

CITY OF GLENDALE
CONSTRUCTION MANAGER AT RISK AGREEMENT

Project:

Project No.:

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CONSTRUCTION MANAGER AT RISK AGREEMENT

This Construction Manager at Risk Agreement (this "Agreement") is made by and between the City of Glendale, an Arizona municipal corporation ("City"), and _____, Corporation ("CMAR").

RECITALS

- A. City is undertaking the design and construction of a public works project, as described in detail in **Exhibit B**, to benefit its citizens and visitors and the region generally (the "Project").
- B. City has engaged _____ to prepare design, programs, budgets, and other criteria for the project (the "Design Documents").
- C. CMAR submitted its Statement of Qualifications dated _____ (the "SOQ"). CMAR's SOQ were submitted in response to City's Request for Qualifications dated _____. CMAR was selected by a qualification-based process in accordance with Title 34 of the Arizona Revised Statutes.
- D. City will engage CMAR under the terms of this Agreement to manage and be responsible for the timely and proper construction and commissioning of the fully completed and functional Project (the "Work").
- E. The parties desire to memorialize their agreements.

AGREEMENT

City, subject to the terms and conditions of this Agreement, hereby engages CMAR to construct the Project, CMAR accepts this engagement, and therefore, City and CMAR agree as follows:

- 1. **Definitions.** Specific words used throughout this Agreement have a particular meaning described in **Exhibit A**. Other words may be described in the section in which they are used. For convenience, Exhibit A includes an index to terms and certain provisions of this Agreement.
- 2. **Construction Services.**
 - 2.1 **CMAR Obligation.**
 - (A) CMAR will furnish all Construction Services, including those further described in **Exhibit C**, that are necessary for the Project's timely and proper construction, completion, and use by City.
 - (B) Construction Services includes the completion of every improvement shown in whole or in part or reasonably inferable from any portion of the Project Documents.
- 3. **Representatives and Key Personnel.**
 - 3.1 **CMAR Representative.**
 - (A) Responsibilities. CMAR's Representative is authorized to act on CMAR's behalf and may not be discharged, replaced or have diminished responsibilities on the Project without City's prior consent, which may not be unreasonably withheld.
 - (B) Address. CMAR's Representative address for Notice, as required in this Agreement, is:

3.2 City's Representative.

- (A) Designation of City Representative. City's Representative is authorized to act on City's behalf, whose address for Notice, as required in this Agreement, is:

Senior Civil Engineer
City of Glendale
5850 W. Glendale Avenue, Suite 315
Glendale, Arizona 85301

With required copies to:

Craig D. Tindall, Esq.
City Attorney
City of Glendale
City Attorney's Office
5850 W. Glendale Avenue, Suite 450
Glendale, Arizona 85301

- (B) Concurrent Notices.
- (1) Except to the extent otherwise directed to CMAR in writing, all Notices to City's Representative must be given concurrently to the Project Coordinator and City Attorney.
 - (2) Notices are not considered received by City's Representative until the time that it has also been received by the Project Coordinator and City Attorney.
- (C) Construction Administration Project Manager. The Construction Administration representative (the "Project Manager") with authority to act for the Construction Administration Firm for the Project whose information for Notices is:

Email:

3.3 Key Personnel.

- (A) Employment of Key Personnel. CMAR and its Subcontractors will employ key personnel in connection with the Work, in categories of persons identified in **Exhibit C** (collectively, "Key Personnel"); each of whom will be acceptable to and approved by City.
- (B) Approval of Key Personnel.

- (1) All personnel listed in CMAR's SOQ will be assigned to the Project and will be dedicated to performing work on the Project at not less than that identified in the SOQ.
- (2) Prior to the commencement of the Work, CMAR must deliver to City a written proposal identifying the names, duties and titles, and attaching the resumes of each person who CMAR proposes as the Key Personnel.
- (3) Except for those Key Personnel identified in the SOQ, City will have the right to disapprove CMAR's choice of any Key Personnel, provided City does so by giving written notice to CMAR.
- (4) If City disapproves any of CMAR's proposed Key Personnel, CMAR must provide City with the name and qualifications of proposed alternates and the procedure will continue until a complement of Key Personnel who meet with City's approval is selected.
- (5) Each Key Personnel will remain assigned to the Project throughout the Project's duration; and
- (6) As long as each Key Personnel remains employed by CMAR or its Subcontractors, he or she must not be discharged, reassigned, replaced, or have his or her responsibility diminished without City's prior written consent.

4. Documents.

- 4.1 **CMAR Documents.** CMAR represents that it has carefully examined, has had the opportunity to object to during the RFQ process, and fully understands this Agreement, including CMAR Documents and all other items, conditions, and things that may affect the performance of its obligations, including the nature, local field conditions and Project's Site that are observable to CMAR without intrusive inspection, any environmental reports, surveys and other information regarding the Site that City has furnished to CMAR.
- 4.2 **Design Documents.** City will furnish the Design Documents with the understanding that CMAR may rely upon it to the extent CMAR's reliance is reasonable.
 - (A) CMAR must consider the Design Documents in agreeing to the Guaranteed Maximum Price (as required by § 5).
 - (B) CMAR hereby waives all claims, demands or requirements for extras or changes to the Work or the Guaranteed Maximum Price based on facts related to the Site that were discoverable by CMAR prior to the Effective Date.
- 4.3 **Work Product Formatting.** Any drawings created by CMAR, its Subcontractors, or its Lower Tier Entities will be generated and furnished to City in hardcopy and in freely modifiable AutoCAD format as City may reasonably request.
- 4.4 **Intellectual Property Rights Assignment.** CMAR hereby irrevocably conveys and assigns to City the exclusive Ownership of, and copyrights in, Work Product

(as defined in **Exhibit A**) that is generated by CMAR, its Subcontractors, and its Lower Tier Entities in connection with the Project, together with all copyright renewals and extensions and the right to reproduce, publish, modify, and create and publish derivative works from the Work Product.

- (A) Use of Intellection Property. CMAR warrants that neither it, its Subcontractors, nor its Lower Tier Entities will utilize any of the Work Product in connection with any other project without City's prior written consent, which may not be unreasonably withheld but which may be denied to the extent the requested use is for the other project and involves aesthetically unique or signature elements of the Project.
- (B) Non-Infringement. CMAR further warrants to City that all Work Product generated or arranged for by CMAR, its Subcontractors, or its Lower Tier Entities in connection with the Project, and CMAR's conveyance and assignment to City of the ownership of, and copyrights in, the Work Product and/or copyrights in them, as provided in this section, will not infringe on the copyrights or another party's contractual or proprietary interests.
- (C) CMAR will include provisions equivalent to § 4.4 in each of CMAR's Subcontracts and Sub-subcontracts.

5. Guaranteed Maximum Price. The maximum amount for completion of the Work as required by the Design Documents will be the Guaranteed Maximum Price ("GMP").

5.1 GMP Elements. The GMP will incorporate into one amount:

- (A) All CMAR's direct and indirect costs and expenses incurred in connection with the Work, whether at the home office, Site, or elsewhere;
- (B) The cost of all construction, construction materials, engineering services, architectural services, geotechnical services, transportation costs, labor, supplies, services, equipment and other elements necessary for the Project's proper and timely completion;
- (C) All profit, home office overhead, job site overhead, wages, salaries and fringe benefits paid to supervisory and other employees and representatives;
- (D) Job trailer rental, utilities, telephone, and other related expenses;
- (E) Printing;
- (F) Long distance charges;
- (G) Deliveries;
- (H) Transportation;
- (I) Insurance, as allowed in § 5.2;
- (J) Bonds, as allowed in § 5.2;
- (K) All building permit costs and fees required by any federal, state or local governmental entity;
- (L) All federal, state and local taxes imposed on labor, construction materials, equipment and services furnished, including transaction

privilege, excise, sales, use, personal property and similar taxes, as allowed in § 7.4; and

- (M) All other general and administrative expenses incurred in connection with the Work.

5.2 Insurance and Bond Premiums. CMAR's Reimbursable Construction Insurance and Bond Premiums are the amounts equal to the premiums CMAR is required to pay to secure:

- (A) The Builder's Risk policy CMAR is required to furnish with City's approval as provided in this Agreement;
- (B) The liability insurance CMAR and its Lower Tier Entities are required to furnish under the provisions of **Exhibit F** in connection with the Construction Services; and
- (C) CMAR's statutory payment and performance bonds as provided in §31.3, if the premium has been included in the GMP Schedule approved in writing by City.

5.3 Contingencies. Any line item identified in the GMP Schedule as a contingency ("Contingency") belongs solely to City, and may not be drawn upon or reallocated by CMAR without City and Project Coordinator's prior written approval.

- (A) Draws Including a Contingency. CMAR must include with each monthly Application for Progress Payment an itemization of each draw from the Contingency (by date, payee, purpose and amount of each transfer or payment) made during the Billing Month, together with a copy of City's written approval for the draw.
- (B) Required Designation of Contingency. Unless the GMP Schedule conspicuously designates a line item as a "contingency," the GMP does not include any contingency amount of any kind or nature.

5.4 Allowance. Any line item identified in the GMP Schedule as an allowance item ("Allowance Item") is subject to the following:

- (A) Allowance Use Approval. CMAR will not place any order for any Allowance Item until after City and Project Coordinator have given their approval of the specific item to be selected, its cost, and the resulting adjustment to the GMP.
- (B) Allowance Use. No Work will be performed for any item that is denoted as an Allowance Item in the GMP Schedule until after City has issued either a Change Directive or executed a Change Order for such allowance Work.
- (C) Adjustment to GMP for Allowance Use. By Contract Amendment the GMP may be increased or decreased by the amount of the cost of the Allowance Item—as approved by City and Project Coordinator (including mark-up for profit, if any)—whether it is greater or less than the amount shown in the GMP Schedule for the Allowance Item.
- (D) Allowance Designation. Except to the extent the GMP Schedule conspicuously designates a line item as an Allowance Item, the GMP does not include any allowance item of any kind or nature.

- 5.5 Unit Priced Items.** Any item identified in the GMP Schedule as a unit price item ("Unit Price Item") and for which a unit price ("Unit Price") and extended price ("Unit Price Extension Amount") are provided in the GMP Schedule are subject to the following:
- (A) Unit Price Compensation. The Unit Price represents CMAR's sole and exclusive compensation for all direct and indirect costs, profit and overhead and taxes for the furnishing and installation of the Unit Price Item.
 - (B) Basis of Unit Price Compensation. The total compensation for the Unit Price Item is to be based on the number of units actually furnished or installed, as certified to City by Architect of Record and verified by Project Coordinator; provided:
 - (1) Total compensation to CMAR for a Unit Price Item will not exceed the Unit Price Extension Amount shown on the GMP Schedule; and
 - (2) Except to the extent the GMP Schedule conspicuously designates a Unit Price Item (including the Unit Price and Unit Price Extension Amount), the Contract Sum does not include any Unit Price Item of any kind or nature.
- 5.6 FFE.** FFE not specified in the Construction Documents will be procured in accordance with the FFE Procurement Schedules to be developed by CMAR subject to CMAR and City's mutual agreement.
- (A) FFE Warranty. CMAR warrants to City that:
 - (1) Construction materials and equipment and FFE furnished under this Agreement will be of good quality and new unless otherwise required or permitted by the Construction Documents and the FFE Procurement Schedules;
 - (2) That the construction will be free from faults and defects; and
 - (3) That the construction and FFE will conform to this Agreement's requirements, the Construction Documents, and the FFE Procurement Schedules.
 - (B) Correction of Nonconforming FFE. Construction and FFE not conforming to these requirements, including substitutions not properly approved by City, must be corrected in accordance with § 23.3.
 - (C) "FFE Procurement Schedules" means the interior design drawings and listings of specific FFE to be purchased for the Project.
- 5.7 CMAR Risk.** CMAR bears the sole risk that any element of cost, overhead, or profit might cause the Guaranteed Maximum to be exceeded.
- 5.8 GMP Savings.** If, upon the Work's Final Completion, the Contract Sum is less than an amount equal to the GMP, the resulting amount will belong solely to City.
- 5.9 GMP Schedule.** The GMP is apportioned among the Work's various elements as provided in **Exhibit D** (the "GMP Schedule"). **Exhibit D** may be used by City as a basis for evaluating CMAR's Applications for Progress Payment. To the

extent there is any inconsistency between any of the provisions in **Exhibit D**, and any of this Agreement's provisions, this Agreement's provisions govern.

6. Schedules.

6.1 Commencement Date. The date of City's written notice to proceed ("Notice to Proceed") will be the Construction Services commencement date.

- (A) City will not issue a Notice to Proceed until City has approved the applicable Construction Documents, and the necessary Permits have been issued.
- (B) CMAR must not commence any Construction Services at the Site until City has first issued a written Notice to Proceed.

6.2 Time of the Essence. Time is of the essence.

6.3 Project Schedule. CMAR must prosecute the Work in a logical and efficient manner in accordance with City's project schedule ("Project Schedule"), attached as **Exhibit E**.

- (A) Initial Project Schedule. Within 15 days of the execution of this Agreement, CMAR must submit an initial Project Schedule, which will include the following:
 - (1) Times (number of days or dates) for starting and completing the various stages of the Work, including milestones as specified in CMAR Documents;
 - (2) A Schedule of Values; and
 - (3) Construction Management Plan ("CMP").
 - (a) CMAR's CMP will include its plans concerning:
 - (i) Project milestone dates and the Project Schedule, including the broad sequencing of the construction of the Project;
 - (ii) Investigations, if any, to be undertaken to ascertain subsurface conditions and physical conditions of existing surface and subsurface facilities and underground utilities;
 - (iii) Alternate strategies for fast tracking and/or phasing the construction;
 - (iv) Number of separate sub-agreements to be awarded to Subcontractors and Suppliers for the Project construction;
 - (v) Permitting strategy;
 - (vi) Safety and training programs;
 - (vii) Construction quality control;
 - (viii) Commissioning program;
 - (ix) Cost estimate and basis of the model; and

- (x) A matrix summarizing each Project Team member's responsibilities and roles.
- (b) CMR will add detail to its previous version of the CMP to keep it current throughout the construction phase and to take into account:
 - (i) Revisions in Drawings and Specifications;
 - (ii) CMR's examination of the results of any additional investigatory reports of subsurface conditions, drawings of physical conditions of existing surface and subsurface facilities and documents depicting underground utilities placement and physical condition, whether obtained by City, Design Professional or CMR;
 - (iii) Unresolved permitting issues, and significant issues, if any, pertaining to the acquisition of land and right of way;
 - (iv) Fast-tracking if any of the construction, or other chosen construction delivery methods;
 - (v) Requisite number of separate bidding documents to be advertised;
 - (vi) Status of the procurement of long-lead time equipment (if any) and/or materials; and
 - (vii) Funding issues identified by City.
- (B) Adherence to Project Schedule. CMAR must adhere to the major milestone dates of the Project Schedule at all times during the Work, unless it has received City's prior written approval for a deviation from or modification to the major milestone dates of the Project Schedule. CMAR must not depart from the major milestone dates of the Project Schedule without prior consultation with and approval from City.
- (C) Project Schedule Revision. The Project Schedule must be revised at least monthly, or at more frequent intervals as required by the conditions of the Work and Project, but each Project Schedule revision must allow for expeditious and practicable execution of the Work consistent with the Contract Times.
 - (1) The monthly revision will be a condition precedent to any payment otherwise due to CMAR.
 - (2) Each revised Project Schedule must be prepared in sufficient detail to demonstrate for each element of the work its timing, duration, and sequence, all integrated to show a logical order and reasonable critical path consistent with the Substantial Completion and Final Completion Dates.
 - (a) The revised Project Schedule may take into account an appropriate number of weather delays reasonably anticipatable based on experience in the area, but not less than one day per month.

