

## **Board of Trustees Agenda Item**

**Board Meeting Date:** August 30, 2010

**Title of Item:** Adopt a Resolution to Authorize a Validation Action for the Lease-Leaseback Project Delivery Method, RFQ/RFP 1263-261, Mediated Learning Center Project at De Anza College

### **Background and Analysis:**

On February 1, 2010, the Board authorized the use of the Lease-Leaseback contractor selection process for this project in accordance with Education Code §81335.

On August 30, 2010, the District's Selection Committee recommended award of a Preconstruction Services Agreement to the top-ranked contractor, Sundt Construction, Inc. (Sundt).

District Staff expects to return to the Board on December 6, 2010, with Sundt's Guaranteed Maximum Price (GMP) and a recommendation to authorize award of the Facilities Lease and Site Lease Agreements in accordance with 100% DSA-approved construction documents to Sundt. Under the two agreements, the District will lease District-owned land to Sundt and Sundt will agree to construct the Project pursuant to the District's Construction Provisions and Sundt's responses to RFQ/RFP 1263-261. The District will receive incremental title to the constructed property in accordance with payments made. The District will pay for and take title to all improvements no later than completion of construction of the Project, at which time the leases will be terminated.

This is the second lease-leaseback arrangement that the District has used as a project delivery method in place of traditional design-bid-build or design-build. A Validation action may be filed in Santa Clara County Superior Court to ensure that this method is in conformity with the provisions of Education Code §81335, the California Constitution, and all other applicable laws and all requirements of regulatory bodies, agencies or officials having authority over or asserting authority over same. The Validation action will thus seek a Court Order that the Site Lease, Facilities Lease, and related documents are lawful, valid and binding on the District upon execution. There is a pending Validation action before the Santa Clara County Superior Court which, if there is no opposition, is expected to be resolved on or about August 30, 2010. If the Court signs the proposed Order approving the lease-leaseback arrangement, then District legal counsel, Phillip Jaret, recommends that no Validation action be filed in connection with this project. If, however, there is opposition to the pending PSEC Validation action, then counsel recommends filing a Validation action in connection with this project.

**Recommendation:** (1) Approve the Facilities Lease, Site Lease, and Construction Provisions as to form and content, and (2) Adopt a resolution authorizing the filing of a Validation action.

Submitted by:	Carmen Redmond, Director of Materials and Purchasing Services
Additional contact names:	Tom Armstrong, Director of Measure C Bond Program for De Anza College; Charles Allen, Executive Director of Facilities, Operations, and Construction Management, Gina Bailey, Senior Buyer
Is backup provided?	Yes

# RESOLUTION

## RESOLUTION NO. 2010-16 AUTHORIZING THE EXECUTION AND DELIVERY OF A SITE LEASE AND FACILITIES LEASE AND OTHER ACTS RELATING TO THE CONSTRUCTION OF THE PROPOSED MEDIATED LEARNING CENTER AT DE ANZA COLLEGE

WHEREAS, the Foothill-De Anza Community College District (ADistrict@) desires to construct a new Mediated Learning Center on the De Anza Campus, which project shall be located on approximately three acres of the campus property, as more particularly described in Exhibit “A” attached hereto and incorporated herein by this reference (the “Site”), as a lease-leaseback project whereby the District will lease the Site which the District owns to Sundt Construction, Inc. (Sundt) which will construct the Project thereon and lease the Project and underlying Site back to the District;

WHEREAS, Education Code Section 81335 authorizes the governing board of a community college district to let to any person, firm or corporation any real property belonging to the District if the instrument by which such property is let requires the lessee to construct on the demised premises, a building or buildings for use of the school district during the term thereof, and provides that title to the building shall vest in the community college district at the expiration of that term;

WHEREAS, it is in the best interest of the District to cause the construction of the Project through lease and sublease of the Site pursuant to Education Code Section 81335.

WHEREAS, in order to complete the Project, it is necessary that the District enter into a Site Lease, in which the Site will be leased to Sundt, and Facilities Lease which provides for the sublease of the Site and the lease of the Project by Sundt to the District, and that certain other action be taken and authorized;

WHEREAS, the Facilities Lease includes construction provisions with which Sundt shall comply with respect to construction of the Project (“Construction Provisions”);

WHEREAS, pursuant to Section 81332 of the Education Code, the plans and specifications for the Project must be prepared and adopted prior to entering into site lease and the sublease/facilities lease agreement for the Project (“Plans and Specifications”);

WHEREAS, the Plans and Specifications shall be prepared for the Project and presented to the Board of Trustees at a future date;

WHEREAS, moneys sufficient to pay all costs for the Project have been allocated as a part of the Measure C bond program;

WHEREAS, the Board has been presented with the form of each document referred to herein relating to the transaction contemplated hereby and the Board has examined and approved each document and desires to authorize and direct the execution of such documents and the consummation of each transaction.

WHEREAS, all acts, conditions and things required by the laws of the State of California exist, to have happened and to have been performed precedent to and in connection with the consummation of the transaction authorized hereby do exist, have happened and have been performed in regular and due time, form and manner as required by law, and the District is now duly authorized and empowered, pursuant to each and every requirement of law to consummate such financing for the purpose, in the manner, and upon the terms herein provided.

NOW, THEREFORE, THE BOARD OF TRUSTEES OF FOOTHILL-DE ANZA COMMUNITY COLLEGE DISTRICT DOES HEREBY RESOLVE, DETERMINE, AND ORDER AS FOLLOWS:

Section 1.     Recitals. All of the recitals herein contained are true and correct.

Section 2.     Site Lease and Facilities Lease. The form of agreement entitled “Site Lease” and the form of agreement entitled “Facilities Lease,” each presented to this meeting and each to be entered into by and between the District and Sundt which together provide generally for (i) the lease by the District of the Site to Sundt, (ii) the sublease of the Site and the lease of the Project by Sundt to the District, and (iii) the payment of certain lease payments by the District under the Facilities Lease in an amount equal to the aggregate construction costs for the Project as set forth in the Construction Provisions (“Lease Payments”) are hereby approved subject to any revisions which are acceptable to both the District’s Chancellor (“Chancellor”) and the District’s legal counsel. The Chancellor or her designee is hereby authorized and directed, for and in the name and on behalf of the District, to execute and deliver to Sundt such agreements once finalized pursuant to the delegation of authority provided for hereby.

Section 3.     Approval of Process. The Governing Board hereby approves of the lease-leaseback process and shall, at a later date, be presented with guaranteed maximum sum amount for the Project and final plans and specifications for the Project, prior to commencement of the Project.

Section 4.     Validation Action. The Board hereby authorizes District counsel to file and litigate an appropriate validation action in the appropriate court with respect to the construction of the Project and the matters approved by this Resolution.

Section 5.     Other Acts; Delegation. The District’s Governing Board hereby approves a delegation of authority and appoints the District Chancellor, or the designee of the District Chancellor, who is/are hereby authorized and directed, to execute and deliver the Site and Facilities Lease as provided by Section 2 above, execute and deliver documents and/or negotiate

documents with Sundt with respect to the Project, execute court pleadings or documents necessary to effectuate the prompt litigation of the Validation action and to do any and all things necessary, in consultation with the staff, that they may deem necessary or advisable in order to effectuate the purpose and intent of this Resolution, all subject to ratification of the Board of Trustees, if necessary. Said delegation shall be valid during the construction of the Project, or until otherwise rescinded by the Governing Board.

Section 7. Effective Date. This Resolution shall take effect upon adoption.

**PASSED AND ADOPTED** this \_\_\_\_\_ by the following vote:

AYES:

NOES:

ABSENT:

ABSTAINED:

I, \_\_\_\_\_, President of the Board of Trustees of the Foothill-De Anza Community College District, do hereby certify that the foregoing is a full, true, and correct copy of the Resolution passed and adopted by said Board at a regularly scheduled and conducted meeting held on said date, which Resolution is on file in office of said Board.

\_\_\_\_\_  
President of the Board of Trustees  
Foothill-De Anza Community College District

I, \_\_\_\_\_, Board Secretary, do hereby certify that the foregoing Resolution was regularly introduced and adopted by the Board of Trustees of the Foothill-De Anza Community College District at a regular meeting thereof held on the 30<sup>th</sup> day of August 2010, by the foregoing vote.

**IN WITNESS WHEREOF**, I have hereunto set my hand and affixed the official seal of the Foothill-De Anza Community College District this 30<sup>th</sup> day of August 2010.

\_\_\_\_\_  
Board Secretary and Chancellor  
Foothill-De Anza Community College District

**EXHIBIT CP**

**CONSTRUCTION PROVISIONS**

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## CONSTRUCTION PROVISIONS

### ARTICLE 1: DEFINITIONS; GENERAL

**1.1 District.** The "District" refers to **Foothill-De Anza Community College District** and unless otherwise stated, includes the District's authorized representatives, including the Program Manager, the District's Board of Trustees and the District's officers, employees, agents and representatives.

**1.2 Contractor.** The Contractor is the person or entity identified as such in the Agreement; references to "Contractor" include the Contractor's authorized representative.

**1.3 Architect.** The Architect is Ratcliff architects; references to the "Architect" includes the Architect's authorized representative.

**1.4 The Work.** The "Work" is the labor and services necessary for construction and delivery of the Project, and all materials, equipment, tools, supplies and incidentals incorporated or to be incorporated in such construction as fully described in the Scope of Work for Construction Services set forth in Article 2.9. Unless otherwise expressly stipulated, the Contractor shall perform all work and provide and pay for all materials, labor, tools, equipment and utilities necessary for the proper execution and completion of the project pursuant to the Contract Documents and the terms of these Construction Provisions.

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

**1.6 Surety.** The Surety is the person or entity that executes, as surety, the Contractor's Labor and Material Payment Bond and/or Performance Bond.

**1.7 Subcontractors; Sub-Subcontractors.** A Subcontractor is a person or entity who has a direct contract with the Contractor to perform a portion of the Work. "Subcontractor" does not include a separate contractor to the District or subcontractors of any separate contractor. A Sub-Subcontractor is a person or entity of any tier, who has a direct or indirect contract with a Subcontractor to perform a portion of the Work at the site.

**1.8 Material Supplier.** A Material Supplier is any person or entity who only furnishes materials, equipment or supplies for the Work without fabricating, installing or consuming them in the Work.

**1.9 Drawings and Specifications.** The Drawings are the graphic and pictorial portions of the Contract Documents, wherever located and whenever issued, showing generally, the design, location and dimensions of the Work and may include without limitation, plans, elevations, sections, details, schedules or diagrams. The Specifications are that portion of the Contract Documents consisting of the written requirements for materials, equipment, construction systems, standards, criteria and workmanship for the Work and related services. The Drawings and Specifications are intended to delineate and describe the Work and its component parts so as to permit skilled and competent contractors to bid upon the Work and prosecute the same to completion.

**1.10 Construction Documents.** Drawings and Specifications.

**1.11 Contract Documents.** The Contract Documents consist of the Site Lease and Facilities Lease (“Leases”) between the District and the Contractor, these Construction Provisions, Project Manual, Drawings, Specifications, and reports, including amendments and addenda thereto issued prior to execution of the Facilities Lease, and any other documents listed in the Facilities Lease. The Contract Documents shall include changes issued after execution of the Facilities Lease.

**1.12 Intent and Correlation of Contract Documents.**

**1.12.1 Work of the Contract Documents.** The intent of the Contract Documents is to include all items necessary for the proper execution and completion of the Work by the Contractor. The Contract Documents are complementary and what is required by one shall be as binding as if required by all; performance by the Contractor shall be required to the extent consistent with the Contract Documents and reasonably inferable therefrom as being necessary to produce the intended results. Organization of the Specifications into divisions, sections or articles, and the arrangement of Drawings shall not control the Contractor in dividing the Work among Subcontractors or in establishing the extent of Work to be performed by any trade. Where any portion of the Contract Documents are silent and information appears elsewhere in the Contract Documents, such other portions of the Contract Documents shall control.

**1.12.2 Technical Terms.** Unless otherwise stated in the Contract Documents, words or terms which have well-known technical or construction industry meanings are used in the Contract Documents in accordance with such recognized meanings.

**1.12.3 Conflict in Contract Documents.** The Contract Documents are complementary and what is required by one shall be as binding as if required by all. Conflicts, inconsistencies or ambiguities in the Contract Documents shall be resolved by the Architect in accordance with Article 3.1.9 of the Construction Provisions; where conflicts or inconsistencies arise between the Drawings and the Specifications, in resolving such conflicts or inconsistencies, the Architect will be governed generally by the following standards: the Construction Provisions shall control over the Specifications, the Drawings are intended to describe matters relating to placement, quantity and the like; the Specifications are intended to describe matters relating to quality, materials, compositions, manufacturers and the like. For conflicts in the Drawings, larger scale drawings shall have precedence over smaller scale drawings and figured dimensions shall have precedence over scaled measurements. The drawings are integrated and should be taken as a whole.

**1.13 Shop Drawings; Samples; Product Data (“Submittals”).** Shop Drawings are diagrams, schedules and other data specially prepared for the Work by the Contractor or a Subcontractor, Sub-Subcontractor, manufacturer, Material Supplier, or distributor to illustrate some portion of the Work. Samples are physical examples of materials, equipment or workmanship forming a part of, or to be incorporated into the Work. Product Data are illustrations, standard schedules, performance charts, instructions, brochures, diagrams and other information furnished by the Contractor to illustrate materials or equipment for some portion of the Work. Shop Drawings, Samples and Product Data prepared or furnished by the Contractor or any of its Subcontractors or Material Suppliers are collectively referred to as “Submittals”.

**1.14 Division of State Architect (“DSA”).** The DSA is the California Division of the State Architect including without limitation the DSA's Office of Construction Services, Office of Design Services and the Office of Regulation Services; references to the DSA in the Contract Documents shall mean the DSA, its offices and its authorized employees and agents. The

authority of the DSA over the Work and the performance thereof shall be as set forth in the Contract Documents and Title 24 of the California Code of Regulations.

**1.15 District's Inspector.** The District's Inspector is the individual designated and employed by the District in accordance with the requirements of Title 24 of the California Code of Regulations. The District's Inspector shall be authorized to act on behalf of the District as provided for in the Contract Documents and in Title 24 of the California Code of Regulations, as the same may be amended from time to time. The District authorizes facilities personnel to inspect MEP systems. Any discrepancy between specified systems with facilities personnel guidance shall require a Request for Information from the Contractor submitted to the Architect and copied to the Program Manager.

**1.16 Contract Document Terms.** The term "provide" means "provide complete in place" or to "furnish and install" such item. Unless otherwise provided in the Contract Documents, the terms "approved;" "directed;" "satisfactory;" "accepted;" "acceptable;" "proper;" "required;" "necessary" and "equal" shall mean as approved, directed, satisfactory, accepted, acceptable, proper, required, necessary and equal, in the opinion of the Architect. The term "typical" as used in the Drawings shall require the installation or furnishing of such item(s) of the Work designated as "typical" in all other areas of similar nature unless noted otherwise; Work in such other areas shall conform to that shown as "typical" or as reasonably inferable therefrom.

**1.17 Contractor's Superintendent.** The Contractor's Superintendent is the individual employed by the Contractor whose principal responsibility shall be the supervision and coordination of the Work; the Contractor's Superintendent shall not perform routine construction labor.

**1.18 Record Drawings.** The Record Drawings are a set of the Drawings marked by the Contractor during the performance of the Work to indicate completely and accurately the actual as-built condition of the Work. The Record Drawings shall be sufficient for a capable and qualified draftsman to modify the Drawings to reflect and indicate the Work actually in place at Final Completion of the Work.

**1.19 Program Manager.** The Program Manager is an independent contractor retained by the District authorized and empowered to act on behalf of the District as set forth in the Contract Documents. The District reserves the right to remove or replace the Program Manager during Contractor's performance of the Work. The designation of a Program Manager or the removal or replacement of the designated Program Manager shall not result in adjustment of the Contract Price or the Contract Time or otherwise affect, limit or restrict Contractor's obligations hereunder.

**1.20 Construction Equipment.** "Construction Equipment" is equipment utilized for the performance of any portion of the Work, but which is not incorporated into the Work.

**1.21 Site.** The Site is the physical area designated in the Contract Documents for Contractor's performance, construction and installation of the Work.

**1.22 Architect's Supplemental Instructions and Bulletins.** A written or graphic document consisting of supplementary details, instructions or information issued on behalf of the District which clarifies or supplements the Contract Documents and which becomes a part of the Contract Documents upon issuance. Architect's Supplemental Instructions (ASI) and Bulletins do not constitute an adjustment of the Contract Time or the Contract Price, unless a Change Order relating to them is authorized and issued under the Contract Documents.

**1.23 Defective or Non-Conforming Work.** Defective or non-conforming Work is any Work which is unsatisfactory, faulty or deficient by: (a) not conforming to the requirements of the Contract Documents; (b) not conforming to the standards of workmanship of the applicable trade or industry; (c) not being in compliance with the requirements of any inspection, reference, standard, test, or approval required by the Contract Documents; or (d) damage occurring prior to Final Completion of all of the Work.

**1.24 Delivery.** The term “delivery” used in conjunction with any item or materials to be incorporated into the Work shall mean the unloading and storage in a protected condition [at the site](#) pending incorporation into the Work.

**1.25 Notice to Proceed.** The Notice to Proceed is the written notice issued by or on behalf of the District to the Contractor authorizing the Contractor to proceed with commencement of the Work or portions thereof and which establishes the date for commencement of the Contract Time.

**1.26 Daily Reports.** Daily Reports are written reports prepared by the Contractor and submitted daily to the Program Manager in the form and content as required by the Contract Documents. A material obligation of the Contractor is the timely preparation and submission of complete and accurate Daily Reports.

**1.27 Phrases and Terms.** Certain phrases and terms used in the Contract Documents shall be defined as set forth herein, unless otherwise expressly defined in a different manner elsewhere in the Contract Documents. The terms “as directed” “as permitted” or similar terms or phrases shall mean as directed or permitted by the District, the District’s representatives and/or governmental agencies with jurisdiction over the Work. The terms “sufficient” “necessary” “proper” or similar terms or phrases shall mean sufficient, necessary or proper in the judgment of the District or the District’s representatives in connection with the Work, including without limitation, the Architect, the Program Manager, the District’s Inspector(s) and the person or entity performing tests/inspections of the Work.

**1.28 Owner.** See “District”.

**1.28.1 Owner’s Representative.** Where the Contract Documents refer to coordination of any aspect of the Work with the District or its agents, the Owner’s Representative shall be the Program Manager. For executing or changing the Contract, the Owner’s Representative shall be the District’s Executive Director of Facilities and Operations as coordinated through the Program Manager.

**1.29 College.** Refers to either the Foothill Campus or the De Anza Campus which ever is applicable to the specific project as indicated in the Contract Documents.

**1.30 Omission.** “Omission” is defined as the lack of a piece of equipment, material or design detail in the Drawings and Specifications the addition of which is necessary for the completion of the Project, which is reasonably inferable from the Contract Documents, and which the Contractor should have discovered using its best skill and judgment; provided, however that the Contractor is not responsible for Omissions that rise to the level of design Error as defined herein.

**1.31 Error.** “Error” is defined as inappropriate or incompatible equipment, materials or design features, or the lack of a piece of equipment, materials or design element in the Drawings and Specifications, the addition of which is necessary for completion of the Project. The correction of an Error does not add to the value of the Project.

**1.32 Contract.** All references to “Contract” relate to the performance and scope of work to be included by the Contractor in performance of these Construction Provisions and Contract Documents as defined in Article 1.11.

## ARTICLE 2: LEASE LEASEBACK PROVISIONS

**2.1 Approved Construction Documents.** Construction Documents for the Project have been submitted to the DSA for approval, have been approved by DSA, have been accepted by the District, and are incorporated herein by reference. Construction Documents include all Addenda issued - with signature from the Architect and approved by DSA. All construction shall be pursuant to the DSA approved Construction Documents.

**2.2 Contractor’s Acceptance of Contract Documents and Site Conditions.** The Contractor has thoroughly investigated the site conditions and has reviewed the Construction Documents to establish that there are no known problems with respect to the site conditions or the Construction Documents and that Contractor can and will construct the Project for the Guaranteed Maximum Price as set forth and defined in Article 2.4.1 of these Construction Provisions, and Contractor will not seek any additional compensation whatsoever, including, without limitation, any requests based upon known site conditions.

**2.3 Contractor’s Duties and Status.** Contractor shall be responsible for furnishing and completing the construction of the Project pursuant to these Construction Provisions and the Contract Documents. Contractor further agrees to furnish efficient business administration and superintendence and to furnish at all times an adequate supply of professionals, workers and materials and to perform the work appropriately, expeditiously, and economically, consistent with the interests of District.

### 2.4 Guaranteed Maximum Price.

**2.4.1 GMP.** The term “Guaranteed Maximum Price” (GMP) as used herein means the amount \_\_\_\_\_ DOLLARS (\$ \_\_\_\_\_), subject to the provisions of the Contractor’s Contingency Fund as set forth in Article 2.7 of these provisions, to be paid to Contractor by the District for the performance of Construction Services with respect to the Project, subject to any adjustments for Extra Work and Changes as provided in Article 2.10, or Savings as provided in Article 2.8.

**2.4.2 Basis of GMP.** The Contractor and District acknowledge that the Guaranteed Maximum Price is based on the Drawings and Specifications which are listed in Facilities Lease Exhibit A, and attached hereto by reference.

**2.4.3 Payment and Rental Amount.** District and Contractor represent and warrant that the Guaranteed Maximum Price consists of tenant improvement/progress payments “Progress Payments” to be paid by District during the course of construction, plus the additional sums to be paid as a portion of the Lease Payments or optional prepayment thereof. District and Contractor represent and warrant that 1) the total amount of Lease Payments and optional prepayment thereof constitute the total rental for the Project, which total does not exceed the fair market value for the Project, 2) said rental amount has been incorporated into the Guaranteed Maximum Price in consideration and inducement of this document and the Site Lease and Facilities Lease, the uses and purposes which may be served by the Project, and the benefits therefrom which will accrue to the District and the

general public, and 3) said rental amount shall be paid by the District as a part of the Guaranteed Maximum Price, pursuant to the terms of this document. For purposes of accounting and tracking expenditures, the Guaranteed Maximum Price shall include TWENTY-FIVE HUNDRED DOLLARS (\$2,500.00) to be paid as rental/lease payments or prepayment thereof, which rental/lease payments or prepayment thereof shall be paid by the District during the course of construction, in equal payments.

**2.4.4 Changes to Contract Documents.** To the extent that the Contract Documents differ from those attached hereto, such differences will be dealt with under the provisions for Changes and Savings as addressed in this document.

**2.4.5 Cost Breakdown.** Contractor shall prepare a detailed line item Cost Breakdown of the Project or Master Budget prior to the execution of the Site and Facilities Lease, totaling the Guaranteed Maximum Price, in accordance with Article 9.2 of these Construction Provisions.

**2.5 Project Contingency Funds.** The Project shall have two (2) contingency funds. The names of these funds shall be the District's Contingency Fund and the Contractor's Contingency Fund. Contingency Funds shall be used for the purposes stated below.

**2.6 District's Contingency Fund.**

**2.6.1 District's Contingency Fund.** The District's Contingency Fund shall be for the District's benefit and exclusive control and use, and shall be separate from the Guaranteed Maximum Price. The District's Contingency Fund shall be set at \_\_\_\_\_ DOLLARS (\$X) and may be increased or decreased during the course of the project without notice to or consent of other parties.

**2.6.2 Use of Fund.** The District's Contingency Fund shall be utilized for the payment of: (1) additional or modified work desired by the District, pursuant to Article 2.10 of these Construction Provisions; or (2) unforeseen site conditions or design Errors. Prior to commencing any work which would result in the utilization of the District's Contingency Fund, District and Contractor shall agree in writing, upon the cost of such work. In the event that Contractor commences such work without the District and Contractor agreeing upon the cost for such work, or mutually acceptable method for determining the cost for such work, Contractor shall be limited to the District's good faith determination of the cost of the additional work.

**2.6.3 Fund Savings.** Any funds remaining in the District's Contingency Fund after completion of the Project shall remain with the District.

**2.7 Contractor's Contingency Fund.**

**2.7.1 Contractor's Contingency Fund.** The Contractor's Contingency Fund shall initially be set at \_\_\_\_\_ DOLLARS (\$X). The Contractor's Contingency Fund shall be a line item within the Guaranteed Maximum Price. In no event shall the total Project budget exceed the budget set forth in section 2.4.1 herein.

**2.7.2 Use of Fund.** The Contractor's Contingency Fund shall be used by the Contractor for costs incurred in the Work for unforeseen causes or details which should have been anticipated by the Contractor at the time the District approved the GMP, and for conflicts,



ambiguities and any problems arising from a lack of coordination among and between the subcontractors' bid packages. [Contractor shall maintain a current log of all uses of this fund. The record shall be provided to the District on a weekly basis and as otherwise requested.](#)

**2.7.2.1 Approved Uses.** The Contractor's Contingency Fund may be used by the Contractor, with the District's approval as stated below, for costs incurred in the following areas:

- Costs associated with refinement of detail within the scope of standards, quality and quantities that are reasonably inferable from the Construction Documents;
- Costs associated with field coordination issues not reasonably inferable from the Drawings, Specifications and codes;
- Correction of minor defects not relating to the design;
- Costs related to delays in receipt of material due to the fault of the Contractor;
- Correction in the work or repair of damages by Contractor (provided the Contractor has exhausted all reasonable means to obtain correction of the same from the responsible subcontractor(s));
- Labor and material overruns;
- Additional costs relating to subcontractor defaults, provided any such default is not due to the District's actions or failure to act;
- Overruns incurred by Contractor in buying out remaining subcontracts, if any, if approved by the District;
- Premium time costs necessary to meet Substantial Completion or Milestone dates;
- Additional costs of Contractor's Construction Services necessary to meet the Substantial Completion or Milestone dates, up to a maximum amount of \$50,000.

**2.7.2.2 Uses Not Approved.** The Contractor's Contingency Fund shall **not** be used for payment of:

- Liquidated damages;
- Fines, penalties, contributions or judgments;
- Legal costs;
- Insured claims;
- [Replacement costs of work in place or stored materials/equipment that is lost, stolen or damaged and not claimed on insurance;](#)
- Project acceleration not approved by the District;
- Replacement of substitutions not approved by the District;
- Removal and replacement of ACBMs installed by Contractor (See Article 5.9.7.2);
- Correction of record documents by District due to Contractor's failure to provide accurate record documents;
- Cleanup performed by District due to Contractor's failure to clean;
- Completion of work or correction of rejected work by District due to Contractor's failure to complete;
- Provision of insurance by District due to Contractor's failure to provide;

- District's costs resulting from multiple inspections, multiple submittal reviews or excessive Requests for Information, if caused by acts of the Contractor.

**2.7.3 Exhaustion of Fund.** Once the Contractor's Contingency Fund has been exhausted, the Contractor shall have no further recourse against the District with respect to any category of cost intended to be covered by the Contractor's Contingency Fund, including, but not limited to, design Omissions or for work defectively performed by the Contractor.

**2.7.4 Approvals by District.** The Contractor shall obtain prior written approval of the District if the cost of an item the Contractor believes to be properly chargeable to the Contractor's Contingency Fund exceeds \$5,000. The District shall not unreasonably withhold approval of the use of the Contractor's Contingency Fund by the Contractor. The District agrees to respond in writing to any requests for District approval within three (3) business days of the District's receipt, provided the request submitted with adequate documentation.

**2.7.5 Basis for Cost of Charges Against Contractor's Contingency Fund.** Costs to be charged against the Contractor's Contingency Fund shall be determined as set forth in Article 10.3.2 of these Construction Provisions, including markups not to exceed those established in Article 10.3.2.4.

**2.7.6 Fund Savings.** Any funds remaining in the Contractor's Contingency Fund after completion of the Project shall be shared by the District and Contractor in the following proportion: District 75%, Contractor 25%.

## **2.8 Cost Savings.**

**2.8.1 Cost Savings.** The Contractor shall work cooperatively with Architect, Subcontractors and District, in good faith, to identify appropriate opportunities to reduce the Project costs and promote cost savings.

**2.8.2 Approval and Use of Cost Savings.** Any identified cost savings from the Guaranteed Maximum Price shall be identified by Contractor, and if approved in writing by the District, such cost savings shall be fully credited towards the Contractor's Contingency Fund.

**2.8.3 Design Costs.** If any cost savings require revisions to the Construction Documents, Contractor shall work with the Architect with respect to revising the Construction Documents and, if necessary, assist the Architect in obtaining the approval of DSA with respect to such revisions. Any reasonable cost incurred by Architect for such revisions shall be paid for out of the identified savings.

## **2.9 Scope of Work for Contractor's Construction Services.**

**2.9.1 Notice to Proceed.** After execution of the Facilities Lease and any related documents relating to the lease of the Site and/or construction of the Project, the District will issue to the Contractor a Notice to Proceed with the construction of the Project pursuant to the terms of the Facilities Lease, Site Lease and the Contract Documents, including these Construction Provisions.



**2.9.2 Construction Services.** Contractor shall furnish construction administration and management services and use its best efforts to construct the Project in accordance with the Contract Documents, performing all work relating to the Project appropriately, expeditiously, and economically, with a high standard of quality with respect to material, assembly, finishes and workmanship. The Contractor's Construction Services, for the cost proposed in its response to the Request for Proposal, shall include:

**2.9.2.1 On-site Staff.**

- Wages or salaries of the [onsite](#) Contractor's supervisory and administrative personnel when stationed at the Site with the District's agreement;
- Wages and salaries of the [onsite](#) Contractor's supervisory or administrative personnel engaged at factories, workshops or on the road expediting the production or transportation of materials or equipment required for the work, but only for that portion of their time required for the work;
- Wages or salaries of the Contractor's project manager, whether stationed at the Site or in the Contractor's principal office or branch offices, but only for that portion of his/her time required for the work;
- [Taxes, insurance, contributions, assessments and benefits associated with the wages or salaries listed in Article 2.9.2.1.](#)
- That portion of the reasonable travel and subsistence expenses of the Contractor's personnel incurred while traveling in discharge of duties connected with the work.

**2.9.2.2 Temporary Facilities.**

- Rental charges and other costs for provision, maintenance and removal of facilities for Contractor's on-site office and administration activities, such as office trailers, furniture and equipment, copying, postage, delivery, photography, and related expenses;
- Rental charges or construction cost, including labor, material and equipment, for provision, maintenance, relocation and removal of temporary facilities required for the construction and phasing of the Work, including storage sheds, access roads and walkways, toilets, stairs, fencing, barricades, opening protection, safety equipment, and the like;
- Construction equipment and tools not customarily owned by the construction workers, which are provided by the Contractor at the site, and have a replacement value of \$500 or less;
- Provision and maintenance of the web-based project management system.

**2.9.2.3 Temporary Utilities.**

- Initial installation of temporary telephone, and data/internet service;
- Monthly service charges on telephone and data services and [similar](#) utilities consumed by the Contractor;
- Provision and maintenance of temporary utility distribution;
- Temporary facilities for heating, ventilation and cooling;

- Provision of security guards and watchman services if required in the course of the Work.

#### **2.9.2.4 Miscellaneous Project Costs.**

- That portion of premiums for insurance and bonds directly attributable to the Contract;
- Fees and assessments for permits, licenses and inspections for which the Contractor is required by the Contract Documents to pay.

#### **2.9.2.5 Not Included in Contractor's Construction Services.** The Contractor's costs for the following shall not be included in the cost of Construction Services:

- [Personnel cost incurred by the Contractor in preparing the Project schedule and schedule updates, preparing payroll, accounting, or other functions of the Contractor's principal office – with the exception of Project specific accounting and bookkeeping, including payroll;](#)
- Salaries and other compensation of the Contractor's personnel stationed at the Contractor's principal office or offices other than the Site office, except as specifically provided above;
- Payments to Contractor's employees over and above their regular pay (bonuses, incentive pay, profit sharing, severance pay, etc.);
- Expenses of the Contractor's principal office and offices other than the Site office;
- Overhead and general expenses, except as may be expressly included above;
- The Contractor's capital expenses, including interest on the Contractor's capital employed for the work;
- Any costs based on percentages, rather than actual costs paid by the Contractor, unless specific percentages are documented and approved by the District;
- Any fees paid to Contractor organizations. (AGC, ABC, AIA etc.);
- Contractor's business license;
- Facilities Lease/site rental costs in accordance with Article 2.4.3 of these Construction Provisions;
- Costs that would cause the Guaranteed Maximum Price to be exceeded.

**2.9.3 Protection.** Contractor shall establish procedures for the protection of the Project and all existing structures, equipment, utilities, and other existing improvements, both on-site and off-site.

**2.9.4 CEQA Compliance, State Water Resources Control Board compliance, and San Francisco Bay Area Air Quality Management District (BAAQMD) compliance.** Contractor shall develop, within 15 days of receipt of the Notice to Proceed, a mutually agreed upon program with the District to comply with any mitigation measures adopted for the Project pursuant to the California Environmental Quality Act ("CEQA") and to abate and minimize noise, dust, and disruption to normal activities at the Project, including procedures to control on-site noise, dust and pollution during construction. [Contractor shall assume responsibility for the current Storm Water Pollution Prevention Plan \(SWPPP\) and shall maintain the SWPPP for the site for the duration of the project. Contractor shall](#)

[secure, pay for and manage any required permits for operation of temporary generators or for the operation or maintenance of any equipment utilized at the site that comes under the per-view of the BAAQMD.](#)

**2.9.5 Administration Procedures.** The Contractor shall establish and implement procedures for expediting and processing Requests for Information, Submittals, Substitutions, payment requests, and other documents and communications required to administer the Project.

