

# AIA<sup>®</sup> Document A133<sup>™</sup> – 2009

## *Standard Form of Agreement Between Owner and Construction Manager as Constructor where the basis of payment is the Cost of the Work Plus a Fee with a Guaranteed Maximum Price*

**AGREEMENT** made as of the \_\_\_\_\_ day of \_\_\_\_\_ in the year 2018

**BETWEEN** the Owner:

City of Rapid City  
300 Sixth Street  
Rapid City, SD 57701

and the Construction Manager:

M. A. Mortenson Company  
700 Meadow Lane North  
Minneapolis, MN 55422  
Rapid City, SD Contractor License No. \_\_\_\_\_

for the following Project:

Rushmore Plaza Civic Center Barnett Arena

This project is located on the northwest corner of the Rushmore Civic Center Plaza and will include: Single concourse that would feed a one large single bowl with the premium level at the top of the bowl. The arena will be constructed with the current standards and needs of a modern traveling show. The expansion is roughly 12,300 seats and around 265,000 square feet.

The Architect:

Perkins+Will, Inc.  
80 South 8th Street, Suite 300  
Minneapolis, MN 55402

The Owner's Designated Representative:

Craig Baltzer, Director of Rushmore Plaza Civic Center  
Phone: (605) 394-4115 (Office) / (605) 381-0223 (Mobile)  
Email: [CraigB@rushmoreplazacc.com](mailto:CraigB@rushmoreplazacc.com)

The Construction Manager's Designated Representative:

Allen Troshinsky  
700 Meadow Lane North, Minneapolis, MN 55422  
Phone: 763.287.5918 (Office) | 612.751.3144 (Mobile)  
Email: [allen.troshinsky@mortenson.com](mailto:allen.troshinsky@mortenson.com)

The Architect's Designated Representative:

Joseph T. Dyer, AIA and Michael Harvey  
Phone: (720) 974-6131 / (720) 974-6117  
Email: [Joe.Dyer@perkinswill.com](mailto:Joe.Dyer@perkinswill.com) / [Mike.Harvey@perkinswill.com](mailto:Mike.Harvey@perkinswill.com)

The Owner and Construction Manager agree as follows.

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## ARTICLE 1 GENERAL PROVISIONS

### § 1.1 The Contract Documents

The Contract Documents consist of this Agreement, Conditions of the Contract (General, Supplementary and other Conditions), Drawings, Specifications, Addenda issued prior to the execution of this Agreement, other documents listed in this Agreement, Exhibits, and Modifications issued after execution of this Agreement, all of which form the Contract and are as fully a part of the Contract as if attached to this Agreement or repeated herein. Upon the

Owner's acceptance of the Construction Manager's Guaranteed Maximum Price proposal, the Contract Documents will also include the documents described in Section 2.2.3 and identified in the Guaranteed Maximum Price Amendment and revisions prepared by the Architect and furnished by the Owner as described in Section 2.2.8. The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. If anything in the other Contract Documents, other than a Modification, is inconsistent with this Agreement, this Agreement (exclusive of its Exhibits) shall govern.

### **§ 1.2 Relationship of the Parties**

The Construction Manager accepts the relationship of trust and confidence established by this Agreement and covenants with the Owner to cooperate and maintain a good working relationship with the Architect and other members of the Project team and exercise the Construction Manager's skill and judgment in furthering the interests of the Owner; to furnish efficient construction administration, management services and supervision; to furnish at all times an adequate supply of workers and materials; to perform the Work in an expeditious and economical manner consistent with the Owner's interests; and to furnish the Construction Manager's services and perform the Work with the skill and care of a sophisticated construction manager and general contractor with experience in projects similar to the Project. The Owner agrees to furnish or approve, in a timely manner, information reasonably required by the Construction Manager and to make payments to the Construction Manager in accordance with the requirements of the Contract Documents.

**§ 1.2.1** Construction Manager is an independent contractor and not an agent of the Owner. Construction Manager shall be liable to the Owner for acts and omissions of Construction Manager and Construction Manager's Subcontractors and Suppliers of any tier, and their agents, employees and parties in privity of contract with any of them and anyone acting on behalf of any of them, and any other persons performing any of the Work directly or indirectly under contract with Construction Manager.

**§ 1.2.2** The Owner has retained The Tegra Group, Inc. to serve as an Owner's representative ("Tegra") in connection with the Project. Tegra is not the Owner's agent and shall not have authority to bind the Owner or to act on the Owner's behalf. The Construction Manager shall cooperate with Tegra and shall communicate with both the Owner and Tegra when transmitting any information required to be transmitted to the Owner under this Agreement. No supervision or review of any portion of the Construction Manager's Work by Tegra shall relieve the Construction Manager of any of its obligations under this Agreement.

### **§ 1.3 General Conditions**

For the Preconstruction Phase, AIA Document A201™–2007, General Conditions of the Contract for Construction, shall apply only as specifically provided in this Agreement. For the Construction Phase, the general conditions of the contract shall be as set forth in A201–2007, as modified and attached hereto as Exhibit B. The term "Contractor" as used in A201–2007 shall mean the Construction Manager. All references to the A201-2007 or "General Conditions" in the Contract Documents shall mean the document attached as Exhibit B.

**§ 1.4** The Construction Manager may have performed, provided or procured services, labor, materials and/or equipment for the Project prior to the date of this Agreement under the Construction Manager's earlier understandings, arrangements or agreements with the Owner (including Preconstruction Phase services, such as certain portions of those pre-vote services described in Exhibit E). All such services, labor, materials and/or equipment shall be deemed to be a portion of the Work hereunder and to have been performed under the terms and obligations of the Contract Documents. All amounts paid, or due to be paid to the Construction Manager under such earlier agreements(s), shall be credited against the compensation due to the Construction Manager in accordance with Section 4.1.2. In accordance with Section 12.1, all such earlier understandings, arrangements or agreements between the Owner and the Construction Manager related to the Project are superseded and replaced by this Agreement.

## ARTICLE 2 CONSTRUCTION MANAGER'S RESPONSIBILITIES

**§ 2.0.1** The Construction Manager's Preconstruction Phase responsibilities are set forth in Sections 2.1 and 2.2. The Construction Manager's Construction Phase responsibilities are set forth in Section 2.3. The Owner and Construction Manager may agree, in consultation with the Architect, for the Construction Phase to commence prior to completion of the Preconstruction Phase, in which case, both phases will proceed concurrently. The Construction Manager shall identify a representative authorized to act on behalf of the Construction Manager with respect to the Project.

**§ 2.0.2** If the Construction Manager is required to provide any design as part of the Work (the "Contractor Designed Work"), the Construction Manager shall use only licensed and qualified design professionals to perform such design Work in accordance with applicable law. Any Contractor Designed Work (if any) shall comply with applicable law, and the Construction Manager shall ensure that the design of the Contractor Designed Work coordinates with and does not impair operation of the other components of the Project. The Construction Manager shall review the Contract Documents and communicate and cooperate with the Architect during the design and installation of the Contractor Designed Work (if any). If, after reviewing the Contract Documents, the Construction Manager suspects or believes that the design or installation of the Contractor's Design Work may not properly coordinate with, or may impair operation of, other components of the Project, the Construction Manager shall give prompt written notice to the Owner and the Architect. The Construction Manager shall cause the Contractor's Design Work (if any) to conform with the requirements of the Contract Documents.

### § 2.1 Preconstruction Phase

**§ 2.1.1** The Construction Manager shall provide a preliminary evaluation of the Owner's program and other information for the Project's development, schedule and construction budget requirements, each in terms of the other. The Construction Manager shall notify the Owner of (1) any inconsistencies or errors discovered by the Construction Manager in any information provided by Owner, and (2) other information or services that may be reasonably needed for the Project. Additional information regarding the scope and duration of preconstruction (Pre-Vote Phase and Design / Pre-Construction Phase) services is more particularly described in Exhibit E, but such information shall not be construed to reduce the Construction Manager's obligations under Section 2.1 and Section 2.2 of this Agreement.

#### § 2.1.2 Consultation

The Construction Manager shall schedule and conduct meetings with the Architect and Owner to discuss such matters as procedures, progress, coordination, and scheduling of the Work. The Construction Manager shall advise the Owner and the Architect on proposed site use and improvements, selection of materials, and building systems and equipment. The Construction Manager shall also provide recommendations and value engineering suggestions consistent with the Project requirements to the Owner and Architect on constructability; availability of materials (including the feasibility of incorporating environmentally responsible Project elements) and labor; time requirements for procurement, installation and construction; and factors related to construction cost including, but not limited to, costs of alternative designs or materials, preliminary budgets, life-cycle data, and possible cost reductions.

**§ 2.1.3** When Project requirements in Section 3.1.1 have been sufficiently identified, the Construction Manager shall prepare and periodically update a Project schedule for the Architect's review and the Owner's acceptance. The Construction Manager shall obtain the Architect's approval for the portion of the Project schedule relating to the performance of the Architect's services. The Project schedule shall coordinate and integrate the Construction Manager's services, the Architect's services, other Owner consultants' and other vendors' services, and the Owner's responsibilities and identify items that could affect the Project's timely completion. The Owner will include schedule performance requirements within the contracts that Owner executes with the Architect, Owner consultants, and other vendors that align with the Construction Manager's Project schedule. The updated Project schedule shall include the following: submission of the Guaranteed Maximum Price proposal; components of the Work; times of commencement and completion required of each Subcontractor; ordering and delivery of products, including those that must be ordered well in advance of construction; and the occupancy requirements of the Owner.

**§ 2.1.3.1** The Construction Manager will prepare a Project disruption avoidance plan for the Architect's review and the Owner's acceptance. Such a plan will address key risks to the Project schedule and will be updated by the Construction Manager as the Project phases and Work proceed.

#### **§ 2.1.4 Phased Construction**

The Construction Manager shall provide recommendations with regard to accelerated or fast-track scheduling, procurement, or phased construction. The Construction Manager shall take into consideration cost reductions, cost information, constructability, provisions for temporary facilities and procurement and construction scheduling issues.

**§ 2.1.4.1** The Construction Manager, along with the Owner and the Architect, will agree upon mechanical, electrical and other critical Subcontractors that are to provide "designer assist" services to the Architect. These Subcontractors will provide such "designer assist" services and other preconstruction support services during the Preconstruction Phase (in addition to the Construction Manager's own Preconstruction Phase services for the Project), and the Owner's payment obligations with respect to such services is limited to the Owner's payment to the Construction Manager in accordance Article 4.

**§ 2.1.4.2** The Construction Manager should anticipate that multiple bid packages may be developed by the Architect (including, for example, grading/utilities, foundation/structural, and MEP/Core/Shell/Interiors packages) in order to minimize the construction duration while allowing bid packages to be completed efficiently.