- (b) Each revised Project Schedule must include activities and logic for mitigating the cost and time impact of any anticipated or potential delays to any critical path elements that CMAR wishes City to consider an Excusable Delay.
- (D) Weekly Progress Meeting. From the Effective Date until Final Completion, CMAR will meet with City every week (or as requested by City or CMAR) to review the Work's progress.
- (1) In advance of each such meeting, CMAR must provide City a written progress report in the format and detail as provided in **Exhibit E** (each a "Progress Report").
 - (a) The Progress report will identify:
 - (i) Whether the Work is on schedule in accordance with the Project Schedule; or
 - (ii) Whether there are anticipated or potential delays to any critical path elements in the Work's construction, then CMAR must include an analysis identifying CMAR's plan for making up or mitigating the delay.
 - (b) Unless a delay is identified in the Progress Report, CMAR's Progress Report will be its certification that it has not incurred any delays to the critical path elements at least to the extent that a cause for the delay can then be reasonably identified.
 - (2) Unless the delay is an Excusable Delay, CMAR must take all actions, at its expense, including working overtime and hiring additional personnel, to comply with such Project Schedule.
 - (3) If the delay is an Excusable Delay, the Project Schedule may be modified to the extent mutually agreed upon by City and CMAR.
 - (4) Notwithstanding anything to the contrary in this Agreement, CMAR is solely responsible for the timing, sequencing, coordination, and supervision of the Work consistent with the Substantial Completion and Final Completion Dates.
 - (5) City's review, acceptance or approval of a Project Schedule or Progress Report provided by CMAR is not:
 - (a) A waiver or bar to any rights or claims City may have against CMAR in the event City subsequently discovers a deficiency in such Project Schedule or Progress Report; and
 - (b) An acceptance of any delay as an Excused Delay, which may only be granted, along with any extension of time, by a Change Directive or Contract Amendment.

6.4 Substantial Completion Notification. CMAR will notify City and Project Coordinator in writing when CMAR, Architect of Record, and Engineer of

Record believe that CMAR has accomplished Substantial Completion of the Project.

- (A) Incomplete Items. If City concurs the Substantial Completion has been accomplished, City, Project Coordinator, CMAR, Architect of Record, and Engineer of Record will determine whether any items remain incomplete.
- (B) Certificate of Substantial Completion. If City concurs the Substantial Completion has been accomplished, Architect of Record, and Engineer of Record will then each issue a "Certificate of Substantial Completion" to City, which will:
 - (1) Record the Substantial Completion date as determined by City;
 - (2) State each party's responsibility for security, maintenance, air conditioning, heat, utilities, damage to the Work and insurance;
 - (3) Include a list of items identified by City, CMAR, Architect of Record and Engineer of Record to be completed or corrected; and
 - (4) Fix a reasonable period of time for their inspection.
- (C) Disagreement as to Substantial Completion. Disagreements between City and CMAR regarding the Certificate of Substantial Completion will be resolved in accordance with provisions of § 11.

6.5 Substantial Completion. CMAR must accomplish substantial completion by (the "Substantial Completion Date").

- (A) Extensions. The Substantial Completion and Final Completion Dates ("Contract Time") may be extended for cause, or by Change Order, as provided in § 6.7.
- (B) Failure to Meet Substantial Completion Date. City will be substantially damaged if CMAR fails to accomplish Substantial Completion of the Work by the Substantial Completion Date, and it will be extremely difficult and impractical to ascertain the actual damages resulting from such delay; therefore:
 - (1) CMAR will pay City liquidated damages ("Liquidated Damages") in the event of a delay.
 - (2) Accordingly, if CMAR fails to accomplish Substantial Completion by the Substantial Completion Date, as it is extended in accordance with this Agreement, City may assess, and CMAR must pay to City as Liquidated Damages, \$ _____ for each day of delay until CMAR accomplishes Substantial Completion.
 - (3) CMAR acknowledges that these sums:
 - (a) Will be paid as Liquidated Damages and not as a penalty;
 - (b) Are reasonable under the circumstances existing as of the Effective Date; and

(c) Are based on the parties' best estimate of damages City would likely suffer in the event of a delay.

(4) CMAR must pay City any Liquidated Damages not so deducted within ten (10) days after demand, or City may deduct these sums from any monies due or that may become due to CMAR under this Agreement.

(5) City's collection of Liquidated Damages will not affect its rights to seek other remedies in law or at equity, including assuring its rights under the payment and performance bonds.

6.6 Final Completion. Final Completion must be accomplished by (the "Final Completion Date").

(A) Extensions. The Final Completion and Final Completion Dates may be extended for cause, or by Change Order, as provided in § 6.7.

(B) Failure to Meet Final Completion Date. If CMAR does not accomplish Final Completion by the Final Completion Date, as it is extended in accordance with this Agreement, City may thereafter take control of the Site, effective upon delivery of written Notice to CMAR, and City may exercise its rights under the terms of any payment and performance bond, or seek any remedy in law or at equity, including engaging other contractors to complete the remaining Work, at CMAR's expense.

(1) City may deduct its resulting expenses plus 20% from amounts otherwise payable to CMAR.

(2) CMAR must pay any amounts not so deducted within ten (10) days after demand.

6.7 Completion Dates Extension. The Substantial Completion and Final Completion Dates may be equitably extended by Change Directive, or Contract Amendment to the extent the Work's critical path, as shown in the most recent approved Project Schedule, is necessarily delayed by:

(A) City Delay. Any of the following (each a "City Delay") to the extent they necessarily result in unreasonable delays that are not caused or contributed to by CMAR:

(1) A Change Directive;

(2) City's failure to make any decision of significance within a reasonable time (not exceed 10 days) after written request from CMAR accompanied by all documents and other information necessary for making the decision; or

(3) Any material breach of this Agreement by City.

(B) Force Majeure. Any of the following force majeure ("Force Majeure") events to the extent they are not caused or contributed to by CMAR, or by any Subcontractor or other person or entity for whom CMAR is responsible:

(1) Fire;

(2) War;

- (3) Damage or disruption committed on behalf of any foreign interests to further international political objectives;
 - (4) Injunction in connection with litigation, governmental action;
 - (5) Severe and adverse weather conditions beyond those reasonably anticipatable as of the Effective Date and beyond those required to be accounted for in the Project Schedule in § 6.3 (C).
- (C) Excusable Delay. Any other cause that, in City's reasonable opinion, constitutes an Excusable Delay, provided that CMAR has timely perfected a CMAR Claim for additional time arising from the alleged delay as provided in § 11 and has timely followed all other requirements of this Agreement related to Excusable Delay.
- (D) Mitigation of Delays. CMAR must use its best efforts to minimize any such time and cost impact of delays and must cooperate with City to mitigate the impact of any delays encountered by CMAR that would entitle it to an extension of time, even if its performance is unreasonably delayed by City.
- (E) Remedies for Delays.
- (1) Pursuant to A.R.S. § 34-607(E), the parties agree to negotiate and discuss in good faith any potential damages related to increased costs incurred by CMAR for any unreasonable delay that is attributable to a City Delay; however, CMAR will not be entitled to additional funds for any increase in General Conditions cost due to any type of delay.
 - (2) CMAR's sole and exclusive remedy for a Force Majeure event is an extension of time.

7. Compensation.

- 7.1 Contract Sum.** For CMAR's performance of the Work, City will pay CMAR the amount ("Contract Sum") determined by the formula, but the combined total of all amounts to be paid by City to CMAR for the performance of the Work will not in any event exceed the GMP:

$$CS = C + F + FFE \leq GMP$$

Where:

"CS" is the Contract Sum;

"C" is the Cost of the Construction Services as provided in § 7.3;

"F" is CMAR's Fee, as provided in § 7.2

"FFE" is the amount to be paid for the FFE Services, as provided in § 7.5; and

"GMP" is the amount of \$ (the "Guaranteed Maximum Price").

- 7.2 CMAR's Fee.** CMAR's Fee, which will be the sole and exclusive compensation for CMAR's direct and/or indirect profit, home office overhead expense including, without limitation, home office administration, accounting, support, clerical services, insurance not specifically reimbursable under this Agreement,

rent, all other direct and indirect home office expenses (including the costs specifically identified by CMAR to recruit and relocate employees and bonuses (at a not-to-exceed amount) that are previously approved by City as reimbursable); taxes other than reimbursable payroll related taxes and any other cost or expense not specifically included within the Cost of Construction Services, is the amount determined by the formula:

$$F = R [C - PT - INS]$$

Where:

"F" is CMAR's Fee;

"R" is percent;

"C" is the Cost of the Construction Services, as defined by § 7.3, excluding any self-performed work;

"PT" is Privilege Taxes, as further specified by § 7.4; and

"INS" is CMAR's Reimbursable Construction Insurance and Bond Premiums, as specified by § 5.2.

7.3 Construction Services Cost.

- (A) Costs included in Construction Services. Construction Services cost consists of the reasonable expenses actually, necessarily and properly paid by CMAR, in the Project's proper and timely construction, without markup for CMAR's Fee or Privilege Taxes, for the following:
- (1) Payments to City-approved Subcontractors or Lower Tier Entities for the performance of the Construction Services and/or the furnishing of Construction Materials, fixtures, equipment and supplies in accordance with the provisions of their respective Subcontracts or Sub-subcontracts;
 - (2) Wages, salaries and normal fringe benefits (as approved by City), and normal employer taxes paid by CMAR thereon, of CMAR's supervisory staff and general field labor assigned to the Work, but only for the portion of time actually devoted to the Work, all subject to and as approved in writing by City, provided such costs are not included in the costs to be paid from CMAR's Fee per § 7.2;
 - (3) Elements of the Construction Services to be self performed by CMAR with City's approval, in amounts approved by City (which will not include any mark-up for CMAR's Fee);
 - (4) Permit, licenses, connection fees, and other such fees to the extent required by any governmental entity;
 - (5) Construction Materials suitably stored on the Site with City's approval as provided in §12.5(A);
 - (6) Construction equipment used on the Site by CMAR with City's approval, at rates not to exceed the lesser of:
 - (a) The prevailing rates charged by others for rental of similar equipment; or

- (b) The purchase price of the Construction equipment less the reasonable depreciation in value of that equipment as a result of its use on the Site;
 - (7) Construction utilities, job site telephone, job trailer rental, portable toilets, dumpsters, cleanup and other job site general conditions as approved by City;
 - (8) Premiums paid by CMAR for Reimbursable Construction Insurance and Bond Premiums as provided in § 5.2, without any markup for CMAR's Fee;
 - (9) Any other reasonable construction expense necessarily required for proper performance of the Work at the Site required by this Agreement as approved in writing by City; and
 - (10) Reimbursable Privilege Taxes, without any mark up for CMAR's Fee. Expenses that do not meet the criteria set forth above are not reimbursable as Costs. All discounts received by CMAR from Lower Tier Entities accrue to City's benefit.
- (B) Cost Excluded from Construction Services. The Cost of the Construction Services *may not* include reimbursement for:
- (1) Any amounts for FFE Services;
 - (2) The performance of any Construction Services by CMAR's own forces or use of any equipment owned by CMAR without City's prior written approval;
 - (3) Any Construction Materials not yet incorporated in the Project or stored at the Site with City's approval, as provided in § 12.5(A);
 - (4) Payment to CMAR or a Lower Tier Person of amounts in excess of the amounts established with City's approval for CMAR's self-performed Construction Services or for the Lower Tier Person;
 - (5) Repair or replacement of defective or nonconforming Work;
 - (6) Repair or replacement of Work damaged by the negligence or failure to perform a responsibility hereunder by CMAR or by any Lower Tier Entities;
 - (7) Any interest or penalties;
 - (8) Premiums for business automobile insurance, workers compensation and employers liability insurance, and any general liability and other insurance normally carried by CMAR;
 - (9) Any legal expense incurred by CMAR;
 - (10) Any other home office expense;
 - (11) Any expense that causes the GMP to be exceeded except by Change Order, Construction Change Directive or Dispute Resolution as provided in this Agreement; or
 - (12) Any other expense that does not meet the criteria set forth in § 7.3(A).

- (C) Schedule of Rates. City will consider approving written schedules of rates upon which CMAR may base its monthly estimated costs for purposes of Applications for Progress Payment of certain Construction Services categories, such as supervisory salaries and equipment; but only on condition that adoption of any schedule for these purposes is subject to audit and adjustment necessary to reflect the actual costs of these items to CMAR.

7.4 Taxes.

(A) Reimbursement.

- (1) Subject to the GMP, City will reimburse CMAR for Privilege Taxes paid by CMAR on gross receipts received by CMAR from City to the extent such Privilege Taxes were timely paid by CMAR on that part of CMAR's compensation for Cost of the Construction Services that is subject to state or local privilege taxation under the prime contractor or construction contractor classifications, and are not otherwise exempt from such taxation.
- (2) City will reimburse CMAR for Privilege Taxes paid by CMAR on amounts received from City for the direct costs paid by its Subcontractors for FFE (excluding Privilege Tax and without markup for profit and overhead) incorporated in the Project, but City will not reimburse CMAR for any amounts paid as and for Privilege Taxes by CMAR to its Lower Tier Entities or by a Lower Tier Entities to a Lower Tier Person.

(B) Application.

- (1) Each Application for Progress Payment and Application for Final Payment will separately identify that part which represents FFE.
- (2) CMAR and its Lower Tier Entities will not report transaction privilege or use taxes paid for FFE.
- (3) CMAR will not seek reimbursement for Privilege Taxes computed on receipts for these expenses.

- (C) Tax Licenses. CMAR must take all steps necessary to obtain state and local retail tax licenses, issue exemption certificates to vendors, and otherwise perfect its right to be exempt from the payment of Privilege Tax for FFE purchases, and CMAR must require its Lower Tier Entities to also obtain state and retail tax licenses, issue exemption certificates to vendors, and otherwise perfect their rights to be exempt from the payment of Privilege Tax for FFE purchases.

7.5 FFE Services.

- (A) The amount to be paid to CMAR for the FFE Services will be an amount equal to the direct expenses (exclusive of any Privilege Taxes) paid by CMAR (or by a Subcontractor or Lower Tier Entities) for the FFE, without markup for profit or overhead of CMAR (or of the Subcontractor or Lower Tier Entities).

- (B) "FFE Services" means interior design of the Project and the procurement of the FFE.

8. Payments.

8.1 Cash Flow Report.

- (A) CMAR will prepare a Cash Flow Report for projected monthly project cash flow on the form provided by City.
- (B) The Cash Flow Report will be submitted for approval prior to issuance of the Notice to Proceed, as set forth in § 6.1.
- (C) The Cash Flow Report will be updated and submitted with each Application for Progress Payment and at any time City requests if the projected monthly project cash flow varies by more than 10% of the GMP.
- (D) The Cash Flow Report will reflect the following:
 - (1) Initially, the accumulation of month pay estimates costs will be plotted versus time in accordance with the proposed construction schedule; and
 - (2) For each update, CMAR's actual month payment versus the actual elapsed time on the Project.

8.2 Draft Application for Progress Payment.

Based on draft applications (each a "Draft Application") followed by formal applications for progress payment (each an "Application for Progress Payment"), City will make monthly progress payments on Contract Sum account as provided in this § 8. The Draft Application is for informational purposes only and its submission is not an Application for Progress Payment.

- (A) Period. The period covered by each Application for Progress Payment will be one calendar month (the "Billing Month") ending on the last day of each month.
- (B) Date for Submission. On or before the 25th day of each Billing Month, CMAR will submit to City its Draft Application, which must identify all amounts CMAR expects to invoice for the entire Billing Month.
- (C) Review Meeting. The parties will thereafter meet and make good faith efforts to reach agreement on the Draft Application by the end of the Billing Month, whereupon CMAR will formalize its Application for Progress Payment for the Billing Month, incorporating all of the agreements reached during the parties' review of the Draft Application.

8.3 Application for Progress Payment.

Provided that CMAR has submitted its Draft Application for review as provided above, CMAR may submit its Application for Progress Payment for the Billing Month to City, no earlier than the 1st day of the month following the Billing Month.

- (A) Date for Submission. City will make a Progress Payment, subject to applicable Withholdings, to CMAR not later than 21 days after the date on which the Application for Progress Payment has been received by City, subject to this Agreement.

