

**AGREEMENT BETWEEN OWNER**  
**AND**  
**CONSTRUCTION MANAGER-AT-RISK**

This Agreement is made as of \_\_\_\_\_, 2020 (the “Effective Date”), by and between

**Owner:** The University of Texas M D Anderson Cancer Center  
1515 Holcombe Boulevard  
Houston, Texas 77030

**And Construction Manager:** \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

For the following:

**Project Name:** Renovate Endoscopy Center – Main Building – Floor 5

**Uniform General Conditions for University of Texas System  
Building Construction Contracts (UTUGC) Version: 2013, dated June 20, 2018**

**The Project Architect/Engineer is:** Hellmuth, Obata, & Kassabaum, L.P.  
3200 Southwest Freeway  
Suite 900  
Houston, Texas 77027

**Owner Controlled  
Insurance Program (OCIP):** No

**Owner Provided Builder’s  
Risk Insurance:** No

**Building Information Modeling:** This project utilizes the BIM process for generating and managing building data. Refer to Exhibits for special requirements.

Owner and Construction Manager agree as follows:

*This form of agreement for Construction Manager-at-Risk services has been prepared by the Office of General Counsel for The University of Texas System for use on M. D. Anderson Cancer Center projects. The legal terms of this agreement should not be altered without the approval of the Office of General Counsel.*

*Use this form for all M. D. Anderson Cancer Center projects after July 12, 2018.*

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## ARTICLE 1 SCOPE OF WORK

Construction Manager has overall responsibility for, and shall provide, complete Pre-Construction Phase and Construction Phase Services and furnish all materials, equipment, tools and labor as necessary or reasonably inferable to complete the Work, or any phase of the Work, in accordance with Owner's requirements and the terms of the Contract Documents.

## ARTICLE 2 CONTRACT DOCUMENTS

2.1 The Contract Documents consist of:

- a. This Agreement and all exhibits and attachments listed, contained or referenced in this Agreement;
- b. The Uniform General Conditions for University of Texas System Building Construction Contracts for Owner (UTUGCs);
- c. Special Conditions and Owner's Specifications;
- d. All Addenda issued prior to the Effective Date of this Agreement;
- e. The Guaranteed Maximum Price Proposal when accepted by Owner and executed by the parties;
- f. All Change Orders issued after the Effective Date of this Agreement;
- g. The Drawings, Specifications, details and other documents developed by Project A/E to describe the Project and accepted by Owner;
- h. The Drawings and Specifications developed or prepared by Owner's other consultants, if any, and accepted by Owner; and
- i. The HUB Subcontracting plan submitted by Construction Manager for this Project.

2.2 The Contract Documents form the entire and integrated Contract between Owner and Construction Manager and supersede all prior negotiations, representations or agreements, written or oral.

2.3 The term "Construction Manager" shall be interchangeable with the terms "Contractor" and "General Contractor" or other similar terms as appropriate in the Contract Documents.

## ARTICLE 3 DEFINITIONS

The terms, words and phrases used in the Contract Documents shall have the meanings given in the UTUGCs and as follows.

3.1 "**Construction Cost Limitation**" (CCL) means the maximum monetary amount payable to Construction Manager for all Construction Phase services, materials, labor and other work required for completion of the Work in accordance with the Contract Documents. The CCL includes, without limitation, the General Conditions Costs, the Cost of the Work, the Construction Phase Fee and Construction Manager's Contingency. The CCL may be adjusted by the parties for changes in the scope of the Project before or after acceptance of the Guaranteed Maximum Price Proposal. The CCL does not include Construction Manager's Pre-Construction Phase Fee, or Owner's Construction Contingency or Owner's Special Cash Allowance.

3.2 "**Construction Documents**" means, collectively, the UTUGCs, Owner's Special Conditions and Specifications, the Drawings, Specifications, details, Change Orders and other documents prepared by Project A/E, its consultants and by Owner's other consultants that describe the scope and quality of the

Project and the materials, supplies, equipment, systems and other elements that are required for construction of the Project that are accepted by Owner.

3.3 “**Construction Phase Services**” means the coordination, implementation and execution of the Work required by the Contract Documents.

3.4 “**Contract Sum**” means the total amount of all compensation payable to Construction Manager for the Project and shall not exceed the sum total amount of the Pre-Construction Phase Fee plus the Guaranteed Maximum Price Proposal accepted by the parties, subject to adjustment for Additional Services or Change Orders. Any costs that exceed the Contract Sum shall be borne solely by Construction Manager without reimbursement by Owner.

3.5 “**Direct Construction Cost**” means the sum of the amounts that Construction Manager actually and necessarily incurs for General Conditions Costs, Cost of the Work and Construction Manager’s Contingency during the Construction Phase as allowed by this Agreement. Direct Construction Cost does not include Pre-Construction Phase Fees or Construction Phase Fees.

3.6 “**Estimated Construction Cost**” (ECC) means the amount calculated by Construction Manager for the total cost of all elements of the project including, without limitation, all alternates, allowances and contingencies, designed and specified by Project A/E or reasonably inferable as a usual and customary component of the project or otherwise necessary for complete installation and operation of the project. The Estimated Construction Cost shall include, at current market rates with a reasonable allowance for overhead, profit and price escalation, the cost of labor and materials furnished by Construction Manager and any equipment which has been shown in the plans, specified, and specially provided for by Project A/E. The ECC shall include and consider the cost of labor and materials necessary for installation of Owner furnished equipment. The ECC does not include Construction Manager’s Pre-Construction Phase Fee, Owner’s Construction Contingency, Owner’s Special Cash Allowance, Project A/E Fees, cost of the land, rights-of-way, or any other costs that are the direct responsibility of Owner.

3.7 “**Guaranteed Maximum Price**” (GMP) means the amount proposed by Construction Manager and accepted by Owner as the maximum cost to Owner for construction of the Work in accordance with the Contract Documents. The GMP includes Construction Manager’s Construction Phase Fee, the General Conditions Costs, the Cost of the Work, Construction Manager’s Construction Contingency amount, and Owner’s Construction Contingency amount and Owner’s Special Cash Allowance.

3.8 “**General Conditions Costs**” means costs incurred and minor work performed by Construction Manager without the need for competitive bids or competitive proposals as allowed under Texas Education Code section 51.782(i), as amended. The allowable items for General Conditions Costs are further described and limited by attached exhibit.

3.9 “**Monthly Salary Rate**” means the amount agreed to by Owner that can be used on Applications for Payment throughout the Construction Phase to account for the services of Construction Manager’s salaried personnel assigned to the Project. A Monthly Salary Rate must be established for each salaried person and must be approved in writing by Owner in advance of any Application for Payment for that person. The Monthly Salary Rate is for convenience only and any payments made for Construction Manager’s personnel are subject to audit to determine the actual cost of the wages and allowable employer contributions incurred by Construction Manager for services performed for the Project.

3.10 “**Owner’s Specifications**” means the construction and contract administration requirements and standards detailed in Owner’s Specifications exhibit attached to this Agreement.

3.11 **“Pre-Construction Phase Services”** means the participation, documentation and execution of Construction Manager’s Pre-Construction Phase deliverables as required by the Contract Documents.

3.12 **“Preliminary Project Cost”** (PPC) means the total estimated cost of the entire Project, including design, construction, and other associated costs and services that is established by Owner prior to the commencement of design.

3.13 **“Project Architect/Engineer”** (Project A/E) means the professional architect or engineer employed by Owner as architect or engineer of record for the Project and its consultants.

3.14 **“Project Team”** means Owner, Construction Manager, Project A/E and its consultants, any separate contractors employed by Owner, and other consultants employed for the purpose of programming, design, and construction of the Project. The members of the Project Team will be designated by Owner and may be modified from time to time by Owner.

3.15 **“Subcontractor”** means a person or entity who has an agreement with Construction Manager to perform any portion of the Work. The term Subcontractor does not include Project A/E or any person or entity hired directly by Owner.

3.16 **“Total Project Cost”** (TPC) means the total budget established for the Project by the Board of Regents or the Chancellor of The University of Texas System or Owner at the end of the design development phase (subject to subsequent modification by Owner). The TPC includes, but is not limited to, Construction Manager’s Pre-Construction Fee, Guaranteed Maximum Price Proposal(s), Project A/E and other professional service fees, and other miscellaneous Project costs.

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

3.18 **“Worker Wage Rate”** means the actual hourly wage of non-salaried persons performing work on the Project plus allowable employer contributions as established on the Worker Wage Rate Form required by the Construction Documents. The Worker Wage Rate for individual persons must be reasonable and customary for their industry and must be approved in writing by Owner in advance of any Application for Payment for that person. Any payments made for Construction Manager’s personnel are subject to audit to determine the actual cost of the wages and allowable employer contributions incurred by Construction Manager for services performed for the Project.

#### **ARTICLE 4 CONSTRUCTION MANAGER’S GENERAL RESPONSIBILITIES**

4.1 Construction Manager shall perform all services specifically allocated to it by the Contract Documents as well as those services reasonably inferable from the Construction Documents as necessary for completion of the Work and the Project and provides Owner with a completely functional building. Construction Manager agrees to perform these services using its best efforts, skills, judgments and abilities.