#### **§ 2.1.5 Preliminary Cost Estimates**

**§ 2.1.5.1** Based on the preliminary design and other design criteria prepared by the Architect, the Construction Manager shall prepare preliminary estimates of the Cost of the Work or the cost of program requirements using area, volume or similar conceptual estimating techniques for the Architect's review and Owner's approval. If the Architect or Construction Manager suggests alternative materials and systems, the Construction Manager shall provide cost evaluations of those alternative materials and systems.

**§ 2.1.5.2** As the Architect progresses with the preparation of the Schematic Design, Design Development and Construction Documents, the Construction Manager shall prepare and update, at the 100% Programming Phase, 100% Schematic Design Phase, 60% Design Development Phase, and 100% Construction Documents Phase, estimates of the Cost of the Work (including evaluating the costs of alternatives) of increasing detail and refinement and allowing for the further development of the design until such time as the Owner and Construction Manager agree on a Guaranteed Maximum Price for the Work. Such estimates shall be provided for the Architect's review and the Owner's approval. The Construction Manager shall inform the Owner and Architect when estimates of the Cost of the Work exceed the latest approved Project budget and make recommendations for corrective action (including without limitation providing value analysis/engineering ideas to the Owner and the Architect with the above-detailed estimates). The Construction Manager will coordinate its estimating and value engineering services with the services of the Architect to bring the Project within the Owner's budget. The Owner agrees to actively participate in such value engineering and scope reduction efforts with Architect and Construction Manager, and to accept recommendations of the Architect and Construction Manager, to enable the estimate to be within the Project budget.

#### **§ 2.1.6 Subcontractors and Suppliers**

The Construction Manager shall develop trade contractors' interest in the Project. Owner and Construction Manager will develop and mutually agree upon a competitive procurement plan that includes the solicitation of bids and proposals, as permitted by South Dakota Codified Laws Title 5. Construction Manager shall not self-perform any portion of the Work without Owner's prior written approval. Upon the prior written approval of the Owner, Construction Manager may self-perform portions of the Work and Construction Manager shall follow the competitive procurement requirements of South Dakota Codified Laws Title 5 with respect to such portions of the Work. Owner approves Construction Manager to self-perform general conditions of the construction contract in accordance with Title 5, including SDCL Chap 5-18B.

**§ 2.1.7** The Construction Manager shall prepare, for the Architect's review and the Owner's acceptance, a procurement schedule for items that must be ordered well in advance of construction. The Construction Manager shall expedite and coordinate the ordering and delivery of materials that must be ordered well in advance of construction. If the Owner agrees to procure any items prior to the establishment of the Guaranteed Maximum Price, the Owner shall procure the items on terms and conditions reasonably acceptable to the Construction Manager. Upon the establishment of the Guaranteed Maximum Price, the Owner shall assign all contracts for these items to the Construction Manager and the Construction Manager shall thereafter accept responsibility for them.

#### **§ 2.1.8 Extent of Responsibility**

The Construction Manager shall exercise reasonable care in preparing schedules and estimates. The Construction Manager, however, does not warrant or guarantee estimates and schedules except as may be included as part of the Guaranteed Maximum Price. Excluding Contractor Designed Work, the Construction Manager is not required to ascertain that the Drawings and Specifications are in accordance with applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities, but the Construction Manager shall promptly report to the Architect and Owner any nonconformity discovered by or made known to the Construction Manager as a request for information in such form as the Architect may require. The Owner acknowledges that any recommendations or advice made or given by the Construction Manager concerning the design of the Project, including any recommendations concerning design alternatives or value analysis but excluding Contractor Designed Work, will be made based upon the Construction Manager's experience as a construction manager or general contractor, not as an architect or engineer, and the ultimate responsibility for the performance or aesthetic characteristics inherent in the design shall remain with the Architect. Any such recommendations or advice shall be subject to review and approval by the Architect or by Owner's other professional consultants. Except to the extent the Contract Documents expressly make the Construction Manager responsible for design (including Contractor Designed Work) or expressly identify a specification as a performance specification, nothing in this Agreement or elsewhere in the Contract Documents shall be construed to create any responsibility of or liability upon the Construction Manager for the accuracy, adequacy, sufficiency, or safety of the design of the Project, except with respect to the Construction Manager's obligations to promptly report to the Architect and Owner any such issues as set forth in the Contract Documents. Owner shall require the Architect to specifically identify in writing for the Construction Manager any specifications that the Architect considers to be performance specifications. In addition, the Owner acknowledges that Construction Manager is not a geotechnical engineer and that the Construction Manager does not assume any responsibility for recommendations in any geotechnical report related to the Project or (excluding any Contractor Designed Work) any design decisions made based upon such geotechnical report, except with respect to the Construction Manager's obligations to promptly report to the Architect and Owner any such issues as set forth in the Contract Documents.

#### **§ 2.1.9 Notices and Compliance with Laws**

The Construction Manager shall comply with applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities applicable to its performance under this Contract, and with equal employment opportunity programs, and other programs as may be required by governmental and quasi-governmental authorities and included in the Contract Documents. The Construction Manager shall, at appropriate times, contact the governmental authorities with jurisdiction over the Project and the entities providing utility services to the Project as required for the development of the Project and shall assist the Owner in connection with the Owner's responsibility for filing documents required for the approval of the Project. The Construction Manager's services shall include attendance at such meetings with neighborhood groups, city planning staff and commissioners, city council members and building construction officials as may be required for the development of the Project.

#### **§ 2.2 Guaranteed Maximum Price Proposal and Contract Time**

**§ 2.2.1** Upon the conclusion of the design development phase of the Project, or such later time as may be allowed by the Owner, the Construction Manager shall prepare a Guaranteed Maximum Price proposal for the Owner's review and acceptance. The Guaranteed Maximum Price in the proposal shall be the sum of the Construction Manager's estimate of the Cost of the Work, including contingencies described in Section 2.2.4, and the Construction Manager's Fee.

**§ 2.2.1.1** To the extent that the Drawings and Specifications are anticipated to require further development following the preparation of the Construction Manager's Guaranteed Maximum Price proposal, the Construction Manager has provided in the proposed Guaranteed Maximum Price for such further development consistent with the Contract Documents and reasonably inferable therefrom. Such further development does not include such things as changes in scope, systems, kinds and quality of materials, finishes or equipment following the submission of such proposal to the Owner. The Construction Manager's Guaranteed Maximum Price proposal will acknowledge that the Drawings and Specifications may be subject to further refinement and detailing (for example, and not in limitation of the foregoing, between a Design Development set of documents issued by the Architect for the preparation of the Construction Manager's Guaranteed Maximum Price proposal and a Construction Documents set of documents issued for the performance of the Work and construction of the Project) without any increase in the Guaranteed Maximum Price or any extension of the Substantial Completion deadline stated in such proposal.

**§ 2.2.2** The Construction Manager's Guaranteed Maximum Price proposal shall be based upon the Construction Manager's most current cost estimate. The Guaranteed Maximum Price Proposal shall separately set forth the portion of the proposed Guaranteed Maximum Price that is allocated to contingency. The Construction Manager shall not include contingency amounts in other portions of the proposed Guaranteed Maximum Price, and the other portions of the proposed Guaranteed Maximum Price shall be based on the cost of actual bids, proposals, and subcontracts for the Work where they exist, or if they do not exist, then on the Construction Manager's best good faith estimate of what the costs of those portions of the Work will be. The estimate of costs and proposed Guaranteed Maximum Price in the Guaranteed Maximum Price proposal shall separately identify the Construction Manager's Fee and shall be broken down into such reasonable additional details as is requested by the Owner. The Construction Manager shall provide the Owner with such documentation as the Owner reasonably requests to substantiate the amount of the proposed Guaranteed Maximum Price. The Owner, at its option, may accept the Guaranteed Maximum Price proposal or reject the Guaranteed Maximum Price proposal. If the Owner rejects the Guaranteed Maximum Price proposal, the Owner may require the Construction Manager to proceed with the Work without a Guaranteed Maximum Price, to prepare a modified Guaranteed Maximum Price proposal, or both, or to terminate this Agreement pursuant to the terms of this Agreement.

**§ 2.2.3** In addition to the information set forth in Section 2.2.2, the Construction Manager shall include with the Guaranteed Maximum Price proposal a written statement of its basis, which shall include the following:

- .1 A list of the Drawings and Specifications, including all Addenda thereto, and the Conditions of the Contract;
- .2 A list of the clarifications and assumptions made by the Construction Manager in the preparation of the Guaranteed Maximum Price proposal to supplement the information provided by the Owner and contained in the Drawings and Specifications;
- .3 A statement of the proposed Guaranteed Maximum Price, including a statement of the estimated Cost of the Work organized by trade categories or systems, allowances, Alternates requested by the Architect or the Owner, contingency, and the Construction Manager's Fee;
- .4 The deadline for Substantial Completion upon which the proposed Guaranteed Maximum Price is based, the date by which the Notice To Proceed must be issued, and a schedule for the issuance of construction documents upon which schedule the date of Substantial Completion is based;
- .5 A date by which the Owner must accept the Guaranteed Maximum Price, which shall, at a minimum, allow the Owner thirty (30) days from the date the Owner receives the Guaranteed Maximum Price proposal;
- .6 A list and descriptions of Allowances and Alternates that include dates by which programmatic decisions will be made and design documents will be issued for procurement and construction for such Allowances and Alternates;
- .7 A list and descriptions of any portion of the Work for which the Owner and Construction Manager agree the basis of payment will be a stipulated sum; and
- .8 Pricing of alternates as defined by the Architect or Owner, which will be equal to approximately five percent (5%) of the Guaranteed Maximum Price.

**§ 2.2.4** In preparing the Construction Manager's Guaranteed Maximum Price proposal, the Construction Manager shall identify any contingency amounts that Construction Manager has allocated to cover those costs considered

reimbursable as the Cost of the Work but which do not result from circumstances for which a Change Order is warranted under the Agreement. The Owner acknowledges that the estimating process is not exact and the Construction Manager's contingency is intended to cover inaccuracies in the quantities and prices in the estimate, and unanticipated items which may not have been taken into account in the establishment of the Guaranteed Maximum Price, including but not limited to: (a) unfavorable bidding from trade contractors due to market conditions, price increases, lack of competition or other variables, (b) default by subcontractors or suppliers, (c) costs of corrective work not provided for elsewhere, (d) labor disputes, and (e) other conditions which result in an increase in the Cost of the Work but do not entitle the Construction Manager to an increase in the Guaranteed Maximum Price. The Construction Manager will be entitled to utilize amounts from the contingency only with the prior written approval of the Owner (which shall not be unreasonably withheld, delayed or conditioned) following written notice from the Construction Manager; such notice shall include a description and amount of the Cost of Work to be covered by the reallocation of amounts from such contingency to a line item on the Construction Manager's approved Schedule of Values and, when applicable, the efforts undertaken or to be taken by the Construction Manager to replenish such funds from insurance, bonds, Subcontractor "backcharges," or otherwise. In no event shall such contingency amounts be used to cover additional costs arising from the Construction Manager's negligence or willful misconduct.