- (B) One Progress Payment Per Month. Unless City agrees otherwise, CMAR may submit only one Application for Progress Payment in a month and City will make only one Progress Payment in a month to CMAR.
- (C) Progress Payment Application Form. The Application for Progress Payment will be in such form as City may reasonably require, and will be accompanied by the following to City's reasonable satisfaction:
- (1) A sworn statement of the Cost of the Work furnished during the Billing Month, together with the required form of application as City requires, properly completed so as to allocate all Construction Services and FFE Services according to the most recent City-approved GMP Schedule;
 - (2) An itemized report of the Work performed during the Billing Month;
 - (3) Proof of CMAR's compliance with testing, submittals, permits, and other requirements applicable to the Work requested by City;
 - (4) Conditional and unconditional waivers and releases from CMAR and from Subcontractors, Lower Tier Entities, vendors, and others relating to Work for which the Application for Progress payment is requested, or receipt of amounts for which payment has previously been made, as requested by City;
 - (5) Payrolls, petty cash accounts, receipted invoices or invoices with check vouchers attached, payrolls, requisitions from Subcontractors and material suppliers, vendors receipted invoices, purchase orders, and delivery tickets;
 - (6) CMAR's monthly updated Project Schedule as provided in § 6.3; and
 - (7) Such other evidence substantiating the particulars of CMAR's Application for Progress Payment as may be required by City.
- (D) Complete Application Required. A complete Application for Progress Payment, including all required documentation, will be a condition precedent to CMAR's right to have the Application for Progress Payment reviewed or to receive any Progress Payments.
- (E) Incomplete or Untimely Applications. If CMAR submits an Application for Progress Payment that is incomplete or untimely, in City's reasonable judgment, CMAR must resubmit the Application for Progress Payment, with any applicable corrections.
- (F) Correspondence to Other Documents. CMAR's Application for Progress Payment must be organized so that all back-up for each line item of the Application for Payment corresponds to the most recently City-approved GMP Schedule and that the back-up for the amount requested for each item of the Construction Services, and FFE Services, and each Change Directive or Change Order is separately provided for and is available for review by City.

- (G) Certification. The Application for Progress Payment must be signed by CMAR, the Architect of Record or the Engineer of Record certifying that:
- (1) The Work has progressed to the point indicated in the Application for Progress Payment;
 - (2) That the Work is in accordance with the Project Documents;
 - (3) CMAR is entitled to payment in the amount requested; and
 - (4) Applications for Progress Payment to City will not be deemed delivered until actually received by City.
- (H) Review of Work by City. City will have the right to review the Work after receipt of CMAR's application.
- (1) Within three days after receipt of the Application for Progress Payment, City will prepare and issue a written statement ("Deficiency Notice") specifying those items covered by the Application for Progress Payment that are not approved and certified for payment if:
 - (a) City reasonably determines that the Work actually completed is less than that represented on the Application for Progress Payment;
 - (b) The Work is defective;
 - (c) The Work does not comply with this Agreement's requirements; or
 - (d) The other grounds for withholding as provided in § 12.3(B) below apply.
 - (2) The Deficiency Notice may be given in any reasonable manner, including handwritten annotations on a copy of the Application for Progress Payment returned to CMAR.
 - (3) City may withhold such sums as are permitted pursuant to A.R.S. § 34-607 to pay the expenses City reasonably expects to incur in correcting the deficiencies so identified.
 - (4) If sums were withheld in connection with a prior Application for Progress Payment, and the associated deficiencies have been corrected, the amount so withheld may be included as part of the current Application for Progress Payment.
 - (5) City will have the right to amend any previously-given Deficiency Notice, or approval for payment, in whole or in part, based on mistake, newly-discovered information, or other grounds permitted by Law, and such amendments will apply to any Application for Progress Payment.
 - (6) However, the failure by City to specify any defect in the Work in a Deficiency Notice will not act as a waiver or otherwise prevent City from raising defect issues at any time.

- (I) Progress Payment to CMAR. Within 21 days after receipt of the properly completed Application for Progress Payment, City will pay to CMAR the entire amount set forth in the Application for Progress Payment, less any applicable Withholding and less retainage as provided in A.R.S. § 34-607(B).
- (J) Progress Payment to Lower Tier Entites. Within seven days after receipt of payment by City, CMAR will make payment available to its Subcontractors or Lower Tier Entities entitled to payment in accordance with A.R.S. § 34-607(F).
 - (1) If any payment is to be withheld from a Subcontractor as provided by Law, the amount withheld must not be included in the Application for Progress Payment.
 - (2) CMAR bears all costs and damages, without reimbursement, that arise from CMAR's failure to pay Subcontractors entitled to payment in a timely manner as provided by Law, to the extent such payment has been received by CMAR from City.
 - (3) City has no obligation under this Agreement to pay or to be responsible in any way for payment to a Subcontractor or Lower Tier Entities performing portions of the Work.

8.4 Proof of Payment.

- (A) Duty to Discharge Debts and Obligations. All CMAR's debts and obligations for labor, materials, equipment or fixtures incorporated into the Project or any other element of Work, including that shown in any estimate, Application for Progress Payment, requisition or claim and upon which CMAR has received a payment must be paid or discharged.
- (B) Proof. Receipts or vouchers showing payment or discharge must, if City so requires, be provided to City before CMAR will be entitled to receive any other or further payment under this Agreement.
- (C) Joint Check Alternative. At CMAR's election, CMAR may satisfy this requirement by requesting City issue joint checks in accordance with § 12.4(2).

9. Final Payment.

9.1 Application for Final Payment. Provided that CMAR has accomplished Final Completion, CMAR may submit an application for final payment ("Application for Final Payment"); however, neither final payment nor amounts retained, if any, will be due until:

- (A) CMAR submits to City an application for final payment with all required documentations in accordance with § 9(2); and
- (B) City has thereafter conducted a review or audit of CMAR's Final Accounting, as defined in § 9(2).

9.2 Application for Final Payment Form. The Application for Final Payment must be in such form as City may reasonably require.

- (A) Required Information. Application for Final Payment must be accompanied by the following to City's satisfaction:

- (1) Waivers and Releases on Final Payment as provided in § 12.1;
 - (2) CMAR's accounting ("Final Accounting"), bearing the certificates of CMAR's chief executive and chief financial officers attesting to the completeness and accuracy of the Cost of the Work for which CMAR has received or seeks reimbursement from City;
 - (3) Architect of Record or the Engineer of Record certification to City that the Project is complete;
 - (4) Proof that CMAR has furnished to City the redlines, warranties, manuals and other close-out documents required by any of the Project Documents or applicable laws of city, county and state governments, or other authorities with jurisdiction over the Project;
 - (5) Certificates that all insurance required by the Project Documents to be in force after Final Payment is made and will be in effect as required;
 - (6) Such other documents substantiating the particulars of CMAR's Application for Final Payment (including additional backup for CMAR's accounting) as may be reasonably required by City, the Financing parties and CMAR's Surety;
 - (7) Consent of CMAR's surety to the Final Payment; and
 - (8) City may require CMAR to submit and meet to discuss a Draft Application for Final Payment, following the procedure provided in § 8.1.
- (B) Other Required Documents. CMAR must prepare or obtain and furnish to City upon completion and prior to and as a condition of the Application for Final Payment, in addition to any other documents as provided elsewhere in this Agreement, the following Project Documents:
- (1) A list of capital assets as described in Governmental Accounting Standards Board Statement No. 34, as it has been supplemented by subsequent pronouncements of the Governmental Accounting Standards Board;
 - (2) Warranties from Subcontractors and Lower Tier Entities;
 - (3) Manufacturer's warranties and manuals for all furniture, fixtures and/or equipment installed or furnished by CMAR (whether as Construction Services or as FFE);
 - (4) Air balance reports, equipment operation and maintenance manuals;
 - (5) Building certificates required prior to occupancy, mechanical, electrical and plumbing certificates, all other required approvals and acceptances by city, county and state governments, or other authority having jurisdiction; and
 - (6) Two sets (one reproducible on Mylar), plus one electronic set, of redline record drawings in size to match the Construction

Documents showing complete information including descriptions, drawings, sketches, marked prints and similar data indicating the final "as built" conditions of the Work, and CMAR must keep redline record drawings up to date concurrently as the Work progresses.

- (C) Application for Final Payment Review. City will have thirty (30) days after its receipt of the fully completed Application for Final Payment within which to audit and/or review CMAR's Final Accounting.
 - (1) City review will result in a Notice to CMAR identifying:
 - (a) The expenses that City has determined are not substantiated;
 - (b) City's determination of the total Contract Sum that has been substantiated; and
 - (c) The resulting amount of the Final Payment to be given to CMAR after deduction for all payments previously made and applicable Withholding.
 - (2) CMAR must cooperate with City's review and/or audit by making all of its records available for inspection and copying, answering questions, and otherwise facilitating City's review promptly upon its request.
 - (3) City's review and/or audit of the Final Accounting will be in whatever detail and scope as City determines, in its discretion; such review or audit may be conducted by City's employees and/or by independent contractor, as City may engage for that purpose.
- (D) Final Payment. Subject to the exchange of unconditional waivers and releases on Final Payment as provided in § 12.1, City will make the Final Payment to CMAR, within ten (10) days after City has issued its written determination of the amount of Final Payment it will pay to CMAR.
- (E) Payment for Withholding. If applicable Withholding exceeds amounts otherwise payable, CMAR must pay the difference to City within ten (10) days after demand from City.
- (F) Acceptance and Waiver. CMAR's acceptance of Final Payment will constitute a waiver of all Claims or Disputes that have not been timely submitted to City as CMAR Claims prior to CMAR's submission of the Application for Final Payment.

10. Changes. Changes in the scope of the Work (including, without limitation, additional and/or deductive Work) or in the Project Schedule (including, without limitation, suspension of all or part of the Work, or an order for acceleration of performance), may be accomplished only by Change Order or Change Directive.

10.1 Change Orders.

- (A) Request for Proposal. If City requests CMAR to submit a proposal for a Change Order, CMAR will do so promptly, within ten (10) days after written request from City, on a form and following a procedure established by Project Manager for the administration of change order

proposals, that specifies CMAR's technical proposal for implementation of the proposed Change, together with CMAR's proposal for the resulting adjustment to the Contract Sum and/or Contract Times.

- (B) Acceptance. City may, in its sole discretion, accept or reject the proposal, or attempt to negotiate a modification and any resulting agreement will be reduced to a written Change Order. If the parties cannot reach agreement within ten (10) days after City has received the proposal, City has the right to issue a Change Directive as provided in §10.2.

10.2 Change Directive.

- (A) Immediate Change. Upon receipt of the Change Directive, CMAR must proceed with the Change as directed, whether or not CMAR agrees with the adjustment to Contract Sum or Contract Times.
- (B) Disagreement. If CMAR disagrees, it must preserve its right to later dispute City's determinations by delivering a written CMAR Claim to City as provided in § 19; otherwise:
 - (1) The written Change Directive will be binding on CMAR; and
 - (2) CMAR will have waived its right to pursue a CMAR Claim and the Change Directive will automatically have the full force and effect of a Change Order, as if it has been signed on CMAR's behalf.

10.3 Field Orders. City or Project Coordinator, when reasonable under the circumstances, may issue a written order that makes or authorizes minor deviations in the Work or provides necessary interpretation of the Construction Documents.

- (A) City may issue a Field Order on its own volition or at the request of CMAR.
- (B) Field Orders are for the benefit of CMAR by providing documentation of minor deviations or necessary interpretations of the Construction Documents.
- (C) If CMAR disagrees that the deviation or interpretation is appropriate for a Field Order, it will provide Notice to City of its disagreement and City may issue a Change Directive.

10.4 Authorization Required. CMAR may not perform any Change, or be entitled to any compensation or extension of time, unless CMAR has first received a Change Order or Change Directive or as provided in this § 10.

11. CMAR's Claims. CMAR may make a claim for any increase in the GMP or extension of the Contract Times, or both, that is otherwise permissible under this Agreement ("CMAR Claim").

11.1 CMAR's Duty to Mitigation Claims. CMAR must at all times and in all circumstances exercise best efforts to avoid or mitigate any potential impact of a CMAR Claim.

11.2 Notice of CMAR Claim. The right to make a CMAR Claim is subject to the condition precedent that in each case CMAR has submitted a written notice to

both the City and the Project Coordinator within five days after CMAR first knew or should have known of the matter, occurrence or event that is the basis for the claim for additional compensation or time (“Notice of Claim”).

- (A) Information. The Notice of Claim must furnish sufficient detail to appraise City and Project Coordinator of the basis, include the cause, for the claim, and will include:
 - (1) A reasonable estimate of the amount of compensation or time CMAR anticipates it will request; and
 - (2) A list of action CMAR intends to take in order to mitigate the time and cost impact of the situation given rise to or related to CMAR Claim.
- (B) Supplementation. CMAR must supplement the Notice of Claim during the course of the Work as additional information becomes available.
- (C) Continuing Delays. Only one notice is necessary in the case of a continuing delay that is attributable to the same cause described in the Notice of Claim.
- (D) Waiver. If CMAR fails to submit a Notice of Claim within five days after CMAR first knew or should have known of the basis therefor, CMAR will have waived the right to later submit or prosecute a Notice of Claim arising from such matter, occurrence or event.

11.3 Procedures for CMAR Claim. The procedures of this Section and **Exhibit H** apply to resolution of all Disputes arising from CMAR Claims.

12. Additional Terms and Condition of Payment.

12.1 Lien Waivers and Releases. Except as otherwise expressly set forth elsewhere herein, with each Application for Progress Payment, application for release of retention or other withholding, and Application for Final Payment, CMAR must submit lien waivers and sworn statements for the application from CMAR, and lien waivers and sworn statements from all Lower Tier Entities and entities who have furnished labor, Construction Materials, equipment, tools, fixtures, services or other work directly or indirectly to or for CMAR, in form and substance as reasonably required by City, to assure that the Site and Project will be free of liens arising from the Work for which the payment is requested.

12.2 Reservations upon Payment.

- (A) No Determination of Standard. No approval given or payment made by City is intended to be evidence of satisfactory performance of any Work, or of the sufficiency of any applicable application for payment.
- (B) Non-Acceptance. No payment to CMAR will constitute an acceptance of any Work not in accordance with this Agreement’s requirements.
- (C) No Waiver of Defective Work. Any application for payment approval pursuant to A.R.S. § 34-607 will constitute approval solely for purposes of making payments and will not constitute a waiver of City's right to have all defective or incomplete Work corrected and performed in accordance with this Agreement, or to later modify or amend a Deficiency Notice or any approval or deemed approval previously given by City.

12.3 Retainage. Retainage will be held by City as additional security for performance of CMAR's obligations, and may be applied by City towards payment of any back-charge, setoff, or other amount payable by CMAR to City.

- (A) Discretionary Reduction of Retainage. After the Work is 50% complete CMAR may submit a request for reduction of the Retainage amount withheld from subsequent Progress Payments.
 - (1) If CMAR has performed its obligations on schedule and is otherwise in compliance with the Project Documents, City may, but will not be required to, reduce the Retainage amount from future Progress Payments to not less than 5%, subject to City's right to later reinstate 10% Retainage if CMAR thereafter fails to perform any responsibility under the Project Documents.
 - (2) With the regular Progress Payment after CMAR has accomplished Substantial Completion, City may release unapplied Retainage to CMAR, less an amount equal to 200% times City's estimate of the costs it would incur to engage a third party to complete any remaining Work.
 - (3) With the Final Payment, any unapplied Retainage will be released to CMAR.
- (B) Withholding.
 - (1) The amount of each Progress Payment, or Final Payment, otherwise payable to CMAR will be reduced by the following ("Withholding"), as applicable, in addition to Retainage:
 - (a) Sums as permitted under applicable Law on account of:
 - (i) The items identified in all applicable Certificates for Payment and/or Deficiency Notices and amendments thereto; or
 - (ii) Any additional amounts City in good faith believes are necessary to withhold, back-charge, or setoff in order to satisfy or cover any actual or reasonably anticipated loss, liability, damage or judgment that City has incurred or may incur in connection with CMAR's performance or non-performance of this Agreement;
 - (b) Any Liquidated Damages then due.
 - (2) City will make appropriate adjustments to Withholding after final disposition of the matter, condition, event or claim that resulted in such Withholding.
 - (3) If the expense incurred by City is less than the amount withheld, City will release the difference to CMAR within fourteen (14) days after such final disposition.
 - (4) If, however, such expense exceeds the unpaid amounts otherwise due, CMAR must pay the difference within fourteen (14) days after demand from City.

12.4 Payments to Lower Tier Entities.

- (A) Remittance to Lower Tier Entities. Except to the extent requested by CMAR pursuant to § 8.4(C), City reserves the right, at its sole discretion, either to:
 - (1) Pay any Subcontractor or Lower Tier Entities directly for performance of the Work, or
 - (2) Issue joint checks.
 - (a) CMAR agrees to accept joint checks and to execute, when requested by City, joint check agreements in a form acceptable to City.
 - (b) Joint checks and direct payments made pursuant to this section will be credited against the Contract Sum.
- (B) Communications with Lower Tier Entities. CMAR consents to such direct payment as well as to City communicating directly with CMAR's Subcontractors, or Lower Tier Entities and other vendors to verify CMAR's payment history and account status.