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

4.3 Construction Manager shall designate a representative authorized to act on Construction Manager's behalf with respect to the Project.

4.4 Construction Manager shall establish procedures for communication and coordination among the Project Team, Subcontractors, separate contractors, and others with respect to all aspects of the construction of the Project, and, upon owner's approval, implement such procedures.

4.5 Construction Manager shall establish and maintain a numbering and tracking system for all Project records, including changes, requests for information, submittals, and supplementary instructions and shall provide updated records at each Owner's meeting and when requested.

4.6 Fast Track/Multiple Completion Times. If Owner elects to "fast-track" or develop the Project in multiple stages, Construction Manager shall organize and perform its services as appropriate to each stage. Each stage of the Project may have a unique schedule for completion and a specific Construction Cost Limitation, at Owner's discretion.

4.7 Attend and participate in Owner's "Partnering" Program for all phases of the Project.

4.8 Construction Manager shall identify to Owner the employees and other personnel that it will assign to the Project and provide the Monthly Salary Rate for each of them. Construction Manager shall also identify any consultants that will be performing services for the Project. After execution of this Agreement by Owner, Construction Manager shall not add, remove or replace the persons or entities assigned to the Project except with Owner's written consent, which consent shall not be unreasonably withheld. Construction Manager shall not assign to the Project or contract with any person or entity to which Owner has a reasonable objection. Construction Manager shall promptly remove any employee that Owner determines, at Owner's sole discretion, to be unacceptable. Construction Manager shall promptly update and resubmit CM's Personnel and Monthly Salary Rates schedule, included as an exhibit to this Agreement, indicating the list of persons by name and title and consultants if they change during the course of the Project. Construction Manager's employees and other personnel that it assigns to the Project shall be identified on the Schedule of Values by name and title.

4.9 Owner's Policy on the Utilization of Historically Underutilized Businesses ("Policy") is described in an attached exhibit. Construction Manager, as a provision of the Agreement, must comply with the requirements of the Policy and adhere to the HUB Subcontracting Plans submitted for Pre-Construction Phase and Construction Phase Services. No changes to the HUB Subcontracting Plans can be made by Construction Manager without the written approval of Owner in accordance with the Policy.

## **ARTICLE 5 PRE-CONSTRUCTION PHASE SERVICES**

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

## **5.1 General Coordination**

5.1.1 Construction Manager's Pre-Construction Phase Services team shall attend Project Team meetings with Owner, Owner's representatives, and Project A/E at regularly scheduled intervals throughout the Pre-Construction Phase. Frequent Project Team meetings are anticipated prior to Owner's acceptance of the GMP and during completion of the Construction Documents.

5.1.2 Provide a preliminary evaluation of Owner's Design Criteria and the Construction Cost Limitation, each in terms of the other.

5.1.3 Review and understand the standards and requirements in Owner's Specifications and perform all services in accordance with those standards and requirements.

5.1.4 Visit the site and inspect the existing facilities, systems and conditions to insure an accurate understanding of the existing conditions as required.

5.1.5 Participate as a member of the Project Team in the development of the Project Facility Program if such program has not been developed prior to the Effective Date of this Agreement.

5.1.6 Provide recommendations and information to the Project Team on: site usage and site improvements; building systems, equipment and construction feasibility; selection and availability of materials and labor; time requirements for installation and construction; assignment of responsibilities for safety precautions and programs; temporary Project facilities; equipment, materials and services for common use of Construction Manager and Owner's separate contractors, if any; cost factors, including costs of alternative materials or designs, preliminary budgets, and possible cost savings; recognizing and tracking the resolution of conflicts in the proposed Drawings and Specifications; methods of delivery of materials, systems, and equipment; and any other matters necessary to accomplish the Project in accordance with the Project Schedule (as defined below) and the CCL.

5.1.7 Assist Owner in selecting and directing the services of surveyors, soils engineers, existing facility surveys, testing and balancing, commissioning, environmental surveys or other special consultants hired by Owner to develop additional information for the design or construction of the Project.

5.1.8 At Owner's request, attend public meetings and hearings concerning the development and schedule of the Project.

## **5.2 Constructability Program**

5.2.1 Implement and conduct a constructability program to identify and document Project cost and schedule savings opportunities. The constructability program shall follow accepted industry practices and be in accordance with the requirements of the attached exhibit. Whenever the term "value engineering" is used in conjunction with this Agreement or the Project, it has its commonly accepted meaning within the construction industry and does not imply the practice of professional engineering without a license. If any value engineering activities constitute the professional practice of engineering, then such activities shall be performed by an engineer licensed in Texas.

5.2.2 Prepare a "Constructability Report" that identifies items that, in Construction Manager's opinion, may negatively impact construction of the Project. The Constructability Report shall

address the overall coordination of Project Drawings, Specifications, and details and identify discrepancies that may generate Change Orders or claims once Project construction commences. The Constructability Report shall be updated at least monthly during the Pre-Construction Phase.

5.2.3 Provide and implement a system for tracking questions, resolutions, decisions, directions and other information matters that arise during the development of the Drawings and Specifications for the Project. The decision tracking system shall be in a format approved by Owner and updated at least monthly during the Pre-Construction Phase.

### **5.3 Scheduling**

5.3.1 Develop a critical path method schedule (CPM Schedule) for Project Team review and Owner's approval, that coordinates and integrates activities on the Project, including Construction Manager's services, Project A/E's design services, commissioning, the work of other consultants and suppliers, and Owner's activities with the anticipated construction schedules for other contractors. The CPM Schedule must identify all major milestones through Project Final Completion. The CPM Schedule shall be created and maintained in accordance with Owner's Specifications using Owner specified format and software.

5.3.2 Construction Manager shall update the CPM Schedule throughout the Pre-Construction and Construction Phases as described in Owner's Specifications.

5.3.3 The CPM Schedule shall include other detailed schedule activities as directed by Owner including, but not limited to, Owner-managed work under separate contracts such as equipment, furniture and furnishings, telephones, project security, property protection, life-safety systems, integration with central campus monitoring systems, information and instructional technology data-transmission systems, and computer technology systems.

### **5.4 Budget and Cost Consultation**

5.4.1 Construction Manager is responsible for preparing and updating all procurement and construction cost estimates and distributing them to the Project Team throughout the duration of the Project.

5.4.2 Provide Estimated Construction Cost (ECC) reports at the required stages of completion of the schematic design, design development, and construction documents phases of the Project as required in Article 25. The Estimated Construction Cost reports for the design development and construction documents phases shall be detailed estimates derived from cost quantity surveys based on unit prices for labor, materials, overhead and profit, organized in current Construction Specifications Institute Division format for each portion of the Work.

5.4.3 Provide continuous cost consultation services throughout the duration of the Project, including identification and tracking of decisions that affect the scope or quality of the Project and providing ongoing updates of their cost and budget impact. Advise the Project Team immediately if Construction Manager has reason to believe that the most current ECC will exceed the Construction Cost Limitation (CCL) or not meet CPM Schedule requirements and recommend reasonable strategies for bringing the Project in line with the CCL and the CPM Schedule.

5.4.4 Construction Manager shall promptly identify all variances between estimated costs and actual costs during the Construction Phase, and shall promptly report such variances to the Project Team along with recommendations for action, but in any event no more than two (2) business days after acquiring such information.



5.4.5 Should any ECC exceed or fall significantly below the approved CCL, Owner and Construction Manager shall negotiate changes to the Project requirements or the CCL as required.

## **5.5 Coordination of Design and Construction Contract Documents**

5.5.1 Review all Drawings, Specifications, and other Construction Documents as they are developed by Project A/E during the schematic design, design development, and construction documents design phases of the Project.

5.5.2 Consult with Owner, Project A/E, and Owner's consultants on the selection of materials, equipment, component systems, and types of construction used on the Project. Advise Owner on site use, construction feasibility, availability of labor and materials, procurement time requirements, and construction coordination.

5.5.3 Advise Owner of any error, inconsistency or omission discovered in the Drawings, Specifications, and other Construction Documents.

5.5.4 Advise Owner on reasonable adjustments in the Project scope, quality or other options for keeping the Project cost within the CCL.

5.5.5 Review the Construction Documents for compliance with all applicable laws, rules and regulations and with Owner and The University of Texas System requirements.

## **5.6 Construction Planning and Procurement Package Strategy**

5.6.1 Identify equipment or material requiring extended delivery times and advise Owner on expedited procurement of those items. Advise Owner and Project A/E on the preparation of performance specifications and requests for technical proposals for the procurement and installation of systems and components and for the procurement of long lead items. If requested by Owner, and subject to Owner's prior approval, issue requests for technical proposals to qualified sources and receive proposals and assist in their evaluation.