**2.9.6 Project Management System.** Contractor shall provide and maintain a computerized, integrated and web-based interactive project management information system, including all required information technology systems hardware, software, training and maintenance. Facilitate the use of, maintain, and update a secure website for communication of project information between the Contractor and its Subcontractors, the District, Architect and its subconsultants, and the Program Manager. [Provide for and support twelve \(12\) users from the District, including District staff, Program Manager, Architect and architect's consultants.](#)

**2.9.6.1 System Requirements:** The system shall have the ability to support the following types of documents: Requests for Information, Submittals, Change Orders, supplemental instructions, Inspections, photographs, memos, daily logs, meeting agendas and minutes, Specifications, Drawings and Schedules.

**2.9.7 Quality Control.** The Contractor shall establish and implement a proactive program to monitor the quality of construction. The purpose of the program shall be to guard the District against defects and deficiencies in the work. Submit a written quality control plan within 30 days of the Notice to Proceed.

**2.9.8 Review of Requests for Changes in GMP, [use of Contingencies](#), or Contract Time.** The Contractor shall thoroughly review the contents of requests for changes submitted by subcontractors, assemble information concerning the requests, and endeavor to determine the cause of the requests. If the Contractor's analysis determines that a request is valid, the Contractor shall forward the assembled information to the Program Manager and District for review and approval.

**2.9.9 Progress Report.** Contractor shall prepare, file, and distribute a monthly Project Status Report, summarizing the progress of construction and key issues currently pending, to include analysis of the Project schedule, logs of Requests for Information, Submittals, Change Orders, [LEED Platinum certification efforts](#), employment of PSA-mandated apprentices and interns, other project management documents, and photographs of work in progress.

## **2.10 Extra Work and Changes.**

**2.10.1 Extra Work and Changes.** The District may prescribe additional work or a change of requirements or of methods of performing the Work of the Project which differ from the work or requirements set forth in the Contract Documents; and for such purposes, the District may at any time during the life of the Facilities Lease, by written order, make such changes as it shall find necessary in the design, line, grade, form, location, dimensions, plan, or material of any part of the work or equipment specified herein or in

the Contract Documents, or in the quantity or character of the work or equipment to be furnished.

**2.10.2 Agreement on Cost and Time.** Changes shall be administered in accordance with Article 10 of these Construction Provisions.

**2.10.3 Funding.** All Changes approved in writing shall be funded from the District's Contingency Fund. In the event that there are not sufficient funds in the District's Contingency Fund for District approved Changes, District shall cause the difference to be deposited into the District's Contingency Fund.

**2.11 Time of Completion of Construction Services.** Once the District has issued a Notice to Proceed pursuant to Article 2.9.2 hereof, the Contractor shall proceed with the construction of the Project with due diligence, in accordance with Article 8 of these Construction Provisions. Contractor agrees to complete those portions of the Work defined in the Contract Documents ("Milestones") and all Work of the Project ("Completion Date") on or before the following dates:

Milestone 1 – Substantial Completion: 516 calendar days after Notice to Proceed or by May 15, 2012, whichever comes first.

Milestone 2 – Commissioning Completion, Punch List Completion, and Final Completion: 562 calendar days after Notice to Proceed or by June 30, 2012, whichever comes first.

Refer to Specification Section 01 11 00 for Milestone descriptions. Failure to achieve completion of Milestones or Completion of the Project will result in the assessment of Liquidated Damages as detailed in Article 2.12 of these Construction Provisions.

**2.12 Liquidated Damages.** If the Project, or a portion thereof, is not completed within the time period set forth above, it is understood that the District will suffer Damage. The Contractor shall be subject to Liquidated Damages stated below, in accordance with Article 8.5 of these Construction Provisions:

Milestone 1: \$2,500 /Calendar Day

Milestone 2: \_\_\_\_\_ \$5,000 /Calendar Day \_\_\_\_\_

**2.13 Progress Schedule.** The Contractor shall prepare a Progress Schedule in accordance with Article 8.3 of these Construction Provisions. The Progress Schedule shall utilize the Milestone Dates and the Completion Date stated above, and shall be updated by Contractor monthly or as may be necessary to report, and revisions in said schedule shall be furnished to District. No fewer than 94 (X) calendar days shall be allotted for in the Progress Schedule for weather days. It is specifically understood that District will utilize the Progress Schedule as it is revised from time to time to determine final dates upon which to make decisions it must make with respect to the Project.

**2.13.1 Rain Days.** Rainfall will be considered unusually severe only when the days of rain (more than 1/10" per day) in any month exceed the prescribed number of days of rain per month as listed below. No time extensions due to rain will be allowed until the number of days of rain for a particular month has been exceeded: January – 10 days; February – 9 days; March – 7 days; April – 3 days; May – 1 day; June – no days; July – no days; August – no days; September – 3 days; October – 7 days; November – 9 days; December – 10 days.

## **2.14 Progress Payments.**

**2.14.1 Progress Payments.** Subject to the provisions set forth in the Facilities Lease, each month while Contractor is providing Construction Services, District shall pay to Contractor a sum equal to ninety percent (90%) of value of the construction service work performed up to the last day of the previous month, less aggregate of previous payments (the "Progress Payments"), in accordance with Article 9.3 of these Construction Provisions.

**2.14.2 Reduction of Retention.** Notwithstanding the above, after at least fifty percent (50%) of the Work has been completed, the District, in its sole discretion, may increase any remaining Progress Payments to a greater percentage of the value of the construction work performed for that applicable pay period.

**2.14.3 GMP Cap on Progress Payments.** In no event shall the cumulative total of the Progress Payments, along with the balance of the Contingency Fund and any anticipated retention ever exceed the Guaranteed Maximum Price as defined herein, unless modified pursuant to Article 8 of these Construction Provisions.

**2.15 Payments Withheld.** District may withhold from the Progress Payments a sufficient amount or amounts (a maximum of 150%) in accordance with Article 9 of these Construction Provisions. District may apply such withheld amount or amounts to payment of claims or obligations at its discretion.

**2.16 Acceptance of Completion; Release of Retention.** The Project shall only be considered complete after District accepts completion of the Project in accordance with Article 8.2 of these Construction Provisions and records the Notice of Completion for the Project. District shall have no obligation to accept completion of the Project until the entire work has been completed to the satisfaction of the District, except for minor corrective items, as distinguished from incomplete items. Subject to these Construction Provisions, District will release retention within thirty-five (35) days of recordation of the Notice of Completion. The release of the retention hereunder shall constitute the final Lease Payment, as provided for in the Facilities Lease.

**2.17 Payments by Contractor.** Contractor shall make all payments to subcontractors and suppliers as expeditiously and timely as possible, in accordance with Article 9.6 of these Construction Provisions and consistent with any applicable law, so as to prevent any stop notices, liens or claims from being filed against the District or the Site. Contractor shall indemnify, defend and hold District harmless from any claims or actions which allege that any subcontractor or supplier failed to be paid with respect to the Project.

## **2.18 Contractor's Supervision.**

**2.18.1 Contractor's Supervision.** Contractor shall supervise and direct the construction and completion of the Project using the Contractor's best skill and attention. Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences, and procedures and for coordinating all portions of the Project. Specific duties of the Contractor shall be in accordance with all applicable sections of Title 24 of the California Code of Regulations which relate to the duties of a contractor. Contractor shall construct the Project in accordance with the Contract Documents and all requirements which are applicable to contractors with respect to the following: DSA, local grading and special local requirements, California Building Code, Title 24, and the Field Act. Contractor shall correct any deficiencies which are the cause of Contractor noted by

Inspector, DSA, or other applicable agencies before or during construction, so that the Project upon completion shall be fit for occupancy for any and all school purposes.

**2.18.2 Contractor's Responsibilities.** Contractor shall be responsible to the District for acts and omissions of the Contractor's employees, subcontractors, material and equipment suppliers, and their agents, employees, invitees, and other persons performing or completing portions of the Project under direct or indirect contract with the Contractor of any of its subcontractors.

**2.19 Insurance.** The Contractor shall purchase and maintain Workers' Compensation Insurance, Employer's Liability Insurance, Commercial General Liability and Property Insurance, and Builder's Risk Insurance in accordance with Article 7 of these Construction Provisions, in the following amounts:

***Commercial General Liability Insurance:***

<i>Per Occurrence</i>	<i>\$10,000,000</i>
<i>Aggregate</i>	<i>\$10,000,000</i>
<i>Product Completed Operations Aggregate*</i>	<i>\$10,000,000</i>
<i>Personal Injury</i>	<i>\$10,000,000</i>

***Automobile Liability Insurance\*\****

<i>Bodily injury per person</i>	<i>\$10,000,000</i>
<i>Bodily injury per accident</i>	<i>\$10,000,000</i>
<i>Property Damage</i>	<i>\$10,000,000</i>

**Builders Risk** Contract Amount

***Worker Compensation/Employers Liability Insurance***

<i>Each accident</i>	<i>\$10,000,000</i>
<i>Disease - each employee</i>	<i>\$10,000,000</i>
<i>Disease – policy limit</i>	<i>\$10,000,000</i>

*\*Product /Completed Operations to be maintained for (3) years following acceptance of the Work by the District.*

*\*\* Automobile Liability Insurance applicable to all company-owned, non owned and hired vehicles, (or "any" auto).*

**2.20 Project Stabilization Agreement / Construction Careers Agreement.**

**2.20.1 PSA Acceptance.** The Contractor and all of its Subcontractors shall provide evidence of acceptance of the terms and conditions of the Project Stabilization Agreement / Construction Careers Agreement (PSA) between Foothill-De Anza Community College District and the Santa Clara & San Benito Counties Building and Construction Trades Council.

**2.20.2 Acceptance Prior to Work.** New and substituted Subcontractors of any tier shall provide such evidence before beginning work at the Project Site.

**2.20.3 Apprentices.** To be considered in compliance with the Construction Careers Agreement, the Contractor and its Subcontractors shall, in good faith, endeavor to employ trade apprentices enrolled in the Foothill-De Anza Community College District's



apprenticeship program. The Contractor shall report compliance in its monthly Progress Status Report.

**2.20.4 Interns.** To be considered in compliance with the Construction Careers Agreement, the Contractor and its Subcontractors shall, during the duration of the Contract, utilize at least five (5) half-time (20 hours per week) student interns enrolled in the Foothill-De Anza Community College District's internship program, or an equivalent hourly rate of intern employment. The Contractor shall report compliance in its monthly Progress Status Report.

**2.20.4.1 Intern Employment.** Student interns placed with the Contractor and its Subcontractors will be employees (Student Workers) of the District. The Contractor will provide compensation to the District through a separate agreement between the Contractor and the District.

**2.20.5 Apprentice and Intern Selection.** The District will, at the request of the Contractor, provide qualifications and/or resumes of District-qualified apprentices and interns to assist in selection and employment of the required student apprentices and interns by the Contractor and its Subcontractors.

## ARTICLE 3: DISTRICT

### 3.1 Information Required of District.

**3.1.1 Surveys; Site Information.** Information, if any, concerning physical characteristics of the Site, including without limitation, surveys, soils reports, and utility locations, to be provided by the District are set forth in the Contract Documents. Information not provided by the District or necessary information in addition to that provided by the District concerning physical characteristics of the Site which is required shall be obtained by Contractor without adjustment to the GMP or the Contract Time.

**3.1.2 Permits; Fees.** Except as otherwise provided in the Contract Documents, the District shall secure and pay for necessary approvals, easements, assessments and charges required for construction, use or occupancy of permanent structures or for permanent changes in existing facilities which relate to the Work of the Contractor under the Contract Documents. If permits and fees are designated as the responsibility of the Contractor under the Contract Documents, the Contractor shall be solely responsible for obtaining the same; the cost of such permits or fees and any costs incurred by the Contractor in obtaining such permits shall be included within the GMP.

**3.1.3 Drawings and Specifications.** Except as otherwise provided for in the Contract Documents, the District shall furnish the Contractor, free of charge, two (2) reproducible printed copies of the Contract Documents and two (2) electronic copies of same. All of the Drawings and the Specifications provided by the District to the Contractor remain the property of the District; the Contractor shall not use any of the Contract Documents for any purpose other than construction of the Work of the Project.

**3.1.4 Notice of Receipt of Third-Party Claim Relating to the Contract.** In accordance with provisions in §9201 of the Public Contracting Code, the District shall provide timely notification to the Contractor of the receipt of any third-party claim

relating to the Contract. The District shall be entitled to recover its reasonable costs incurred in providing this notification.

**3.1.5 Furnishing of Information.** Information or services to be provided by the District under the Contract Documents shall be furnished by the District with reasonable promptness to avoid delay in the orderly progress of the Work. Information about existing conditions furnished by the District under the Contract Documents is obtained from sources believed to be reliable, but the District neither guarantees nor warrants that such information is complete and accurate. The Contractor shall verify all information provided by the District. To the extent that the Contract Documents depict existing conditions on or about the Site, or the Work involves the renovation, removal or changes to existing improvements, or the Work involves any tie-in or other connection with any existing improvements, the conditions and/or existing improvements depicted in the Contract Documents are as they are believed to exist. Contractor shall bear the risk of any variations between conditions or existing improvements depicted in the Contract Documents and those conditions or existing improvements actually encountered in the performance of the Work. The existence of any variations between conditions or existing improvements depicted in the Contract Documents and those actually encountered in the performance of the Work shall not result in any District liability therefore, nor shall any such variations result in an adjustment of the Contract Time or the GMP.

**3.2 District's Right to Stop the Work.** In addition to the District's right to suspend the Work or terminate the Contract pursuant to the Contract Documents, the District, may, by written order, direct the Contractor to stop the Work, or any portion thereof, until the cause for such stop work order has been eliminated if the Contractor: (i) fails to correct Work which is not in conformity and in accordance with the requirements of the Contract Documents, (ii) otherwise fails to carry out the Work in conformity and accordance with the Contract Documents, or (iii) contractor's failure to comply with safety protocols. The right of the District to stop the Work hereunder shall not be deemed a duty on the part of the District to exercise such right for the benefit of the Contractor or any other person or entity, nor shall the District's exercise of such right waive or limit the exercise of any other right or remedy of the District under the Contract Documents or at law.

### **3.3 Partial Occupancy or Use.**

**3.3.1 District's Right to Partial Occupancy.** The District may occupy or use any completed or partially completed portion of the Work, provided that: (i) the District has obtained the consent of, or is otherwise authorized by, public authorities with jurisdiction thereof, to so occupy or use such portion of the Work and (ii) the District and the Contractor have accepted, in writing, the responsibilities assigned to each of them for payments, retainage, if any, security, maintenance, utilities, damage to the Work, insurance and the period for correction of the Work and commencement of warranties required by the Contract Documents for such portion of the Work partially used or occupied by the District. If the Contractor and the District are unable to agree upon the matters set forth in (ii) above, the District may nevertheless use or occupy any portion of the Work, with the responsibility for such matters subject to resolution in accordance with the Contract Documents. Immediately prior to such partial occupancy or use of the Work, or portions thereof, the Program Manager, the District's Inspector, the Contractor and the Architect shall jointly inspect the portions of the Work to be occupied or to be used to determine and record: (a) the condition of the Work; (b) identify punchlist items in the portion of the Work to be used or occupied by the District for subsequent



correction or completion by the Contractors; and (c) time for the Contractor's completion of the punchlist. The District's use or occupancy of the Work or portions thereof pursuant to the preceding shall not be deemed "completion" of the Work as that term is used in Public Contract Code §7107.

**3.3.2 No Acceptance of Defective or Nonconforming Work.** Unless otherwise expressly agreed upon by the District and the Contractor, the District's partial occupancy or use of the Work or any portion thereof, shall not constitute the District's acceptance of the Work not complying with the requirements of the Contract Documents or which is otherwise defective.

**3.4 The District's Inspector.** In addition to the authority and rights of the District's Inspector as provided for elsewhere in the Contract Documents, all of the Work shall be performed under the observation of the District's Inspector. The District's Inspector shall have access to all parts of the Work at any time, wherever located and whether partially or completely fabricated, manufactured, furnished or installed. The performance of the duties of the District's Inspector under the Contract Documents shall not relieve or limit the Contractor's performance of its obligations under the Contract Documents.

## ARTICLE 4: ARCHITECT

### 4.1 Architect's Administration of the Contract.

**4.1.1 Administration of the Contract.** The Architect will provide administration of the Contract as described in the Contract Documents, and will be one of the District's representatives during construction. The Architect will advise and consult with the District, the Program Manager and the District's Inspector with respect to the administration of the Contract and the Work. The Architect is authorized to act on behalf of the District to the extent provided for in the Contract Documents; and shall have the responsibilities and powers established by law, including Title 24 of the California Code of Regulations.

**4.1.2 Periodic Site Inspections.** The Architect will visit the Site at intervals appropriate to the stage of construction to become generally familiar with the progress and quality of the completed Work and to determine, in general, if the Work is being performed in a manner indicating that the Work, when completed, will be in accordance with the Contract Documents. The Architect will not be required to make exhaustive or continuous site inspections to check quality or quantity of the Work. On the basis of Site observations as an architect, the Architect will keep the District informed of the progress of the Work, and will endeavor to guard the District against defects and deficiencies in the Work.

**4.1.3 Contractor Responsibility for Construction Means, Methods and Sequences.** The Architect will not have control over or charge of and will not be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, these being solely the Contractor's responsibility. The Architect will not have control over or charge of and will not be responsible for acts or omissions of the Contractor, Subcontractors, or their agents or employees, or of any other persons performing portions of the Work.

**4.1.4 Verification of Applications for Payment.** In accordance with Article 9 hereof, the Architect will review the Contractor's Applications in consultation with the Program Manager for Progress Payments and for Final Payment, verify the extent of Work performed and the amount properly due the Contractor on such Application for Payment.

**4.1.5 Rejection of Work.** The Architect is authorized to reject Work which is defective or does not conform to the requirements of the Contract Documents. Whenever the Architect considers it necessary or advisable, for implementation of the intent of the Contract Documents, the Architect will have authority to require additional inspections or testing of the Work, whether or not such Work is fabricated, installed or completed. Neither this authority of the Architect nor a decision made in good faith by the Architect to exercise or not to exercise such authority shall give rise to a duty or responsibility of the Architect to the Contractor, Subcontractors, Material Suppliers, their agents or employees, or other persons performing portions of the Work.

#### **4.1.6 Submittals**

**4.1.6.1 Architect's Review.** The Architect will review and accept or take other appropriate action upon the Contractor's Submittals, but only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. Review of Submittals is not conducted for the purpose of determining the accuracy and completeness of other details such as dimensions and quantities, or for substantiating instructions for installation or performance of equipment or systems, all of which remain the responsibility of the Contractor as required by the Contract Documents. The Architect's review of the Contractor's Submittals shall not relieve the Contractor of its obligations under the Contract Documents. The Architect's review of Submittals shall not constitute approval of safety measures, programs or precautions or, unless otherwise specifically stated by the Architect, of any construction means, methods, techniques, sequences or procedures. The Architect's acceptance of a specific item in a Submittal shall not indicate acceptance of an assembly of which the item is a component until the Submittal(s) required and relating to such assembly have been reviewed and accepted by the Architect.

**4.1.6.2 Time for Architect's Review.** The Architect's review of Submittals will be conducted promptly so as not to delay or hinder the progress of the Work or the activities of the Contractor, the District or the District's separate contractors while allowing sufficient time, in the Architect's reasonable professional judgment, to permit adequate review of Submittals. The foregoing notwithstanding, the Architect's review and return of Submittals will conform with the time limits and other conditions, if any, set forth in the Specifications or the Contractor's Submittal Schedule. The Architect is allowed twenty-one (21) days for regular submittals and five (5) days for high priority items. Architect or District is the arbiter of what determines a high priority item.

**4.1.7 Changes to the Work; Change Orders.** The Architect is not authorized to direct changes to the Work, other than minor Changes in the Work not involving an adjustment to GMP or Contract Time as set forth in Article 10.8 of these Construction Provisions. The Architect will, however, participate in evaluation of data submitted by the Contractor with a Proposal Request directing a Change in the Work to the extent set

forth in Articles 10.3 and 10.4 of these Construction Provisions. All applicable structural, fire, life/safety and accessibility related Change Orders shall be submitted to and be approved by DSA prior to commencement of the work shown thereon pursuant to Section 4-338, Part 1, Title 24 of the California Code of Regulations. Unless otherwise indicated in the Contract Documents, submissions to DSA will be made by the Architect.

**4.1.8 Completion.** The Architect will conduct observations to determine the date or dates of Substantial Completion, completion dates of Milestones and the date of Final Completion in consultation with the Program Manager, will receive and forward to the District, for the District's review and records, written warranties and related documents required by the Contract Documents and assembled by the Contractor, and will verify that the Contractor has complied with all requirements of the Contract Documents and is entitled to receipt of Final Payment.

**4.1.9 Interpretation of Contract Documents.** The Architect will interpret and decide matters concerning the requirements of the Contract Documents on written request of either the District or the Contractor. The Architect's response to such requests will be made with reasonable promptness and within the time limits agreed upon, if any. If no agreement is reached establishing the time for the Architect's review and response to requests under this Article 4.1.9, the Architect shall be afforded a [seven \(7\) day period for Request for Information \(RFI\) items](#) after receipt of such request to review and respond thereto [and a fifteen \(15\) day period for other items](#). Interpretations and decisions of the Architect will be consistent with the intent of and reasonably inferable from the Contract Documents and will be in writing or in the form of drawings. When making such interpretations and decisions, the Architect will endeavor to secure faithful performance by both the District and the Contractor, will not show partiality to either and will not be liable for results of interpretations or decisions so rendered in good faith. The Architect's decisions on matters relating to aesthetic effect will be final if consistent with the intent expressed in the Contract Documents.

**4.1.10 Request for Information.** If the Contractor encounters any condition which the Contractor believes, in good faith and with reasonable basis, is the result of an ambiguity, conflict, error or omission in the Contract Documents (collectively "the Conditions"), it shall be the affirmative obligation of the Contractor to timely notify the Architect, in writing, of the Conditions encountered and to request information from the Architect necessary to address and resolve the Conditions before proceeding with any portion of the Work affected or which may be affected by the Conditions. If the Contractor fails to timely notify the Architect in writing of any Conditions encountered and the Contractor proceeds to perform any portion of the Work containing or affected by such Conditions the Contractor shall bear all costs associated with or required to correct, remove, or otherwise remedy any portion of the Work affected thereby without adjustment of the Contract Time or the GMP. In requesting information of the Architect to address and resolve any Conditions, the Contractor shall act with promptness in submitting any such written request so as to allow the Architect a reasonable period of time to review, evaluate and respond to any such request, taking into account the then current status of the progress and completion of the Work and the actual or potential impact of any such Conditions upon the completion of the Work within the Contract Time. The Contract Time shall not be subject to adjustment in the event that the Contractor shall fail to timely request information from the Architect. The Architect's responses to any such Contractor request for information shall conform with the standards and time frame set forth in Article 4.1.9 of these Construction Provisions. The Contractor shall not submit a Request

for Information as 1.) a Request for Substitution, 2.) a Submittal, or 3.) a discovery of a discrepancy or omission in the Conditions without a thorough review of the Conditions, or with the assumption that specific portions of the Conditions are excluded or by taking an isolated portion of the Conditions in part rather than as the whole. The foregoing provisions notwithstanding, in the event that the Architect reasonably determines that any of Contractor's request(s) for information: (i) does not reflect adequate or competent supervision or coordination by the Contractor or any Subcontractor; or (ii) does not reflect the Contractor's adequate or competent knowledge of the requirements of the Work or the Contract Documents; or (iii) is not justified for any other reason, Contractor shall be liable to the District for all costs incurred by the District associated with the processing, reviewing, evaluating and responding to any such request for information, including without limitation, fees of the Architect and any other design consultant to the Architect or the District. In responding to any of Contractor's request(s) for information, the Architect shall, in the response, indicate if the Architect has made the determination pursuant to the preceding sentence and, if so, the amount of costs to be borne by the Contractor for the processing, review, evaluation and response to the request for information. Thereafter, the District is authorized to deduct such amount from any portion of the GMP then or thereafter due the Contractor.

**4.2 Communications; Architect's and Program Manager's Roles.** All communications regarding the Work, the performance thereof, or the Contract Documents shall be in writing; verbal communications shall be reduced to writing. Communications between the Contractor and the District shall be through the Program Manager. Communications between separate contractors, if any, shall be through the Program Manager. All written communications between the Contractor and any Subcontractor, Material Supplier or others directly or indirectly engaged by the Contractor to perform or provide any portion of the Work shall be available to the District, the Program Manager and the Architect for review, inspection and reproduction as may be requested from time to time. Failure or refusal of the Contractor to permit the District, the Program Manager or Architect to review, inspect or reproduce such written communications may be deemed a default of Contractor hereunder. All written communication directly sent to the Architect shall be copied to the Program Manager by the Contractor. All communications with the Architect's design consultants shall be made directly through the Architect, unless otherwise agreed upon between the Architect, the Program Manager and the Contractor.

## **ARTICLE 5: THE CONTRACTOR**

### **5.1 Contractor Review of Contract Documents.**

**5.1.1 Examination of Contract Documents.** The Contractor shall carefully study and compare the Contract Documents with each other and with information furnished by the District pursuant to the Contract Documents and shall at once report to the Architect any errors, inconsistencies or omissions discovered. If the Contractor performs any Work knowing, or with reasonable diligence should have known that, it involves an error, inconsistency or omission in the Contract Documents without prior notice to the Architect of the same, the Contractor shall assume full responsibility for such performance and shall bear all attributable costs for correction of the same.

**5.1.2 Field Measurements.** Prior to commencement of the Work, or portions thereof, the Contractor shall take field measurements and verify field conditions at the Site and shall carefully compare such field measurements and conditions and other information

known to the Contractor with information provided in the Contract Documents. Errors, inconsistencies or omissions discovered shall be immediately reported to the Architect.

**5.1.3 Dimensions; Layouts and Field Engineering.** Dimensions indicated in the Drawings are intended for reference only. The Drawings are intended to be diagrammatic and schematic in nature; the Contractor shall be solely responsible for dimensioning and coordinating the Work of the Contract Documents. All field engineering required for laying out the Work and establishing grades for earthwork operations shall be by the Contractor at its expense. Any field engineering or other engineering to be provided or performed by the Contractor under the Contract Documents and required or necessary for the proper execution or installation of the Work shall be provided and performed by an engineer duly registered under the laws of the State of California in the engineering discipline for such portion of the Work.

**5.1.4 Work in Accordance With Contract Documents.** The Contractor shall perform all of the Work in strict conformity with the Contract Documents, which have been reviewed and accepted by the Architect and DSA.

## **5.2 Site Investigation; Subsurface Conditions.**

**5.2.1 Contractor Investigation.** The Contractor shall be responsible for, and by executing the Agreement acknowledges, that it has carefully examined the Site and has taken all steps it deems reasonably necessary to ascertain all conditions which may effect the Work, or the cost thereof, including, without limitation, conditions bearing upon transportation, disposal, handling or storage of materials; availability of labor or utilities; access to the Site; and the physical conditions and the character of equipment, materials, labor and services necessary to perform the Work. Any failure of the Contractor to do so will not relieve it from the responsibility for fully and completely performing all Work without adjustment to the GMP or the Contract Time. The District assumes no responsibility to the Contractor for any understandings or representations concerning conditions or characteristics of the Site, or the Work, made by any of its officers, employees or agents prior to the execution of the Agreement, unless such understandings or representations are expressly set forth in the Agreement.

**5.2.2 Subsurface Data.** By executing the Agreement, the Contractor acknowledges that it has examined the boring data and other subsurface data available and satisfied itself as to the character, quality and quantity of surface and subsurface materials, including without limitation, obstacles which may be encountered in performance of the Work, insofar as this information is reasonably ascertainable from an inspection of the Site including the immediate adjacent area, review of available subsurface data and analysis of information furnished by the District under the Contract Documents. Information contained in such data or report regarding subsurface conditions, elevations of existing grades, or below grade elevations are approximate only and is neither guaranteed nor warranted by the District to be complete and accurate.

**5.2.3 Subsurface Conditions.** If the Work under the Contract Documents involves digging trenches or other excavations that extend deeper than four feet below the surface, the Contractor shall promptly, and before the following conditions are disturbed, notify the District and the District's Inspector, in writing, of any: (i) material that the Contractor believes may be material that is hazardous waste, as defined in California Health and Safety Code §25117, that is required to be removed to a Class I or Class II or Class III



disposal site in accordance with provisions of existing law; (ii) subsurface or latent physical conditions at the site differing from those indicated by information about the site made available to bidders prior to the deadline for submitting bids; (iii) unknown physical conditions at the site of any unusual nature, different materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the Contract. The District will promptly investigate the conditions, and if it finds that the conditions do materially so differ, or do involve hazardous waste, and cause a decrease or increase in the contractor's cost of, or the time required for, performance of any part of the work shall issue a change in accordance with Article 9 of these Construction Provisions. In the event that a dispute arises between the District and the Contractor whether the conditions materially differ, or involve hazardous waste, or cause a decrease or increase in the Contractors cost of, or time required for, performance of any part of the Work, the Contractor shall not be excused from any scheduled completion date provided for in the Contract, but shall proceed with all work to be performed under the Contract. The Contractor shall retain any and all rights provided either by contract or by law which pertain to the resolution of disputes and protests between the contracting parties.

### **5.3 Supervision and Construction Procedures.**

**5.3.1 Supervision of the Work.** The Contractor shall supervise and direct performance of the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for, and have control over, construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract Documents, unless Contract Documents give other specific instructions concerning these matters. The Contractor shall be responsible for inspection of completed or partially completed portions of Work to determine that such portions are in proper condition to receive subsequent Work. The Contractor's Site Supervisor shall be present on site at all times while work by the contractor, subcontractor or lower tier subcontractor is taking place and shall submit Daily Reports to the Program Manager on a daily basis.

**5.3.2 Responsibility for the Work.** The Contractor shall be responsible to the District for acts and omissions of the Contractor's employees, Subcontractors and their agents and employees, and all other persons performing any portion of the Work under a contract with the Contractor. The Contractor shall not be relieved of the obligation to perform the Work in accordance with the Contract Documents either by activities or duties of the Program Manager, District's Inspector or the Architect in the Architect's administration of the Contract, or by tests, inspections or approvals required or performed by persons other than the Contractor.

**5.3.3 Surveys.** The Contractor shall prepare or cause to be prepared all detailed surveys necessary for performance of the Work, including without limitation, slope stakes, points, lines and elevations. The Contractor shall be responsible for the establishment, location, maintenance and preservation of all benchmarks, reference points and stakes for the Work. The cost of any surveys and the establishment, location, maintenance and preservation of benchmarks, reference points and stakes shall be included within the GMP. The Contractor shall be solely responsible for all loss or costs resulting from the loss, destruction, disturbance or damage of benchmarks, reference points or stakes.

**5.3.4 Construction Utilities.** The District will provide, without charge to the Contractor, [electrical power](#), domestic water, heating hot water and chilled water necessary to complete the Work, provided that the Contractor shall be responsible, without adjustment of the Contract Time or the GMP to install and maintain all necessary temporary distributions to the Site as necessary to perform the Work and to remove the same upon completion of the Work. The foregoing notwithstanding, if the District reasonably determines that the Contractor or any of the Subcontractors are misusing or wasting services provided by the District, the District may charge the Contractor reasonable utility rates for the services provided. Except as expressly provided for herein, the Contractor shall be solely responsible for obtaining all other utility services necessary for performance and completion of the Work.

**5.3.5 Existing Utilities; Removal, Relocation and Protection.** In accordance with California Government Code §4215, the District shall assume the responsibility for the timely removal, relocation, or protection of existing main or trunkline utility facilities located on the Site, which are not identified in the Drawings, Specifications or other Contract Documents. Contractor shall be compensated for the costs of locating, repairing damage not due to the Contractor's failure to exercise reasonable care, and removing or relocating such utility facilities not indicated in the Drawings, Specifications and other Contract Documents with reasonable accuracy, and for equipment on the Site necessarily idled during such work. Contractor shall not be assessed Liquidated Damages for delay in completion of the Work when such delay is caused by the failure of the District or the District of the utility to provide for removal or relocation of such utility facilities. Nothing in this Article 5.3.5 shall be deemed to require the District to indicate the presence of existing service laterals or appurtenances whenever the presence of such utilities on the Site can be inferred from the presence of other visible facilities, such as buildings, meters and junction boxes, on or adjacent to the Site. If the Contractor encounters utility facilities not identified by the District in the Drawings, Specifications, or other Contract Documents, the Contractor shall immediately notify, in writing, the District, the District's inspector, the Architect, the Program Manager and the utility owner. In the event that such utility facilities are owned by a public utility, the public utility shall have the sole discretion to perform repairs or relocation work or permit the Contractor to do such repairs or relocation work at a reasonable price.

## **5.4 Labor and Materials.**

**5.4.1 Payment for Labor, Materials and Services.** Unless otherwise provided in the Contract Documents, the Contractor shall provide and pay for labor, materials, equipment, tools, Construction Equipment and machinery, water, heat, utilities, transportation, and other facilities and services necessary for proper execution and completion of the Work, whether temporary or permanent and whether or not incorporated in the Work.

**5.4.2 Employee Discipline.** The Contractor shall enforce strict discipline and good order among the Contractor's employees, the employees of any Subcontractor or Sub-subcontractor, and all other persons performing any part of the Work at the Site. The Contractor shall not permit employment of unfit persons or persons not skilled in tasks assigned to them. The Contractor shall remove from the site and direct any Subcontractor or Sub-subcontractor to remove from the site any person deemed by the District to be unfit or incompetent to perform Work and thereafter, the Contractor shall not employ nor permit the employment of such person for performance of any part of the

Work without the prior written consent of the District, which consent may be withheld in the reasonable discretion of the District.