12.5 Non-Incorporated Construction Materials. CMAR must not charge City for any Construction Materials that are not incorporated into the Project, unless City has given its written approval.

- (A) Storage of Materials. City may condition on its determination that the Construction Materials are suitably stored and properly secured from casualty, properly insured, and that title has passed to City free and clear of any liens or encumbrances.
- (B) Receipt of Documentation. City may further condition the making of payments with respect to Construction Materials upon receipt of contracts, bills of sale, or other agreements satisfactory to City to establish City's title to the Construction Materials, or otherwise protect City's interest.

13. Project Coordinator. (the "Project Coordinator") will assist City in this Agreement's administration and overall Project administration.

13.1 Project Coordinator's Authority.

- (A) The Project Coordinator and its personnel has no authority, express or implied, to act on behalf of City in any capacity whatsoever as an agent and has no authority, express or implied, to bind City to any obligations whatsoever.
- (B) CMAR agrees that it shall look only to City for direction related to the Project.

13.2 Project Coordinator's Duties.

- (A) Project Coordinator is initially empowered to communicate with CMAR, and to review and make recommendations to City regarding:
 - (1) The Work Product;
 - (2) The Services furnished by CMAR in connection with the Project; and

- (3) CMAR's invoices.
- (B) Project Coordinator may have other duties and responsibilities as City's Representative may designate in writing from time to time.

13.3 Cooperation. CMAR agrees to cooperate with the Project Coordinator so as not to result in any delay in the progress of the Services.

14. Subcontractors and Lower Tier Entities.

14.1 Subcontractors Unless otherwise agreed upon in writing by City and CMAR, the Construction Services will be performed by qualified Subcontractors and Lower Tier Entities to be selected and engaged as provided in § 14.2.

- (A) CMAR will be responsible and liable to City for the Work's proper and timely performance by Subcontractors and Lower Tier Entities.
- (B) CMAR will be responsible and liable to City for the proper and timely performance of the Work by each Subcontractor, Lower Tier Entities, and any other person or entity who furnishes any Work.

14.2 Subcontractor Selection. Subcontractors will be selected on the basis of qualifications alone, or a combination of qualifications and price, but not price alone, as provided either in City's Subcontractor Selection Plan or in the Subcontractor Selection Plan detailed by CMAR submitted during the selection process.

- (A) The process for Subcontractor selection will include:
 - (1) A qualifications and price selection may be a single step selection based on a combination of qualifications and price ,or a two-step selection where the first step is based on qualifications and the second step may be based on a combination of qualifications and price or on price alone;
 - (2) CMAR will then determine, with City's advice, which bids or proposals will be accepted;
 - (3) CMAR may obtain bids or proposals from Subcontractors from the list previously reviewed and, after analyzing such bids or proposals, will deliver copies of such bids or proposals to City;
 - (4) CMAR will not be required to contract with anyone to whom CMAR has a reasonable objection;
 - (5) Requests for submittal of qualifications must be in writing, and kept by CMAR in its Project records; and
 - (6) Each Subcontract must meet other requirements set forth in § 17.
- (B) Subcontracts. Except as provided in § 14.4, with respect to certain Vendors, each Subcontract must:
 - (1) Be in writing;
 - (2) Provide for a fixed, or not-to-exceed amount as the Subcontractor's entire compensation;

- (3) State that the Subcontract is subject to this Agreement's terms and conditions and specifically incorporates this Agreement's provisions (except its compensation terms);
- (4) Bind and obligate the Subcontractor to CMAR as CMAR is bound to City under this Agreement;
- (5) State that City is the intended third-party beneficiary of the Subcontract, with the right (but not the obligation) to pursue claims for damages and/or equitable or other rights or remedies directly against Subcontractor for breach of Subcontractor's obligations under the Subcontract, or of any warranty given by Subcontractor, without liability for benefits received, and that City may exercise its rights as third-party if the breach continues without cure for seven days after written notice has been given to CMAR;
- (6) Contingently assign the Subcontract to City in the event this Agreement is terminated, subject to City's election to accept the assignment by delivery to Subcontractor of written notice—which City is not obligated to give—but that City is not under any obligation to compensate Subcontractor except for future Work performed after the date of City's election;
- (7) Obligate Subcontractor to be joined as a party to any arbitration or other dispute resolution proceeding in which City or CMAR are parties and which arises out of or relates to Subcontractor's performance or nonperformance of the Subcontract;
- (8) Include a termination for convenience clause equivalent to § 36.5;
- (9) Contain an indemnity that is, at a minimum, equivalent to the provisions of § 30 and identifying, as Indemnitees, all Indemnified parties identified in § 30;
- (10) Include any other provision required by the Project Documents; and
- (11) Agree to contract with Lower Tier Entities upon a written agreement with Lower Tier Entities meeting the requirements of § 14.3.

14.3 Lower Tier Entities. Except as provided in § 14.4, with respect to certain Vendors, each agreement between a Subcontractor and Lower Tier Entities, or between any party contracted to provide work or matters on the Project with another party providing work on the Project (each a "Sub-subcontract"), must:

- (A) Be in writing;
- (B) Provide for a fixed, or not-to-exceed amount as Lower Tier Entities' entire compensation;
- (C) State that Lower Tier Entities are subject terms and conditions of, and specifically incorporates to this Agreement's provisions, (except its compensation terms);

- (D) Bind and obligate Lower Tier Entities to Subcontractor as Subcontractor is bound and obligated to CMAR;
- (E) State that City is the intended third-party beneficiary of the Sub-subcontract, with the right (but not the obligation) to pursue claims for damages or equitable or other rights or remedies directly against Lower Tier Entities for breach of Lower Tier Entities' obligations under the Sub-subcontract, or of any warranties given by Lower Tier Entities without liability for benefits received;
- (F) Provide that City may exercise its rights as third-party beneficiary if the breach continues without cure for seven (7) days after written notice has been given to CMAR;
- (G) Consent to the contingent assignment of the Sub-subcontract to City, in the event this Agreement is terminated;
- (H) Obligate Lower Tier Entities to be joined as a party to any arbitration or other dispute resolution proceeding in which City or CMAR is a party and arises out of or relates to Lower Tier Entities' performance or nonperformance of the Sub-subcontract;
- (I) Include a termination for convenience clause equivalent to § 36.5;
- (J) Contain an indemnity that is, at a minimum, equivalent to the provisions of § 30 and identifying, as Indemnities, all Indemnified parties identified in § 30;
- (K) Include any other provision required under the Project Documents.

14.4 Vendors. Each Subcontract or Sub-subcontract with a Vendor must:

- (A) Be in writing;
- (B) Specifically incorporate the requirements of the Drawings & Specifications insofar as applicable to the Construction Materials to be furnished;
- (C) Provide a fixed, or not-to-exceed amount, as the Vendor's entire compensation with all Construction Materials delivered FOB to the Project site;
- (D) Require that the Vendor will, as a condition precedent to the right to deliver any Construction Materials to the Site:
 - (1) Comply with the insurance requirements of **Exhibit F**; and
 - (2) Execute an indemnity equivalent to that provided in § 30 and identifying, as Indemnities, all Indemnified parties identified in § 30.

14.5 Employment Verification. CMAR will take all steps necessary and appropriate to ensure no employee will be recruited, interviewed, screened and employed in connection with the Work unless CMAR, Subcontractor or Lower Tier Entities, as applicable, verified the employee's authorization to work in the United States in compliance with all applicable Laws, including without limitation, Immigration Reform and Control Act, codified at 8 U.S.C.A. § 1324a, *et. seq.* and Legal Arizona Workers Act, codified at A.R.S. § 23-211, *et. seq.*

14.6 Condition Precedent to Work of Lower Tier Entities. Satisfaction of all requirements of this § 14 is a condition precedent of Subcontractor or Lower Tier Entities' right to commence any Work element and to the payment of any amount otherwise payable to CMAR for the Subcontractor or Lower Tier Entities.

- (A) Compliance Warranty. By permitting a Subcontractor or Lower Tier Entities to commence any Work element, CMAR conclusively warrants to City that all of this Agreement's requirements have been fulfilled and must continue to be fulfilled as to the Subcontractor or Lower Tier Entities.
- (B) CMAR Responsibility for Lower Tier Entities. CMAR is solely responsible and liable to City for the Work's proper and timely performance by each Subcontractor and Lower Tier Entities.
- (C) Copies of Subcontracts. CMAR shall furnish a copy of any Subcontract or Sub-subcontract to City within two (2) days after it is requested by City; however, City shall have no obligation to make such a request, or to review any Subcontract or Lower Tier Entities when received, and no review, non-review, objection or failure to object by City shall relieve CMAR and its Subcontractors and Lower Tier Entities from their responsibilities for fulfilling this Agreement's requirements.
- (D) Change of Subcontractor Approval. CMAR will not change a Subcontractor after the Subcontractor has been approved by City, without City's written consent to the change.

15. Self-Performed Work.

15.1 Selection of CMAR. CMAR, or affiliates or entity under control of CMAR (or any entity composing CMAR), may seek to self-perform portions of the Construction Services only if selected by City following this Agreement's full subcontractor procurement process, and if and only:

- (A) CMAR is selected by City on the basis provided in § 13 in competition with at least two other candidates as determined by City; or
- (B) City has given prior written approval of *de minimus* Construction Services, such as minor clean-up work (but only to the extent of the type of *de minimus* work and the not-to-exceed amount authorized in City's written approval).

15.2 Contract for Self-Performed Work. If CMAR is selected to self-perform portions of the Construction Services, a written Subcontract will not be required and this Agreement's provisions will be applicable, but City and CMAR will agree prior to work on a written scope and a lump sum or not to exceed line item that will include CMAR's direct and indirect compensation, labor, labor burden, supervision, overhead, and all other costs.

16. Performance Standards. CMAR warrants to City that:

16.1 Standard of Care. CMAR, and all of its Subcontractors and Lower Tier Entities, will perform their respective obligations under this Agreement with the professional diligence and care prevailing among highly skilled and experienced commercial contractors and subcontractors with demonstrated ability to timely and properly construct projects equivalent to the Project (the "Standard of Care"), on schedule, within budget, and without latent defects.

16.2 Standard of Work. The Work must be:

- (A) In accordance with the requirements of the Project Documents;
- (B) Free from defects; and
- (C) Fit for City's intended use.

16.3 Standard of Construction Materials. All Construction Materials will be new and in excellent condition, except to the extent specifically provided otherwise in the Project Documents.

16.4 Quality Control. CMAR must establish, maintain, and implement a quality control program that is consistent with that described in the CMP and which is:

- (A) Sufficient to insure proper supervision, examination, inspection, and testing of all item of Work at appropriate intervals, including the work of Subcontractors, Lower Tier Entities, suppliers; and
- (B) Sufficient to assure conformance to the Project Documents with respect to Specifically Described Items, as defined in § 22.2, general workmanship, construction, and equipment (including maintenance, while-idle, and functional performance).

17. Regulatory Compliance.

17.1 Duty to Comply. CMAR must comply with all federal, state, county, and local statutes, rules, regulations, codes, ordinances, executive orders, and other legislative, executive, or judicial requirements and/or decisions (collectively, "Laws") applicable to the Work whether or not specifically referenced elsewhere in this Agreement.

- (A) Compliance must include adherence to those laws, rules, and regulations pertaining to contractor licensing, occupational health, safety, disabilities, building codes, construction standards, licensure, social security, employment, workers compensation, immigration, wages, payrolls, health, discrimination, equal employment opportunity, civil rights, storm water, solid wastes, Hazardous Substances, grading, air pollution, water pollution, waste disposal, human remains, land use, historic preservation, endangered or threatened species, navigable waters, waters of the United States and tributaries thereof, and all other Laws applicable to the Work.
- (B) Reference to standards, specifications, manuals, or codes of any technical society, organization, or association, shall mean the latest standard, specification, manual, code adopted by City (and as modified by City), or the latest in time if not adopted by City, unless specifically excepted or modified by City.

17.2 Notification of Investigations. To the fullest extent permitted by applicable Law, CMAR will notify City, and require its Subcontractors and Lower Tier Entities to notify City, in each case within twenty-four (24) hours after a demand for records or notice of audit is received and/or any inspection or other investigation is commenced by any federal, state or local governmental agency that relates to the Work, including, without limitation:

- (A) Any Site inspection or investigation relative to a determination of compliance with any Laws or Permits pertaining to Hazardous

Substances, waste, dust control, air quality, water pollution, storm water runoff, endangered species, navigable waters, occupational health or safety; and

- (B) Any inspection, audit or other investigation, whether on or off the Site, that is initiated by any federal or state authorities to verify the immigration and/or worker authorization status of any of CMAR's workers, any Subcontractors, or any Lower Tier Entity or Person.

17.3 City's Rules. City has the right, but not the obligation, to adopt and prescribe from time to time one or more reasonable rules and regulations ("City's Rule(s)") governing parking, access, times of work, noise, behavior towards City's employees, customers, guests or invitees, and such other matters not involving the means, method, techniques or manner of the Work's performance that City deems pertinent to preventing disruption to City's ongoing operations.

- (A) CMAR will enforce, and will be responsible to City for the failure of its employees, or employees of Subcontractors or Lower Tier Entities to comply with City's Rules.
- (B) Compliance with City's Rules will be a condition to the right of any person to enter upon any of City's property, and City has the right to revoke such right of access as to any person who has materially breached any of City's Rules.
- (C) The issuance or non-issuance, enforcement or non-enforcement of City's Rules by City will not relieve CMAR from its sole and exclusive responsibility to City for taking all appropriate precautions, in accordance with applicable Laws, to ensure the health and safety of persons and property with respect to the Work.

17.4 Compliance Assurances. CMAR further warrants to City that CMAR and its Subcontractors and Lower Tier Entities are in compliance with the following:

- (A) Subcontractors and Lower Tier Entities now hold—and, at all times material, will hold—all licenses, registrations and other approvals necessary for the lawful furnishing of the Services;
- (B) Subcontractors and Lower Tier Entities are not—and, at all times material, will not—be debarred or otherwise legally excluded ("Debarred") from contracting with any federal, state or local governmental entity; and
- (C) Except with City's knowledge and consent and if the activity, employment, interest or contribution will not reasonably compromise or appear to compromise their professional judgment or prevent them from serving the best interests of City, Subcontractors and Lower Tier Entities will not:
 - (1) Accept trade discounts;
 - (2) Have a significant direct or indirect financial interest in CMAR or any of its Subcontractors or Lower Tier Entities; or
 - (3) Undertake any activity or employment or accept any contribution.

18. Health and Safety.

18.1 General Safety Duty.

- (A) CMAR is solely responsible for the safety and health effects of the Work as it may impact all persons and property whether or not under CMAR's control.
- (B) CMAR shall at all times:
 - (1) Provide proper traffic control, warnings, and all other measures necessary to protect City and City's employees, invitees, licensees, and agents, and all other third persons from illness, sickness, death, personal injury or property damage arising from or relating to the Work; and
 - (2) Maintain a safe working environment, in full compliance with all applicable Laws relating to occupational health and safety and drugs in the workplace.

18.2 Hazardous Substances. CMAR is responsible for the proper handling of every substance, material and equipment it brings to the Site, and in the conduct of its operations, so as to prevent the release of any Hazardous Substance:

- (A) Remediation. CMAR is responsible for the cost of remediation and all other losses and damages to City resulting from any release by CMAR of any Hazardous Substance.
- (B) Actions upon Discovery. If CMAR discovers material on the Site it reasonably believes to be a pre-existing Hazardous Substance, then CMAR must immediately:
 - (1) Notify City in writing of the discovery of the hazard and provide all relevant information;
 - (2) Discontinue Work in the affected area leaving the suspected Hazardous Substance uncovered as it was found (taking reasonable precautions to protect persons and property and prevent the movement, spread or disturbance of the suspected Hazardous Substance in accordance with applicable Laws);
 - (3) CMAR may resume operations in the affected area only after City has determined by reasonable means that the material is either not a Hazardous Substance or has been mitigated in accordance with applicable Law; and
 - (4) If the remedy directed by City results in a delay to the Work's critical path, and if CMAR did not cause, suffer, or permit the release of the Hazardous Substance, CMAR may be entitled to an equitable adjustment of the Contract Times and Contract Sum, subject to § 20.3(E).