5.6.2 Make recommendations to the Project Team regarding organization of the Construction Documents to facilitate the soliciting of offers and awarding of construction subcontracts in a manner that promotes the interests of the Project and Owner. These recommendations may include, but are not limited to, phased or staged construction or multiple separate contracts. The recommendations shall take into consideration such factors as time of performance, type and scope of work, availability of labor and materials, overlapping trade jurisdictions, provisions for temporary facilities, comparisons of factory and on-site production costs, shipping costs, code restrictions, Owner's goals for HUB contractor participation, and other constraints.

5.6.3 Review the Construction Documents with the Project Team to eliminate areas of conflict and overlap in the work to be performed by the various Subcontractors or Owner's separate contractors.

5.6.4 Develop a procurement package strategy in coordination with Project A/E that addresses the entire scope of Work for each phase and stage of the Project. In developing the procurement package strategy, Construction Manager shall identify all procurement packages on which Construction Manager intends to submit a self-performance bid or proposal. The procurement

package strategy shall be reviewed with Owner on a regular basis and revised throughout the buyout of the Project so as to best promote the interests of the Project and Owner.

5.6.5 Assist Owner, Project A/E, Owner's other consultants, and Owner's separate contractors in obtaining all applicable risk management, code, and regulatory agency reviews and approvals for the Project including, without limitation, the Texas Higher Education Coordinating Board, the Texas Department of Licensing and Regulation, the State Fire Marshal, the local fire department, and Owner's insurance provider.

5.6.6 Refine, implement and monitor required HUB Subcontracting Plans to promote equal employment opportunity in the provision of goods and services to Owner for the Project.

5.6.7 Advise Owner of any tests to be performed, and assist Owner in selecting testing laboratories and consultants, without assuming direct responsibility for the work of such laboratories and consultants.

5.6.8 Construction Manager shall review the Construction Documents to ensure that they contain adequate provision for all temporary facilities necessary for performance of the Work, and provisions for all of the job site facilities necessary to manage, inspect, and supervise construction of the Work.

5.6.9 Provide an analysis of the types and quantities of labor required for the Project and review the appropriate categories of labor required for critical phases or Stages. Make recommendations that minimize adverse effects of labor shortages.

5.6.10 Consult with and make recommendations to Owner on the acquisition schedule for fixtures, furniture and equipment, and coordinate with Owner as may be required to meet the Schedule.

## **5.7 Obtaining Offers for the Work**

5.7.1 In accordance with *Texas Education Code* section 51.782, as amended, Construction Manager shall publicly advertise and solicit competitive lump sum bids or competitive lump sum proposals from trade contractors or subcontractors for the performance of all major elements of the Work other than the minor work that may be included in General Conditions Costs. Subcontracts awarded on the basis of competitive bids shall be awarded to the lowest responsible bidder. For subcontracts awarded on the basis of competitive sealed proposals, criteria for determining the proposals that provide the best value to Owner shall be established by the Project Team and included in the request for proposals. Construction Manager shall notify Owner in advance in writing of the date(s) it will receive the bids and proposals.

5.7.2 Schedule and conduct pre-submittal conferences with interested offerors, subcontractors, material suppliers, and equipment suppliers, and record minutes of the conferences.

5.7.3 Construction Manager and Owner shall review all trade contractor or subcontractor offers in a manner that does not disclose the contents of any bid or proposal to persons outside of the Project Team during the selection process. Based on the selection criteria included in the requests for bids or requests for proposals, Construction Manager shall recommend to Owner the bid submitted by the lowest responsible bidder if soliciting competitive bids, or the proposal that provides the best value for the Project if soliciting competitive proposals. Upon Owner's concurrence in the recommendation, Construction Manager may negotiate the terms of the subcontract with the apparent lowest responsible bidder or best value offeror.

5.7.4 All subcontracts must be on a lump sum basis unless other payment terms are approved in writing and in advance by the Executive Director for Owner's Facilities Planning, Design and Construction. Upon Owner's concurrence in the final terms of the subcontract, Construction Manager shall enter into a written subcontract for the subcontract work and provide a copy to Owner. All offers shall be publicly available after award of the subcontract or within seven (7) days after the date of final selection, whichever is later.

5.7.5 If Construction Manager reviews, evaluates, and recommends to Owner an offer from a trade contractor or subcontractor, but Owner requires another offer to be accepted, Owner shall compensate Construction Manager by a change in price, time, or Guaranteed Maximum Price for any additional cost and risk that Construction Manager incurs because of Owner's requirement that the other offer be accepted.

5.7.6 Construction Manager may seek to self-perform portions of the Work identified for self-performance in the procurement package strategy. Construction Manager must submit an offer for the self-performance work in the same manner as all other trade contractors or subcontractors. Owner will determine whether Construction Manager's offer provides the best value for Owner, which determination is final. Construction Manager must perform approved self-performance work in accordance with the same terms and conditions as its other Subcontractors. For payment purposes, Construction Manager shall account for self-performance work in the same manner as it does all other subcontract costs.

5.7.7 For scope of work procurement packages typically performed by subcontractors, Construction Manager may "self-perform" such work on a cost-plus fee (Not-To-Exceed 7.5%) basis subject to an agreed upon guaranteed maximum price for the "self-performed work". Construction Manager shall submit its Guaranteed Maximum Price for the work to be "self-performed" against at least three other interested trade contractors. Any subcontract for "self-performed work" will provide for payment in an amount equal to the Cost of the Work (as defined in this agreement) and will not exceed the agreed upon subcontract guaranteed maximum price. All terms and provisions of any subcontract for "self-performed work" will be consistent with the terms and conditions of this Agreement with the exception of the agreed upon Fee percentage. All savings under any such subcontract for "self-performed work" shall be applied to reduce the Cost of the Work under this Agreement and the Guaranteed Maximum Price of this Agreement. For purposes of defining "self-performed work" subject to this contract provision, any division of Construction Manager, or any separate Construction Manager or subcontractor that is partially owned or wholly owned by Construction Manager or any of their employees or employee's relatives will be considered a related party entity and will be subject to this provision regarding "self-performed work". No self-performed work will be allowed to be performed on a lump sum basis.

5.7.8 Construction Manager shall identify every subcontractor it intends to use on the Project, including subcontractors used for self-performed work, to Owner in writing at least ten (10) days before entering into any subcontract. Construction Manager shall not use any subcontractor to which Owner has a reasonable objection. Construction Manager shall not be required to subcontract with any subcontractor to which it has reasonable objection. Following Owner acceptance of a subcontractor, that subcontractor shall not be changed without Owner's written consent, which shall not be unreasonably withheld.

5.7.9 If a selected trade contractor or subcontractor fails to execute a subcontract after being selected in accordance with this section or defaults in the performance of its work, Construction

Manager may, in consultation with Owner and without further advertising, fulfill the subcontract requirements itself or select a replacement trade contractor or subcontractor to do so.

## **5.8 Safety**

5.8.1 In accordance with UTUGCs, Construction Manager is responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the Work. The safety program shall comply with all applicable requirements of the Occupational Safety and Health Act of 1970 and all other applicable federal, state and local laws and regulations and with the requirements of an Owner controlled insurance program, if any, and with Owner's safety program.

5.8.2 Construction Manager shall provide recommendations and information to Owner and Project A/E regarding the assignment of responsibilities for safety precautions and programs, temporary Project facilities, and equipment, materials, and services for common use of the Subcontractors. Construction Manager shall verify that appropriate safety provisions are included in the Construction Documents. The existence or creation of any Owner controlled insurance program in connection with the Work shall not lessen or reduce Construction Manager's safety responsibilities.

## **ARTICLE 6 PRE-CONSTRUCTION PHASE FEE**

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

6.2 Except as specifically allowed in paragraph 6.4, Construction Manager shall not be entitled to any increase in the Pre-Construction Phase Fee for any costs, expenses, liabilities or other obligations arising from the performance of Pre-Construction Phase Services.

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

6.4 If the scope of the Pre-Construction Phase Services is changed materially, the Pre-Construction Phase Fee may be equitably adjusted. If the CCL is changed materially, due to a change in the project scope, before acceptance of the GMP Proposal, the Pre-Construction Phase Fee may be equitably adjusted solely at the discretion of Owner in proportion to the change in the CCL. There shall be no adjustments in the Pre-Construction Phase Fee following acceptance of the GMP Proposal.

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

6.5.1 A pre-established lump sum amount; or

6.5.2 The hourly cost of Construction Manager's employee's or consultants who actually perform the Additional Services based on the employee's Worker Wage Rate or prorated

Monthly Salary Rate plus the actual cost of allowable expenses incurred in the performance of the Additional Services plus an overhead and profit markup of ten percent (10%) of the total cost; or

- 6.5.3 As otherwise agreed to by the parties in advance of performing the Additional Pre-Construction Phase Services.

## **ARTICLE 7                    GUARANTEED MAXIMUM PRICE PROPOSAL**

7.1 When the Parties agree that the design of the Project is sufficiently developed and documented to allow detailed pricing of its construction, Construction Manager shall prepare and submit a Guaranteed Maximum Price (GMP) Proposal to Owner. The GMP Proposal must be prepared in accordance with the guidelines and delivered in the format specified by Owner in the attached exhibits. Owner, at its sole option and discretion, may specify different requirements for the GMP Proposal. Construction Manager shall not withdraw its Guaranteed Maximum Price Proposal for ninety (90) days following submission to Owner.