**5.4.3 Contractor's Staff.** The Contractor shall employ a competent superintendent and all necessary assistants who shall be in attendance at the Site at all times during performance of the Work. The Project Manager and superintendent shall represent the Contractor and communications given to the superintendent or the Contractor's Project Manager shall be binding as if given to the Contractor. The Contractor shall remove the Superintendent, Project Manager or their respective assistants if they are deemed, in the sole reasonable judgment of the District, to be unfit, incompetent or incapable of performing the functions assigned to them. In such event, the District shall have the right to approve of the replacement Project Manager, superintendent or assistant.

**5.4.4 Prohibition on Harassment.**

**5.4.4.1 District's Policy Prohibiting Harassment.** The District is committed to providing a campus and workplace free of sexual harassment and harassment based on factors such as race, color, religion, national origin, ancestry, age, medical condition, marital status, disability or veteran status. Harassment includes without limitation, verbal, physical or visual conduct which creates an intimidating, offensive or hostile environment such as racial slurs; ethnic jokes; posting of offensive statements, posters or cartoons or similar conduct. Sexual harassment includes without limitation the solicitation of sexual favors, unwelcome sexual advances, or other verbal, visual or physical conduct of a sexual nature.

**5.4.4.2 Contractor's Adoption of Anti-Harassment Policy.** Contractor shall adopt and implement all appropriate and necessary policies prohibiting any form of discrimination in the workplace, including without limitation harassment on the basis of any classification protected under local, state or federal law, regulation or policy. Contractor shall take all reasonable steps to prevent harassment from occurring, including without limitation affirmatively raising the subject of harassment among its employees, expressing strong disapproval of any form of harassment, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment and informing complainants of the outcome of an investigation into a harassment claim. Contractor shall require that any Subcontractor or Sub-subcontractor performing any portion of the Work to adopt and implement policies in conformity with this Article 5.4.4.

**5.4.4.3 Prohibition on Harassment at the Site.** Contractor shall not permit any person, whether employed by Contractor, a Subcontractor, Sub-subcontractor, or any other person or entity, performing any Work at or about the Site to engage in any prohibited form of harassment. Any such person engaging in a prohibited form of harassment directed to any individual performing or providing any portion of the Work at or about the Site shall be subject to appropriate sanctions in accordance with the anti-harassment policy adopted and implemented pursuant to Article 5.4.4.2 above. Any person, performing or providing Work on or about the Site engaging in a prohibited form of harassment directed to any student, faculty member or staff of the District or directed to any other person on or about the Site shall be subject to immediate removal and shall be prohibited thereafter



from providing or performing any portion of the Work. Upon the District's receipt of any notice or complaint that any person employed directly or indirectly by Contractor in performing or providing the Work has engaged in a prohibited form of harassment, the District will promptly undertake an investigation of such notice or complaint. In the event that the District, after such investigation, reasonably determines that a prohibited form of harassment has occurred, the District shall promptly notify the Contractor of the same and direct that the person engaging in such conduct be immediately removed from the Site. Unless the District's determination that a prohibited form of harassment has occurred is grossly negligent or without reasonable cause, District shall have no liability for directing the removal of any person determined to have engaged in a prohibited form of harassment nor shall the GMP or the Contract Time be adjusted on account thereof. Contractor and the Surety shall defend, indemnify and hold harmless the District and its employees, officers, board of trustees, agents, and representatives from any and all claims, liabilities, judgments, awards, actions or causes of actions which arise out of, or pertain in any manner to: (i) the assertion by any person dismissed from performing or providing work at the direction of the District pursuant to this Article 5.4.4.3; or (ii) the assertion by any person that any person directly or indirectly under the employment or direction of the Contractor has engaged in a prohibited form of harassment directed to or affecting such person. The obligations of the Contractor and the Surety under the preceding sentence are in addition to, and not in lieu of, any other obligation of defense, indemnity and hold harmless whether arising under the Contract Documents, at law or otherwise; these obligations survive completion of the Work or the termination of the Contract.

**5.5 Taxes.** The Contractor shall pay, without adjustment of the GMP, all sales, consumer, use and other taxes for the Work or portions thereof provided by the Contractor under the Contract Documents.

**5.6 Permits, Fees and Notices; Compliance With Laws.**

**5.6.1 Payment of Permits, Fees.** Except as otherwise provided in the Contract Documents, the District shall secure and pay for the necessary approvals, easements, assessments and charges required for construction, use or occupancy of permanent structures or for permanent changes in existing facilities which relate to the Work of the Contractor under the Contract Documents. If permits and fees are designated as the responsibility of the Contractor under the Contract Documents, the Contractor shall be solely responsible for obtaining the same; the cost of such permits or fees and any costs incurred by the Contractor in obtaining such permits shall be included within the GMP.

**5.6.2 Compliance With Laws.** The Contractor shall comply with and give notices required by laws, ordinances, rules, regulations and other orders of public authorities bearing on performance of the Work.

**5.6.3 Notice of Variation From Laws.** If the Contractor knows, or has reason to believe, that any portion of the Contract Documents are at variance with applicable laws, statutes, ordinances, building codes, regulations or rules, the Contractor shall promptly notify the Program Manager, the Architect and the District's Inspector, in writing, of the same. If the Contractor performs Work knowing, or with reasonable diligence should have known, it to be contrary to laws, statutes, ordinances, building codes, rules or

regulations applicable to the Work without such notice to the Architect and the District's Inspector, the Contractor shall assume full responsibility for such Work and shall bear the attributable costs arising or associated therefrom, including without limitation, the removal, replacement or correction of the same.

## **5.7 Submittals.**

**5.7.1 Purpose of Submittals.** The purpose for submission of Submittals is to demonstrate, for those portions of the Work for which Submittals are required, the manner in which the Contractor proposes to provide or incorporate such item of the Work in conformity with the information given and the design concept expressed in the Contract Documents.

### **5.7.2 Contractor's Submittals.**

**5.7.2.1 Prompt Submittals.** The Contractor shall review, approve and submit to the Architect or such other person or entity designated by the District, the number of copies of Submittals required by the Contract Documents. All submittals sent to the Architect shall be copied to the Program Manager by the Contractor. All Submittals required by the Contract Documents shall be prepared, assembled and submitted by the Contractor to the Architect within the time frames set forth in the Submittal Schedule incorporated and made a part of the Approved Construction Schedule prepared and submitted by the Contractor pursuant to Article 8 of these Construction Provisions. Contractor's submission of Submittals in conformity with the Submittal Schedule is a material consideration of the Contract. Notwithstanding Contractor's submission of all required Submittals in accordance with the Submittal Schedule, in the event that the District, Program Manager or the Architect reasonably determines that all or any portion of such resubmittals fail to comply with the requirements of Articles 5.7.2.2, 5.7.2.3 and 5.7.2.4 of these Construction Provisions and/or such resubmittals are not otherwise complete and accurate so as to require a second re-submission, Contractor shall bear all costs associated with the review and approval of resubmitted Submittals, including without limitation Architect's fees incurred in connection therewith. In the event of the District's assessment of costs and expenses incurred to review incomplete or inaccurate Submittals, the District may deduct the same from any portion the GMP then or thereafter due the Contractor. Submittals not required by the Contract Documents or which do not otherwise conform with the requirements of the Contract Documents may be returned by the Architect without action. No increase in the Contract Time or the GMP shall be granted to the Contractor on account of its failure to make timely submission of any Submittal. Contractor shall maintain a current log of all submittals required by contract, actual and scheduled dates for submission and the status of each.

**5.7.2.2 Approval of Subcontractor Submittals.** All Submittals prepared by Subcontractors, of any tier, Material Suppliers, manufacturers or distributors shall bear the written approval of the Contractor thereto prior to submission to the Architect for review. Any Submittal not bearing the Contractor's written approval shall be subject to return to the Contractor for re-submittal in conformity herewith, with the same being deemed to not have been submitted. Any delay, impact or cost associated therewith shall be the sole and exclusive

responsibility of the Contractor without adjustment to the Contract Time or the GMP.

**5.7.2.3 Verification of Submittal Information.** By approving and submission of Submittals, the Contractor represents to the District and Architect that the Contractor has determined and verified materials, field measurements, field construction criteria, catalog numbers and similar data related thereto and has checked and coordinated the information contained within such Submittals with the requirements of the Work and of the Contract Documents.

**5.7.2.4 Information Included in Submittals.** All Submittals shall be accompanied by a written transmittal or other writing by the Contractor providing an identification of the portion of the Drawings or the Specifications pertaining to the Submittal, with Specification Section and applicable paragraphs identified for ease of reference along with the following information: (i) date of submission; (ii) project name; (iii) name of submitting Subcontractor; and (iv) if applicable, the revision number. The foregoing information is in addition to, and not in lieu of, any other information required for the Architect's review, evaluation and acceptance of the Contractor's Submittals.

**5.7.2.5 Contractor Responsibility for Deviations.** The Contractor shall not be relieved of responsibility for correcting deviations from the requirements of the Contract Documents by the Architect's acceptance of Submittals unless the Contractor has specifically informed the Architect in writing of such deviation at the time of submission of the Submittal and the Architect has given written approval to the specific deviation. The Contractor shall not be relieved of responsibility for errors or omissions in Submittals by the Architect's acceptance thereof.

**5.7.2.6 No Performance of Work Without Approval.** The Contractor shall perform no portion of the Work requiring the Architect's review and acceptance of Submittals until the Architect has completed its review and indicated acceptance of such Submittal [without assuming full liability for any subsequent correction or replacement](#). The Contractor shall not perform any portion of the Work forming a part of a Submittal or which is affected by a related Submittal until the entirety of the Submittal or other related Submittal has been fully approved. Such Work shall be in accordance with approved Submittals and other applicable portions of the Contract Documents.

**5.7.3 Architect Review of Submittals.** The purpose of the Architect's review of Submittals and the time for the Architect's return of Submittals to the Contractor shall be as set forth elsewhere in the Contract Documents. If the Architect returns a Submittal as rejected or requiring correction(s) and re-submission, the Contractor, so as not to delay the progress of the Work, shall promptly thereafter resubmit a Submittal conforming with the requirements of the Contract Documents; the resubmitted Submittal shall indicate the portions thereof modified in order to obtain the Architect's acceptance. When professional certification of performance criteria of materials, systems or equipment is required by the Contract Documents, the Architect shall be entitled to rely upon the accuracy and completeness of such calculations and certifications accompanying Submittals. The Architect's review of the Submittals is for the limited purposes described in the Contract Documents.

**5.7.4 Deferred Approval Items.** In the event that any portion of the Work is designated in the Contract Documents as a "Deferred Approval" item, Contractor shall be solely and exclusively responsible for the preparation of Submittals for such item(s) in a timely manner so as not to delay or hinder the completion of the Work within the Contract Time. Deferred approval submittals will be reviewed by the appropriate engineer of record and may require corrections and resubmission prior to submission to the authority having jurisdiction over the deferred approval submittal.

## **5.8 Materials and Equipment.**

**5.8.1 Specified Materials, Equipment.** References in the Contract Documents to any specific article, device, equipment, product, material, fixture, patented process, form, method or type of construction, by name, make, trade name, or catalog number, with or without the words "or equal" shall be deemed to establish a minimum standard of quality or performance, and shall not be construed as limiting competition.

**5.8.2 Approval of Substitutions or Alternatives.** Public Contract Code Section 3400 states: “(a) The Legislature finds and declares that it is the intent of this section to encourage contractors and manufacturers to develop and implement new and ingenious materials, products, and services that function as well, in all essential respects, as materials, products, and services that are required by a contract, but at a lower cost to taxpayers. (b) No agency of the state nor any political subdivision, municipal corporation, or district, nor any public officer or person charged with the letting of contracts for the construction, alteration, or repair of public works, shall draft or cause to be drafted specifications for bids, in connection with the construction, alteration, or repair of public works, (1) in a manner that limits the bidding, directly or indirectly, to any one specific concern, or (2) calling for a designated material, product, thing, or service by specific brand or trade name unless the specification is followed by the words “or equal” so that bidders may furnish any equal material, product, thing or service. In applying this section, the specifying agency shall, if aware of an equal product manufactured in this state, name that product in the specification. Specifications shall provide a period of time prior to or after, or prior to and after, the award of the contract for submission of data substantiating a request for a substitution of “an equal” item. If no time period is specified, data may be submitted any time within 35 days after the award of the contract. (c) Subdivision (b) is not applicable if the awarding authority, or its designee, makes a finding that is described in the invitation for bids or request for proposals that a particular material, product, thing, or service is designated by specific brand or trade name for either of the following purposes: (1) In order that a field test or experiment may be made to determine that product’s suitability for future use; (2) In order to match other products in use on a particular public improvement either completed or in the course of completion; (3) In order to obtain a necessary item that is only available from one source; (4) (A) In order to respond to an emergency declared by a local agency, but only if the declaration is approved by a four-fifths vote of the governing board of the local agency issuing the invitation for bid or request for proposals. (B) In order to respond to an emergency declared by the state, a state agency, or political subdivision of the state, but only if the facts setting forth the reasons for the finding of the emergency are contained in the public records of the authority issuing the invitation for bid or request for proposals.” Unless otherwise specified the Contractor may propose to furnish alternatives or substitutes for a particular item specified in the Contract Documents, provided that the Contractor provides advance written notice to the District, Program Manager and the Architect of such proposed substitution or alternative and certifies to the District and

Architect that the quality, performance capability and functionality (including visual and/or aesthetic effect) of the proposed alternative or substitute will meet or exceed the quality, performance capability and functionality of the item or process specified, and must demonstrate to the District and Architect that the use of the substitution or alternative is appropriate and will not delay completion of the Work or result in an increase to the GMP. The Contractor shall submit engineering, construction, dimension, visual, aesthetic and performance data to the District and Architect to permit its proper evaluation of the proposed substitution or alternative. If requested by the District or Architect, Contractor shall promptly furnish any additional information or data regarding a proposed substitution or alternative which the District or Architect deems reasonably necessary for the evaluation of the proposed substitution or alternative. The Contractor shall not provide, furnish or install any substitution or alternative without the District's and Architect's prior approval of the same; any alternative or substitution installed or incorporated into the Work without first obtaining the District's and Architect's approval of the same shall be subject to removal and replacement pursuant to Article 13 hereof. The cost of such removal and replacement shall not be charged against the Contractor's Contingency Fund. The District's and Architect's decision shall be final regarding the approval or disapproval of the Contractor's proposed substitutions or alternatives. The District's and Architect's approval of Contractor's proposed substitutions or alternatives shall not otherwise relieve the Contractor from complying with the requirements of the Contract Documents. Neither the Contract Time nor the GMP shall be increased on account of any substitution or alternative proposed by the Contractor and which is approved by the District and Architect; provided, however, that in the event a substitution or alternative is approved by the District and Architect and purchase, fabrication and/or installation or such approved substitution or alternative shall be less expensive than the originally specified item, the actual cost savings realized by the Contractor's furnishing and/or installation of such approved substitution or alternative shall be credited to the Contractor's Contingency Fund in accordance with Article 2.8 of these Construction Provisions. The Contractor shall be solely responsible for all costs and fees of the District, the Architect, of the Architect's consultant(s) and/or governmental agencies to review and/or approve any proposed substitution or alternative. The Contractor shall be solely responsible for any increase in the cost of any approved substitution or alternative or any Work affected by such alternative or substitution. The foregoing notwithstanding, all requests for the District's and Architect's review and approval of any proposed substitution or alternative and all engineering, construction, dimension and performance data substantiating the equivalency of the proposed substitution or alternative shall be submitted by Contractor not later than thirty-five (35) days following the date of the District's award of the Contract to Contractor by action of the District's Board of Trustees; any request for approval of proposed alternatives or substitutions submitted thereafter may be rejected summarily. The foregoing process and time limits shall apply to any proposed substitution or alternative regardless of whether the substitute or alternate item is to be provided, furnished or installed by Contractor, any Subcontractor, any Sub-Subcontractor, Material Supplier or Manufacturer.

**5.8.3 Placement of Material and Equipment Orders.** Contractor shall, after award of the Contract, promptly and timely place all orders for materials and/or equipment necessary for completion of the Work so that delivery of the same shall be made without delay or interruption to the timely completion of the Work. Contractor shall require that any Subcontractor or Sub-Subcontractor performing any portion of the Work similarly place orders for all materials and/or equipment to be furnished by any such Subcontractor or Sub-Subcontractor in a prompt and timely manner so that delivery of the same shall be



made without delay or interruption to the timely completion of the Work. Upon request of the Program Manager, the Contractor shall furnish reasonably satisfactory written evidence of the placement of orders for materials and/or equipment necessary for completion of the Work, including without limitation, purchase orders for materials and/or equipment to be provided, furnished or installed by any Subcontractor or Sub-Subcontractor.

**5.8.4 District's Right to Place Orders for Materials and/or Equipment.** Notwithstanding any other provision of the Contract Documents, in the event that the Contractor shall, upon request of the Program Manager, fail or refuse, for any reason, to provide reasonably satisfactory written evidence of the placement of orders for materials and/or equipment necessary for completion of the Work, or should the District determine, in its sole and reasonable discretion, that any orders for materials and/or equipment have not been placed in a manner so that such materials and/or equipment will be delivered to the Site so the Work can be completed without delay or interruption, the District shall have the right, but not the obligation, to place such orders on behalf of the Contractor. In the event that the District shall exercise the right to place orders for materials and/or equipment pursuant to the foregoing, the District's conduct in that regard shall not be deemed to be an exercise, by the District, of any control over the means, methods, techniques, sequences or procedures for completion of the Work, all of which remain the responsibility and obligation of the Contractor. Notwithstanding the right of the District to place orders for materials and/or equipment pursuant to the foregoing, the election of the District to exercise, or not to exercise, such right shall not relieve the Contractor from any of Contractor's obligations under the Contract Documents, including without limitation, completion of the Work within the Contract Time and for the GMP. If the District exercises the right hereunder to place orders for materials and/or equipment on behalf of Contractor pursuant to the foregoing, Contractor shall reimburse the District for all costs and fees incurred by the District in placing such orders; such costs and fees may be deducted by the District from the GMP then or thereafter due the Contractor.

## **5.9 Safety.**

**5.9.1 Safety Programs.** At least fifteen (15) calendar days prior to commencement of the Work at the site, the Contractor shall prepare and submit to the Program Manager, for review, a written safety plan. The Contractor shall revise the safety plan as necessary to obtain the Program Manager's acceptance of the plan for record purposes only. The Contractor shall be solely responsible for initiating, maintaining and supervising all safety programs required by applicable law, ordinance, regulation or governmental orders in connection with the performance of the Contract, or otherwise required by the type or nature of the Work. The Contractor's safety program shall include all actions and programs necessary for compliance with California or federally statutorily mandated workplace safety programs, including without limitation, compliance with the California Drug Free Workplace Act of 1990 (California Government Code §§8350 et seq.). Without limiting or relieving the Contractor of its obligations hereunder, the Contractor shall require that its Subcontractors similarly initiate and maintain all appropriate or required safety programs.

**5.9.2 Safety Precautions.** The Contractor shall be solely responsible for initiating and maintaining reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to: (i) employees on the Work and other persons who may be affected thereby; (ii) the Work and materials and equipment to be incorporated

therein, whether in storage on or off the site, under care, custody or control of the Contractor or the Contractor's Subcontractors or Sub-subcontractors; and (iii) other property or items at the site of the Work, or adjacent thereto, such as trees, shrubs, lawns, walks, pavements, roadways, structures and utilities not designated for removal, relocation or replacement in the course of construction.

**5.9.3 Safety Signs, Barricades.** The Contractor shall erect and maintain, as required by existing conditions and conditions resulting from performance of the Contract, reasonable safeguards for safety and protection of property and persons, including, without limitation, posting danger signs and other warnings against hazards, promulgating safety regulations and notifying owners and users of adjacent sites and utilities.

**5.9.4 Safety Notices.** The Contractor shall give or post all notices required by applicable law and comply with applicable laws, ordinances, rules, regulations and lawful orders of public authorities bearing on safety of persons or property or their protection from damage, injury or loss.

**5.9.5 Safety Coordinator.** The Contractor shall designate a responsible member of the Contractor's organization at the Site whose duty shall be the prevention of accidents and the implementation and maintenance safety precautions and programs. This person shall be the Contractor's superintendent unless otherwise designated by the Contractor in writing to the District's Inspector, Program Manager and the Architect.

**5.9.6 Emergencies.** In an emergency affecting safety of persons or property, the Contractor shall act, to prevent threatened damage, injury or loss.

**5.9.7 Hazardous Materials.**

**5.9.7.1 Use of Hazardous Materials.** In the event that the Contractor, any Subcontractor or anyone employed directly or indirectly by them shall use, at the Site, or incorporate into the Work, any material or substance deemed to be hazardous or toxic under any law, rule, ordinance, regulation or interpretation thereof (collectively "Hazardous Materials"), the Contractor shall comply with all laws, rules, ordinances or regulations applicable thereto and shall exercise all necessary safety precautions relating to the use, storage or disposal thereof.

**5.9.7.2 Prohibition on Use of Asbestos Construction Building Materials ("ACBMs").** Notwithstanding any provision of the Drawings or the Specifications to the contrary, it is the intent of the District that ACBMs not be used or incorporated into any portion of the Work. In the event that any portion of the Work depicted in the Drawings or the Specifications shall require materials or products which the Contractor knows, or should have known with reasonably diligent investigation, to contain ACBMs, Contractor shall promptly notify the Architect, the Program Manager and the District's Inspector of the same so that an appropriate alternative can be made in a timely manner so as not to delay the progress of the Work. Contractor warrants to the District that there are no materials or products used or incorporated into the Work which contain ACBMs. Whether before or after completion of the Work, if it is discovered that any product or material forming a part of the Work or incorporated into the Work contains ACBMs, the Contractor shall at its sole cost and expense remove such

product or material in accordance with any laws, rules, procedures and regulations applicable to the handling, removal and disposal of ACBMs and to replace such product or material with non-ACBM products or materials and to return the affected portion(s) of the Work to the finish condition depicted in the Drawings and Specifications relating to such portion(s) of the Work. The cost of such work shall not be charged against the Contractor's Contingency Fund. Contractor's obligations under the preceding sentence shall survive the termination of the Contract, the warranty period provided under the Contract Documents, the Contractor's completion of the Work or the District's acceptance of the Work. In the event that the Contractor shall fail or refuse, for any reason, to commence the removal and replacement of any material or product containing ACBMs forming a part of, or incorporated into the Work, within ten (10) days of the date of the District's written notice to the Contractor of the existence of ACBM materials or products in the Work, the District may thereafter proceed to cause the removal and replacement of such materials or products in any manner which the District determines to be reasonably necessary and appropriate; all costs, expenses and fees, including without limitation fees and costs of consultants and attorneys, incurred by the District in connection with such removal and replacement shall be the responsibility of the Contractor and the Contractor's Performance Bond Surety. The District will deduct such costs from the GMP.

**5.9.7.3 Disposal of Hazardous Materials.** Contractor shall be solely and exclusively responsible for the disposal of any Hazardous Materials on or about the Contractor's obligations hereunder shall include without limitation, the transportation and disposal of any Hazardous Materials in strict conformity with any and all applicable laws, regulations, orders, procedures or ordinances. [Contractor to provide proper notice to the District prior to disposal.](#)

## **5.10 Maintenance of Documents.**

**5.10.1 Documents at Site.** The Contractor shall maintain at the Site: (i) one record copy of the Drawings, Specifications and all amendments thereto; (ii) Change Orders approved by the District and all other modifications to the Contract Documents; (iii) Submittals reviewed by the Architect; (iv) Record Drawings; (v) Material Safety Data Sheets ("MSDS") accompanying any materials, equipment or products delivered or stored at the Site or incorporated into the Work; and (vi) all building and other codes or regulations applicable to the Work, including without limitation, Title 24, Parts 1 and 2 of the California Code of Regulations. During performance of the Work, all documents maintained by Contractor at the Site shall be available to the District, the Program Manager, the Architect, the District's Inspector and DSA for review, inspection or reproduction. Upon completion of the Work, all documents maintained at the Site by the Contractor pursuant to the foregoing shall be assembled and transmitted to the Architect for delivery to the District.

**5.10.2 Maintenance of Record Drawings.** During its performance of the Work, the Contractor shall maintain Record Drawings consisting of a set of the Drawings which are marked to indicate all field changes made to adapt the Work depicted in the Drawings to field conditions, changes resulting from Change Orders, substitutions, and all concealed or buried installations, including without limitation, piping, conduit and utility services. All buried or concealed items of Work shall be completely and accurately marked and



located on the Record Drawings. The Record Drawings shall be clean and all changes, corrections and dimensions shall be marked in a neat and legible manner in a contrasting color. Record Drawings relating to the Structural, Mechanical, Electrical and Plumbing portions of the Work shall indicate without limitation, circuiting, wiring sizes, equipment/member sizing and shall depict the entirety of the as built conditions of such portions of the Work. The Record Drawings shall be continuously maintained by the Contractor during the performance of the Work. At any time during the Contractor's performance of the Work, upon the request of the District, the Program Manager or the Architect, the Contractor shall make the Record Drawings maintained here under available for the District's review and inspection. Review and inspection of the Record Drawings during the Contractor's performance of the Work, pursuant to the preceding, shall be only for the purpose of generally verifying that Contractor is continuously maintaining the Record Drawings in a complete and accurate manner; any such inspection or review shall not be deemed to be the District's approval or verification of the completeness or accuracy thereof. The failure or refusal of the Contractor to continuously maintain complete and accurate Record Drawings or to make available the Record Drawings for inspection and review by the District may be deemed by the District to be Contractor's default of a material obligation hereunder. Without waiving, restricting or limiting any other right or remedy of the District for the Contractor's failure or refusal to continuously maintain the Record Drawings, the District may, upon reasonably determining that the Contractor has not, or is not, continuously maintaining the Record Drawings in a complete and accurate manner, take appropriate action to cause the continuous maintenance of complete and accurate Record Drawings, in which event all fees and costs incurred or associated with such action shall be charged to the Contractor and the District may deduct the amount of such fees and costs from any portion of the GMP then or thereafter due the Contractor. The Contractor shall first deliver the Record Drawings to the Architect for review. Once they are accepted the Drawings are to be delivered to the District. In accordance with Article 9.4.2 of these Construction Provisions, prior to receipt of the Final Payment, the Record Drawings are to be received by the District.

**5.11 Use of Site.** The Contractor shall confine operations at the Site to areas permitted by law, ordinances or permits, subject to any restrictions or limitations set forth in the Contract Documents. The Contractor shall not unreasonably encumber the Site or adjoining areas with materials or equipment. The Contractor shall be solely responsible for providing security at the Site with all such costs included in the GMP. The District shall at all times have access to the Site.

**5.12 Clean-Up.** The Contractor shall at all times keep the Site and all adjoining areas free from the accumulation of any waste material or rubbish caused or generated by performance of the Work. Without limiting the generality of the foregoing, Contractor shall maintain the Site in a "rake-clean" standard on a daily basis. In the event that the Work of the Contract Documents includes painting and/or the installation of floor covering, prior to commencement of any painting operations or the installation of any flooring covering, the area and adjoining areas of the Site where paint is to be applied or floor covering is to be installed shall be in a "broom-clean" condition. Prior to completion of the Work, Contractor shall remove from the Site all rubbish, waste material, excess excavated material, tools, Construction Equipment, machinery, surplus material and any other items which are not the property of the District under the Contract Documents. Upon completion of the Work, the Site and all adjoining areas shall be left in a neat and broom clean condition satisfactory to District. The District's Inspector or Program Manager shall be authorized to direct the Contractor's clean-up obligations hereunder. If the Contractor

fails to clean up as provided for in the Contract Documents, the District may do so, and all costs incurred in connection therewith shall be charged to the Contractor; the District may deduct such costs from any portion of the GMP then or thereafter due the Contractor.

**5.13 Access to the Work.** The Contractor shall provide the DSA, the District, the Program Manager, the District's Inspector, the Architect and the Architect's consultant(s) with access to the Work, whether in place, preparation and progress and wherever located.

**5.14 Facilities and Information for the District's Inspector.**

**5.14.1 Information to District's Inspector.** The Contractor shall furnish the District's Inspector access to the Work for obtaining such information as may be necessary to keep the District's Inspector fully informed respecting the progress, quality and character of the Work and materials, equipment or other items incorporated therein.

**5.15 Patents and Royalties.** The Contractor and the Surety shall defend, indemnify and hold harmless the District and its agents, employees and officers from any claim, demand or legal proceeding arising out of or pertaining, in any manner, to any actual or claimed infringement of patent rights in connection with performance of the Work under the Contract Documents.

**5.16 Cutting and Patching.** The Contractor shall be responsible for cutting, fitting or patching required to complete the Work or to make the component parts thereof fit together properly. The Contractor shall not damage or endanger any portion of the Work, or the fully or partially completed construction of the District or separate contractors by cutting, patching, excavation or other alteration. The Contractor shall not cut, patch or otherwise alter the construction by the District or separate contractor without the prior written consent of the District or separate contractor thereto, which consent shall not be unreasonably withheld. The Contractor shall not unreasonably withhold consent to the request of the District or separate contractor to cut, patch or otherwise alter the Work.

**5.17 Encountering of Hazardous Materials.** In the event the Contractor encounters Hazardous Materials at the Site which have not been rendered harmless or for which there is no provision in the Contract Documents for containment, removal, abatement or handling of such Hazardous Materials, the Contractor shall immediately stop the Work in the affected area, but shall diligently proceed with the Work in all other unaffected areas. Upon encountering such Hazardous Materials, the Contractor shall immediately notify the District's Inspector and Program Manager, in writing, of such condition. The Contractor shall proceed with the Work in such affected area only after such Hazardous Materials have been rendered harmless, contained, removed or abated. In the event such Hazardous Materials are encountered, the Contractor shall be entitled to an adjustment of the Contract Time to the extent that the Work is stopped and Substantial Completion of the Work is affected thereby. In no event shall there be an increase in the GMP solely on account of the Contractor encountering such Hazardous Materials.

**5.18 Wage Rates; Employment of Labor.**

**5.18.1 Determination of Prevailing Rates.** Pursuant to the provisions of Division 2, Part 7, Chapter 1, Article 2 of the California Labor Code at §§1770 et seq., the District has obtained from the Director of the Department of Industrial Relations the general prevailing rate of per diem wages and the prevailing rate for holiday and overtime work

in the locality in which the Work is to be performed. Holidays shall be as defined in the collective bargaining agreement applicable to each particular craft, classification or type of worker employed under the Contract. Per diem wages include employer payments for health and welfare, pensions, vacation, travel time and subsistence pay as provided in California Labor Code §1773.8, apprenticeship or other training programs authorized by California Labor Code §3093, and similar purposes when the term "per diem wages" is used herein. Holiday and overtime work, when permitted by law, shall be paid for at the rate of at least one and one-half (1 1/2) times the above specified rate of per diem wages, unless otherwise specified. The Contractor shall post, at appropriate and conspicuous locations on the Site, a schedule showing all determined general prevailing wage rates.

**5.18.2 Payment of Prevailing Rates.** There shall be paid each worker of the Contractor, or any Subcontractor, of any tier, engaged in the Work, not less than the general prevailing wage rate, regardless of any contractual relationship which may be alleged to exist between the Contractor or any Subcontractor, of any tier, and such worker.

**5.18.3 Prevailing Rate Penalty.** The Contractor shall, as a penalty, forfeit Fifty Dollars (\$50.00) to the District for each calendar day or portion thereof, for each worker paid less than the prevailing rates as determined by the Director of the Department of Industrial Relations for such work or craft in which such worker is employed for the Work by the Contractor or by any Subcontractor, of any tier, in connection with the Work. Pursuant to California Labor Code §1775, the difference between prevailing wage rates and the amount paid to each worker each calendar day, or portion thereof, for which each worker paid less than the prevailing wage rate, shall be paid to each worker by the Contractor.

**5.18.4 Payroll Records.** Pursuant to California Labor Code §1776, the Contractor and each Subcontractor, of any tier, shall keep an accurate payroll record, showing the name, address, social security number, work classification, straight time and overtime hours worked each day and week, and the actual per diem wages paid to each person employed for the Work. The payroll records shall be certified and available for inspection at all reasonable hours at the principal office of the Contractor on the following basis: (i) a certified copy of an employee's payroll record shall be made available for inspection or furnished to such employee or his/her authorized representative on request; (ii) a certified copy of all payroll records shall be made available for inspection or furnished upon request to the District, the Division of Labor Standards Enforcement and the Division of Apprenticeship Standards of the Department of Industrial Relations; (iii) a certified copy of payroll records shall be made available upon request to the public for inspection or copies thereof made; provided, however, that a request by the public shall be made through either the District, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement. If the requested payroll records have not been provided, the requesting party shall, prior to being provided the records, reimburse the cost of preparation by the Contractor, Subcontractors and the entity through which the request was made; the public shall not be given access to such records at the principal office of the Contractor; (iv) the Contractor shall file a certified copy of the payroll records with the entity that requested such records within ten (10) days after receipt of a written request; (v) any copy of records made available for inspection as copies and furnished upon request to the public or any public agency by the District, the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement shall be marked or obliterated in such a manner as to prevent disclosure of an individual's name, address and social security number. The name and address of the Contractor or any

Subcontractor, of any tier, performing a part of the Work shall not be marked or obliterated. The Contractor shall inform the District of the location of payroll records, including the street address, city and county and shall, within five (5) working days, provide a notice of a change or location and address. In the event of noncompliance with the requirements of this Article 5.18.4, the Contractor shall have ten (10) days in which to comply, subsequent to receipt of written notice specifying in what respects the Contractor must comply herewith. Should noncompliance still be evident after such 10-day period, the Contractor shall, as a penalty to the District, forfeit Twenty-Five Dollars (\$25.00) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated. Upon the request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement, such penalties shall be withheld from any portion of the GMP then or thereafter due the Contractor. The responsibility for compliance with the foregoing provisions.