18.3 Waste.

- (A) Waste Defined. "Waste" includes any dust, solids, liquids or other form of discardable material that is not a Hazardous Substance.
- (B) Waste Management. CMAR must maintain proper precautions so that the amount of Waste resulting from CMAR's Work is at all times:

- (1) Kept at minimum;
 - (2) Confined within the Site; and
 - (3) Not permitted to interfere with or disturb City's ongoing operations or the activities of City's employees, customers, guests, invitees, or licensees.
- (C) Waste Removal. All Waste must be removed from the Site each day, pursuant to a plan approved by City, and disposed of at a disposal facility in accordance with applicable Law.
- (D) Contract. CMAR must contract with City for any regular waste removal.

19. Permits.

- 19.1 Duty to Secure.** CMAR will timely and proactively apply for, and thereafter coordinate and interface as necessary to secure issuance to City all Permits, licenses and approvals required for the Work.
- 19.2 Costs of Permits.** The cost of permits, licenses, connection fees, and other such fees must be included in the Construction Services Costs, and if CMAR's actions cause the cost thereof due to expediting in order to comply with the Construction Schedule, those costs must be borne solely by CMAR and will not be reimbursed by City.
- 19.3 Public Hearings.** CMAR will attend and participate in all public hearings held by local governmental jurisdictions and utilities in connection with such Permits, licenses and approvals.
- 19.4 Compliance.** CMAR and each of its Subcontractors and Lower Tier Entities must comply with, and give all notices and take all actions required by all permits issued for the Work.

20. Site.

- 20.1 Title to Project Site.** City warrants that it owns title to the Project site and that all know easements, licenses, and restrictions that may affect the Project have or will be timely disclosed.
- 20.2 On-Site Locations.**
- (A) Reference Points. City will provide engineering surveys to establish reference points for construction, which in City's judgment are necessary to enable CMAR to begin the Work.
 - (B) Site Layout. CMAR will be responsible for laying out the Work, protecting and preserving the established reference points and must not make change relocations without the proper written approval of City.
 - (C) CMAR's Responsibilities. CMAR must report to City whenever any reference point is lost or destroyed or a required relocation because of necessary changes in grades or locations, and CMAR will be responsible for the accurate replacement or relocation of the reference points by professionally qualified personnel.
- 20.3 Improper or Differing Conditions.** CMAR warrants and represents that CMAR:

- (A) Inspection. Has inspected the Site's visible portions, reviewed the soils report, and performed other due diligence with respect to the existing conditions of the Project that CMAR considers adequate to verify the conditions of the soils and other conditions at the Site;
- (B) No Defects. Has observed no defects, discrepancies or problems with the Site or in the Project Documents application to the Site that would require further investigation (except those that have been reported to City in writing); and
- (C) Acceptance. Accepts the condition of the soils and the Site as being fit and proper to receive CMAR's Work, except only for concealed or unknown conditions differing materially from those expected to be encountered, and which could not reasonably have been detected by CMAR's investigation.
- (D) Discovery of Conditions. If, at any time CMAR encounters conditions at the Site that are not suitable for the Work's proper and accurate performance—including, without limitation, deficiencies in the design or in the condition of existing construction, conditions in or beneath the Site that differ materially from indications in the Design Documents, or other improper or differing conditions that may adversely impact the Work and that are not provided for in the Design Documents (collectively, "Improper or Differing Conditions")—CMAR must promptly:
 - (1) Discontinue Work in the affected area;
 - (2) Leaving the Improper or Differing Conditions as they are found (taking reasonable precautions for the protection of persons and property);
 - (3) Notify City and Project Coordinator (immediately by phone or email, followed by written notice within 24 hours identifying the Improper or Differing Conditions with specificity); and
 - (4) Await clarification and direction before CMAR proceeds with any Work that may be affected.
- (E) Equitable Adjustment. If the Improper or Differing Conditions were not reasonably anticipatable by CMAR during its Site review, CMAR will be entitled to equitable adjustment of the Contract Times and GMP for any resulting critical path delays or additional expenses incurred by CMAR, subject to §§ 10 and 11.
- (F) Liability and Responsibility. If CMAR proceeds with Work after discovery of an Improper or Differing Condition without notifying City and deferring applicable Work as provided in this section, CMAR will be liable and responsible to City for all resulting losses, liabilities, damages, and expenses and CMAR will have waived any right to prosecute a CMAR Claim arising from the Improper or Differing Conditions.

20.4 Underground Facilities. CMAR will comply with the provisions of A.R.S. § 40-360.21 *et. seq.*, relating to underground facilities, and further:

- (A) Other Owners. CMAR acknowledges that City is not the owner of some underground facilities on or adjacent to the construction site, such as electrical conduit, water irrigation canals and ditches, gas lines,

telecommunications lines, and may be owned and operated by other governmental or private entities;

- (B) Information and Data. The information and data shown or indicated on the Design Documents and other site specific documents concerning existing underground facilities at, or contiguous to, the construction site will be based on information and data furnished to City by the owners of the underground facilities or by others;
- (C) CMAR's Responsibilities. City will not be responsible for the accuracy or completeness of the information or data provided by others and CMAR will have the responsibility for the following, the cost of which may be included in the GMP:
 - (1) Reviewing and verifying the information and data provided by others;
 - (2) Locating all underground facilities on the construction site or adjacent to the construction site to the extent knowledge of adjacent underground facilities is necessary and reasonable to secure;
 - (3) Coordinating the Work with the owners of the underground facilities during construction;
 - (4) Providing for the safety and protection of all underground facilities affected by the work; and
 - (5) Integrating any underground facility into the Work as necessary.
- (D) Repair and Replacement. City will not be responsible for any repair or consequential damages resulting from CMAR's responsibility to locate underground facilities and appropriately integrate the location into the Work.
- (E) City-Owned Underground Facilities. City will provide CMAR with information and data about the location and characteristics of any underground facility that it owns, generally water and sewer, and CMAR may rely on that information and data.

20.5 Archaeological Deposits. In accordance with A.R.S. § 41-844, if CMAR discovers any archaeological sites or objects, CMAR must promptly report them to City and Director of the Arizona State Museum:

- (A) CMAR will further ensure compliance with the provisions of state law with respect to archaeological sites or objects; and
- (B) CMAR may be allowed an adjustment for time depending on the extent of the work associated with the find and affect of the find on the Work.

21. On-Site City Activity.

21.1 Partial Utilization. City may opt to place into use a reasonably divisible part of the Project when that part has reached substantial completion if:

- (A) The Design Documents identify phase of the Project and the part sought to be placed into use has been identified in the Design Documents as a separate phase; or

- (B) City and CMAR agree that the part sought to be placed into use is a separately functioning and usable part of the Work that can be used by City for its intended purpose without significantly interfering with CMAR's timely and proper performance of the remainder of the Work.
- (C) If the Project is not phased and City decides to place a part of the Project into use such that CMAR incurs additional costs or requires additional time, CMAR may present a Claim under § 11.

21.2 Other On-site Work. City may perform other work on-site that is related to the Project using either City's own forces or let contracts for this work, or City may have utility companies, e.g., electric, gas, telecommunications, perform work on the Site. ("Other On-site Work").

- (A) Access. CMAR will assure that the entities handling the Other On-site Work have safe and proper access to the Site and that portion of the Site upon which the Other On-site Work is to be performed.
- (B) Materials and Equipment. CMAR will assure that the entities handling the Other On-site Work have reasonable area and opportunity for the introduction and storage of materials and equipment and reasonable area and opportunity to conduct the Other On-site Work.
- (C) Coordination. To the extent necessary, CMAR will appropriately coordinate the Work with the Other On-site Work.
 - (1) Unless otherwise provided in the Project Documents, CMAR will do all cutting, fitting, and patching of the Work that may be required to make the Work and the Other On-site Work come together properly and be sufficiently integrated.
 - (2) CMAR will not endanger any Other On-site Work while integrating the works.
 - (3) If the Work depends on the Other On-site Work, CMAR will inspect the Other On-site Work and report time to City any delays, defects, or deficiencies that may render it unavailable or unsuitable for CMAR to complete execution of the Work; failure by CMAR to inspect and report will constitute acceptance of the Other On-site Work.
- (D) Compensation. If Other On-site Work is required, but not noted in the Design Documents or other documents upon which CMAR could reasonably rely in preparing the GMP, the following may occur:
 - (1) Written notice of the Other On-site Work will be given to CMAR a reasonable time before this work begins; and
 - (2) CMAR may make a Claim, under the provisions of § 11 if CMAR believes the Other On-site Work will cause CMAR to incur additional expenses or time.

21.3 Transfer of Control. CMAR and City will work to assure that safety of the work site is not compromised, that property site control is maintained, and that proper insurance is in place.

22. Inspection of Work.

22.1 City Inspections. City has the right to inspect the Work at any time and to any degree it believes is necessary and reasonable.

- (A) Required Inspections. Certain aspects of the Work will require inspections in accordance with existing Ordinances and regulations of City or the scope of Work as set forth in this Agreement.
 - (1) CMAR must timely arrange and finalize these required inspections and testing.
 - (2) CMAR will pay all costs associated with the required inspections, which costs may be reflected in the GMP, including the costs of any testing or collection of data that is required for the inspection of City.
 - (3) CMAR must obtain and provide to City Certifications or warranties required or which reasonably result from the required inspection or testing.
- (B) Cooperation. CMAR will cooperate fully with the inspections of City and City will attempt to coordinate appropriately the inspections with the Work; however, inspections for life or safety issues will be handled by both parties on a priority basis.
- (C) Independent Inspections. City may employ the services of an independent party to conduct any tests or inspections at City's cost and expense.

22.2 Specifically Described Items. If any material, component, or equipment (collectively, an "Item") is specified or described in the Project Document, Construction Document, or other document submitted to City by CMAR or by CMAR to City, by trade, proprietary, or supplier name, that specification or description is intended to establish the specific item that is to be used in the Work.

- (A) "Or-equal". If the specification or description contains or is followed by the words "or-equal", other Items may be accepted by City if, in City's sole discretion, if the Item proposed by CMAR prior to use is qualitatively and functionally equal to that named and the Item is sufficiently similar so that no change in the related Work will be required.
- (B) Substitutions. If CMAR proposes to use an Item different than that which is specifically named, CMAR must make an application for approval of a substitution to City prior to use or prior to any modification or deviation intended to accommodate the use.
 - (1) CMAR must submit a request for substitution in writing to City.
 - (2) CMAR must submit with the request for substitution the following:
 - (a) Information about the Item sufficient for City to make a determination if the Item is essentially equivalent to that named and is an acceptable substitute.
 - (b) Any effect the substitution may have on timely achievement of the Substantial Completion date;

- (c) Any cost or credits that will result from the substitution must detail; and
- (d) Any other relevant information requested by City.
- (3) City approval of any substitute Item will be within its sole discretion.
- (4) CMAR is responsible for the costs associated with making the request for substitution, including the cost of obtaining the data.

22.3 Uncovering Work. City or Project Coordinator may require CMAR to uncover Work for inspection and testing.

- (A) Builder's Responsibility. If the Work had been covered without CMAR's compliance with all applicable inspection and approval requirements of the Project Documents, CMAR must properly remedy or replace all nonconforming or deficient Work, and adjacent property damaged thereby, to City's satisfaction, and CMAR must pay the costs City reasonably incurs in connection with uncovering, testing, inspection and remedial work, subject to § 11.
- (B) City Responsibility. If the Work had been covered in accordance with all applicable inspection and approval requirements of CMAR Documents, City will pay the costs CMAR reasonably incurs in connection with the uncovering, testing, inspection, remedial and restoration work, subject to § 11.

22.4 Rejected Work. CMAR must promptly, so as not to interfere with the Contract Times, remove and replace, at CMAR's expense, any Work that is rejected by City or Project Coordinator as defective, contrary to CMAR's warranties, or otherwise not in accordance with the Project Documents.

22.5 City's Remedy. If CMAR does not correct such deficient or nonconforming Work within seven (7) days (or to initiate any work that would reasonably take longer than seven (7) days) after receipt of written notice from City to do so, City may, without prejudice to any other remedies it may have, take whatever steps are necessary to correct the deficient or nonconforming Work, and CMAR will pay City the costs City reasonably incurs in connection with the remedial and corrective Work.

23. Warranties.

23.1 CMAR Warranty. At any time within one year after Final Completion of the Work, CMAR must, at CMAR's sole expense, within twenty (20) days of written notice from City, uncover, correct, and remedy all defects in CMAR's Work or any defects in work that CMAR has accepted pursuant to § 22.

23.2 Third Party Warranties. If any other Contract Document or third party warranty provides for a period longer than two years, the longer period applies.

23.3 Remedial Work. CMAR, at CMAR's sole expense, will properly restore any of the Work or other property that is damaged by reason of any remedial Work, to City's satisfaction.

- (A) Warranty on Remedial Work. All remedial Work will have an extended warranty equal to the later of Final Completion or six (6) months after completion of the remedial Work.

- (B) Self-Help. If CMAR fails to correct any defects in accordance with this call-back warranty, then City may correct the defects and CMAR must reimburse City for all expenses incurred by City.
- (C) Non-exclusivity. This express call-back warranty is given in addition to, and without any limitation on, any other claim, right or remedy City may have under this Agreement or applicable Law including, without limitation, any claim, right or remedy arising from tort, contract breach, license bond, recovery fund, latent defect, breach of the implied warranty of habitability, CMAR's violation of any Law, or any other claim, right or remedy, whether discovered before or after the above described call-back period (as may be extended above).
- (D) No Fault of CMAR. This express call-back warranty excludes remedy for damage or defect caused by abuse, modifications not executed by CMAR, improper or insufficient maintenance, improper operation, or normal wear and tear usage.

24. Liens and Stop Notices.

- 24.1 Title to Work.** CMAR warrants that title to all Work covered by an Application for Progress Payment or Application for Final Payment will pass to City no later than the time of payment.
- 24.2 Work Free of Liens.** CMAR further warrants that, upon Application for Progress Payment or Application for Final Payment submittal, all Work for which Certificates for Payment have been previously issued and payments received from City must, to the best of CMAR's knowledge, information and belief, be free and clear of liens, claims, security interests or encumbrances.
- 24.3 Duty to Remove Liens.** In the event any document intending to give rise to a lien, or any other claim is asserted, filed, or maintained against the Project or City contrary to the foregoing warranty by CMAR, Subcontractor, or any Lower Tier Entity or Person, then CMAR agrees to cause such lien or claim to be satisfied, removed, or otherwise discharged at its own expense, by payment, bond or otherwise, within ten (10) days from the lien's filing date.
- 24.4 City's Remedy for Liens.** While state law precludes the filing of liens against public property, liens cause City to incur unnecessary legal fees and costs in their removal. Therefore:
 - (A) City right to Action. If CMAR fails to take such action promptly after notice from City, then City has the right, in addition to all other rights and remedies under the Project Documents and at Law, to cause each such lien or claim to be removed, satisfied or discharged by whatever means City chooses.
 - (B) Costs and Expenses. CMAR will be responsible for the entire cost and expense of this action, including reasonable attorneys' fees and expenses incurred by City, and will remit payment for these costs and expenses immediately upon demand by City.