**§ 2.2.5** The Construction Manager shall meet with the Owner and Architect to review the Guaranteed Maximum Price proposal. In the event that the Owner and Architect discover any inconsistencies or inaccuracies in the information presented or any conflicts with such information and the Owner's program, budget or schedule for the Project, they shall promptly notify the Construction Manager, who shall make appropriate adjustments to the Guaranteed Maximum Price proposal, its basis, or both.

**§ 2.2.6** If the Owner notifies the Construction Manager that the Owner has accepted the Guaranteed Maximum Price proposal in writing before the date specified in the Guaranteed Maximum Price proposal, the Guaranteed Maximum Price proposal shall be deemed effective without further acceptance from the Construction Manager. Following acceptance of a Guaranteed Maximum Price, the Owner and Construction Manager shall execute the Guaranteed Maximum Price Amendment amending this Agreement, the form of which is attached as Exhibit A – Guaranteed Maximum Price Amendment. The Guaranteed Maximum Price Amendment shall set forth the agreed upon Guaranteed Maximum Price with the information and assumptions upon which it is based and the agreed upon deadline for Substantial Completion.

**§ 2.2.7** The Construction Manager shall not incur any cost to be reimbursed as part of the Cost of the Work prior to the commencement of the Construction Phase, unless the Owner provides prior written authorization for such costs.

**§ 2.2.8** The Owner shall authorize the Architect to provide the revisions to the Drawings and Specifications to incorporate the agreed-upon assumptions and clarifications contained in the Guaranteed Maximum Price Amendment. The Owner shall promptly furnish those revised Drawings and Specifications to the Construction Manager as they are revised. The Construction Manager shall notify the Owner and Architect of any inconsistencies it may discover between the Guaranteed Maximum Price Amendment and the revised Drawings and Specifications.

**§ 2.2.9** The Construction Manager shall include in the Guaranteed Maximum Price all sales, consumer, use and similar taxes for the Work provided by the Construction Manager that are legally enacted, whether or not yet effective, at the time the Guaranteed Maximum Price Amendment is executed.

**§ 2.2.10** The Cost of the Work paid to the Construction Manager shall be limited only by the Guaranteed Maximum Price in the aggregate and not by estimates for the various categories or line items of Work comprising the Guaranteed Maximum Price.

**§ 2.2.11** Any changes to the scope of the Work or other conditions or assumptions described in the written statement of the basis of the Guaranteed Maximum Price submitted pursuant to Section 2.2.3.2 shall entitle the Construction Manager to an adjustment in the Guaranteed Maximum Price and required date of Substantial Completion, as applicable, to the extent provided by the Contract Documents (including Articles 7, 8 and 15 of the A201–2007.



## **§ 2.3 Construction Phase**

### **§ 2.3.1 General**

**§ 2.3.1.1** For purposes of Section 8.1.2 of A201–2007, the date of commencement of the Work shall mean the date of commencement of the Construction Phase.

**§ 2.3.1.2** The Construction Phase shall commence upon the date which the Guaranteed Maximum Price Amendment is executed by the Owner and Construction Manager or the Owner’s issuance of a Notice to Proceed, whichever occurs earlier.

### **§ 2.3.2 Administration**

**§ 2.3.2.1** Those portions of the Work that the Construction Manager does not customarily perform with the Construction Manager’s own personnel to the extent permitted under the Contract Documents and South Dakota Codified Laws Title 5 shall be performed under subcontracts or by other appropriate agreements with the Construction Manager. To the extent permitted by South Dakota Codified Laws Title 5, the Owner may designate specific persons from whom, or entities from which, the Construction Manager shall obtain bids or competitive proposals. In accordance with Exhibit G and in compliance with the requirements of applicable law, the Construction Manager shall obtain bids or competitive proposals from Subcontractors (with no less than 3 competitive bids or proposals for each sub-trade category unless so otherwise accepted by the Owner upon consultation with the Construction Manager) and from suppliers of materials or equipment fabricated especially for the Work and shall deliver such bids and competitive proposals, or cause such bids or proposals to be directly delivered, to the Architect and the Owner. The Construction Manager will provide Cost of the Work information, competitive proposals and bids from Subcontractors and suppliers (unless directly provided to the Owner or the Architect in accordance with the requirements of applicable law) on an “open book” basis and, to the extent permitted by the requirements of applicable law, will arrange for Subcontractor interviews with the Owner. The Owner shall then determine, with the advice of the Construction Manager (through a written award recommendation) and the Architect and in accordance with South Dakota Codified Laws Title 5, which bids or proposals will be accepted. However, by determining which bids or proposals will be accepted, the Owner does not assume any responsibility for the proper performance of such Subcontractor. Except as otherwise required in accordance with South Dakota Codified Laws Title 5, the Construction Manager shall not be required to contract with anyone to whom the Construction Manager has reasonable objection. To the extent permitted by South Dakota Codified Laws Title 5, included among the requisite qualifications for a Subcontractor to be approved as qualified to perform the portion of the Work proposed to be subcontracted, the prospective Subcontractor must have good experience performing the Work with the size of subcontract contemplated, be in bondable financial condition (and shall provide such bonds as required under applicable law), be capable of performing the Work in a timely fashion, be capable of providing sufficient quality employees with experience, and have a reasonable safety record.

**§ 2.3.2.1.1** The contingency referenced in Section 2.2.4 shall be increased or decreased, as the case may require, to reflect net savings or net losses resulting from the award of Subcontracts for the Work. The aggregate sum of the net savings and net losses are referred to herein as “Buyout Savings” or “Buyout Losses”, as the case may be, and shall be determined by subtracting the face amount of each Subcontract at the time the Subcontract is entered into, and subtracting any unawarded amounts to be used for additional anticipated trade expenditures and identified to the Owner, from the amount allocated in the initial Schedule of Values of the Work included in the Guaranteed Maximum Price proposal in accordance with Section 2.2.3.3 applicable to the Work to be performed under such Subcontract.

**§ 2.3.2.2** If the Guaranteed Maximum Price has been established and when a specific bidder (1) is recommended to the Owner by the Construction Manager, (2) is qualified to perform that portion of the Work, and (3) has submitted a bid that conforms to the requirements of the Contract Documents without reservations or exceptions, but the Owner requires that another bid be accepted, then the Construction Manager may require that a Change Order be issued to adjust the Contract Time and the Guaranteed Maximum Price by the difference between the bid of the person or entity recommended to the Owner by the Construction Manager and the amount and time requirement of the subcontract or other agreement actually signed with the person or entity designated by the Owner.

**§ 2.3.2.3** Subcontracts or other agreements shall conform to the applicable payment provisions of this Agreement, and shall not be awarded on the basis of cost plus a fee without the prior consent of the Owner. If the Subcontract is awarded on a cost-plus a fee basis, the Construction Manager shall provide in the Subcontract for the Owner to receive the same audit rights with regard to the Subcontractor as the Owner receives with regard to the Construction Manager in Section 6.11 below.

**§ 2.3.2.4** If the Construction Manager recommends a specific bidder that may be considered a “related party” according to Section 6.10, then the Construction Manager shall promptly notify the Owner in writing of such relationship and notify the Owner of the specific nature of the contemplated transaction, according to Section 6.10.2. In all events the Construction Manager shall comply with South Dakota Codified Laws Title 5 with respect to the bidding, procurement and performance of the Work.

**§ 2.3.2.5** The Construction Manager shall schedule and conduct meetings to discuss such matters as procedures, progress, coordination, scheduling, and status of the Work. Such meetings shall include weekly Project site meetings that include the Construction Manager, appropriate Subcontractors, Tegra, the Architect, and the Owner in which open issues, scheduled Work, and pending or upcoming issues will be discussed and resolved. The Construction Manager shall prepare a written agenda in advance of each such meeting and shall prepare and promptly distribute (within 48 hours following such meeting) minutes to the Owner and Architect (including a list of action items with identification of the responsible person or entity and the due date for each item).

**§ 2.3.2.6** Upon the execution of the Guaranteed Maximum Price Amendment, the Construction Manager shall prepare and submit to the Owner and Architect a construction schedule for the Work and submittal schedule in accordance with Section 3.10 of A201–2007.

**§ 2.3.2.7** The Construction Manager shall record the progress of the Project. On a monthly basis, or otherwise as agreed to by the Owner, the Construction Manager shall submit written progress reports to the Owner and Architect, showing percentages of completion and other information required by the Owner. Such monthly report shall include information on the actual Work progress versus the scheduled Work progress, including identifying any variances related thereto and providing a written action plan to address each such variance, if any, in a manner that will maintain the Project schedule. The Construction Manager shall also keep, and make available to the Owner and Architect, a daily log containing a record for each day of weather, portions of the Work in progress, number of workers on site, identification of equipment on site, problems that might affect progress of the work, accidents, injuries, and other information required by the Owner.

**§ 2.3.2.8** The Construction Manager shall develop a system of cost control for the Work, including regular monitoring of actual costs for activities in progress and estimates for uncompleted tasks and proposed changes. The Construction Manager shall identify variances between actual and estimated costs and report the variances to the Owner and Architect and shall provide this information in its monthly reports to the Owner and Architect, in accordance with Section 2.3.2.7 above.

**§ 2.3.2.9** The Construction Manager will provide competent, experienced full-time staff, including an experienced construction field superintendent and project management team, to coordinate the Work, maintain the progress of the Subcontractors, coordinate with the Owner’s and the Architect’s ongoing activities and operations, and provide overall direction for the Project during the Construction Phase. The Construction Manager will establish on-site organization and levels of authority to carry out the overall plans of the construction team. The Construction Manager’s staff must demonstrate high levels of effective, proactive Project leadership and must work cooperatively and constructively with the Owner’s and Architect’s members and representatives to foster positive relationships that support positive outcomes for all persons and the Project.