#### **5.18.5 Hours of Work.**

**5.18.5.1 Limits on Hours of Work.** Pursuant to California Labor Code §1810, eight (8) hours of labor shall constitute a legal day's work. Pursuant to California Labor Code §1811, the time of service of any worker employed at any time by the Contractor or by a Subcontractor, of any tier, upon the Work or upon any part of the Work, is limited and restricted to eight (8) hours during any one calendar day and forty (40) hours during any one calendar week, except as hereafter provided. Notwithstanding the foregoing provisions, Work performed by employees of Contractor or any Subcontractor, of any tier, in excess of eight (8) hours per day and forty (40) hours during any one week, shall be permitted upon compensation for all hours worked in excess of eight (8) hours per day at not less than one and one-half (1-1/2) times the basic rate of pay.

**5.18.5.2 Penalty for Excess Hours.** The Contractor shall pay to the District a penalty of Twenty-five Dollars (\$25.00) for each worker employed on the Work by the Contractor or any Subcontractor, of any tier, for each calendar day during which such worker is required or permitted to work more than eight (8) hours in any calendar day and forty (40) hours in any one calendar week, in violation of the provisions of the California Labor Code, unless compensation to the worker so employed by the Contractor is not less than one and one-half (1-1/2) times the basic rate of pay for all hours worked in excess of eight (8) hours per day.

**5.18.5.3 Contractor Responsibility** Any Work performed by workers after regular working hours or on Sundays or other holidays shall be performed without adjustment to the GMP or any other additional expense to the District.

#### **5.18.6 Apprentices.**

**5.18.6.1 Employment of Apprentices.** Any apprentices employed to perform any of the Work shall be paid the standard wage paid to apprentices under the regulations of the craft or trade for which such apprentice is employed, and such individual shall be employed only for the work of the craft or trade to which such individual is registered. Only apprentices, as defined in California Labor Code §3077 who are in training under apprenticeship standards and written apprenticeship agreements under California Labor Code §§3070 et seq. are eligible to be employed for the Work. The employment and training of each

apprentice shall be in accordance with the provisions of the apprenticeship standards and apprentice agreements under which such apprentice is training.

**5.18.6.2 Apprenticeship Certificate.** When the Contractor or any Subcontractor, of any tier, in performing any of the Work employs workers in any Apprenticeable Craft or Trade, the Contractor and such Subcontractor shall apply to the Joint Apprenticeship Committee administering the apprenticeship standards of the craft or trade in the area of the site of the Work for a certificate approving the Contractor or such Subcontractor under the apprenticeship standards for the employment and training of apprentices in the area or industry affected, provided, however, that the approval as established by the Joint Apprenticeship Committee or Committees shall be subject to the approval of the Administrator of Apprenticeship. The Joint Apprenticeship Committee or Committees, subsequent to approving the Contractor or Subcontractor, shall arrange for the dispatch of apprentices to the Contractor or such Subcontractor in order to comply with California Labor Code §1777.5. The Contractor and Subcontractors shall submit contract award information to the applicable Joint Apprenticeship Committee, which shall include an estimate of journeyman hours to be performed under the Contract, the number of apprentices to be employed, and the approximate dates the apprentices will be employed. There shall be an affirmative duty upon the Joint Apprenticeship Committee or Committees, administering the apprenticeship standards of the crafts or trades in the area of the site of the Work, to ensure equal employment and affirmative action and apprenticeship for women and minorities. Contractors or Subcontractors shall not be required to submit individual applications for approval to local Joint Apprenticeship Committees provided they are already covered by the local apprenticeship standards.

**5.18.6.3 Ratio of Apprentices to Journeymen.** The ratio of Work performed by apprentices to journeymen, who shall be employed in the Work, may be the ratio stipulated in the apprenticeship standards under which the Joint Apprenticeship Committee operates, but in no case shall the ratio be less than one hour of apprentice work for each five hours of labor performed by a journeyman, except as otherwise provided in California Labor Code §1777.5. The minimum ratio for the land surveyor classification shall not be less than one apprentice for each five journeymen. Any ratio shall apply during any day or portion of a day when any journeyman, or the higher standard stipulated by the Joint Apprenticeship Committee, is employed at the site of the Work and shall be computed on the basis of the hours worked during the day by journeymen so employed, except for the land surveyor classification. The Contractor shall employ apprentices for the number of hours computed as above before the completion of the Work. The Contractor shall, however, endeavor, to the greatest extent possible, to employ apprentices during the same time period that the journeymen in the same craft or trade are employed at the Site. Where an hourly apprenticeship ratio is not feasible for a particular craft or trade, the Division of Apprenticeship Standards, upon application of a Joint Apprenticeship Committee, may order a minimum ratio of not less than one apprentice for each five journeymen in a craft or trade classification. The Contractor or any Subcontractor covered by this Article and California Labor Code §1777.5, upon the issuance of the approval certificate, or if it has been previously approved in such craft or trade, shall employ the number of apprentices or the ratio of



apprentices to journeymen stipulated in the apprenticeship standards. Upon proper showing by the Contractor that it employs apprentices in such craft or trade in the State of California on all of its contracts on an annual average of not less than one apprentice to each five journeymen, the Division of Apprenticeship Standards may grant a certificate exempting the Contractor from the 1-to-5 ratio as set forth in this Article and California Labor Code §1777.5. This Article shall not apply to contracts of general contractors, or to contracts of specialty contractors not bidding for work through a general or prime contractor, involving less than Thirty Thousand Dollars (\$30,000.00) or twenty (20) working days. The term "Apprenticeable Craft or Trade," as used herein shall mean a craft or trade determined as an Apprenticeable occupation in accordance with rules and regulations prescribed by the Apprenticeship Council.

**5.18.6.4 Exemption From Ratios.** The Joint Apprenticeship Committee shall have the discretion to grant a certificate, which shall be subject to the approval of the Administrator of Apprenticeship, exempting the Contractor from the 1-to-5 ratio set forth in this Article when it finds that any one of the following conditions are met: (i) unemployment for the previous three-month period in such area exceeds an average of fifteen percent (15%) or; (ii) the number of apprentices in training in such area exceeds a ratio of 1-to-5 in relation to journeymen, or; (iii) the Apprenticeable Craft or Trade is replacing at least one-thirtieth (1/30) of its journeymen annually through apprenticeship training, either on a statewide basis or on a local basis, or; (iv) if assignment of an apprentice to any Work performed under the Contract Documents would create a condition which would jeopardize such apprentice's life or the life, safety or property of fellow employees or the public at large, or if the specific task to which the apprentice is to be assigned is of such a nature that training cannot be provided by a journeyman. When such exemptions from the 1-to-5 ratio between apprentices and journeymen are granted to an organization which represents contractors in a specific trade on a local or statewide basis, the member contractors will not be required to submit individual applications for approval to local Joint Apprenticeship Committees, provided they are already covered by the local apprenticeship standards.

**5.18.6.5 Contributions to Trust Funds.** The Contractor or any Subcontractor, of any tier, who, performs any of the Work by employment of journeymen or apprentices in any Apprenticeable Craft or Trade and who is not contributing to a fund or funds to administer and conduct the apprenticeship program in any such craft or trade in the area of the site of the Work, to which fund or funds other contractors in the area of the site of the Work are contributing, shall contribute to the fund or funds in each craft or trade in which it employs journeymen or apprentices in the same amount or upon the same basis and in the same manner as the other contractors do, but where the trust fund administrators are unable to accept such funds, contractors not signatory to the trust agreement shall pay a like amount to the California Apprenticeship Council. The Division of Labor Standards Enforcement is authorized to enforce the payment of such contributions to such fund(s) as set forth in California Labor Code §227.

**Contractor's Compliance.** The responsibility of compliance with this Article for all Apprenticeable Trades or Crafts is solely and exclusively that of the Contractor. All decisions of the Joint Apprenticeship Committee(s) under this Article are subject to the provisions of California Labor Code §3081. In the



event the Contractor willfully fails to comply with the provisions of this Article and California Labor Code §1777.5, pursuant to California Labor Code §1777.7, the Contractor shall: (i) be denied the right to bid on any public works contract for a period of one (1) year from the date the determination of non-compliance is made by the Administrator of Apprenticeship; and (ii) forfeit, as a civil penalty, Fifty Dollars (\$50.00) for each calendar day of noncompliance. Notwithstanding the provisions of California Labor Code §1727, upon receipt of such determination, the District shall withhold such amount from the GMP then due or to become due. Any such determination shall be issued after a full investigation, a fair and impartial hearing, and reasonable notice thereof in accordance with reasonable rules and procedures prescribed by the California Apprenticeship Council. Any funds withheld by the District pursuant to this Article shall be deposited in the General Fund or other similar fund of the District. The interpretation and enforcement of California Labor Code §§1777.5 and 1777.7 shall be in accordance with the rules and procedures of the California Apprenticeship Council.

**5.18.7 Employment of Independent Contractors.** Pursuant to California Labor Code §1021.5, Contractor shall not willingly and knowingly enter into any agreement with any person, as an independent contractor, to provide any services in connection with the Work where the services provided or to be provided requires that such person hold a valid contractors license issued pursuant to California Business and Professions Code §§7000 et seq. and such person does not meet the burden of proof of his/her independent contractor status pursuant to California Labor Code §2750.5. In the event that Contractor shall employ any person in violation of the foregoing, Contractor shall be subject to the civil penalties under California Labor Code §1021.5 and any other penalty provided by law. In addition to the penalties provided under California Labor Code §1021.5, Contractor's violation of this Article or the provisions of California Labor Code §1021.5 shall be deemed an event of Contractor's default under Article 16.1 of these Construction Provisions. The Contractor shall require any Subcontractor or Sub-Subcontractor performing or providing any portion of the Work to adhere to and comply with the foregoing provisions.

**5.19 Assignment of Antitrust Claims.** Pursuant to California Government Code §4550, the Contractor and its Subcontractor(s), of any tier, hereby offers and agrees to assign to the District all rights, title and interest in and to all causes of action they may have under Section 4 of the Clayton Act, (15 U.S.C. §15) or under the Cartwright Act (California Business and Professions Code §§16700 et seq.), arising from purchases of goods, services or materials hereunder or any Subcontract. This assignment shall be made and become effective at the time the District tenders Final Payment to the Contractor, without further acknowledgment by the parties. If the District receives, either through judgment or settlement, a monetary recovery in connection with a cause of action assigned under California Government Code §§4550 et seq., the assignor thereof shall be entitled to receive reimbursement for actual legal costs incurred and may, upon demand, recover from the District any portion of the recovery, including treble damages, attributable to overcharges that were paid by the assignor but were not paid by the District as part of the GMP, less the expenses incurred by the District in obtaining that portion of the recovery. Upon demand in writing by the assignor, the District shall, within one year from such demand, reassign the cause of action assigned pursuant to this Article if the assignor has been or may have been injured by the violation of law for which the cause of action

arose; and (i) the District has not been injured thereby; or (ii) the District declines to file a court action for the cause of action.

## ARTICLE 6: SUBCONTRACTORS

**6.1 Subcontracts.** Any Work performed for the Contractor by a Subcontractor shall be pursuant to a written agreement between the Contractor and such Subcontractor which specifically incorporates by reference the Contract Documents and which specifically binds the Subcontractor to the applicable terms and conditions of the Contract Documents, including without limitation, the policies of insurance required under Article 7 of these Construction Provisions and obligates the Subcontractor to assume toward the Contractor all the obligations and responsibilities of the Contractor which by the Contract Documents the Contractor assumes toward the District and the Architect. The foregoing notwithstanding, no contractual relationship shall exist, or be deemed to exist, between any Subcontractor and the District, unless the Contract is terminated and the District, in writing, elects to assume the Subcontract. Each Subcontract for a portion of the Work shall provide that such Subcontract may be assigned to the District if the Contract is terminated by the District pursuant to Article 16.1 hereof, subject to the prior rights of the Surety obligated under a bond relating to the Contract. During performance of the Work, the Contractor shall, from time to time, as and when requested by the District, the Architect or the Program Manager provide the District with copies of any and all Subcontracts or Purchase Orders relating to the Work and all modifications thereto. The Contractor's failure or refusal, for any reason, to provide copies of such Subcontracts or Purchase Orders in accordance with the two preceding sentences is Contractor's default of a material term of the Contract Documents.

## **6.2 Substitution of Listed Subcontractor.**

**6.2.1 Substitution Process.** Any request of the Contractor to substitute a listed Subcontractor will be considered only if such request is in strict conformity with this Article 6.2 and California Public Contract Code §4107. All costs incurred by the District, including without limitation, costs of the District's Inspector, the Architect, the Program Manager, or attorneys fees in the review and evaluation of a request to substitute a listed Subcontractor shall be borne by the Contractor.

**6.2.2 Responsibilities of Contractor Upon Substitution of Subcontractor.** The District's consent to Contractor's substitution of a listed Subcontractor shall not relieve Contractor from its obligation to complete the Work within the Contract Time and for the GMP. The substitution of a listed Subcontractor shall not, under any circumstance, result in, or give rise to any increase of the GMP or the Contract Time on account of such substitution. In the event of the District's consent to the substitution of a listed Subcontractor, the Architect shall determine the extent to which, if any, revised or additional Submittals will be required of the newly substituted Subcontractor. In the event that the Architect determines that revised or additional Submittals are required of the newly substituted Subcontractor, the Architect shall promptly notify the Contractor, in writing, of such requirement. In such event, revised or additional Submittals shall be submitted to Architect not later than thirty (30) days following the date of the Architect's written notice to the Contractor pursuant to the foregoing sentence; provided that if in the reasonable and good faith judgment of the Architect, the progress of the Work or completion of the Work requires submission of

additional or revised Submittals by the newly substituted Subcontractor in less than thirty (30) days, the Architect shall so state in its written notice to the Contractor. Any revised or additional Submittals required pursuant to this Article 6.2.2 shall conform with the requirements of Article 5.7 of these Construction Provisions. Contractor shall reimburse the District for all fees and costs, including without limitation fees of the Architect or any design consultant to the Architect or the District and DSA fees, incurred or associated with the processing, review and evaluation of any revised or additional Submittals required pursuant to this Article 6.2.2. In the event that additional or revised Submittals are required pursuant to this Article 6.2.2, such requirement shall not result in an increase to the Contract Time or the GMP.

## ARTICLE 7: INSURANCE; INDEMNITY; BONDS

**7.1 Workers' Compensation Insurance; Employer's Liability Insurance.** The Contractor shall purchase and maintain Workers' Compensation Insurance as will protect the Contractor from claims under workers' or worker's compensation, disability benefit and other similar employee benefit acts which are applicable to the Work to be performed, whether such operations be by the Contractor or by a Subcontractor or by anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable. Contractor shall purchase and maintain Employer's Liability Insurance covering bodily injury (including death) by accident or disease to any employee which arises out of the employee's employment by Contractor. The Employer's Liability Insurance required of Contractor hereunder may be obtained by Contractor as a separate policy of insurance or as an additional coverage under the Workers' Compensation Insurance required to be obtained and maintained by Contractor hereunder. The limits of liability for the Employer's Liability Insurance required hereunder shall be as set forth in Article 2.19 of these Construction Provisions.

**7.2 Commercial General Liability and Property Insurance.** The Contractor shall purchase and maintain Commercial General Liability and Property Insurance covering the types of claims set forth below which may arise out of or result from Contractor's operations under the Contract Documents and for which the Contractor may be legally responsible: (i) claims for damages because of bodily injury, sickness or disease or death of any person other than the Contractor's employees; (ii) claims for damages insured by usual personal injury liability coverage which are sustained (a) by a person as a result of an offense directly or indirectly related to employment of such person by the Contractor, or (b) by another person; (iii) claims for damages, other than to the Work itself, because of injury to or destruction of tangible property, including loss of use resulting therefrom; (iv) claims for damages because of bodily injury, death of a person or property damages arising out of ownership, maintenance or use of a motor vehicle; and (v) contractual liability insurance applicable to the Contractor's obligations under the Contract Documents.

**7.3 Builder's Risk "Special Form" Insurance.** The Contractor, during the progress of the Work and until Final Acceptance of the Work by the District upon completion of the Work, shall maintain Builder's Risk "Special Form" Completed Value Insurance Coverage on all insurable Work included under the Contract Documents which coverage is to provide "Special Form" insurance coverage including, but not limited to, vandalism and malicious mischief, perils of fire, sprinkler leakage, civil authority and collapse upon the entire Work which is the subject of the Contract Documents, and including completed Work and Work in progress to the full insurable value thereof. Insurance shall not include coverage for flood or earthquake damage. Such insurance shall include the District as both a Certificate Holder and as an additional insured, the

Program Manager as an additional insured, the Architect as an additional insured and any other person with an insurable interest designated by the District as an additional insured. The risk of damage to the Work due to the perils covered by the Builder's Risk "Special Form" Insurance, as well as any other hazard which might result in damage to the Work, is that of the Contractor and the Surety, and no claims for such loss or damage shall be recognized by the District, nor will such loss or damage excuse the complete and satisfactory performance of the Contract by the Contractor. The loss payee shall be the District. The provisions of Section 7105 of the California Public Contract Code shall not apply to this Contract or the Contractor's liability except to the extent of the Contractor's coverage under the Builder's Risk Special Form Insurance required by the Contract Documents.

**7.4 Contractor Responsible for All Deductibles and SIRs.** The insurance required of the Contractor hereunder shall be written for not less than any limits of liability specified in the Contract Documents, or required by law, whichever is greater. In the event of any loss or damage covered by a policy of insurance required to be obtained and maintained by the Contractor hereunder, the Contractor shall be solely and exclusively responsible for the payment of the deductible or Self-Insured Retentions (SIRs), if any, under such policy of insurance, without adjustment to the GMP on account thereof.

**7.5 Evidence of Insurance; Subcontractor's Insurance.**

**7.5.1 Certificates of Insurance / Declaration Page.** Prior to commencing the Work, Contractor shall deliver to the District Certificates of Insurance and a declaration page evidencing the insurance coverages required by the Contract Documents. Failure or refusal of the Contractor to so deliver Certificates of Insurance and declaration page may be deemed by the District to be a default of a material obligation of the Contractor under the Contract Documents, and thereupon the District may proceed to exercise any right or remedy provided for under the Contract Documents or at law. The Certificates of Insurance and declaration page and the insurance policies required by the Contract Documents shall contain a provision that coverages afforded under such policies will not be canceled or allowed to expire until at least thirty (30) days prior written notice has been given to the District. The insurance policies required of Contractor hereunder shall also name the District and the Program Manager as an additional insured as its interests may appear. Should any policy of insurance be canceled before Final Acceptance of the Work by the District and the Contractor fails to immediately procure replacement insurance as required, the District reserves the right to procure such insurance and to deduct the premium cost thereof and other costs incurred by the District in connection therewith from any sum then or thereafter due the Contractor under the Contract Documents. The Contractor shall, from time to time, furnish the District, when requested, with satisfactory proof of coverage of each type of insurance required by the Contract Documents; failure of the Contractor to comply with the District's request may be deemed by the District to be a default of a material obligation of the Contractor under the Contract Documents.

**7.5.2 Subcontractors' Insurance.** Contractor shall require that every Subcontractor, of any tier, performing or providing any portion of the Work obtain and maintain the policies of insurance set forth in Articles 7.1 and 7.2 of these Construction Provisions; the coverages and limits of liability of such policies of insurance to be obtained and maintained by Subcontractors shall be as agreed upon between the Contractor and the District prior to bidding and included in the subcontract bid package. The policies of insurance to be obtained and maintained by Subcontractors hereunder are in addition to,

and not in lieu of, Contractor obtaining and maintaining such policies of insurance. Each of the policies of insurance obtained and maintained by a Subcontractor hereunder shall conform with the requirements of this Article 7. Upon request of the District, Contractor shall promptly deliver to the District Certificates of Insurance evidencing that the Subcontractors have obtained and maintained policies of insurance in conformity with the requirements of this Article 7. Failure or refusal of the Contractor to provide the District with Subcontractors' Certificates of Insurance evidencing the insurance coverages required hereunder is a material default of Contractor hereunder.

**7.6 Maintenance of Insurance.** Obtaining and maintaining all insurance coverage required by the Contract Documents is a material obligation of the Contractor. Any insurance bearing on the adequacy of performance of Work shall be maintained after the District's Final Acceptance of all of the Work for the full one year correction of Work period and any longer specific guarantee or warranty periods set forth in the Contract Documents. Without waiving any other right or remedy of the District, should any insurance required by the Contract Documents be canceled before the end of any such periods and the Contractor fails to immediately procure replacement insurance as specified, the District reserves the right to procure such insurance and to charge the cost thereof to the Contractor. In no instance will the District's exercise of its option to occupy and use completed portions of the Work relieve the Contractor of its obligation to maintain insurance required under this Article until the date of Final Acceptance of the Work by the District, or such time thereafter as required by the Contract Documents. The Contractor and Subcontractors' policies of Commercial General Liability and Property/Casualty insurance and the Contractor's Builders Risk insurance will be accepted by the District only if the insurer(s) are: (a) A.M. Best rated A- or better; (b) A.M. Best Financial Size Category XII or higher; and (c) authorized under California law to transact business in the State of California and authorized to issue insurance policies in the State of California. If at any time during performance of the Work, the insurer(s) issuing a policy of insurance covering Commercial General Liability, Property/Casualty or Builder Risk is/are not A.M. Best rated A- or better and is/are not A.M. Best Financial Size Category XII or higher, the Contractor or Subcontractor, as applicable shall within thirty (30) days of the District's written notice of the insufficiency of an insurer to the Contractor, obtain insurance coverage(s) from alternative insurer(s) who is are/then A.M. Best rated A- or better and who is/are A.M. Best Financial Size Category XII or higher. If the Contractor fails to deliver Certificate(s) of Insurance from an alternative insurer(s) meeting or exceeding the A.M. Best rating and A.M. Best Financial Size Category set forth above, within thirty (30) days of the date of the District's issuance of a written notice pursuant to the preceding sentence, in addition to any other right or remedy of the District under the Contract Documents or arising by operation of law, the District may withhold disbursement of any Progress Payment otherwise due hereunder until the Contractor has delivered such Certificate(s) of Insurance from an alternative insurer(s).

**7.7 Contractor's Insurance Primary; No Waiver of Subrogation by District.** All insurance and the coverages thereunder required to be obtained and maintained by Contractor hereunder, if overlapping with any policy of insurance maintained by the District, shall be deemed to be primary and non-contributing with any policy maintained by the District and any policy or coverage thereunder maintained by District shall be deemed excess insurance. The Contractor and all Subcontractors shall waive rights of subrogation against the District. The costs for obtaining and maintaining the insurance coverages required herein shall be included in the GMP.

**Indemnity.** Unless arising solely out of the active negligence, gross negligence or willful misconduct of the Indemnified Parties (as that term is hereinafter defined), the Contractor shall to the fullest extent permitted by law, indemnify, defend and hold harmless: (i) the District and its



Board of Trustees and its members, officers, employees, agents and representatives (including the District's Inspector and the Program Manager); (ii) the Architect and its consultants for the Work and their respective agents and employees; and (iii) if one is designated by the District for the Work, the Program Manager and its agents and employees. The foregoing are individually and collectively hereinafter referred to as "the Indemnified Parties." The Contractor's obligations hereunder includes indemnity, defense and hold harmless of the Indemnified Parties from and against any and all damages, losses, claims, demands or liabilities whether for damages, losses or other relief, including, without limitation attorneys fees and costs, expert consultant/witness fees and costs which arise, in whole or in part, from the Work, the Contract Documents or the acts, omissions or other conduct of the Contractor or any Subcontractor or any person or entity engaged by them for the Work. The Contractor's obligations under the foregoing include without limitation: (i) injuries to or death of persons; (ii) damage to property; (iii) theft or loss of property, including loss of use; (iv) stop notice claims asserted by any person or entity in connection with the Work; and (v) other losses, liabilities, damages or costs resulting from, in whole or part, any acts, omissions or other conduct of Contractor, any of Contractor's Subcontractors, of any tier, any person or entity employed directly or indirectly by Contractor or any Subcontractor in connection with the Work and their respective agents, officers or employees. If any action or proceeding, whether judicial, administrative, arbitration or otherwise, shall be commenced on account of any claim, demand, liability or other matter subject to Contractor's obligations hereunder, and such action or proceeding names any of the Indemnified Parties as a party thereto, the Contractor shall, at its sole cost and expense, defend the named Indemnified Parties with counsel reasonably satisfactory to the named Indemnified Parties. If there is any judgment, award, ruling, settlement, or other relief arising out of any claim, demand, liability or other matter subject to the Contractor's obligations hereunder, and which binds the Indemnified Parties, Contractor shall promptly pay, satisfy or otherwise discharge any such judgment, award, ruling, settlement or relief; Contractor shall indemnify and hold harmless the Indemnified Parties from any and all liability or responsibility arising out of any such judgment, award, ruling, settlement or relief. The Contractor's obligations hereunder are binding upon Contractor's Performance Bond Surety and these obligations shall survive notwithstanding Contractor's completion of the Work or the termination of the Contract.

**7.8 Payment Bond; Performance Bond.** Prior to commencement of the Work, the Contractor shall furnish a Performance Bond as security for Contractor's faithful performance of the Contract and a Labor and Material Payment Bond as security for payment of persons or entities performing work, labor or furnishing materials in connection with Contractor's performance of the Work under the Contract Documents. The amounts of the Performance Bond and the Payment Bond required hereunder shall be one hundred percent (100%) of the GMP. Said Labor and Material Payment Bond and Performance Bond shall be in the form and content set forth in the Contract Documents. The Contractor's obligation to furnish both the Performance Bond and the Labor and Material Payment Bond in strict conformity with this Article 7.9 is a material obligation of the Contractor. The Surety on any bond required under the Contract Documents shall be a Secured Admitted Surety Insurer as that term is defined in California Code of Civil Procedure Section §995.120. If at any time during performance of the Work, a Surety issuing a bond required by the Contract Documents is not qualified as a secured California Admitted Surety Insurer, within thirty (30) days of the District's written notice to the Contractor of the insufficiency of a Surety, the Contractor shall obtain an alternative bond issued by a Surety who is then a Secured Admitted Surety Insurer. The District reserves the right to request appropriate financial statements and other information from the proposed Surety, pursuant to California Code of Civil Procedure Section 995.660.



**ARTICLE 8: CONTRACT TIME**

**8.1 Substantial Completion of the Work Within Contract Time.** Unless otherwise expressly provided in the Contract Documents, the Contract Time is the period of time, including authorized adjustments thereto, allotted in the Contract Documents for achieving Substantial Completion of the Work. The date for commencement of the Work is the date established by the Notice to Proceed issued by the District pursuant to the Agreement, which shall not be postponed by the failure to act of the Contractor or of persons or entities for whom the Contractor is responsible. The date of Substantial Completion is the date certified by the Architect, Program Manager and the District's Inspector as such in accordance with the Contract Documents.

**8.2 Progress and Completion of the Work.**

**8.2.1 Time of Essence.** Time limits stated in the Contract Documents are of the essence. By executing the Agreement, the Contractor confirms that the Contract Time is a reasonable period for performing and achieving Substantial Completion of the Work and for completion of Project Milestones, if any. The Contractor shall employ and supply a sufficient force of workers, material and equipment, and prosecute the Work with diligence so as to maintain progress, to prevent Work stoppage and to achieve completion of Milestones and Substantial Completion of the Work within the Contract Time.

**8.2.2 Substantial Completion.** Substantial Completion is that stage in the progress of the Work when the Work is complete in accordance with the Contract Documents so the District can occupy or use the Work for its intended purpose. For building projects, this shall include submission [and acceptance](#) of Test and Balance Reports as described in the Specifications and approval for building occupancy by authorities having jurisdiction. Substantial Completion shall be determined by the Architect, the Program Manager and the District's Inspector upon request by the Contractor in accordance with the Contract Documents. The good faith and reasonable determination of Substantial Completion by the District's Inspector, Program Manager, and the Architect shall be controlling and final.

**8.2.3 Project Milestones.** If Project Milestones are identified in Article 2.11 of these Construction Provisions, the work associated with that Project Milestone shall be completed on or before the defined Milestone Date. Completion of Project Milestones shall be determined by the Architect, the Program Manager and the District's Inspector upon request by the Contractor in accordance with the Contract Documents. The good faith and reasonable determination of completion of each Project Milestone by the District's Inspector, Program Manager, and the Architect shall be controlling and final.

**8.2.4 Correction or Completion of the Work After Substantial Completion.**

**8.2.4.1 Punchlist.** Upon achieving Substantial Completion of the Work, the District, the District's Inspector, the Program Manager, the Architect and the Contractor shall jointly inspect the Work and prepare a comprehensive list of items of the Work to be corrected or completed by the Contractor ("the Punchlist"). The exclusion of, or failure to include, any item on the Punchlist shall not alter or limit the obligation of the Contractor to complete or correct any portion of the Work in accordance with the Contract Documents. Items remaining on any Notice to Comply issued during construction will be added to the Punchlist.

**8.2.4.2 Time for Completing Punchlist Items.** In addition to setting forth items for correction or completion pursuant to Article 8.2.4.1, the Program Manager, Contractor and Architect shall, after the joint inspection, establish a reasonable time for Contractor's completion of all Punchlist items. If mutual agreement is not reached for the Contractor's completion of Punchlist items, the Program Manager and District in consultation with the Architect shall determine such time, and in such event, the time determined by the Architect shall be final and binding upon the District and Contractor so long as the Architect's determination is made in good faith. The Contractor shall promptly and diligently proceed to complete all Punchlist items within the time established. In the event that the Contractor shall fail or refuse, for any reason, to complete all Punchlist items within the time established, Contractor shall be subject to assessment of Liquidated Damages in accordance with Article 8.5 hereof. The foregoing notwithstanding, if the Contractor fails or refuses to complete all Punchlist items, the District may, in its sole and exclusive discretion and without further notice to Contractor, elect to cause the completion of all remaining Punchlist items provided, however, that such election by the District is in addition to, and not in lieu of, any other right or remedy of the District under the Contract Documents or at law. If the District elects to complete Punchlist items of the Work, pursuant to the foregoing, Contractor shall be responsible for all costs incurred by the District in connection therewith and the District may deduct such costs from the GMP then or thereafter due the Contractor; if these costs exceed the remaining GMP due to the Contractor, the Contractor and the Performance Bond Surety are liable to District for any such excess costs.

**8.2.5 Final Completion.** Final Completion is that stage of the Work when all Work has been completed in accordance with the Contract Documents, including without limitation, the performance of all Punchlist items noted upon Substantial Completion, and all other Contractor obligations under the Contract Documents have been fully performed by the Contractor. Final Completion shall be determined by the Architect, the District's Inspector, and the Program Manager upon request of the Contractor. The good faith and reasonable determination of Final Completion by the District's Inspector, the Program Manager and the Architect shall be controlling and final.

**8.2.6 Contractor Responsibility for Multiple Inspections.** In the event the Contractor shall request determination of Substantial Completion or Final Completion by the Program Manager, the District's Inspector and the Architect and it is determined by the Program Manager, the District's Inspector and the Architect that the Work does not then justify certification of Substantial Completion or Final Completion and re-inspection is required at a subsequent time to make such determination, the Contractor shall be responsible for all costs of such reinspection, including without limitation, the fees of the Architect, Program Manager and District's Inspector. The District may deduct such costs from the GMP then due or thereafter due to the Contractor.

**8.2.7 Final Acceptance.** Final Acceptance of the Work shall occur upon approval of the Work by the District's Board of Trustees; such approval shall be submitted for adoption at the next regularly scheduled meeting of the District's Board of Trustees after the determination of Final Completion. The commencement date of any warranty or guarantee period under the Contract Documents shall be the date upon which the District's Board of Trustees approves of the Final Acceptance of the Work unless otherwise determined in accordance with Article 3.3.1.