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

7.3 The GMP Proposal must include a written description of how it was derived that specifically identifies the clarifications and assumptions made by Construction Manager in developing the GMP and the monetary amounts attributable to them. The GMP Proposal shall include, without limitation, a breakdown of Construction Manager's estimated General Conditions Costs and estimated Costs of the Work organized by trade; contingency amounts; the Construction Phase Fee; and the proposed Contract Time, including dates for Notice to Proceed, Substantial Completion and Final Completion.

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

7.5 The GMP Proposal may include a Construction Manager's Contingency amount as allowed under Cost of the Work.

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

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

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

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

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

7.11 Following Owner acceptance of the GMP Proposal, Construction Manager shall continue to monitor the development of the Construction Documents so that, when complete, the Construction Documents adequately incorporate and resolve all qualifications, assumptions, clarifications, exclusions and value engineering issues identified in the GMP Proposal. During the Construction Documents stage, Construction Manager and Project A/E shall jointly deliver a monthly status report to Owner describing the progress on the incorporation of all qualifications, assumptions, clarifications, exclusions, value engineering issues and all other matters relevant to the establishment of the GMP into the Construction Documents. The monthly status report shall also include an updated start-to-finish project schedule that encompasses Project A/E's activities, Construction Manager's activities, and Owner's commissioning and occupancy activities, short-term schedules, and production rates for key elements of the Project as determined by Owner.

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

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

- a. The stage of completion of the Project;
- b. The trade packages that have been completely bought out;
- c. The trade packages remaining that have not been bought out;

- d. A complete line item breakdown of the calculations used to establish a lump sum amount based on the GMP Schedule of Values;
- e. An accounting of all savings amounts that are to be returned to Owner as part of the lump sum calculation; and
- f. Any other Project information requested by Owner.

7.14 Construction Manager shall document the actual Cost of the Work at buyout as compared to the Guaranteed Maximum Price Proposal and shall report this information to Owner monthly and with Construction Manager's recommendation for selection of a bid or proposal for each subcontracting package.

## **ARTICLE 8 CONSTRUCTION PHASE SERVICES**

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

8.1 Construct the Work in strict accordance with the Construction Documents and as required by the UTUGCs and Owner's Specifications within the time required by the Project Schedule approved by Owner.

8.2 Organize and maintain a competent, full-time staff at the Project site with clearly defined lines of authority and communication as necessary to coordinate construction activities, monitor and direct progress of the Work, and further the goals of the Project Team.

8.3 Designate in writing a representative who is responsible for the day-to-day management of the Construction Phase Services. The designated representative shall be Owner's primary contact during the Construction Phase and shall be available as required for the benefit of the Project and Owner. The designated representative shall be authorized to act on behalf of and bind Construction Manager in all matters related to Construction Phase Services including, but not limited to, execution of Change Orders and Applications for Payment.

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

8.5 In addition to attending Owner's regularly scheduled Project progress meetings, Construction Manager shall schedule, direct and attend interim progress meetings with other members of the Project Team as required to maintain Project progress. Construction Manager shall record and distribute the minutes of each meeting to each Project Team member. The minutes shall identify critical activities that require action and the dates by which each activity must be completed.

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

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

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

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

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

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

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

8.13 In accordance with the UTUGCs regarding Record Documents and Owner's Project Closeout Specification, Construction Manager shall maintain and deliver the required documents that describe changes or deviations from the Construction Documents that occurred during construction and that reflect the actual "As Built" conditions of the completed Work. As part of this agreement Construction Manager will also provide electronic versions of the above documents in a format acceptable to Owner.

## **ARTICLE 9 OWNER'S RESPONSIBILITIES**

9.1 Owner will designate a Project A/E for the Project.

9.2 Owner will provide the Preliminary Project Cost and general schedule for the Project. The PPC will include the Construction Cost Limitation, contingencies for changes in the Work during construction, and other costs that are the responsibility of Owner. The general schedule will set forth Owner's plan for milestone dates and completion of the Project.

9.3 Owner will identify a person as its Owner Designated Representative (ODR) who is authorized to act in Owner's behalf with respect to the Project. The ODR shall examine the documents submitted by Construction Manager and shall render decisions pertaining thereto.

9.4 The ODR shall be authorized to administer this Agreement on behalf of Owner, including final determination of fees and costs earned by Construction Manager and equitable back charges against Construction Manager.

9.5 Owner, at Owner's cost, will secure the services of surveyors, soils engineers, existing facility surveys, testing and balancing, commissioning, environmental surveys or other special consultants to develop such additional information as may be necessary for the design or construction of the Project.

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



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

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

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

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

9.11 Owner shall furnish to Construction Manager the number of Construction Document sets as required by this Agreement.

## **ARTICLE 10 OWNERSHIP AND USE OF DOCUMENTS**

10.1 The Construction Documents are instruments of service and shall remain the property of their authors whether the Project for which they are made is executed or not. Construction Manager shall be permitted to retain one record set of the Construction Documents. All other copies of the Construction Documents shall be returned to their respective authors or suitably accounted for. Construction Manager and its Subcontractors are authorized to reproduce and use portions of the Construction Documents as necessary and appropriate for the execution of the Work. Construction Manager and its Subcontractors shall not use the Construction Documents on any other projects.

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

## **ARTICLE 11 TIME**

11.1 TIME LIMITS STATED IN THE CONTRACT DOCUMENTS ARE OF THE ESSENCE OF THIS AGREEMENT.

11.2 Unless otherwise approved, Owner and Construction Manager shall perform their respective obligations under the Contract as expeditiously as is consistent with reasonable skill and care and the orderly progress of the Work.

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

## ARTICLE 12 PAYMENTS

### 12.1 General Requirements

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

12.1.2 Expenses of transportation and overnight living expenses in connection with Owner approved out-of-state travel shall be identified separately in each Application for Payment. All travel must be approved in writing and in advance by Owner to be eligible for payment. Expense of transportation and overnight living expenses in connection with out-of-state travel approved in advance in writing by Owner and directly associated with the Project will be reimbursed per Owner's Travel Policy, which is attached to this Agreement as Rider 107.

12.1.2.1 Unless expressly directed and approved in advance by Owner, transportation (including mileage and parking expenses) and living expenses incurred within the State of Texas will not be subject to reimbursement.

12.1.2.2 Expenses specifically excluded from reimbursement include telephone charges, FAX services, alcoholic beverages, laundry service, valet service, entertainment expenses and any non-Project related items. Tips are included in the per diem rates. Owner shall not pay a mark-up on reimbursables. Construction Manager shall submit receipts for all reimbursable expenses along with any reimbursement request.

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

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

12.1.5 This Agreement is subject to the assessment of liquidated damages against Construction Manager. Amounts assessed as liquidated damages, and other amounts to which Owner is entitled by way of setoff or recovery, may be deducted from any moneys due Construction Manager.

12.1.6 Owner shall have the right to withhold from payments due Construction Manager such sums as are necessary to protect Owner against any loss or damage which may result from negligence by Construction Manager or any Subcontractor or failure of Construction Manager or any Subcontractor to perform their obligations under this Agreement.

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

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

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

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

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

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

12.1.7.6 Construction Manager has persistently failed to complete the Work in accordance with the CPM Schedule requirements or if Owner, in its good faith judgment, determines that the remaining Work will not be completed within the Contract Time;

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

12.1.7.8 Construction Manager fails to obtain, maintain or renew insurance coverage as required by the Contract Documents.

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

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

## **12.2 Pre-Construction Phase Payments**

12.2.1 Payments for Pre-Construction Phase Services shall be made monthly based on the percentage completion of Construction Manager's required services for each stage of development of the Construction Documents and the procurement of goods and services needed for the Project (Buyout Stage) in accordance with the schedule set forth in Article 24, Compensation.

12.2.2. All payment requests for Pre-Construction Phase Services shall be submitted on an Application for Payment and Schedule of Values approved by Owner and include all required attachments identifying payments to Historically Underutilized Businesses and to all Subcontractors.

## **12.3 Construction Phase Payments**

12.3.1 Payments for Construction Phase Services shall be made as provided for in the UTUGCs. All payment requests shall be submitted on an Application for Payment with a Schedule of Values approved by Owner and include all required attachments identifying payments to Historically Underutilized Businesses and to all Subcontractors. Payment for approved Change Orders shall be made as part of Construction Manager's Application for Payment. Failure to submit "HUB Progress Assessment Report Documentations of Subcontracted Work" form with each Application for Payment Application will cause rejection of the application by Owner and its return to Construction Manager.

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

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

12.3.4 Pay requests for Subcontractor work included in an Application for Payment shall not exceed the percentage of Work allocated to that Subcontractor for each respective Schedule of Values work classification which has been actually completed and shall not exceed the total value of the subcontract amount. Commissioning activities for Construction Manager and Subcontractors shall be a deliverable item identified on the Schedule of Values and broken out sufficiently to allow for monthly review of progress by Owner.

