to help reduce the risks assumed by the CMAR in providing the GMP for the Project. The entire CMAR-GMP Contingency shall be fixed, based on the final GMP, after which the CMAR-GMP Contingency shall not be adjusted unless an amount is negotiated with Town requested Change Orders to the Work of the Project. In the event an adjustment to the CMAR-GMP Contingency is negotiated

under this paragraph, a lump sum adjustment to the CMAR-GMP Contingency shall be equitably determined based on the nature of the changes to the Work, proven changes in the scope of services provided by the CMAR, and any other factor that would affect the CMAR risks due to changes to the Work.

- 6.3.1** The Town and the CMAR acknowledge that the CMAR-GMP Contingency is included to compensate for eventualities which have not been taken into precise account in the establishment of the GMP, specifically unanticipated costs which do not result in, warrant, or cause a change order to the GMP, including (1) legal fees not to exceed in the aggregate \$50,000.00 associated with defending bid protests or subcontract awards, provided the CMAR is not negligent or at fault, (2) scope gaps between trade Subcontractors, (3) contract default by trade Subcontractors, (4) threat of or damage due to Acts of God to the extent not otherwise covered by insurance; (5) costs of corrective work not provided for elsewhere, and (6) unforeseen field conditions and design omissions. Design errors which the CMAR could not have reasonably detected during the discharge of CMAR's preconstruction duties will be resolved on a case-by-case basis and may warrant a change order to the GMP. Such design errors may be paid from the Town Contingency, but shall not be chargeable to the CMAR-GMP Contingency.
- 6.3.2** The CMAR-GMP Contingency is not allocated to any particular item of the Cost of the Work, and is established for the CMAR's use as may be required for increases in costs as noted above. It is understood that the amount of the CMAR-GMP Contingency is the maximum sum available to the CMAR to cover costs incurred as a result of such unanticipated causes or details, and that cost overruns in excess of the amount of the CMAR-GMP Contingency will be borne by the CMAR.
- 6.3.3** The CMAR-GMP Contingency may be applied to any items within the Cost of the Work without the necessity of a change order, without constituting a change in the Work, and without resulting in any change in the GMP. The CMAR will notify the Town and Designer in writing of the CMAR's intent to apply any part of the CMAR-GMP Contingency to any item within the Cost of the Work prior to any such application. The CMAR shall fully document the change on its copy of the Construction Documents for inclusion in the as-built record documents required by this Contract.
- 6.3.4** When each GMP is fixed, the CMAR - GMP Contingency for that GMP shall be converted to a lump sum. The entire CMAR-GMP Contingency shall be fixed in the final GMP, after which the CMAR-GMP Contingency shall not be adjusted unless an amount is negotiated with Town requested Change Orders to the Work of the Project.
- 6.3.5** The amount of the CMAR - GMP Contingency is to be reviewed by the Town as part of its review of each GMP. The Town retains the right to specifically request revisions to the amount of the CMAR - GMP Contingency prior to the Town's acceptance and approval of each GMP. If, after a contingency is fixed as part of a GMP proposal, the contract prices are lower than anticipated, the CMAR and Town agree that the CMAR-GMP Contingency shall not be reduced prior to completion of that GMP phase. In the event that the CMAR is not required to use any or all of the CMAR - GMP Contingency for a particular GMP it shall be carried forward to each subsequent GMP. In the event that there are any funds remaining in any special or dedicated Town's allowance, those funds shall be retained solely by the Town.

7. COMPENSATION:

- 7.1** For services to be performed hereunder, the Town shall authorize payments for Pre-Construction Services under this Contract a lump sum not to exceed **One Hundred Eighty-One Thousand, Seven Hundred and Ten Dollars (\$181,710.00)**. The parties acknowledge that the sums due to the CMAR for Pre-Construction Services shall not exceed the amount listed in 7.1 without amendment to this Contract.
- 7.2** Upon the execution of this Contract, payment for sub-phases and specific services as indicated in

Appendix D shall be authorized, payable monthly upon the Town's evaluation of monthly payment requests and after consultation with the Designer.

7.3 Applications for payment shall be in a format required by the Town and include whatever supporting information that is reasonable and consistent with requirements of other Town projects, as may be required by the Town.

7.4 **The Town of Apex shall pay invoices within thirty (30) days of certification of the Payment Application by the Designer.**

8. PRE-CONSTRUCTION SERVICES: General Requirements

8.1 The CMAR services shall include pre-construction services as required during design development as set forth herein. The CMAR shall continue to provide pre-construction services throughout the Project as needed. The CMAR shall become an integral part of the Project Team that will coordinate the development and progress of the design and construction processes.

8.2 The CMAR shall meet with the Town, the Designer and any other design team members to better understand the Project program, the design documents, the Project scope and all other pertinent aspects of the Project.

8.3 The CMAR shall develop initial written project procedures, in cooperation with the Town and the Designer, which will be used as a guide for the management and coordination of the Project throughout the life of the Project to ensure adherence to the Project schedule and budget. Provide a management plan, updated for each design phase of the Project.

8.4 If requested by the Town, the CMAR shall develop detailed cost estimates for special system comparison and shall research different construction materials and report findings as needed. The CMAR will assist with the selection of systems and products by providing market intelligence to the Designer.

8.5 The CMAR shall develop a construction site management plan and utility installation plan. In conjunction with the Designer, these plans shall be presented and coordinated with Town and other regulatory entities and approved by the Town. These plans shall reflect construction offices and construction vehicle parking, crane and other equipment operations, material deliveries and storage, safety stations, temporary utility services, street and sidewalk closures and detours, traffic and vehicle movements, utility routing and signage and other items as needed to accomplish the Work.

8.6 The CMAR shall develop a process to track all changes or potential changes to the Work. It shall identify the potential change; track the review and evaluation of the potential change; estimate cost and/or time impacts; and record the authorization or acknowledgement of the change. These documents shall track, but are not limited to, the following items: use of allowances for their intended purposes, back charges between trade sub-contractors, use of the CMAR-GMP Contingency, use of the Town's special allowances; impacts of concealed conditions; or Town requested changes. These documents shall be available for auditing as requested by the Town.

8.7 The CMAR shall evaluate the designs available at the time of the CMAR's commencement of pre-construction services and conduct constructability review in conjunction with the Designer and Town.

8.8 Within ten (10) working days from the execution of this Contract, the CMAR is to establish a detailed CPM schedule of the pre-construction / design phase with the concurrence of the Town and Designer. The CMAR is responsible to monitor this schedule during the pre-construction / design phase, ensure that this schedule is updated, and advise the Town of any deficiencies in adhering to this schedule by any party. The CPM schedule to the Town shall provide a cash flow analysis to the extent practical during the pre-construction phase of services. Scheduling shall allow for integration of all aspects of the design processes and provide for coordination of all work to be performed including but not limited to identifying the critical path for regulatory agency approvals and permitting, development and approval of the site logistics plan, development and approval of the site utility construction and sequencing plan, and development and approval of a construction material delivery, staging and site utilization plan. The construction schedule shall be

included with the pre-construction/design phase schedule and shall be updated in increasing detail as the construction plans and specifications are revised and finalized. It shall include, but not be limited to, indicating methods of sequencing of procurement, permitting, construction and close out of the Project include time requirements for sequences and durations, milestone dates for receipt and approval of design documents, receipt of regulatory approvals and permits, preparation and processing of shop drawings and samples, delivery schedule of materials or equipment long-lead time procurement, project procurement schedule, installation and construction completion, and critical milestone dates for Town procured and installed fixtures, furnishings and equipment . Updated schedules will be required at the end of each design phase established by the Contract between the Town and Designer. Schedules will be reviewed by the Designer and approved by the Town.

- 8.9** The CMAR shall review the plans and specifications and make recommendations to the Town and Designer regarding phased issuance of the drawings and specifications prepared by the Architect to facilitate phased construction where such phasing is appropriate.
- 8.10** The CMAR shall review the drawings and specifications as they are being prepared, recommending alternative solutions whenever design details affect costs, construction feasibility or schedules. The CMAR shall notify the Designer and the Town in writing upon observing any features in the plans or specifications, which appear to be ambiguous, confusing, conflicting or erroneous. The CMAR shall provide a thorough interdisciplinary coordination review of the Construction Documents submitted for review to the Town and Design Team (to be performed by a qualified firm or qualified personnel) before trade contract bidding. Review shall be performed utilizing a structured and industry accepted process. The CMAR shall review the final documents to ensure that all comments have been incorporated.
- 8.11** The CMAR shall develop and implement MBE / WBE procedures and policies and shall prepare the MWBE Participation Plan, begin MWBE outreach, and compile the MWBE database. The CMAR shall participate in and lead meetings regarding MWBE related issues, including but not limited to contracting, outreach and partnering. The CMAR shall document all aspects of activities for this section as needed for reporting under State of North Carolina and Town of Apex requirements.
- 8.12** The CMAR shall develop material for Town Council presentations and assist with those presentations as needed.
- 8.13** The CMAR shall meet with the Town, the Designer and any other design team members to better understand the Project, the design documents, the Project scope and all other pertinent aspects of the Project.
- 8.14** The CMAR shall attend regularly scheduled and especially called meetings with the Town and the Designer during their Design phases established by the contract between the Town and the Designer, to advise them on matters of cost, schedule, site use, utility relocations, on-site and off-site Improvements, maintenance of traffic and traffic control during construction, selection of materials, building methods, construction details, building systems and equipment, phasing and sequencing as follows: 1) Monthly meetings at the Designers or Towns offices, and 2) upon establishment of the first GMP, weekly on-site meetings as approved by the Town. Additional consultations required to maintain Project schedule and / or to achieve budget compliance shall be provided at no additional cost to the Town. The CMAR shall develop a Project Management Plan for management of the Project, including early hazardous materials (e.g., underground chemicals, etc.) abatement, site development including excavation and shoring, utility relocations, geological and environmental Investigations if applicable.

9. PRE-CONSTRUCTION SERVICES: Constructability Reviews

- 9.1** The CMAR shall review the design throughout the pre-construction phase as to constructability. A constructability report shall be submitted from the CMAR with each design team submission. With respect to each such issue, the CMAR shall submit a written report to both the Town and the Designer. At a minimum, each such written report shall contain: (1) A description of the constructability issue with background information; (2) a summary of the CMAR's in-depth study /

research; and (3) written recommendations for addressing each specific issue.

10. PRE-CONSTRUCTION SERVICES: Construction Cost Models / Estimates

- 10.1** The CMAR shall develop a project budget / cost model (independent from any similar cost estimates required of the Designer) which shall be updated as needed. Construction phase budgets and cost reports will be generated as the GMP for each construction phase is approved. Construction cost estimates shall be able to be sorted by trade bid packages. Financial and quality analysis of different construction methods in each major trade group shall be provided for potential quality, cost and schedule enhancements. Meetings and negotiations between the Town, the Designer and the CMAR will be held to resolve questions and differences that may occur between the estimates by the Designer and the CMAR cost estimates. The Town shall make the final decision after receiving recommendations from the CMAR and Designer.
- 10.2** Each CMAR cost estimate must contain a statement of the total amount determined to be the total construction costs for the Project (including alternates, CMAR General Conditions, CMAR fees, and CMAR-GMP Contingency).
- 10.3** In the event that the Designer's or CMAR's estimates exceed the Town's Project Budget and the CMAR's additional services under this Section were not reasonably anticipated in the CMAR's Pre-Construction Services or General Conditions, the Town and CMAR may agree on a change order directing the CMAR to work in conjunction with the Designer to revise the Project as necessary to meet the Town's Project Budget.
- 10.4** Meetings and negotiations between Town, Designer and the CMAR will be held to resolve questions and differences that may occur between the Designer's and CMAR's estimates. The CMAR shall work with the Town and Designer to reach a mutually acceptable Construction Cost.
- 10.5** The CMAR shall, if requested by the Town, provide review, assistance and recommendations in estimating all elements of the total construction cost.

11. PRE-CONSTRUCTION SERVICES: Value Analysis

- 11.1** The CMAR shall, after a complete review of the Project, evaluate the designs available at the time of the CMAR's commencement of pre-construction services, and obtain an understanding of the intent of the Town and the Designer, provide Value Analysis services and offer cost savings suggestions and best value recommendations to the Town. All recommendations shall be in writing and must be fully reviewed with the Designer and Town, and approved by the Town prior to implementation.
- 11.2** Value Analysis efforts shall also take into consideration applicable constructability issues.
- 11.3** All Value Analysis studies must be provided on a timely basis within the design schedule.
- 11.4** Value Analysis studies shall continue to be refined as the design is developed.
- 11.5** The CMAR shall conduct a major Value Analysis study at the end of Design Development (utilizing the Design Development documents) which shall include, but not be limited to, the items noted below:
 - 11.5.1** Value Analysis at the Completion of the Design Development Design Phase
 - 11.5.1.1** Building Structure
 - 11.5.1.2** Foundation Systems
 - 11.5.1.3** Retaining Wall Systems
 - 11.5.1.4** Structural Framing Systems
 - 11.5.1.5** Building Enclosure
 - 11.5.1.6** Enclosures Systems and Materials
 - 11.5.1.7** Engineering Systems
 - 11.5.1.8** Plumbing Systems, Equipment and Materials

- 11.5.1.9 HVAC Systems, Equipment and Materials
- 11.5.1.10 Fire Protection Systems and Equipment
- 11.5.1.11 Electrical Systems and Equipment
- 11.5.1.12 Fire Detection and Alarm Systems and Equipment

11.5.2 Value Analysis at the Completion of the Construction Document Phase

- 11.5.2.1 Building Enclosure Systems such as variations within the selected enclosure system(s) (e.g., material quality, material sizes, fastening methods etc.)
- 11.5.2.2 Engineering Systems —such as, 1) Plumbing Fixtures and Fittings, 2) HVAC Devices and Controls, 3) Fire Protection Devices, 4) Electrical Fixtures and Controls, and 5) Fire Detection and Alarm Devices and Controls

11.6 Develop a value-analysis study for consideration at the session noted below (It is anticipated that the Designer will concurrently conduct a similar activity).

- 11.6.1 Brainstorming session(s) with design team.
- 11.6.2 Written cost studies shall be produced and submitted to the Town within two (2) weeks of the final brainstorming session.
- 11.6.3 Written pro / con evaluation of the cost studies shall be provided to the Town within two (2) weeks after submission of the cost studies and shall be prepared in collaboration with the Designer.
- 11.6.4 Formal presentation of the written study shall be conducted by the Designer and the CMAR firm.
- 11.6.5 A formal written Value Analysis study document including a summary of Value Analysis items, applicable cost savings, selected Items and their corresponding cost savings shall be presented to the Town and Designer.

11.7 Should the Town request the CMAR to conduct additional Value Analysis studies not contemplated in section 11.6 above, the CMAR may be entitled to request and justify a change order allowing payment for additional time needed by the CMAR to prepare such Value Analysis studies.

12. PRE-CONSTRUCTION SERVICES: Coordination of Contract Documents

12.1 The CMAR shall review the drawings and specifications as they are being prepared, recommending alternative solutions whenever design details affect costs, construction feasibility or schedules. The CMAR shall within seven business days notify the Designer and the Town in writing upon identifying any features in the plans or specifications, which appear to be ambiguous, confusing, conflicting, or erroneous.

12.2 The CMAR shall provide a thorough interdisciplinary coordination review of the Construction Drawings and Specifications submitted for review to the Town and Design Team (to be performed by qualified personnel) before trade contract bidding. Review shall be performed utilizing a structured and industry accepted process. The CMAR shall review the final documents for each phase of design to ensure that all comments have been incorporated.

12.3 All ambiguous, confusing, conflicting and / or erroneous features in the drawings or specifications discovered by the CMAR during the review process shall be brought to the attention of the Town and Designer in writing. If after review with the Designer the Town agrees that corrections should be made by the Designer, the Designer shall incorporate such changes and / or revisions as directed by the Town into the Project Manual to allow the CMAR to include associated cost impacts in the CMAR Cost Model Update.

12.4 The CMAR shall be primarily responsible, with the assistance of the Designer, for preparing bid packages and proposed subcontracts to solicit bids for the Work.

13. PRE-CONSTRUCTION SERVICES: Guaranteed Maximum Price (GMP)

- 13.1 Within time frames agreed upon between the Town and the CMAR, the CMAR will develop and provide to the Town a GMP which will include all construction costs, and all other projected costs including without limitation the CMAR fees, the CMAR-GMP Contingency and General Conditions lump sum but not including any Town Construction Contingency or other Town allowances. The GMP shall set out each anticipated trade contract amount: the CMAR's fixed fee; General Conditions reimbursable cost items including on-site field staff, and all project related costs, e.g., bonds, personnel payroll benefits, etc.
 - 13.2 In the event that the GMP exceeds the Town's Project Budget, the Town reserves the right to direct the CMAR to (and the CMAR shall) work in conjunction with the Designer who shall redesign the facility as necessary to meet the Town's budget as follows:
 - 13.3 After consultation with the Town, the CMAR shall coordinate and cooperate with the Project Design Team to assist the Designer who shall alter and redraft Construction Documents as necessary to accomplish the required reduction in cost.
 - 13.4 The CMAR shall develop and provide to the Town a GMP in connection with the redrafted and altered Construction Documents to accomplish the necessary reductions in cost.
 - 13.5 The CMAR shall analyze the Designer's originally submitted and as altered and redrafted Construction Documents, and make recommendations to the Town as to ways and methods to reduce the costs of constructing the Project to a sum which does not exceed the Town's budget.
 - 13.6 *Deleted.*
 - 13.7 The Town has the right to reject the GMP as originally submitted or as adjusted.
 - 13.8 The CMAR's detailed construction cost estimates and GMP will be reviewed by the Designer and the Town for reasonableness and compatibility with the Town's budget. Meetings and negotiations between the Town, Designer, and CMAR will be held to resolve questions and differences that may occur between the Town's Budget and the CMAR's construction cost estimate and corresponding GMP. The CMAR shall work with the Town and Designer to reach a mutually acceptable GMP.
 - 13.9 Upon acceptance by the Town of the GMP or the first GMP, the Town shall prepare an Amendment to this Contract detailing the GMP and scope of services covered by that GMP. Within ten (10) days after the Town provides the CMAR with the Amendment acceptable to both parties, the CMAR shall execute said Amendment, submit it to the Town, and provide the Town with an amended Performance Bond and Payment Bond each in the amount of the GMP in conformity with the provisions of Chapter 44A, Article 3 of the General Statutes of North Carolina.
 - 13.10 Phasing of the Project may require that an initial GMP be developed by the CMAR and presented to the Town for approval to facilitate early construction packages. Such initial GMP(s) shall not relieve the CMAR of the responsibility to execute and submit the Amendment containing said GMP(s) and otherwise complete the Project within the Total Construction Budget as set forth by the Town.
- 14. BIDDING PHASE SERVICES:**
- 14.1 The CMAR, shall develop procedures to advertise and solicit trade subcontractors in an open and public manner consistent with North Carolina General Statutes – Chapter 143. The CMAR shall act as the Town's fiduciary in handling and opening bids to the extent required by N.C.G.S. 143-128.1. The CMAR shall develop procedures and requirements to assure time, cost and quality control during construction.
 - 14.2 The CMAR shall arrange and prepare bid packages to completely execute the Work and provide opportunities for maximum participation by minority and women-owned businesses. CMAR shall include a provisional construction schedule for issuance with the bid packages.
 - 14.3 The CMAR shall identify, solicit and pre-qualify bidders for all packages. In conjunction with Town representatives, prepare and implement an MWBE outreach program to encourage participation by minority-owned and women-owned contracting firms. Advertise and distribute bid

packages. Schedule and conduct pre-bid conferences in conjunction with the Designer. Educate trade subcontractors on sustainability measures and monitor bidder activity.

14.4 The CMAR shall publicly open, review and analyze bids in conjunction with the Town and the Designers. A thorough scope review will be conducted with the bidders. A "Recommendation to Award" (RTA) for each trade subcontract shall be prepared which documents the reasons for the CMAR's decision and recommendation. Bid tabulations shall accompany the RTA's.

14.5 Upon approval of the Town, the CMAR shall execute subcontracts with the trade subcontractors.

15. CONSTRUCTION PHASE SERVICES:

15.1 The CMAR shall provide construction services as required to complete construction of the Project in a timely and economic fashion. The CMAR shall become an integral part of the Project Team that will coordinate the development and progress of the construction processes. Construction responsibilities are described further in this and subsequent sections of this document.

15.2 The CMAR shall maintain an on-site staff for management of the construction process. The CMAR shall establish and maintain coordinating procedures to execute the Work in its entirety. Industry standard monitoring shall be performed by the CMAR to ensure the quality of the Work and conformity to the plans and specifications. Deficiencies in the Work shall be documented and tracked until satisfactorily corrected.

15.3 The CMAR shall ensure satisfactory installation and operation of building systems prior to substantial completion. The CMAR and the trade subcontractors are responsible for construction quality control at all times.

15.4 Construction Services shall continue until certain post-occupancy activities, including coordination of furniture, furnishings and equipment deliveries and installation; resolution of punch lists; assembly of guarantees, operation manuals, record drawings and closeout documents; training; and regulatory approvals are completed.

16. BONDS:

16.1 Bonds shall be provided as indicated in Section 48 of the General Conditions of the Contract in Appendix A of this Contract.

17. NON-ACCEPTANCE OF THE GMP AND / OR TERMINATION:

17.1 Termination by Town for Cause: The Town may terminate this Contract for cause pursuant to Section 38 of the General Conditions of the Contract.

17.2 Termination for Convenience of Town: The Town may terminate this Contract for the Town's convenience pursuant to Section 37 of the General Conditions of the Contract.