### 8.3 Progress Schedule.

**8.3.1 Submittal of Preliminary Construction Schedule.** Within the first ten (10) days following the issuance of the Notice to Proceed the Contractor shall submit to the District, the Program Manager and the Architect the Preliminary Construction Schedule, prepared during Preconstruction Services in accordance with this Article 8.3.1, for review and acceptance as the basis for preparation of the Approved Construction Schedule, as described in Article 8.3.3. The Preliminary Construction Schedule shall indicate, in graphic form, the estimated rate of progress and sequence of all Work including all critical path items and identification of such, required under the Contract Documents. All time periods specified herein are considered calendar days unless specifically noted otherwise. The purpose of the Preliminary Construction Schedule is to assure adequate planning and execution of the Work so that it is completed within the Contract Time and to permit evaluation of the progress of the Work. The Preliminary Construction Schedule shall indicate activity descriptions, durations, remaining durations, total float, the start and finish dates for all activities of work, including, without limitation, the procurement and fabrication of major items, material and equipment forming a part of, or to be incorporated into, the Work, sequencing and interrelationships among Site construction activities necessary to support construction of the Work as indicated in the Preliminary Construction Schedule. The Preliminary Construction Schedule shall identify all Submittals required, the portion(s) of the Work for which the identified Submittals relate to and the date upon which each Submittal required will be transmitted to the Architect for review and the anticipated date(s) for the Architect's return of reviewed Submittals ("the Submittal Schedule"). Unless otherwise expressly provided elsewhere in the Contract documents, the Preliminary Construction Schedule and all schedules required by the Contract Documents shall be with a computer software program which has the following capabilities: (a) text and graphic reporting; (b) critical path method scheduling; (c) resource (at least cost, labor and materials) loading; and (d) performing analytical evaluations of isolated activities or schedule, sequence, cost and time. The most recently publicly released version of Primavera is an acceptable software programs. The Contractor's use of any other software schedule program(s) will require the prior approval of the District. The District's enforcement of schedule requirements of the Contract Documents shall not be deemed District control over or assumption of construction means, methods or sequences by the District, all of which remain the Contractor's responsibility. The Contractor may submit a Preliminary Construction Schedule depicting completion of the Work in a duration shorter than the Contract Time provided that such Preliminary Construction Schedule shall not be a basis for adjustment to the GMP in the event that completion of the Work shall occur after the time depicted therein, nor shall such Preliminary Construction Schedule be the basis for any extension of the Contract Time. The Contractor's entitlement to any extension of the Contract Time shall be based upon the Contract Time and not on any shorter duration which may be depicted in the Contractor's Preliminary Construction Schedule. Float time, if any, in the Approved Construction Schedule shall not be for the benefit of the District or the Contractor; float time is for the benefit of the Work. As used herein, "float time" shall be deemed to refer to the time between the earliest start date and the latest start date, or between the earliest finish date and the latest finish date of each activity shown on the Construction Schedule. The Contractor shall not sequester shared float through such strategies as extending activity duration estimates to consume available float, using preferential logic, using extensive crew/resource sequencing, etc. Since float time within the schedule is jointly owned, no time extensions will be granted nor delay damages paid until a delay occurs which extends the work beyond the Contract completion date. Since

float time within the Construction Schedule is jointly owned, it is acknowledged that District caused delays on the project may be offset by District caused time savings (i.e. critical path submittals returned in less time than allowed by the Contract, approval of substitution requests which result in a savings of time to the Contractor, etc.). In such an event, the Contractor shall not be entitled to receive a time extension or delay damages until all District caused time savings are exceeded and the Contract completion date is also exceeded.

**8.3.2 Review of Preliminary Construction Schedule.** The District, the Program Manager, and the Architect shall review the Preliminary Construction Schedule submitted by the Contractor pursuant to Article 8.3.1 above for conformity with the requirements of the Contract Documents. Within ten (10) days of the date of receipt of the Preliminary Construction Schedule, the Preliminary Construction Schedule will be returned to the Contractor with comments to the form or content thereof. Review of the Preliminary Progress Schedule and any comments thereto by the District, the Program Manager or the Architect shall not be deemed to be the assumption or direction of construction means, methods or sequences, all of which remain the Contractor's obligations under the Contract Documents.

**8.3.3 Preparation and Submittal of Contract Construction Schedule;** Within thirty (30) days of the District's return of the Preliminary Construction Schedule to the Contractor pursuant to all requirements of Articles 8.3.1 and 8.3.2 above, the Contractor shall prepare and submit to the District, Program Manager and the Architect the Construction Schedule for the overall duration of the Work which incorporates therein the comments to the Preliminary Construction Schedule. Upon the Contractor's submittal of such Construction Schedule, the District, the Program Manager and the Architect shall review the same for purposes of determining conformity with the requirements of the Contract Documents. Within ten (10) days of the receipt of the Construction Schedule, the Construction Schedule will be returned to the Contractor with acceptance noted or comments to the form or content required to obtain acceptance. In the event there are comments to the form or content thereof, the Contractor shall within five (5) days of receipt of such comments, revise and resubmit the Construction Schedule incorporating therein such comments. Upon the District's acceptance of the form and content of a Construction Schedule, the same shall be deemed the "Approved Construction Schedule." The District's approval of a Construction Schedule shall be for the sole and limited purpose of determining conformity with the requirements of the Contract Documents. By the Approved Construction Schedule, the District shall not be deemed to have exercised control over, or approval of, construction means, methods or sequences, all of which remain the responsibility and obligation of the Contractor in accordance with the terms of the Contract Documents. Further, the Approved Construction Schedule shall not operate to limit or restrict any of Contractor's obligations under the Contract Documents nor relieve the Contractor from the full, faithful and timely performance of such obligations in accordance with the terms of the Contract Documents. The activities, commencement and completion dates of activities, and the sequencing of activities depicted on the Approved Construction Schedule shall not be modified or revised by the Contractor without the prior consent, or direction, of the District, Program Manager and the Architect. Updates to the Approved Construction Schedule pursuant to Article 8.3.5 below shall not be deemed revisions to the Approved Construction Schedule. If the Approved Construction Schedule depicts completion of the Work in a duration shorter than the Contract Time, the same shall not be a basis for an adjustment of the Contract Time or the GMP if actual completion of the Work occurs after the time depicted in such

an Approved Construction Schedule. In such event, the GMP shall not be subject to adjustment on account of any additional costs incurred by the Contractor to complete the Work prior to the Contract Time, as adjusted in accordance with the terms of the Contract Documents. Any adjustment of the Contract Time or the GMP shall be based upon the Contract Time set forth in the Contract Documents and not any shorter duration, which may be depicted in the Approved Construction Schedule.

**8.3.4 Revisions to Approved Construction Schedule.** If progress of the Work or the sequencing of the activities of the Work materially differs from that indicated in the Approved Construction Schedule, as determined by the District in its reasonable discretion and judgment, the District may direct the Contractor to revise the Approved Construction Schedule; within ten (10) days of the District's direction, the Contractor shall prepare and submit to the Program Manager a revised Approved Construction Schedule, for review and approval by the District. The Contractor may request consent of the District to revise the Approved Construction Schedule. Any such request shall be considered by the District only if in writing setting forth the Contractor's proposed revision(s) to the Approved Construction Schedule and the reason(s) therefrom. The District may consent to, or deny, any such request of the Contractor to revise the Approved Construction Schedule in its reasonable discretion.

**8.3.5 Updates to Approved Construction Schedule.** The Contractor shall monitor and update the Approved Construction Schedule on a monthly basis and submit with Payment Application, or more frequently as required by the conditions or progress of the Work, or as may be requested by the District. The Contractor shall provide the District, the Program Manager and the Architect with updated Approved Construction Schedules indicating progress achieved and activities commenced or completed within the prior updated Approved Construction Schedule. Updates to the Approved Construction Schedule shall not include any revisions to the activities, commencement and completion dates of activities or the sequencing of activities depicted on the Approved Construction Schedule. Any such revisions to the Approved Construction Schedule shall result in the District's rejection of such update, and the Contractor shall, within five (5) days of the District's rejection of such update, submit to the Architect and the Program Manager an Updated Approved Construction Schedule which does not incorporate any such revisions. The Contractor shall also submit with its updates to the Approved Construction Schedule a narrative statement including a description of current and anticipated problem areas of the Work, delaying factors and their impact, and an explanation of corrective action taken or proposed by the Contractor. If the progress of the Work is behind the Approved Construction Schedule, the Contractor shall indicate what measures will be taken to place the Work back on schedule. The District may, from time to time, and in the District's sole and exclusive discretion, transmit to the Contractor's Performance Bond Surety the Approved Construction Schedule, any updates thereof and the narrative statement described hereinabove. The District's election to transmit, or not to transmit such information, to the Contractor's Performance Bond Surety shall not limit the Contractor's obligations under the Contract Documents.

**8.3.5.1 Contractor Time Schedule Recovery Plan.** If at any time during the project the Contractor fails to complete any activity by its latest scheduled completion date, which late completion will impact the end date of the work past the contract completion date, the Contractor shall, within five (5) working days, submit to the District a written statement as to how and when the Contractor will reorganize its work force to return to the current Contractor's Construction



Schedule. Whenever it becomes apparent from the current monthly progress evaluation and updated Construction Schedule data that any Milestone Date(s) or the Contract completion date will not be met, the Contractor shall take some or all of the following actions:

- (1) Increase construction manpower in such quantities and crafts as shall substantially eliminate the backlog of work and meet the current Contract completion date.
- (2) Increase the number of working hours per shift, the number of shifts per day, the number of work days per week, or the amount of construction equipment, or any combination of the foregoing sufficient to substantially eliminate the backlog of work.
- (3) Reschedule work items to achieve concurrent accomplishment of work activities.

Under no circumstances will the addition of equipment or construction forces, increasing the working hours, or any other method, manner, or procedure to return to the contractually required completion dates be considered justification for additional cost to the District or treated as an acceleration unless specifically directed by the District as set forth in Paragraph 8.3.5.2.

**8.3.5.2 District Requested Contractor Acceleration.** The District reserves the right to accelerate the work of the Contract. In the event that the District directs acceleration, such directive will be only in written form. The Contractor shall keep cost and other project records related to the acceleration directive separately from normal project costs and shall provide a written record of acceleration cost to the District on a daily basis.

In the event that the Contractor believes that some action or inaction on the part of the District constitutes an acceleration directive, the Contractor shall immediately notify the District in writing that the Contractor considers the actions an acceleration directive. This written notification shall detail the circumstances of the acceleration directive. The Contractor shall not accelerate its work efforts until the District responds to the written notification. If acceleration is then directed or required by the District, all cost records referred to above shall be maintained by the Contractor and provided to the District on a daily basis.

In order to recover additional costs due to acceleration, the Contractor must document that additional expenses were incurred and paid by the Contractor. Labor costs recoverable will be only overtime or shift premium costs or the cost of additional workers brought to the site to accomplish the accelerated work effort. Equipment costs recoverable will be only the cost of added equipment mobilized to the site to accomplish the accelerated work effort.

**8.3.6 Contractor Responsibility for Construction Schedule.** The Contractor shall be responsible for the preparation, submittal and maintenance of the Construction Schedules required by the Contract Documents, and any failure of the Contractor to do so may be deemed by the District as the Contractor's default in the performance of a material obligation under Contract Documents. Any and all costs or expenses required or incurred to prepare, submit, maintain, and update the Construction Schedule shall be solely that of



the Contractor and no such cost or expense shall be charged to the District. The GMP shall not be subject to adjustment on account of costs, fees or expenses incurred or associated with the Contractor's preparation, submittal, maintenance, or updating of the Construction Schedules.

**8.4 Adjustment of Contract Time.** If Substantial Completion or completion of a Project Milestone is delayed, adjustment, if any, to the Contract Time on account of such delay shall be in accordance with this Article.

**8.4.1 Excusable Delays.** If Substantial Completion of the Work or completion of a Project Milestone is delayed by Excusable Delays, the Contract Time shall be subject to adjustment for such reasonable period of time. Excusable Delays shall not result in any increase in the GMP. Excusable Delays refer to unforeseeable and unavoidable casualties or other unforeseen causes beyond the control, and without fault or neglect, of the Contractor, any Subcontractor, Material Supplier or other person directly or indirectly engaged by the Contractor any Subcontractor or Material Supplier in performance of any portion of the Work. Excusable Delays include unanticipated and unavoidable labor disputes, unusual and unanticipated delays in transportation of equipment, materials or Construction Equipment reasonably necessary for completion and proper execution of the Work, and unanticipated unusually severe weather conditions. Neither the financial resources of the Contractor any Subcontractor or Material Supplier, or any person or entity directly or indirectly engaged by the Contractor in performance of any portion of the Work shall be deemed conditions beyond the control of the Contractor. If an event of Excusable Delay occurs, the Contract Time shall be subject to adjustment hereunder only if the Contractor establishes: (i) full compliance with all applicable provisions of the Contract Documents relative to the method, manner and time for Contractor's notice and request for adjustment of the Contract Time; (ii) that the event(s) forming the basis for Contractor's request to adjust the Contract Time are outside the reasonable control and without any fault or neglect of the Contractor or any person or entity directly or indirectly engaged by Contractor in performance of any portion of the Work; and (iii) that the event(s) forming the basis for Contractor's request to adjust the Contract Time directly and adversely impacted the critical path of the Work as indicated in the Approved Construction Schedule or the most recent updated Approved Construction Schedule relative to the date(s) of the claimed event(s) of Excusable Delay. The foregoing provisions notwithstanding, the Contract Time shall not be adjusted for rain related to unusually severe weather conditions until and unless the actual number of Rain Days during performance of the Work shall exceed those noted in Article 2.13 of these Construction Provisions and such additional Rain Days shall have directly and adversely impacted the progress of the Work with respect to the Critical Path, as depicted in the Approved Construction Schedule or the most recent updated Approved Construction Schedule relative to the date(s) of such additional Rain Days.

When delays are experienced by the Contractor and a time extension is requested, the Contractor shall submit to the District a written Time Impact Analysis illustrating the influence of all changes or all delays on the current project completion date. The time impact analysis shall be constructed on an As-Built Schedule Analysis approach. The As-Built Schedule that is created will incorporate all actual start and finish dates, actual durations of activities, actual sequences of construction (referred to as the As-Built Logic) current as of the time the Time Impact Analysis is performed. This Time Impact Analysis shall incorporate all delays (including District, Contractor and third party delays without exception) in the time frame that they actually occurred with actual logic ties.

The As-Built Schedule data shall be obtained from the most recent approved monthly schedule update. The As-Built Schedule shall be created as an early start schedule with the actual start and finish dates coinciding with the early start and finish dates from the most recent approved monthly schedule update. The As-Built Schedule shall show the original activity durations equal to the actual duration and the actual logic driving all activities. This As-Built Schedule will be validated by the District. All requests for time extension shall be based upon analysis of this As-Built Schedule. The critical path will be established and all District caused delays on the critical path will be identified. The time extension will be based solely upon the cumulative duration of all District and third party caused delays (as set forth in the Delay Clause of these Contract Documents) which are on the critical path. Any time extensions to the project's interim Milestone Dates, if any, shall be no-cost time extensions only.

Each Time Impact Analysis shall demonstrate the estimated time impact based on the events of delay, the date the Change Order was given to the Contractor, the status of construction at that point in time, and the event time computation of all activities affected by the change or delay. The event times used in the analysis shall be those included in the latest approved update of the project schedule, in effect at the time the change or delay was encountered. The District shall periodically review these Contractor submissions and make adjustments during the course of construction at its discretion.

**8.4.2 Compensable Delays.** If Substantial Completion of the Work is delayed and such delay is caused by the acts or omissions of the District, the Architect, or separate contractor employed by the District (collectively "Compensable Delays"), upon Contractor's request and notice, in strict conformity with Articles 8 and 10 of these Construction Provisions, the Contract Time will be adjusted by Change Order for such reasonable period of time as determined by the Architect and the District. In accordance with California Public Contract Code §7102, if the Contractor's progress is delayed by any of the events described in the preceding sentence, Contractor shall not be precluded from the recovery of damages directly and proximately resulting therefrom, provided that the District is liable for the delay, the delay is unreasonable under the circumstances involved and the delay was not within the reasonable contemplation of the District and the Contractor at the time of execution of the Agreement. In such event, Contractor's damages, if any, shall be limited to direct, actual and unavoidable additional costs of labor, materials or Construction Equipment directly resulting from such delay, and shall exclude indirect or other consequential damages. Except as expressly provided for herein, Contractor shall not have any other claim, demand or right to adjustment of the Contract Price arising out of delay, interruption, hindrance or disruption to the progress of the Work. Adjustments to the GMP and the Contract Time, if any, on account of Changes to the Work or Suspension of the Work shall be governed by the applicable provisions of the Contract Documents, including without limitation, Articles 10 and 15 of these Construction Provisions.

**8.4.3 Unexcusable Delays.** Unexcusable Delays refer to any delay to the progress of the Work caused by events or factors other than those specifically identified in Article 8.4.1 and 8.4.2 above. Neither the GMP nor the Contract Time shall be adjusted on account of Unexcusable Delays.

**8.4.4 Procedure for Adjustment of Contract Time.** The Contract Time shall be subject to adjustment only in strict conformity with applicable provisions of the Contract Documents. Failure of Contractor to request adjustment(s) of the Contract Time in strict

conformity with applicable provisions of the Contract Documents shall be deemed Contractor's waiver of the same.

**8.4.5 Limitations Upon Adjustment of Contract Time on Account of Delays.** Any adjustment of the Contract Time on account of an Excusable Delay or a Compensable Delay shall be limited as set forth herein. If an Excusable Delay and a Compensable Delay occur concurrently, the maximum extension of the Contract Time shall be the number of days from the commencement of the first delay to the cessation of the delay which ends last. If an Unexcusable Delay occurs concurrently with either an Excusable Delay or a Compensable Delay, the maximum extension of the Contract Time shall be the number of days, if any, which the Excusable Delay or the Compensable Delay exceeds the period of time of the Unexcusable Delay. In addition to the foregoing limitations upon extension of the Contract Time, no adjustment of the Contract Time shall be made on account of any Excusable Delays or Compensable Delays unless such delay(s) actually and directly impact Work or Work activities on the critical path of the then current and updated Approved Construction Schedule as of the date on which such delay first occurs. The District shall not be deemed in breach of, or otherwise in default of any obligation hereunder, if the District shall deny any request by the Contractor for an adjustment of the Contract Time for any delay which does not actually and directly impact Work or Work activities on the critical path of the then current and updated Approved Construction Schedule.

**8.5 Liquidated Damages.** Should the Contractor neglect, fail or refuse to achieve Substantial Completion of the Work within the Contract Time, as adjusted, or fail to achieve completion of the work of Project Milestones, the Contractor agrees to pay to the District the amount of per diem Liquidated Damages set forth in Article 2.12 of these Construction Provisions, not as a penalty but as Liquidated Damages, for every day beyond the Contract Time or Project Milestone date, as adjusted, until Substantial Completion of the Work is achieved or the work of the Project Milestone is completed. The Liquidated Damages amount set forth in the Article 2.12 are agreed upon by and between the Contractor and the District because of the difficulty of fixing the District's actual damages in the event of delayed completion of the Work. The Contractor and the District specifically agree that said amount is a reasonable estimate of the District's damage in such event, and that such amount does not constitute a penalty. Liquidated Damages may be deducted from the GMP then or thereafter due the Contractor. The Contractor and the Surety shall be liable to the District for any Liquidated Damages exceeding any amount of the GMP then held or retained by the District. Notwithstanding achievement of Substantial Completion of the Work or completion of work of Project Milestones, if the Contractor fails or refuses, for any reason, to promptly and diligently commence performance of all Punchlist items noted upon Substantial Completion or Project Milestone completion, and to complete the same within a reasonable time, as determined in accordance with the Contract Documents, the Contractor shall be liable to the District for the per diem Liquidated Damages, if any, set forth in Article 2.12 of these Construction Provisions, from the date that such items should have been corrected or completed until the date that all such items are actually corrected or completed. If the Contractor fails or refuses to correct or complete Punchlist items noted upon Substantial Completion or Project Milestone completion, and the District elects to exercise its right to cause completion or correction of such items, the District's assessment of Liquidated Damages pursuant to the foregoing shall be in addition, and not in lieu of, the District's right to charge Contractor with the cost of completing or correcting such items of the Work. The Contractor and the District acknowledge and agree that the provisions of this Article are reasonable under the circumstances existing at the time of the Contractor's execution of the Agreement.

**ARTICLE 9: GUARANTEED MAXIMUM PRICE**

**9.1 Guaranteed Maximum Price.** The Guaranteed Maximum Price (GMP) is the amount stated in Article 3.4.1 of these Construction Provisions. The District's payment of the Guaranteed Maximum Price to the Contractor shall be in accordance with the Contract Documents.

**9.2 Cost Breakdown.** Within fifteen (15) days of the execution of the Facilities Lease by Contractor and District, Contractor shall furnish to the Program Manager and Architect a detailed estimate and complete Cost Breakdown of the GMP. The Cost Breakdown shall be subject to the review and approval of the form and content thereof by the District, Program Manager and Architect. If there are objections to any portion of the Cost Breakdown, within ten (10) days of the Contractor's submission of the Cost Breakdown, the Contractor will be notified, of objection(s) to the Cost Breakdown. Within five (5) days of the date of the written objection(s), Contractor shall submit a revised Cost Breakdown for review and approval. The foregoing procedure for the preparation, review and approval of the Cost Breakdown shall continue until the entirety of the Cost Breakdown has been approved. Once the Cost Breakdown is approved, the Cost Breakdown shall not be thereafter modified or amended by the Contractor without the prior consent and approval of the District, which may be granted or withheld in the sole reasonable discretion of the District. Notwithstanding any provision of the Contract Documents to the contrary, payment of the Contractor's overhead and profit and for Construction Services, as the costs for such items are reflected in the Cost Breakdown, shall be made by the District in equal installments with its disbursements of Progress Payments and the Final Payment with the amount of each such installment equal to the aggregate amount of such items as reflected in the Cost Breakdown divided by the number of months of the Contract Time.

**9.3 Progress Payments.**

**9.3.1 Applications for Progress Payments.** During the Contractor's performance of the Work, the Contractor shall submit monthly, a draft copy of the Application for Progress Payment to the Program Manager on the 25th of each month. During the last construction meeting of the month, the Contractor and Program Manager will review the percentages complete for each item on the Schedule of Values and come to an agreement on the earned value for the Contract projected to the final day of the month, as well as the Change Orders that will be credited to the current Application. The Contractor will make the agreed-upon changes and will submit the final copy of the Application on the first working day of each month to the Program Manager. Applications for Progress Payments are to be submitted on AIA forms G702 and G703, setting forth an itemized estimate of Work completed in the preceding month for the purpose of the District's making of Progress Payments thereon. Values utilized in the Applications for Progress Payments shall be based upon the District approved Cost Breakdown pursuant to Article 9.2 above and such values shall be only for determining the basis of Progress Payments to Contractor, and shall not be considered as fixing a basis for adjustments, whether additive or deductive, to the Guaranteed Maximum Price, or for determining the extent of Work actually completed.

**9.3.2 District's Review of Applications for Progress Payments.** In accordance with Public Contract Code §20104.50, upon receipt of an Application for Progress Payment, the District shall cause the same to be reviewed by the District's Inspector, the Program Manager and the Architect, as soon as is practicable after receipt of such Application for

Progress Payment. Such review shall be for the purpose of determining that the Application for Progress Payment is a proper Progress Payment request. For purposes of this Article 9.3.2, an Application for Progress Payment shall be deemed "proper" only if it is submitted on the form approved by the District, with all of the requested information of such form of Application for Progress Payment completely and accurately provided by the Contractor and such completed Application for Progress Payment is accompanied by: (i) duly completed and executed forms of Conditional Waiver and Release of Rights Upon Progress Payment in accordance with California Civil Code §3262 of the Contractor, all Subcontractors of any tier, and Material Suppliers covering the Progress Payment requested; (ii) duly completed and executed forms of Unconditional Waiver and Release of Rights upon Progress Payment in accordance with California Civil Code §3262 of the Contractor, all Subcontractors of any tier, and Material Suppliers covering the Progress Payment received by the Contractor under the prior Application for Progress Payment; (iii) update of the Approved Construction Schedule; (iv) if applicable, a current union statement reflecting that the Contractor and any Subcontractor of any tier, are current in the payment of any supplemental fringe benefits required pursuant to any collective bargaining agreement to which the Contractor or any such Subcontractor is a party to or is otherwise bound by; and (v) a certification by the Contractor that it has continuously maintained, or caused to be maintained, the Record Drawings reflecting the actual as-built conditions of the Work performed for which the Progress Payment is requested, it being understood that such certification is subject to verification by the District, Architect or the Program Manager prior to disbursement of the Progress Payment. In accordance with Public Contract Code §20104.50, an Application for Progress Payment determined by the District not to be a proper Application for Progress Payment shall be returned by the District to the Contractor as soon as is practicable after receipt of the same from the Contractor, but in no event not more than seven (7) days after the District's receipt thereof. The District's return of any Application for Progress Payment pursuant to the preceding sentence shall be accompanied by a written document setting forth the reason(s) why the Application for Progress Payment is not proper or complete.

**9.3.3 Review of Applications for Progress Payments.** Upon receipt of an Application for Progress Payment, the Architect, Program Manager and the District's Inspector shall inspect and verify the Work to determine whether it has been performed in accordance with the terms of the Contract Documents and to determine the portion of the Application for Progress Payment which is properly due to the Contractor under the terms of the Contract Documents.

**9.3.4 District's Disbursement of Progress Payments.**

**9.3.4.1 Timely Disbursement of Progress Payments.** In accordance with Public Contract Code §20104.50, within thirty (30) days after the District's receipt of a proper Application for Progress Payment, there shall be paid, by District, to Contractor a sum equal to ninety percent (90%) of the value of the Work indicated in the Application for Progress Payment which is actually in place as of the date of the Application for Progress Payment and as verified and approved by the District's Inspector, Program Manager and the Architect and the pro rata portion of the Contractor's overhead and profit and Construction Services costs for that month; provided, however, that the District's obligation to disburse any Progress Payment shall be subject to the District's receipt of all documents set forth in Article 9.3.2 above, each and all of which are conditions precedent to



the District's obligation to disburse Progress Payments. If an Application for Progress Payment is determined not to be proper due to the failure or refusal of the Contractor to submit documents with the Application for Progress Payment, as required by Article 9.3.2, or incompleteness or inaccuracies in any such documents submitted or if it is reasonably determined that the Record Drawings have not been continuously maintained to reflect the actual as built conditions of the Work completed in the period for which the Progress Payment is requested, the thirty (30) day period hereunder for the District's timely disbursement of a Progress Payment shall be deemed to commence on the date that the District is actually in receipt of documents not submitted with the Application for Progress Payment, or corrections to documents with the Application for Progress Payment so as to render them complete and accurate, or the date upon which the Contractor accurately and fully completes preparation of the Record Drawings relating to the Work for which the Progress Payment is requested.

**9.3.4.2 Untimely Disbursement of Progress Payments.** In accordance with Public Contract Code §20104.50, in the event that the District shall fail to make any Progress Payment within thirty (30) days after receipt of an undisputed and properly submitted Application for Progress Payment, the District shall pay the Contractor interest on the undisputed amount of such Application for Progress Payment equal to the legal rate of interest set forth in California Code of Civil Procedure §685.010(a). The foregoing notwithstanding, in the event that the District shall determine that any Application for Progress Payment is not proper, pursuant to Article 9.3.2 above, and the District does not return such Application for Progress Payment within the seven (7) day period provided for in Article 9.3.2, the period of time for the District's disbursement of the Progress Payment on such Application for Progress Payment without incurring the interest liability shall be reduced by the number of days exceeding the seven (7) day return period.

**9.3.4.3 District's Right to Disburse Payments by Joint Checks.** Provided that the District is in receipt of the applicable Subcontract or Purchase Order, the District, may in its sole discretion, issue joint checks to the Contractor and such Subcontractor or Material Supplier in satisfaction of its obligation to make Progress Payments or the Final Payment due hereunder.

**9.3.4.4 No Waiver of Defective or Non-Conforming Work.** The approval of any Application for Progress Payment or the disbursement of any Progress Payment to the Contractor shall not be deemed nor constitute acceptance of defective Work or Work not in conformity with the Contract Documents.

**9.3.5 Progress Payments for Changed Work.** The Contractor's Applications for Progress Payment may include requests for payment on account of Changes in the Work for which a Change Order has been issued and approved by the District's Board of Trustees. Except as provided for herein, no other payment shall be made by the District for Changes in the Work.

**9.3.6 Materials or Equipment Not Incorporated Into the Work.**

**9.3.6.1 Limitations Upon Payment.** Except as expressly provided for herein, no payments shall be made by the District on account of any item of the Work,



including without limitation, materials or equipment which, at the time of the Contractor's submittal of an Application for Progress Payment, has/have not been incorporated into and made a part of the Work.

**9.3.6.2 Materials or Equipment Delivered and Stored at the Site.** The District may, in its sole and exclusive discretion, make payment for materials or equipment not yet incorporated into the Work if, at or prior to the time of the Contractor's submittal of a an Application for Progress Payment incorporating therein a request for payment of such materials or equipment if all of the following are complied with: (a) the materials or equipment have been delivered to the Site; (b) adequate arrangements, reasonably satisfactory to the District, have been made by the Contractor to store and protect such materials or equipment at the Site including without limitation, insurance reasonably satisfactory to the District, covering and protecting against the risk of loss, destruction, theft or other damage to such materials or equipment while in storage; and (c) the establishment of procedures reasonably satisfactory to the District by which title to such materials or equipment will be vested in the District upon the District's payment therefor. The Contractor acknowledges that the discretion to make, or not to make, payment for materials or equipment delivered or stored at the site of the Work pursuant to the preceding sentence shall be exercised exclusively by the District; the District's exercise of discretion not to make payment for materials or equipment delivered or stored at the Site, but not yet incorporated into the Work shall not be deemed the District's default hereunder. In the event that the District shall elect to make payment for materials or equipment delivered and stored at the Site, the costs and expenses incurred to comply with the requirements of (b) and (c) of this Article 9.3.6.2 shall be borne solely and exclusively by the Contractor and no payment shall be made by the District on account of such costs and expenses.

**9.3.6.3 Materials or Equipment Not Delivered or Stored at the Site.** The District may, in its sole and exclusive discretion, elect to make payment for materials or equipment not incorporated into the Work and which are not delivered or stored at the Site at or prior to the time of the Contractor's submittal of an Application for Progress Payment.

Payment for stored materials: Materials, equipment and associated components that are in compliance with the approved submittals and will be incorporated into the structure, may be taken into consideration in computing payment requests, provided the material is properly stored in a warehouse, storage yard or similar suitable place as may be approved by the Program Manager. The Contractor will remain responsible for all such stored materials.

- 1.) Payment for materials, equipment and associated components stored on-site will be 85% of valid invoice, indicating the unit of quantity, description of the material or equipment and cost.
- 2.) Payment for materials, equipment and associated components stored off-site will be 85% - less 10% retention of valid invoice, indicating the unit of quantity, description of material or equipment or costs. Before such payment is made the Contractor shall furnish District with a certified statement giving the exact location of the material or equipment, stating

that such material or equipment is properly fabricated, stored and protected, and that it will not be diverted for use or installation at a different project. The Contractor shall furnish the District with copies of material or equipment invoices, properly executed bills of sale and a certificate of insurance coverage for material upon which payment is being made.

All material and work covered by payments made will thereupon become the sole property of the District.

The Contractor shall provide arrangements for the District's Program Manager to inspect the stored materials and shall ensure that all materials are clearly marked "Property of Foothill-DeAnza Community College District."

**9.3.6.4 Materials or Equipment in Fabrication or Transit.** The provisions of this Article 9.3.6 notwithstanding, the District shall not make any payment on account of any materials or equipment which are in the process of being fabricated or which are in transit to the Site or other storage location.

**9.3.7 Exclusions From Progress Payments.** In addition to the District's right to withhold disbursement of any Progress Payment provided for in the Contract Documents, neither the Contractor's Application for Progress Payment shall include, nor shall the District be obligated to disburse any portion of the GMP for amounts which the Contractor does not intend to pay any Subcontractor, of any tier, or Material Supplier because of a dispute or any other reason.

**9.3.8 Title to Work.** The Contractor warrants that title to all Work covered by an Application for Progress Payment will pass to the District in accordance with provisions of the Facilities Lease, Section 4.7.

**9.3.9 Substitute Security for Retention.** In accordance with the provisions of California Public Contract Code §22300, eligible and equivalent securities may be substituted for any monies withheld by the District to ensure the Contractor's performance under the Contract Documents at the request and expense of the Contractor and in conformity with the provisions of California Public Contract Code §22300.

## **9.4 Final Payment.**

**9.4.1 Application for Final Payment.** When the Contractor has achieved Final Completion of the Work and has otherwise fully performed its obligations under the Contract Documents, the Contractor shall submit an Application for Final Payment on such form as approved by the District. Thereupon, the Architect and the District's Inspector will promptly make a final inspection of the Work and when the Architect, Program Manager and the District's Inspector find the Work acceptable under the Contract Documents and that the Contract has been fully performed by the Contractor, the Architect and the District's Inspector will thereupon promptly approve the Application for Final Payment, stating that to the best their knowledge, information and belief, the Work has been completed in accordance with the terms of the Contract Documents. The Final Payment shall include the remaining balance of the Guaranteed Maximum Price, adjusted for shared savings of the Contractor's Contingency Fund, and any retention from Progress Payments previously withheld by the District.

**9.4.2 Conditions Precedent to Disbursement of Final Payment.** Neither Final Payment nor any remaining GMP shall become due until the Contractor submits to the District each and all of the following, the submittal of which are conditions precedent to the District's obligation to disburse the Final Payment: (i) an affidavit or certification by the Contractor that payrolls, bills for materials and other indebtedness incurred in connection with the Work for which the District or the District's property may or might be responsible or encumbered have been paid or otherwise satisfied; (ii) a certificate evidencing that insurance required by the Contract Documents to remain in force after the Contractor's receipt of Final Payment is currently in effect; (iii) a written statement that the Contractor knows of no substantial reason that the insurance will not be renewable to cover any period following Final Payment as required by the Contract Documents; (iv) consent of the Surety on the Labor and Material Payment Bond and Performance Bond, to Final Payment if required; (v) duly completed and executed forms of Conditional or Unconditional Waivers and Releases of rights upon Final Payment of the Contractor, Subcontractors of any tier and Material Suppliers in accordance with California Civil Code §3262, with each of the same stating that there are, or will be, no claims for additional compensation after disbursement of the Final Payment; (vi) Operations and Maintenance manuals and separate warranties provided by any manufacturer or distributor of any materials or equipment incorporated into the Work; (vii) the Record Drawings; (viii) the form of Guarantee included in the Contract Documents duly executed by an authorized representative of the Contractor; (ix) any and all other items or documents required by the Contract Documents to be delivered to the District upon completion of the Work; (x) full accounting of the Contractor's Contingency Fund balance and calculation of shared savings; and (y) if required by the District, such other data establishing payment or satisfaction of obligations such as receipts, releases and waivers of liens, stop notices, claims, security interest or encumbrances arising out of the Contract to the extent and in such form as may be required by the District.