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

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

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

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

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

## **ARTICLE 13 DIRECT CONSTRUCTION COST**

Direct Construction Cost is defined in paragraph 3.5 and means the sum of the amounts that Construction Manager actually and necessarily incurs constructing the Work in strict compliance with the Construction Documents. Direct Construction Cost includes only the cost categories set forth in this Article and does not include the Pre-Construction Phase Fees or the Construction Phase Fees unless specifically noted. References in the UTUGCs to adjustments in "cost" or "costs" mean the Direct Construction Cost.

### **13.1 General Conditions Costs**

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

Items that are allowable as General Conditions Costs are identified below and by attached exhibit. These items shall be included in the General Conditions Costs shown as a line item in the Guaranteed Maximum Price Proposal and as detailed on the Schedule of Values. Items not specifically included below or in the exhibit will not be allowed as a General Conditions Costs.

13.1.1 Personnel Costs. The actual Worker Wage Rate for Construction Manager's hourly employees and the Monthly Salary Rate of Construction Manager's salaried personnel who are identified to Owner in advance and in writing but only for the time actually stationed at the Project site with Owner's prior consent. The Project Manager's Monthly Salary Rate may be included in the General Conditions Costs only when the Project Manager is directly managing the

Project. All personnel costs are subject to audit to determine the actual cost of the wages, salaries and allowable employer contributions incurred by Construction Manager for services performed for the Project.

13.1.2 Costs of long-distance telephone calls, telegrams, postage, package delivery and courier service, hardwired telephone service, and reasonable expenses of Construction Manager's jobsite office if incurred at the Project site and directly and solely in support of the Work.

13.1.3 Costs of materials, supplies, temporary facilities, equipment, and hand tools (except those customarily owned by construction workers), supplied to the Project site by Construction Manager, if such items are fully consumed in the construction of the Work and are included in the list of allowable General Condition Costs. Cost for used items shall be based on fair market value and may include transportation, installation, and minor maintenance costs, and removal costs. If an item is not fully consumed in the construction of the Work, its cost shall be based on actual cost of the item less its fair market salvage value.

13.1.4 Rental charges for temporary facilities, equipment, and hand tools (except those customarily owned by construction workers), supplied to the Project site by Construction Manager, provided they are included in the list of allowable General Condition Costs and Owner has approved the rentals and the rental rates in advance and in writing. Rental rates may include transportation, installation, and minor maintenance costs, and removal costs. For tools, machinery or construction equipment rented directly from Construction Manager, the rental rate, including freight and delivery costs and all operating expenses except labor, shall be approved in advance by Owner and shall be in accordance with the "Rental Rate Blue Book for Construction Mobilization Costs" published by Primedia, latest edition, but no higher than the prevailing competitive rates for rental of similar equipment in the Project vicinity.

13.1.5 The aggregate rental cost of any item charged to Owner shall not exceed ninety percent (90%) of the purchase price and maintenance cost of the item. If the anticipated aggregate rental cost for an item of equipment exceeds ninety percent (90%) of the purchase and maintenance price, Construction Manager shall purchase the equipment and turn it over to Owner upon final completion of the Work or, at Owner's option, credit Owner with the fair market resale value of the item.

13.1.6 Permit and inspection fees that are not subject to exemption.

13.1.7 Premiums for Construction Manager's insurance and bonds to the extent directly attributable to this Project. Premiums for bonds or subcontractor default insurance purchased for Subcontractor work are excluded from General Conditions Costs.

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

## **13.2 Cost of the Work**

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

13.2.1 Costs of materials and equipment purchased directly by Construction Manager and incorporated into or consumed in the performance of the Work, including transportation charges, and a reasonable and customary allowance for waste and spoilage. Payment for stored materials is subject to the requirements set forth in the UTUGCs.

13.2.2 Costs of site debris removal and disposal in accordance with all applicable laws and regulations if not otherwise included in General Conditions Costs.

13.2.3 Payments made to Subcontractors and their vendors or suppliers by Construction Manager for subcontract work in accordance with the Construction Documents and the requirements of the subcontracts with the Subcontractors, vendors or suppliers, however, the cost of Subcontractor payment and performance bonds, if any, are specifically excluded from the Cost of the Work.

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

13.2.5 Testing fees pursuant to the UTUGCs.

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

13.2.7 Costs associated with any subcontractor default insurance program (sometimes referred to as SUBGUARD) provided or required by Construction Manager ARE EXPLICITLY EXCLUDED from the Cost of the Work.

### **13.3 Construction Manager's Contingency**

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

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

13.3.3 Construction Manager's Contingency is specifically not to be used for rework, unforeseen conditions, cost increases caused by lack of coordination or communication with Project A/E or trade Subcontractors, or to correct errors or omissions in the Construction Documents.

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

## **ARTICLE 14 CONSTRUCTION PHASE FEE**

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

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

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

14.3 Any and all overhead, labor or general expenses of any kind unless specifically allowed as General Conditions Costs. These costs include, but are not limited to: costs for the purchase, lease, rental, allowance or maintenance of vehicles, radios/communication equipment, jobsite computers, copiers and other business equipment, specialized telephone systems and cellular/digital phones; trade or professional association dues; costs for hiring, relocation, or hiring and relocation of any of Construction Manager's personnel; and travel, per diem and subsistence expense of Construction Manager, its officers or employees except as specifically allowed as General Conditions Costs.

14.4 Any billing or other subsidiary that supports the project/jobsite accounting function.

14.5 In the event that Construction Manager elects to provide or require participation in a subcontractor default insurance program (sometimes referred to as SUBGUARD), the entire cost of the insurance program and all costs related to the administration of the program shall be included in the Construction Phase Fee.

14.6 All costs associated with payment and performance bonds obtained from trade contractors or Subcontractors, including bonds for change orders to subcontracts and the cost of any bonds for minor work that might be includable as General Conditions Costs.

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

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

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

14.10 Any cost arising out of a breach of this Agreement or the fault, failure or negligence of Construction Manager, its Subcontractors, or any person or entity for whom they may be liable. These costs include, without limitation: costs to remedy defective, rejected, or nonconforming work, materials or equipment; costs due to failure to coordinate the Work or meet CPM Schedule milestones; costs arising from Construction Manager's contractual indemnification obligations; liquidated or actual damages



imposed by Owner for failure to complete the Work within the Contract Time; costs due to the bankruptcy or insolvency of any Subcontractor; and damage or losses to persons or property.

14.11 The cost of any and all insurance deductibles payable by Construction Manager and costs due to the failure of Construction Manager or any Subcontractor to procure and maintain insurance as and to the extent required by the Contract Documents.

14.12 Any and all costs that would cause the Guaranteed Maximum Price, minus the amounts allocated in the GMP for Owner's Contingency and Owner's Special Cash Allowance, to be exceeded.

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

## **ARTICLE 15 CONTRACT SAVINGS, ALLOWANCES, REBATES & REFUNDS**

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

15.2 Items to be provided for through Owner's Special Cash Allowances shall be clearly identified in the Construction Documents and the Guaranteed Maximum Price proposal. The Cost of the Work included in the allowances shall be determined in accordance with the UTUGCs. Any claim by Construction Manager for an adjustment to an allowance amount included in the Guaranteed Maximum Price based on the cost of allowance work shall be made within a reasonable time after the issuance of the Construction Documents for the allowance items. Construction Manager shall not be entitled to any increase in its Construction Phase Fee for increases to allowance amounts that were initially based on estimates provided by Construction Manager. Owner shall be entitled to retain 100% of the balance of any unused allowance amount.

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

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

15.3.2 Discounts earned by Construction Manager through advance or prompt payments funded by Owner. Construction Manager shall obtain all possible trade and time discounts on bills for material furnished, and shall pay bills within the highest discount periods. Construction Manager shall purchase materials for the Project in quantities that provide the most advantageous prices to Owner.

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

15.3.4 Deposits made by Owner and forfeited due to the fault of Construction Manager.

15.3.5 Balances remaining on any allowances, Construction Manager's Contingency, or any other identified contract savings.

15.4 Owner shall be entitled to recover any savings realized between the Guaranteed Maximum Price and the buyout price for subcontracting work, provided however, that Construction Manager may use such savings to offset other buyout packages that exceed the amounts identified in the initial Guaranteed Maximum Price, so long as the total Cost of Work proposed in the Guaranteed Maximum Price does not increase.

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

## **ARTICLE 16 PRE-EXISTING CONDITIONS & DESIGN ERRORS AND OMISSIONS**

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

16.2 Construction Manager acknowledges that as part of its Pre-Construction Phase Services it shall participate in the development and review of the Construction Documents. Construction Manager's participation in the design development process will be instrumental in preparing its Guaranteed Maximum Price Proposal for the Work. Before submitting its Guaranteed Maximum Price Proposal, Construction Manager shall review the drawings, specifications and other documents upon which the GMP Proposal is to be based and notify Owner of any errors, omissions or discrepancies in the documents of which it becomes aware or in the exercise of reasonable care should have become aware. Construction Manager shall not make or be entitled to any claim for any adjustment to the Contract Time or the Contract Sum for errors or omissions in the Construction Documents that Construction Manager discovered or, in the exercise of reasonable care, should have discovered in Construction Manager's Pre-Construction Phase design review process that Construction Manager did not bring to the attention of Owner and Project A/E in a timely manner.