17.3 Intentionally Deleted.

17.4 Delivery of Documents After Termination: Upon any termination, CMAR shall deliver or otherwise make available to Town all documents, data, drawings, specifications, reports, estimates, summaries, and such other information and materials that have been created, in whole or in part, or accumulated by CMAR in performing this Contract or Contract Amendments.

17.5 Town May Complete Work: Upon termination, the Town may complete the services in any way that the Town, in its discretion, determines is appropriate, including but not limited to using Town personnel, retention of selected sub-CMARs of the CMAR, or contracting with outside parties. The Town shall have the right to continue its activities to place the Project under construction with no further obligation towards the terminated CMAR and with full ownership and use of any data and information developed during pre-construction activities. Completion of such work shall not waive any of Town's rights and remedies.

18. INSURANCE:

18.1 Insurance shall be provided as indicated in Section 47 of the General Conditions of the Contract in Appendix A of this Contract.

19. LAWS AND REGULATIONS:

19.1 The validity, construction, interpretation, and administration of this Contract shall be governed by and subject to the jurisdiction and laws of the State of North Carolina.

19.2 If any disputes arise regarding the parties rights under this Contract, the parties shall endeavor to resolve their disputes pursuant to the dispute resolution provisions in G. S. 143-128 (f1) and 1 N.C.A.C. 30H. Should any dispute arise that cannot be settled through the above referenced dispute resolution provisions, then any civil action to be brought by either party shall be filed in the General Court of Justice of North Carolina, Superior Court Division, Wake County, North Carolina, which shall be the sole and exclusive venue for the resolution of any dispute arising out of or any way relating to this Contract.

19.3 The CMAR and its officers, managers, employees, representatives, agents, assigns and others acting on behalf of the CMAR in connection with the Project, agree to comply with all applicable laws, ordinances, statutes, building codes, rules and regulations pertinent to the Work to be performed under this Contract for the Project.

20. STANDARD OF CARE:

20.1 The CMAR shall perform for or furnish to the Town construction management services in all phases of the Project to which this Contract applies as hereinafter provided. The CMAR may employ subcontractors and consultants as deemed necessary to assist in the performance or furnishing of construction management services hereunder. The CMAR shall not be required to employ any Subcontractors unacceptable to CMAR.

20.2 The standard of care for all construction management services performed or furnished by CMAR under this Contract will be that of the care and skill ordinarily used by construction managers under similar conditions at the same time and in the same locality. CMAR makes no warranties, express or implied, under this Contract or otherwise, in connection with CMAR's services.

20.3 The CMAR shall re-perform any faulty or defective work that is not in compliance with the Standard of Care set forth above, at no expense to the Town, provided that the CMAR is notified of such non-compliance within the agreed upon period.

21. NOTICES:

All notices, requests for payment, or other communications arising hereunder shall be sent to the following:

For the Town of Apex:
Dennis Brown, Construction Project Manager
Town of Apex
PO Box 250
Apex, NC 27502

For CMAR:
Marty Thompson, Project Executive
J.M. Thompson Company
1002 E. Chatham St.
Cary, NC 27511

22. SMALL DISADVANTAGED MINORITY AND WOMEN-OWNED BUSINESS (SDMWOB) PARTICIPATION PLAN:

22.1 The CMAR shall develop and implement procedures and policies and review with Town for approval regarding:

- 22.1.1** Outreach and Networking
- 22.1.2** SDMWOB participation in preconstruction
- 22.1.3** SDMWOB E Contractors College
- 22.1.4** Community meetings
- 22.1.5** Workforce Program Development
- 22.1.6** Certification Assistance
- 22.1.7** Payment handling
- 22.1.8** Change Order handling
- 22.1.9** Bonding Assistance
- 22.1.10** Partnering with first tier subcontractors
- 22.1.11** Handling of rental and leasing equipment

22.2 The CMAR shall prepare the SDMWOB Participation Plan, begin SDMWOB outreach, and compile the SDMWOB database. The established SDMWOB goals for this Project are as outlined in N.C.G.S. 143-128.2.

22.3 The CMAR shall participate in and lead meetings regarding SDMWOB related issues, including but not limited to contracting, outreach and partnering.

22.4 The CMAR shall document all aspects of activities for this section as needed for reporting under State of North Carolina and Town of Apex requirements.

23. ANTI-HUMAN TRAFFICKING:

23.1 The CMAR warrants and agrees that no labor supplied by the CMAR or the CMAR's subcontractors in the performance of this Contract shall be obtained by means of deception, coercion, intimidation or force, or otherwise in violation of North Carolina law, specifically Article 10A, Subchapter 3 of Chapter 14 of the North Carolina General Statutes, Human Trafficking.

23.2 This provision being incorporated for the benefit of the Town of Apex and its residents may be enforced by action for specific performance, injunctive relief, or other remedy as by law provided. Failure to comply with this provision shall also be a default of this Contract.

24. INTELLECTUAL PROPERTY / OWNERSHIP OF WORK PRODUCT:

- 24.1** Intellectual Property, including, but not limited to copyrightable works, developed or created in performance of this Contract shall be the property of the Town. Any information, data, instruments, documents, studies, reports or deliverables given to, exposed to, or prepared or assembled by the CMAR under this Contract shall be kept as confidential proprietary information of the Town and not divulged or made available to any individual or organization without the prior written approval of the Town, unless required by law or to fulfill CMAR's obligations under this Contract (e.g., sharing Project documents and information with design professionals, subcontractors and potential subcontractors). Such information, data, instruments, documents, studies, reports or deliverables created for this Project will be the sole property of the Town and not the CMAR.
- 24.2** The Town shall maintain the right of reuse to any drawings, specifications or other deliverables (final drawings, plans, calculations, specifications, studies, electronic data and information, etc.) provided or furnished by the CMAR with respect to the design or construction of this project. The Town acknowledges that such drawings or specifications are not intended or represented to be suitable for reuse by the Town or others on extensions of the Project or on any other Project. If CMAR does not furnish a written verification that the products and deliverables can be reused for the Town's other purposes, or does not adapt them for such purposes, then re-use of the work product as a result of this Contract is at the sole risk of the Town, and Town shall waive and release CMAR from any liabilities arising, related, or associated with such unauthorized use.
- 24.3** Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, including, but not limited to, copy, art, negatives, photographs, design, text, software, or documentation created as part of the CMAR's performance of this Project shall vest in the Town. Works of authorship and contribution to works of authorship created by the CMAR's performance of this Project are hereby agreed to be 'Works Made for Hire' within the meaning of 17 U.S.C. 201: Ownership of copyright. All plans, maps, documents, reports, studies, and /or other data and materials prepared or obtained under this Contract, and any Amendments (hereafter "work product"), shall be considered works made for hire and shall become the property of the Town without restriction or limitation on their use. Such work product shall be made available, upon request, to the Town at any time during the term of this Contract and any Amendments.

25. ASSIGNMENT:

- 25.1** Neither the Town nor the CMAR will assign, sublet, or transfer their interest, duties, or obligations hereunder without the prior written consent of the other. Nothing herein shall be construed as creating any personal liability on the part of any officer, employee, elected officials, or agent of any public body which may be party hereto, nor shall it create any rights or benefits to parties other than the Town and the CMAR, except such other rights as may be specifically called for herein.

26. APPLICABLE LAW:

- 26.1** All matters relating to this Contract shall be governed by the laws of the State of North Carolina, without regard to its choice of law provisions, and venue for any action relating to this Contract shall be the General Court of Justice of North Carolina, Superior Court Division, in Wake County, North Carolina, which shall be the sole and exclusive venue for the resolution of any dispute arising out of or any way relating to this Contract.

27. FORCE MAJEURE:

Except at otherwise provided in any environmental laws, rules, regulations or ordinances applicable to the parties and the services performed under this Contract, neither party shall be deemed to be in default of its obligations hereunder if and so long as it is prevented from performing such obligations by an act of war, hostile foreign actions, nuclear explosion, earthquake, hurricane, tornado, or other catastrophic natural event or act of God. Either party to the Contract must take reasonable measures and implement reasonable protections when a weather event otherwise defined as a force majeure event is forecast to be eligible to be excused from the performance otherwise required under this Contract by this provision.

28. ADVERTISING:

The CMAR may not use the project for marketing purposes unless advised otherwise by the Town of Apex.

29. LAWS / SAFETY STANDARDS:

29.1 The CMAR shall comply with all laws, ordinances, codes, rules, regulations, safety standards and licensing requirements that are applicable to the conduct of its business, including those of Federal, State, and local agencies having jurisdiction and/or authority.

The CMAR must comply with *North Carolina Occupational Safety and Health Standards for General Industry, 29CFR 1910*. In addition, CMAR shall comply with all applicable occupational health and safety and environmental rules and regulations.

CMAR shall effectively manage their safety and health responsibilities including:

A. **Accident Prevention**

Prevent injuries and illnesses to their employees and others on or near their job site. CMAR managers and supervisors shall ensure employer's personnel safety by strict adherence to established safety rules and procedures.

B. **Environmental Protection**

Protect the environment on, near, and around their work site by compliance with all applicable environmental regulations.

C. **Employee Education and Training**

Provide education and training to all CMAR's employees before they are exposed to potential workplace or other hazards as required by specific OSHA Standards.

30. APPLICABILITY OF NORTH CAROLINA PUBLIC RECORDS LAW:

30.1 Notwithstanding any other provisions of this Contract, this Contract and all materials submitted to the Town by the CMAR are subject to the public records laws of the State of North Carolina and it is the responsibility of the CMAR to properly designate materials that may be protected from disclosure as trade secrets under North Carolina law as such and in the form required by law prior to the submission of such materials to the Town or as designated in North Carolina General Statute § 132-1.7. SENSITIVE PUBLIC SECURITY INFORMATION. CMAR understands and agrees that the Town may take any and all actions necessary to comply with federal, state, and local laws and / or judicial orders and such actions will not constitute a breach of the terms of this Contract. To the extent that any other provisions of this Contract conflict with this paragraph, the provisions of this section shall control. CMAR acknowledges that it will not provide any trade secrets or confidential materials to the Town and that the Town may rely on this representation in the release of any materials associated with this Contract for inspection pursuant to a public records request.

31. MISCELLANEOUS:

- 31.1 The CMAR shall be responsible for the proper custody and care of any property furnished or purchased by the Town for use in connection with the performance of this Contract, and will reimburse the Town for its loss or damage.
- 31.2 The CMAR shall be considered to be an independent contractor and as such shall be wholly responsible for the Work to be performed and for the supervision of its employees. Nothing herein is intended or will be construed to establish any agency, partnership, or joint venture. CMAR represents that it has, or will secure at its own expense, all personnel required in performing the services under this Contract. Such employees shall not be employees of or have any individual contractual relationship with the Town.
- 31.3 This Contract may be amended only by written Contract of the parties executed by their authorized representatives.
- 31.4 The CMAR shall comply with the requirements of Article 2 of Chapter 64 of the North Carolina General Statutes (E-Verify). CMAR shall require all of its subcontractors to comply with the requirements of Article 2 of Chapter 64 of the North Carolina General Statutes (E-Verify).
- 31.5 Notwithstanding any other provisions of this Contract, the parties agree that payments due hereunder from the Town are from appropriations and monies from the Town Council and any other governmental entities. In the event sufficient appropriations or monies are not made available to the Town to pay the terms of this Contract for any fiscal year, the Town shall promptly terminate this Contract pursuant to Section 37 of the General Conditions to the Contract.
- 31.6 N.C.G.S. 147-86.60 prohibits the State of North Carolina, a North Carolina local government, or any other political subdivision of the State of North Carolina from contracting with any entity that is listed on the Final Divestment List created by the North Carolina State Treasurer pursuant to N.C.G.S. 147-86.58. N.C.G.S. 147-86.59 further requires that contractors with the State, a North Carolina local government, or any other political subdivision of the State of North Carolina must not utilize any subcontractor found on the State Treasurer's Final Divestment List. As of the date of execution of this Contract the CMAR hereby certifies that it is not listed on the Final Divestment List created by the North Carolina State Treasurer and that the CMAR will not utilize any subcontractors found on the Final Divestment List.
- 31.7 The Town of Apex may conduct an audit of CMAR's financial, performance and compliance records maintained in connection with the operations and services performed under this Contract. In the event of such an audit, CMAR agrees to provide the Town with reasonable access to CMAR's employees and make all such financial, performance and compliance records available to the Town. The Town agrees to provide the CMAR with an opportunity to discuss and respond to any findings before a final audit report is issued.

32. SURVIVAL:

- 32.1 Upon completion of all Services, obligations, and duties provided for in this Contract, or if this Contract is terminated for any reason, the terms and conditions of this Contract shall survive.

33. INCORPORATION OF DOCUMENTS / COMPLETE CONTRACT:

- 33.1 This Contract, and any documents incorporated below, represent the entire Contract between the parties and suspend all prior negotiations, representations or Contracts, either written or oral.
- 33.2 This Contract may only be amended in writing by consent of the Town and the CMAR.
- 33.3 Each party represents that it is authorized to execute this Contract and agrees to be bound by its terms and provisions.
- 33.4 Specifically incorporated into this Contract and attached are the following documents:
 - 33.4.1 **Appendix A** General Conditions of the Contract
 - 33.4.2 **Appendix B** Performance Bond
 - 33.4.3 **Appendix C** Payment Bond

33.4.4 Appendix D Preconstruction Fee Proposal

33.5 Specifically incorporated into this contract, but not physically attached to this document, are the following documents:

33.5.1 Statement of Qualifications for CM at Risk Services Town of Apex Pleasant Park, dated February 27, 2019.


33.5.2 Request for Qualifications for Construction Manager at Risk for the Town of Apex Pleasant Park, including all addenda.

In cases of conflict between this Contract and any of the above incorporated attachments or references in this Section 33.5, the terms of this Contract shall prevail.

IN WITNESS WHEREOF, the CMAR has executed with the signature(s) of its duly authorized officer(s), under seal, and the Town has executed with the signature of its Town Manager, attested by its Town Clerk, with the official seal affixed, the day and date first above written.

CMAR: J.M. Thompson Company

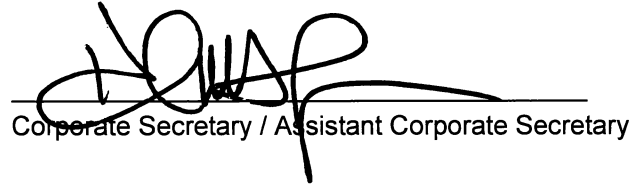
By:



President / Corporate Officer

(CORPORATE SEAL)

ATTEST:



Corporate Secretary / Assistant Corporate Secretary

Town of Apex, North Carolina

By:

Andrew L. Havens
Town Manager

(SEAL)

ATTEST:

Donna Hosch
Town Clerk

This instrument has been preaudited in the manner required by the Local Government Budget and Fiscal Control Act.

Vance Holloman, Finance Director

**TOWN OF APEX
PLEASANT PARK**

APPENDIX A

GENERAL CONDITIONS OF THE CONTRACT

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1. DEFINITIONS:

- 1.1. The Project Team consists of the Owner, the Project Designer, the CMAR and others as identified in the RFQ.
- 1.2. The Owner is the Town of Apex. The Owner in its sole discretion shall designate an Owner's Representative who shall be the CMAR's Owner contact point during both the Pre-Construction and Construction Phases. This representative is the Town's Construction Project Manager unless designated otherwise in writing. This representative shall be the primary channel of communication to the Owner and shall act as the Owner's liaison with the CMAR. The Owner may designate in writing multiple representatives responsible for defined aspects of the Project, and may replace or re-designate any or all multiple representatives. In the event of any disagreement or dispute between any members of the Project Team regarding the Project, the Owner's Representative shall be the final decision making authority, subject to written appeal by either party to the Owner and dispute resolution procedures incorporated herein.
- 1.3. The Designer or Project Designer means the firm or firms of architects or engineers or both (and their consultants) which have undertaken to design the Project pursuant to a contract with the Owner, (hereinafter, the "design contract" or "design agreement"). The Project Designer, WithersRavenel, Inc., will provide design services throughout the duration of the Project. Owner may utilize independent designers in addition to WithersRavenel, Inc.
- 1.4. The Construction Manager "at Risk" (CMAR) shall take all necessary action contemplated under the Contract Documents to: 1) establish during the design phase a Guaranteed Maximum Price (GMP) to construct the Project, and 2) ensure timely and quality completion of the Project at a cost within the GMP. CMAR as used in the Contract Documents means Construction Manager at Risk (CMAR), a licensed (Unlimited) General Contractor. The CMAR is the fiduciary for the Owner in handling and opening bids to the extent required by N.C.G.S. 143-128.1.
- 1.5. Construction management services means services provided by a construction manager, which may include preparation and coordination of bid packages, scheduling, cost control, value engineering, evaluation, preconstruction services, and construction administration.
- 1.6. A Subcontractor, as the term is used herein, shall include a general, mechanical, electrical or plumbing Subcontractor, or other specialty Subcontractor, trade Subcontractor, supplier or vendor who has entered into a direct contract with the CMAR, and includes one who furnishes labor, materials, equipment or other services to complete Work in accordance with the drawings, specifications and other plans for the Project. The term Subcontractor shall include, where appropriate, sub-subcontractors and suppliers to subcontractors of any tier.
- 1.7. Total Construction Budget shall consist of the Cost of the Work as defined in Item 1.8, the General Conditions of the Contract as defined in Item 1.9, the CMAR - GMP Contingency as defined in Item 1.10 below, the CMAR General Conditions, as defined in Item 1.9, and the CMAR Fee, as defined in Section 1.13. The Total Construction Budget number shall be determined and agreed upon in future Contract Amendments. The Owner reserves the right to adjust the Total Construction Budget at any time prior to agreement on the final GMP.
- 1.8. Cost of the Work is the sum of the trade packages and any self-performed work of the CMAR (only as permitted under this Contract) necessary to perform the Work and does not include General Condition Costs, CMAR – GMP Contingency or CMAR Fee.
- 1.9. General Conditions of the Contract shall define the contractual relationships between the Owner, Contractor, and Designer. The general conditions are usually included in the book of specifications (or in the accompanying architectural drawings) of a contract, that set the minimum performance requirements for the contractor. These conditions also include the rights and responsibilities of the parties involved. The general conditions provide the legal and liability

language necessary to establish a balanced work flow among the contracting parties. It clearly defines the roles of each contracting party and describes the scope and time frames of the project. In addition, general conditions may outline the insurance and bonding requirements for the project.

- 1.10. CMAR – GMP Contingency shall be allocated within each GMP. A CMAR-GMP Contingency fixed as an estimated lump sum for each GMP in an amount approved by the Owner, to help reduce the risks assumed by the CMAR in providing the GMP for the Project.
- 1.11. Owner Contingency, An Owner's Construction Contingency will be established. Expenditures against this contingency will be available to cover all costs not covered by the GMP resulting from changes in scope and initiated by the Owner via a change order amendment issued by the Owner.
- 1.12. The Guaranteed Maximum Price, also referred to as the GMP, is a monetary amount for the Work or a phase of the Work that, once approved by the Owner, the Owner will not be required to pay in excess of that amount to the CMAR for the Work covered by the GMP, unless the GMP is adjusted in accordance with the CMAR Pre-Construction and Construction Services Contract. The GMP is defined further in Article 5 of the CMAR Pre-Construction and Construction Services Contract. It is the intent of the CMAR Pre-Construction and Construction Services Contract that, once a GMP is fixed, any costs incurred by the CMAR over and above the GMP for the Work covered by the GMP will be at the risk of and shall be borne by the CMAR, unless the GMP is adjusted in accordance with this CMAR Pre-Construction and Construction Services Contract.
- 1.13. CMAR Fee, shall mean the fee to be negotiated between the Owner and the CMAR and paid to the CMAR for construction management services as a percentage of the sum of the "Cost of the Work", the CMAR General Conditions, and the CMAR-GMP Contingency. Notwithstanding anything to the contrary, if the GMP is not accepted, the CMAR shall only be entitled to receive a fee for the portion of the Pre-Construction Services completed as described in the Contract.
- 1.14. The Contract Documents consist of the RFQ, CMAR's Statement of Qualifications in response to the RFQ, the drawings and specifications, including all bulletins, addenda or other modifications of the drawings and specifications incorporated into the documents prior to their execution; the Construction Manager at Risk Pre-Construction and Construction Services Contract; the performance bond; the payment bond; and insurance certificates. All of these together form the Contract.
- 1.15. The Project Manual shall consist of the drawings, specifications and other plans for the Project prepared by the Designer and approved in writing by the Owner's Representative, which define the scope of the Work. The Contract Documents define terms and conditions. In case of discrepancy or disagreement in the Contract Documents, the order of precedence shall be the Construction Manager at Risk Pre-Construction and Construction Services Contract, large-scale detail drawings, small scale drawings. Construction Documents distributed to the CMAR for construction of the project shall be sealed by the appropriate design professional and reviewed by the Owner.
- 1.16. Bid packages are assembled by the CMAR to solicit and secure work from the trade subcontractors. It is the CMAR's responsibility to clearly assign and describe the scope of work in each bid package so that the intent of the Construction Documents will be met in their entirety. Bid packages or other materials prepared by the CMAR to contract with Subcontractors, while they might incorporate all or part of the Contract Documents and the Construction Documents, shall not be deemed part of nor shall they modify the Contract Documents or the Construction Documents for purposes of this Contract. The CMAR may obtain bids prior to issuance of the Final Construction Documents with approval of the Owner when deemed necessary to maintain schedule or for others reasons deemed important to the Owner. If bids are received prior to issuance of Final Construction Documents, changes affecting cost or time after issuance of the

Final Construction Drawings will be made in accordance with Section 30 of these General Conditions of the Contract.