**9.4.3 Disbursement of Final Payment.** Provided that the District is then in receipt of all documents and other items in Article 9.4.2 above as conditions precedent to the District's obligation to disburse Final Payment, not later than sixty (60) days following Final Acceptance the District shall disburse the Final Payment to the Contractor. Pursuant to California Public Contract Code §7107, if there is any dispute between the District and the Contractor at the time that disbursement of the Final Payment is due, the District may withhold from disbursement of the Final Payment an amount not to exceed one hundred fifty percent (150%) of the amount in dispute.

**9.4.4 Waiver of Claims.** The Contractor's acceptance of the Final Payment is a waiver and release by the Contractor of any and all claims against the District for compensation or otherwise in connection with the Contractor's performance of the Contract.

**9.4.5 Claims Asserted After Final Payment.** Any lien, stop notice or other claim filed or asserted after the Contractor's acceptance of the Final Payment by any Subcontractor, of any tier, laborer, Material Supplier or others in connection with or for Work performed under the Contract Documents shall be the sole and exclusive responsibility of the Contractor who further agrees to indemnify, defend and hold harmless the District and its officers, agents, representatives and employees from and against any claims, demands or judgments arising or associated therewith, including without limitation attorneys fees incurred by the District in connection therewith. In the event any lien, stop notice or other claim of any Subcontractor, Laborer, Material Supplier or others performing Work under the Contract Documents remain unsatisfied

after Final Payment is made, Contractor shall refund to District all monies that the District may pay or be compelled to pay in discharging any lien, stop notice or other claim, including, without limitation all costs and reasonable attorneys fees incurred by District in connection therewith.

**9.5 Withholding of Payments.** The District may withhold any Progress Payment or the Final Payment, in whole or in part, to the extent it may deem advisable to protect the District on account of: (i) defective Work or Work not in conformity with the requirements of the Contract Documents which is not remedied; (ii) failure of the Contractor to make payments when due Subcontractors or Material Suppliers for materials or labor; (iii) claims filed or reasonable evidence of the probable filing of claims by Subcontractors, laborers, Material Suppliers, or others performing any portion of the Work under the Contract Documents for which the District may be liable or responsible including, without limitation, Stop Notice Claims filed with the District pursuant to California Civil Code §3179 et seq.; (iv) a reasonable doubt that the Work can be completed for the then unpaid balance of the GMP; (v) tax demands filed in accordance with California Government Code §12419.4; (vi) other claims, penalties and/or forfeitures for which the District is required or authorized to retain funds otherwise due the Contractor; (vii) any amounts due from the Contractor to the District under the terms of the Contract Documents, including but not limited to assessed liquidated damages in delay of completion; or (viii) the Contractor's failure to perform any of its obligations under the Contract Documents or its default under the Contract Documents or its failure to maintain adequate progress of the Work. In addition to the foregoing, the District shall not be obligated to process any Application for Progress Payment or Final Payment, nor shall Contractor be entitled to any Progress Payment or Final Payment so long as any lawful or proper direction concerning the Work or the performance thereof or any portion thereof, given by the District, the District's Inspector, the Program Manager, the Architect or any public authority having jurisdiction over the Work, or any portion thereof, shall not be fully and completely complied with by the Contractor. When the District is reasonably satisfied that the Contractor has remedied any such deficiency, payment shall be made of the amount withheld.

**9.6 Payments to Subcontractors.** The Contractor shall pay all Subcontractors for and on account of Work of the Contract performed by such Subcontractors in accordance with the terms of their respective subcontracts and as provided for pursuant to California Public Contract Code §10262, the provisions of which are deemed incorporated herein by this reference. In the event of the Contractor's failure to make payment to Subcontractors in conformity with California Public Contract Code §10262, the provisions of California Public Contract Code §10253 shall apply; by this reference, the provisions of California Public Contract Code §10253 are incorporated herein in its entirety, except that the references in said Section 10253 to "the director" shall be deemed to refer to the District.

**ARTICLE 10: CHANGES**

**10.1 Changes in the Work.** The District, at any time, by Construction Change Directive or Change Order, may make Changes within the general scope of the Work under the Contract Documents or issue additional instructions, require additional Work or direct deletion of Work. The Contractor shall not proceed with any Change involving an increase or decrease in the GMP or the Contract Time without prior written authorization from the District and governmental agencies with jurisdiction over the Work or the Change, including without limitation, DSA. The foregoing notwithstanding, the Contractor shall promptly commence and diligently complete any authorized Change to the Work; the Contractor shall not be relieved or excused from its prompt commencement and diligent completion of any authorized Change by virtue of the absence or inability of the Contractor and the District to agree upon the extent of any adjustment to the Contract Time or the GMP on account of such Change. The issuance of a Change Order pursuant to this Article 10 in connection with any Change authorized by the District under this Article 10.1 shall not be deemed a condition precedent to Contractor's obligation to promptly commence and diligently complete an authorized Change. The District's right to make Changes shall not invalidate the Contract nor relieve the Contractor of any liability or other obligations under the Contract Documents. Any requirement of notice of Changes in the scope of Work to the Surety shall be the responsibility of the Contractor. Changes to the Work depicted or described in the Drawings or the Specifications shall be subject to DSA approval. The District may make Changes to bring the Work or the Project into compliance with environmental requirements or standards established by state or federal statutes and regulations enacted after award of the Contract.

**10.2 Contractor Submittal of Data.** Within ten (10) days after receipt of a Proposal Request [or Construction Change Directive](#) directing a Change in the Work, the Contractor shall submit to the Program Manager a detailed written statement setting forth the general nature of the Change, the amount of any adjustment to the GMP on account thereof, properly itemized and supported by sufficient substantiating data to permit evaluation in the opinion of the Program Manager or the Architect of the same, and the extent of adjustment of the Contract Time, if any, required by such Change. No claim or adjustment to the GMP or the Contract Time shall be allowed if not asserted by the Contractor in strict conformity herewith or if asserted after Final Payment is made under the Contract Documents.

**10.3 Adjustment to GMP and Contract Time on Account of Changes to the Work.**

**10.3.1 Adjustment to GMP.** Adjustments to the GMP due to Changes in the Work shall be determined by application of one of the following methods, in the following order of priority:

**10.3.1.1 Mutual Agreement.** By negotiation and mutual agreement, on a lump sum basis, between the District, Program Manager and the Contractor on the basis of the estimate of the actual and direct increase or decrease in costs on account of the Change. Upon request of the District, Program Manager or the Architect, the Contractor shall provide a detailed estimate of increase or decrease in costs directly associated with performance of the Change along with cost breakdowns of the components of the Change and supporting data and documentation. The Contractor's estimate of increase or decrease in costs pursuant to the foregoing, if requested, shall be in sufficient detail and in such form as to allow the District, Program Manager and the Architect to review and

assess the completeness and accuracy thereof. The Contractor shall be solely responsible for any additional costs or additional time arising out of, or related in any manner to, its failure to provide the estimate of costs within the time specified in the request of the District, Program Manager or the Architect for such estimate.

**10.3.1.2 Time and Material.** The District may elect to direct the Contractor to proceed with work and perform on a time and material basis. The guidelines established in 10.3.2 shall be the basis of that submitted. Time and material slips shall be submitted and signed by the Program Manager on the same day the work in question is performed. Slips shall be made in duplicate, one copy to be retained by the Program Manager following that day's Work, one copy to be returned to the Contractor. The final copy is to be submitted by the Contractor with an invoice once the work is complete.

**10.3.1.3 Unit Prices.** If any item or component of the Work was bid as a Unit Price Item, adjustment of the GMP for quantity variations of Unit Price Items will be based upon prices proposed by the Contractor, unless the District reasonably determines that the price proposed for a Unit Price Item does not reasonably reflect marketplace costs, in which event the adjustment of the GMP will be based upon reasonable cost. Unless otherwise expressly provided, prices for Unit Price Items are inclusive of all direct, indirect and administration costs as well as profit.

**10.3.1.4 Determination by the District.** By the District, whether or not negotiations are initiated pursuant to Article 10.3.1.1 above, based upon actual and necessary costs incurred by the Contractor as determined by the District on the basis of the Contractor's records. In the event that the procedure set forth in this Article 10.3.1.2 is utilized to determine the extent of adjustment to the GMP on account of Changes to the Work, promptly upon determining the extent of adjustment to the GMP, the District shall notify the Contractor in writing of the same; the Contractor shall be deemed to have accepted the District's determination of the amount of adjustment to the GMP on account of a Change to the Work unless Contractor shall notify the District, the Program Manager, the Architect and the District's Inspector, in writing, not more than fifteen (15) days from the date of the District's written notice, of any objection to the District's determination. Failure of the Contractor to timely notify the District, the Program Manager, the Architect and the District's Inspector of Contractor's objections to the District's determination of the extent of adjustment to the GMP shall be deemed Contractor's acceptance of the District's determination and a waiver of any right or basis of the Contractor to thereafter protest or otherwise object to the District's determination. Notwithstanding any objection of the Contractor to the District's determination of the extent of any adjustment to the GMP pursuant to this Article 10.3.1.2, Contractor shall, pursuant to Article 10.6 below, diligently proceed to perform and complete any such Change.

**10.3.2 Basis for Adjustment of GMP & Contractor's Contingency Fund.** If Changes in the Work require an adjustment of the GMP pursuant to Articles 10.3.1.1, 10.3.1.2 or 10.3.1.4 above, the basis for adjustment of the GMP shall be as stated below. Charges against the Contractor's Contingency Fund shall be made as stated below, except that no adjustment to the GMP will be made.



**10.3.2.1 Labor.** Contractor shall be compensated for the costs of labor actually and directly utilized in the performance of the Change. Such labor costs shall be limited to field labor for which there is a prevailing wage rate classification. Wage rates for labor shall not exceed the prevailing wage rates in the locality of the Site and shall be in the labor classification(s) necessary for the performance of the Change. Use of a labor classification, which would increase labor costs associated with any Change, shall not be permitted. Labor costs shall exclude costs incurred by the Contractor in preparing estimate(s) of the costs of the Change, in the maintenance of records relating to the costs of the Change, coordination and assembly of materials and information relating to the Change or performance thereof, or the supervision and other overhead and Construction Services costs associated with the Change or performance thereof.

**10.3.2.2 Materials and Equipment.** Contractor shall be compensated for the costs of materials and equipment necessarily and actually used or consumed in connection with the performance of Changes. Costs of materials and equipment may include reasonable costs of transportation from a source closest to the site of the Work and delivery to the Site. If discounts by Material Suppliers are available for materials necessarily used in the performance of Changes, they shall be credited to the District. If materials and/or equipment necessarily used in the performance of Changes are obtained from a supplier or source owned in whole or in part by the Contractor, compensation therefore shall not exceed the current wholesale price for such materials or equipment. If, in the reasonable opinion of the District, the costs asserted by the Contractor for materials and/or equipment in connection with any Change is excessive, or if the Contractor fails to provide satisfactory evidence of the actual costs of such materials and/or equipment from its supplier or vendor of the same, the costs of such materials and/or equipment and the District's obligation for payment of the same shall be limited to the then lowest wholesale price at which similar materials and/or equipment are available in the quantities required to perform the Change. The District may elect to furnish materials and/or equipment for Changes to the Work, in which event the Contractor shall not be compensated for the costs of furnishing such materials and/or equipment or any mark-up thereon.

**10.3.2.3 Construction Equipment.** Contractor shall be compensated for the actual cost of the necessary and direct use of Construction Equipment in the performance of Changes to the Work. Use of such Construction Equipment in the performance of Changes to the Work shall be compensated in increments of fifteen (15) minutes. Rental time for Construction Equipment moved by its own power shall include time required to move such Construction Equipment to the site of the Work from the nearest available rental source of the same. If Construction Equipment is not moved to the Site by its own power, Contractor will be compensated for the loading and transportation costs in lieu of rental time. The foregoing notwithstanding, neither moving time or loading and transportation time shall be allowed if the Construction Equipment is used for performance of any portion of the Work other than Changes to the Work. Unless prior approval in writing is obtained by the Contractor from the District's Inspector, Program Manager and the District, no costs or compensation shall be allowed for time while Construction Equipment is inoperative, idle or on standby, for any reason. The Contractor shall not be entitled to an allowance or any other compensation for Construction Equipment or tools used in the

performance of Changes to the Work where such Construction Equipment or tools have a replacement value of \$500.00 or less. Construction Equipment costs claimed by the Contractor in connection with the performance of any Change to the Work shall not exceed rental rates established by distributors or construction equipment rental agencies in the locality of the Site; any costs asserted which exceed such rental rates shall not be allowed or paid. Unless otherwise specifically approved in writing by the Program Manager, the District's Inspector and the District, the allowable rate for the use of Construction Equipment in connection with Changes to the Work shall constitute full compensation to the Contractor for the cost of rental, fuel, power, oil, lubrication, supplies, necessary attachments, repairs or maintenance of any kind, depreciation, storage, insurance, labor (exclusive of labor costs of the Construction Equipment operator), and all other costs incurred by the Contractor incidental to the use of such Construction Equipment.

**10.3.2.4 Mark-up on Costs of Changes to the Work & Contractor's Contingency Fund.** In determining the cost to the District and the extent of increase to the GMP resulting from a Change adding to the Work, or to determine the cost to be charged against the Contractor's Contingency Fund, the allowance for mark-ups on the costs of the Change for all overhead (including home office and field overhead), Construction Services costs and profit associated with the Change shall not exceed \_\_\_\_\_ percent (X%), regardless of the number of Subcontractors, of any tier, performing any portion of any Change to the Work. If a Change to the Work reduces the GMP, no profit, Construction Services or overhead costs shall be paid by the District to the Contractor for the reduced or deleted Work. In such event, the adjustment to the GMP shall be the actual cost reduction realized by the reduced or deleted Work multiplied by the percentage for mark-ups on the cost of a Change adding to the scope of the Work. Refer to Specification Section 01 26 00 for detailed modification procedures.

**10.3.3 Contractor Maintenance of Records.** In the event that Contractor shall be directed to perform any Changes to the Work pursuant to Article 10.1 or should the Contractor encounter conditions which the Contractor, pursuant to Article 10.5, believes would obligate the District to adjust the GMP and/or the Contract Time, Contractor shall maintain detailed records on a daily basis. Such records shall include without limitation hourly records for labor and Construction Equipment and itemized records of materials and equipment used that day in connection with the performance of any Change to the Work. In the event that more than one Change to the Work is performed by the Contractor in a calendar day, Contractor shall maintain separate records of labor, Construction Equipment, materials and equipment for each such Change. In the event that any Subcontractor, of any tier, shall provide or perform any portion of any Change to the Work, Contractor shall require that each such Subcontractor maintain records in accordance with this Article. Each daily record maintained hereunder shall be signed by Contractor's Superintendent or Contractor's authorized representative; such signature shall be deemed Contractor's representation and warranty that all information contained therein is true, accurate, complete and relate only to the Change referenced therein. All records maintained by a Subcontractor, of any tier, relating to the costs of a Change to the Work shall be signed by such Subcontractor's authorized representative or Superintendent. All records maintained hereunder shall be subject to inspection, review and/or reproduction by the District, the Program Manager, the Architect or the District's

Inspector upon request. In the event that Contractor shall fail or refuse, for any reason, to maintain or make available for inspection, review and/or reproduction such records and the adjustment to the GMP on account of any Change to the Work is determined pursuant to this Article, the District's reasonable good faith determination of the extent of adjustment to the GMP on account of such Change shall be final, conclusive, dispositive and binding upon Contractor. Contractor's obligation to maintain records hereunder is in addition to, and not in lieu of, any other Contractor obligation under the Contract Documents with respect to Changes to the Work. These records are to be verified by the Program Manager on a daily basis in order to qualify as reimbursable. Records not verified by the Program Manager on a daily basis will not qualify as reimbursable.

**10.3.4 Adjustment to Contract Time.** In the event of any Change(s) to the Work pursuant to this Article 10, the Contract Time shall be extended or reduced by Change Order, as determined by the Program Manager and District, for a period of time commensurate with the time reasonably necessary to perform such Change. In the event that any Change shall require an extension of the Contract Time or any Milestone Date, the Contractor shall not be subject to Liquidated Damages for such period of time.

**10.3.5 Addition or Deletion of Alternate Bid Item(s).** If development of the Guaranteed Maximum Price for the Work included proposal(s) for Alternate Bid Item(s), the District may elect, pursuant to this Article 10, to add any such Alternate Bid Item(s) if the same did not form a basis of the GMP, or delete any such Alternate Bid Item(s) if the same formed a basis of the GMP. If the District elects to add or delete any such Alternate Bid Item(s), the cost or credit for such Alternate Bid Item(s) shall be as determined at the time they were considered as a part of the GMP but not included in the GMP.

**10.4 Change Orders.** If the District approves of a Change, a written Change Order prepared by the Contractor shall be forwarded to the Program Manager and Architect describing the Change and setting forth the adjustment to the Contract Time and the GMP, if any, on account of such Change. All Change Orders shall be in full payment and final settlement of all claims for direct, indirect and consequential costs, including without limitation, costs of delays or impacts related to, or arising out of, items covered and affected by the Change Order, as well as any adjustments to the Contract Time. Any claim or item relating to any Change incorporated into a Change Order not presented by the Contractor for inclusion in the Change Order shall be deemed waived. Unless otherwise expressly provided for in the Contract Documents or in the Change Order, any Change Order issued hereunder shall be binding upon the District only upon action of the District's Board of Trustees approving and ratifying such Change Order.

**10.5 Contractor Notice of Changes.** If the Contractor should claim that any instruction, request, sketch, the Drawings, the Specifications, action, condition, omission, default, or other situation obligates the District to increase the GMP or to extend the Contract Time, the Contractor shall notify the District's Inspector, the Program Manager and the Architect, in writing, of such claim within ten (10) days from the date of its actual or constructive notice and prior to implementation of such work, of the factual basis supporting the same. The District shall consider any such claim of the Contractor only if sufficient supporting documentation is submitted with the Contractor's notice to the District's Inspector, the Program Manager and the Architect. Time is of the essence in Contractor's written notice pursuant to the preceding sentence so that the District can promptly investigate and consider alternative measures to address such instruction, request, Drawings, Specifications, action, condition, omission, default or other situation. Accordingly, Contractor acknowledges that its failure, for any reason, to give written notice (with sufficient supporting documentation to permit the District's review and evaluation)

within ten (10) days of its actual or constructive knowledge of any instruction, request, Drawings, Specifications, action, condition, omission, default or other situation for which the Contractor believes there should an adjustment of the Contract Time or the GMP shall be deemed Contractor's waiver, release, discharge and relinquishment of any right to assert or claim any entitlement to an adjustment of the Contract Time or the GMP on account of any such instruction, request, Drawings, Specifications, action, condition, omission, default or other situation. In the event that the District determines that the GMP or the Contract Time are subject to adjustment based upon the events, circumstances and supporting documentation submitted with the Contractor's written notice under this Article 10.5, any such adjustment shall be determined in accordance with the provisions of Articles 10.3.1 and 10.3.2.

**10.6 Disputed Changes.** In the event of any dispute or disagreement between the Contractor and the District, the Program Manager or the Architect regarding the characterization of any item as a Change to the Work or as to the appropriate adjustment of the GMP or the Contract Time on account thereof, the Contractor shall promptly proceed with the performance of such item of the Work, subject to a subsequent resolution of such dispute or disagreement in accordance with the terms of the Contract Documents. The Contractor's failure or refusal to so proceed with such Work may be deemed to be Contractor's default of a material obligation of the Contractor under the Contract Documents.

**10.7 Emergencies.** In an emergency affecting the safety of life, or of the Work, or of property, the Contractor, without special instruction or prior authorization from the District, the Program Manager or the Architect, is permitted to act at its discretion to prevent such threatened loss or injury. Any compensation claimed by the Contractor on account of such emergency work shall be submitted and determined in accordance with this Article 10.

**10.8 Minor Changes in the Work.** The Architect may order minor Changes in the Work not involving an adjustment in the GMP or the Contract Time and not inconsistent with the intent of the Contract Documents. Such Changes shall be effected by Architect's Supplemental Instructions (ASI) and shall be binding on the District and the Contractor. The Contractor shall carry out such orders promptly.

**10.9 Unauthorized Changes.** Any Work beyond the lines and grades shown on the Contract Documents, or any extra Work performed or provided by the Contractor without notice to the Architect and the District's Inspector in the manner and within the time set forth in Article 10.5 shall be considered unauthorized and at the sole expense of the Contractor. Work so done will not be measured or paid for, no extension to the Contract Time will be granted on account thereof and any such Work may be ordered removed at the Contractor's sole cost and expense. The failure of the District to direct or order removal of such Work shall not constitute acceptance or approval of such Work nor relieve the Contractor from any liability on account thereof.

## **ARTICLE 11: SEPARATE CONTRACTORS**

**11.1 District's Right to Award Separate Contracts.** The District reserves the right to perform construction or operations related to the Project with the District's own forces or to award separate contracts in connection with other portions of the Project or other construction or operations at or about the Site. Award of a separate contract or work performed by the District's own forces shall not be considered as a delay or reason for extra work claims.

**11.2 District's Coordination of Separate Contractors.** The Contractor shall assist the District in coordination of the activities of the District's own forces and of each separate

contractor with the Work of the Contractor. The Contractor shall participate with other separate contractors and the District in reviewing their respective Construction Schedules when directed to do so. The Contractor shall make any revisions to the Approved Construction Schedule for the Work hereunder deemed necessary after a joint review and mutual agreement. The Construction Schedules shall then constitute the Construction Schedules to be used by the Contractor, separate contractors and the District until subsequently revised.

**11.3 Mutual Responsibility.** The Contractor shall afford the District and separate contractors reasonable opportunity for storage of their materials and equipment and performance of their activities at the Site and shall connect and coordinate the Contractor's Work, construction and operations with theirs as required by the Contract Documents.

**11.4 Discrepancies or Defects.** If part of the Contractor's Work depends for proper execution or results upon construction or operations by the District or a separate contractor, the Contractor shall, prior to proceeding with that portion of the Work, promptly report to the Architect, the Program Manager and the District's Inspector any apparent discrepancies or defects in such other construction that would render it unsuitable for such proper execution and results. Failure of the Contractor to so report shall constitute an acknowledgment that the District's or separate contractors' completed or partially completed construction is fit and proper to receive the Contractor's Work, except as to defects not then discoverable by the Contractor's reasonable diligence.

## ARTICLE 12: TESTS AND INSPECTIONS

### 12.1 Tests; Inspections; Observations.

**12.1.1 Contractor's Notice.** If the Contract Documents, laws, ordinances or any public authority with jurisdiction over the Work requires the Work, or any portion thereof, to be specially tested, inspected or approved, the Contractor shall give the Architect, the Program Manager and the District's Inspector written notice of the readiness of such Work for observation, testing or inspection at least three (3) working days prior to the time for the conducting of such test, inspection or observation. If inspection, testing or observation is by authority other than the District, the Contractor shall inform the District's Inspector and the Program Manager not less than three (3) working days prior to the date fixed for such inspection, test or observation. The Contractor shall not cover up any portion of the Work subject to tests, inspections or observations prior to the completion and satisfaction of the requirements of such test, inspection or observation. In the event that any portion of the Work subject to tests, inspection or approval shall be covered up by Contractor prior to completion and satisfaction of the requirements of such tests, inspection or approval, Contractor shall be responsible for the uncovering of such portion of the Work as is necessary for performing such tests, inspection or approval without adjustment of the GMP or the Contract Time on account thereof. Special Inspection, as required, shall conform to Section 4-333(c), Title 24 of the California Code of Regulations.

**12.1.2 Cost of Tests and Inspections.** Costs for tests and inspection of materials required by code or needed to confirm that the Work is in compliance with the Contract Documents shall be paid by the District as provided for herein. If such tests, inspections or approvals reveal any failure of the Work to comply with the requirements of the Contract Documents, the District may back charge the Contractor for all costs made necessary by such failures, including without limitation, the costs of corrections, repeat



tests, inspections or approvals and the costs of the Architect's services or its consultants in connection therewith. If work requiring testing or inspection is performed by the Contractor during Saturdays, Sundays or holidays for the sole benefit of the Contractor, the District may back charge the Contractor for the premium cost of testing and inspection services. If the contractor or its supplier or subcontractor, of any tier, is performing inefficiently or performing at multiple locations, the District may back charge the Contractor for extraordinary costs incurred.

**12.1.3 Testing/Inspection Laboratory.** The District shall select duly qualified person(s) or testing laboratory(ies) to conduct the tests and inspections to be paid for by the District and required by the Contract Documents. All such tests and inspections shall be in conformity with Title 24 of the California Code of Regulations. Where inspection or testing is to be conducted by an independent laboratory or testing agency, materials or samples thereof shall be selected by the laboratory, testing agency, the District's Inspector, the Program Manager or the Architect and not by the Contractor.

**12.2 Delivery of Certificates.** Required certificates of testing, inspection or approval shall, unless otherwise required by the Contract Documents, be secured by the Contractor and promptly delivered to the Architect and copied to the Program Manager and District's Inspector.

**12.3 Timeliness of Tests, Inspections and Approvals.** Tests or inspections required and conducted pursuant to the Contract Documents shall be made or arranged by Contractor to avoid delay in the progress of the Work.

## **ARTICLE 13: UNCOVERING AND CORRECTION OF WORK**

### **13.1 Inspection of the Work.**

**13.1.1 Access to the Work.** All Work and all materials and equipment forming a part of the Work or incorporated into the Work are subject to inspection by the District, the Program Manager, the Architect and the District's Inspector for conformity with the Contract Documents. The Contractor shall, at its cost and without adjustment to the GMP or the Contract Time, furnish any facilities necessary for sufficient and safe access to the Work for purposes of inspection by the District, the Program Manager, the Architect, the District's Inspector, DSA or any other public or quasi-public authority with jurisdiction over the Work or any portion thereof.

**13.1.2 Limitations Upon Inspections.** Inspections, tests, measurements, or other acts of the Architect and the District's Inspector hereunder are for the sole purpose of assisting them in determining that the Work, materials, equipment, progress of the Work, and quantities generally comply and conform with the requirements of the Contract Documents. These acts or functions shall not relieve the Contractor from performing the Work in full compliance with the Contract Documents. No inspection by the Architect or the District's Inspector shall constitute or imply acceptance of Work inspected. Inspection of the Work hereunder is in addition to, and not in lieu of, any other testing, inspections or approvals of the Work required under the Contract Documents.

**13.2 Uncovering of Work.** If any portion of the Work is covered contrary to the request of the Architect, the Program Manager, the District's Inspector, any authority having jurisdiction or the requirements of the Contract Documents, it must, if required by the Architect or the District's



Inspector, be uncovered for observation by the Architect and the District's Inspector and be replaced at the Contractor's expense without adjustment of the Contract Time or the GMP.

**13.3 Rejection of Work.** Prior to the District's Final Acceptance of the Work, any Work or materials or equipment forming a part of the Work or incorporated into the Work which is defective or not in conformity with the Contract Documents may be rejected by the District, the Program Manager the Architect or the District's Inspector and the Contractor shall correct such rejected Work without any adjustment to the GMP or the Contract Time, even if the Work, materials or equipment have been previously inspected by the Architect or the District's Inspector or even if they failed to observe the defective or non-conforming Work, materials or equipment.

**13.4 Correction of Work.** The Contractor shall promptly correct any portion of the Work rejected by the District, the Program Manager, the Architect or the District's Inspector for failing to conform to the requirements of the Contract Documents, or which is determined by them to be defective, whether observed before or after Substantial Completion and whether or not fabricated, installed or completed. The Contractor shall bear all costs of correcting such rejected Work, including additional testing and inspections and compensation for the Architect's services and expenses made necessary thereby. The Contractor shall bear all costs of correcting destroyed or damaged construction, whether completed or partially completed, of the District or separate contractors, caused by the Contractor's correction or removal of Work which is not in accordance with the requirements of the Contract Documents, or which is defective.

**13.5 Removal of Non-Conforming or Defective Work.** The Contractor shall, at its sole cost and expense, remove from the Site all portions of the Work, which are defective or are not in accordance with the requirements of the Contract Documents, which are neither corrected by the Contractor nor accepted by the District.

**13.6 Failure of Contractor to Correct Work.** If the Contractor fails to commence to correct defective or non-conforming Work within 3 days of notice of such condition and promptly thereafter complete the same within a reasonable time, the District may correct it in accordance with the Contract Documents. If the Contractor does not proceed with correction of such defective or non-conforming Work within the time fixed herein, the District may remove it and store the salvable materials or equipment at the Contractor's expense. If the Contractor does not pay costs of such removal and storage after written notice, the District may sell such materials or equipment at auction or at private sale and shall account for the proceeds thereof, after deducting costs and damages that should have been borne by the Contractor, including without limitation compensation for the Architect's services, attorneys fees and other expenses made necessary thereby. If such proceeds of sale do not cover costs, which the Contractor should have borne, the GMP shall be reduced by the deficiency. If payments of the GMP then or thereafter due the Contractor are not sufficient to cover such amount, the Contractor and the Surety shall promptly pay the difference to the District.

**13.7 Acceptance of Defective or Non-Conforming Work.** The District may, in its sole and exclusive discretion, elect to accept Work which is defective or which is not in accordance with the requirements of the Contract Documents, instead of requiring its removal and correction, in which case the GMP shall be reduced as appropriate and equitable.

## ARTICLE 14: WARRANTIES

**14.1 Workmanship and Materials.** The Contractor warrants to the District that all materials and equipment furnished under the Contract Documents shall be new, of good quality and of the

most suitable grade and quality for the purpose intended, unless otherwise specified in the Contract Documents. All Work shall be of acceptable quality, free from faults and defects, within specified tolerances, and in conformity with the requirements of the Contract Documents. If required by the Architect, the Program Manager or the District, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment incorporated into the Work. Any Work, or portion thereof not conforming to these requirements, including substitutions or alternatives not properly approved in accordance with the Contract Documents may be deemed defective. Where there is an approved substitution of, or alternative to, material or equipment specified in the Contract Documents, the Contractor warrants to the District that such installation, construction, material, or equipment will equally perform the function and have the quality of the originally specified material or equipment. The Contractor expressly warrants the merchantability, the fitness for use, and quality of all substitute or alternative items in addition to any warranty given by the manufacturer or supplier of such item.

**14.2 Warranty Work.** If, within one year after the date of Final Acceptance, or such other time frame set forth elsewhere in the Contract Documents, any of the Work is found to be defective or not in accordance with the requirements of the Contract Documents, or otherwise contrary to the warranties contained in the Contract Documents, the Contractor shall commence all necessary corrective action not more than seven (7) days after receipt of a written notice from the District to do so, and to thereafter diligently complete the same. In the event that Contractor shall fail or refuse to commence correction of any such item within said seven (7) day period or to diligently prosecute such corrective actions to completion, the District may, without further notice to Contractor, cause such corrective Work to be performed and completed. In such event, Contractor and Contractor's Performance Bond Surety shall be responsible for all costs in connection with such corrective Work, including without limitation, general administrative overhead costs of the District in securing and overseeing such corrective Work. Nothing contained herein shall be construed to establish a period of limitation with respect to any obligation of the Contractor under the Contract Documents. The obligations of the Contractor hereunder shall be in addition to, and not in lieu of, any other obligations imposed by any special guarantee or warranty required by the Contract Documents, guarantees or warranties provided by any manufacturer of any item or equipment forming a part of, or incorporated into the Work, or otherwise recognized, prescribed or imposed by law. Neither the District's Final Acceptance, the making of Final Payment, any provision in Contract Documents, nor the use or occupancy of the Work, in whole or in part, by District shall constitute acceptance of Work not in accordance with the Contract Documents nor relieve the Contractor or the Contractor's Performance Bond Surety from liability with respect to any warranties or responsibility for faulty or defective Work or materials, equipment and workmanship incorporated therein.

**14.3 Guarantee.** Upon completion of the Work, Contractor shall execute and deliver to the District the form of Guarantee included within the Contract Documents. The Contractor's execution and delivery of the form of Guarantee is an express condition precedent to any obligation of the District to disburse the Final Payment to the Contractor.

**14.4 Survival of Warranties.** The provisions of this Article 14 shall survive the Contractor's completion of Work under the Contract Documents, the District's Final Acceptance or the termination of the Contract.

## **ARTICLE 15: SUSPENSION OF WORK**

**15.1 District's Right to Suspend Work.** The District may, without cause, and without invalidating or terminating the Contract, order the Contractor, in writing, to suspend, delay or

interrupt the Work in whole or in part for such period of time as the District may determine. The Contractor shall resume and complete the Work suspended by the District in accordance with the District's directive, whether issued at the time of the directive suspending the Work or subsequent thereto.

**15.2 Adjustments to GMP and Contract Time.** In the event the District shall order suspension of the Work, an adjustment shall be made to the GMP for increases in the direct cost of performance of the Work of the Contract Documents, actually caused by suspension, delay or interruption ordered by the District; provided however that no adjustment of the GMP shall be made to the extent: (i) that performance is, was or would have been so suspended, delayed or interrupted by another cause for which the Contractor is responsible under the Contract Documents; or (ii) that an equitable adjustment is made or denied under another provision of the Contract Documents. The foregoing notwithstanding, any such adjustment of the GMP shall not include any adjustment to increase the Contractor's overhead, general administrative costs or profit, all of which will remain as reflected in the Cost Breakdown submitted by the Contractor pursuant to the Contract Documents. In the event of the District's suspension of the Work, the Contract Time shall be equitably adjusted.