**§ 2.3.2.9.1** Certain personnel of the Construction Manager (as identified in Exhibit D) are considered by the Owner to be essential for the performance of the services required under this Agreement. The Construction Manager agrees that such key personnel shall remain actively involved in the Project and the performance of the services required under this Agreement throughout the term of this Agreement; provided, however, that in the event such personnel are no longer employed by the Construction Manager, or become disabled or otherwise similarly unable to be

actively involved in the Project, the Construction Manager may replace such personnel with personnel having reasonably comparable levels of experience, qualifications and abilities with the advance written approval of the Owner (which shall not be unreasonably withheld, delayed or conditioned).

**§ 2.3.2.10** The Construction Manager will develop, implement and maintain a Project-specific safety plan for the Work.

#### **§ 2.4 Professional Services**

Section 3.12.10 of A201–2007 shall apply to both the Preconstruction and Construction Phases.

#### **§ 2.5 Hazardous Materials**

Section 10.3 of A201–2007 shall apply to both the Preconstruction and Construction Phases.

#### **§ 2.6 Electronic Document Library and Warranty Management**

During the period for correction of Work identified under Section 12.2.2 of A201-2007, as amended, the Construction Manager will provide to the Owner an online facility document library and warranty management service through a web-based computerized maintenance management system. This electronic library will include as-built drawings, operations and maintenance manuals, catalog and important equipment data, as well as other Project documents (e.g. permits, inspection reports, certifications, security procedures, etc.). The Construction Manager will have no obligation to maintain this electronic library after the period for correction of warranty items identified under Section 12.2.2 of A201-2007, unless the Owner and the Construction Manager otherwise agree. If the Owner does not elect to contract with the Construction Manager for ongoing electronic document library and warranty management services, the Construction Manager will provide to the Owner, at no cost to the Owner, a record copy of the facility document library and warranty document electronic library in the quantity, form and format that Owner elects.

#### **§2.7 Liquidated Damages**

If Substantial Completion occurs after the Substantial Completion deadline established under the Contract Documents, then the Construction Manager shall pay to the Owner (by direct payment or offset from the Contract Sum) the following liquidated damages: (a) \$300,000, plus (b) \$250,000 per each scheduled Planned Event (exclusive of the first scheduled Planned Event) if Substantial Completion has not occurred by the date necessary for such Planned Event to occur without adverse impact thereto; provided, however, that if the Construction Manager's delay in achieving Substantial Completion of the Work does not adversely impact any Planned Events, the Construction Manager's liability for liquidated damages under this Section 2.7 will be limited to \$1,000 for each day that expires after the deadline for Substantial Completion established under the Contract Documents until Substantial Completion is achieved by the Construction Manager.

All liquidated damages referenced in this Section 2.7 are collectively referred to herein as the "Delay Liquidated Damages." The Delay Liquidated Damages shall be payable upon demand at the time they accrue. As used in this Section 2.7, the term "Planned Event" means each event planned by the Owner for the Project site. The Owner shall not plan an event for the Project site that is to occur prior to or on the Substantial Completion deadline established under the Contract Documents. The Construction Manager's total liability for Delay Liquidated Damages shall be subject to an aggregate limit of eight hundred thousand dollars (\$800,000) and the Owner waives recovery for any delay damages in excess of such Delay Liquidated Damages cap.

The Parties agree that the payment of these liquidated damages shall be the Owner's sole and exclusive remedy for delay by the Construction Manager in the completion of the Work, notwithstanding 6.2.3 of the General Conditions to the extent that Construction Manager has not reasonably coordinated with separate contractors. However, nothing in this Section 2.7 shall be construed to limit the Owner's right to terminate the Contract for the Construction Manager's default in accordance with Section 14.2 of A201-2007 or to exercise its other rights set forth in other provision of the Contract Documents (such as Section 2.4 of the A201-2007). The Parties acknowledge and agree it is difficult or impossible to determine with precision the amount of damages that would or might be incurred by the Owner as a result of Construction Manager's failure to timely achieve Substantial Completion. It is understood and agreed by the Parties that any sums that would be payable under this section are in the nature of liquidated damages,

and not a penalty, and are fair and reasonable and such payment would represent a reasonable estimate of fair compensation for the losses that may reasonably be anticipated from such failure.

### **ARTICLE 3 OWNER'S RESPONSIBILITIES**

#### **§ 3.1 Information and Services Required of the Owner**

**§ 3.1.1** The Owner shall provide information with reasonable promptness, regarding requirements for and limitations on the Project, including a written program which shall set forth the Owner's objectives, constraints, and criteria, including schedule, space requirements and relationships, flexibility and expandability, special equipment, systems sustainability and site requirements.

**§ 3.1.2** Prior to the execution of the Guaranteed Maximum Price Amendment, the Construction Manager may request in writing that the Owner provide reasonable evidence that the Owner has made financial arrangements to fulfill the Owner's obligations under the Contract. Thereafter, the Construction Manager may only request such evidence if the Owner fails to make payments to the Construction Manager as the Contract Documents require. The Owner shall furnish such evidence as a condition precedent to commencement or continuation of the Work or the portion of the Work affected by a material change. After the Owner furnishes the evidence, the Owner shall not materially vary such financial arrangements without prior notice to the Construction Manager and Architect.

**§ 3.1.3** The Owner shall establish and periodically update the Owner's budget for the Project, including (1) the budget for the Cost of the Work as defined in Section 6.1.1, (2) the Owner's other costs, and (3) reasonable contingencies related to all of these costs. If the Owner significantly increases or decreases the Owner's budget for the Cost of the Work, the Owner shall notify the Construction Manager and Architect. The Owner and the Architect, in consultation with the Construction Manager, shall thereafter agree to a corresponding change in the Project's scope and quality.

**§ 3.1.4 Structural and Environmental Tests, Surveys and Reports.** During the Preconstruction Phase, the Owner shall furnish the following information or services with reasonable promptness. The Owner shall also furnish any other information under the Owner's control and relevant to the Construction Manager's performance of the Work with reasonable promptness after receiving the Construction Manager's written request for such information or services. Except to the extent the Construction Manager knows of any inaccuracy, the Construction Manager shall be entitled to rely on the accuracy of information and services furnished by the Owner but shall exercise proper precautions relating to the safe performance of the Work.

**§ 3.1.4.1** The Owner shall furnish tests, inspections and reports required by law and as otherwise agreed to by the parties, such as structural, mechanical, and chemical tests, tests for air and water pollution, and tests for hazardous materials, but only to the extent not otherwise required of the Architect or the Construction Manager.

**§ 3.1.4.2** During the Construction Phase, the Owner shall furnish information or services required of the Owner by the Contract Documents with reasonable promptness. The Owner shall also furnish any other information under the Owner's control and necessary for the Construction Manager's performance of the Work with reasonable promptness after receiving the Construction Manager's written request for such information.

#### **§ 3.2 Owner's Designated Representative**

The Owner has identified the Owner's Designated Representative authorized to act on behalf of the Owner with respect to the Project. The Owner's Designated Representative shall render decisions promptly and furnish information expeditiously, so as to avoid unreasonable delay in the services or Work of the Construction Manager. Except as otherwise provided in Section 4.2.1 of A201-2007, the Architect does not have such authority. The term "Owner" means the Owner or the Owner's Designated Representative.

**§ 3.2.1 Legal Requirements.** The Owner shall furnish all legal, insurance and accounting services, including auditing services, that may be reasonably necessary at any time for the Project to meet the Owner's needs and interests.

**§ 3.3 Architect**

The Owner has retained an Architect to provide services, duties and responsibilities as described in AIA Document B101™–2007, Standard Form of Agreement Between Owner and Architect, as amended by Owner and Architect. Any performance specifications or design services deferred to the CM shall be clearly labeled.

**ARTICLE 4 COMPENSATION AND PAYMENTS FOR PRECONSTRUCTION PHASE SERVICES**

**§ 4.1 Compensation**

**§ 4.1.1** For the Construction Manager’s Preconstruction Phase services, the Owner shall compensate the Construction Manager as follows:

**§ 4.1.2** For the Construction Manager’s Preconstruction Phase services described in Sections 2.1 and 2.2:

The Construction Manager shall be paid a lump-sum Preconstruction Services Fee of Forty-Eight Thousand dollars (\$48,000) for Preconstruction Services performed through June 5, 2018, payable as follows:

	Monthly Amount	Cumulative Amount
March 5 to April 4	\$16,000	\$16,000
April 5 to May 4	\$16,000	\$32,000
May 5 to June 5	\$16,000	\$48,000

Provided that the Project continues beyond the Pre-Vote Phase, into the Design / Preconstruction Phase, the Construction Manager shall be paid a lump-sum Preconstruction Services Fee of Five Hundred Eighty-Two Thousand dollars (\$582,000) for Preconstruction Services performed after June 5, 2018, payable as follows:

	Monthly Amount	Cumulative Amount
June, 2018	\$117,714	\$117,714
July	\$ 35,714	\$153,428
August	\$ 35,714	\$189,142
September	\$ 35,714	\$224,856
October	\$ 35,714	\$260,570
November	\$ 35,714	\$296,284
December	\$ 35,714	\$331,998
January, 2019	\$ 35,714	\$367,712
February	\$ 35,714	\$403,426
March	\$ 35,714	\$439,140
April	\$ 35,714	\$474,854
May	\$ 35,714	\$510,568
June	\$ 35,714	\$546,282
July	\$ 35,718	\$582,000

**§ 4.1.3** If the Preconstruction Phase services covered by this Agreement have not been completed by the date set forth in Section 4.1.2, through no fault of the Construction Manager, and the Construction Manager thereby incurs additional cost, the Construction Manager shall be paid a reasonable amount as approved by the Owner thereafter for such extended Preconstruction Phase services as a Cost of the Work under Article 6.

**§ 4.2 Payments**

**§ 4.2.1** Unless otherwise agreed, payments for services shall be made monthly as set forth in Section 4.1.2.

**§ 4.2.2** Payments are due and payable within 45 days from the Owner’s receipt of the Construction Manager’s invoice. Amounts unpaid sixty (60) days from the date payment is due shall bear interest at the rate entered below:

Prime Rate plus two percent (2%) of the National Average Prime Rate as published daily by The Wall Street Journal or the maximum rate permitted by law, whichever is less.

**§ 4.2.3** The Construction Manager’s invoices for its Preconstruction Phase services shall be supported by such data substantiating the Construction Manager’s right to payment as the Owner may reasonably require. In exchange for each payment on the Construction Manager’s Preconstruction Phase invoices and as a precondition to the Construction Manager’s right to receive payment, Construction Manager shall submit lien waivers and releases in a form acceptable to the Owner. Contractor shall also submit lien waivers and releases from Construction Manager’s subcontractors involved in the Preconstruction Phase services (if any). The time for the Owner to make payment shall be extended until the Construction Manager has complied with the requirements of this Section and the Owner has had at least five business days to review the submitted materials.