- 1.17. Written notice shall be defined as notice in writing delivered in person or to a member of the contracting organization authorized to act or accept notice on behalf of the organization hereunder, or sent to the last known business address of the contracting organization by registered mail.
- 1.18. Work, as used herein as a noun, is intended to include materials, labor, and workmanship provided by the CMAR and its Subcontractors to carry out the intent of the Construction Documents.
- 1.19. Project is the total construction Work to be performed under the Contract Documents, whether performed by the CMAR and its Subcontractors, by the Owner, or by the Owner's separate contractors.
- 1.20. Cost or Construction Change Events (or similar term used by the CMAR's cost accounting system) shall identify all changes to the Contract and subcontracts. Certain Cost or Construction Change Events between trade subcontractors or causing the utilization of CMAR Contingency will be reviewed by the Owner with no further action taken. Other Cost or Construction Change Events that require changes in the design, project duration, or project cost, and in particular use of Construction Allowances or Owner's Special Allowances will require approval and signature of the CMAR, Designer, and the Owner. All documents are subject to audit.
- 1.21. Change Order Amendment, as used herein, shall mean a written order to the CMAR subsequent to the signing of the Contract authorizing a change in the Contract Amount (GMP) or Project Duration. The change order shall be signed by the CMAR, Designer, and the Owner. Approval by the Apex Town Council may be required.
- 1.22. Field Order, as used herein, shall mean a written approval for the CMAR to proceed with the Work requested by Owner prior to issuance of a formal Change Order. The field order shall be signed by the CMAR, Designer, and Owner's Representative.
- 1.23. Liquidated Damages, as stated in the Contract Documents, is an amount reasonably estimated in advance to cover the losses incurred by the Owner by reason of failure of the CMAR to complete the Work within the time specified.
- 1.24. Surety, as used herein, shall mean the bonding company or corporate body which is bound with and for the CMAR, and which engages to be responsible for the CMAR and its acceptable performance of the Work.
- 1.25. Request for information (RFI) is a request from the CMAR seeking an interpretation or clarification by the Designer relative to the Contract Documents. The RFI, which shall be labeled "RFI", shall clearly and concisely set forth the issue or item requiring clarification or interpretation and why the response is needed. The RFI must set forth the CMAR's interpretation or understanding of the Contract Documents requirements in question, along with reasons for such an understanding.
- 1.26. Inspection shall mean examination or observation of Work completed or in progress to determine its compliance with the Contract Documents.
- 1.27. "Equal to" or "approved equal" shall mean materials, products, equipment, assemblies, or installation methods considered equal by the bidder in all characteristics (physical, functional, and aesthetic) to those specified in the Construction Documents.
- 1.28. "Substitution" or "substitute" shall mean materials, products, equipment, assemblies, or installation methods deviating in at least one characteristic (physical, functional, or aesthetic) from those specified, but which in the opinion of the bidder would improve competition and/or enhance the finished installation.

- 1.29. "Provide" or "provides" shall mean furnished or furnished and installed by the CMAR or its Subcontractors as more fully described in the Contract Documents.
- 1.30. "Value Analysis" shall mean providing information on alternative means, methods, material or equipment that when incorporated into the project will provide the intended function at less cost.
- 1.31. "Substantial Completion" is that point when the work is sufficiently complete in accordance with the Contract Documents that the Owner could occupy and/or utilize the Project for its intended use, without undue interference.
- 1.32. "Beneficial Occupancy" is that stage of construction before final completion at which the Owner can occupy the Project for its intended purposes.
- 1.33. "Final Completion" is that stage that all contract requirements have been met including completion of all punch list items and owner training, delivery of all attic stock and submission of all close out documents.

2. GENERAL SCOPE AND INTENT:

- 2.1. For the fee, allowances and other sums set forth herein, the CMAR undertakes to furnish construction management services during the Project. The CMAR shall also act as the Owner's fiduciary in handling and opening bids to the extent required by N.C.G.S. 143-128.1. In broad terms, under this Contract, the CMAR will perform services, as generally defined in the RFQ, with General Conditions services being provided on a not-to-exceed allowance basis, and all construction being accomplished through the CMAR's Subcontractors, selected as provided herein, except as set forth in Section 7 and Section 9 and as allowed under GS143-128.1. The CMAR shall furnish efficient engineering reviews, cost control, business administration, and field supervision, and shall use its best efforts to see to it that the Work of the Project is done in the best and most expeditious, economical manner consistent with the interests of the Owner, and in strict conformity with the Contract Documents, including all reasonable implications therein. The Work of the Project may be divided into construction phases. The CMAR shall provide a Guaranteed Maximum Price for each construction phase, as more fully defined herein.
- 2.2. The CMAR shall familiarize itself with all available Project funding and Work with the Owner and Project Designer to maximize the scope and quality of the Project based upon the available funds.
- 2.3. The performance of the CMAR's services shall be in strict compliance with this Contract, the requirements of the RFQ (including all its general conditions, appendices and attachments), the CMAR's proposal, the CMAR's Small Disadvantaged Minority and Women Owned Business (SDMWOB) Plan as approved by the Owner, bonds, and all amendments hereto. To the extent that any term, requirement, or specification in the CMAR's proposal shall be in conflict with the Contract Documents, the terms, requirements, and specifications of the Contract Documents shall control and the conflicting contents of the CMAR's proposal and supporting documents shall be deemed unenforceable.
- 2.4. During the construction of the Work, the CMAR will provide all services to coordinate, manage and effect the construction of the Work (including the provision of General Conditions and the award and management of all Subcontracts) including without limitation: value analysis, change order review e.g., evaluation, negotiation, and recommendations for approval; quality control inspections; schedule maintenance; cost control measures; all meetings; shop drawing review; processing, tracking and monitoring of Requests For Information and substitution requests; resolution of claims by all Subcontractors; all inspections, including inspections by regulatory agencies, the Designer, the Owner's Representative, and the Owner's other technical inspectors; and close out documents with the Owner and Designer.

- 2.5. The drawings and specifications for the Project shall be considered complementary, one to the other. That which is shown on the drawings or called for in the specifications shall be as binding as if it were both called for and shown. The intent of the drawings and specifications is to establish the scope of all labor, materials, transportation, equipment, and any and all other things necessary to provide a complete job.
- 2.6. The wording of the specifications shall be interpreted in accordance with common usage of the language except that words having a commonly used technical or trade meaning shall be so interpreted in preference to other meanings.

3. PROJECT DESIGNER'S STATUS:

- 3.1. The Project Designer shall provide liaison and necessary inspection of the Work to ensure compliance with the Construction Documents. The Project Designer is the agent of the Owner only for the purposes to the extent stipulated in the various Contract Documents. The Project Designer has authority to stop Work or to order Work removed, or to order corrections of faulty Work where such action may be necessary to assure successful completion of the Work.
- 3.2. The Project Designer is the impartial interpreter of the Contract Documents, and, as such, shall exercise its powers under the Contract to enforce faithful performance by both the Owner and the CMAR, taking sides with neither. Designer shall review and make a recommendation to Owner approving, denying or modifying all change orders and change order requests.
- 3.3. Should the Project Designer cease to be employed on the Project for any reason whatsoever, then the Owner shall employ a competent replacement, subject to the CMAR's approval, which approval shall not be unreasonably withheld, who shall assume the status of the former Project Designer.
- 3.4. The Project Designer will make periodic inspections of the Project at intervals appropriate to the stage of construction. The Project Designer will inspect the progress, the quality and the quantity of the Work.
- 3.5. The Project Designer and the Owner shall have access to the Work whenever it is in preparation and progress during normal working hours. The CMAR shall provide facilities for such access so the Project Designer may perform its functions under the Contract Documents.
- 3.6. Based on the Project Designer's inspections and evaluations of the Project, the Project Designer shall issue interpretations, directives and decisions as may be necessary to assist the CMAR in the administration of the Project. The Project Designer's decisions relating to artistic effect and technical matters shall be final, provided such decisions are within the limitations of the Contract. The CMAR's decisions, however, relating to means and methods, and administration of the contracts the CMAR holds are final.

4. DRAWINGS, SPECIFICATIONS AND RECORD DOCUMENTS:

- 4.1. All data, information, material and matter of any nature and all copies thereof in any and all forms whatsoever developed by the CMAR or in the CMAR's possession or control relating to the Project are the property of the Owner and shall be turned over to the Owner within ten (10) days after the Owner's request.
- 4.2. All design drawings and specifications are instruments of service and remain the property of the Owner. The use of these instruments on Work other than this Contract without permission of the Owner is prohibited. All copies of drawings and specifications other than contract copies shall be returned to the Owner upon request after completion of the Work.
- 4.3. The Owner will bear the reasonable cost of reproduction and distribution of drawings, sketches, specifications and other Construction Documents for use on the project development and by the

CMAR and its Subcontractors for bidding and administrative purposes, up to an allowance to be determined upon the agreement of CMAR and Owner. No such costs shall be incurred until this agreement is reached. The CMAR shall receive clean sets of black line prints on white paper of all appropriate drawings provided by the Owner, the CMAR shall clearly and legibly record in redline all work-in-place that is at variance with the Contract Documents.

- 4.4. In such cases where the nature of the Work requires clarification by the Project Designer, such clarification shall be furnished by the Project Designer with reasonable promptness by means of written instructions or detail drawings, or both. Clarifications and drawings shall be consistent with the intent of Construction Documents, and shall become a part thereof unless objected to by the Owner's representative.
- 4.5. The CMAR shall maintain, in readable condition at its job office, one complete set of working drawings and specifications for its Work, including all shop drawings. Such drawings and specifications shall be available for use by the Project Designer or its authorized representative.
- 4.6. The CMAR shall require all Subcontractors to provide and CMAR shall maintain a day-to-day record of "as built" work-in-place that is at variance with the Contract Documents. Such variations shall be compiled by and fully noted on Project drawings by the CMAR and submitted to the Project Designer upon Project completion and no later than 30 days after acceptance of the Project. A condition of final payment to the CMAR shall be delivery to the Project Designer, in paper, digital image or electronic form, each Subcontractor's submittal drawings and as-built records, and certification by the Project Designer that it has the information needed to prepare a comprehensive as-built record of the Project for delivery to the Owner in accordance with the Project Designer's agreement.
- 4.7. The CMAR shall devise, implement and maintain at the Project site, on a current basis, a structured document control system which includes and tracks records of all necessary contracts, RFI's, shop drawings, samples, purchases, materials, equipment, maintenance and operating manuals and instructions, and any other documents and revisions thereto which arise out of the Contract or the Work. These documents and copies thereof in paper or electronic form or both as requested shall be readily available to the Owner any time during the performance of this Contract.
 - 4.7.1. The CMAR shall arrange for and submit monthly to the Owner and Project Designer, as a General Conditions expense, progress photographs, organized by date into a sequentially labeled, three ring binders or approved electronic equivalent, in sufficient detail to properly record the Work.

5. CODES AND STANDARDS:

- 5.1. Wherever reference is given to codes, standard specifications or other data published by regulating agencies including, but not limited to, national electrical codes, North Carolina state building codes, federal specifications, ASTM specifications, various institute specifications, etc., it shall be understood that such reference is to the latest edition including addenda published prior to the date of the Contract Documents.

6. LABOR, MATERIALS AND EQUIPMENT:

- 6.1. The CMAR shall, unless otherwise specified, contract for and pay for all labor, transportation, materials, tools, construction apparatus, lights, power distribution, generators, heating apparatus, sanitary facilities, water distribution, scaffolding and incidentals necessary for the completion of the Work, shall arrange for the installation, maintenance and removal of all construction equipment, utensils or things, and be responsible for the safe, proper and lawful construction, maintenance and use of same, and the CMAR shall construct in the best and most workmanlike

manner, a complete Project and everything incidental thereto, as shown on the drawings, stated in the specifications, or reasonably implied there from, all in accordance with the Contract Documents.

- 6.2. All materials shall be new and of quality specified, except where reclaimed material is authorized herein and approved for use. Workmanship shall at all times be of a grade accepted as the best practice of the particular trade involved, and as stipulated in written standards of recognized organizations or institutes of the respective trades except as exceeded or qualified by the specifications.
- 6.3. As set forth in the Construction Documents or upon reasonable notice from the Owner's Representative, the CMAR shall require the Subcontractors to furnish warranties and evidence as to quality of materials.
- 6.4. Products are generally specified by ASTM or other reference standard and/or by manufacturer's name and model number or trade name. When specified only by reference standard, the CMAR may select any product meeting this standard, by any manufacturer. When several products or manufacturers are specified as being equally acceptable, the CMAR has the option of using any product and manufacturer combination listed. However, the CMAR shall be aware that the cited examples are used only to denote the quality standard of the product desired and that they do not restrict bidders to a specific brand, make, manufacturer or specific name; that they are used only to set forth and convey to bidders the general style, type, character and quality of product desired; and that equivalent products will be acceptable. Request for substitution of materials, items, or equipment shall be submitted to the Project Designer for approval or disapproval; such approval or disapproval shall be made by the Project Designer prior to the opening of bids.
- 6.5. The CMAR shall obtain written approval from the Project Designer for the use of products, materials, equipment, assemblies or installation methods claimed as equal to those specified. Such approvals must be obtained as soon after contract awards as possible and before any materials are ordered.
- 6.6. The Project Designer shall adjudge the equality of proposed substitution of products, materials or equipment, and its opinion shall be final, unless overridden by the Owner's Representative in writing, subject to written appeal to the Owner.
- 6.7. If at any time during the construction and completion of the Work covered by these Contract Documents, the conduct of any worker of the various crafts be adjudged by the Owner's Representative a nuisance to the Owner or Project Designer, or if any worker be considered detrimental to the Work, the CMAR and the Subcontractor shall order such parties removed immediately from the site and its environs.

7. SUBCONTRACTS AND SUBCONTRACTORS:

- 7.1. The CMAR shall determine the appropriate bid packages based on the available resources. One or more bid packages shall be prepared for each of the general construction, electrical, mechanical, fire protection, and plumbing divisions of the Work of the Project. The CMAR shall prepare any other contract packages for other divisions or subdivisions of the Work. Each Subcontractor may be required by the CMAR to provide bonds and insurance, consistent with the terms of the RFQ.
- 7.2. First-tier Subcontractors shall be pre-qualified by the CMAR. Only pre-qualified Subcontractors are allowed to bid to and contract with the CMAR on a Project. The CMAR and the Owner's Representative shall confer on the prequalification of lower tier subcontractors, and the CMAR shall decide whether to pre-qualify lower tier subcontractors after giving due regard to the Owner's SDMWOB goals. The prequalification criteria shall be determined jointly by the Owner, Project Designer and the CMAR to address quality, performance, time specified in the bids for

performance of the Contract, the cost of construction oversight, time for completion, capacity to perform, and other factors deemed appropriate by the Owner. The CMAR shall publicly advertise as prescribed in G.S. 143-129; and shall accept bids from first-tier Subcontractors for all construction Work. All bids shall be opened publicly and once they are opened, shall be public record under Chapter 132 of the General Statutes. The CMAR shall award each contract to the lowest responsible, responsive bidder, taking into consideration the Owner's requirements, quality, performance, time specified in the bids for performance of the contract, the cost of construction oversight, time for completion, compliance with G.S. 143-128.2, and other factors deemed appropriate by the Owner's Representative and advertised as part of the bid solicitation. If the low bid Subcontractor fails to account for all costs associated with the scope of the Work on which it is bidding, then the bid may be disqualified at the discretion of the CMAR or modified to show additional Project costs not accounted for. If after modification, the apparent low bid is no longer low, then the CMAR shall disqualify that bid and consider the next low bid submitted. The CMAR shall have the right as outlined above to verify the scope of each low bid in the same manner until it determines the lowest verified bid.

- 7.3.** The CMAR shall conduct pre-bid meetings and award meetings for all contracts. The CMAR shall notify the Owner and Project Designer of each such meeting and shall not hold any such meeting outside the presence of the Owner and Project Designer.
- 7.4.** The CMAR may reject all bids and repeat the bidding for a given division of Work or re-package the Work activity.
- 7.5.** The CMAR shall not award or issue notice of award for the Work until certified tabulation of the bids, copies of the bids received, the CMAR's recommendations for award, a report of the documentation of SDMWOB participation and documentation of the good faith efforts of the bidders are provided to and reviewed with the Owner. Furthermore, the CMAR shall not award or issue notice of award of any Subcontract until the GMP that includes that Subcontract has been approved by the Owner and fixed by amendment to this Contract.
- 7.6.** The CMAR may not bid on any trade package, nor may the CMAR perform the Work of any trade package except in the case of an emergency or extraordinary circumstance without the written approval of the Owner and Project Designer. The Owner's Representative may approve the CMAR performing a portion of the Work only if that bidding produces no responsible, responsive bidder for that portion of the Work, the lowest, responsive, responsible bidder will not execute a contract for the bid portion of the Work, or a Subcontractor defaults and a pre-qualified replacement cannot be obtained in a timely manner.
- 7.7.** Once Subcontractors are in place, the CMAR shall provide copies of contracts to the Owner and Project Designer, including those for equipment and material suppliers. The CMAR will require the Subcontractors to provide the applicable Contract Documents including insurance certificates, SDMWOB participation schedules, and verification of SDMWOB participation (by submission of letters of intent, copies of purchase orders, etc).
- 7.8.** If the Project Designer disapproves of any Subcontractor, then it shall submit its reasons for disapproval in writing to the Owner and CMAR. If the Owner's Representative concurs with the Project Designer's recommendation, the CMAR shall submit a substitute for approval. The Project Designer shall act promptly in the approval of material and equipment suppliers and when approval is given, no changes will be permitted except for cause or reason considered justifiable to the Project Designer and Owner's Representative.
- 7.9.** The Project Designer will furnish to any Subcontractor, upon request, evidence regarding amounts of money approved for payment to the CMAR on account of the Subcontractor's Work.
- 7.10.** The CMAR is and remains fully responsible for its own acts or omissions as well as those of any Subcontractor or of any employee of either. The CMAR agrees that no contractual relationship exists between the Subcontractor and the Owner in regard to the Contract, and that the

Subcontractor acts on its work as a subcontractor of the CMAR. The CMAR shall prepare bid documents and construction contract conditions for the Subcontracts for the Work, with the participation of the Designer as set forth in the agreement between the Designer and the Owner. Bid documents containing (but not limited to) the terms described below shall be prepared by the CMAR and the Design Professional as indicated:

- 7.10.1. Designer and CMAR: Any procedure or condition requested by the Owner's Representative in writing that is consistent with this Contract.
- 7.10.2. CMAR: Time of completion and liquidated damages.
- 7.10.3. Designer and CMAR: Alternate bids – as previously established with Owner's representative and CMAR's approval.
- 7.10.4. Designer and CMAR: Allowances - as previously established with Owner's representative and CMAR's approval.
- 7.10.5. Designer and CMAR: Any condition peculiar to the Project and the requirements of the particular contract.
- 7.10.6. CMAR: Tax reporting and payment procedures.
- 7.10.7. CMAR: Bid, Payment and Performance Bond forms and procedures in accordance with NC General Statutes.
- 7.10.8. CMAR: Insurance coverage and certificates.
- 7.10.9. CMAR: A statement emphasizing execution of the contract(s) and delivery to the CMAR and Owner in accordance with General Statutes (within 10 days of award).
- 7.10.10. Designer and CMAR: Determine special definitions, such as "unclassified excavation, mucking or rock", etc.
- 7.10.11. CMAR: Develop procedures for the Subcontractor(s) to request and the Owner's Representative to authorize field and laboratory testing by qualified independent testing agent, which include typically soils, concrete, masonry, asphalt, steel, welding, etc. in accordance with ASTM standards. The CMAR and Project Designer shall participate in reviewing qualification statements from local testing companies, evaluating with the Project Designer and Owner, and providing a final recommendation to the Owner. Subsequent to the Owner's Representatives approval, the CMAR shall participate in seeking proposals for separate contracts as required for testing and special testing necessary for the Project and recommending selection to the Designer and Owner, and the execution of contracts. The cost of independent testing agent(s) is not included in CMAR's GMP.
- 7.10.12. CMAR: Provisions which establish appropriate incentives and remedial measures for enforcing the contract requirements during construction.
- 7.10.13. Designer shall provide a listing of all Construction Documents.
- 7.10.14. CMAR: The Subcontractors shall be required to perform corrections to their Work and fulfill all Project closeout requirements in a timely manner.
- 7.10.15. CMAR: The CMAR shall require Subcontractors to organize their Work, and incorporate scheduling by the CMAR in accordance with the Owner's requirements.
- 7.10.16. CMAR: No retention shall be withheld on the CMAR's General Conditions Allowance expenditures.

8. BUSINESS PARTICIPATION GOALS AND STANDARDS:

- 8.1. CMAR shall document good faith efforts for meeting SDMWOB goals established by the Contract Documents.
- 8.2. The Subcontractor and CMAR shall comply in all respects with SDMWOB policies, rules and regulations. Percentages include all tiers of subcontractors in accordance with state laws and regulations.
- 8.3. To increase participation, if necessary, the CMAR may, with the written approval of the Owner's Representative, waive performance or payment bonds by Subcontractors, or may offer the participation of the CMAR as a guarantor or surety in the financing of materials purchases by Subcontractors, provided that the CMAR may condition such financing participation upon the issuance of joint checks or other similar arrangements to allow the CMAR to verify that timely payments are made to suppliers furnishing credit.