25. No Waiver. Any review or approval given, or payment made, by City or any of its representatives does not:

- 25.1** Constitute acceptance of CMAR's Work or of the sufficiency of any request for payment;

- 25.2 Operate as an acquiescence to, or waiver of, any departure from, or CMAR's failure to perform in accordance with, any of this Agreement's requirements;
- 25.3 Constitute approval of:
- (A) The adequacy, form or content of any Subcontract; or
 - (B) Any actions taken by CMAR or by any Subcontractor.
- 25.4 Relieve CMAR or any Subcontractor of any obligations or responsibilities under this Agreement;
- 25.5 Be accepted as evidence of satisfactory performance of any Work; or
- 25.6 Diminish in any manner City's rights and remedies under this Agreement.
- 26. CMAR's Warranties and Representations.**
- 26.1 Warranty.** CMAR represents and warrants the following to City (in addition to the other representations and warranties contained in the Agreement) as an inducement to City to execute this Agreement:
- (A) Financial Condition. That it and its affiliated entities are financially solvent and able to pay its debts as they mature, and possessed of sufficient working capital to complete the Work and perform its obligations under this Agreement, provided that City satisfies its payment and other obligations under this Agreement;
 - (B) Performance Ability. That it is able to furnish the Construction Services and FFE Services required to complete the Project and perform its obligations hereunder, provided that City satisfies its payment and other obligations, and that CMAR has sufficient experience and competence to do so;
 - (C) Litigation Status. There are no pending or threatened actions or proceedings which might materially impair it or its affiliated entities' ability to satisfy its obligations hereunder;
 - (D) Legal Status. That it, or the prime contractor that is a part of a CMAR entity, is licensed by the Arizona Registrar of Contractors to perform construction and that all its construction Subcontractors and Lower Tier Entities also will be so licensed; and
 - (E) Proper Authorization. That execution of this Agreement and its performance are within its authorized powers.
- 26.2 Survival.** These representations and warranties survive this Agreement's execution and delivery and the Project's final completion.
- 27. CMAR Relationship to City.**
- 27.1** CMAR's relationship to City is in all respects that of an independent contractor.
- 27.2** CMAR is solely responsible for the means, manner, method, supervision, performance, coordination, safety programs, or control of the Work to be performed by CMAR.
- 27.3** CMAR is not and will not be found to be an employee or member of City for any purpose.

- 27.4 This Agreement will in no respect be construed to create a partnership, joint venture, or agency between the parties.
- 27.5 Neither party has right or power to bind or obligate the other party for any liabilities or obligations without the other party's prior written consent.
28. **Assignments.**
- 28.1 **City Assignment.** City may assign or transfer this Agreement without CMAR's consent.
- 28.2 **City Financing.** CMAR agrees that if City assigns this Agreement to any lender or other third party source of funding for the Project (each, a "Financing Party");
- (A) CMAR will cooperate with any such assignments, and will execute any consents, assignments and other instruments reasonably required to facilitate the assignments;
- (B) CMAR will cooperate with any inspectors engaged by a Financing Party to observe or inspect the work; and
- (C) CMAR will execute any documents that the Financing Party reasonably requests it to execute in connection with its review of any of CMAR's Work or any of City's requests to Financing Party for disbursements on account of the Work.
- 28.3 **CMAR Assignment.** CMAR will not, without City's prior written consent, which may not be unreasonably withheld, do the following:
- (A) Sell, transfer, assign or delegate any interest in this Agreement or any rights or CMAR's obligations; or
- (B) Until Final Payment is made, cause, suffer or permit:
- (1) Any sale, transfer or assignment of any stock, membership or other equity ownership interest in CMAR, or
- (2) The issuance of any new stock or other equity ownership in CMAR.
- 28.4 **Void Assignments.** Any transfer, sale, assignment, delegation, or issuance of any stock, membership, or other interest in CMAR without City's written consent is void.
29. **Taxation of Revenue Bonds.** City may issue revenue bonds to fund the Project's construction and development. If City issues these bonds:
- 29.1 CMAR, to the extent within its control, and so long as it does not increase CMAR's time or cost of performance of the Work, covenants that it will not knowingly take any action, or fail to take any action, that adversely affects the inclusion from gross income of the interest on any of revenue bonds under § 103(a) of the *Internal Revenue Code of 1986, as amended* (the "Code");
- 29.2 Nor will CMAR cause the interest on any revenue bonds to become an item of tax preference for purposes of the alternative minimum tax imposed on individuals and corporations under the Code; and
- 29.3 In the event of such action or omission, CMAR will, promptly upon having any action or inaction brought to its attention, take any reasonable actions based upon

an opinion of bond counsel to City, as may rescind or otherwise negate such action or omission.

- 29.4** CMAR, to the extent within its control, and so long as it does not increase CMAR's time or cost of performance of the Work, will not knowingly directly or indirectly use or permit the use of any proceeds of any revenue bonds or any other funds of City to take or omit to take any action that would cause any revenue bonds issued to be or become "arbitrage bonds" within the meaning of § 148(a) of the Code or to fail to meet any other applicable requirement of §§ 103, 141, 148, 149 and 150 of the Code to the extent applicable to the Revenue Bonds.

30. Indemnity.

- 30.1 Duty to Indemnify, Defend, and Hold Harmless.** To the fullest extent permitted by Law, CMAR will indemnify, defend and hold harmless City and its elected officials, officers, employees, agents, consultants, sub-consultants, representatives, and agents (individually, an "Indemnified Party"; collectively, the "Indemnified Parties") for, from and against any and all third-party claims, demands, causes of action, damages (including compensatory, consequential, liquidated, and punitive), judgments, penalties, settlements and all other losses arising (collectively "Claim") from the performance or nonperformance of this Agreement by CMAR or of a Subcontractor, Lower Tier Entities, or any other person or entity for whom CMAR is responsible and all attorneys' fees, consultants' fees, court costs (whether or not taxable by statute), and expenses incurred by each Indemnified Party.

30.2 Extent of Indemnification.

- (A) This indemnification is comprehensive and encompassing to the maximum extent permitted by Law and includes, but is not limited to, a Claim, just or unjust, of any kind, nature or description whatsoever, whether sounding in a tort, warranty, contract (including breach of this Agreement), equity, a statute, or any other theory of liability, and whether Claim is based on an alleged death, personal injury, sickness, conversion, breach of contract, breach of warranty (express or implied), breach of representation, defective work not remedied, lien, stop notice, property damage (including property damage to the Work), patent infringement, copyright infringement, loss of use and all other economic loss, release of a petroleum byproduct or other substance regulated by applicable Law, legal violations or other claimed damage.
- (B) This indemnity is in addition to and will not be deemed to limit any other indemnity given by CMAR.

- 30.3 Defense of Indemnified Party.** CMAR will defend each Indemnified Party under this indemnity at CMAR's expense with counsel reasonably acceptable to the Indemnified Party, subject to the following:

- (A) The Indemnified Party has the opportunity to participate in the defense against the Claim;
- (B) If there are potential conflicting interests that would make it inappropriate for the same counsel to represent both CMAR and the Indemnified Party, or the Indemnified Party has defenses available to it

that are not available to CMAR, then the Indemnified Party may select separate counsel to represent it at CMAR's expense;

- (C) No settlement or compromise can be effected by CMAR without the prior consent of the Indemnified Party; and
- (D) If CMAR does not, within fifteen (15) days after receipt of Notice from the Indemnified Party (or such shorter period of time as may be necessary to avoid a default on a Claim), give Notice to the Indemnified Party of CMAR's election to assume the defense of the Claim, the Indemnified Party has right to undertake, at the expense and risk of CMAR, the defense, compromise or settlement of the Claim.

30.4 Negligence of Indemnified Party. The foregoing obligations to indemnify, hold harmless and defend apply even if a Claim results in part from the negligence of an Indemnified Party, but, in such event, the ultimate liability of CMAR is only to the extent the Claim is found to have resulted from the negligence of CMAR or of any Lower Tier Entity or Person.

- (A) In no event, however, will an Indemnified Party be indemnified for a Claim to the extent it results from the negligence of the Indemnified Party or the Indemnified Party's agents, employees or indemnity as provided in A.R.S. § 34-226.
- (B) An Indemnified Party's acting or failing to act in reliance on promises, representations or agreements made by CMAR in the performance of the Work may not be considered negligently or knowingly acting or failing to act by the Indemnified Party.

31. Insurance Requirements.

31.1 Insurance Obligation. CMAR must, as a material obligation to City and a condition precedent to any payment otherwise due to CMAR, furnish and maintain, and cause its Subcontractors and Lower Tier Entities to furnish and maintain, insurance in accordance with the Insurance Requirements attached as **Exhibit F**.

- (A) Force Placement. In the event CMAR fails, or any Subcontractor or Lower Tier Person fails, to maintain all insurance as provided in **Exhibit F**, City may, in addition to, and without prejudice to any other remedies available to it under this Agreement or applicable Law, on two (2) days notice, purchase equivalent insurance.
- (B) Reimbursement for Force Placement. CMAR will reimburse City upon demand, or, at City's option, by way of withholding from amounts otherwise due to CMAR, for all expenses City incurs in connection with obtaining such insurance.

31.2 Risk of Loss.

- (A) CMAR bears the risk of loss to all materials, equipment, fixtures, supplies, or other Work element, whether in transit, stored off-site, or stored or housed on site, until these have been incorporated into the Project, at which time CMAR risk of loss will be addressed in accordance with the other portions of this Agreement.

- (B) CMAR is solely responsible for insuring all such materials, equipment fixtures or other Work element from loss until such materials, equipment, fixtures or other elements have been physically incorporated in the Project, at which time CMAR risk of loss will be addressed in accordance with the other portions of this Agreement.
- 31.3 Bonds.** Upon this Agreement's execution, CMAR must furnish Payment and Performance Bonds required under the provisions of A.R.S. § 34-608. The forms of the bonds will comply with the statute and be provided by a surety approved by City.
- 31.4 Builder's Risk Insurance.** CMAR will furnish an all risk property insurance ("Builder's Risk") for the replacement value of the Work performed.
 - (A) Form. The form of policy for this Builder's Risk coverage must be non-reporting, in completed value with no co-insurance, and valued at replacement cost with non-standard (broad) form all risk policy.
 - (B) Coverage Value. The value utilized must be 100% of the completed value (including Contract Amendments) of the renovation, repairs or construction.
- 31.5 Other Property Lost Coverage.** Insurance against loss of tools, equipment, or otherwise not to be incorporated in the Work, but required for the Work's prosecution, is CMAR's responsibility.
- 32. Records.** CMAR must keep full and detailed accounts and exercise controls as may be reasonably necessary for the Work's proper financial management using accounting and control systems reasonably satisfactory to City.
 - 32.1** City and its properly authorized representatives—who may be City employees or independent contractors as determined by City—will be afforded access at all times on reasonable advance notice to all CMAR's tangible and electronic records received or generated in connection with the Project, including, without limitation, records, books, correspondence, instructions, drawings, receipts, contracts, subcontracts, vouchers, memoranda, electronic data bases and other electronically stored data and printouts thereof, and similar data relating to this Agreement ("Project Data").
 - (A) Project Data availability is intended to allow for audit, review, inspection and copying, at the Site or at CMAR's offices if these offices are located in Maricopa County, Arizona.
 - (B) Access will be available during regular business hours.
 - (C) Project Data will be available for this inspection until after City has issued its Final Payment or final resolution of any claims pending as of the date of Final Payment, whichever date is later.
 - 32.2** CMAR will be entitled to a reasonable charge for furnishing more than one copy of any document that is requested by City.
 - 32.3** CMAR must preserve all such Project Data for a period of six (6) years after Final Payment, or longer where required by law, and prior to destruction, Project Data will be delivered to City if City requests.

32.4 CMAR must include this provision in its Subcontracts and Sub-subcontracts affording City similar access for audit, inspection and copying, to all of the hard copy and electronically stored Project Data of CMAR's Lower Tier Entities.

33. Equal Employment Opportunity.

33.1 Non-Discrimination Policies. CMAR must develop, consistently implement, and effectively maintain non-discrimination policies.

(A) Duty to Not Discrimination. CMAR and CMAR's Subcontractors and Lower Tier Entities must not discriminate against any employee or applicant for employment because of race, religion, color, sex, or national origin.

(B) Affirmative Action. CMAR must take affirmative action to insure that applicants are employed, and that the employees are treated during employment without regard to their race, religion, color, sex, or national origin. This affirmative action includes, but not be limited to, the following:

- (1) employment;
- (2) upgrading;
- (3) demotion or transfer;
- (4) recruitment or recruitment advertising;
- (5) layoff or termination;
- (6) rates of pay or other compensation; and
- (7) selection for training, including apprenticeship.

33.2 Notices of Non-Discrimination Policies. CMAR will post in conspicuous places, available to employees and applicants for employment, notices that set forth the non-discrimination policies and CMAR and CMAR's Subcontractors and Lower Tier Entities will, in all solicitations or advertisements for employees placed by them or on their behalf, state that all qualified applicants will receive consideration for employment without regard to race, religion, color, sex, or national origin.

34. Prohibition: CMAR, and on behalf of any subcontractor or lower tier entity, certifies, to the extent applicable under A.R.S. §§ 35-391 et seq. and 35-393 et seq., that neither has "scrutinized" business operations, as defined above, in Sudan or Iran.

35. Immigration Law Compliance: CMAR, and on behalf any subcontractor, warrants, to the extent applicable under A.R.S. § 41-4401, compliance with all federal immigration laws and regulations that relate to their employees as well as compliance with A.R.S. § 23-214(A) which requires registration and participation with the E-Verify Program.

Any breach of warranty under this Section is considered a material breach of this Agreement and is subject to penalties up to and including termination of this Agreement.

City retains the legal right to inspect the papers of any CMAR or subcontractor employee who performs work under this Agreement to ensure that CMAR or any subcontractor is compliant with the warranty under this Section.

City may conduct random inspections, and upon request of City, CMAR shall provide copies of papers and records of CMAR demonstrating continued compliance with the

warranty under this Section. CMAR agrees to keep papers and records available for inspection by the City during normal business hours and will cooperate with City in exercise of its statutory duties and not deny access to its business premises or applicable papers or records for the purposes of enforcement of this Section.

CMAR agrees to incorporate into any subcontracts under this Agreement the same obligations imposed upon CMAR and expressly accrue those obligations directly to the benefit of the City. CMAR also agrees to require any subcontractor to incorporate into each of its own subcontracts under this Agreement the same obligations above and expressly accrue those obligations to the benefit of the City.

CMAR's warranty and obligations under this Section to the City is continuing throughout the term of this Agreement or until such time as the City determines, in its sole discretion, that Arizona law has been modified in that compliance with this Section is no longer a requirement.

The "E-Verify Program" above means the employment verification program administered by the United States Department of Homeland Security, the Social Security Administration, or any successor program.

36. Termination.

36.1 For Cause. City has the right to terminate this Agreement without notice if CMAR:

- (A) Fails to maintain insurance required by this Agreement;
- (B) Violates any applicable Law regulating Hazardous Substances, occupational health, job safety, or environmental matters;
- (C) Jeopardizes the health, safety or welfare of persons or property;
- (D) Is Debarred by any governmental entity (in which event the termination will be effective as of the date of the sanction or debarment); or
- (E) Abandons the Work.

36.2 For Breach. If this Agreement is breached by CMAR, City may terminate this Agreement if CMAR fails to cure the breach within seven (7) calendar days after delivery of written notice specifying the breach or within such longer period of time as City may agree to in writing.

36.3 Remedy after Termination. If this Agreement is terminated, CMAR will immediately stop Work and remove its employees from the Site, and City may, without prejudice to any other right or remedy available in law or in equity, complete the Project through alternate means in whatever manner City deems appropriate, and City may, at its election, take possession of and use the materials, equipment, tools and machinery of CMAR, a Subcontractor, or any Lower Tier Entities.

36.4 Payment after Termination. CMAR will have no right to any further payment until after City has completed the Project and determined the amount of its costs, and expenses and damages resulting from the termination.

- (A) If the unpaid balance of the Contract Sum exceeds the costs City incurs to complete the Project, plus other expenses and damages incurred by City resulting from CMAR's breaches of this Agreement, City will pay CMAR the difference.

- (B) If the expense of completing the Project, plus City's damages, exceeds such unpaid balance CMAR will pay the difference to City upon demand.

36.5 For Convenience. City may terminate this Agreement as to all or any part of the Work for convenience at any time without cause upon five (5) days written notice

- (A) Notice of Termination for Convenience. Notice of termination for convenience:
 - (1) Will be provided no less than five (5) days before cessation of work;
 - (2) Will specify the date of termination for that part of the Work; and
 - (3) Will direct the sequence and manner in which the termination will be implemented.
- (B) Payment after Termination for Convenience. Upon termination for convenience, City will pay CMAR the reasonable value of all Work furnished to the date of termination, including costs necessarily incurred, reasonable costs of demobilization and shut down, and reasonable overhead and profit on Work performed, but excluding any profit or overhead on unexecuted Work.