**ARTICLE 5 COMPENSATION FOR CONSTRUCTION PHASE SERVICES**

**§ 5.1** For the Construction Manager’s performance of the Work as described in Section 2.3 and elsewhere in the Contract Documents, the Owner shall pay the Construction Manager the Contract Sum in current funds for the Construction Manager’s performance of the Work. The Contract Sum is the Cost of the Work as defined in Section 6.1.1 plus the Construction Manager’s Fee.

**§ 5.1.1** The Construction Manager’s Fee is: An amount equal to three and 15/100<sup>th</sup> percent (3.15%) of the Cost of the Work set forth in the Guaranteed Maximum Price proposal accepted by the Owner in accordance with Section 2.2, which amount shall be converted to a lump sum upon the establishment of the Guaranteed Maximum Price, and shall be payable in proportion to the percentage of completion of the Work based on the approved schedule of values. The Construction Manager’s Fee shall be paid and accepted by the Construction Manager as full consideration for all overhead and profit of the Construction Manager applicable to the Work, including all expenses incurred by the Construction Manager with respect to the Work or the Project which do not qualify as a Cost of the Work as defined by the Contract Documents.

**§ 5.1.2** The method of adjustment of the Construction Manager’s Fee for changes in the Work: For changes in the Work, the Construction Manager’s Fee shall be calculated on the net increase in the Cost of the Work resulting from the change to the extent allowed in the applicable Change Order. The Construction Manager’s Fee shall not be reduced by reason of Change Orders reducing the Guaranteed Maximum Price unless the aggregate amount of all such reductions by previous Change Orders caused the Guaranteed Maximum Price to be equal to or greater than 5% of the original Guaranteed Maximum Price. Similarly, there shall be no increase in the Construction Manager’s Fee until the Guaranteed Maximum Price has been increased by previous Change Orders to an amount equal to or greater than 5% of the original Guaranteed Maximum Price.

**§ 5.1.3** Limitations, if any, on a Subcontractor’s overhead and profit for increases in the cost of its portion of the Work: No more than ten percent (10%) of the costs of its portion of the Work.

**§ 5.1.4** To the extent permitted by South Dakota Codified Laws Title 5, rental rates for equipment furnished by the Construction Manager shall be those rates set forth in Exhibit F.

**§ 5.1.5** Unit prices, if any:

Item	Units and Limitations	Price per Unit (\$0.00)
See GMP Amendment	See GMP Amendment	See GMP Amendment

**§ 5.1.6** For the services described in Section 2.6, the Owner shall pay the Construction Manager an amount equal to the lesser of (a) \$1,000 for each \$1,000,000 incurred as the Cost of the Work for the Project or (b) \$45,000. Such amount may be included in the Construction Manager’s final Application for Payment.

**§ 5.2 Guaranteed Maximum Price**

**§ 5.2.1** The Construction Manager guarantees that the Contract Sum shall not exceed the Guaranteed Maximum Price set forth in the Guaranteed Maximum Price Amendment, as it is amended from time to time. To the extent the Contract Sum exceeds the Guaranteed Maximum Price, the Construction Manager shall bear such costs in excess of the Guaranteed Maximum Price without reimbursement or additional compensation from the Owner. Should the

Contract Sum be less than the Guaranteed Maximum Price, then the difference shall constitute savings and One Hundred Percent (100%) of the savings shall accrue to the Owner.

**§ 5.2.2** The Guaranteed Maximum Price is subject to additions and deductions by Change Order as provided in the Contract Documents and the Date of Substantial Completion shall be subject to adjustment as provided in the Contract Documents.

**§ 5.2.3** In the event Work (other than Preconstruction Phase services defined in Sections 2.1 and 2.2 and Exhibit E) is performed by the Construction Manager prior to the establishment of the Guaranteed Maximum Price as authorized in advance by the Owner in accordance with Section 2.0.1 or Section 2.2.7, the applicable Cost of the Work shall be invoiced and paid in accordance with Articles 5, 6, and 7, and subsequently included in the Guaranteed Maximum Price.

### **§ 5.3 Changes in the Work**

**§ 5.3.1** The Owner may, without invalidating the Contract, order changes in the Work within the general scope of the Contract consisting of additions, deletions or other revisions. The Owner shall issue such changes in writing. The Architect may make minor changes in the Work as provided in Section 7.4 of AIA Document A201–2007, General Conditions of the Contract for Construction. The Construction Manager shall be entitled to an equitable adjustment in the Contract Time as a result of changes in the Work.

**§ 5.3.2** Adjustments to the Guaranteed Maximum Price on account of changes in the Work subsequent to the execution of the Guaranteed Maximum Price Amendment may be determined by any of the methods listed in Section 7.3.3 of AIA Document A201–2007, General Conditions of the Contract for Construction.

**§ 5.3.3** In calculating adjustments to subcontracts (except those awarded with the Owner’s prior consent on the basis of cost plus a fee), the terms “cost” and “fee” as used in Section 7.3.3.3 of AIA Document A201–2007 and the term “costs” as used in Section 7.3.7 of AIA Document A201–2007 shall have the meanings assigned to them in AIA Document A201–2007 and shall not be modified by Sections 5.1 and 5.2, Sections 6.1 through 6.7, and Section 6.8 of this Agreement. Adjustments to subcontracts awarded with the Owner’s prior consent on the basis of cost plus a fee shall be calculated in accordance with the terms of those subcontracts.

**§ 5.3.4** In calculating adjustments to the Guaranteed Maximum Price, the terms “cost” and “costs” as used in the above-referenced provisions of AIA Document A201–2007 shall mean the Cost of the Work as defined in Sections 6.1 to 6.7 of this Agreement and the term “fee” shall mean the Construction Manager’s Fee as defined in Section 5.1 of this Agreement.

**§ 5.3.5** If changes in the Work, or if the extent of such changes is such, in the aggregate, that application of the adjustment provisions of Section 5.1.2 will cause substantial inequity to the Owner or Construction Manager, the Construction Manager’s Fee shall be equitably adjusted on the same basis that was used to establish the Fee for the original Work, and the Guaranteed Maximum Price shall be adjusted accordingly.

## **ARTICLE 6 COST OF THE WORK FOR CONSTRUCTION PHASE**

### **§ 6.1 Costs to Be Reimbursed**

**§ 6.1.1** The term Cost of the Work shall cost necessarily incurred by the Construction Manager in the proper performance of the Work. Such costs shall be the actual costs for such items and shall include only the items set forth in Sections 6.1 through 6.7. All trade contracts will bid or procured in accordance with South Dakota Codified Laws Title 5, and any costs related to any Allowances or any Change Orders or Construction Change Directives utilizing a “time and materials” or similar compensation method, and all costs for Project “general conditions / requirements” will be tracked for reimbursement utilizing generally accepted accounting procedures and supported by documentation reasonably acceptable to the Owner.

**§ 6.1.2** Where any cost is subject to the Owner's prior approval, the Construction Manager shall obtain this approval prior to incurring the cost. The parties shall endeavor to identify any such costs prior to executing Guaranteed Maximum Price Amendment.

## **§ 6.2 Labor Costs**

### **§ 6.2.1** [Not Utilized]

**§ 6.2.2** Wages or salaries and other compensation of the Construction Manager's supervisory and administrative personnel when stationed at the site, or (for the Construction Manager's Project manager, Project coordinator and others performing tasks generally associated with the daily management of a construction project), when stationed at the Construction Manager's home office or a location other than the Project site, in either case with the Owner's prior approval, but only for that portion of their time required for the Work. Such wages, salary and other compensation for such supervisory and administrative personnel shall be invoiced at the rates set forth on Exhibit C (which, in addition to wages paid and attendant burdens, includes charges for overhead and/or profit not otherwise included in the Construction Manager's Fee and all other costs for Work not performed on a lump sum basis). Supervisory personnel shall not be paid as a Cost of the Work in excess of 80 hours per 2 week pay period.

**§ 6.2.3** Wages or salaries and other compensation of the Construction Manager's supervisory or administrative personnel engaged at factories, workshops or on the road, in expediting the production or transportation of materials or equipment required for the Work, but only for that portion of their time required for the Work. Such wages, salary and other compensation for such supervisory and administrative personnel shall be invoiced at the rates set forth on Exhibit C (which, in addition to wages paid and attendant burdens, includes charges for overhead and/or profit not otherwise included in the Construction Manager's Fee and all other costs for Work not performed on a lump sum basis).

**§ 6.2.4** The rates set forth in Exhibit C are "fully-burdened" and include all costs incurred by the Construction Manager for taxes, insurance, contributions, assessments and benefits required by law or collective bargaining agreements and, for personnel not covered by such agreements, customary benefits such as sick leave, medical and health benefits, holidays, vacations and pensions.

## **§ 6.3 Subcontract Costs**

Payments made or owed by the Construction Manager to Subcontractors in accordance with the requirements of the subcontracts properly entered into by the Construction Manager under the terms of the Contract Documents. If the Construction Manager is directly performing or providing any portion of the Work in accordance with Section 2.3.2.1, Section 2.3.2.4, Section 6.10 and the requirements South Dakota Codified Laws Title 5, it will be treated as a Subcontractor under the Contract Documents with respect to such portions of the Work.

## **§ 6.4 Costs of Materials and Equipment Incorporated in the Completed Construction**

**§ 6.4.1** Costs, including transportation and storage, of materials and equipment incorporated or to be incorporated in the completed construction.

**§ 6.4.2** Costs of materials described in the preceding Section 6.4.1 in excess of those actually installed to allow for reasonable waste and spoilage. Unused excess materials, if any, shall become the Owner's property at the completion of the Work or, at the Owner's option, shall be sold by the Construction Manager. Any amounts realized from such sales shall be credited to the Owner as a deduction from the Cost of the Work.

## **§ 6.5 Costs of Other Materials and Equipment, Temporary Facilities and Related Items**

**§ 6.5.1** Costs of transportation, storage, installation, maintenance, dismantling and removal of materials, supplies, temporary facilities, machinery, equipment and hand tools not customarily owned by construction workers that are provided by the Construction Manager at the site and fully consumed in the performance of the Work. Costs of materials, supplies, temporary facilities, machinery, equipment and tools that are not fully consumed shall, if approved in advance by the Owner, be charged as a Cost of the Work, but only for the cost or value of the item at the time it is first used on the Project site. Items not fully consumed by the Construction Manager shall be the Owner's property.



**§ 6.5.2** Rental charges for temporary facilities, machinery, equipment and hand tools not customarily owned by construction workers that are provided by the Construction Manager at the site and costs of transportation, installation, minor repairs, dismantling and removal. Such temporary facilities, machinery, equipment and hand tools shall be billed and paid at the equipment billing rates attached as Exhibit F.