9. CONSTRUCTION MANAGER AND SUBCONTRACTOR RELATIONSHIPS:

- 9.1. The CMAR agrees that the requirements of these Contract Documents shall apply equally to each Subcontractor as to the CMAR, and the CMAR agrees to take such action as may be necessary to bind each Subcontractor to these requirements. The CMAR further agrees to conform to the Code of Ethical Conduct as adopted by the Associated General Contractors of America, Inc., with respect to CMAR-Subcontractor relationships, and that payments to Subcontractors shall be made in accordance with the provisions of G.S. 143-134.1 providing for interest on final payments due to prime Subcontractors and sub-subcontractors.
- 9.2. Within seven days after the CMAR receives each periodic or final payment and its bank makes the funds available after deposit, the CMAR shall pay each Subcontractor based on Work completed or service provided under the Contract. Should any periodic or final payment to a Subcontractor be delayed by more than seven days after receipt of periodic or final payment by the CMAR, the CMAR shall pay the Subcontractor interest, beginning on the eighth day, at the rate of one percent (1%) per month or fraction thereof on such unpaid balance as may be due, provided the Subcontractor has conformed to the specified billing procedures and insurance requirements.
- 9.3. The retainage withheld from payments made by the CMAR to the Subcontractor shall not exceed the retainage reflected in the CMAR payment applications and payments made by the Owner to the CMAR. Any retainage on payments made by the CMAR to the Subcontractor that exceeds the corresponding retainage on payments made by the Owner to the CMAR shall be subject to interest to be paid by the CMAR to the Subcontractor at the rate of one percent (1%) per month or fraction thereof.
- 9.4. Nothing in this section shall prevent the CMAR at the time of application and certification to the Owner from withholding application and certification to the Owner for payment to a Subcontractor for unsatisfactory job progress; defective construction not remedied; disputed Work; third-party claims filed or reasonable evidence that claim will be filed; failure of Subcontractor to make timely payments for labor, equipment and materials; damage to CMAR or another Subcontractor; reasonable evidence that the contract cannot be completed for the unpaid balance of the contract sum; or a reasonable amount for retainage not to exceed the initial percentage retained by Owner.

10. SEPARATE CONTRACTS:

- 10.1. Without invalidating the relationships with the CMAR, the Owner reserves the right to let other contracts in connection with the Project, the Work under which shall proceed simultaneously with the execution of the CMAR's Work. Separate contracts may include materials or equipment that the Owner elects to provide itself. The Owner may also enter into separate contracts with testing

firms or other technical support firms to assist the Owner in connection with the Project. The CMAR shall afford other separate Subcontractors reasonable opportunity for the execution of their work and for the introduction and storage of their materials, and the CMAR shall take all reasonable action to coordinate its Work with theirs. If the work performed by the separate Subcontractor is defective or so performed as to prevent the CMAR from carrying out its Work according to the plans and specifications, the CMAR shall immediately notify the Project Designer and the Owner upon discovering such conditions.

11. WARRANTY AND GUARANTEE:

- 11.1.** The CMAR unconditionally warrants and guarantees all materials and workmanship against patent defects arising from faulty materials, faulty workmanship or negligence for a period of twelve (12) months following the date of substantial completion of the Work and beneficial occupancy (whichever is later) and shall replace such defective materials or workmanship without cost to the Owner. CMAR shall include this requirement in all subcontracts except demolition, any cleaning or trade support contracts, or others approved by the Owner's Representative.
- 11.2.** In addition to the foregoing general warranty, the Owner may require extended warranties for specified building components, including without limitation mechanical and electrical equipment, elevators and escalators, security equipment, curtain wall, doors, roofing and waterproofing. Extended warranties shall be specified in the Construction Documents or specific written instructions from the Owner. All such extended warranties shall either be provided by the CMAR or by a Subcontractor or manufacturer. If the warranty is provided by a Subcontractor or manufacturer, the warranty shall explicitly state that it is for the benefit of and may be enforced by the Owner. Such warranties shall provide, at a minimum, for the repair or replacement of defective or non-conforming components within the warranty period. Beyond its general twelve month warranty, the CMAR shall not be responsible for extended warranties given by a Subcontractor or manufacturer, so long as the Owner has the benefit of and right to enforce the warranty. CMAR shall make recommendations on warranty issues and include as approved by Owner and Designer, alternates in all bid packages seeking optimal bid responses for Owner's and Designer's consideration on all warranty time length and feature issues, prior to bidding any packages. Owner and Designer shall review, consider options and direct CMAR on inclusion of warranty alternates in all bid package awards.
- 11.3.** Additionally, the Owner may bring an action against the CMAR for latent defects which are hidden or not readily apparent to the Owner at the time of beneficial occupancy or final acceptance, whichever occurred first, in accordance with applicable law. The Owner shall not bring an action against the CMAR under this section unless the Owner has first provided the CMAR with sufficient notice of the latent defect, and the CMAR has refused to remedy the defect within a reasonable period of time.
- 11.4.** The CMAR services shall extend through the completion of the warranty phase; once Project Closeout is achieved, however, the CMAR's obligations and services are limited to Warranty obligations.

12. ROYALTIES, LICENSES AND PATENTS:

- 12.1.** The CMAR shall pay all royalties and license fees. The CMAR shall defend suits or claims for infringement of copyright and patent rights and shall hold the Owner harmless from loss on account thereof, but shall not be responsible for such defense or loss when a particular design, process, or product of a particular manufacturer or manufacturers is required by the Contract Documents or Construction Documents or where the copyright violation are contained in Drawings, Specifications or other documents prepared by the Owner or Designer. However, if the infringement of a copyright or a patent is identified by the CMAR or the CMAR is otherwise

made aware of such infringement, the CMAR shall be responsible for such loss unless such information is promptly furnished to the Designer.

13. COMPLIANCE WITH LAWS, PERMITS, INSPECTIONS, FEES, AND REGULATIONS:

- 13.1.** The CMAR shall give all notices and comply with all laws, ordinances, codes, rules and regulations bearing on the conduct of the Work under the Contract. If the CMAR observes that the drawings and specifications are at variance therewith, it shall promptly notify the Project Designer and Owner in writing. Any necessary changes required after contract award shall be made by change order. If the CMAR performs any Work knowing it to be contrary to such laws, ordinances, codes, rules and regulations, and without such notice to the Project Designer and Owner, it shall bear all cost arising there from. Additional legal requirements implemented after bidding will be subject to equitable adjustments to the GMP.
- 13.2.** All Work under the CMAR Contract shall conform to the North Carolina State Building Code and other State, local and national codes as are applicable. The cost of all required regulatory agency inspections under State, local and national codes shall be the responsibility of the CMAR and its Subcontractors. Costs for re-inspections by the Town of Apex or other regulatory agencies, to the extent attributable to the CMAR and its Subcontractors, shall be the responsibility of the CMAR and its Subcontractors.
- 13.3.** The CMAR shall cooperate with the state, county or municipal authorities by obtaining building and other required permits. Permits shall be obtained and paid for by the CMAR.

14. CONDUCT AND USE OF PREMISES:

- 14.1.** The CMAR shall confine its apparatus, the storage of materials and the operations of its workers to limits as indicated by law, ordinances, permits or directions of the Project Designer and Owner's Representative and shall not exceed those established limits in its operations.
- 14.2.** The CMAR shall not load or permit any part of the structure to be loaded with a weight that will endanger its integrity or safety.
- 14.3.** The CMAR shall enforce the Project Designer's and Owner's Representative's instructions regarding signs and advertisements.
- 14.4.** The CMAR, its Subcontractors and employees shall not possess or carry, whether openly or concealed, any gun, rifle, pistol, or explosive on any property owned by the Owner. This includes firearms locked in containers, vehicles or firearm racks within vehicles.
- 14.5.** The CMAR, its Subcontractors and employees, are prohibited from profane, lewd, obscene or offensive conduct, including engaging in sexual harassment.
- 14.6.** The CMAR and its Subcontractors shall not manufacture, transmit, conspire to transmit, possess, use or be under the influence of any alcoholic or other intoxicating beverage, narcotic drug, hallucinogenic drug, amphetamine, barbiturate, marijuana or anabolic steroids, or possess, use, transmit or conspire to transmit drug paraphernalia on any property owned by the Owner, except pursuant to a drug prescription by a physician.
- 14.7.** Smoking or use of any tobacco product is prohibited in any enclosed or occupied facility at all times. The use of tobacco products is prohibited at all times on this site in areas routinely occupied by staff, and in enclosed areas of unoccupied sites. An enclosed area for construction projects shall be defined as any dried-in area or as designated by the Project Designer. Smoking shall be located in designated areas only.
- 14.8.** The CMAR, its employees, its Subcontractors and their employees shall not solicit from or sell within the Owner's facilities.

- 14.9. Operators of all commercial vehicles on any property owned by the Owner shall be subject to post-accident, random, reasonable suspicion and follow-up testing for drugs and alcohol.
- 14.10. The CMAR shall at all times enforce strict discipline and good order among its employees and shall not employ any unfit person or anyone not skilled in the task assigned to it. The Owner may require the CMAR to remove any employee or Subcontractor the Owner deems incompetent, careless, or otherwise objectionable.
- 14.11. All agents and workers of the CMAR and its Subcontractors shall wear identification badges approved by the Owner's Representative and provided by the CMAR at all times they are on the Owner's property, or in the alternative, have a representative present that can confirm the workers' or agents' status as an employee of that entity. The CMAR and its Subcontractors shall comply with the Owner's access procedures when working on any existing facility.

15. CUTTING, PATCHING AND DIGGING:

- 15.1. The CMAR shall ensure satisfactory performance of all cutting, fitting or patching that may be required to make the Work come together properly and fit to receive or be received by Work of other Subcontractors shown upon or reasonably implied by the drawings and specifications for the completed structure, as the Project Designer may direct.
- 15.2. Any cost brought about by defective or ill-timed Work shall be borne by the party responsible therefore.
- 15.3. No Subcontractor shall endanger any work of another such Subcontractor by cutting, digging or other means, nor shall he cut or alter the work of any other such Subcontractor without the consent of the CMAR, the Project Designer, and the affected Subcontractor(s).

16. UTILITIES, STRUCTURES, SIGNS:

- 16.1. Prior to the operation of permanent systems, the CMAR will cooperate with the Owner to arrange for temporary power, lighting, water, and heat to maintain space temperature above freezing, as required for construction operations. Utility charges for temporary power, lighting, water and heat will be paid the CMAR as a General Conditions expense.
- 16.2. The CMAR shall provide or arrange for, as appropriate, necessary and adequate apparatus and facilities for water, electricity, gas, oil, sewer, and other utility services, which may be required for completion of the Project. It is anticipated that the Owner will pay directly to the each utility company all public utility charges for metered utilities such as water, sewer and power. Nevertheless, if requested by the Owner, any permanent meters installed shall be listed in the CMAR's name until its Work is deemed substantially complete and occupied by the Owner, and the Owner may hold the CMAR responsible for extended utility charges in the event completion of the Project is delayed. The Owner or CMAR, as applicable, shall cooperate with one another to recover actual costs of metered utilities from the responsible party should delays occur in Project completion. Extended metered utility costs are in addition to the liquidated damages provided for elsewhere in this Contract.
- 16.3. Any meters listed in the name of the CMAR shall be re-listed in the Owner's name on the day following completion and acceptance of the CMAR's Work, and the Owner shall pay for services used after that date.
- 16.4. The Owner shall be reimbursed for all metered utility charges after the meter is re-listed in the Owner's name and prior to completion and acceptance of the Work of all Subcontractors. Reimbursement shall be made by the Subcontractor that's Work has not been completed and accepted.

- 16.5.** The CMAR shall have the permanent building systems in sufficient readiness for furnishing temporary climatic control at the time a building is enclosed and secured. The HVAC systems shall maintain climatic control throughout the enclosed portion of the building sufficient to allow completion of the interior finishes of the building. A building shall be considered enclosed and secured when windows, doorways (exterior, mechanical, and electrical equipment rooms), and hardware are installed; and other openings have protection, which will provide reasonable climatic control. The appropriate time to start the mechanical systems and climatic condition shall be jointly determined by the CMAR and the Project Designer. Use of the equipment in this manner shall in no way affect the warranty requirements of the CMAR.
- 16.6.** The CMAR shall coordinate the Work so that the building's permanent power wiring distribution system shall be in sufficient readiness to provide power as required by the HVAC Subcontractor for temporary climatic control.
- 16.7.** The CMAR shall coordinate the Work so that the building's permanent lighting system shall be ready at the time the Subcontractors begin final interior painting and other final interior finishes and shall provide adequate lighting in those areas where other interior painting and finishing is being performed.
- 16.8.** The CMAR shall be responsible for its permanently fixed service facilities and systems in use during progress of the Work. The following procedures shall be strictly adhered to:

 - 16.8.1.** Prior to acceptance of Work by the Owner, the CMAR shall coordinate the removal and replacement of any parts of the permanent building systems damaged through use during construction.
 - 16.8.2.** Temporary closures or filters shall be installed in each of the heating and air conditioning units and at each return grille during construction. New filters shall be installed in each unit prior to the Owner's acceptance of the Work.
 - 16.8.3.** Extra effort shall be maintained to keep the building and the site adjacent to the building clean. Under no circumstances shall air systems be operated if finishing and site work operations are creating dust in excess of what would be considered normal if the building were occupied.
 - 16.8.4.** It shall be understood that any warranty on equipment presented to the Owner shall extend from substantial completion and occupancy by the Owner. The cost of maintaining the equipment during operation in the finishing stages of construction shall be borne by the Subcontractor whose system is utilized.
 - 16.8.5.** The CMAR shall ensure that all lamps are in proper working condition at the time of final Project acceptance.
- 16.9.** The CMAR shall provide, if required and where directed, a shed for toilet facilities and shall furnish and install in its shed all water closets required for a complete and adequate sanitary arrangement. These facilities will be available to other Subcontractors on the job and shall be kept in a neat and sanitary condition at all times. Chemical toilets are acceptable.
- 16.10.** The CMAR shall, if needed and where directed by the Owner's Representative, erect a temporary field office, complete with lights, telephone, heat and air conditioning. A portion of this office shall be partitioned off, of sufficient size, for the use of the Project Designer, should the Owner's Representative so direct.
- 16.11.** The CMAR is responsible for making temporary elevators, lifts, or other special equipment available for the general use of all Subcontractors. The cost for such elevators, lifts or other special equipment and the operation thereof may be included in the CMAR's General Conditions.
- 16.12.** The CMAR will erect one sign on the Project, and may erect others if approved by the Owner's Representative. The sign(s) shall be of sound construction, and shall be neatly lettered and

comply with all local, state, and federal regulations. Directional signs may be erected on the Owner's property subject to approval of the Owner with respect to size, style and location of such directional signs. Such signs may bear the name of the CMAR and a directional symbol. All signs must comply with Town of Apex sign, appearance and traffic ordinances. No other signs will be permitted except by permission of the Owner's Representative.

17. CLEANING UP:

- 17.1. The CMAR shall ensure that the building and surrounding area is reasonably free from rubbish at all times, and shall remove debris from the site on a timely basis or when directed to do so by the Owner's Representative. The CMAR shall provide an on site refuse container(s) for the use of all Subcontractors. The CMAR shall ensure that each Subcontractor removes their rubbish and debris from the building on a daily basis. The CMAR shall ensure that the building is broom cleaned as required to minimize dust and dirt accumulation.
- 17.2. The CMAR shall provide and maintain suitable all-weather access to the building.
- 17.3. Before final inspection and acceptance of the building, the CMAR shall ensure that all portions of the Work are clean, including glass, hardware, fixtures, masonry, tile and marble (using no acid). The CMAR shall clean and wax all floors as specified, and completely prepare the building for use by the Owner, with no additional pre-occupancy cleaning required by the Owner.

18. PROTECTION OF WORK, PROPERTY AND THE PUBLIC:

- 18.1. The CMAR shall be responsible for the entire site and the building or construction of the same and provide all the necessary protections, as required by the Owner's Representative or Designer, and by laws or ordinances governing such conditions. Consistent with the indemnification provisions elsewhere in the Contract Documents, and subject to the benefits of any Owner-controlled or Owner-provided insurance that covers the interests of the CMAR and its Subcontractors, the CMAR shall be responsible for protecting the public and those on the site against all bodily injury or harm, and protecting against any damage to the Work, to adjacent property, and to property of others. The CMAR shall have access to the Project at all times. Subject to its ultimate contractual responsibility for protection of work, property and the public under this Contract, and subject to any non-delegable duties imposed by law, the CMAR may delegate to Subcontractors these obligations of the CMAR under this Contract, and may obtain indemnification and insurance from Subcontractors as the CMAR deems reasonable and prudent.
- 18.2. The CMAR shall provide cover and protect all portions of the structure when the Work is not in progress, provide and set all temporary roofs, covers for doorways, sash and windows, and all other materials necessary to protect all the Work on the building, whether set by it, or any of the Subcontractors.
- 18.3. Any Work damaged through the lack of proper protection or from any other cause, shall be repaired or replaced without extra cost to the Owner.
- 18.4. No fires of any kind will be allowed inside or around the operations during the course of construction without special permission from the Owner's Representative.
- 18.5. The CMAR shall protect all trees and shrubs designated to remain in the vicinity of the operations in accordance with the Contract Documents. The CMAR shall barricade all walks, roads, etc., as directed by the Designer to keep the public away from the construction. All trenches, excavations or other hazards in the vicinity of the Work shall be well barricaded and properly lighted at night.
- 18.6. The CMAR shall develop and implement a Project safety program in accordance with the RFQ and applicable regulations. The Owner will have final approval of the CMAR's Safety Program. The Owner's Representative may require additional safety measures before granting approval.

Subcontractors must also comply with any such additional safety requirements of the Owner Controlled Insurance Program, if any, or the Contractor Controlled Insurance program. The CMAR shall report, to the Owner, as part of each monthly report, any safety violations and actions taken to protect the safety of persons and property engaged in the Project. The CMAR may require that all Subcontractors meet the CMAR's safety program requirements including where those requirements meet or exceed State or Federal requirements.

- 18.7.** In the event the Owner implements an Owner Controlled Insurance Program ("OCIP") or a Contractor Controlled Insurance Program ("CCIP"), the CMAR agrees to cooperate and coordinate with any reasonable safety plan or risk management plan implemented in connection with the OCIP or CCIP.
- 18.8.** The CMAR shall be responsible for all necessary safety measures for the protection of all persons on the job, including the requirements of the Associated General Contractors of America Manual of Accident Prevention in Construction, as amended, and shall fully comply with all state laws or regulations and North Carolina State Building Code requirements to prevent accident or injury to persons on or about the location of the Work. The CMAR shall clearly mark or post signs warning of hazards existing, and shall barricade excavations, elevator shafts, stairwells and similar hazards. The CMAR shall protect against damage or injury resulting from falling materials and shall maintain all protective devices and signs throughout the progress of the Work.
- 18.9.** The CMAR shall, at a minimum, adhere to the rules, regulations and interpretations of the North Carolina Department of Labor relating to Occupational Safety and Health Standards for the Construction Industry (Title 29, Code of Federal Regulations, Part 1926, published in Volume 39, Number 122, Part II, June 24, 1974, Federal Register), and revisions thereto as adopted by General Statutes of North Carolina 95-126 through 155.
- 18.10.** The CMAR shall designate a responsible member of its organization as safety inspector, whose duties shall include accident prevention on the Project. The name of the full-time onsite safety inspector shall be made known to the Designer and Owner at the time the Work is started. The CMAR will provide the Owner's Representative with the name of each Subcontractor's onsite safety officer.
- 18.11.** In the event of emergency affecting the safety of life, the protection of Work, or the safety of adjoining properties, the CMAR is hereby authorized to act at its own discretion, without further authorization from anyone, to prevent such threatened injury or damage. Any compensation claimed by the CMAR on account of such action shall be determined as provided for in the Contract Documents.
- 18.12.** If reasonable precautions are inadequate to prevent foreseeable bodily injury or death to persons resulting from a material or substance encountered but not created on the site by the CMAR or its Subcontractors, the CMAR shall, upon recognizing the condition, immediately stop Work in the affected area and report the condition to the Owner and Designer in writing. The Owner shall take responsibility for remediation of the material or substance from the site. If the CMAR claims its progress in completing the Project is delayed because of the Owner's remediation of the site, the CMAR shall file notice and a claim in accordance with this Contract.

19. SEDIMENTATION POLLUTION CONTROL ACT OF 1973:

- 19.1.** Any land-disturbing activity performed by the CMAR in connection with the Project shall comply with all erosion control measures set forth in the Contract and Construction Documents and any additional measures which may be required in order to ensure that the Project is in full compliance with the Sedimentation Pollution Control Act of 1973, as implemented by Title 15, North Carolina Administrative Code, Chapter 4, Sedimentation Control, Subchapters 4A, 4B and 4C, as amended (15 N.C.A.C. 4A, 4B and 4C).

- 19.2.** Upon receipt of notice that a land-disturbing activity is in violation of said Act, the CMAR shall be responsible for ensuring that all steps or actions necessary to bring the Project in compliance with said act are promptly taken.
- 19.3.** The CMAR shall be responsible for defending any legal actions instituted pursuant to N.C.G.S. 113A-64 unless such legal action arises from the acts or omissions of: the Owner; the Designer; any of the Owner's or Designer's agents, elected officials, consultants, contractors, subcontractors, or employees; or any person or entity who is not under the CMAR's control.
- 19.4.** To the fullest extent permitted by law, the CMAR shall indemnify and hold harmless the Owner, the Project Designer and the agents, elected officials, consultants, and employees of the Owner and Project Designer, from and against all claims, damages, civil penalties, losses and expenses, including, but not limited to, attorneys' fees, arising out of or resulting from the performance of Work or failure of performance of Work, provided that and only to the extent that any such claim, damage, civil penalty, loss or expense is solely attributable to the CMAR or its Subcontractors and is a violation of the Sedimentation Pollution Control Act. Such obligation shall not be construed to negate, abridge or otherwise reduce any other right or obligation of indemnity which would otherwise exist as to any party or persons described in this Contract, including specifically paragraph 40.