## ARTICLE 16: TERMINATION

### 16.1 Termination for Cause.

**16.1.1 District's Right to Terminate.** The District may terminate the Contract upon the occurrence of any one or more of the following events of the Contractor's default: (i) if the Contractor refuses or fails to prosecute the Work with diligence as will insure Substantial Completion of the Work within the Contract Time, or if the Contractor fails to substantially Complete the Work within the Contract Time; (ii) if the Contractor becomes bankrupt or insolvent, or makes a general assignment for the benefit of creditors, or if the Contractor or a third party files a petition to reorganize or for protection under any bankruptcy or similar laws, or if a trustee or receiver is appointed for the Contractor or for any of the Contractor's property on account of the Contractor's insolvency, and the Contractor or its successor in interest does not provide adequate assurance of future performance in accordance with the Contract Documents within 10 days of receipt of a request for such assurance from the District; (iii) if the Contractor repeatedly fails to supply sufficient skilled workmen or suitable materials or equipment; (iv) if the Contractor repeatedly fails to make prompt payments to any Subcontractor, of any tier, or Material Suppliers or others for labor, materials or equipment; (v) if the Contractor disregards laws, ordinances, rules, codes, regulations, orders applicable to the Work or similar requirements of any public entity having jurisdiction over the Work; (iv) if the Contractor disregards proper directives of the Architect, the District's Inspector or District under the Contract Documents; (vii) if the Contractor performs Work which deviates from the Contract Documents and neglects or refuses to correct such Work; or (viii) if the Contractor otherwise violates in any material way any provisions or requirements of the Contract Documents; or (ix) if the Contractor made any material misrepresentations in its response to the Request for Proposal that would have resulted in the Contractor not being selected. Once the District determines that sufficient cause exists to justify the action, the District may terminate the Contract without prejudice to any other right or remedy the District may have, after giving the Contractor and the Surety at least seven (7) days advance written notice of the effective date of termination. The District shall have the sole discretion to permit the Contractor to remedy the cause for the termination without waiving the District's right to terminate the Contract, or

otherwise waiving, restricting or limiting any other right or remedy of the District under the Contract Documents or at law. Should the District discover any material misrepresentations in the Contractor's response to the Request for Qualifications or Request for Proposal that would have resulted in the Contractor not being selected, the district reserves the right to make a claim for "fraud in the inducement" and seek to recover all fees paid to the Contractor, in addition to any other false claims/breach of contract remedies it may seek.

**16.1.2 District's Rights Upon Termination.** In the event that the Contract is terminated pursuant to this Article 16.1, the District may take over the Work and prosecute it to completion, by contract or otherwise, and may exclude the Contractor from the site. The District may take possession of the Work and of all of the Contractor's tools, appliances, construction equipment, machinery, materials, and plant which may be on the site of the Work, and use the same to the full extent they could be used by the Contractor without liability to the Contractor. In exercising the District's right to prosecute the completion of the Work, the District may also take possession of all materials and equipment stored at the site of the Work or for which the District has paid the Contractor but which are stored elsewhere, and finish the Work as the District deems expedient. In exercising the District's right to prosecute the completion of the Work, the District shall have the right to exercise its sole discretion as to the manner, methods, and reasonableness of the costs of completing the Work and the District shall not be required to obtain the lowest figure for completion of the Work. In the event that the District takes bids for remedial Work or completion of the Work, the Contractor shall not be eligible for the award of such contract(s).

**16.1.3 Completion by the Surety.** In the event that the Contract is terminated pursuant to this Article 16.1, the District may demand that the Surety take over and complete the Work. The District may require that in so doing, the Surety not utilize the Contractor in performing and completing the Work. Upon the failure or refusal of the Surety to take over and begin completion of the Work within twenty (20) days after demand therefore, the District may take over the Work and prosecute it to completion as provided for above.

**16.1.4 Assignment and Assumption of Subcontracts.** The District shall, in its sole and exclusive discretion, have the option of requiring any Subcontractor or Material Supplier to perform in accordance with its Subcontract or Purchase Order with the Contractor and assign the Subcontract or Purchase Order to the District or such other person or entity selected by the District to complete the Work.

**16.1.5 Costs of Completion.** In the event of termination under this Article 16.1, the Contractor shall not be entitled to receive any further payment of the GMP until the Work is completed. If the unpaid balance of the GMP as of the date of termination exceeds the District's direct and indirect costs and expenses for completing the Work, including without limitation, attorneys' fees and compensation for additional professional and consultant services, such excess shall be used to pay the Contractor for the cost of the Work performed prior to the effective date of termination with a reasonable allowance for overhead and profit. If the District's costs and expenses to complete the Work exceed the unpaid GMP, the Contractor and/or the Surety shall pay the difference to the District.

**16.1.6 Contractor Responsibility for Damages.** The Contractor and the Surety shall be liable for all damage sustained by the District resulting from, in any manner, the termination of Contract under this Article 16.1, including without limitation, attorneys'

fees, and for all costs necessary for repair and completion of the Work over and beyond the GMP.

**16.1.7 Conversion to Termination for Convenience.** In the event the Contract is terminated under this Article 16.1, and it is determined, for any reason, that the Contractor was not in default under the provisions hereof, the termination shall be deemed a Termination for Convenience of the District and thereupon, the rights and obligations of the District and the Contractor shall be determined in accordance with Article 16.2 hereof.

**16.1.8 District's Rights Cumulative.** In the event the Contract is terminated pursuant to this Article 16.1, the termination shall not affect or limit any rights or remedies of the District against the Contractor or the Surety. The rights and remedies of the District under this Article 16.1 are in addition to, and not in lieu of, any other rights and remedies provided by law or otherwise under the Contract Documents. Any retention or payment of monies to the Contractor by the District shall not be deemed to release the Contractor or the Surety from any liability hereunder.

**16.2 Termination for Convenience of the District.** The District may at any time, in its sole and exclusive discretion, by written notice to the Contractor, terminate the Contract in whole or in part when it is in the interest of, or for the convenience of, the District. In such case, the Contractor shall be entitled to payment for: (i) Work actually performed and in place as of the effective date of such termination for convenience of the District, with a reasonable allowance for profit and overhead on such Work, and (ii) reasonable termination expenses for reasonable protection of Work in place and suitable storage and protection of materials and equipment delivered to the site of the Work but not yet incorporated into the Work, provided that such payments exclusive of termination expenses shall not exceed the total GMP as reduced by payments previously made to the Contractor and as further reduced by the value of the Work as not yet completed. The Contractor shall not be entitled to profit and overhead on Work which was not performed as of the effective date of the termination for convenience of the District nor shall Contractor be entitled to damages for profit it may have earned on other jobs. The District may, in its sole discretion, elect to have subcontracts assigned pursuant to Article 16.1.4 above after exercising the right hereunder to terminate for the District's convenience.

**16.3 Disputes; Continuation of Work.** Notwithstanding any claim, dispute or other disagreement between the District and the Contractor regarding performance under the Contract Documents, the scope of Work thereunder, or any other matter arising out of or related to, in any manner, the Contract Documents, the Contractor shall proceed diligently with performance of the Work in accordance with the District's written direction, pending any final determination or decision regarding any such claim, dispute or disagreement.

**16.4 Dispute Resolution; Arbitration.**

**16.4.1 Claims Under \$375,000.00.** Claims between the District and the Contractor of \$375,000.00 or less shall be resolved in accordance with the procedures established in Part 3, Chapter 1, Article 1.5 of the California Public Contract Code, §§20104 et seq.; provided however that California Public Contract Code §20104.2(a) shall not supersede the requirements of the Contract Documents with respect to the Contractor's notification to the District of such claim or extend the time for the giving of such notice as provided in the Contract Documents. The term "claims" as used herein shall be as defined in California Public Contract Code §20104(b)(2).



**16.4.2 Arbitration.** Except as provided in Article 17.11.1, any other claims, disputes, disagreements or other matters in controversy between the District and the Contractor arising out of, or related, in any manner, to the Contract Documents, or the interpretation, clarification or enforcement thereof shall be resolved by arbitration conducted in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association ("AAA") in effect as of the date that a Demand for Arbitration is filed, except as expressly modified herein. The locale for any arbitration commenced hereunder shall be the regional office of the AAA closest to the Site. The award rendered by the Arbitrator(s) shall be final and binding upon the District and the Contractor. In connection with any arbitration proceeding commenced hereunder, the discovery rights and procedures provided for in California Code of Civil Procedure §1283.05 shall be applicable, and the same shall be deemed incorporated herein by this reference. A Demand for Arbitration shall be filed and served within a reasonable time after the occurrence of the claim, dispute or other disagreement giving rise to the Demand for Arbitration, but in no event shall a Demand for Arbitration be filed or served after the date when the institution of legal or equitable proceedings based upon such claim, dispute or other disagreement would be barred by the applicable statute of limitations. In the event more than one Demand for Arbitration is made by either the District or the Contractor, all such controversies shall be consolidated into a single arbitration proceeding, unless otherwise agreed to by the District and the Contractor. The Contractor's Surety, a Subcontractor or Material Supplier to the Contractor and other third parties may be permitted to join in and be bound by an arbitration commenced hereunder if required by the terms of their respective agreements with the Contractor, except to the extent that such joinder would unduly delay or complicate the expeditious resolution of the claim, dispute or other disagreement between the District and the Contractor, in which case an appropriate severance order shall be issued by the Arbitrator(s). The expenses and fees of the Arbitrator(s) shall be divided equally among the parties to the arbitration. Each party to any arbitration commenced hereunder shall be responsible for and shall bear its own attorneys' fees, witness fees and other cost and expense incurred in connection with such arbitration. The foregoing notwithstanding, the Arbitrator(s) may award arbitration costs, including Arbitrators' fees but excluding attorneys' fees, to the prevailing party. The confirmation, enforcement, vacation or correction of an arbitration award rendered hereunder shall be the Superior Court of the State of California for the county in which the Site is situated. The substantive and procedural rules for such post-award proceedings shall be as set forth in California Code of Civil Procedure §§1285 et seq.

**16.5 Capitalized Terms.** Except as otherwise expressly provided, capitalized terms used in the Contract Documents shall have the meaning and definition for such term as set forth in the Contract Documents.

**16.6 Provisions Required by Law Deemed Inserted.** Each and every provision of law and clause required by law to be inserted in the Contract Documents is deemed to be inserted herein and the Contract Documents shall be read and enforced as though such provision or clause are included herein, and if through mistake, or otherwise, any such provision or clause is not inserted or if not correctly inserted, then upon application of either party, the Contract Documents shall forthwith be physically amended to make such insertion or correction.

**16.7 Days.** Unless otherwise expressly stated, references to "days" in the Contract Documents shall be deemed to be calendar days.



**ARTICLE 17: MISCELLANEOUS**

**17.1 Governing Law.** This Contract shall be governed by and interpreted in accordance with the laws of the State of California.

**17.2 Marginal Headings; Interpretation.** The titles of the various Articles of these Construction Provisions and elsewhere in the Contract Documents are used for convenience of reference only and are not intended to, and shall in no way, enlarge or diminish the rights or obligations of the District or the Contractor and shall have no effect upon the construction or interpretation of the Contract Documents. The Contract Documents shall be construed as a whole in accordance with their fair meaning and not strictly for or against the District or the Contractor.

**17.3 Successors and Assigns.** Except as otherwise expressly provided in the Contract Documents, all terms, conditions and covenants of the Contract Documents shall be binding upon, and shall inure to the benefit of the District and the Contractor and their respective heirs, representatives, successors-in-interest and assigns.

**17.4 Cumulative Rights and Remedies; No Waiver.** Duties and obligations imposed by the Contract Documents and rights and remedies available thereunder shall be in addition to and not in lieu of or otherwise a limitation or restriction of duties, obligations, rights and remedies otherwise imposed or available by law. No action or failure to act by the District shall constitute a waiver of a right or remedy afforded it under the Contract Documents or at law nor shall such an action or failure to act constitute approval of or acquiescence in a breach hereunder, except as may be specifically agreed in writing.

**17.5 Severability.** In the event any provision of the Contract Documents shall be deemed illegal, invalid, unenforceable and/or void, by a court or any other governmental agency of competent jurisdiction, such provision shall be deemed to be severed and deleted from the Contract Documents, but all remaining provisions hereof, shall in all other respects, continue in full force and effect.

**17.6 No Assignment by Contractor.** The Contractor shall not sublet or assign the Contract, or any portion thereof, or any monies due thereunder, without the express prior written consent and approval of the District, which approval may be withheld in the sole and exclusive discretion of the District. The District's approval to such assignment shall be upon such terms and conditions as determined by the District in its sole and exclusive discretion.

**17.7 Gender and Number.** Whenever the context of the Contract Documents so require, the neuter gender shall include the feminine and masculine, the masculine gender shall include the feminine and neuter, the singular number shall include the plural and the plural number shall include the singular.

**17.8 Independent Contractor Status.** In performing its obligations under the Contract Documents, the Contractor is an independent contractor to the District and not an agent or employee of the District.

**17.9 Notices.** Except as otherwise expressly provided for in the Contract Documents, all notices which the District or the Contractor may be required, or may desire, to serve on the other, shall be effective only if delivered by personal delivery or by postage prepaid, First Class Certified Return Receipt Requested United States Mail, addressed to the District or the Contractor at their respective address set forth in the Contract Documents, or such other address(es) as either

the District or the Contractor may designate from time to time by written notice to the other in conformity with the provisions hereof. In the event of personal delivery, such notices shall be deemed effective upon delivery, provided that such personal delivery requires a signed receipt by the recipient acknowledging delivery of the same. In the event of mailed notices, such notice shall be deemed effective on the third working day after deposit in the mail.

**17.10 Attorneys Fees.** Except as expressly provided for in the Contract Documents, or authorized by law, neither the District nor the Contractor shall recover from the other any attorneys fees or other costs associated with or arising out of any legal, administrative or other proceedings filed or instituted in connection with or arising out of the Contract Documents or the performance of either the District or the Contractor thereunder.

**17.11 Entire Agreement.** The Contract Documents contain the entire agreement and understanding between the District and the Contractor concerning the subject matter hereof, and supersedes and replaces all prior negotiations, proposed agreements or amendments, whether written or oral. No amendment or modification to any provision of the Contract Documents shall be effective or enforceable except by an agreement in writing executed by the District and the Contractor.

## ARTICLE 18: CLAIMS SUBMISSION

**18.1 Procedure.** The Contractor may submit a claim concerning a matter properly noticed in accordance with the requirements of this Contract.

The Contractor shall furnish all claim documentation as specified herein no later than thirty (30) days after the event or situation causing the claim has been overcome. Failure by the Contractor to furnish the required claim documentation within the time set forth above shall constitute waiver of the Contractor's right to compensation for such claim.

Contractor shall furnish three (3) certified copies of the requirement claim documentation. The claim documentation shall be complete when furnished. The evaluation of the Contractor's claim will be based upon District project records and the Contractor's furnished claim documentation.

Claim documentation shall conform to Generally Accepted Accounting Principles and shall be in the following format:

1. General Introduction
2. General Background Discussion
3. Issues
  - A. Index of Issues (listed numerically)
  - B. For each issue
    - (1) Background
    - (2) Chronology
    - (3) Contractor's position (reason for District's potential liability)
    - (4) Supporting documentation of merit or entitlement
    - (5) Supporting documentation of damages
    - (6) Begin each issue on a new page
4. All critical path method schedules, both as-planned, monthly updates, schedule revisions, and as-built along with the computer disks of all schedules related to the claim.

5. Productivity exhibits (if appropriate)
6. Summary of Issues and Damages

Supporting documentation of merit for each issue shall be cited by reference, photocopies, or explanation. Supporting documentation may include, but shall not be limited to, Construction Services; general requirements; technical specifications; drawings; correspondence; conference notes; shop drawings and submittals; shop drawing logs; survey books; inspection reports; delivery schedules; test reports; daily reports; subcontracts; fragmentary CPM schedules or time impact analyses; photographs; technical reports; requests for information; field instructions; and all other related records necessary to support the Contractor's claim.

Supporting documentation of damages for each issue shall be cited, photocopied, or explained. Supporting documentation may include, but shall not be limited to, any or all documents related to the preparation and submission of the bid; certified, detailed labor records including labor distribution reports; material and equipment procurement records; construction equipment ownership cost records or rental records; subcontractor or vendor files and cost records; general cost records; purchase orders; invoices; project as-planned and as-built cost records; general ledger records; variance reports; accounting adjustment records; and any other accounting materials necessary to support the Contractor's claim.

Each copy of the claim documentation shall be certified by a responsible officer of the Contractor in accordance with the requirements of these Contract Documents.

Should the Contractor be unable to support any part of the claim and it is determined that such inability is attributable to falsity of such certification or misrepresentation of fact or fraud on the part of the Contractor, the Contractor shall be liable to the District as provided for under California Government Code Section 12650 et. seq.

**18.2 California False Claims Act Compliance.** Claims submitted by the Contractor shall be accompanied by a notarized certificate containing the following language:

Under the penalty of law for perjury or falsification and with specific reference to the California False Claims Act, Government Code Section 12650 et. seq., the undersigned,

\_\_\_\_\_  
(Name)

\_\_\_\_\_  
(Title)

\_\_\_\_\_  
(Company)

hereby certifies that the claim for the additional compensation and time; if any, made herein for the work on this Contract is a true statement of the actual Costs incurred and time sought, and is fully documented and supported under the Contract between the parties.

Dated \_\_\_\_\_

Signature \_\_\_\_\_

Subscribed and sworn before me this \_\_\_\_\_ day of \_\_\_\_\_

\_\_\_\_\_  
Notary Public

My Commission Expires \_\_\_\_\_

Failure to submit the notarized certificate will be cause for denying the claim.

## **ARTICLE 19: RECORDS ACCESS**

**19.1. District's Right to Audit and Access to Contractor's Records.** The Contractor shall maintain all books, records, documents, and other evidence directly pertinent to the performance of the work under this Contract in accordance with generally accepted accounting principles and practices consistently applied. The Contractor shall also maintain all financial information and data used by the Contractor in the preparation or support of any cost submission, including the Contractor's original bid, required for this Contract, or any Change Order, claim or other request for equitable adjustment, and a copy of the cost summary or information submitted to the District. The District's representatives shall have access upon twenty-four hours advanced written notice, at all times during normal business hours, to all such books, records, documents, financial information, and all other evidence for the purpose of inspection, audit, and copying. The Contractor shall, at no cost to the District, provide proper facilities for such access, inspection and copying purposes.

The Contractor agrees to make the provisions of this Section applicable to this Contract, and all Change Orders, claims or other requests for equitable adjustment affecting the Contract time or price. The Contractor agrees to include the provisions of this Section in all subcontracts and sub-subcontracts or purchase orders, at any tier, and make this Section applicable to all subcontracts, at any tier, in excess of \$10,000 and to make the provisions of this Section applicable to all Change Orders, claims, and other requests for equitable adjustment related to project performance.

Audits conducted under this Section shall be in accordance with generally accepted auditing standards and established procedures and guidelines of the reviewing or audit agency.

The Contractor agrees to the disclosure of all information and reports resulting from access to records under the provisions of this Section, to the District and other affected agencies.

Records under the provisions of this Section shall be maintained and made available during the performance of the work under this Contract until three years past final payment, and until final settlement of all disputes, claims, or litigation, whichever occurs later. In addition, those records which relate to any portion of this Contract, to any Change Order, to any dispute, to any litigation, to the settlement of any claim arising out of such performance, or to the cost or items to which an audit exception has been taken, shall be maintained and made available until final payment or final resolution of such dispute, litigation, claim, or exception, which ever occurs later.

This Right to Access Section applies to all financial records pertaining to this Contract and all Change Orders and claims. In addition, this Right of Access applies to all records pertaining to all contracts, Change Orders and Contract Amendments:

1. To the extent the records pertain directly to Contract performance;
2. If there is any indication that fraud, gross abuse, or corrupt practices may be involved;
3. If the Contract is terminated for default or convenience.

Access to records is not limited to the required retention periods. The authorized representative of the District shall have access to records at any reasonable time for as long as the records are maintained.

**[END OF CONSTRUCTION PROVISIONS]**

RECORDING REQUESTED BY AND  
WHEN RECORDED RETURN TO:

Foothill De Anza Community College District  
12345 El Monte Road  
Los Altos Hills, CA 94022  
Attention: Carmen Redmond

This document is recorded for the  
benefit of the Foothill-De Anza  
Community College District, and  
recording is fee exempt under Section  
6103 of the Government Code.

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**FACILITIES LEASE AGREEMENT**

MEDIATED LEARNING CENTER  
DE ANZA COLLEGE  
Cupertino, California

by and between

–SUNDT CONSTRUCTION, INC.  
as Sublessor

and

FOOTHILL-DEANZA COMMUNITY COLLEGE DISTRICT  
as Sublessee

Dated as of \_\_\_\_\_, 2010



## **FACILITIES LEASE**

**THIS FACILITIES LEASE** (“Facilities Lease”), dated as of \_\_\_\_\_, 2010 (“Effective Date”), is made and entered into by and between Sundt Construction, Inc., a corporation duly organized and existing under the General Corporation Law of the State of California, as sublessor (the “Contractor”), and FOOTHILL-DE ANZA COMMUNITY COLLEGE DISTRICT, a California community college district duly organized and validly existing under the Constitution and laws of said State of California, as sublessee (the “District”).

### **RECITALS**

WHEREAS, the District desires to provide for the construction of a new Mediated Learning Center as more particularly described in Exhibit “A” attached hereto and incorporated herein by this reference (the “Project”);

WHEREAS, on the date hereof, the District has leased to the Contractor the real property for the construction of the Project described on Exhibit “B” attached hereto (the “Site”) pursuant to the terms of a Site Lease dated as of the date hereof by and between the District and the Contractor;

WHEREAS, the District is authorized under Section 81335 of the Education Code of the State of California to lease the Site to the Contractor and to have the Contractor construct the Project on the Site and to lease to the District the Site and the Project, and to accomplish that purpose has duly authorized the execution and delivery of this Facilities Lease;

WHEREAS, the Contractor is authorized to sublease the Site as lessee and is obligated to construct the Project on the Site, and has duly authorized the execution and delivery of this Facilities Lease;

WHEREAS, the Governing Board of the District (the “Board”) has determined that it is in the best interests of the District and for the common benefit of the citizens residing in the District to construct the Project by leasing the Site to the Contractor and by immediately entering into this Facilities Lease under which the District will sublease the Site and lease the Project from the Contractor and make Lease Payments on the dates and in the amounts set forth in the payment schedule attached hereto as Exhibit “C” (the “Lease Payment Schedule”).

WHEREAS, the District has performed all acts, conditions and things required by law to exist, to have happened and to have been performed precedent to and in connection with the execution and entering into this Facilities Lease do exist, have happened and have been performed in regular and due time, form and manner as required

by law, and the parties hereto are now duly authorized to execute and enter into this Facilities Lease;

**NOW, THEREFORE**, in consideration of the above premises and of the mutual covenants hereinafter contained and for other valuable consideration, the parties hereto do hereby agree as follows:

## **ARTICLE I**

### **DEFINITIONS AND EXHIBITS**

Section 1.1. Definitions. Unless the context otherwise requires, the terms defined in this Section shall, for all purposes of this Facilities Lease, have the meanings herein specified.

“Construction Provisions” means the terms and conditions for construction of the Project as set forth in Exhibit “D”.

“Contractor” means “Sundt Construction, Inc.”, a corporation organized and existing under the General Corporation Law of the State of California, and its successors and assigns.

“Contractor Representative” means the Chief Executive Officer of the Contractor, or any person authorized to act on behalf of the Contractor under or with respect to this Facilities Lease as evidenced by a resolution conferring such authorization adopted by the Board of Directors of the Contractor or as so designated by the President of the Contractor.

“District” means the FOOTHILL-DE ANZA COMMUNITY COLLEGE DISTRICT, a California community college district duly organized and validly existing under the Constitution and laws of said State of California.

“District Representative” means the spokesperson or agent of the District, or any other person authorized by the Governing Board of the District to act on behalf of the District under or with respect to this Facilities Lease.

“Event of Default” means one or more events of default as defined in Section 9.1 of this Facilities Lease.

“Facilities Lease” means this Facilities Lease together with any duly authorized and executed amendment hereto.

“Lease Payment” means any payment required to be made by the District pursuant to Section 4.5 of this Facilities Lease and as set forth in Exhibit “C” attached to this Facilities Lease.

“Lease Payment Schedule” shall mean the payment schedule attached hereto as Exhibit “C”.

“Permitted Encumbrances” means, as of any particular time: (i) liens for general ad valorem taxes and assessments, if any, not then delinquent, or which the District may, pursuant to provisions of Section 5.1 hereof, permit to remain unpaid; (ii) the Site Lease; (iii) this Facilities Lease; (iv) easements, rights of way, mineral rights, drilling rights and other rights, reservations, covenants, conditions or restrictions which exist of record as of the date of this Facilities Lease and which will not materially impair the use of the Site; and (v) easements, rights of way, mineral rights, drilling rights and other rights, reservations, covenants, conditions or restrictions established following the date of recordation of this Facilities Lease and to which the Contractor and the District consent in writing which will not impair or impede the operation of the Site.

“Project” means the improvements and equipment to be constructed and installed by the Contractor as more particularly described in Exhibit “A” attached hereto, and includes, unless the context requires otherwise, the Site.

“Site” means that certain parcel of real property and improvements thereon (if any) more particularly described in Exhibit “B” attached hereto.

“Site Lease” means the Site Lease dated as of \_\_\_\_\_, 2010, by and between the District and the Contractor together with any duly authorized and executed amendment thereto under which the District leases the Site to the Contractor.

“Term of this Facilities Lease” or “Term” means the time during which this Facilities Lease is in effect, as provided for in Section 4.2 of this Facilities Lease.

Section 1.2. Exhibits. The following Exhibits are attached to and by reference incorporated and made a part of this Facilities Lease:

Exhibit A - DESCRIPTION OF PROJECT: The description of the Project.

Exhibit B - DESCRIPTION OF SITE: The descriptions of the real property constituting the Site.

Exhibit C - SCHEDULE OF LEASE PAYMENTS: The schedule of Lease Payments to be paid by the District hereunder.

Exhibit D - CONSTRUCTION PROVISIONS: The terms and conditions for the construction of the Project.

## ARTICLE II

### REPRESENTATIONS, COVENANTS AND WARRANTIES

Section 2.1. Representations, Covenants and Warranties of the District. The District represents, covenants and warrants to the Contractor as follows:

(a) Due Organization and Existence. The District is a community college district, duly organized and existing under the Constitution and laws of the State of California.

(b) Authorization. The District has the full power and authority to enter into, to execute and to deliver this Facilities Lease, and to perform all of its duties and obligations hereunder, and has duly authorized the execution of this Facilities Lease.

(c) No Violations. Neither the execution and delivery of this Facilities Lease nor the Site Lease, nor the fulfillment of or compliance with the terms and conditions hereof or thereof, nor the consummation of the transactions contemplated hereby or thereby, conflicts with or results in a breach of the terms, conditions or provisions of any restriction or any agreement or instrument to which the District is now a party or by which the District is bound, or constitutes a default under any of the foregoing, or results in the creation or imposition of any lien, charge or encumbrance whatsoever upon any of the property or assets of the District, or upon the Site, except Permitted Encumbrances.

Section 2.2. Representations, Covenants and Warranties of the Contractor. The Contractor represents, covenants and warrants to the District as follows:

(a) Due Organization and Existence. The Contractor is a corporation duly organized and existing under the General Corporation Law of the State of California, has power to enter into this Facilities Lease and the Site Lease; is possessed of full power to own and hold real and personal property, and to lease and sell the same; and has duly authorized the execution and delivery of all of the aforesaid agreements.

(b) No Encumbrances. The Contractor will not pledge the Lease Payments or other amounts derived from the Site and from its other rights under this Facilities Lease, and will not mortgage or encumber the Site, except as provided under the terms of this Facilities Lease.

(c) No Violations. Neither the execution and delivery of this Facilities Lease or the Site Lease, nor the fulfillment of or compliance with the terms and conditions hereof or thereof, nor the consummation of the transactions contemplated hereby or thereby, conflicts with or results in a breach of the terms, conditions or provisions of any restriction or any agreement or instrument to which the Contractor is now a party or by which the Contractor is bound, or constitutes a default under any of the

foregoing, or results in the creation or imposition of any lien, charge or encumbrance whatsoever upon any of the property or assets of the Contractor, or upon the Site, except Permitted Encumbrances.

(d) No Assignments. Except upon written consent of the District, the Contractor will not assign this Facilities Lease, its right to receive Lease Payments and prepayments from the District, or its duties and obligations hereunder to any other person, firm or Contractor so as to impair or violate the representations, covenants and warranties contained in this Section 2.2.

(e) Authorization. The Contractor has the full power and authority to enter into, to execute and to deliver this Facilities Lease, and to perform all of its duties and obligations hereunder, and has duly authorized the execution of this Facilities Lease.

### **ARTICLE III**

#### **CONSTRUCTION OF PROJECT**

Section 3.1. The Contractor agrees to cause the Project to be constructed and installed in accordance with the Construction Provisions which are attached hereto as Exhibit "D". The Contractor agrees that it will cause the construction and installation of the Project to be diligently performed. The District and the Contractor may approve changes in the plans and specifications for the Project as provided in the Construction Provisions. The Contractor will cooperate at all times with the District in bringing about the timely completion of the Project. The definition and description of the Project contained herein may be amended by the District from time to time.

### **ARTICLE IV**

#### **AGREEMENT TO LEASE; TERMINATION OF LEASE; LEASE PAYMENTS; TITLE TO THE SITE**

Section 4.1. Lease of Property; No Merger. The Contractor hereby leases the Project and the Site to the District, and the District hereby leases said Project and Site from the Contractor upon the terms and conditions set forth in this Facilities Lease. The leasing by the Contractor to the District of the Site shall not effect or result in a merger of the District's leasehold estate pursuant to this Facilities Lease and its fee estate as lessor under the Site Lease, and the Contractor shall continue to have and hold a leasehold estate in said Site pursuant to the Site Lease throughout the term thereof and the term of this Facilities Lease. As to the Site, this Facilities Lease shall be deemed and constitute a sublease. Leasing the Project to the District shall not relieve the Contractor of its obligations under Article III.

Section 4.2. Term of Facilities Lease. The Term of this Facilities Lease shall commence as of, \_\_\_\_\_ 2010 and shall terminate on the completion of the Project and payment of the last Lease Payment, as provided in the Lease Payment Schedule.

Section 4.3. Termination of Term. The Term of this Facilities Lease shall terminate upon the earliest of any of the following events:

(a) An Event of Default and the Contractor's election to terminate this Facilities Lease pursuant to Section 9.2 hereof; or

(b) The arrival of the last day of the Term of this Facilities Lease and payment of all Lease Payments hereunder.

Section 4.4. Possession. The District may take possession of the Project hereunder as it is completed.

Section 4.5. Lease Payments.

(a) Obligation to Pay. Subject to the provisions of Articles III, VI and X hereof, the District agrees to pay to the Contractor, its successors and assigns, as rental for the use and occupancy of the Project and the Site, the Lease Payments in the amounts specified in the Lease Payment Schedule. Pursuant to the Lease Payment Schedule, Lease Payments shall be made for the Site and portions of the Project as construction of the Project is completed. All Lease Payments will be subject to the Final Guaranteed Maximum Price set forth in the Construction Provisions.

(b) Lease Payments to Constitute Current Expense of the District. The District and the Contractor understand and intend that the obligation of the District to pay Lease Payments and other payments hereunder constitutes a current expense of the District and shall not in any way be construed to be a debt of the District in contravention of any applicable constitutional or statutory limitation or requirement concerning the creation of indebtedness by the District, nor shall anything contained herein constitute a pledge of the general tax revenues, funds or moneys of the District. Lease Payments due hereunder shall be payable only from current funds which are budgeted and appropriated, or otherwise legally available, for the purpose of paying Lease Payments or other payments due hereunder as consideration for use of the Site during the fiscal year of the District for which such funds were budgeted and appropriated or otherwise made legally available for such purpose. This Facilities Lease shall not create an immediate indebtedness for any aggregate payments which may become due hereunder. The District has not pledged the full faith and credit of the District, the State of California or any agency or department thereof to the payment of the Lease Payments or any other payments due hereunder. It is the intent of the parties that Lease Payments by the District shall not be considered tax exempt or tax free interest payments.

(c) Appropriation. The District has appropriated the Guaranteed Maximum Price from the District's current fiscal year and/or State funds to be received



during the District's current fiscal year, and has segregated such funds in a separate account to be utilized solely for Lease Payments.

Section 4.6. Quiet Enjoyment. Excepting any interference resulting from the Contractor's performance pursuant to the Construction Provisions, during the term of this Facilities Lease, the Contractor shall provide the District with quiet use and enjoyment of the Site, and the District shall during such Term peaceably and quietly have and hold and enjoy the Site, without suit, trouble or hindrance from the Contractor, except as expressly set forth in this Facilities Lease. The Contractor will, at the request of the District join in any legal action in which the District asserts its right to such possession and enjoyment to the extent the Contractor may lawfully do so. Notwithstanding the foregoing, the Contractor shall have the right to inspect the Site as provided in Section 7.2 hereof.

Section 4.7. Title. During the Term of this Facilities Lease, the District shall hold title to the Site and obtain title to the Project from the Contractor, and any and all additions which comprise futures, repairs, replacements or modifications thereof, as construction progresses and lease payments are made to the Contractor. During the term of this Facilities Lease, the Contractor shall have a leasehold interest in the Site pursuant to the Site Lease.