**§ 6.5.3** Costs of removal of debris from the site of the Work and its proper and legal disposal.

**§ 6.5.4** Costs of document reproductions, long-distance telephone calls, postage and parcel delivery charges, messenger services, office supplies, parking, telephone service at the Project site and reasonable petty cash expenses of the Project site office.

**§ 6.5.5** That portion of the reasonable expenses of the Construction Manager's supervisory or administrative personnel incurred while traveling in discharge of duties connected with the Work, provided that such expenses are approved by the Owner in advance.

**§ 6.5.6** Costs of materials and equipment suitably stored off the site at a mutually acceptable location and in accordance with the requirements of the Contract Documents, subject to the Owner's prior approval.

## **§ 6.6 Miscellaneous Costs**

**§ 6.6.1** Insurance, exclusive of worker's compensation insurance, subcontractor default insurance and builder's risk insurance (if obtained by the Construction Manager) will be paid at the rate of \$8.05 / \$1,000 of billings. Performance and payment bonds obtained by the Construction Manager for the Project, if any, shall be paid at the rate of \$4.97 / \$1,000 of the GMP and paid by the Owner at the times the bonds are furnished. Subcontractor default insurance will be paid at the rate of \$13.00 / \$1,000 of Subcontract Costs attributable to enrolled Subcontractors (and excluding any Work directly performed or provided by the Construction Manager).

**§ 6.6.2** Sales, use or similar taxes imposed by a governmental authority that are related to the Work and for which the Construction Manager is liable.

**§ 6.6.3** Fees and assessments for the building permit and for other permits, licenses and inspections for which the Construction Manager is required by the Contract Documents to pay.

**§ 6.6.4** Fees of laboratories for tests required by the Contract Documents, except those related to defective or nonconforming Work for which reimbursement is excluded by Section 13.5.3 of AIA Document A201-2007 or by other provisions of the Contract Documents, and which do not fall within the scope of Section 6.7.3.

**§ 6.6.5** Royalties and license fees paid for the use of a particular design, process or product required by the Contract Documents, but only with Owner's prior approval; the cost of defending suits or claims for infringement of patent rights arising from such requirement of the Contract Documents; and payments made in accordance with legal judgments against the Construction Manager resulting from such suits or claims and payments of settlements made with the Owner's consent. However, such costs of legal defenses, judgments and settlements shall not be included in the calculation of the Construction Manager's Fee or subject to the Guaranteed Maximum Price. If such royalties, fees and costs are excluded by the last sentence of Section 3.17 of AIA Document A201-2007 or other provisions of the Contract Documents, then they shall not be included in the Cost of the Work.

**§ 6.6.6** Data access charges, data processing costs related to the Work, cost of jobsite personal computer hardware, software, data service lines, internet access, internal computer support services, network hardware, supplies and communications and cost of corporate and regional data processing/MIS services are included in the rates referenced in Section 6.2. Large format printers, plotters, large monitors, "all-in-one" copiers and similar equipment located at the Project site are excluded from the rates in Section 6.2 for such items required for the Work and shall be a Cost of the Work in accordance this Section 6.6.6.

§ 6.6.7 Deposits lost for causes other than the Construction Manager’s negligence or failure to fulfill a specific responsibility in the Contract Documents.

§ 6.6.8 With the Owner’s prior approval, which will not be unreasonably withheld, legal, mediation and arbitration costs, including attorneys’ fees, other than those arising from disputes between the Owner and Construction Manager, reasonably incurred by the Construction Manager and for the benefit of the Project, after the execution of this Agreement in the performance of the Work.

§ 6.6.9 Expenses incurred in accordance with the Construction Manager’s standard written personnel policy for relocation of the Construction Manager’s personnel required for the Work.

### § 6.7 Other Costs and Emergencies

§ 6.7.1 Other costs incurred in the performance of the Work if, and only to the extent, approved in advance in writing by the Owner.

§ 6.7.2 Costs incurred in taking action to prevent threatened damage, injury or loss in case of an emergency affecting the safety of persons and property, as provided in Section 10.4 of AIA Document A201–2007.

§ 6.7.3 Costs of repairing or correcting damaged or nonconforming Work executed by the Construction Manager, Subcontractors or suppliers, provided that such damaged or nonconforming Work was not caused by negligence or failure to fulfill a specific non-warranty responsibility of the Construction Manager and only to the extent that the cost of repair or correction is not recovered by the Construction Manager from insurance, sureties, Subcontractors, suppliers, or others.

§ 6.7.4 The costs described in Sections 6.1 through 6.7 shall be included in the Cost of the Work, notwithstanding any provision of AIA Document A201–2007 or other Conditions of the Contract which may require the Construction Manager to pay such costs, unless such costs are excluded by the provisions of Section 6.8.

§ 6.7.5 With the Owner’s prior approval of the specific professional service agreements, compensation of consultants employed by the Construction Manager in connection with the Project.

§ 6.7.6 Costs associated with Construction Manager’s Zero Injury and safety incentive program for this Project.

§ 6.7.7 For document record retention, a lump sum of Thirty-Five Thousand Dollars (\$35,000) for the Cost of the Work.

§ 6.7.8 The deductible portion of any losses under policies of Builder’s Risk Insurance to the extent incurred by the Construction Manager under the Contract Documents.

### § 6.8 Costs Not To Be Reimbursed

§ 6.8.1 The Cost of the Work shall not include the items listed below:

- .1 Salaries and other compensation of the Construction Manager’s personnel stationed at the Construction Manager’s principal office or offices other than the Project site office, except as specifically provided in Section 6.2, or as may be provided in Article 11;
- .2 Expenses of the Construction Manager’s principal office and offices other than the Project site office;
- .3 Overhead and general expenses, except as may be expressly included in Sections 6.1 to 6.7;
- .4 The Construction Manager’s capital expenses, including interest on the Construction Manager’s capital employed for the Work;
- .5 Except as provided in Section 6.7.3 of this Agreement, costs due to the negligence or failure of the Construction Manager, Subcontractors and suppliers or anyone directly or indirectly employed by any of them or for whose acts any of them may be liable to fulfill a specific responsibility of the Contract;
- .6 Any cost not specifically and expressly described in Sections 6.1 to 6.7;
- .7 Costs, other than costs included in Change Orders approved by the Owner, that would cause the Guaranteed Maximum Price to be exceeded;

- .8 Costs for services incurred during the Preconstruction Phase;
- .9 The costs associated with any Pre-Construction Services, if any, not pre-approved by the Owner in writing;
- .10 Computer hardware, software and technology support, except for those described in Section 6.6.6;
- .11 Storage costs of materials delivered to the site or stored at an approved off site location which are not scheduled to be incorporated into the Work within thirty (30) days after delivery unless Owner pre-approves in writing such storage costs;
- .12 Cost due to emergencies if such emergencies could have been avoided by the exercise by Construction Manager of commercially reasonable construction practices or to the extent that Construction Manager is required by the Contract Documents to insure against such risk;
- .13 Costs related to losses or expenses resulting from risks for which the Construction Manager has obtained, or is required by the Contract Documents to obtain insurance;
- .14 Costs for which the Construction Manager does not have the Owner's prior written approval and for which the Construction Manager is required to have the Owner's prior written approval or prior approval; and
- .14 Costs related to the performance or management of warranty work or service.

### **§ 6.9 Discounts, Rebates and Refunds**

**§ 6.9.1** The Construction Manager shall notify the Owner of the availability of such cash discounts so that the Owner has the opportunity to make funds available to take advantage of such discounts. Cash discounts obtained on payments made by the Construction Manager shall accrue to the Owner if (1) before making payment, the Construction Manager included them in an Application for Payment and received payment from the Owner, or (2) the Owner has deposited funds with the Construction Manager with which to make payment; otherwise, cash discounts shall accrue to the Construction Manager. Trade discounts, rebates, refunds, and amounts received from sales of surplus materials and equipment shall accrue to the Owner, and the Construction Manager shall make provisions so that they can be obtained.

**§ 6.9.2** Amounts that accrue to the Owner in accordance with the provisions of Section 6.9.1 shall be credited to the Owner as a deduction from the Cost of the Work.

### **§ 6.10 Related Party Transactions**

**§ 6.10.1** For purposes of Section 6.10, the term "related party" shall mean a parent, subsidiary, affiliate or other entity having common ownership or management with the Construction Manager; any entity in which any stockholder in, or management employee of, the Construction Manager owns any interest in excess of ten percent in the aggregate; or any person or entity which has the right to control the business or affairs of the Construction Manager. The term "related party" includes any member of the immediate family of any person identified above and includes any person or entity determined to be a related party of the Construction Manager in accordance with South Dakota Codified Laws Title 5.

**§ 6.10.2** If any of the costs to be reimbursed arise from a transaction between the Construction Manager and a related party, the Construction Manager shall notify the Owner of the specific nature of the contemplated transaction, including the identity of the related party and the anticipated cost to be incurred, before any such transaction is consummated or cost incurred. If the Owner, after such notification and after the Construction Manager's compliance with the requirements of South Dakota Codified Laws Title 5, authorizes the proposed transaction in writing, then the cost incurred shall be included as a Cost of the Work, and the Construction Manager shall procure the Work, equipment, goods or service from the related party, as a Subcontractor, according to the terms of Sections 2.3.2.1, 2.3.2.2 and 2.3.2.3 and other terms of the Contract Documents and South Dakota Codified Laws Title 5. If the Owner fails to authorize the transaction in writing, the Construction Manager shall procure the Work, equipment, goods or service from some person or entity other than a related party according to the terms of Sections 2.3.2.1, 2.3.2.2 and 2.3.2.3 and other terms of the Contract Documents and South Dakota Codified Laws Title 5.