20. INSPECTION OF THE WORK:

- 20.1.** It is a condition of this Contract that the Work shall be subject to inspection during normal working hours by the Designer, designated official representatives of the Owner, and those persons required by state law to test special Work for official approval. The CMAR shall therefore provide safe access to the work at all times for such inspections.
- 20.2.** All instructions to the CMAR regarding the interpretation of the plans and specifications will be made only by or through the Designer or its designated Project representative. Observations made by official representatives of the Owner shall be conveyed to the Project Designer for review and coordination prior to issuance to the CMAR.
- 20.3.** Where special inspection or testing is required by virtue of any state laws, instructions of the Designer, specifications or codes, the CMAR shall give adequate notice to the Designer and Owner of the time set for such inspection or test, if the inspection or test will be conducted by a party other than the Designer. Such special tests or inspections will be made in the presence of the Designer and Owner's representative or the Owner's designated agent, and it shall be the CMAR's responsibility to serve ample notice of such tests.
- 20.4.** All laboratory tests shall be paid by the Owner unless provided otherwise in the Contract Documents except the CMAR shall pay for laboratory tests to establish design mix for concrete, and for additional tests to prove compliance with Contract Documents where materials have tested deficient except when the Owner's testing laboratory did not follow the appropriate ASTM testing procedures.
- 20.5.** The CMAR shall perform quality control inspections on the work of the Subcontractors to guard the Owner against defects and deficiencies in the Work and shall coordinate its activity with the on-site duties of the Designer. The CMAR shall advise the Designer of any apparent variation and deviation from the intent of the Construction Documents and shall take the necessary action to correct such variations and deviations from the intent of the Construction Documents. The CMAR shall provide two sets of all inspection reports (in binder form) as part of the job progress meetings to the Designer and the Owner.
- 20.6.** The Owner reserves the right to independently contract for compliance inspection and testing.
- 20.7.** The CMAR shall record and effectuate the correction of deficiencies submitted by the Owner and the Designer.

- 20.8.** The Designer shall in all cases make final interpretation of the Contract Documents and rule on compliance of the Work.
- 20.9.** Should any Work be covered up or concealed prior to required inspection and approval by the Designer, such Work shall be uncovered or exposed for inspection, if so requested by the Designer in writing. Inspection of the Work will be made promptly upon notice from the Designer or Owner. All cost involved in uncovering, repairing, replacing, recovering and restoring to design condition, the Work that has been covered or concealed will be paid by the CMAR.
- 20.10.** If any other portion of the Work has been covered which the Designer has not specifically requested to observe prior to being covered, the Designer or Owner's Representative may request to see such Work and it shall be uncovered by the CMAR. If such Work be found in accordance with the Construction Documents, the cost of uncovering and replacement shall, by appropriate change order, be charged to the Owner. If such Work be found not in accordance with the Contract Documents, the CMAR shall pay such costs.

21. TIME OF COMPLETION, DELAYS, EXTENSION OF TIME:

- 21.1.** The CMAR shall commence provision of services under this Contract not later than five days after the date of this Contract, and shall fully complete all services hereunder and accomplish the substantial and final completion of the Project in accordance with the schedules attached to future contract amendments of the Contract, which shall be adhered to unless otherwise agreed to in writing by the Owner.
- 21.2.** The Project shall be brought to Substantial and Final Completion within the time prescribed by the Project schedule that is updated and established at the time the final GMP is accepted, which shall be in accord with the foregoing target schedule as extended by the Owner by change order in accordance with the Contract.
- 21.3.** If the CMAR is delayed at any time in the progress of its Work by any act or negligence of the Owner or the Designer, or by any employee of either; by changes ordered in the Work; by labor disputes at the Project site; by abnormal weather conditions not reasonably anticipated for the locality where the Work is performed; by unavoidable casualties; by any causes beyond the CMAR's control; or by any other causes which may justify the delay, then the Contract time shall be extended by change order for a reasonable time as agreed upon by the CMAR, Owner, and Project Designer. Contract defaults or other breaches of any legal duty by a Subcontractor shall not be grounds for a time extension under this Contract. Time extensions will not be granted for rain, wind, snow or other natural phenomena of normal intensity for the locality where the Work is performed. For purpose of determining the extent of delay attributable to unusual weather phenomena, a determination shall be made by comparing the weather for the contract period involved with the average of the preceding ten (10) year climatic range during the same time interval based on the National Oceanic and Atmospheric Administration National Weather Service statistics for the locality where Work is performed and on daily weather logs kept on the job site by the CMAR reflecting the effect of the weather on progress of the Work. Absent extraordinary circumstances, time extensions for weather delays shall not entitle the CMAR to an increase in the GMP.
- 21.4.** Except for requests due to weather delays, a request for extension of time shall be made in writing to the Designer and the Owner's Representative within twenty one (21) consecutive calendar days following the CMAR's identification of the event that is the cause of delay. The CMAR shall submit any requests for extension of time due to weather delays in writing to the Designer and Owner's Representative on a monthly basis. If notification is not made as defined above, no time extension will be considered.
- 21.5.** The CMAR shall notify its surety in writing of each extension of time granted.

- 21.6.** The schedule for all responses by the Designer to submittals by the CMAR shall be part of the Project schedule, as amended from time to time in accordance with the Contract. No request for a time extension shall be allowed on account of failure of the Project Designer to process any type of submittals, furnish drawings, or provide instructions unless and until the CMAR provides written notice of the request to the Owner as defined in Section 21.
- 21.7.** Should the CMAR fail to bring the Project to substantial completion within the time prescribed by the schedule that is established at the time the final GMP is accepted (or such later date as may result from extension of time granted by the Owner), the CMAR shall be liable to the Owner for delay damages as set forth herein. The CMAR acknowledges that delays will damage the Owner, but also acknowledges that proof of such damages would be difficult and costly for both parties, and that the injury to the Owner which could result from a failure of the CMAR to complete on schedule is uncertain and cannot be computed with exact precision. In order to liquidate in advance the delay damages that the Owner will be entitled to recover from the CMAR in the event of unexcused delays in the completion of the Project, the CMAR agrees that it will pay, and that the Owner may retain from the funds otherwise to be paid to the CMAR, the following liquidated damages, which sums are agreed upon as a reasonable and proper measure of damages which the Owner will sustain by failure of the CMAR to complete Work within the time stipulated.
- 21.7.1.** The sum of **\$1,500.00** per day for each consecutive calendar day that the CMAR fails to achieve substantial completion of the entire Project.
- 21.8.** In addition to the foregoing liquidated damages, the Owner may recover extended utility charges as expressly set forth elsewhere in this Contract.
- 21.9.** The CMAR shall not use its unexpended GMP Contingency to pay liquidated damages. The CMAR may in its discretion provide in its construction contracts that its Subcontractors will be liable for liquidated delay damages, in the amount of the Owner's liquidated damages or in different amounts. Notwithstanding anything in this Contract that might be construed to the contrary, in the event the CMAR deducts liquidated damages from a particular construction contract, thereby reducing the sum payable under that contract, the GMP will not be reduced by the amount withheld from that Subcontractor.
- 21.10.** This provision for liquidated damages does not bar Owner's right to enforce its other contractual rights and remedies under this Contract, including without limitation the right to order the CMAR to accelerate the Work or the right to terminate the Contract. Liquidated damages represent the Owner's best effort at the commencement of the Contract to estimate its reasonable anticipated damages for delay, and should not be construed as a penalty.

22. CONSTRUCTION SUPERVISION AND SCHEDULE:

- 22.1.** The CMAR shall maintain a competent and adequate full-time staff approved by the Owner at the Project site to coordinate and provide adequate direction of the Work, and to monitor progress of the Subcontractors on the Project at all times. The CMAR's on-site representatives shall manage the Work of the Subcontractors and coordinate the Work with the activities and responsibilities of the Owner, Designer and CMAR to complete the Project in accordance with the Owner's objectives of cost, time and quality.
- 22.2.** It is understood that the designated and approved on-site resident CMAR representatives will remain on the job and in responsible charge as long as those persons remain employed by the CMAR, unless the Owner's Representative agrees otherwise in writing during the course of the Project. A contract amendment may be required by the Owner's Representative issued accordingly by the Owner. The Owner may request in writing that the CMAR promptly remove any individual staff member for any reason.

- 22.3.** The CMAR shall establish an on-site organization and lines of authority in order to carry out the overall plans of the Project Team. The CMAR will coordinate with the on-site Subcontractors to provide the necessary on-site services for the construction activities and on-site requirements of the CMAR, Owner and Designer.
- 22.4.** The CMAR shall establish and maintain an on-site safety program. The safety program shall be discussed on a regular basis at contractor meetings and during CMAR/Owner/Designer progress meetings. Safety reports shall be included in weekly and monthly progress reports. The CMAR will also provide project orientation and safety training to the Owner's staff, all consultants, agents of the Owner and visitors. The CMAR will lead and facilitate tours of the site as requested by the Owner.
- 22.5.** The CMAR shall accept delivery and arrange for storage, protection and security for any Owner purchased materials, systems and equipment that are a part of the Work until such items are turned over to the respective Subcontractors.
- 22.6.** The CMAR shall provide a cost and resource loaded critical path method (CPM) schedule utilizing accepted standard computer based software. The scheduling software shall allow for integration of all aspects of the Project and provide for coordination of all Work to be performed. The scheduling software used by the CMAR shall be capable of producing and coordinating logic developed network diagrams, and tabular format reports.
- 22.7.** After acceptance of each GMP and issuance of a construction contract amendment to the CMAR for a Construction Phase of the Project and within fifteen (15) days of written notice to proceed (NTP), the CMAR shall submit a preliminary CPM schedule for inclusion in the contract bid packages consistent with the time frames submitted in each GMP.
- 22.8.** After contract award but prior to thirty (30) days from the date of the notice to proceed, the CMAR shall obtain from the Subcontractors their respective Work activities and integrate them into a Project construction schedule. The CMAR shall develop the complete and final CPM schedule in the form of a CPM network arrow diagram using the CMAR's logic and time estimates for each segment of the Work and shall be cost loaded, the sum of which totals the GMP exclusive of a CMAR-GMP contingency, and manpower loaded to complete the Work within the scheduled time frames. The scheduling obligation shall include coordinating and tracking the progress of the Owner's and Designer's tasks and activities in relation to the milestone schedule including but not limited to Fixtures, Furnishing and Equipment delivery; and telecommunications and data installation. The CMAR shall promptly notify Owner of any delay that might impact construction. The CMAR shall make recommendations to the Owner, with a copy to the Designer, regarding strategies for overcoming any delay in the design of the Project that will affect the construction schedule. The CMAR and the Designer shall prepare, if deemed necessary, a schedule fixing dates upon which foreseeable clarifications will be required. The schedule will be subject to addition or change in accordance with progress of the Work. The Designer shall furnish drawings or clarifications in accordance with that schedule. The CMAR shall not proceed with the Work without such detail drawings and/or written clarifications.
- 22.9.** The arrow network diagram will be drawn in a level of detail suitable for display of salient features of the Work, including but not limited to the placing of orders for materials, submission of shop drawings for approval, approval of shop drawings by the Designer and the Owner, delivery of material, and all Work activities inclusive of punch list agreed to by the Owner. Each Work activity shall be assigned a time estimate by the CMAR. One-day shall be the smallest time unit used. This cost loaded schedule will not be the basis for invoicing, but may be considered by the Designer and the Owner when evaluating the percentage of Work represented to be complete in each schedule of values.
- 22.10.** Upon completion of the network diagrams, the CMAR shall have computer input data prepared, and a computer run made to generate a printout for the Project based on the information

supplied. In the event the completion date indicated by the schedule exceeds the contractual date, the logic and time estimates used to develop the plan will be reviewed, changes made in the logic and time estimates, and another computer run made to generate a new schedule. This procedure shall be repeated, if necessary, to provide a plan and schedule to meet Owner requirements. All submissions shall be both in hard copy and in electronic format.

- 22.11.** Within fifteen (15) days of each GMP notice-to-proceed, the updated CPM schedule shall be submitted to the Owner for review and approval. No application for payment will be processed until the Project CPM schedule is approved by the Owner. This working plan shall show job identification, job duration, manpower loading, cost loading, calendar dates for start and finish of each job, and jobs critical to the completion of the Project on schedule. When approved by the Owner, they shall become the working plan and schedule for the Project and such information shall be provided to the CMAR for distribution to the Project Team. The CMAR shall distribute to the Subcontractors the approved Project CPM schedule and shall display same at the job site.
- 22.12.** The CMAR shall review the plan and schedule each week. An updated cost-loaded Project schedule shall be furnished showing actual completed Work at the end of each month in respect to the entire Project. The form used shall be approved by the Owner and shall be submitted with the monthly invoice. The CMAR shall also develop and submit a Work plan for a two week, thirty day and sixty day look ahead.
- 22.13.** The CMAR shall provide regular monitoring of the schedule as construction progresses, identify potential variances between scheduled and desired completion dates, review the schedule for Work not started or incomplete, review the status of submittals and delivery of long-lead time deliveries, review the Owner's occupancy priorities, and take the action necessary to meet the required completion date. The CMAR shall furnish to the Owner various schedules and updates setting forth planned and completed progress of the Project broken down by the various divisions or parts of the Work and by calendar days. The CMAR shall ensure that all schedules are prepared and updated in strict conformance with the Owner's requirements for formatting of reports for the Owner. The CMAR shall keep the Owner, the Designer and all Subcontractors fully informed as to all changes and updates to the schedule. The CMAR shall ensure that all schedules are prepared and updated in strict conformance with the Owner's requirements and for provision of one inclusive schedule incorporating necessary lead times for actions required, by the Owner and regulatory agencies (including the Town of Apex), by the Designer, by the CMAR, and by utility companies providing services or relocating service lines and facilities, by all Subcontractors, and for significant General Condition's activities, including but not limited to agenda submittals, permit and approvals applications and review of interim and final plans, specifications and bid packages.
- 22.14.** The CMAR shall schedule and preside over regular site coordination meetings with Subcontractors as conditions on the Project require, but at least weekly. In addition, the CMAR shall conduct weekly progress meetings and other meetings as may be directed by the Owner, at which Subcontractors, the Owner, the Designer, other designated representatives, and the CMAR can discuss jointly such matters as progress, scheduling, and construction-related problems. All Subcontractors shall be represented at these job progress conferences by both home office and Project personnel, unless specifically excused by both the CMAR and the Owner. The CMAR shall require attendance from other subcontractors and material suppliers who can contribute toward maintaining required job progress. It shall be the principal purpose of these meetings, or conferences, to effect coordination, cooperation and assistance in every practical way toward the end of maintaining progress of the Project on schedule and to complete the Project within the specified contract time. The CMAR shall be prepared to assess progress of the Work and to recommend remedial measures for correction of progress as may be appropriate. The CMAR with assistance from the Project Designer shall be the coordinator of the conferences and shall preside as chairman. The CMAR shall take and distribute complete minutes of meetings to all attendees and others as directed by the Owner within three (3) days of such meetings.

Representatives of the Owner may attend any or all meetings and shall in any case receive all notices and minutes of meetings.

- 22.15.** The CMAR shall keep accurate and detailed written records of Project progress during all stages of construction. The CMAR shall maintain a detailed daily diary of all events, which occur at the jobsite or elsewhere, and which affect, or may be expected to affect, Project progress. The diary shall record weather data, including minimum and maximum temperatures, precipitation type and amount, sky conditions, and wind velocities. The diary shall also record all visitors, and include a detailed list of all material deliveries to the site. The diary shall be available to the Owner at all times and shall be turned over to the Owner upon completion of the Contract.
- 22.16.** The CMAR shall compile and submit to the Owner daily a summary report consisting of the CMAR's Daily Diary and each Subcontractor's daily report describing the construction activities of the day along with manpower and equipment usage, including that of the Subcontractors and safety incidents or concerns.
- 22.17.** The CMAR shall submit to the Owner and the Designer a weekly report of the status of all Work activities. The CMAR is to submit and confirm the report format to the Owner's requirements for these reports and prior to implementation the CMAR must obtain the Owner's approval of the format. The Owner shall have no duty to respond to any information in the periodic reports, unless the CMAR specifically requests a response or action by the Owner in writing in a separate document.
- 22.18.** The weekly status report shall show the actual Work completed to date in comparison with the original amount of Work scheduled, inclusive of information on the Subcontractors' Work and the percentage of completion for the Project. The report shall describe major milestones achieved and slipped, including a discussion of each slippage. In addition to schedule information, the report shall contain an overall summary of the financial status of the Project with a cost control report with proposed solutions for resolution of any cost concerns or issues. The report shall contain a summary statement on the status of change orders for the Project inclusive of potential change orders, approved change order and rejected/voided change orders as well as change orders which require the Owner's immediate attention. The report shall contain a summary statement as to the status of shop drawings, submittals and RFI's for the Project inclusive of items requiring the Owner and/or the Designer's immediate attention. The report shall contain a summary statement as to the status of quality control/inspections for the Project including, but not limited to, number and type of inspections made, overall Project quality to date, and recommendations. Finally, subject to the requirements of any OCIP or CCIP, if utilized, the report shall include a safety/accident report. If an OCIP or CCIP is utilized, additional details and reports may be required.
- 22.19.** Should an issued Project schedule indicate that the critical path is thirty (30) days or more behind schedule, the CMAR shall within fourteen (14) calendar days after schedule issuance, provide a written report of such condition to the Owner and Designer and present to the Owner and Designer a written recovery schedule and acceleration plan to re-sequence and reschedule the Work to achieve the agreed Project completion dates. The recovery schedule and acceleration plan shall be in a format suitable to the Owner with all data and any requested PDF (filtered) files for review. The recovery schedule and acceleration plan shall indicate what measures are being taken to bring the Work back on schedule and ensure that the Substantial Completion date is not exceeded. The recovery schedule and acceleration plan shall include as necessary overtime work, extra shifts, additional labor forces, additional supervision, re-sequencing of activities, changes in means and methods, and any other tactics needed to achieve timely completion. The recovery schedule shall identify the activity durations to be achieved by the plan and the Subcontractors that are affected by the plan. If the schedule delay is solely due to the action, inaction, or fault of the CMAR, the CMAR shall immediately implement the acceleration plan and recovery schedule upon written approval by the Owner's Representative which shall not warrant

an increase to the GMP. If the schedule delay is not the fault of the CMAR, then implementation of the acceleration plan and/or recovery schedule shall warrant an increase in the GMP, and the CMAR shall not implement the acceleration plan or recovery schedule until a change order is issued. The acceleration plan shall also include an estimate of the cost of acceleration. If the CMAR intends to seek a time extension, in addition to the other requirements of the Contract, the request for a time extension shall include a fragnet analysis appropriately referenced to specific predecessor and successor activities in the base line schedule as updated supporting any proposed revisions to the schedule.

22.20. In the event the CMAR is required to present a recovery plan and accelerate the Work, the CMAR shall account for and allocate the costs of acceleration as follows:

22.20.1. If the CMAR otherwise would be entitled to a time extension, and the CMAR has requested a time extension or given notice of a claim for acceleration in writing in accordance with the Contract, and the Owner orders the CMAR to implement a recovery plan to accelerate the Work, then in such event the Owner will authorize the use of other funds in the Total Construction Budget or provide additional funds to pay the costs of such acceleration and issue a change order to increase the GMP.

22.20.2. Should an issued Project schedule indicate that the critical path is thirty (30) days or more behind schedule, the CMAR and its trade subcontractors shall without being entitled to any increase in the GMP or other compensation work overtime, increase labor forces, or take such action as may be necessary or appropriate to complete the activity by the completion dates shown, unless the CMAR is otherwise entitled to an extension of the completion dates under the Contract. The CMAR shall require each subcontractor to prepare and submit a recovery schedule as specified herein. The CMAR shall review and ascertain that each subcontractor is providing sufficient resources to regain lost time. In no event will the GMP be increased or any expenses paid to the CMAR or its subcontractors for delays solely caused by the CMAR or its subcontractors, it being understood that the CMAR bears the risk of delays caused by its subcontractors.

23. SHOP DRAWINGS, SUBMITTALS, SAMPLES, DATA:

23.1. The CMAR shall develop and implement a system for review, acceptance or rejection, and processing of all shop drawings and submittals, including the projected lead-time on the CPM schedule. The CMAR shall review this system with the Owner and the Designer, and obtain the Owner's approval prior to implementation.

23.2. Within 30 consecutive calendar days of the notice to proceed with each GMP, a schedule for anticipated submission of all shop drawings, product data, samples, and similar submittals shall be prepared by the CMAR and provided to the Designer. This schedule shall indicate the items, relevant specification sections, other related submittal data, and the date when these items will be furnished to the Designer.

23.3. The CMAR will be responsible for logging all shop drawings/submittals and stamping them reviewed and approved prior to submission to the Designer. The CMAR shall provide additional copies of any submittals or shop drawings requested by the Owner. The CMAR is to insure that shop drawing/submittal packages are submitted in an appropriate manner and, if not, return them to the Subcontractor for proper submission.

23.4. The CMAR shall be responsible for tracking and monitoring all shop drawings/submittals throughout construction until all shop drawings/submittals have been approved by the Designer and completion reported to the Owner.

- 23.5.** The CMAR shall include shop drawings as an agenda item on all Owner meetings and advise the Owner immediately of any delays in the shop drawing and submittal process.
- 23.6.** The CMAR shall develop a shop drawing and submittal aging report which is to be submitted to the Owner at each weekly progress meeting.
- 23.7.** Approval of shop drawings by the Designer shall not be construed as relieving the CMAR from responsibility for compliance with the design or terms of the Contract Documents nor from responsibility of errors of any sort in the shop drawings, unless such error has been called to the attention of the Designer in separate writing by the CMAR.