36.6 Abandonment.

- (A) City's Right to Terminate. In the event CMAR or any Subcontractor or Lower Tier Entity suspends or terminates its performance under the Agreement for any reason, City has the right to suspend or terminate all or any part of the Agreement and finish the suspended or terminated Work by whatever means City determines is expedient.
- (B) Replacement. To preclude termination, CMAR must replace Subcontractor or Lower Tier Entity within five (5) days by procurement of a Subcontractor or Lower Tier Entity that is reasonably acceptable to City.
- (C) Withholding of Payments. If the abandoning Subcontractor or Lower Tier Entity is not timely replaced, City may complete the Work at CMAR's expense, in which case:
 - (1) CMAR will not be entitled to receive any further payment hereunder until:
 - (a) The entire Project is complete; and
 - (b) All direct and indirect costs incurred by City to complete CMAR's Work, plus a reasonable allowance for City's overhead and profit, has been determined.
 - (2) Direct and indirect costs and the allowance for overhead and profit will apply against the Contract Price and, if the cost to complete the Project is greater than the amount due CMAR, CMAR will pay that difference immediately to City.

37. Dispute Resolution.

- 37.1** Each claim, controversy and dispute (each a "Dispute," collectively, "Disputes") will be initiated and resolved as provided in **Exhibit H**.
- 37.2** CMAR will continue performance of the Work pending resolution of any CMAR Claim, or of any Dispute unless otherwise directed by City in writing.

38. Notices.

- 38.1** Any communication or notice required to be issued or given under this Agreement (each, a "Notice") will be effective only if:
- (A) Notice is in writing; and
 - (B) Delivered to the physical or electronic address given in § 3 on a business day observed by City ("Business Day"):
 - (1) in person;
 - (2) by private express overnight delivery service (delivery service charges prepaid);
 - (3) certified or registered mail (return receipt requested); or
 - (4) electronic mail, if confirmation of receipt is given and received.
- 38.2** A notice will be deemed delivered to the party:
- (A) As of the date of receipt if received before 5:00 PM on a Business Day at the address for Notices identified in § 3; or
 - (B) As of the next Business Day if received after 5:00 PM on a Business Day at the address for Notices identified in § 3.
- 38.3** The party giving Notice will have the burden of proof as to the time and place of delivery.
- 38.4** A party may only change its Representative or the information for giving Notice by giving Notice of the change if done in writing and in accordance with this Section.
- 38.5** CMAR or City may change the name of a representative and/or information for Notices under this Agreement, by giving Notice of the change in accordance with this Section at least ten (10) days prior to the change.

39. Miscellaneous.

- 39.1 Contract Amendment.** The parties may, at any time, modify this Agreement by written agreement ("Contract Amendment") signed by City and CMAR, and, upon its execution, the Contract Amendment will be a Contract Document.
- 39.2 Integration.** This is the entire agreement of City and CMAR, and it supersedes all negotiations and any prior agreements between them relating to the Work. No other documents are included unless incorporated herein by reference.
- 39.3 Counterparts.** This Agreement may be executed in counterparts, and all counterparts will together comprise one instrument.
- 39.4 Successor and Assigns.** This Agreement will insure to the benefit of and be binding on the parties' successors and assigns.

39.5 Rights and Remedies.

- (A) All rights and remedies provided in this Agreement are cumulative and the exercise or assertion of one or more rights or remedies will not affect any other rights or remedies allowed by Law or equity or this Agreement.
- (B) Neither the failure nor any delay on the part of a party to exercise any right, remedy, power or privilege under this Agreement's provisions, or with respect to any occurrence, operates as a waiver with respect to such provision or occurrence thereof.
- (C) No single or partial exercise of any right, remedy, power or privilege precludes any other or further exercise of the same or of any right, remedy, power or privilege.

39.6 No Waiver. No waiver is effective unless it is in writing and is signed by the party asserted to have granted such waiver.

39.7 Severability. If any provision of this Agreement is held by any court to be void or unenforceable, that provision will not affect the validity of the other provisions.

39.8 Survival. Except as specifically provided otherwise in this Agreement, each warranty, representation, indemnification provision, insurance requirement, and every other right, remedy and responsibility of City or CMAR under this Agreement will survive the Project's completion, or this Agreement earlier termination.

40. Conditions Precedent. This Agreement's effectiveness, and City's obligations hereunder, are contingent upon City's written confirmation to CMAR that each of the following contingencies have been fulfilled:

40.1 Funding. City has allocated funds specifically for the purpose of the Project or has secured financing it deems satisfactory for the Project.

40.2 Approval. This Agreement has been approved by the Glendale City Council.

41. Exhibits. The following exhibits are incorporated by this reference:

<u>Exhibit</u>	<u>Title</u>	<u>First Reference</u>
A	Definition Index	§ 1
B	The Project	Recital A
C	The Work; Key Personnel	Recital B; § 3.2(C)
D	GMP Schedule	§ 5.9
E	Project Schedule	§ 6.3
F	CMAR's Insurance Requirements	§ 31
G	Forms of Payment and Performance Bonds	§ 31.1
H	Dispute Resolution Procedures	§ 37

[Remainder of page intentionally left blank. Signatures of the parties appear on the following page.]

IN WITNESS WHEREOF, City and CMAR enter into this agreement as of _____,
200__ (the "effective date").

CITY OF GLENDALE

Ed Beasley, City Manager

Date: _____

Approved as to Form:

Craig D. Tindall, City Attorney

Attestation:

City Clerk

a(n) _____ Corporation

By: _____

Its:
Registrar of Contactors License:

Date: _____

EXHIBIT A

DEFINED TERMS AND INDEX

DEFINED TERMS

[Any plural of a defined term will have the same meaning logical as its singular.]

"Change Directive" means a written directive issued by City specifying the required Change, together with City's determination of the corresponding adjustment (if any) in the Contract Sum and/or Contract Times.

"Change Order" means a written amendment to this Agreement, executed on behalf of City and CMAR that specifies the Change, and the adjustment to the Contract Sum and/or Contract Times.

"Construction Documents" means those stamped and sealed documents containing all of the elements required in this Agreement and prepared by a registered design professional in connection with the Work that have been accepted by both CMAR and City and approved and released for construction by the applicable governmental permitting authorities.

"Construction Materials" means all fixtures, materials, and supplies provided for incorporation in the Project.

"Project Documents" include:

- this Agreement and any amendments,
- Design Documents,
- Construction Documents,
- any Change Orders, Change Directives, or Field Orders,
- Notice to Proceed,
- Project related specifications and drawings,
- permits,
- FFE Procurement Schedules,
- provisions of the required bonds and insurance policies, and
- other documents identified in **Exhibit B**.

"Construction Services" means all procurement and construction services of every kind and description, including all construction services, expertise, labor, materials, equipment, tools, utilities, supervision, coordination, scheduling, permitting, shop drawings, transportation, insurance, testing, inspection, procurement, installation and other facilities and services of every kind and description, and calculations incidental and required in connection therewith and as further described in **Exhibit C**.

"Excusable Delay" means a delay that that City determines has or will cause the Project Schedule not to be met as a result of an event that is not attributable in any manner to CMAR's actions or inactions, or attributable in any manner to the actions or inactions of any entity under CMAR's control or direction, and cannot be avoided or mitigated by CMAR's best efforts. A Force Majeure event, as defined in § 6.7(B), would constitute an Excusable Delay.

"FFE" means the furniture, fixtures, and moveable equipment and other items of Work that are required for the completed Project. City may distinguish between furniture, fixtures, and moveable equipment that will be provided by City outside CMAR's scope and that which CMAR will provide as a part of this Agreement.

"Final Completion" means the date when all of the following have occurred:

- (a) All punch list items have been completed to the satisfaction of the governmental permitting authority;
- (b) A permanent certificate of occupancy has been secured;

EXHIBIT A

DEFINED TERMS AND INDEX

- (c) The Architect of Record has accepted the Project and submitted the property Certificate of Final Completion to City; and
- (d) City has accepted the Project.

"Hazardous Substance" means any element, compound, mixture, solution, particle or substance which is or may become dangerous, or harmful to the health and welfare of life or the physical environment if not used, stored or disposed of in accordance with applicable law, such as, but not limited to, explosives, petroleum products, radioactive materials, hazardous wastes, toxic substances and related materials, and including without limitation: (1) any substance or material included within the definitions of "hazardous substances," "hazardous wastes," "special wastes," "regulated substances," "Hazardous Substances," "toxic substances," "hazardous pollutants" or "toxic pollutants" in any of the Resource Conservation and Recovery Act, 42 U.S.C. § 9601, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. 6901, the Toxic Substances Control Act, the Clean Air Act and/or the Clean Water Act, as the foregoing may be amended from time to time, or any regulations promulgated thereunder, and any analogous state, local or other governmental laws, rules or regulations; (2) any "PCBs" or "PCB items," as defined in 40 CFR § 761.3; and (3) any "asbestos," as defined in 40 CFR § 763.63.

"Lower Tier Persons" means collectively any entity except the CMAR and a Subcontractor of the CMAR that is contracted to furnish any labor, equipment, professional services, Construction Materials or other Work.

"Subcontractor" means any person or entity, including materialmen, that has a direct contract with CMAR to furnish any element of the Work. The prime contractor of CMAR is not a subcontractor.

"Substantial Completion" of the Work means the date when all of the following have occurred:

- (a) The Work is approved by City and substantially complete;
- (b) The applicable permitting authorities have each issued their respective written approvals of the Work as being sufficiently complete so that it may lawfully be occupied by City for City's intended use;
- (c) The Architect of Record has accepted the Project and submitted the property Certificate of Substantial Completion to City certifying that the work is substantially complete; and
- (d) Subject only to specified punch list items.

"Vendor" means a Subcontractor or Lower Tier Entities who sells, but does not attach or install Construction Materials that are not specially manufactured or fabricated for the Project.

"Withholding" means the amount of each Progress Payment, Final Payment, or other amount otherwise payable to CMAR will be reduced for the reasons provided in this Agreement.

"Work" means that activity required for the timely, cost-effective, and proper design, engineer, construct, and commission of the Project. Work includes and is the result of CMAR performing, furnishing, and incorporating as necessary all labor, materials, and equipment into the construction of the Project, and CMAR performing, furnishing, or making provision for the services and documents required by this Agreement and the other associated Project documents.

EXHIBIT A

DEFINED TERMS AND INDEX

"Work Product" means the documents generated by CMAR and its Lower Tier Entities, including, but not limited to, all preliminary and completed evaluations, programs, reports, drawings, plans, operational documents or other work product in any media or form that CMAR and its Lower Tier Entities generate, or arrange for, in connection with the Project, together with the design of the buildings and structures embodied within them, and all items and matters included within the definition of "architectural work" as provided in 17 U.S.C. § 101.

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Exhibit B

THE PROJECT

(See Attached)

EXHIBIT C
THE WORK
KEY PERSONNEL

(See Attached)

EXHIBIT D

GMP PROPOSAL SCHEDULE

(See Attached)

EXHIBIT E
PROJECT SCHEDULE
SCHEDULE UPDATES

(See Attached)

EXHIBIT F

CMAR'S INSURANCE REQUIREMENTS

CMAR must, as a material obligation to City and a condition precedent to any payment otherwise due to CMAR, furnish and maintain, and cause its Subcontractors to furnish and maintain, insurance in accordance with the provisions of this Exhibit.

CMAR must secure and maintain without interruption, from the date of commencement of the Work until the later of the date of Final Completion, the date of final payment, or the date until which this Agreement requires any coverage to be maintained after final payment, policies of commercial general liability, commercial auto, umbrella/excess, workers compensation and employers liability insurance, providing the following coverages, limits and endorsements:

1. Commercial General Liability Insurance.

1.1 The CGL policy must be written on an occurrence basis, on ISO form CG 001 or its equivalent, providing coverage for bodily injury, broad form property damage, personal injury (including coverage for contractual and employee acts), contractual liability, incidental professional liability, the hazards commonly referred to as XCU, and products and completed operations, with a combined single limit of liability of not less than \$5,000,000 for each occurrence applicable to the Work, and an annual aggregate limit of liability of not less than \$5,000,000 applicable solely to the Work, and meeting all other requirements of this Exhibit.

1.2 **The general liability insurance may be accomplished with a combination of a general liability and an excess/umbrella liability policy.**

1.3 **Each general liability policy must be endorsed or written to:**

- (A) Include the per project aggregate endorsement;
- (B) Name as additional insureds the following: City of Glendale and its employees, representatives and agents (collectively, the "Additional Insureds");
- (C) Stipulate that the insurance afforded by the policies furnished by CMAR will be primary insurance and that any insurance, self-insured retention, deductibles, or risk retention programs maintained or participated in by the Additional Insureds, or their agents, officials or employees will be excess and not contributory to the liability insurance furnished by CMAR and by its Subcontractors;
- (D) Includes a severability of interest clause; and
- (E) Waive all rights of recovery against the Additional Insureds.

2. Workers' Compensation Insurance.

2.1 The Workers' Compensation policy must meet all Arizona statutory requirements, and Employers' Liability Insurance, with limits of at least \$500,000 per accident or disease per employee, both policies endorsed to waive subrogation against the Additional Insureds.

2.2 CMAR must provide, at CMAR's expense, Voluntary Compensation insurance for the protection of employees engaged in the Work who are exempt from the coverage provided under the Workers' Compensation statutes with coverage equivalent or better than the coverage required in the preceding sentence, for the duration of the project.

3. **Auto Liability Insurance,**
 - 3.1 Auto Liability must be carried with minimum combined single limits of \$1,000,000 per occurrence for bodily injury and property damage.
 - 3.2 This policy must include a duty to defend and cover all owned, non-owned, leased, hired, assigned or borrowed vehicles.
 - 3.3 This policy must be endorsed to name the Additional Insureds as such, stipulate that any insurance carried by the Additional Insureds must be excess and not contributory, and to waive subrogation against the Additional Insureds.
4. **Equipment Property Insurance.**
 - 4.1 CMAR must secure, pay for, and maintain all-risk insurance as necessary to protect City against loss of owned, non-owned, rented or leased capital equipment and tools, equipment and scaffolding, staging, towers and forms owned or rented by CMAR, its Subcontractors or Lower Tier Entities and any construction material in transit or stored in any location other than the Site.
 - 4.2 This policy must have a waiver of subrogation in favor of the Additional Insureds.
5. **Commercial Crime Insurance.** This policy must cover employees responsible to disburse funds to pay project costs against employee dishonesty, forgery or alteration, or computer fraud.
6. **Waiver of Subrogation.** CMAR hereby waives, and will require each of its Subcontractors and Lower Tier Entities to waive, all rights of subrogation against the Additional Insureds to the extent of all losses or damages covered by any policy of insurance.
7. **Term of Coverage.**
 - 7.1 The products and completed operations liability coverage required by this Agreement must extend for a period of not less than five years after the earlier of Final Payment for the Work, or the termination of the Agreement (the "Completed Operations Term").
 - 7.2 If at any time during the Completed Operations Term CMAR cannot obtain equivalent coverage by replacement or renewal, CMAR must acquire a tail policy prior to expiration of the existing policy that will extend coverage until the end of the Completed Operations Term.
 - 7.3 CMAR will furnish certificates of insurance and other evidence that City may reasonably require during the Completed Operations Term to establish compliance with the requirements of this paragraph.
 - 7.4 All other policies of insurance must be maintained continuously in force from commencement of the Work until the date of Final Payment.
8. **Subcontractor and Lower-Tier Entities Insurance Requirements.**
 - 8.1 CMAR must require all of CMAR's Subcontractors and Lower Tier Entities, as a condition of working on the Project, and of receiving payment, to:
 - (A) Purchase and maintain Commercial General Liability, Workers' Compensation and Employer's Liability, and Automotive insurance policies, with the same coverages, endorsements, terms of coverage and

other provisions as are required of CMAR under by this Exhibit, **EXCEPT THAT** the combined coverage limits of the general liability insurance to be furnished by Lower Tier Entities must be \$1,000,000 per occurrence, and \$1,000,000 as the annual aggregate limit); and

- (B) Timely furnish to City proper certificates, endorsements, copies of declarations pages, and other documents necessary to establish the Subcontractor's compliance with this Exhibit.
- (C) The Lower Tier Entities' general liability policy must also be endorsed to provide the same coverage as the primary insurance, the general liability insurance furnished by CMAR must be the secondary and non-contributory, and any insurance carried by the Additional Insureds must be excess, tertiary and non-contributory to the insurance furnished by CMAR and Subcontractor.
- (D) City has the right to inspect and copy all such certificates, endorsements, or other proof at any reasonable time.