### **§ 6.11 Accounting Records**

The Construction Manager shall keep full and detailed records and accounts related to the Cost of the Work and exercise such controls as may be necessary for proper financial management under this Contract and to substantiate

all costs incurred. The accounting and control systems shall be satisfactory to the Owner. The Owner and the Owner's auditors shall, during regular business hours and upon reasonable notice, be afforded access to, and shall be permitted to audit and copy, the Construction Manager's records and accounts, including complete documentation supporting accounting entries, books, correspondence, instructions, drawings, receipts, subcontracts, Subcontractor's proposals, purchase orders, vouchers, memoranda, schedules, minutes, quality assurance and quality control documentation, test results, and other data relating to this Contract, but only to the extent such records and accounts relate to amounts requested for payment by the Construction Manager or the Construction Manager's compliance with the terms and conditions of this Contract. The Construction Manager shall preserve these records for a period of three years after final payment, or for such longer period as may be required by law. All accounting records shall be maintained by the Construction Manager in accordance with generally accepted accounting procedures, consistently applied. Subcontractors retained by Construction Manager on a "cost-plus" basis with the Owner's consent shall have the same obligations to retain records and cooperate with audits as required of the Construction Manager under this Section 6.11. If any inspection by the Owner or the Owner's auditors of the Construction Manager's accounting records reveals an overcharge, the Construction Manager shall promptly refund to the Owner the amount of the overcharge and shall reimburse Owner for its expenses incurred to audit the Construction Manager's records. The rates established by the Parties in connection with any Cost of the Work furnished on a unit basis, as established in any of the Exhibits attached to this Agreement or in Article 6 for such things as personnel rates, field rates, burden, tools, equipment and insurance shall not be subject to audit and adjustment, and the audit of such items of Cost of the Work shall be limited to a determination of the quantities of the units for which payment has been made or is requested. Notwithstanding the foregoing provisions of this Section 6.11, the Construction Manager shall maintain and make available to the Owner all records as required by South Dakota Codified Laws Title 5 and other applicable laws.

## **ARTICLE 7 PAYMENTS FOR CONSTRUCTION PHASE SERVICES**

### **§ 7.1 Progress Payments**

**§ 7.1.1** Based upon Applications for Payment, including all supporting documentation, submitted to the Architect by the Construction Manager and Certificates for Payment issued by the Architect, the Owner shall make progress payments on account of the Contract Sum to the Construction Manager as provided below and elsewhere in the Contract Documents.

**§ 7.1.2** The period covered by each Application for Payment shall be one calendar month ending on the last day of the month.

**§ 7.1.3** Construction Manager shall submit its applications for payment not later than the 5<sup>th</sup> day of a month. The Owner shall make payment of the certified amount to the Construction Manager not later than 45 days after receipt of the Construction Manager's Application for Payment. Amounts unpaid sixty (60) days from the date payment is due shall bear interest at the rate set forth in Section 4.2.2.

**§ 7.1.4** With each Application for Payment, the Construction Manager shall submit payrolls, petty cash accounts, receipted invoices or invoices with check vouchers attached, the Construction Manager's most current cost report, draw requests from Subcontractors and evidence of payments by the Construction Manager to Subcontractors and suppliers, and any other evidence required by the Owner or Architect to demonstrate that cash disbursements already made by the Construction Manager on account of the Cost of the Work equal or exceed progress payments already received by the Construction Manager, less that portion of those payments attributable to the Construction Manager's Fee, plus payrolls and expenses for the period covered by the present Application for Payment. Construction Manager shall also submit an updated sworn construction cost statement in the form acceptable to the Owner. The sworn construction cost statement shall show the amount paid to date, the amount being requested, and the balances due. In addition, as a precondition to the Construction Manager's right to receive payment, Construction Manager shall submit lien waivers in a form acceptable to the Owner covering the Construction Manager's Work from the last date of the period covered by the Application for Payment and from all Subcontractors, Sub-subcontractors, and suppliers through the last date of the period covered by the most recent Application for Payment for which the Owner has made payment. The time for the Owner to make payment shall be

extended until the Construction Manager has reasonably complied with the requirements of this Section and the Owner has had at least five business days to review submitted materials.

**§ 7.1.5** Each Application for Payment shall be based on the most recent schedule of values submitted by the Construction Manager in accordance with the Contract Documents. The schedule of values shall allocate the entire Guaranteed Maximum Price among the various portions of the Work, except that the Construction Manager's Fee shall be shown as a single separate item. The schedule of values shall be prepared in such form and supported by such data to substantiate its accuracy as the Architect may require. This schedule, unless objected to by the Architect, shall be used as a basis for reviewing the Construction Manager's Applications for Payment.

**§ 7.1.6** Applications for Payment shall show the percentage of completion of each portion of the Work as of the end of the period covered by the Application for Payment. The percentage of completion shall be the lesser of (1) the percentage of that portion of the Work which has actually been completed, or (2) the percentage obtained by dividing (a) the expense that has actually been incurred by the Construction Manager on account of that portion of the Work for which the Construction Manager has made or intends to make actual payment prior to the next Application for Payment by (b) the share of the Guaranteed Maximum Price allocated to that portion of the Work in the schedule of values.

**§ 7.1.7** Subject to other provisions of the Contract Documents, the amount of each progress payment shall be computed as follows:

- .1 Take that portion of the Guaranteed Maximum Price properly allocable to completed Work as determined by multiplying the percentage of completion of each portion of the Work by the share of the Guaranteed Maximum Price allocated to that portion of the Work in the schedule of values. Pending final determination of cost to the Owner of changes in the Work, amounts not in dispute shall be included as provided in Section 7.3.9 of AIA Document A201–2007;
- .2 Add that portion of the Guaranteed Maximum Price properly allocable to materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work, or if approved in advance by the Owner, suitably stored off the site at a location agreed upon in writing;
- .3 Add the Construction Manager's Fee. The Construction Manager's Fee shall be computed upon the Cost of the Work at the rate stated in Section 5.1 or, if the Construction Manager's Fee is stated as a fixed sum in that Section, shall be an amount that bears the same ratio to that fixed-sum fee as the Cost of the Work bears to a reasonable estimate of the probable Cost of the Work upon its completion;
- .4 Subtract retainage of 10% from the aggregate of the foregoing amounts;
- .5 Subtract the aggregate of previous payments made by the Owner;
- .6 Subtract the shortfall, if any, indicated by the Construction Manager in the documentation required by Section 7.1.4 to substantiate prior Applications for Payment, or resulting from errors subsequently discovered by the Owner's auditors in such documentation; and
- .7 Subtract amounts, if any, for which the Architect has withheld or nullified a Certificate for Payment as provided in Section 9.5 of AIA Document A201–2007 or otherwise properly withheld by the Owner in accordance with the Contract Documents.

**§ 7.1.8** The Owner and Construction Manager shall agree upon (1) a mutually acceptable procedure for review and approval of payments to Subcontractors and (2) the percentage of retainage held on Subcontracts, and the Construction Manager shall execute subcontracts in accordance with those agreements.

**§ 7.1.8.1** The Owner recognizes that certain Subcontractors complete their work early in the course of the Project and may have performed well and extended extra efforts to maintain the progress of the Work. Accordingly, the Owner agrees, to the extent permitted by applicable law, to consider in good faith and act promptly upon request made by Construction Manager for the early release, in whole or in part, of retainage held on account of Subcontractors who have performed in the manner described above or for other equitable reasons.

**§ 7.1.9** Except with the Owner's prior approval, the Construction Manager shall not make advance payments to suppliers for materials or equipment which have not been delivered and stored at the Project site.

**§ 7.1.10** In taking action on the Construction Manager's Applications for Payment, the Owner and the Architect shall be entitled to rely on the accuracy and completeness of the information furnished by the Construction Manager and shall not be deemed to represent that the Owner or the Architect has made a detailed examination, audit or arithmetic verification of the documentation submitted in accordance with Section 7.1.4 or other supporting data; that the Owner or the Architect has made exhaustive or continuous on-site inspections; or that the Owner or the Architect has made examinations to ascertain how or for what purposes the Construction Manager has used amounts previously paid on account of the Contract. Such examinations, audits and verifications, if required by the Owner, will be performed by the Owner or the Owner's auditors acting in the sole interest of the Owner.

**§ 7.1.11** Notwithstanding anything to the contrary herein, the Owner shall be entitled to withhold 200% of the estimated cost of the completion of punch list items as retainage. Said retainage shall be paid within thirty (30) days of completion of the punch list items in a good and workmanlike manner. Additionally, the Owner shall have the right but not the obligation to complete the punch list items in the event the Construction Manager has failed to complete same within sixty (60) days after Substantial Completion and the Owner has provided the Construction Manager with seven (7) days' advance written notice. In the event the Owner completes the punch list items, the Owner shall have the right to apply the reasonable cost of such completion against amounts otherwise owed to the Construction Manager. If the Owner's cost to complete the punch list items exceed amounts owed to the Construction Manager, the Construction Manager shall immediately pay the difference to the Owner.

**§ 7.1.12** In the event the Construction Manager fails to pay any Subcontractors or suppliers when due and payable, and after consultation with the Construction Manager, the Owner shall have the right, but not the obligation, to pay any such Subcontractor directly and the Contractor shall immediately reimburse the Owner for the amount of such payment, or at the Owner's sole option, the Owner may subtract the amount paid plus a percentage equal to the Construction Manager's Fee for such work from the Guaranteed Maximum Price and Contract Sum.

## **§ 7.2 Final Payment**

**§ 7.2.1** Final payment, constituting the entire unpaid balance of the Contract Sum, shall be made by the Owner to the Construction Manager when

- .1 the Construction Manager has fully performed the Contract except for the Construction Manager's responsibility to correct Work as provided in Section 12.2.2 of AIA Document A201–2007, and to satisfy other requirements, if any, which extend beyond final payment;
- .2 the Construction Manager has submitted a final accounting for the Cost of the Work and a final Application for Payment with all required accompanying documentation;
- .3 a final Certificate for Payment has been issued by the Architect; and
- .4 final lien waivers in a form approved by the Owner have been submitted.

The Owner's final payment to the Construction Manager shall be made no later than 45 days after the issuance of the Architect's final Certificate for Payment. Amounts unpaid sixty (60) days from the date payment is due shall bear interest at the rate set forth in Section 4.2.2.

**§ 7.2.2** The Owner's auditors will review and report in writing on the Construction Manager's final accounting within 30 days after delivery of the final accounting to the Architect by the Construction Manager. Based upon such Cost of the Work as the Owner's auditors report to be substantiated by the Construction Manager's final accounting, and provided the other conditions of Section 7.2.1 have been met, the Architect will, within seven days after receipt of the written report of the Owner's auditors, either issue to the Owner a final Certificate for Payment with a copy to the Construction Manager, or notify the Construction Manager and Owner in writing of the Architect's reasons for withholding a certificate as provided in Section 9.5.1 of the AIA Document A201–2007. The time periods stated in this Section supersede those stated in Section 9.4.1 of the AIA Document A201–2007. The Architect is not responsible for verifying the accuracy of the Construction Manager's final accounting.

**§ 7.2.3** If the Owner's auditors report the Cost of the Work as substantiated by the Construction Manager's final accounting to be less than claimed by the Construction Manager, the Construction Manager shall be entitled to request mediation of the disputed amount. A request for mediation shall be made by the Construction Manager

within 10 days after the Construction Manager's receipt of a copy of the Architect's final Certificate for Payment. Failure to request mediation within this 10-day period shall result in the substantiated amount reported by the Owner's auditors becoming binding on the Construction Manager. Pending a final resolution of the disputed amount, the Owner shall pay the Construction Manager the amount certified in the Architect's final Certificate for Payment.