If the District prepays the Lease Payments in full pursuant to Article X hereof or makes an advance deposit pursuant to Section 10.1 hereof, or pays all Lease Payments, all remaining right, title and interest of the Contractor, if any, in and to the Project and the Site, shall be fully transferred to and vested in the District. Title shall be transferred to and vested in the District hereunder without the necessity for any further instrument of transfer. However, upon such prepayment if then deemed necessary by the District, the Contractor shall be required to execute an instrument conveying to the District any interest created by the Site Lease.

Section 4.8. Abatement of Rental in the Event of Substantial Interference With Use and Occupancy of the Project and the Site. The amount of Lease Payments for the Project and the Site shall be abated during any period in which by reason of delay in the completing of the Project beyond the final completion date specified in the Construction Provisions, there is substantial interference with the use and occupancy of the Project and the Site by the District. The amount of such abatement shall be agreed upon by the District and the Contractor such that the resulting Lease Payments represent fair consideration for the use and occupancy of the portion of the Project and the Site, if any, with respect to which there is no such substantial interference. Such abatement shall continue for the period commencing with such substantial interference and ending with the termination of such interference.

Section 4.9. Fair Rental Value. The Lease Payments and any prepayment thereof coming due and payable constitute the total rental for the Project and shall be paid by the District as set forth in Exhibit "D" hereto for and in consideration of the right to use and occupy, and the continued quiet use and enjoyment of, the Project

during each month. The District and the Contractor have agreed and determined that the total Lease Payments and any prepayment thereof do not exceed the fair rental value of the Project. In making such determination, consideration has been given to the obligations of the parties under the Facilities Lease and Site Lease, the uses and purposes which may be served by the Project, and the benefits therefrom which will accrue to the District and the general public.

## **ARTICLE V**

### **MAINTENANCE; TAXES; AND OTHER MATTERS**

Section 5.1. Maintenance, Utilities, Taxes and Assessments. Except as provided for in the Construction Provisions, the repair and maintenance of the Project and the Site shall be the responsibility of the District.

If applicable, the District shall also pay or cause to be paid all taxes and assessments of any type or nature charged to the Contractor or District which affect the Project and the Site.

## **ARTICLE VI**

### **EMINENT DOMAIN**

Section 6.1. Eminent Domain.

(a) Eminent Domain Takings. If all of the Project and the Site shall be taken permanently under the power of eminent domain, the term of this Facilities Lease shall cease as of the day possession shall be so taken. If less than all of the Project and the Site shall be taken permanently, or if all of the Project and the Site or any part thereof shall be taken temporarily, under the power of eminent domain:

(1) this Facilities Lease shall continue in full force and effect and shall not be terminated by virtue of such taking and the parties waive the benefit of any law to the contrary, and

(2) there shall be a partial abatement of Lease Payments as a result of the application of the net proceeds of any eminent domain award to the prepayment of the Lease Payments hereunder.

(b) From Eminent Domain Award. The net proceeds of any eminent domain or condemnation shall be payable to the District.

## **ARTICLE VII**

### **ACCESS**

Section 7.1. The Contractor shall have the right at all reasonable times to enter upon the Site to construct the Project pursuant to the Construction Provisions. The District shall have the right at all reasonable times to enter upon the Site for whatever purpose the District chooses.

## **ARTICLE VIII**

### **ASSIGNMENT, SUBLEASING; AMENDMENT**

Section 8.1. Assignment and Subleasing. This Facilities Lease may be assigned by the District subject to the terms hereof, but may not be assigned by the Contractor without the written consent of the District. Any sublease by the District shall be subject to all of the following conditions:

- (a) This Facilities Lease and the obligation of the District to make Lease Payments hereunder shall remain obligations of the District; and
- (b) The District shall, within thirty (30) days after the delivery thereof, furnish or cause to be furnished to the Contractor a true and complete copy of such sublease; and
- (c) No such sublease by the District shall cause the Project or the Site to be used for a purpose other than a governmental or proprietary function authorized under the provisions of the Constitution and laws of the State of California.

Section 8.2. Amendment of this Facilities Lease. Without the written consent of the Contractor, the District will not alter, modify or cancel, or agree or consent to alter, modify or cancel this Facilities Lease.

## **ARTICLE IX**

### **EVENTS OF DEFAULT AND REMEDIES**

Section 9.1. Events of Default Defined. The following shall be “Events of Default” under this Facilities Lease and the terms “Event of Default” and “Default” shall mean, whenever they are used in this Facilities Lease, any one or more of the following events:

- (a) Failure by the District to pay any Lease Payment or other payment required to be paid hereunder at the time specified herein.

(b) Failure by the District to observe and perform any covenant, condition or agreement in this Facilities Lease on its part to be observed or performed, other than as referred to in clause (a) of this Section, for a period of thirty (30) days after written notice specifying such failure and requesting that it be remedied has been given to the District by the Contractor; provided, however, if the failure stated in the notice cannot be corrected within the applicable period, the Contractor shall not unreasonably withhold their consent to an extension of such time if corrective action is instituted by the District within the applicable period and diligently pursued until the default is corrected.

(c) The filing by the District of a voluntary petition in bankruptcy, or failure by the District promptly to lift any execution, garnishment or attachment, or adjudication of the District as bankrupt, or assignment by the District for the benefit of creditors, or the entry by the District into an agreement of composition with creditors, or the approval by a court of competent jurisdiction of a petition applicable to the District in any proceedings instituted under the provisions of the Federal Bankruptcy Statute, as amended, or under any similar acts which may hereafter be enacted.

Section 9.2. Remedies on Default. Whenever any Event of Default referred to in Section 9.1 hereof shall have happened and be continuing, it shall be lawful for the Contractor to exercise any and all remedies available pursuant to law or granted pursuant to this Facilities Lease; provided, however, there shall be no right under any circumstances to accelerate the Lease Payments or otherwise declare any Lease Payments not then in default to be immediately due and payable. Each and every covenant hereof to be kept and performed by the District is expressly made a condition hereof and upon the breach thereof, the Contractor may exercise any and all rights of entry and re-entry upon the Project and the Site, and also, at its option, with or without such entry, may terminate this Facilities Lease; provided, however, that no such termination shall be effected either by operation of law or acts of the parties hereto, except only in the manner herein expressly provided. In the event of such default and notwithstanding any re-entry by the Contractor, the District shall, as herein expressly provided, continue to remain liable for the payment of the Lease Payments and/or damages for breach of this Facilities Lease and the performance of all conditions herein contained and in any event such rent and/or damages shall be payable to the Contractor at the time and in the manner as herein provided, to wit:

(a) In the event the Contractor does not elect to terminate this Facilities Lease in the manner herein provided for in subparagraph (b) hereof, the District agrees to and shall remain liable for the payment of all Lease Payments and the performance of all conditions herein contained and shall reimburse the Contractor for any deficiency arising out of the re-letting of the Project and the Site, or, in the event the Contractor is unable to re-let the Project and the Site, then for the full amount of all Lease Payments to the end of the Term of this Facilities Lease, but said Lease Payments and/or deficiency shall be payable only at the same time and in the same manner as hereinbefore provided for the payment of Lease Payments hereunder, notwithstanding such entry or

reentry by the Contractor or any suit in unlawful detainer, or otherwise, brought by the Contractor for the purpose of effecting such re-entry or obtaining possession of the Project and the Site or the exercise of any other remedy by the Contractor. The District hereby waives any and all claims for damages caused or which may be caused by the Contractor in re-entering and taking possession of the Project and the Site as herein provided, all claims for damages that may result from the destruction of or injury to the Project and the Site, and all claims for damages to or loss of any property belonging to the District that may be in or upon the Project and the Site. The District agrees that the terms of this Facilities Lease constitute full and sufficient notice of the right of the Contractor to re-rent the Project and the Site in the event of such re-entry without effecting a surrender of this Facilities Lease, and further agrees that no acts of the Contractor in effecting such re-renting or re-leasing shall constitute a surrender or termination of this Facilities Lease irrespective of the term for which such re-leasing or re-renting is made or the terms and conditions of such re-leasing or re-renting or otherwise, but that, on the contrary, in the event of such default by the District the right to terminate this Facilities Lease shall vest in the Contractor to be effected in the sole and exclusive manner hereinafter provided for in subparagraph (b) hereof.

(b) In an event of default by the District hereunder, the Contractor at its option may terminate this Facilities Lease and re-rent or re-lease all or any portion of the Project and the Site. In the event of the termination of this Facilities Lease by the Contractor at its option and in the manner hereinafter provided on account of default by the District (and notwithstanding any re-entry upon the Project and the Site by the Contractor in any manner whatsoever or the re-renting or re-leasing of the Project and the Site), the District nevertheless agrees to pay to the Contractor all costs, losses or damages howsoever arising or occurring, payable at the same time and in the same manner as is herein provided in the case of payment of Lease Payments. The Net Proceeds relating to the re-renting of the Site and the Project shall be used in the manner set forth in Section 9.6 hereof. Neither notice to pay rent or to deliver up possession of the premises given pursuant to law nor any proceeding in unlawful detainer taken by the Contractor shall of itself operate to terminate this Facilities Lease, and no termination of this Facilities Lease on account of default by the District shall be or become effective by operation of law, or otherwise, unless and until the Contractor shall have given written notice to the District of the election on the part of the Contractor to terminate this Facilities Lease. The District covenants and agrees that no surrender of the Site for the remainder of the Term hereof or any termination of this Facilities Lease shall be valid in any manner or for any purpose whatsoever unless stated or accepted by the Contractor by such written notice.

(c) Notwithstanding any other provision herein, to the extent this Lease provides any right or remedy to Contractor which contradicts or is inconsistent with the Construction Provisions, the latter shall control over the former.

Section 9.3. No Remedy Exclusive. No remedy herein conferred upon or reserved to the Contractor is intended to be exclusive and every such remedy shall be cumulative and shall be in addition to every other remedy given under this Facilities

Lease or now or hereafter existing at law or in equity. No delay or omission to exercise any right or power accruing upon any default shall impair any such right or power or shall be construed to be a waiver thereof, but any such right and power may be exercised from time to time and as often as may be deemed expedient. In order to entitle the Contractor to exercise any remedy reserved to it in this Article IX it shall not be necessary to give any notice, other than such notice as may be required in this Article or by law.

Section 9.4. Attorneys' Fees and Expenses. In the event either party to this Facilities Lease should default under any of the provisions hereof, each party shall bear the cost of its own attorney's fees and expenses.

Section 9.5. No Additional Waiver Implied by One Waiver. In the event any agreement contained in this Facilities Lease should be breached by either party and thereafter waived by the other party, such waiver shall be limited to the particular breach so waived and shall not be deemed to waive any other breach hereunder.

Section 9.6. Application of Proceeds. All net proceeds received from the re-rent, re-lease or other disposition of the Project and the Site under this Article IX, and all other amounts derived by the Contractor as a result of an Event of Default hereunder, shall be applied to the Lease Payments in order of payment date and, in the case of the Net Proceeds received from the re-renting or re-leasing of the Project and the Site pursuant to Section 9.2(b), shall be applied to the prepayment of the Lease Payments in accordance with Section 10.2 hereof.

## **ARTICLE X**

### **PREPAYMENT OF LEASE PAYMENTS**

Section 10.1. Security Deposit. Notwithstanding any other provision of this Facilities Lease, the District may, so long as the District is not in default hereunder, on any date secure the payment of Lease Payments by a deposit with the Contractor of cash in an amount which is sufficient to pay all unpaid Lease Payments, including the principal and interest components thereof, in accordance with the Lease Payment Schedule set forth in Exhibit "C" hereto. In the event of a deposit pursuant to this Section, all obligations of the District under this Facilities Lease and all security provided by this Facilities Lease for said obligations shall cease and terminate, excepting only the obligation of the District to make, or cause to be made, Lease Payments from the deposit made by the District pursuant to this Section.

Section 10.2. Optional Prepayment. The District may prepay the Lease Payments, in whole or in part, at any time. The District shall give the Contractor written notice of its intention to exercise its option and the date and amount of such prepayment no less than fifteen (15) days in advance of the date of exercise.



## ARTICLE XI

### MISCELLANEOUS

Section 11.1. Notices. All notices, certificates or other communications hereunder shall be sufficiently given and shall be deemed to have been received forty-eight (48) hours after deposit in the United States mail in registered or certified form with postage fully prepaid:

If to the Contractor: Sundt Construction, Inc.  
2860 Gateway Oaks Dr., Suite 300  
Sacramento, CA 95833  
Attn: Cody Pearson

If to District: Foothill-De Anza Community College District  
12345 El Monte Road  
Los Altos Hills, California 94022  
Attn: Carmen Redmond, District Purchasing Services

WITH A COPY TO:

Foothill-De Anza Community College District  
12345 El Monte Road  
Los Altos Hills, California 94022  
Attn: De Anza Bond Director, Facilities Department

The Contractor and the District, by notice given hereunder, may designate different addresses to which subsequent notices, certificates or other communications will be sent.

Section 11.2. Binding Effect. This Facilities Lease shall inure to the benefit of and shall be binding upon the Contractor and the District and their respective successors and assigns.

Section 11.3. Severability. In the event any provision of this Facilities Lease shall be held invalid or unenforceable by any court of competent jurisdiction, such holding shall not invalidate or render unenforceable any other provision hereof.

Section 11.4. Net-Net-Net Lease. This Facilities Lease shall be deemed and construed to be a “net-net-net lease” and the District hereby agrees that the Lease Payments shall be an absolute net return to the Contractor, free and clear of any expenses, charges or setoffs whatsoever.

Section 11.5. Further Assurances and Corrective Instruments. The Contractor and the District agree that they will, from time to time, execute, acknowledge and deliver, or cause to be executed, acknowledged and delivered, such supplements hereto and such further instruments as may reasonably be required for correcting any inadequate or incorrect description of the Site hereby leased or intended so to be or for carrying out the expressed intention of this Facilities Lease.

Section 11.6. Execution in Counterparts. This Facilities Lease may be executed in several counterparts, each of which shall be original and all of which shall constitute but one and the same instrument.

Section 11.7. Applicable Law. This Facilities Lease shall be governed by and construed in accordance with the laws of the State of California.

Section 11.8. Contractor and District Representatives. Whenever under the provisions of this Facilities Lease the approval of the Contractor or the District is required, or the Contractor or the District is required to take some action at the request of the other, such approval or such request shall be given for the Contractor by the Contractor Representative and for the District by the District Representative, and any party hereto shall be authorized to rely upon any such approval or request.

Section 11.9. Captions. The captions or headings in this Facilities Lease are for convenience only and in no way define, limit or describe the scope or intent of any provisions or section of this Facilities Lease, nor the construction or interpretation of any part thereof.

Section 11.10 Prior Agreements. This Facilities Lease and the corresponding Site Lease and the exhibits incorporated into them collectively contain all of the agreements of the parties hereto with respect to any matter covered or mentioned in this Facilities Lease and no prior agreements or understanding pertaining to any such matter shall be effective for any purpose. No provision of this Facilities Lease may be amended or added to except by an agreement in writing signed by the parties hereto or their respective successors-in-interest.

Section 11.11 Attorney's Fees. If either party brings an action or proceeding involving the Property or to enforce the terms of this Facilities Lease or to declare rights hereunder, each party shall bear the cost of its own attorney's fees.

---

Its: \_\_\_\_\_



Its: \_\_\_\_\_

By: \_\_\_\_\_

[illegible]

On \_\_\_\_\_, 2010, before me, the undersigned notary public, personally appeared \_\_\_\_\_, [ ] personally known to me OR [ ] proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

\_\_\_\_\_  
Signature of Notary

## **EXHIBIT “A”**

### **DESCRIPTION OF PROJECT**

Construction of a new 67,000 gross square foot, two-story, Type II-B mixed occupancy building on an existing community college campus. The building will contain specialized classrooms, computer labs, a media production suite including a television production studio, a student lounge and faculty offices.

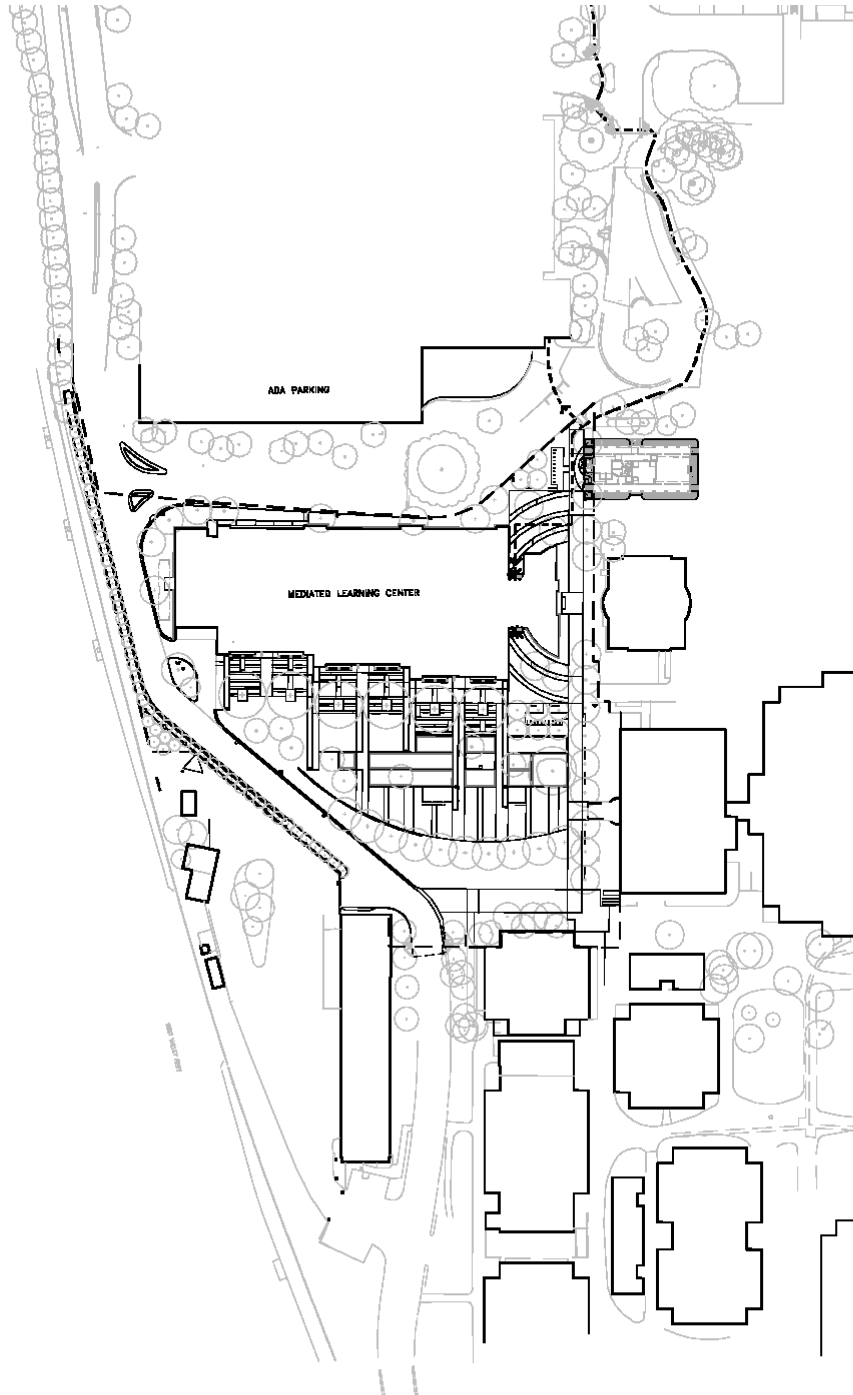
Building construction will include a detailed concrete and steel structure - including buckling restraint brace frames, with exterior cladding of terra cotta and metal panel rain screens with storefront infill. The specialized building components are designed to meet energy efficiency goals such as a passive ventilation system, solar thermal for radiant floor heating and domestic water heat, temperature controls, photovoltaic system, and daylight control features. These systems were incorporated to reach the LEED Platinum certification sustainability goals of the College.

Construction of this project also includes extensive landscaping including new irrigation systems/plants/trees/shrubs/grasses as well as a variety of new hardscape paving, site electrical, wireless connectivity in the plaza, and a fountain system. All utility connections for the building and a new emergency generator are also included in the scope of this project.

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**EXHIBIT "B"**

**DESCRIPTION OF SITE**





## **EXHIBIT “C”**

### **SCHEDULE OF LEASE PAYMENTS**

District shall make Lease Payments for the Facilities Lease in conformance with and subject to the terms and conditions for payments for the Project as set forth in the Construction Provisions.

*Draft*

RECORDING REQUESTED BY AND  
WHEN RECORDED RETURN TO:

Foothill-De Anza Community College District  
12345 El Monte Road  
Los Altos Hills, CA 94022  
Attention: Carmen Redmond

This document is recorded for the  
benefit of the Foothill-De Anza  
Community College District, and  
recording is fee exempt under Section  
6103 of the Government Code.

---

**SITE LEASE AGREEMENT**

MEDIATED LEARNING CENTER  
DE ANZA COLLEGE  
Cupertino, California

by and between

FOOTHILL-DE ANZA COMMUNITY COLLEGE DISTRICT  
as Lessor

and

SUNDT CONSTRUCTION, INC.  
as Lessee

Dated as of \_\_\_\_\_, 2010

## **SITE LEASE**

THIS SITE LEASE (this "Lease") dated as of \_\_\_\_\_, 2010 ("Effective Date"), is made and entered into by and between the FOOTHILL-De ANZA COMMUNITY COLLEGE DISTRICT, a California community college district duly organized and validly existing under the Constitution and laws of said State of California, (the "District"), as lessor, and Sundt Construction, Inc. ("Contractor"), a corporation duly organized and existing under the laws of the State of California, as lessee.

### **I. RECITALS**

WHEREAS, the District currently owns a parcel of land located at De Anza College, Cupertino, California, containing approximately three (3) acres, as more particularly described in Exhibit A attached hereto and incorporated herein by this reference (the "Site"), which Site is adequate to accommodate the construction of a new building to house general purpose classrooms, distance learning classrooms, teacher training facilities, associated general office and storage areas, multi-media recording and broadcasting facilities, utility interconnections, and site improvements;

WHEREAS, the District desires to provide for the construction of a new Mediated Learning Center as more particularly described in Exhibit "A" to the Facilities Lease (defined below) and incorporated herein by this reference (the "Project");

WHEREAS, the Governing Board of the District (the "Board") has determined that it is in the best interests of the District and for the common benefit of the citizens residing in the District to construct the Project by leasing the Site to the Contractor and by immediately entering into the Facilities Lease (defined below) under which the District will sublease the Site and lease the Project from the Contractor;

WHEREAS, the District is authorized under Section 81335 of the Education Code of the State of California to lease the Site to the Contractor and to have the Contractor construct the Project on the Site and to lease to the District the Site and the Project, and has duly authorized the execution and delivery of this Lease;

WHEREAS, the Contractor is authorized to lease the Site as lessee and to construct the Project on the Site, and has duly authorized the execution and delivery of this Site Lease; and

WHEREAS, the District has performed all acts, conditions and things required by law to exist, to have happened and to have been performed precedent to and in connection with the execution and entering into this Site Lease do exist, have happened and have been performed in regular and due time, form and manner as required by law, and the parties hereto are now duly authorized to execute and enter into this Site Lease;

**NOW, THEREFORE**, in consideration of the promises and of the mutual agreements and covenants contained herein, the sum of One Dollar (\$1.00) and other valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto do hereby agree as follows:

## **ARTICLE I**

### **II. DEFINITIONS**

Section 1.1. Unless the context clearly otherwise requires, all words and phrases defined in Section 1.1 of the Facilities Lease dated as of \_\_\_, 2010 by and between the District and the Contractor (the "Facilities Lease") shall have the same meaning in this Site Lease.

## **ARTICLE II**

### **DEMISING CLAUSES**

Section 2.1. Lease of the Site. The District hereby leases to the Contractor, and the Contractor hereby leases from the District the Site, subject only to Permitted Encumbrances, in accordance with the provisions of this Site Lease, to have and to hold for the term of this Site Lease. This Site Lease shall only take effect if the Facilities Lease is executed by the District and Contractor within three (3) days of execution of this Site Lease.

Section 2.2. Rental. In consideration for the lease of the Site by the District to the Contractor and for other good and valuable consideration, the Contractor shall pay One Dollar (\$1.00) to the District per year.

Section 2.3. No Merger. The leasing of the Site by the Contractor to the District pursuant to the Facilities Lease shall not effect or result in a merger of the estates of the District in the Site, and the Contractor shall continue to have a leasehold estate in the Site pursuant to this Site Lease throughout the term hereof.

## **ARTICLE III**

### **QUIET ENJOYMENT**

Section 3.1. The parties intend that the Site will be sub-leased back to the District pursuant to the Facilities Lease for the term thereof. It is further intended that, to the extent provided herein and in the Facilities Lease, if an Event of Default occurs under the Facilities Lease, the Contractor, or its assignee, will have the right, for the then remaining term of this Site Lease, to: (a) take possession of the Site; (b) if it deems it appropriate, cause appraisal of the Site and a study of the then reasonable use thereof to be undertaken; and (c) relet the Site. Subject to any rights the District may have under the Facilities Lease (in the absence of an Event of Default) to possession and

enjoyment of the Site, the District hereby covenants and agrees that it will not take any action to prevent the Contractor from having quiet and peaceable possession and enjoyment of the Site during the term hereof and will, at the request of the Contractor, to the extent that it may lawfully do so, join in any legal action in which the Contractor asserts its right to such possession and enjoyment.

## **ARTICLE IV**

### **SPECIAL COVENANTS AND PROVISIONS**

Section 4.1. Waste. The Contractor agrees that at all times that it is in possession of the Site, it will not commit, suffer or permit any waste on the Site, and that it will not willfully or knowingly use or permit the use of the Site for any illegal purpose or act.

Section 4.2. Further Assurances and Corrective Instruments. The District and the Contractor agree that they will, from time to time, execute, acknowledge and deliver, or cause to be executed, acknowledged and delivered, such supplements hereto and such further instruments as may reasonably be required for correcting any inadequate or incorrect description of the Site hereby leased or intended so to be or for carrying out the expressed intention of this Site Lease and the Facilities Lease.

Section 4.3. Right of Entry. The District reserves the right for any of its duly authorized representatives to enter upon the Site at any reasonable time to inspect the same.

Section 4.4. Representations of the District. The District represents and warrants to the Contractor as follows:

(a) Due Organization and Existence. The District is a community college district, duly organized and existing under the Constitution and laws of the State of California.

(b) Authorization. The District has the full power and authority to enter into, to execute and to deliver this Site Lease, and to perform all of its duties and obligations hereunder, and has duly authorized the execution of this Site Lease.

(c) No Violations. Neither the execution and delivery of this Site Lease nor the Facilities Lease, nor the fulfillment of or compliance with the terms and conditions hereof or thereof, nor the consummation of the transactions contemplated hereby or thereby, conflicts with or results in a breach of the terms, conditions or provisions of any restriction or any agreement or instrument to which the District is now a party or by which the District is bound, or constitutes a default under any of the foregoing, or results in the creation or imposition of any lien, charge or encumbrance whatsoever upon any of the property or assets of the District, or upon the Site, except Permitted Encumbrances.

Section 4.5. Representations of the Contractor. The Contractor represents, covenants and warrants to the District as follows:

(a) Due Organization and Existence. The Contractor is a corporation duly organized and existing under the General Corporation Law of the State of California, has power to enter into this Site Lease and the Facilities Lease; is possessed of full power to own and hold real and personal property, and to lease and sell the same; and has duly authorized the execution and delivery of all of the aforesaid agreements.

(b) Authorization. The Contractor has the full power and authority to enter into, to execute and to deliver this Site Lease, and to perform all of its duties and obligations hereunder, and has duly authorized the execution of this Site Lease.

(c) No Violations. Neither the execution and delivery of this Site Lease or the Facilities Lease, nor the fulfillment of or compliance with the terms and conditions hereof or thereof, nor the consummation of the transactions contemplated hereby or thereby, conflicts with or results in a breach of the terms, conditions or provisions of any restriction or any agreement or instrument to which the Contractor is now a party or by which the Contractor is bound, or constitutes a default under any of the foregoing, or results in the creation or imposition of any lien, charge or encumbrance whatsoever upon any of the property or assets of the Contractor, or upon the Site, except Permitted Encumbrances.

## ARTICLE V

### ASSIGNMENT, SUBLEASING, MORTGAGING AND SELLING

Section 5.1. Assignment and Subleasing. This Site Lease may be assigned and the Site subleased, as a whole or in part, by the Contractor only upon the prior written consent of the District to such sublease.

Section 5.2. Restrictions on District. The District agrees that it will not mortgage, sell, encumber, assign, transfer or convey the Site or any portion thereof during the term of this Site Lease.

Section 5.3. Liens. The Contractor agrees to keep the Site and every part thereof free and clear of any and all liens, including without limitation, pledges, charges, encumbrances, claims, materialmen liens, mechanic liens and other liens for or arising out of or in connection with work or labor done, services performed, or materials or appliances used or furnished for or in connection with the Site or the Project. Contractor further agrees to pay promptly and fully and discharge any and all claims on which any such lien may or could be based, and to save and hold the District free and harmless from any and all such liens, mortgages, including without limitation, claims of liens and suits or other proceedings pertaining thereto.

**ARTICLE VI**  
**IMPROVEMENTS**

Section 6.1. Title to all improvements made on the Site during the term hereof shall vest subject to the terms of the Facilities Lease.

**ARTICLE VII**  
**TERM AND TERMINATION**

Section 7.1. Term. The term of this Site Lease shall commence as of \_\_\_\_, 2010 and shall terminate on the last day of the Term of the Facilities Lease, provided the District has paid to the Contractor, or its assignee, all Lease Payments and other payments which may be due under the Facilities Lease, and provided this Site Lease has not terminated pursuant to Sections 4.3(a) or 4.3(c) of the Facilities Lease.

**ARTICLE VIII**  
**MISCELLANEOUS**

Section 8.1. Notices. All notices, certificates or other communications hereunder shall be sufficiently given and shall be deemed to have been received forty-eight (48) hours after deposit in the United States mail in registered or certified form with postage fully prepaid:

If to the Contractor: Sundt Construction, Inc.  
2860 Gateway Oaks Dr., Suite 300  
Sacramento, CA 95833  
Attn: Cody Pearson

If to the District: Foothill-De Anza Community College District  
12345 El Monte Road  
Los Altos Hills, California 94022  
Attn: Carmen Redmond, Purchasing Services

**WITH A COPY TO:**

Foothill-De Anza Community College District  
12345 El Monte Road  
Los Altos Hills, California 94022  
Attn: Tom Armstrong, De Anza Bond Director



The Contractor and the District, by notice given hereunder, may designate different addresses to which subsequent notices, certificates or other communications will be sent.

Section 8.2. Binding Effect. This Site Lease shall inure to the benefit of and shall be binding upon the Contractor and the District and their respective successors and assigns.

Section 8.3. Severability. In the event any provision of the Site Lease shall be held invalid or unenforceable by any court of competent jurisdiction, such holding shall not invalidate or render unenforceable any other provision hereof.

Section 8.4. Amendments, Changes and Modifications. This Site Lease may not be effectively amended, changed, modified, altered or terminated without the written agreement of both parties hereto.

Section 8.5. Obligations Absolute. The Contractor agrees that the obligations of the Contractor are absolute and unconditional and not subject to any charges or setoffs against the District whatsoever.

Section 8.6. Execution in Counterparts. This Site Lease may be executed in several counterparts, each of which shall be original and all of which shall constitute but one and the same instrument.

Section 8.7. Applicable Law. This Site Lease shall be governed by and construed in accordance with the laws of the State of California.

Section 8.8. Contractor and District Representatives. Whenever under the provisions of this Site Lease the approval of the Contractor or the District is required, or the Contractor or the District is required to take some action at the request of the other, such approval or such request shall be given for the Contractor by the Contractor Representative and for the District by the District Representative, and any party hereto shall be authorized to rely upon any such approval or request.

Section 8.9. Captions. The captions or headings in this Site Lease are for convenience only and in no way define, limit or describe the scope or intent of any provisions or sections of this Site Lease.

Section 8.10 Prior Agreements. This Site Lease and the corresponding Facilities Lease collectively contain all of the agreements of the parties hereto with respect to any matter covered or mentioned in this Site Lease and no prior agreements or understanding pertaining to any such matter shall be effective for any purpose. No provision of this Site Lease may be amended or added to except by an agreement in writing signed by the parties hereto or their respective successors-in-interest.

Section 8.11 Attorney's Fees. If either party brings an action or proceeding involving the Property or to enforce the terms of this Site Lease or to declare rights hereunder, each party shall bear the cost of its own attorney's fees.

Section 8.12. Construction of Lease. It is the intent of the parties that this Site Lease and the Facilities Lease, and all Exhibits incorporated therein, be construed and interpreted together to accomplish the goals of the parties.

**IN WITNESS WHEREOF**, the parties hereto have caused this Site Lease to be executed by their respective officers thereunto duly authorized, as of the Effective Date.

By: \_\_\_\_\_

Its: \_\_\_\_\_

Attest: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

By: \_\_\_\_\_

Its: \_\_\_\_\_

Approved as to form:

JARET & JARET

By: \_\_\_\_\_

Phillip A. Jaret, Legal Counsel for  
Foothill-De Anza Community College District

STATE OF CALIFORNIA    )  
  ) ss.  
COUNTY OF \_\_\_\_\_)

On \_\_\_\_\_, 2010, before me, the undersigned notary public, personally appeared \_\_\_\_\_, [ ] personally known to me OR [ ] proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

\_\_\_\_\_  
Signature of Notary

DRAFT