## **ARTICLE 17 BONDS AND INSURANCE**

17.1 **Security Bond;** upon execution of this Agreement, Construction Manager shall provide a security bond on the form provided by Owner in the amount of 5% of the Construction Cost Limitation. The surety for a security bond shall meet the same requirements as set forth for payment and performance bonds.

17.2 **Payment and Performance Bonds;** upon acceptance by Owner of a Guaranteed Maximum Price Proposal, Construction Manager shall provide performance and payment bonds on forms prescribed by

Owner and in accordance with the requirements set forth in the Uniform General Conditions for University of Texas System Building Construction Contracts. The penal sum of the payment and performance bonds shall be equal to the Guaranteed Maximum Price. If construction is phased or staged with different Guaranteed Maximum Prices established at different times, the penal sum of the bonds shall be increased at the start of each stage or phase based on the cumulative total value of all Guaranteed Maximum Prices in effect.

17.3 **Insurance:** Construction Manager shall not commence work under the Agreement until it has obtained all insurance required by the UTUGCs and until evidence of the required insurance has been reviewed and approved by Owner. Owner's review of the insurance shall not relieve nor decrease the liability of Construction Manager.

17.3.1 The cost of premiums for any additional insurance coverage desired by Construction Manager in excess of that required by this Agreement, the UTUGCs, or the Contract Documents shall be borne solely by Construction Manager out of its fees and not included in the GMP Proposal as a Direct Construction Cost.

17.3.2 During construction, Owner may audit Construction Manager's and Subcontractors' labor hours and certified payroll reports to determine actual insurance costs.

17.3.3 Construction Manager shall not cause or allow any of its required insurance to be canceled nor permit any insurance to lapse during the term of the Agreement or as required in the Agreement. If Construction Manager fails to obtain, maintain or renew any insurance required by the Agreement, Owner may obtain insurance coverage directly and recover the cost of that insurance from Construction Manager.

17.3.4 Owner reserves the right to review the insurance requirements set forth in this Article during the effective period of the Agreement and to make reasonable adjustments to the insurance coverages and their limits when deemed necessary and prudent by Owner based upon changes in statutory law, court decisions, or the claims history of the industry as well as Construction Manager.

17.3.5 Owner shall be entitled, upon request, and without expense, to receive complete copies of the policies with all endorsements and may make any reasonable requests for deletion, or revision or modification of particular policy terms, conditions, limitations, or exclusions, except where policy provisions are established by law or regulation binding upon the Parties or the underwriter of any of such policies. Damages caused by Construction Manager and not covered by insurance shall be paid by Construction Manager.

## **ARTICLE 18 DISPUTE RESOLUTION**

18.1 To the extent that Chapter 2260, Texas Government Code, as it may be amended from time to time ("Chapter 2260"), is applicable to this Agreement and is not preempted by other applicable law, the dispute resolution process provided for in Chapter 2260 will be used by Owner and Construction Manager to attempt to resolve any claim for breach of contract made by Construction Manager.

18.2 Neither the occurrence of an event giving rise to a breach of contract claim nor the pendency of a claim constitute grounds for the suspension of performance by Construction Manager, in whole or in part, except as permitted by Subchapter D, Chapter 2251 of the Texas Government Code. Any periods set forth in this Agreement for notice and cure of defaults are not waived.

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

18.4 In any litigation between the Owner and the Construction Manager arising from this Agreement or this Project, neither party will be entitled to an award of legal fees or costs in any judgment regardless of which one is deemed the prevailing party.

## **ARTICLE 19 PROJECT TERMINATION AND SUSPENSION**

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

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

19.3 This Agreement may be terminated by Owner at the GMP Proposal stage upon at least three (3) days written notice to Construction Manager in the event that the parties are unable or unwilling to agree on a GMP Proposal.

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

19.5 Termination of this Agreement shall not relieve Construction Manager or any of its employees, subcontractors, or consultants of liability for violations of this Agreement or for any act or omission, or negligence, of Construction Manager related to the Project. In the event of a termination, Construction Manager hereby consents to employment by Owner of a substitute Construction Manager to complete the services under this Agreement.

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

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

## **ARTICLE 20 INDEMNITY**

20.1 SEE ARTICLE 3 OF THE UNIFORM GENERAL CONDITIONS FOR UNIVERSITY OF TEXAS SYSTEM BUILDING CONSTRUCTION CONTRACTS FOR CONSTRUCTION MANAGER'S GENERAL INDEMNIFICATION OBLIGATIONS.

## **ARTICLE 21 SPECIAL WARRANTIES**

21.1 Notwithstanding anything to the contrary contained in this Agreement, Owner and Construction Manager agree and acknowledge that Owner is entering into this Agreement in reliance on Construction Manager's represented expertise and ability to provide construction management services. Construction Manager agrees to use its best efforts, skill, judgment, and abilities to perform its obligations and to further the interests of Owner in accordance with Owner's requirements and procedures.

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

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

21.4 Construction Manager represents and agrees that all persons connected with Construction Manager directly in charge of its services are duly registered or licensed as required under the laws, rules and regulations of any authority having jurisdiction over the Project if registration or licensing is required.

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

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

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

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

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

**ARTICLE 22                    CERTIFICATION OF NO ASBESTOS CONTAINING MATERIALS OR WORK**

22.1 Construction Manager shall provide a certification statement with each materials submittal stating that no asbestos containing materials or work is included within the scope of the proposed submittal.

22.2 Construction Manager shall insure that Texas Department of Health licensed individuals, consultants or companies are used for any required asbestos work including asbestos inspection, asbestos abatement plans/specifications, asbestos abatement, asbestos project management and third-party asbestos monitoring.

22.3 Construction Manager shall provide at Substantial Completion, a notarized affidavit to Owner and the Architect stating that no asbestos containing materials or work was provided, installed, furnished or added to the Project.

22.4 Construction Manager shall take whatever measures he deems necessary to ensure that all employees, suppliers, fabricators, materialmen, Subcontractors, or their assigns, comply with this requirement.

22.5 All materials used on this Project shall be certified as non-Asbestos Containing Building Materials (ACBM). Construction Manager shall insure compliance with the following acts from all of its Subcontractors and assigns:

22.5.1 Asbestos Hazard Emergency Response Act (AHERA—40 CFR 763-99 (7));

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

22.5.3 Texas Asbestos Health Protection Rules (TAHRP—Tex. Admin. Code Title 25, Part 1, Ch. 295C, Asbestos Health Protection

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

22.7 Construction Manager shall provide, in hard copy and electronic form, all necessary material safety data sheets (MSDS) of all products used in the construction of the Project to the Texas Department of Health licensed inspector or Project A/E who will compile the information from the MSDS and, finding no asbestos in any of the product, make a certification statement.

22.8 At Final Completion, Construction Manager shall provide a notarized certification statement per TAC Title 25 Part 1, Ch. 295.34, par. c.1 that no ACBM was used during construction of the Project.

**ARTICLE 23                    MISCELLANEOUS PROVISIONS**

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

23.2 **Construction Manager's.** Records of Construction Manager's costs, Reimbursable Expenses, expenses pertaining to Additional Pre-Construction Phase Services, and services performed on the basis of a

Worker Wage Rate, Direct Salary Expense or Monthly Salary Rate (individually and collectively “Project Financial Records”) shall be kept on the basis of generally accepted accounting principles and in accordance with cost accounting standards promulgated by the Federal Office of Management and Budget Cost Accounting Standards Board. Project Financial Records shall be available for audit by Owner or Owner's authorized representative during normal business hours upon reasonable notice, and shall be retained for four (4) years after Final Payment or abandonment of the Project, unless Owner otherwise instructs Construction Manager in writing.

**23.3 Owner’s Right to Audit.** Owner shall have the right to verify and audit the details of Construction Manager’s billings, certificates, accountings, cost data, and statements, either before or after payment, by (1) inspecting the books and records of Construction Manager; (2) examining any reports with respect to this Project; (3) interviewing Construction Manager’s employees; (4) visiting the Project site; and (5) any other reasonable action.

**23.4 Texas Family Code Child Support Certification.** Pursuant to Section 231.006, *Texas Family Code*, Construction Manager certifies that it is not ineligible to receive the award of or payments under this Agreement and acknowledges that this Agreement may be terminated and payment may be withheld if this certification is inaccurate.

**23.5 Tax Certification.** If Construction Manager is a taxable entity as defined by Chapter 171, Texas Tax Code (“Chapter 171”), then Construction Manager certifies that it is not currently delinquent in the payment of any taxes due under Chapter 171, or that Construction Manager is exempt from the payment of such taxes, or that Construction Manager is an out-of-state taxable entity that is not subject to those taxes, whichever is applicable.