**§ 7.2.4** If, subsequent to final payment and at the Owner's request, the Construction Manager incurs costs described in Section 6.1.1 and not excluded by Section 6.8 to correct defective or nonconforming Work, the Owner shall reimburse the Construction Manager such costs and the Construction Manager's Fee applicable thereto on the same basis as if such costs had been incurred prior to final payment, but not in excess of the Guaranteed Maximum Price.

## **ARTICLE 8 INSURANCE AND BONDS**

For all phases of the Project, the Construction Manager and the Owner shall purchase and maintain insurance, and the Construction Manager shall provide bonds, as set forth in Article 11 of AIA Document A201–2007, as set forth in any "Insurance and Bonds Exhibit" to this Agreement, and in accordance with requirements of applicable law.

## **ARTICLE 9 DISPUTE RESOLUTION**

**§ 9.1** Any Claim between the Owner and Construction Manager shall be resolved in accordance with the provisions set forth in this Article 9 and Article 15 of A201–2007.

**§ 9.2** For any Claim subject to, but not resolved by mediation pursuant to Section 15.3 of AIA Document A201–2007, the method of binding dispute resolution shall be as follows: Litigation in a court of competent jurisdiction in Rapid City, SD.

## **ARTICLE 10 TERMINATION OR SUSPENSION**

### **§ 10.1 Termination Prior to Establishment of the Guaranteed Maximum Price**

**§ 10.1.1** Prior to the execution of the Guaranteed Maximum Price Amendment, the Owner may terminate this Agreement upon not less than seven days' written notice to the Construction Manager for the Owner's convenience and without cause, and the Construction Manager may terminate this Agreement, upon not less than seven days' written notice to the Owner, for the reasons set forth in Section 14.1.1 of A201–2007.

**§ 10.1.2** In the event of termination of this Agreement pursuant to Section 10.1.1, the Construction Manager shall be equitably compensated for Preconstruction Phase services performed prior to receipt of a notice of termination. In no event shall the Construction Manager's compensation under this Section exceed the compensation set forth in Section 4.1.

**§ 10.1.3** If the Owner terminates the Contract pursuant to Section 10.1.1 after the commencement of the Construction Phase but prior to the execution of the Guaranteed Maximum Price Amendment, the Owner shall pay to the Construction Manager an amount calculated as follows, which amount shall be in addition to any compensation paid to the Construction Manager under Section 10.1.2:

- .1** Take the Cost of the Work incurred by the Construction Manager to the date of termination;
- .2** Add the Construction Manager's Fee computed upon the Cost of the Work to the date of termination at the rate stated in Section 5.1 or, if the Construction Manager's Fee is stated as a fixed sum in that Section, an amount that bears the same ratio to that fixed-sum Fee as the Cost of the Work at the time of termination bears to a reasonable estimate of the probable Cost of the Work upon its completion; and
- .3** Subtract the aggregate of previous payments made by the Owner for Construction Phase services and any other credits to which the Owner is entitled.

The Owner shall also pay the Construction Manager fair compensation, either by purchase or rental at the election of the Owner, for any equipment owned by the Construction Manager which the Owner elects to retain and which is not otherwise included in the Cost of the Work under Section 10.1.3.1. To the extent that the Owner elects to take legal assignment of subcontracts and purchase orders (including rental agreements), the Construction Manager shall, as a condition of receiving the payments referred to in this Article 10, execute and deliver all such papers and take all such steps, including the legal assignment of such subcontracts and other contractual rights of the Construction Manager, as the Owner may require for the purpose of fully vesting in the Owner the rights and benefits of the Construction Manager under such subcontracts or purchase orders. All Subcontracts, purchase orders and rental agreements entered into by the Construction Manager will contain provisions allowing for assignment to the Owner as described above.

If the Owner accepts assignment of subcontracts, purchase orders or rental agreements as described above, the Owner will reimburse or indemnify the Construction Manager for all costs arising under the subcontract, purchase order or rental agreement, if those costs would have been reimbursable as Cost of the Work if the contract had not been terminated. If the Owner chooses not to accept assignment of any subcontract, purchase order or rental agreement that would have constituted a Cost of the Work had this agreement not been terminated, the Construction Manager will terminate the subcontract, purchase order or rental agreement and the Owner will pay the Construction Manager the costs necessarily incurred by the Construction Manager because of such termination.

### **§ 10.2 Termination Subsequent to Establishing Guaranteed Maximum Price**

Following execution of the Guaranteed Maximum Price Amendment and subject to the provisions of Section 10.2.1 and 10.2.2 below, the Contract may be terminated as provided in Article 14 of AIA Document A201–2007.

**§ 10.2.1** If the Owner terminates the Contract after execution of the Guaranteed Maximum Price Amendment, the amount payable to the Construction Manager pursuant to Sections 14.2 and 14.4 of A201–2007 shall not exceed the amount the Construction Manager would otherwise have received pursuant to Sections 10.1.2 and 10.1.3 of this Agreement.

**§ 10.2.2** If the Construction Manager terminates the Contract after execution of the Guaranteed Maximum Price Amendment, the amount payable to the Construction Manager under Section 14.1.3 of A201–2007, shall not exceed the amount the Construction Manager would otherwise have received under Sections 10.1.2 and 10.1.3 above, except that the Construction Manager’s Fee shall be calculated on all Work properly completed on the effective date of such termination. In no event shall the Construction Manager be entitled to the Construction Manager’s Fee or any overhead or profit on Work not properly performed prior to the effective date of such termination.

### **§ 10.3 Suspension**

The Work may be suspended by the Owner as provided in Article 14 of AIA Document A201–2007. In such case, the Guaranteed Maximum Price and Contract Time shall be increased as provided in Section 14.3.2 of AIA Document A201–2007, except that the term “profit” shall be understood to mean the Construction Manager’s Fee as described in Sections 5.1 and 5.3.5 of this Agreement.

## **ARTICLE 11 MISCELLANEOUS PROVISIONS**

**§ 11.1** Terms in this Agreement shall have the same meaning as those in A201–2007.

### **§ 11.2 Ownership and Use of Documents**

Section 1.5 of A201–2007 shall apply to both the Preconstruction and Construction Phases.

### **§ 11.3 Governing Law**

Section 13.1 of A201–2007 shall apply to both the Preconstruction and Construction Phases.



#### **§ 11.4 Assignment**

The Owner and Construction Manager, respectively, bind themselves, their agents, successors, assigns and legal representatives to this Agreement. Neither the Owner nor the Construction Manager shall assign this Agreement without the written consent of the other, except that the Owner may assign this Agreement to a lender providing financing for the Project if the lender agrees to assume the Owner's rights and obligations under this Agreement. Except as provided in Section 13.2.2 of A201–2007, neither party to the Contract shall assign the Contract as a whole without written consent of the other. If either party attempts to make such an assignment without such consent, that party shall nevertheless remain legally responsible for all obligations under the Contract.

#### **§ 11.5 Publicity**

Construction Manager may not issue a press release, advertisement, publicity material, or similar matter concerning the Project or this Agreement without the prior written consent of the Owner with respect to the exact content and timing of the news releases, articles, advertisements or other information releases concerning the Project or this Agreement. The Owner's consent may be provided at its sole discretion. Participation in media (whether print or broadcast) interviews is strictly forbidden unless the Owner's prior written consent is obtained in each instance. The Construction Manager must assure that its consultants, Subcontractors, and suppliers of any tier abide by the terms of this Section 11.5 and shall insert these provisions in its agreements with its consultants, Subcontractors, and suppliers for this Project.

#### **§ 11.6 Licenses**

The Construction Manager represents and agrees that any individual that performs any Work under this Agreement, either as the Construction Manager, a direct employee of the Construction Manager, or under a contract with the Construction Manager, will possess all licensures required by South Dakota law and any other necessary licensures for the performance of the Work.

#### **§ 11.7 BIM / VDC Protocol**

The Architect uses building information modeling software ("BIM") as its primary production tool for design, coordination, and documentation, and the Architect will prepare and distribute BIM models for the Construction Manager's and other parties' use for this Project to the extent permitted by the applicable agreements related thereto. The protocols for the transmission, use, and management of the BIM models (including without limitation expected Level of Development for Model Elements at various milestones of the Project and the associated Authorized Uses thereof) shall be mutually acceptable to the Owner, the Architect and the Construction Manager and set forth in the BIM Execution Plan for the Project (which shall be attached as Exhibit I to this Agreement and incorporated into the Contract Documents). Initial BIM / VDC Collaboration Requirements are attached hereto as Exhibit H.

### **ARTICLE 12 SCOPE OF THE AGREEMENT**

**§ 12.1** This Agreement represents the entire and integrated agreement between the Owner and the Construction Manager and supersedes all prior negotiations, representations or agreements, either written or oral. This Agreement may be amended only by written instrument signed by both Owner and Construction Manager.

**§ 12.2** The following documents comprise the Agreement:

- .1 AIA Document A133–2009, Standard Form of Agreement Between Owner and Construction Manager as Constructor where the basis of payment is the Cost of the Work Plus a Fee with a Guaranteed Maximum Price as modified herein.
- .2 The following Exhibits:
  - Exhibit A, Guaranteed Maximum Price Amendment
  - Exhibit B, A201--2007 General Conditions of the Contract, as modified
  - Exhibit C, Construction Manager's Labor Rates
  - Exhibit D, Construction Manager's Key Project Personnel

Exhibit E, ADDITIONAL PRE-VOTE PHASE AND DESIGN / PRE-CONSTRUCTION PHASE SERVICES  
Exhibit F, CONSTRUCTION MANAGER’S EQUIPMENT RENTAL RATES  
Exhibit G, ADDITIONAL INFORMATION REGARDING CONSTRUCTION MANAGER’S SUBCONTRACTOR PROCUREMENT METHODOLOGY  
Exhibit H, BIM / VDC COLLABORATION REQUIREMENTS  
Exhibit I, BIM EXECUTION PLAN FOR THE PROJECT (WHEN MUTUALLY ACCEPTED BY THE OWNER, ARCHITECT AND CONSTRUCTION MANAGER IN ACCORDANCE WITH THE CONTRACT DOCUMENTS)

This Agreement is entered into as of the day and year first written above.

\_\_\_\_\_  
**OWNER** *(Signature)*

\_\_\_\_\_  
**CONSTRUCTION MANAGER** *(Signature)*

Steve Allender, Mayor  
*(Printed name and title)*

Derek Cunz, Senior Vice President  
*(Printed name and title)*