9. Other Policy Provisions. Each policy to be furnished by CMAR, A/E and each Subcontractor must:

- 9.1** Be issued by an insurance carrier having a rating from A.M. Best Company of at least A-VII or better;
- 9.2** Have a deductible not exceeding \$10,000 unless otherwise agreed upon by City;
- 9.3** Provide that attorneys fees shall be outside of the policy's limits and shall be unlimited;
- 9.4** Include the Facility per aggregate endorsement;
- 9.5** Waive all rights of subrogation against City;
- 9.6** Contain a provision that coverages afforded under the policies will not be canceled, allowed to expire, or reduced in amount until at least thirty (30) days prior written notice has been given to City; and
- 9.7** Be otherwise satisfactory to City. City agrees to consider alternatives to the requirements imposed by this Exhibit but only to the extent that City is satisfied the insurance is not commercially available to the insured. In such event, City shall have the right to set conditions for such waiver, including, but not limited to, additional indemnities, and the request that City shall be a loss-payee under the policy.

10. Certificates and Endorsements.

- 10.1** Within ten (10) days after the execution of this Agreement, CMAR must provide City with certificates and endorsements;
- 10.2** Within ten (10) days after execution of each Subcontract (but in all events prior to such Subcontractor commencing Services), CMAR must provide City with certificates and endorsements from each of its Subcontractors, in all cases evidencing compliance by CMAR, each Subcontractor, and Lower Tier Entities with the requirements of this Exhibit together with letters from the respective carriers (including, but not limited to, the Errors and Omissions insurance carriers) that there are no known or pending claims or incidents which have resulted in the establishment of a reserve or otherwise have reduced the amount

of coverage potentially available to City under the policy and that available coverage has not been reduced because of revised limits or payments made (or, in the event such representations cannot be given, CMAR, its Subcontractors must furnish the particulars thereof to City.

- 10.3** If any of the foregoing insurance coverages are required to remain in force after final payment, CMAR must submit an additional certificate evidencing continuation of such coverage with the application for final payment.
- 11. Reduction in Coverage.** CMAR, each of its Subcontractors and Lower Tier Entities must promptly inform City of any reduction of coverage resulting from revised limits, claims paid, or both. City shall have the right to require CMAR or the applicable Subcontractor to obtain supplemental or replacement coverage to offset such reduced coverage, at the sole cost or expense of CMAR or the applicable Subcontractor.
- 12. Suppliers and Materialmen Coverages.**
- 12.1** CMAR will endeavor to cause all suppliers and materialmen to deliver any equipment, machinery or other goods FOB Site.
- 12.2** With respect to any equipment, machinery or other goods for which City or CMAR has paid a deposit, CMAR will cause the respective suppliers and materialmen to maintain personal property insurance in an amount equal to the value of such equipment, machinery or other goods (but in no event less than the amount of the applicable deposit) during fabrication, storage and transit, naming City and CMAR as loss payee as their interests appear.
- 13. Condition Precedent to Starting Work.**
- 13.1** Prior to, and as a condition of its right to begin performing any Work on the Site, CMAR and each Subcontractor and Lower Tier Entities must deliver to City certificates of insurance representing that the required insurance is in force, together with the additional insured endorsements and waivers of subrogation required above, and such other proof satisfactory to City that the required insurance is in place; together with the original of each bond required under this Agreement. CMAR and each Subcontractor and Lower Tier Entities hereby authorize City to communicate directly with the respective insurance agents, brokers and/or carriers and sureties to verify their insurance and bond coverage;
- 13.2** City shall be under no obligation or duty to make any such inquiry and City shall be entitled to rely on any proofs of insurance tendered by CMAR and its Subcontractors and Lower Tier Entities. City's acceptance of any proof of insurance and bonds offered by CMAR or any Subcontractor or Lower Tier Entities will not be deemed a waiver of the obligations of CMAR and Subcontractors and Lower Tier Entities to furnish the insurance and bonds required by this Exhibit.
- 14. Additional Proofs of Insurance.** CMAR must, within ten (10) days after request, provide City with certified copies of all policies and endorsements obtained in compliance with this Agreement.
- 15. Indemnity.** The fact that CMAR and its Subcontractors are required by this Agreement to purchase and maintain insurance in no way limits or restricts any other obligations or duties CMAR and its Subcontractors and Lower Tier Entities may have to indemnify, defend or hold harmless City and the other Additional Insureds from and against any and all Demands, Liabilities, Losses or Expenses of whatever kind or nature.

16. Interpretation. In the event of any inconsistency between the provisions of this Exhibit and those of the other provisions of the Agreement, the terms of this Exhibit will govern.

EXHIBIT G

FORMS OF PAYMENT AND PERFORMANCE BONDS

(See Attached)

PAYMENT BOND

A.R.S. § 34-608

Penal Sum: \$ _____

KNOW ALL MEN BY THESE PRESENTS:

That _____ as Principal, hereinafter called Contractor, and _____, as Surety, hereinafter called Surety, jointly and severally, bind themselves to the City of Glendale, a municipal corporation of the State of Arizona ("Obligee") and its assigns, solely for the protections of claimants supplying labor or materials to CMAR or to CMAR's Subcontractors in the prosecution of construction and not for the protection of persons providing any design services, preconstruction or other non-construction services as provided in A.R.S. § 34-608(A)(2).

WHEREAS Principal has by written agreement dated _____ entered into that certain "CMAR Agreement" ("Contract") with Obligee (referred to therein as "City") for the design and construction of that certain _____, as provided therein. In accordance with A.R.S. § 34-608(A)(2)(C), the Obligee estimates the price of the Construction Services the Obligee believes is likely to be furnished as of the date hereof \$ _____ (the "Penal Sum").

NOW, THEREFORE, the condition of this obligation is that if the Principal promptly pays all monies due to all persons supplying labor or materials to the Principal or the Principal's Subcontractors in the prosecution of the construction provided for in the Contract, this obligation is void. Otherwise it remains in full force and effect. Provided, however, that this bond is executed pursuant to Title 34, Chapter 6, Arizona Revised Statutes, and all liabilities on this bond shall be determined in accordance with the provisions, conditions and limitations of Title 34, Chapter 6, Arizona Revised Statutes, to the same extent as if they were copied at length in this Agreement. The Surety hereby consents in advance to, and waives notice of any change directive or change order, extension of time or any other material alteration or modification of the Contract, or of the Work to be performed thereunder. The prevailing party in a suit on this bond shall recover as a part of the judgment reasonable attorney fees that may be fixed by the court.

Witness our hands this _____ day of _____, 200_____.

PRINCIPAL SEAL

SURETY SEAL

By: _____

By: _____
(Attorney-in-Fact)

Title: _____

Agency of Record

Agency Address

Arizona Resident Agent Countersignature
Bond Number _____

PERFORMANCE BOND

A.R.S. § 34-608

Penal Sum: \$ _____

KNOW ALL MEN BY THESE PRESENTS:

That _____ as Principal, hereinafter called Contractor, and _____, as Surety, hereinafter called Surety, jointly and severally bind themselves to the City of Glendale, a municipal corporation of the State of Arizona ("Obligee") and its assigns solely for the protection of Obligee as provided in A.R.S. § 34-608(A)(1).

WHEREAS Principal has entered into that certain "CMAR Agreement" ("Contract") with Obligee (referred to therein as "City"), dated _____, for the design and construction of that certain _____, as described therein, which Contract, together with all Change Orders and amendments thereto, is by reference made a part hereof, providing for a cumulative amount to be paid to Contractor for all design services, construction and other work (collectively, "Work" as described in the Contract) not to exceed guaranteed maximum price of \$ _____ dollars. In accordance with A.R.S. § 34-608(A)(1)(A), the Obligee estimates the price of the Construction Services the Obligee believes is likely to be furnished as of the date hereof \$ _____ (the "Penal Sum").

NOW, THEREFORE, the condition of this obligation is that, if the Principal faithfully performs and fulfills all of the undertakings, covenants, terms, conditions and agreements of the Contract during the original term of the Contract and any change, extension, alteration or modification of the Contract, with or without notice to the Surety, and during the life of any guaranty required under the Contract, and also performs and fulfills all of the undertakings, covenants, terms, conditions and agreements of all duly authorized changes, extensions, alterations or modifications of the Contract that may hereafter be made, notice of which changes, extensions, alterations or modifications to the Surety being hereby waived, the above obligation is void. Otherwise it remains in full force and effect. Provided, however, that this bond is executed pursuant to Title 34, Chapter 6, Arizona Revised Statutes, and all liabilities on this bond shall be determined in accordance with Title 34, Chapter 6, Arizona Revised Statutes, to the extent as if it were copied at length in this Agreement. The prevailing party in a suit on this bond shall recover as part of the judgment reasonable attorney fees that may be fixed by the court.

The performance under this bond is limited to the construction to be performed under the Contract and does not include any design services, preconstruction services, finance services, maintenance services, operations services or any other related services included in the Contract.

Signed and sealed this _____ day of _____, 200____.

PRINCIPAL SEAL

SURETY SEAL

By: _____

By: _____

(Attorney-in-Fact)

Title: _____

Agency of Record

Agency Address

Arizona Resident Agent Countersignature

Bond Number _____

EXHIBIT H

DISPUTE RESOLUTION PROCEDURES

1. Disputes.

- 1.1 Each Dispute arising out of or related to this Agreement (including Disputes regarding any alleged breaches of this Agreement) shall be initiated and decided under the provisions of this Exhibit.
- 1.2 CMAR and City shall each designate in writing to the other party, from time to time, a member of senior management who shall be authorized to attempt to expeditiously resolve any Dispute relating to the subject matter of this Agreement in an equitable manner.
- 1.3 A party shall initiate a Dispute by delivery of written notice to the members of management designated by the respective parties under § 1.2.
- 1.4 The parties must:
 - (A) Attempt to resolve all Disputes promptly, equitably and in a good faith manner; and
 - (B) Provide each other with reasonable access during normal business hours to any and all non-privileged records, information and data pertaining to any such Dispute.
- 1.5 With respect to matters concerning modification of the GMP or any schedule, CMAR must first follow the provisions of any Claim procedure established by the Design-Build Agreement before seeking relief under these Procedures.

2. Emergency Arbitration.

- 2.1 If the parties are unable to accomplish resolution of a Dispute, the expedited resolution of which either party considers necessary to prevent or mitigate a material delay to the critical path of the Services (a "Time Sensitive Dispute") within two days after the Time Sensitive Dispute has been initiated by a party, either party may thereafter seek emergency relief before an emergency arbitrator (the "Emergency Arbitrator") appointed as follows:
 - (A) The parties will exercise best efforts to pre-select an Emergency Arbitrator within 20 days after entering into this Agreement;
 - (B) If the Emergency Arbitrator has not been selected at the time a party delivers Notice of a Time Sensitive Dispute, the parties will each select a representative within one day after the Notice is delivered and the two representatives will then select the Emergency Arbitrator by the third day following delivery of the Notice.
 - (C) The Emergency Arbitrator shall be an attorney with at least ten (10) years experience with commercial construction legal matters in Maricopa County, Arizona, be independent, impartial, and not have engaged in any business for or adverse to either party for at least ten (10) years.
- 2.2 The Emergency Arbitrator will conduct a hearing and render a written determination on the Dispute to both parties within five business days of the matter being referred to him or her, all in accordance with Rules O-1 to O-8 of

the American Arbitration Association ("AAA") Commercial Rules-Optional Rules for Emergency Protection Commercial Rules ("AAA Emergency Rules").

- 2.3 Although the hearing will be conducted using AAA rules, unless both parties agree otherwise, this dispute process will not be administered by the AAA but will be conducted by the parties in accordance with these procedures.
 - 2.4 If, however, an Emergency Arbitrator has not selected within three days after delivery of the Notice, either party may upon three days additional notice, thereafter seek emergency relief before the AAA, in accordance with the AAA Emergency Rules, provided that the Emergency Arbitrator meets the qualifications set forth above.
 - 2.5 All proceedings to arbitrate Time Sensitive Disputes shall be conducted in Glendale, Arizona.
 - 2.6 Presentation, request for determination (i.e., a party's prayer), and the Emergency Arbitrators decision will adhere to the procedures required in § 3.5.
 - 2.7 The finding of the Emergency Arbitrator with respect to any Time Sensitive Dispute will be binding upon the parties on an interim basis during progress of the Services, subject to review *de novo* by arbitration after the Project Substantial Completion Date.
 - 2.8 The time and extent of discovery will be as determined by the Emergency Arbitrator.
 - (A) Discovery orders of the Emergency Arbitrator will consider the time sensitivity of the matter and the parties desire to resolve the issue in the most time and costs efficient manner;
 - (B) The parties are obligated to cooperate fully and completely in the provision of documents and other information, including joint interviews of individuals with knowledge such that the matter moves toward resolution in the most time and costs efficient manner and the Emergency Arbitrator is empowered to fashion any equitable penalty against a party that fail to meet this obligation.
3. **Non-Emergency Arbitration.**
- 3.1 Except as provided in § 5, any Dispute that is either a non-emergency Dispute that has not been resolved by negotiation, or a *de novo* review of an AAA emergency arbitration will be decided by binding arbitration by a panel of three arbitrators in accordance with, but not necessarily administered by, the Construction Industry Rules of the AAA.
 - (A) The parties shall each select an arbitrator within 15 days after notice that a party desires to resolve a dispute by arbitration.
 - (B) The two arbitrators shall then each select a third arbitrator. If an arbitrator is not selected within any such 15 day period, then the arbitrator shall be appointed by the AAA.
 - 3.2 The arbitrator(s) shall meet the qualifications of Emergency Arbitrators as provided in § 2.
 - 3.3 The arbitrators do not have the authority to consider or award punitive damages as part of the arbitrators' award.

- 3.4** In connection with such arbitration, each party shall be entitled to conduct up to five depositions, and, no less than 90 days prior to the date of the arbitration hearing, each party shall deliver to the other party copies of all documents in the delivering party's possession that are relevant to the dispute.
- 3.5** The arbitration hearing shall be held within 150 days of the appointment of the arbitrators.
- 3.6** At the arbitration hearing, each party will argue its position to the arbitrators in support of one proposed resolution to the dispute (a "Proposed Resolution").
- (A) Each party's Proposed Resolution must be fully dispositive of the dispute.
 - (B) The arbitrators must select one Proposed Resolution by majority consent and are not free to fashion any alternative resolutions.
 - (C) The parties must submit their proposed resolution of the matter to the arbitrators and the other party 15 days prior to the date set for commencement of the arbitration proceeding.
 - (D) The decision of the arbitrators will be forwarded to the parties within 15 days after the conclusion of the arbitration hearing.
 - (E) The decision of the arbitration panel is final and binding on the parties and may be entered in any court of competent jurisdiction for the purpose of securing an enforceable judgment.
 - (F) All costs and expenses associated with the arbitration, including the reasonable legal fees and costs incurred by the prevailing party, must be paid by the party whose position was not selected by the arbitrators.
- 4. Continuing Work.** Unless otherwise agreed to in writing, CMAR must continue to perform and maintain progress of the Work during any Dispute resolution or arbitration proceedings, and City will continue to make payment to CMAR in accordance with the Design-Build Agreement.
- 5. Exceptions.**
- 5.1** Neither City nor CMAR are required to arbitrate any third-party claim, cross-claim, counter claim, or other claim or defenses in any action that is commenced by a third-party who is not obligated by contract to arbitrate disputes with City and CMAR.
 - 5.2** City or CMAR may commence and prosecute a civil action to contest a lien or stop notice, or enforce any lien or stop notice (but only to the extent the lien or stop notice the party seeks to enforce is enforceable under Arizona law), including, without limitation, an action under A.R.S. § 33-420, without the necessity of initiating or exhausting the procedures of this Exhibit.
 - 5.3** This Exhibit does not apply to, and may not be construed to require arbitration of, any claims, actions or other process undertaken, filed, or issued by the City of Glendale Building Safety Department, Code Compliance Department, Police Department, Fire Department, or any other agency of City acting in its governmental permitting, for the benefit of public health, safety, and welfare, or other regulatory capacity.

5.4 In connection with any arbitration, the arbitrators do not have the authority to, and may not enforce, any provision of the Federal or Arizona Rules of Civil Procedure.