24. SUBSTITUTION REQUESTS:

24.1. The CMAR will be responsible for logging all substitution requests. The CMAR will be responsible for reviewing all substitution requests to ensure that they are complete; and, if not, return them to the Subcontractor for proper submission. The CMAR will be responsible to review all substitution requests prior to submission to the Designer and the Owner. It is to be noted that the Owner discourages substitutions and the Owner's approval will be granted only upon the most persuasive arguments as to quality, function and financial merit regarding a substitution. The CMAR shall be responsible for tracking and monitoring all substitution requests throughout construction until all substitution requests are processed by the Designer and the Owner. The CMAR shall be responsible to see that all substitution requests are submitted in a timely manner per the specifications. The CMAR shall include substitution requests, if any, on the agenda topic at the Owner's meetings and advise the Owner immediately of any delays in the substitution request process.

25. REQUESTS FOR INFORMATION:

25.1. The CMAR will be responsible for developing and implementing a Request for Information (RFI's) form for use on the Project. The CMAR will be responsible for logging and reviewing all RFI's prior to submission to the Owner and the Designer. The CMAR is to insure that the RFI's submitted are appropriate and not frivolous. The CMAR shall be responsible for tracking and monitoring all RFI's throughout construction in a timely manner until they are processed by the Designer and the Owner. The CMAR shall include RFI's as an agenda topic at all Owner meetings and advise the Owner immediately of any delays in their process. All responses to the RFI's that have an added cost impact must also be discussed with the Owner immediately upon such determination. The CMAR shall develop an RFI aging report that is to be submitted to the Owner at each progress meeting.

26. SUBSTANTIAL COMPLETION:

26.1. The date of substantial completion of the Work or designated portion thereof is the date certified by the Designer when the Work or a designated portion thereof is sufficiently complete, in accordance with the Construction Documents, so the Owner can fully occupy and utilize the Work or designated portion thereof for the use for which it is intended, with all of the Project's parts and systems operable as required by the Contract Documents. Only incidental corrective Work and any final cleaning beyond that needed for the Owner's full use may remain for final completion. The issuance of a temporary or final certificate of occupancy shall not, in itself, constitute substantial completion.

26.2. When the CMAR considers that the Work, or a designated portion thereof which is acceptable to the Owner, is substantially complete as defined above, the CMAR shall prepare for and submit to the Designer and Owner a list of all items which in the CMAR'S opinion are to be completed or corrected and shall attach it to a request in writing that the Designer perform a substantial completion inspection. The Owner's occupancy of incomplete Work shall not alter the CMAR's responsibilities. The Designer shall review the CMAR'S list and shall compile a punch list of items to be corrected and completed. The failure to include any items on such list does not alter the responsibility of the CMAR to complete all Work in accordance with the Contract Documents.

26.3. When the Owner, Designer and CMAR, on the basis of an inspection, jointly determine that the Work or designated portion thereof is substantially complete, the Designer will then prepare a certificate of substantial completion which shall establish the date of substantial completion, shall state the responsibilities of the Owner and the CMAR for security, maintenance, heat, utilities, damage to the Work, and insurance, and shall signify the beginning of the time within which the

CMAR shall complete the items listed therein. Warranties required by the Contract Documents shall commence on the date of substantial completion of the Work or designated portion thereof, unless otherwise provided in the certificate of substantial completion.

- 26.4.** The certificate of substantial completion shall be submitted to the Owner and the CMAR for their written acceptance of the responsibilities assigned to them in such certificate. Upon substantial completion of the Work or designated portion thereof and upon application by the CMAR and certification by the Designer, the Owner shall make payment, except retainage held pursuant to the Contract Documents, for such Work or portion thereof as provided in the Contract Documents.
- 26.5.** The acceptance of substantial completion payment shall constitute a waiver of all claims by the CMAR and its Subcontractors, except those previously made in writing and identified by the CMAR as unsettled at the time the CMAR submits the application for payment for substantial completion, and except for the retained sums due at final acceptance.
- 26.6.** The CMAR shall indemnify and hold the Owner harmless against any accrued claims by its Subcontractors that are waived because they were not made in writing and identified by the CMAR as unsettled when the CMAR submitted the application for payment for substantial completion.
- 26.7.** The Owner shall have the option to correct or complete any and all punch list items not completed by the CMAR to the satisfaction of the Designer and the Owner within forty five (45) days for any GMP package of less than 1 year's duration and not more than ninety (90) days from the actual date of substantial completion for any GMP package of more than 1 year's duration by utilizing its own forces or by hiring others. The cost of such correction of remaining punch list items by the Owner or others shall be deducted from the final payment to the CMAR.
- 26.8.** If CMAR does not complete certain punch list items within the required time period, all warranties and guarantees for such incomplete punch list items shall become effective upon CMAR submitting to the Owner and Designer certification of the date such items were completed and approval by the Owner's Representative and Designer. The issuance of the certificate of substantial completion does not indicate final acceptance of the Project by the Owner, and the CMAR is not relieved of any responsibility for the Project except as specifically stated in the certificate of substantial completion.
- 26.9.** Should the Designer and the Owner determine that the Work or a designated portion thereof is not substantially complete, they shall provide the CMAR with written notice stating why the Work or designated portion is not substantially complete. The CMAR shall expeditiously complete the Work and shall re-request in writing that the Designer perform another substantial completion inspection. Costs, if any, associated with such re-inspection shall be assessed to the CMAR at the rates specified in the Designer's contract.

27. PARTIAL UTILIZATION / BENEFICIAL OCCUPANCY:

- 27.1.** The Owner may desire to occupy or utilize all or a portion of the Project when the Work for that portion is substantially complete.
- 27.2.** Prior to the final payment, the Owner may request that the CMAR in writing, through the Designer if applicable, permit the Owner to use a specified part of the Project which the Owner believes it may use without significant interference with construction of the other parts of the Project. If the CMAR agrees, the Designer will schedule a beneficial occupancy inspection after which the Designer may issue a certificate of substantial completion. The certificate shall include the following documentation and information:
 - 27.2.1.** Date of substantial completion.

- 27.2.2. A tentative list of items to be completed or corrected before final payment.
 - 27.2.3. Establish responsibility between the CMAR and Owner for maintenance, heat, utilities and insurance.
 - 27.2.4. Establish the date for guarantees and warranties under the terms of the Contract.
 - 27.2.5. Consent of surety.
 - 27.2.6. Endorsement from the CMAR'S insurance company permitting occupancy shall be a condition precedent to the Owner's occupancy of a part or parts of the Project.
- 27.3. The Owner shall have the right to exclude the CMAR from any part of the Project which the Designer has so certified to be substantially complete, but the Owner will allow the CMAR reasonable access to complete or correct Work to bring it into compliance with the Contract. Subcontractors allowed to work in substantially complete and occupied areas shall clean up after their operations daily or be subject to back charges therefore. Occupancy by the Owner pursuant to this section will in no way relieve the CMAR from its contractual requirement to complete the Project within the specified time.

28. FINAL INSPECTION, ACCEPTANCE, AND PROJECT CLOSEOUT:

- 28.1. The CMAR is responsible for the close out requirements under the Contract. The CMAR is to work closely with the Owner as to the procedures and schedule for contract close-out and the related contractual obligations.
- 28.2. Upon notification from the CMAR that the Project is complete and ready for inspection, the Designer shall make a preliminary final inspection to verify that the Project is complete and ready for final inspection. Prior to final inspection, the CMAR shall complete all items requiring corrective measures noted at the preliminary inspection. The Designer shall schedule a final inspection at a time and date acceptable to the Owner and the CMAR.
- 28.3. At the final inspection, the Designer shall, if job conditions warrant, record a list of items that are found to be incomplete or not in accordance with the Construction Documents. At the conclusion of the final inspection, the Designer shall make one of the following determinations:
- 28.3.1. That the Project is completed and accepted.
 - 28.3.2. That the Project is accepted subject to the list of discrepancies (punch list). Subject to unavoidable delays in the delivery of materials needed to correct or complete discrepancies, all punch list items must be completed within thirty (30) days of acceptance or the Owner may invoke Owner's Right to Do Work.
 - 28.3.3. That the Project is not complete and another date for a final inspection will be established.
- 28.4. Within fourteen (14) days of acceptance or within fourteen (14) days after completion of punch list, the Designer shall certify the Work and issue applicable certificate(s) of compliance.
- 28.5. Any discrepancies listed or discovered after the date of final inspection and acceptance shall be resolved as a warranty item.
- 28.6. The CMAR shall obtain as-built and product data from Subcontractors and maintain a current set of record drawings, specifications and operating & maintenance manuals. For mechanical and electrical equipment, the CMAR is to obtain the operating and maintenance (O&M) manuals at least three (3) months prior to the demonstration for such equipment for review prior to the equipment demonstration. Prior to Project Closeout, three copies of the O&M manuals are to be sent to the Owner's representative who will forward as he/she sees fit.

28.7. At the completion of the Project and before final payment, the CMAR shall deliver a complete set of as-built drawings for use by the Designer in preparing Record Drawings.

29. COST CONTROL:

29.1. The CMAR shall develop and maintain an effective system of Project cost control. Elements of the system of Project cost control will include, but not necessarily be limited to, Project budgets, GMP proposals, the cost and resource loaded critical path schedule, and cash flow forecasts and reports, all in formats to be approved by the Owner.

29.2. The CMAR shall incorporate into each element of the system of Project cost control all Owner approved changes as they occur, update and refine the GMP, and develop reports and forecasts as needed, or as directed by the Owner. The CMAR shall identify variances between actual and estimated costs and advise the Owner whenever projected cost exceeds bid allowances or estimates.

29.3. The CMAR shall check and supervise all material deliveries, equipment and labor entering the Work site. The CMAR shall maintain cost accounting records on authorized Work performed under unit costs, actual costs for labor and material, or other bases requiring accounting records, and afford the Owner access to these records and preserve them for a period of three (3) years after final payment. The Owner reserves the right to audit these records during that period.

30. CHANGES IN THE WORK:

30.1. The CMAR shall develop and implement a system for review, negotiation, and processing of proposed Change Orders. The CMAR shall, with complete supporting data, recommend necessary desirable changes to the Owner and the Designer for approval.

30.2. The Owner unilaterally at any time may have changes made in the Work covered by the Contract, including but not limited to changes: (1) in the specifications or drawings; (2) in the sequence, method or manner of performance of the Work; (3) in the Owner-furnished facilities, equipment, materials, services or site; or (4) directing acceleration in the performance of the Work. Furthermore, it is understood and agreed that refinement and detailing may be accomplished from time to time with respect to the drawings and specifications. The CMAR's entitlement to an increase in the GMP or an extension of time, or both, if any, for such changes shall be determined in accordance with the Contract.

30.3. No adjustment in the Guaranteed Maximum Price shall be made unless such change, refinement, or detailing results in changes in the scope and/or design of the Project, or a compensable delay to the Project's schedule.

30.4. The Designer with the Owner's Representative's approval has the authority to order minor changes in the Work not involving an adjustment in the GMP or time for completion, and not inconsistent with the intent of the Construction Documents. Such changes shall be effected by written order and shall be binding on the Owner and the CMAR. The CMAR shall not perform any changes, other than minor changes, in the Work unless authorized in writing by the Owner. The CMAR's performance of minor changes pursuant to this section shall not constitute a waiver of any claim the CMAR may have for additional compensation or time. Any claim the CMAR may have, however, shall be filed in strict conformance with the Contract.

30.5. No Change Order will be issued for resolution of conflicts in the documents which are to be covered by the CMAR-GMP Contingency.

30.6. Except in an emergency endangering life or property, no change shall be made by the CMAR except upon receipt of approved change order or written field order from the Designer, countersigned by the Owner's representative authorizing such change. No claim for increases in

the GMP shall be honored or valid unless this procedure is followed. A field order, transmitted by fax or hand-delivered, may be used where the change involved impacts the critical path of the Work. A formal change order shall be issued within the time stated on the field order.

- 30.7.** The CMAR shall notify the Owner in writing (and copy to Designer) if the CMAR believes that a change in scope or design will require a change in the GMP. The Owner shall have the right to require the performance thereof on a lump sum basis, a unit price not to exceed basis, or a time and material not to exceed basis.
- 30.8.** The CMAR shall notify the Designer and the Owner of such changes before trade bids for the Work associated are requested. The Owner and CMAR shall reach agreement on the nature of the subject change and upon the Owner's direction, eliminate the circumstances of the change or negotiate a mutually agreed cost change to be made to the GMP.
- 30.9.** The CMAR acknowledges that some changes in the Project may require approval by the Apex Town Council. So as not to delay the Project, the CMAR shall notify the Owner's representative of any requested deadlines for responses and how the Owner's failure to respond will impact the Project schedule. CMAR shall notify the Owner of any such changes as soon as practicable and shall not be entitled to an extension or change in cost or GMP due to failure to timely notify Owner such that any decision needing approval by the Apex Town Council can be obtained at a regularly scheduled Council meeting.
- 30.10.** Upon receipt of an Owner directed change request, the CMAR shall submit a proposal within fourteen (14) calendar days, or provide written justification acceptable to the Owner within ten (10) working days stating the additional time required to submit a proper proposal for the change requested. The CMAR's proposal shall be itemized and segregated by labor and materials for the various components of the change in or addition to the Work (no aggregate labor total will be acceptable) and shall be accompanied by signed proposals by any Subcontractors who will perform any portion of the change in, or addition to, the Work, and of any persons who will furnish materials or equipment for incorporation therein. The proposal shall also include the CMAR's estimate of the time required to perform said changes or additional Work.
- 30.11.** Change order proposals will consist of actual costs, e.g., Subcontractors' change order proposals and CMAR General Conditions items, if applicable, plus CMAR Fee pursuant to the Contract. All costs saved by scope reductions shall revert to the Owner in full.
- 30.12.** All change orders shall be supported by a breakdown showing method of arriving at net cost as defined below. The Owner and Designer will review the CMAR's analysis and cost data and advise the CMAR of their findings. The CMAR will provide such supporting data in suitable format. The Designer shall verify correctness. Within ten (10) days after receipt of the CMAR's proposal, the Designer shall prepare the change order and forward to the CMAR for its signature or otherwise respond, in writing, to the CMAR's proposal. Within five (5) days after receipt of the change order executed by the CMAR, the Designer shall certify the change order by its signature, and forward the change order and all supporting data to the Owner for the Owner's signature. The Owner shall endeavor to execute the change order within fifteen (15) days of receipt, or in accordance with the Owner's standard procedures when Town Council approval is required. Upon approval by the Owner, copies of the change order will be sent to the Designer and the CMAR and its surety. In case of emergency or extenuating circumstances, approval of changes may be obtained verbally by telephone or field orders approved by all parties, then shall be substantiated in writing as outlined under normal procedure.
- 30.13.** The portions of the proposal relating to labor and materials may include the reasonably anticipated direct costs to any of the CMAR's Subcontractors for labor and materials to be purchased for incorporation in the change in the Work, plus transportation and applicable sales and use taxes. The term "direct cost" as used herein shall mean the difference between all proper cost additions and deductions. The "cost" as used herein shall be limited to the following:

- 30.14.** The actual costs of materials and supplies incorporated or consumed as part of the Project;
- 30.15.** The actual costs of labor expended performing the Work;
- 30.16.** The actual costs of labor burden, limited to the costs of social security (FICA) and Medicare/Medicaid taxes; unemployment insurance costs; health/dental/vision insurance premiums; paid employee leave for holidays, vacation, sick leave, and/or petty leave, not to exceed a total of 30 days per year; retirement contributions; worker's compensation insurance premiums; and the costs of general liability insurance when premiums are computed based on payroll amounts; the total of which shall not exceed forty percent (40%) of the actual costs of labor.
- 30.17.** The actual costs of rental for tools, excluding hand tools; equipment; machinery; and temporary facilities required for the Project;
- 30.18.** The actual costs of premiums for bonds, insurance, permit fees, and sales or use taxes related to the Project;
- 30.19.** Overtime and extra pay for holidays and weekends may be a cost item only to the extent approved by the Owner;
- 30.20.** The CMAR may include up to fifteen percent (15%) of said costs as overhead and profit for its Subcontractors. In the case of deductible change orders, the CMAR shall deduct no less than ten percent (10%) for overhead and profit.
- 30.21.** If any of the items included in the lump sum proposal are covered by unit prices, the Owner may, if it requires the change in the Work to be performed on a lump sum basis, elect to use these unit prices in lieu of the similar items included in the lump sum proposal, in which event an appropriate deduction will be made in the lump sum amount prior to the application of any allowed overhead and profit percentages. No additional Subcontractor overhead and profit shall be applied to any unit prices.
- 30.22.** In the event that the CMAR fails to submit its proposal or obtain approval of an extension of time within the designated period, the Owner may order the CMAR to proceed with the change or addition to the Work and the CMAR shall so proceed. The Owner shall unilaterally determine the reasonable cost and time to perform the Work in question, subject to dispute resolution at a later time.
- 30.23.** The Owner reserves the right to reject the CMAR's proposal for a change in the Work and to elect to perform said Work using a separate Contractor. Under such circumstances, the CMAR shall coordinate the work of the Owner's contractor.
- 30.24.** If the Owner requests a change order and the CMAR's terms are unacceptable, the Owner may require the CMAR to perform such Work on a time and material basis. If the Owner elects to have the change in the Work performed on a time and material basis, the CMAR shall submit to the Owner daily time and material tickets, to include the identification number assigned to the change in the Work, the location and description of the change in the Work, the classification of labor employed, the materials used, the equipment rented (not tools) and such other evidence of cost as the Owner may require. The Owner may require authentication of all time and material tickets and invoices by persons designated by the Owner for such purpose. The failure of the CMAR to secure any required authentication shall constitute a waiver by the CMAR of any claim for the cost of that portion of the change in the Work covered by a non-authenticated ticket or invoice.
- 30.25.** In the event that the parties are unable to agree as to the reasonable cost and time to perform the change in or addition to the Work based upon the CMAR's proposal and the Owner does not elect to have the change in the Work performed on a time and material basis, Owner has the right to direct in writing that the CMAR perform the change in the Work. Failure of the parties to reach agreement regarding the cost and time of performing the change in the Work regardless of any

pending protest, shall not relieve the CMAR from performing the change in the Work promptly and expeditiously. Nothing contained in this section shall prevent the CMAR from making a claim for additional costs and/or an extension of time for changes to the Work that justify an increase in the GMP and/or an extension to the Contract time.

- 30.26.** At the time of signing a change order, the CMAR shall be required to certify as follows: "I certify that my bonding company will be notified forthwith that my contract has been changed by the amount of this change order, and that a copy of the approved change order will be mailed upon receipt by me to my surety."
- 30.27.** A change order, when issued, shall be full compensation, or credit, for the Work included, omitted or substituted. It shall show on its face the adjustment in time for completion of the Project as a result of the change in the Work.
- 30.28.** No changes will invalidate, relieve or release the CMAR from any guarantee given by him pertinent to the contract provisions. No changes will affect the validity of the performance bond or relieve the surety on said bond.
- 30.29.** In the event of emergency endangering life or property, the CMAR and the Subcontractors may be directed to proceed on a time and material basis by the Owner's Representative whereupon the CMAR shall proceed and keep accurately on such form as may be required, a correct account of costs together with all proper invoices, payrolls and supporting data. Upon completion of the Work the change order will be prepared and settled as outlined herein.

31. CLAIMS FOR EXTRA COST:

- 31.1.** If the CMAR or any of its Subcontractors asserts that any event or occurrence has caused a change in or addition to the Work which change causes an increase or decrease in the GMP or the time required for the performance of any part of the Work under the Contract, including Work not affected directly by the change, the CMAR shall, within twenty one (21) calendar days of the CMAR receiving notice of such event, give the Owner and Designer written notice as herein required. Said notice shall include the instructions or circumstances that are the basis of the claim and the CMAR's best estimate of the cost and time involved. The statement of claim hereunder may be included in the notice required above. The statement of claim shall include all direct, indirect and impact costs associated with the change, as well as the CMAR's estimate of the schedule impact of the change, if any. The CMAR and its Subcontractors shall not be entitled to reimbursement or an increase in the GMP for any claims that are not filed in strict conformance with this section. The CMAR shall not proceed with the Work affected until further advised, except in emergency involving the safety of life or property. No claims for extra compensation will be considered unless the claim is so made. The Designer shall review and render a written decision on each claim for extra cost within seven (7) days of receipt of claim.
- 31.2.** The CMAR shall not act on instructions received by it from persons other than the Designer, and any claims for extra compensation or extension of time on account of such instruction will not be honored. The Designer will not be responsible for misunderstandings claimed by the CMAR of verbal instructions which have not been confirmed in writing, and in no case shall instructions be interpreted as permitting a departure from the Contract Documents unless such instruction is confirmed in writing and supported by a properly authorized change order.
- 31.3.** Approved claims for extra cost will be considered change orders for purposes of determining if the CMAR is entitled to an increase in its Fee under the Contract.
- 31.4.** If the parties are unable to agree to the reasonable cost and time to perform the change, or are unable to agree as to whether a change occurred, the Owner's representative shall make a unilateral determination regarding the basis of proceeding, subject to dispute resolution at a later time. The CMAR shall proceed with the Work as directed by the Owner's representative.

31.5. Should a claim for an increase in the GMP or an extension of the Contract time by the CMAR be denied by the Owner, the CMAR may request mediation in connection with the dispute resolution rules adopted for this Project.

32. DIFFERING SITE CONDITIONS:

32.1. Should the CMAR encounter subsurface or latent conditions, or both, at the site materially differing from those shown on the drawings or indicated in the specifications or differing materially from those ordinarily encountered and generally recognized as inherent in Work of the character provided for in this Contract, the CMAR shall immediately, and in no event later than thirty days later, give notice to the Owner of such conditions before they are further disturbed. The Owner and the Designer shall thereupon promptly investigate the conditions and if they find that they materially differ from those shown on the drawings or indicated in the specifications, they shall at once make such changes in the drawings and/or specifications as they may find necessary. Any increase or decrease in the Cost of the Work or the Contract time resulting from such changes shall be adjusted in the manner provided herein for adjustments as to extra and/or additional Work and changes. However, neither the Owner nor the Designer shall be liable or responsible for additional Work, costs or changes to the Work that could have been reasonably determined from any geotechnical, soils and other reports, surveys and analyses made available for the CMAR's review or that could of been discovered by the CMAR through the performance of its obligations pursuant to the Contract Documents.