**23.6 Payment of Debt or Delinquency to the State.** Pursuant to Sections 2107.008 and 2252.903, *Texas Government Code*, Construction Manager agrees that any payments owing to Construction Manager under this Agreement may be applied directly toward any debt or delinquency that Construction Manager owes the State of Texas or any agency of the State of Texas regardless of when it arises, until such debt or delinquency is paid in full.

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

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

**23.9 Governing Law and Venue.** This Agreement will be construed under and in accordance with the laws of the State of Texas without reference to its conflicts of law provisions, and all obligations of the parties created under this Agreement are performable in Harris County, Texas. Subject to the sovereign immunity of the State of Texas, any lawsuit brought against MD Anderson under this Agreement may only be filed in the State District Court in Harris County, Texas.

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

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

23.12 **Appointment.** Owner hereby expressly reserves the right from time to time to designate by notice to Construction Manager a representative(s) to act partially or wholly for Owner in connection with the performance of Owner's obligations. Construction Manager shall act only upon instructions from the designated representative(s) unless otherwise specifically notified to the contrary.

23.13 **Notices.** All notices, consents, approvals, demands, requests or other communications relied on by the parties shall be in writing. Written notice shall be deemed to have been given when delivered in person to the designated representative of Construction Manager or Owner for whom it is intended; or sent by U. S. Mail to the last known business address of the designated representative; or transmitted by fax machine to the last known business fax number of the designated representative. Mail notices are deemed effective upon receipt or on the third business day after the date of mailing, whichever is sooner. Fax notices are deemed effective the next business day after faxing.

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

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

23.16 **Ethics Matters; No Financial Interest.** Construction Manager and its employees, agents, representatives and Subcontractors have read and understand Owner's Conflicts of Interest Policy available at <http://www.mdanderson.org/about-us/compliance-program/conflict-of-interest-policy-no.-adm0255.pdf>, Owner's Standards of Conduct Guide available at <http://www.mdanderson.org/about-us/compliance-program/do-the-right-thing.pdf>, and applicable state ethics laws and rules available at. Neither Construction Manager nor its employees, agents, representatives or Subcontractors will assist or cause Owner's employees to violate Owner's Conflicts of Interest Policy, provisions described by Owner's Standards of Conduct Guide, or applicable state ethics laws or rules. By signature hereon, Construction Manager certifies that no member of the Board of Regents of The University of Texas System, or Executive Officers, including component institutions, has a financial interest, directly or indirectly, in the transaction that is the subject of this Agreement.

23.17 **Drug Testing Requirements.** Prior to commencing any Work under this Agreement, Construction Manager will ensure that all Construction Manager Personnel have tested negative on a five (5) panel drug test. The test must include the following: (a) Amphetamines, (b) Cocaine, (c) Opiates (2000 ng/ml), (d) PCP, and (e) THC. "Construction Manager Personnel" is any individual who is compensated by Construction Manager, or by a Subcontractor engaged by Construction Manager, for providing a service directly to MD Anderson, whether or not that individual is present on MD Anderson premises. Construction Manager Personnel may include consultants, service vendor employees, construction workers, and temporary personnel needed for staff augmentation.

23.18 **Responsibility for Individuals Performing Work; Criminal Background Checks:** Each Construction Manager Personnel who is assigned to perform Work under this Agreement will be an employee of Construction Manager or an employee of Project A/E or one of its consultants or an employee of a Subcontractor engaged by Construction Manager. Construction Manager is responsible for the performance of all Construction Manager Personnel performing Work under this Agreement. Prior to any Construction Manager Personnel commencing Work, Construction Manager will have the following criminal background checks and screenings performed on the Construction Manager Personnel assigned: (1) Positive Identification Check– Social Security Number Trace, Maiden & Alias Name Search; (2)



Criminal Record Search – County, Statewide and Nationwide Level (past 15 years); (3) Employment Verification (all previous employers for past 15 years); and (4) Sex Offender Registry Search. Construction Manager will be provided The University of Texas Police at Houston (the “UTP-H”) Security Sensitive Investigations Criminal Background Manual (the “Manual”). Construction Manager will maintain all documentation, including the results of any background checks, during the Term of this Agreement and will provide The University of Texas Police Department investigators copies of such documentation upon request. Construction Manager will determine on a case-by-case basis whether each Construction Manager Personnel assigned to perform Work is qualified to do so. Construction Manager will not assign any Construction Manager Personnel to perform Work under this Agreement who has a felony conviction or convictions of theft, embezzlement, fraud or property crime offenses of any grade, or a history of criminal conduct, or who does not otherwise comply with the Manual or MD Anderson’s Criminal and Personal Background Check Policy (ADM0312). Upon request, Construction Manager will provide MD Anderson a letter signed by an authorized officer of Construction Manager that certifies compliance with this provision. Construction Manager should send any questions regarding investigations to the UTP-H at [UTPD-SSR@mdanderson.org](mailto:UTPD-SSR@mdanderson.org).

**23.19 Disclosure of Interested Parties.** By signature hereon, Construction Manager certifies that, if the value of this agreement exceeds \$1 Million, it has complied with Section 2252.908 of the Texas Government Code and Part 1 Texas Administrative Code Sections 46.1 through 46.3 as implemented by the Texas Ethics Commission (TEC), if applicable, and has provided Owner with a fully executed TEC Form 1295, certified by the TEC and signed and notarized by Construction Manager.

**23.20 Certification regarding Boycotting Israel.** Pursuant to Chapter 2270, *Texas Government Code*, Construction Manager certifies Construction Manager (1) does not currently boycott Israel; and (2) will not boycott Israel during the Term of this Agreement. Construction Manager acknowledges this Agreement may be terminated and payment withheld if this certification is inaccurate.

**23.21 Certification regarding Business with Certain Countries and Organizations.** Pursuant to Subchapter F, Chapter 2252, *Texas Government Code*], Construction Manager certifies Construction Manager is not engaged in business with Iran, Sudan, or a foreign terrorist organization. Construction Manager acknowledges this Agreement may be terminated and payment withheld if this certification is inaccurate.

**23.22 Domestic Iron and Steel Certification.** Pursuant to Sections 2252.201-2252.205 of the Government Code, Service Provider certifies that it is in compliance with the requirement that any iron or steel product produced through a manufacturing process and used in the project is produced in the United States.

## **ARTICLE 24                    COMPENSATION**

### **24.1        Construction Cost Limitation**

24.1.1    As of the Effective Date, the anticipated Construction Cost Limitation for the Project is:

\_\_\_\_\_ Dollars    (\$\_\_\_\_\_).

### **24.2        Pre-Construction Phase Fee**

24.2.1        For Pre-Construction Phase Services, Owner shall pay Construction Manager a Pre-Construction Phase Fee in the total stipulated amount in accordance with the following schedule::

Phase or Stage	%	Amount
Pre-Design Phase (Program)	05%	\$ _____.
Schematic Design Stage	10%	\$ _____.
Design Development Stage	20%	\$ _____.
GMP Development Stage	20%	\$ _____.
Construction Document Stage	40%	\$ _____.
Buyout Stage	05%	\$ _____.
<b>Total Pre-Construction Phase Fee</b>	<b>100%</b>	<b>\$ _____.</b>

24.2.2 Owner may elect, at its option, to stage or “fast-track” portions of the work. If Owner elects to implement the Project in multiple stages, Construction Manager shall allocate the Pre-Construction Phase Fee across all stages of the Project pursuant to the schedule set forth above, unless Owner and Construction Manager agree otherwise.

**24.3 Construction Phase Fee**

24.3.1 For Construction Phase Services, Owner shall pay Construction Manager a stipulated Construction Phase Fee equal to \_\_\_\_\_ percent (\_\_\_\_%) of the Construction Cost Limitation for the Project.

24.3.2 Based on the anticipated CCL set forth in paragraph 24.1.1 above, the Construction Phase Fee would be the total stipulated amount of:

\_\_\_\_\_ Dollars (\$ \_\_\_\_\_).

24.3.3 If Owner agrees to an increase in the Construction Cost Limitation during the Construction Phase, the Construction Phase Fee shall be equitably adjusted by applying the percentage established in paragraph 24.3.1 to the amount of the increase in the Construction Cost Limitation.

24.3.4 For the purpose of pricing Change Order Work as provided in Section 11.8 of the UTUGCs, Owner and Construction Manager hereby agree that the allowable percentage to be added to the sum of the Cost of Work and Construction Manager’s Contingency, if any, for the Construction Phase Fee associated with the change will not exceed \_\_\_\_\_ percent (\_\_\_\_%) as established in Construction Manager's Pricing and Delivery Proposal, a copy of which is included as an Exhibit hereto. Owner and Construction Manager further agree that this percentage shall be used in lieu of the percentages set forth in Section 11.8 of the UTUGCs and that this percentage will be used in addition to the percentage set forth in paragraph 23.4.4, below.