33. CORRECTION OF WORK BEFORE FINAL PAYMENT:

33.1. Any Work, materials, fabricated items or other parts of the Work which have been condemned or declared not in accordance with the Contract by the Designer shall be promptly removed from the Work site by the CMAR, and shall be immediately replaced by new Work in accordance with the Contract at no additional cost to the Owner. Work or property of the Owner, damaged or destroyed by virtue of such faulty Work, shall be made good at the expense of the CMAR.

33.2. Correction of condemned Work described above shall commence within seventy-two (72) hours after receipt of notice from the Designer, and shall make satisfactory progress until completed.

33.3. Should the CMAR fail to proceed with the required corrections, then the Owner shall have the right to complete the Work under the terms herein.

34. CORRECTION OF WORK AFTER FINAL PAYMENT:

34.1. Neither the final certificate, final payment, occupancy of the premises by the Owner, nor any provision of the Contract, nor any other act or instrument of the Owner, shall relieve the CMAR from responsibility for negligence, for faulty material or workmanship, for breach of any warranty or guarantee, or for failure to comply with the drawings and specifications. The CMAR shall correct any defects due thereto and repair any damage resulting therefrom, which may appear during the guarantee period following final acceptance of the Work in accordance with its warranty and guarantee. The Owner will report any defects as they may appear to the CMAR and establish a time limit for completion of corrections by the CMAR.

35. UNCORRECTED FAULTY WORK:

35.1. Should the correction of faulty or damaged Work be considered inadvisable or inexpedient by the Owner and the Designer, the Owner shall be equitably reimbursed by the CMAR. The reimbursement may be deducted from any amounts due or to become due to the CMAR. Should the cost of such reimbursement exceed the amount due or to become due the CMAR, then the CMAR or its surety, or both, shall be liable for and shall pay to the Owner the amount of said

deficiency. The CMAR may in turn deduct such reimbursements from amounts due to responsible Subcontractors.

36. OWNER'S RIGHT TO DO WORK:

- 36.1.** If, during the progress of the Work or during the period of guarantee or warranty, the CMAR fails to prosecute the Work properly or to perform any provision of the Contract, the Owner, after fifteen (15) days' written notice sent by certified mail, return receipt requested, to the CMAR and the Designer, may perform or have performed that portion of the Work. The cost of the Work may be deducted from any amounts due or to become due to the CMAR, such action and cost of same having been first approved by the Designer. Should the cost of such action of the Owner exceed the amount due or to become due the CMAR, then the CMAR or its surety, or both, shall be liable for and shall pay to the Owner the amount of said excess.

37. TERMINATION FOR CONVENIENCE:

- 37.1.** The Owner may terminate the Contract for the Owner's convenience at any time and for any reason including, without limitation, failure of the parties to reach agreement on any GMP. In the event the Contract is terminated pursuant to this provision, the CMAR shall, as requested by the Owner, cancel all subcontracts for Work or cooperate with the Owner to assign subcontracts for portions of the Work to the Owner or the Owner's designee. The Owner shall pay the CMAR all costs of the Work incurred by the CMAR, including cancellation costs, settlement costs, demobilization costs and restocking Fees, until all subcontracts with the CMAR can be canceled or assigned, and the CMAR has otherwise been paid in-full for the Cost of the Work it has incurred. Otherwise, the CMAR shall only receive the CMAR Fee and the CMAR General Conditions Costs incurred through demobilization from the Project.
- 37.2.** Termination under this paragraph shall not release either the CMAR or its surety from liability or responsibility for any default, known or unknown, at the time of termination. If known, Owner shall provide proper notice in accordance with the Contract.

38. TERMINATION FOR DEFAULT:

- 38.1.** If the CMAR (1) fails to begin the Work within the time specified by the Contract; (2) fails to complete the Work consistent with the schedule provided pursuant to the Contract; (3) fails to perform consistently with the terms of the Contract or allows Work to be performed inconsistent with the standards and terms mandated by the Contract; (4) refuses or fails to supply enough properly skilled workers or proper materials; (5) fails to make payment to Subcontractors for materials or labor in accordance with the respective agreements between the CMAR and the Subcontractor; (6) disregards applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of a public authority; (7) becomes insolvent or is declared bankrupt, or allows any final monetary judgment, which is not subject to appeal or challenge, to stand against it unsatisfied for a period of seven days after the CMAR receives notice of the judgment, or shall make a general assignment for the benefit of its creditors; (8) or otherwise is guilty of a material breach of this Contract, the Owner may give notice in writing, sent by certified mail, return receipt requested, to the CMAR and its surety of such default, specifying the same, and if the CMAR within a period of thirty (30) days after such notice shall not proceed in accordance therewith, then upon the Owner's issuance of an additional ten (10) day notice of intent to terminate, the Owner may terminate employment of the CMAR and may, subject to any prior rights of the surety, take the prosecution of the Work out of the hands of the CMAR, to appropriate or use any or all Contract materials and equipment on the grounds as may be suitable and acceptable and may enter into an agreement, either by public letting or negotiation, for the completion of said Contract according to the terms and provisions thereof or use such other reasonable methods for the

completion of the Work in an acceptable manner. All costs and charges incurred by the Owner in completing the Work under Contract, shall be deducted from any monies due or which may become due said CMAR and surety. In case the expense so incurred by the Owner shall be less than the sum which would have been payable under the Contract, if it had been completed by said CMAR, then the said CMAR and surety shall be entitled to receive the difference, but in case such expense shall exceed the sum which would have been payable under the Contract, then the CMAR and the surety shall be liable and shall pay to the Owner the amount of said excess.

- 38.2.** It is further mutually agreed between the parties hereto that if at any time after the execution of this Contract and the surety bonds hereto attached for its faithful performance, such bonds, for any reason, cease to be adequate to cover the performance of the Work, the CMAR shall, within twenty (20) days after the receipt of notice from the Owner of such inadequacy, furnish an additional bond or bonds in such form and amount, and with such surety or sureties as shall be adequate to cover the performance of the Work. In such event no further payment to the CMAR shall be due under this Contract until such new or additional security for the faithful performance of the Work shall be furnished to the Owner. Said new or additional security shall meet the same criteria required for the furnishing of the original bonds pursuant to the Contract Documents.
- 38.3.** In the event it is determined by a court of law that termination under this paragraph was not justified, the termination of the CMAR will be treated as if it were a termination for convenience hereunder.

39. CONSTRUCTION MANAGER'S RIGHT TO STOP WORK OR TERMINATE THE CONTRACT:

- 39.1.** Should the Work be stopped for a period of three months by order of a court having jurisdiction or by order of any other public authority due to cause beyond the fault or control of the CMAR, or if the Owner should fail or refuse to make payment on account of a certificate issued by the Designer within thirty (30) days after receipt of same, or in the event that the Designer receives the CMAR's application for payment but fails to take any action on it, within thirty (35) days of the Designer's receipt of the application for payment, then the CMAR, after fifteen (15) days' written notice sent by certified mail, return receipt requested, to the Owner and the Designer, may suspend operations on the Work and/or terminate the Contract.
- 39.2.** The Owner shall be liable to the CMAR for the cost of the Work delivered and performed on this Contract plus all general conditions costs incurred to date plus its fee earned to date, and shall make such payment. The Designer shall determine and certify the correctness of such payment.

40. INDEMNIFICATION:

- 40.1.** Except to the extent caused by the negligence, willful misconduct, acts, or omissions of the Owner, the Designer, any of the Owner's or Designer's agents, elected officials, consultants, contractors, subcontractors, or employees, or any person or entity who is not under the CMAR's control, the CMAR shall indemnify and hold and save the Owner, its officers, elected officials, agents, and employees harmless from liability of any kind, including all claims, costs (including defense) and losses accruing or resulting to any other person, firm, or corporation furnishing or supplying work, services, materials, or supplies in connection with the performance of this Contract, and from any and all claims, costs (including defense) and losses accruing or resulting to any person, firm, or corporation to the extent caused by the negligent acts or omissions of the CMAR and its Sub-contractors and suppliers at any level in the performance of the Contract. This representation and warranty shall survive the termination or expiration of the Contract.

The above obligations shall not be construed to negate, abridge or otherwise reduce any other right or obligation of indemnity which would otherwise exist as to any party or person described in this Section. Such obligation shall not be affected or limited by the immunity granted under any worker's compensation plan.

41. REQUEST FOR PAYMENT:

- 41.1. Prior to payment by the Owner, the Designer shall review and approve the CMAR's pay applications. Based on applications for payment submitted to the Designer by the CMAR and certificates for payment issued by the Designer, the Owner shall make progress payments to the CMAR as provided below and elsewhere in the Contract Documents.
- 41.2. The period covered by each application for payment shall be one calendar month ending on the last day of the month or as agreed to and set during the Pre-construction Conference.
- 41.3. No advance payments or interim payments will be made by the Owner.
- 41.4. Provided a proper and complete application for payment is received by the Designer, payment shall be made by the Owner not later than thirty days after the Designer's certification of the application for payment.
- 41.5. With each application for payment for General Conditions and Work performed directly by the CMAR and such Subcontractors as the Owner may specify, the CMAR shall submit transaction summaries, certified payrolls, petty cash accounts, receipted invoices or invoices with check vouchers attached, and any other evidence required by the Owner or Designer to demonstrate that cash disbursements already made by the CMAR on account of general conditions and the Cost of the Work equal or exceed (1) progress payments already received by the CMAR less (2) that portion of those payments attributable to the CMAR's Fee; plus (3) payrolls and costs for the period covered by the present application for payment. All documentation for General Conditions claimed with a pay application shall be for the actual period stated on the payment application.
- 41.6. With each application, the CMAR shall submit:
 - 41.6.1. Evidence of Consent of Surety to the partial payment.
 - 41.6.2. Update reports of SDMWOB subcontracting status are required to be included in each pay application from the CMAR unless all work is self-performed.
 - 41.6.3. Copies of CMAR's daily reports are to be included in every pay application.
 - 41.6.4. Lien releases will be provided with each pay application for each paid entity.
 - 41.6.5. Progress photos (dated) of weekly progress are to be included in each pay application (on disc).
 - 41.6.6. Copies of all building code and regulatory permits of any type obtained during the pay period are to be included in each pay application.
 - 41.6.7. Status of State and Town required licenses (including business licenses) for each contractor.
 - 41.6.8. Updated project schedule.
 - 41.6.9. Insurance certificates.
 - 41.6.10. Submittal schedule log updates signed and dated by Designer and CMAR.
 - 41.6.11. Requests for Information status log signed and dated by Designer and CMAR.
 - 41.6.12. Change order status log signed and dated by CMAR.
 - 41.6.13. License status update, signed and dated by CMAR.
 - 41.6.14. As-built update log signed and dated by Designer.
 - 41.6.15. Format and content of pay application as directed by Owner's Representative.
 - 41.6.16. Initial pay application shall contain the following if not submitted prior:

- 41.6.16.1.** Performance and Payment Bond documents
 - 41.6.16.2.** Project directory
 - 41.6.16.3.** Submittal schedule
 - 41.6.16.4.** Licenses status (numbers and dates of authorized period) of all contractors (including business licenses)
 - 41.6.16.5.** Initial conditions photographs, dated, on disc, flash drive or other portable data storage device
 - 41.6.16.6.** Schedule of unit prices applicable to the Project, signed and dated as approved by Designer and Owner's Representative
 - 41.6.16.7.** Other items as required by law or written direction of the Owner's Representative.
- 41.7.** The CMAR shall submit a schedule of values that allocates the entire GMP among the various portions of the Work, except that the CMAR's Fee shall be shown as a separate item. The schedule of values shall be prepared in such form and supported by such data to substantiate its accuracy as the Designer may require. This schedule, unless objected to by the Designer, shall be used as a basis for reviewing the CMAR's applications for payment. The Designer may also use the Project critical path schedule when reviewing the CMAR's applications for payment.
- 41.8.** Each application for payment shall be compared to the most recent schedule of values submitted by the CMAR. Applications for payment shall show the percentage completion of each portion of the Work as of the end of the period covered by the application for payment. The percentage completion shall be the percentage of that portion of the Work which has actually been completed.
- 41.9.** Subject to other provisions of the Contract, the amount of each progress payment shall be computed as follows:
 - 41.9.1.** Take that portion of the GMP properly allocable to completed Work as determined by multiplying the percentage completion of each portion of the Work by the share of the GMP allocated to that portion of the Work in the schedule of values.
 - 41.9.2.** Add that portion of the GMP properly allocable to materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work or if approved in advance by the Owner, suitably stored off site at a location agreed upon in writing.
 - 41.9.3.** Subtract the aggregate of previous payments made by the Owner.
 - 41.9.4.** Subtract the amount, in any, by which the CMAR has been previously overpaid, as evidenced by the Owner's review of the CMAR's documentation required herein or by any audit of the CMAR records.
 - 41.9.5.** Subtract amounts, if any, for which the Designer has withheld or nullified a certificate of payment.
 - 41.9.6.** Subtract retainage as provided below.
- 41.10.** Payments allocated to Subcontractors shall be subject to a retention of five percent (5%), provided, however, that after fifty percent (50%) of the Cost of the Work has been satisfactorily completed on schedule, with the approval of the Designer and Owner and with written consent of the Surety, the CMAR shall not retain any further retainage from periodic payments due the Subcontractor if the Subcontractor continues to perform satisfactorily and any nonconforming work identified in writing prior to that time by the Designer and Owner has been corrected by the Subcontractor and accepted by the Owner. The Subcontractor shall be deemed fifty percent (50%) complete when the Subcontractor's gross project invoices, excluding the materials stored

off-site, equal or exceed fifty percent (50%) of the value of the Subcontractor's contract, except the value of materials stored on-site shall not exceed twenty percent (20%) of the Subcontractor's gross project invoices for the purpose of determining whether the Project is fifty percent (50%) complete.

- 41.11.** Periodic payments to the CMAR shall be subject to a retention of five percent (5%) of the value of Work completed then to date and not previously invoiced and paid, provided however, that after fifty percent (50%) of the CMAR's work has been satisfactorily completed on schedule, with approval of the Owner and written consent of the surety, further requirements for retainage will be waived so long as work continues to be completed satisfactorily and on schedule.
- 41.12.** Notwithstanding the above provisions, following fifty percent (50%) completion of the Project, the Owner shall be authorized to withhold additional retainage from a subsequent periodic payment, not to exceed five percent (5%), in order to allow the Owner to retain two and one-half percent (2.5%) total retainage through the completion of the Project. If the Owner elects to withhold additional retainage on any periodic payment subsequent to the release of retainage pursuant to this subparagraph, the CMAR may also withhold from the subcontractors remaining on the Project sufficient retainage to offset the additional retainage held by the Owner, notwithstanding the actual percentage of retainage withheld by the Owner of the Project as a whole. Nothing in this section shall prevent the Owner from withholding payment to the CMAR in addition to the amounts authorized by this section for unsatisfactory job progress, defective construction not remedied, disputed work, or third-party claims filed against the Owner, or reasonable evidence that a third-party claim will be filed.
- 41.13.** Except with the Owner's prior approval, the CMAR shall not make advance payments to suppliers for materials or equipment that has not been delivered and stored at the site.
- 41.14.** Within five (5) days of receipt of the CMAR's application for payment, the Designer shall take action on the CMAR's application for payment in accordance with the Agreement between the Owner and Designer. The Designer's certification for payment shall be based upon the Designer's on-site observation and the documentation submitted in accordance with this paragraph and the CMAR's application for payment.

42. CERTIFICATES OF PAYMENT AND FINAL PAYMENT:

- 42.1.** Within five (5) days from receipt of request for payment from the CMAR, the Designer shall issue and forward to the Owner a certificate for payment. This certificate shall indicate the amount requested or as approved by the Designer. If the certificate is not approved by the Designer, it shall state in writing to the CMAR and the Owner its reasons for withholding payment. No certificate issued or payment made shall constitute an acceptance of the Work or any part thereof.
- 42.2.** The Owner reserves the right, prior to making final payment to the CMAR, to conduct a final audit of the expenditures by the CMAR on the Project for assurances that the final payment to the CMAR does not exceed the amounts properly payable to the CMAR for the Cost of the Work, General Conditions, the CMAR Fee, any special allowances, and CMAR-GMP Contingency savings. In the event an audit determines that the CMAR has been paid more than it is entitled to be paid under the Contract, the CMAR will refund the overpayment to the Owner.
- 42.3.** Prior to submitting request for final payment to the Designer for approval, the CMAR shall fully comply with all requirements specified in the "Project closeout" section of the specifications. These requirements include but are not limited to the following:
 - 42.3.1.** Submittal of Product and Operating Manuals, Warranties and Bonds, Guarantees, Maintenance Agreements, As-Built Drawings, Certificates of Inspection or Approval

from agencies having jurisdiction. (The Designer must approve the Manuals prior to delivery to the Owner).

- 42.3.2.** Transfer of required attic stock material and all keys in an organized manner.
- 42.3.3.** Record of Owner's training.
- 42.3.4.** Resolution of any final inspection discrepancies.
- 42.4.** The CMAR shall forward to the Designer the final application for payment along with the following documents:
 - 42.4.1.** List of minority business subcontractors and material suppliers showing breakdown of contracts amount.
 - 42.4.2.** Affidavit of Release of Liens.
 - 42.4.3.** Affidavit of Subcontractors' payment to material suppliers and subcontractors.
 - 42.4.4.** Consent of Surety to Final Payment.
 - 42.4.5.** Certificates of state agencies required by state law.
- 42.5.** The Designer will not authorize final payment until the Work under Contract has been certified by Designer, certificates of compliance issued, and the CMAR has complied with the closeout requirements. The Designer shall forward the CMAR's final application for payment to the Owner along with respective certificate(s) of compliance required by law.

43. CONTRACTOR'S AFFIDAVIT:

- 43.1.** The final payment of retained amounts due the CMAR on account of the Contract shall not become due until the CMAR has furnished to the Owner through the Designer an affidavit signed, sworn and notarized to the effect that all payments for materials, services or contracted Work to Subcontractors in connection with this Contract and included in prior Owner payments have been satisfied, that all payments for materials, services or contracted Work to Subcontractors in connection with this Contract will be satisfied within seven days' of receipt of final payment from the Owner, and that no claims or liens exist against the CMAR in connection with this Contract. In the event that the CMAR cannot obtain similar affidavits from Subcontractors to protect the CMAR and the Owner from possible liens or claims against the CMAR, the CMAR shall state in its affidavit that no claims or liens exist against any Subcontractor to the best of its (the CMAR's) knowledge, and if any appear afterward, the CMAR shall save the Owner harmless from all claims by any Subcontractor or other claimant for payment or any other compensation for Work on the Project.

44. AUDIT OF RECORDS:

- 44.1.** The CMAR agrees to maintain all information pertaining to billing for Services performed under this Contract in accordance with State Law for public records. The CMAR shall afford the Owner access to these records for audit during the design and construction phases at such intervals as may be desired by the Owner. The CMAR shall also preserve the records for a period of three (3) years after final payment during which time the Owner will have access for audit purposes.

45. TAXES:

- 45.1.** North Carolina sales tax and use tax, as required by law, do apply to materials entering into municipal work and such costs shall be included in all bid proposals and contract sums.

- 45.2.** Local option sales and use taxes, as required by law, do apply to materials entering into municipal work and such costs shall be included in all bid proposals and contract sums.
- 45.3.** The CMAR shall give the Owner a signed tax statement containing the information listed in G.S. 105-164.14(e) before any payment requests submitted will be due.
- 45.4.** The Department of Revenue has agreed as of April 1, 1991 that in lieu of obtaining copies of sales receipts from Subcontractors, an agency may obtain a certified statement from the Subcontractor setting forth the date, the type of property and the cost of the property purchased from each vendor, the county in which the vendor made the sale and the amount of local sales and use taxes paid thereon. If the property was purchased out-of-state, the county in which the property was delivered should be listed. The Subcontractor should also be notified that the certified statement may be subject to audit.
- 45.5.** In the event the CMAR makes several purchases from the same vendor, such certified statement must indicate the invoice numbers, the inclusive dates of the invoices, the total amount of the invoices, the counties, and the county sales and use taxes paid thereon. The position of a sale is the retailer's place of business located within a taxing county where the vendor becomes contractually obligated to make the sale. Therefore, it is important that the county tax be reported for the county of sale rather than the county of use. When property is purchased from out-of-state vendors and the county tax is charged, the county should be identified where delivery is made when reporting the county tax. Such statement must also include the cost of any tangible personal property withdrawn from the CMAR's warehouse stock and the amount of county sales or use tax paid thereon by the CMAR. Similar certified statements by its Subcontractors must be obtained by the CMAR and furnished.
- 45.6.** The CMAR and its Subcontractors are not to include any tax paid on supplies, tools and equipment which they use to perform their contracts and should include only those building materials, supplies, fixtures and equipment which actually become a part of or annexed to the building or structure.
- 45.7.** Any sales tax refunds paid to the Owner shall be exclusively for the Owner's use and shall not in any way reduce the cost of the Project or impact the GMP.