24.3.5 The percentage rate established in paragraph 24.3.1 and paragraph 24.3.4 of this Agreement for calculation of the Construction Phase Fee, and adjustment thereto, cannot be increased except with the express written approval of Owner’s Vice President for Operations and Facilities Management.

**24.4 Limitation on General Condition Costs**

24.4.1 The maximum allowable amount of General Conditions Costs payable to Construction Manager during the Construction Phase of the Project shall not exceed \_\_\_\_\_ percent (\_\_\_\_%) of the Construction Cost Limitation.

24.4.2 Based on the CCL set forth in paragraph 24.1.1 above, the maximum allowable amount of General Conditions Costs is expected to be the total amount of:

\_\_\_\_\_ Dollars (\$ \_\_\_\_\_).

24.4.3 If Owner agrees to an increase in the Construction Cost Limitation during the Construction Phase the maximum allowable amount of General Conditions Costs shall be equitably adjusted by applying the percentage established in paragraph 24.4.1 to the amount of the increase in the Construction Cost Limitation.

24.4.4 For the purpose of pricing Change Order Work as provided in Section 11.8 of the UTUGCs, Owner and Construction Manager hereby agree that the allowable percentage to be added to the sum of the Cost of Work and Construction Manager's Contingency, if any, for General Conditions Costs associated with the change will not exceed \_\_\_\_\_ percent (\_\_\_\_%) as established in Construction Manager's Pricing and Delivery Proposal, a copy of which is included as an Exhibit hereto. Owner and Construction Manager further agree that this percentage shall be used in lieu of the percentages set forth in Section 11.8 of the UTUGCs and that this percentage will used in addition to the percentage set forth in paragraph 23.3.4, above.

24.4.5 The percentage rate established in paragraph 24.4.1 and paragraph 24.4.4 of this Agreement for calculation of the maximum allowable amount of General Conditions Costs, and adjustment thereto, cannot be increased except with the express written approval of Owner's Vice President for Operations and Facilities Management.

## **ARTICLE 25 OTHER TERMS AND CONDITIONS**

### **25.1 Time of Completion**

25.1.1 As of the Effective Date, the anticipated date for achieving Substantial Completion of the Project is:

**April 15, 2022.**

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

25.1.3 Construction Manager shall achieve Substantial Completion of the Work and Final Completion of the Work on or before the dates agreed to in the Guaranteed Maximum Price Proposal, subject to time extensions granted by Change Order.

25.1.4 THE TIMES SET FORTH FOR COMPLETION OF THE WORK IN THE NOTICE TO PROCEED WITH CONSTRUCTION AND THE GUARANTEED MAXIMUM PRICE PROPOSAL ARE AN ESSENTIAL ELEMENT OF THE AGREEMENT. Owner may elect, at its option, to stage or "fast-track" portions of the work. Owner shall issue a separate Change Order and a separate Notice to Proceed for each such stage, or phase, and each such stage, or phase, shall have a separate Substantial Completion date and a separate liquidated damages amount.

### **25.2 Liquidated Damages**

25.2.1 For each consecutive calendar day after the Substantial Completion date that the Work is not substantially completed, Owner may deduct the amount of:

**Two Hundred Dollars (\$ 200.00)**

from any money due or that becomes due Construction Manager, not as a penalty but as liquidated damages representing the parties' estimate at the time of contract execution of the damages that Owner will sustain for late completion.

25.2.2 The parties stipulate and agree that calculating Owner's actual damages for late completion of the Project would be impractical, unduly burdensome, and cause unnecessary delay and that the amount of daily liquidated damages set forth is reasonable.

**25.3 Estimated Construction Cost Reports**

Construction Manager shall prepare and update an Estimated Construction Cost report as required by Article 5.4 at fifty percent (50%) and ninety-five percent (95%) completion of the schematic, design development and construction documents phases.

**25.4 Notices**

Notices of claims or disputes or other legal notices required by this Agreement shall be sent to the following persons at the indicated locations.

If to Owner: Ben Melson  
Senior Vice President and Chief Financial Officer  
1515 Holcombe Blvd., Unit 1495  
Houston, Texas 77030-4009

With Copies to: James H. Waters, J.D., P.E.  
Director, Facilities Project Contract & Control Services  
Facilities Planning, Design and Construction  
6900 Fannin, Suite 10.1024  
Houston, Texas 77030

If to Construction Manager: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

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

**25.5 Party Representatives**

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

Karen J. Mooney  
Associate Vice President  
Facilities Planning, Design & Construction  
1515 Holcombe Blvd., Unit 0703

Houston, Texas 77030-4009

25.5.2 Construction Manager's designated representative authorized to act on Construction Manager's behalf and bind Construction Manager with respect to the Project is:

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

25.5.3 The parties may make reasonable changes in their designated representatives upon advance written notice to the other party and in accordance with Paragraph 4.8.

**25.6 Construction Document Sets**

Project A/E shall coordinate the printing, binding and distribution of the initial issuance of all Construction Documents for all subcontract offerors requesting documents in order to provide proposals to Construction Manager. A maximum of twenty-five (25) sets will be furnished at the expense of Owner. Construction Manager shall utilize all Construction Documents returned to Project A/E from the subcontract offerors.

**25.7 OCIP Insured Project —(Not Applicable)**

**[Balance of page intentionally left blank.]**

**25.8 List of Exhibits**

The following exhibits are fully incorporated into this Agreement:

Exhibit A	2013 Uniform General Conditions of University of Texas System Building Construction Contracts
Exhibit B	Owner’s Division 00 and Division 01 Specifications
Exhibit C	Allowable Line Items for General Conditions Costs
Exhibit D Attachment 1 Attachment 2	Guaranteed Maximum Price Proposal Form Guidelines for Preparation of the Guaranteed Maximum Price Proposal Forms for Payment and Performance Bonds
Exhibit E	Security Bond Form (Actual Security Bond will be inserted prior to execution of this Agreement.)
Exhibit F	Construction Manager’s Personnel and Monthly Salary Rates
Exhibit G	Constructability Implementation Program
Exhibit H	Additional Pre-Construction Phase Services Proposal Form
Exhibit I	Texas Sales and Use Tax Exemption Certification
Exhibit J	Rider 104C – Policy on Utilization of Historically Underutilized Businesses
Exhibit K	HUB Subcontracting Plan for Pre-Construction Phase Services
Exhibit L	Rider 105 – Contractor’s Affirmations and Warranties
Exhibit M	Rider 106 – Premises Rules
Exhibit N	Rider 107 – Travel Policy
Exhibit O	Rider 117 – Institutional Policies
Exhibit P	Building Information Modeling (BIM) Requirements
Exhibit Q	Execution of Offer (To be inserted prior to execution of this Agreement.)
Exhibit R	Pricing and Delivery Proposal (To be inserted prior to execution of this Agreement.)

**BALANCE OF PAGE INTENTIONALLY LEFT BLANK.**

**SIGNATURE PAGE FOLLOWS.**

BY SIGNING BELOW, Construction Manager has executed and bound itself to this Agreement upon the execution of the Agreement by both parties. Changes in the terms and conditions under which Construction Manager must perform the services to be provided hereunder shall become effective only upon the execution of a written Amendment to this Agreement. Changes in the Work to be provided hereunder for the Pre-Construction Phase or the Pre-Construction Phase Fee shall become effective upon Owner's acceptance of an Additional Services Proposal. Changes in the Work to be provided hereunder for the Construction Phase, the Contract Time, the Guaranteed Maximum Price, following its acceptance, or the Contract Sum shall become effective upon the execution of a Change Order, signed by duly authorized representatives of the parties, except as otherwise provided in the UTUGCs. Construction Manager shall be authorized to proceed with a change as of the date set forth in the Notice to Proceed with Additional Services or the Notice to Proceed date set forth in the Change Order. Subsequent to such acceptance or issuance, Owner will issue a revised Purchase Order. Construction Manager must receive the revised Purchase Order prior to requesting compensation for the changed Work in its Application for Payment. Only duly authorized representatives of MD Anderson's Supply Chain Management department are authorized to execute amendments to this Agreement and issue Purchase Orders to bind MD Anderson for any payment to be made to Construction Manager pursuant to the terms of this Agreement.

**[CONSTRUCTION MANAGER'S NAME]**  
(Construction Manager)

By: \_\_\_\_\_  
(original signature)

Name: \_\_\_\_\_  
Title: \_\_\_\_\_

Date: \_\_\_\_\_

CONTENT APPROVED:

THE UNIVERSITY OF TEXAS  
MD ANDERSON CANCER CENTER  
(Owner)

Office of the VP & Chief Facilities Officer  
Division of Operations and Facilities Management

Office of the Sr. VP & Chief Financial Officer  
Finance Division

By: \_\_\_\_\_  
(original signature)

By: \_\_\_\_\_  
(original signature)

Name: Spencer Moore  
Title: Vice President and Chief Facilities Officer

Name: Ben Melson  
Title: Sr. Vice President and CFO

Date: \_\_\_\_\_

Date: \_\_\_\_\_