46. PAYMENTS WITHHELD:

- 46.1.** The Designer may withhold a certificate for payment in whole or in part, to the extent reasonably necessary to protect the Owner. If the Designer is unable to certify payment in the amount of the application, the Designer will notify the CMAR and the Owner in writing. If the CMAR and Designer cannot agree on a revised amount, the Designer will promptly issue a certificate for payment for the amount for which the Designer is able to make such representations to the Owner. The Designer may also withhold a certificate for payment, in whole or in part, to such extent as may be necessary in the Designer's opinion to protect the Owner from loss for which the CMAR or the Subcontractor(s) is responsible, including loss resulting from acts and omissions, because of:
- 46.1.1.** Defective Work not remedied;
- 46.1.2.** Third party claims filed or reasonable evidence indicating probable filing of such claims unless security acceptable to the Owner is provided by the CMAR;
- 46.1.3.** Failure of the CMAR or Subcontractor(s) to make payments properly to Subcontractors or sub-subcontractors or for labor, materials or equipment;
- 46.1.4.** Reasonable evidence that the Work cannot be completed for the unpaid balance of the GMP;
- 46.1.5.** Damage to the Owner or another Subcontractor;

- 46.1.6. Reasonable evidence that the Work will not be completed within the contract time, and that the unpaid balance would not be adequate to cover liquidated damages for the anticipated delay;
 - 46.1.7. Failure to carry out the Work in accordance with the Contract Documents;
 - 46.1.8. Failure to provide sales tax documentation as required by the Owner;
 - 46.1.9. Failure or refusal of the CMAR or Subcontractors to submit the required information on minority business enterprises;
 - 46.1.10. Failure to provide supporting documentation of general condition payments with the monthly pay application;
 - 46.1.11. Any other reason deemed necessary by the Designer to protect the Owner unless arbitrary and unreasonable ; or
 - 46.1.12. Subsequently discovered evidence that Work previously approved was not performed in accordance with the Contract Documents.
- 46.2. When the above reasons for withholding certification are removed, certification will be made for amounts previously withheld.

47. INSURANCE REQUIREMENTS:

- 47.1. The Work under this Contract shall not commence until the CMAR has verified to the Owner that all required insurance coverage as described herein has been obtained and verifying certificates of insurance have been provided to the Owner. These certificates shall contain a provision that coverage afforded under the policies will not be cancelled, reduced in amount or coverage eliminated until at least thirty (30) days after mailing written notice, by certified mail, return receipt requested, to the insured and the Owner of such alteration or cancellation.

All insurance companies must be licensed in North Carolina and be acceptable to the Town of Apex's Risk Manager.

- 47.2. The CMAR shall provide documentation evidencing that it maintains the following insurance:
- 47.2.1. The CMAR shall be required under this Contract to provide or maintain any insurance during the life of the contract as shall protect him and any Subcontractor performing work under the contract from claims for damages from Bodily Injury including accidental death, as well as from claims for Property Damage which may arise from operations under the contract, whether such operations be by himself or by any subcontractor or anyone directly or indirectly employed by either of them. Such insurance shall be of the kinds and have limits of liability and coverage not less than the minimum limits hereinafter specified or required by law, whichever is greater.
 - 47.2.2. The CMAR shall, without limiting its obligations or liabilities, procure, pay for and maintain such insurance as is required by law and as is required by the Contract to protect the CMAR, the Owner and the Designer from claims for damages for bodily injury, including death, and from claims for property damage which may arise out of or result from the CMAR's or its representatives, Consultants, Sub-contractors, agents, or employees operations under the Contract. Such insurance shall be of the kinds and have limits of liability and coverage not less than the minimum limits hereinafter specified or required by law, whichever is greater. The Owner makes no representation as to the adequacy or sufficiency of such coverage. The following requirements shall in no way be construed to limit or eliminate the liability of the CMAR that arises from performance of Work under the Agreement. The CMAR is strictly responsible for any losses, claims, and costs of any

kind which exceed the CMAR's limits of liability, or which may be outside the coverage scope of the policies.

- 47.2.2.1.** The obligations of the CMAR under this section shall not extend to liability arising out of the acts or omissions of the Owner, the Designer, any of the Owner's or Designer's agents, elected officials, consultants, contractors, subcontractors, or employees, or any person or entity who is not under the CMAR's control. The obligations of the CMAR under this section shall not extend to liability arising out of Professional Services unless performed by the CMAR, including defects in design, performed by the Owner or Designer or their representatives, Consultants, Sub-contractors, agents and / or employees.
- 47.2.3.** The Insurance specified shall be provided by an Insurer approved by the Owner, licensed to do such business in the State of North Carolina. Insurance companies utilized shall have a minimum rating of A- and Class VII as evaluated by the most current A M Best Rating Guide. All agents and brokers shall hold valid licenses from the State of North Carolina. The CMAR shall furnish to the Owner a certificate or certificates of insurance for their Sub-contractors in a form satisfactory to the Owner contemporaneously with the executed Contract with the Sub-contractor. Upon request of the Owner, the CMAR shall provide the Owner with redacted copies of the insurance policies required by this Section, including without limitation declaration pages, conditions, exclusions and additional insured endorsements, and confirmation that each policy premium has been paid for the required term of this Contract. Certificates of Insurance shall be signed by a person authorized by that insurer to bind coverage on its behalf.
- 47.2.4.** All insurance policies shall provide that the insurance carrier shall not initiate cancellation, non-renewal or material limitation of coverage, without at least thirty (30) days prior written notice to the Owner (10 days for cancellation due to non-payment of premium). Direct Notice of Cancellation endorsement is to be attached to corresponding Certificates of Insurance. In the event of any such cancellation, non-renewal or material limitation, the CMAR is obligated to replace such insurance within seven (7) days without a gap in coverage and file accordingly such notice with the Owner and other interested parties. Failing immediate receipt of evidence of such replacement of insurance, the Owner reserves the right to procure comparable insurance and the CMAR shall pay or reimburse the cost of the premium in respect thereof without any rights to seek subsequent reimbursements from the Owner.
- 47.2.5.** It is expressly provided, however, that any action or inaction on the part of the Owner shall in no way change or reduce the CMAR's responsibilities and liabilities under this Contract. Self-funded, policy fronting, or other non-risk transfer insurance mechanisms are not acceptable without prior written approval of the Owner. Full disclosure of such a program must be made prior to commencing mobilization to the Project site. Failure to make a full disclosure constitutes a breach of the Contract.
- 47.2.6.** The CMAR shall name the Owner as additional insured under all its insurance contracts (except workers' compensation, employers liability and professional liability) with respect to and including liability for bodily Injury and property damage caused, in whole or in part, by the willful misconduct, negligent act or omission of the CMAR or those acting on the CMAR's behalf under the Contract, products and completed operations of the CMAR, and automobiles owned, hired, leased, or borrowed by the CMAR. Additional insured status is not required to extend to liability caused by the Owner's or Designer's negligence.

- 47.2.7. For any claims related to this Project, the CMAR's insurance or self-insurance shall be primary and non-contributory with respect to the Owner's insurance to the extent of the CMAR's liability hereunder. Any insurance or self-insurance maintained by the Owner shall be excess and non-contributory with respect to the CMAR's Insurance.
- 47.2.8. All policies of insurance shall contain a clause or endorsement waiving rights of subrogation against the Owner.
- 47.2.9. Limits of coverage are not to be amended by deductible clauses of any nature without the express written consent of the Owner. The CMAR shall be solely responsible for any deductible assumptions that may exist in any insurance policies required under this Contract. In addition, the CMAR shall be responsible and shall not be reimbursed for any losses arising from any risk or exposure not insured as required herein, or not covered as a result of normal policy exclusion or that falls within the self-insured retention, if the CMAR is self-insured. Notwithstanding any other provision in this Contract, the CMAR may include insurance policy premiums and deductibles in the CMAR General Conditions, Cost of the Work, or CMAR-GMP Contingency, as appropriate and subject to the GMP.
- 47.2.10. The CMAR's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.
- 47.2.11. The claim provisions in the CMAR's insurance policies must specifically state the insurance company or CMAR's third party administrator. If self-insured, CMAR has both the right and duty to adjust a claim and provide defense.
- 47.2.12. If the policies contain any warranty stating that coverage is null and void (or words to that effect), or if the CMAR does not comply with the most stringent regulations governing the Work, policies shall be modified so that coverage shall be afforded in all cases except for the CMAR's willful or intentional non-compliance with applicable government regulations.
- 47.2.13. Any failure by any person to comply with reporting or other provisions of the policy, including breach of warranties, shall not affect coverage provided to the Owner and its respective representatives, officials, and employees. The Builder's Risk coverage does not include a Separation of Insured's provisions.
- 47.2.14. The insolvency or bankruptcy of the insured or of the insured's estate shall not relieve the insurance companies of their obligations under these policies. Any clauses to the contrary are unacceptable and must be stricken.
- 47.2.15. The Work under this Contract shall not commence until the CMAR has verified to the Owner that all required insurance coverage as described herein, have been obtained and verifying Certificates of Insurance have been provided to the Owner.

47.3. Worker's Compensation and Employer's Liability:

- 47.3.1. The CMAR shall ensure that it and all its Subcontractors shall procure and maintain Workers' Compensation Insurance in the amount and type required by the State of North Carolina and federal law for all employees employed under this Contract who may come within the protection of Workers' Compensation Laws and covering all operations under the Contract whether performed by the CMAR or by its Subcontractors. In jurisdictions not providing complete Workers' Compensation protection, the CMAR shall ensure that it and its Subcontractors shall maintain employers' liability insurance in an amount, form, company, and agency satisfactory to the State of North Carolina and the Owner for the benefit of all employees not protected by Workers' Compensation Laws and covering all operations under this Contract whether performed by the CMAR or by its Subcontractors.

- 47.3.1.1. The CMAR shall pay such assessments as will protect the CMAR and the Owner from claims under the Workers' Compensation Laws, workers' or workmen's compensation disability benefits, and other similar employee benefit acts.
- 47.3.1.2. Coverage under this section shall be as required by federal and state Workers' Compensation and Occupational Disease Statutes, and shall have minimum limits as follows:
 - a. Coverage A Statutory, State of North Carolina
 - b. Employers' Liability Each Accident \$1,000,000
 - c. Disease - Policy Limit \$1,000,000
 - d. Disease - Each Employee \$1,000,000
- 47.3.1.3. Such Insurance shall include Voluntary Compensation coverage, a Waiver of Subrogation in favor of the Owner as well as other endorsements that may be required by applicable jurisdictions, e.g., United States Longshoremen and Harbor Workers Act and maritime coverage (Jones Act).

47.4. Automobile Liability Insurance:

- 47.4.1. The CMAR shall procure and maintain automobile insurance against liability for bodily injury and property damage as described below, that may arise out of or result from the Work being performed under this Contract, and will provide protection from claims which may arise out of or result from the CMAR's performance of the Work and the CMAR's other obligations under this Contract, whether such performance of the Work is by the CMAR, by any representative or Subcontractor, by anyone, both officially and personally, directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable.
 - 47.4.1.1. This policy of insurance shall carry the following minimum Limit of Liability
Combined Single Limit - \$2,000,000
 - 47.4.1.2. The policy of insurance shall contain or be endorsed to include owned, hired, and non-owned automobile liability coverage.
 - 47.4.1.3. If the policy contains a warranty stating that coverage is null and void (or words to that effect) or if the transporter does not comply with the most stringent regulations governing the Work, it shall be modified so that coverage shall be afforded in all cases except for the transporter's willful or intentional non-compliance with applicable government regulations.

47.5. General Liability:

- 47.5.1. This policy must be written on an occurrence basis, with the following minimum Limits of Liability:
 - a. General Aggregate per project \$5,000,000
 - b. Products / Completed Operations Aggregate \$5,000,000
 - c. Bodily Injury & Property Damage / each occurrence \$5,000,000
 - d. Personal Injury and Advertising Injury \$2,000,000
- 47.5.2. The policy shall contain or be endorsed to include the coverages shown in Sections 47.5.3 through 47.5.5 below:
- 47.5.3. Blanket Contractual Liability covering the CMAR's indemnification obligations under this Contract in accordance with ISO policy form CG 00 01. Modifications to the standard provisions will not be acceptable if they serve to reduce coverage:
 - a. Premises/Operations Liability

- b. Explosion, collapse, and underground fault
- c. Independent Contractors and Independent Sub-contractors coverage
- d. Broad Form Property Damage
- e. Personal Injury
- f. Cross Liability / Severability of Interest clause
- g. Employer's Stop-Gap Liability endorsement, if applicable
- h. Amendment of the Pollution Exclusion Endorsement to allow coverage for bodily injury or property damage caused by heat, smoke, or fumes from a hostile fire
- i. Designated General Aggregate Limit Endorsement if required by the Supplementary Condition

47.5.4. The CMAR and all Subcontractors shall provide the Owner additional Insured endorsements CG 20 10 07 04 or CG D3 61 03 05 for ongoing and premise operations and CG 20 37 07 04 for completed operations, except as may otherwise be approved by the Town to meet SDMWOB goals.

47.5.5. Umbrella or Excess Liability Insurance coverage may be used to meet or exceed the minimum insurance limits under this Contract. Coverage shall remain continuously in effect and without interruption for at least five (5) years from the date of the Contract and shall include coverage for exposures arising from operations that have been completed. The CMAR shall furnish the Owner and each other additional insured listed in this Contract to whom the Certificates of Insurance have been issued, evidence satisfactory to the Owner of continuation of such insurance at the date of Substantial Completion and each year thereafter.

47.6. Property Insurance:

47.6.1. The CMAR shall be responsible for purchasing and maintaining Builder's Risk insurance to protect the Project from perils of physical loss. The Builder's Risk policy must be an "All Risk" (Special Perils) coverage form, have no co-insurance penalty provisions and be endorsed to increase the limit of insurance for all Change Orders. There shall be no exclusion for theft, collapse, or damage to foundations or underground structures, pipes or conduits.

47.6.2. The insurance shall provide for the cost of replacement for the Work at the time of any loss. The insurance shall insure against the loss from the perils of fire and all risk coverage for physical loss or damage due to theft, vandalism, collapse, malicious mischief, transit, flood, earthquake, testing, damages resulting from defective design, negligent workmanship or defective material. The Owner, Designer and all tiers of Subcontractors will be additional insureds on the Builder's Risk policy. The CMAR will be the named insured (responsible for premium payments, policy changes, etc.). The CMAR shall increase the coverage limits as necessary to reflect changes in the estimated replacement cost of the Project.

47.6.3. Certain collapse and damage to foundation exclusions (settling, shrinking, cracking, etc.) are standard Builder's Risk exclusions. Additional premium may apply to eliminate these, if possible. Theft is excluded when the only indicator is mysterious disappearance or shortage from inventory. Outward signs of theft must be present. Cold Testing will be automatically included in the policy. If any Hot Testing exposures apply to the project, additional premium may apply to add this coverage.

47.6.3.1. WAIVERS OF SUBROGATION. The Owner and CMAR waive all rights against (1) each other and any of their Subcontractors, Sub-subcontractors, elected officials, agents and employees, each of the other, and (2) the Designer, Designer's Consultants, separate Subcontractors, agents and employees, for damages caused by fire or other causes of loss to the extent

covered by property insurance pursuant to this section or other property insurance applicable to the Work, except such rights as they have to proceeds of such insurance held by the Owner as fiduciary. The Owner or CMAR, as appropriate, shall require of the Designer, Designer's, Consultants, separate Sub-contractors, agents and employees, if any, and the Sub-contractors, separate Sub-sub-contractors, agents, and employees of any of them, by appropriate agreements, written where legally required for validity, similar waivers each in favor of other parties enumerated herein. The policies shall provide such waivers of subrogation by endorsement or otherwise. A waiver of subrogation shall be effective as to a person or entity even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, did not pay the insurance premium directly or indirectly, and whether or not the person or entity had an insurable interest in the property damaged.

47.7. Public Liability:

- 47.7.1.** The CMAR shall ensure that it and all its Subcontractors provide and maintain, during the life of the Contract, comprehensive Public Liability Insurance, including coverage for premises operations, independent Subcontractors, completed operations, products and contractual exposures. Such insurance shall protect the CMAR and the Subcontractors from claims arising out of or resulting from any bodily Injury, including accidental death, and claims for property damages which may arise out or result from operations under this Contract, whether such operations are by the CMAR or by any Subcontractor, or by anyone directly or indirectly employed by either of them. The minimum limits of such insurance shall be:
- a. \$2,000,000 for each occurrence and \$4,000,000 aggregate, or such lower limits as may be agreed to by the Owner in writing on a case-by-case basis.
 - b. Such coverage for completed operations must be maintained for at least five (5) years following final acceptance of the Work performed under this Contract.

47.8. Professional Liability:

- 47.8.1.** The CMAR shall provide and maintain Professional Liability Insurance coverage to protect Owner from liability arising out of or resulting from the performance of professional services by CMAR or its Subcontractors, if any, under the Contract. Such coverage shall be in the sum of not less than Five Million Dollars (\$5,000,000.00).
- 47.8.2.** Policies for Professional Liability coverage must be provided by the CMAR or its independent design professional if the CMAR is required to provide any professional design services under this Contract or the Contract Documents. The limits of coverage required for professional liability shall be included herein.

47.9. Deductibles:

- 47.9.1.** Any deductible, where applicable to loss covered by insurance provided, is to be borne by the CMAR or its Subcontractors; however, the CMAR may include insurance policy premiums, deductibles, and unreimbursed losses in the CMAR General Conditions, Cost of the Work, or CMAR-GMP Contingency, as appropriate and subject to the GMP.

47.10. Proof of Coverage:

47.10.1. The CMAR shall ensure that it furnishes the Owner with satisfactory proof of carriage of the insurance required above before written approval of the CMAR's insurance for its Subcontractors is granted by the Owner.

47.11. Claims:

47.11.1. The CMAR shall notify the Owner within twenty-four (24) hours of any claims or alleged claims received by the CMAR, or by its Subcontractors, that is covered by any of the policies of insurance required of CMAR or its Subcontractors. The CMAR shall provide a written copy of the claim or alleged claim to the Owner within three (3) days of the CMAR's receipt of the claim or alleged claim. If a claim is settled to the satisfaction of the claimant, the CMAR shall submit a copy of the claimant's release to the Owner.

If a claim or alleged claim is rejected by the CMAR and / or its insurance company, the CMAR shall immediately report this fact to the Owner. Should thirty (30) days elapse after the claim or alleged claim has been received by the CMAR, and the CMAR is not able to report a settlement or rejection of the claim, it shall report to the Owner the steps being taken with respect to the claim without limiting the foregoing. The CMAR shall notify the Owner in writing of any paid or incurred claims which may impair annual aggregate or general liability.

47.12. RESERVED

47.13. The Owner may elect to purchase certain insurance, specifically Pollution Legal Liability and / or Builder's Risk Insurance covering the Owner, CMAR, all Subcontractors and all Sub-subcontractors. In this event, the CMAR and its Subcontractors are not required to purchase insurance provided by the Owner. If the Owner elects to purchase either Pollution Legal Liability and / or Builder's Risk Insurance, this Contract shall be amended accordingly. (The CMAR shall provide the cost of the "Builder's Risk Insurance" coverage to the Owner for determination as to whether this coverage may be obtained by the Owner).

48. PERFORMANCE BOND AND PAYMENT BOND:

48.1. Within 15 days of the establishment of each GMP, the CMAR shall provide a performance bond and payment bond, each in the amount of the GMP plus the Owner's allowance. The amount of the performance and payment bonds may be adjusted if the guaranteed maximum price is reduced or increased after the bids are received. Each time a new GMP is established and approved by the Owner, the CMAR shall increase the amount of the performance and payment bonds to the amount of the cumulative GMP, including remaining Owner's allowances, so that at all times a single performance bond and a single payment bond shall be in effect for the entire Project under contract at that time.

48.2. The performance bond and payment bond shall be executed by a surety company authorized to do business in North Carolina. Bonds shall be executed in a form acceptable to Owner.

48.3. All bonds shall be countersigned by an authorized agent and attorney-in-fact for the bonding company who is licensed to do business in North Carolina. The title "Licensed Resident Agent" shall appear after the signature. There shall be attached to each copy of the bond a certified copy of power of attorney properly executed and dated. The seal of the bonding company shall be impressed on each signature page of the bonds.

49. ASSIGNMENTS:

49.1. The CMAR shall not delegate or subcontract its duties under this Contract or any portion of this Contract except as expressly set forth herein for general conditions and construction

subcontracts. The CMAR may not make a general assignment of its rights under this Contract to any third party without the express consent of the Owner. Except as may be required under terms of the performance bond or payment bond, no funds or sums of money due or to become due to the CMAR under the Contract may be assigned or pledged as collateral for a loan or other debt without the consent of the Owner. In the event the CMAR has prior to execution of this Contract pledged payments hereunder as collateral for any loan or debt, the CMAR shall advise the Owner of the circumstances of the loan or debt, and arrange for the subordination of the security interest of the creditor or lender to the Owner's rights under this Contract.

50. DISPUTE RESOLUTION:

- 50.1.** In the event that a dispute of any nature cannot be resolved by the Project Team pursuant to the terms and conditions herein, the parties shall endeavor to resolve the dispute pursuant to the Rules Implementing Mediated Settlement Conferences in North Carolina Public Construction Projects, as adopted by the State Building Commission on February 26, 2002, as amended and in effect when the procedures are invoked. The Rules relating to non-State projects shall apply. Mediation in accordance with those procedures shall be a condition precedent that must occur before any party may bring a civil action against the Owner, Designer, or CMAR.
- 50.2.** Should a dispute arise that cannot be finally settled through the claims and dispute resolution procedures in this Contract, then any civil action brought by either party shall be brought only in the General Court of Justice of North Carolina, Superior Court Division, in Wake County, North Carolina, which shall be the sole and exclusive venue for the resolution of any dispute arising out of or any way relating to this Contract.

51. CONTRACTOR EVALUATION:

- 51.1.** The CMAR's overall Work performance on the Project shall be fairly evaluated for determining qualifications to bid on future Town of Apex capital improvement projects. In addition to final evaluation, interim evaluation may be prepared during the progress of the Project. The Owner may request the CMAR's comments to evaluate the Designer.